

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT OF FLORIDA

Case No.: 2D12-186
L.T. No.: 11-2840-CA

MARIO SÁNCHEZ,

Appellant,

v.

ARNON RONY JOEL,

Appellee.

On Appeal from the Circuit Court
of the Twentieth Judicial Circuit
in and for Collier County, Florida

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT..... 5

 A. Jurisdictional Basis for Appeal..... 5

 B. Standard of Review 5

 C. Florida’s venue statute limits where Appellee may bring his defamation claims, and Collier County does not meet the statutory requirements in this instance. 6

 D. Dr. Sánchez has provided sufficient evidence to show that none of the allegedly defamatory statements was first published in Collier County. 7

 E. Dr. Sánchez does not operate or distribute the Online Newspaper from Collier County. 8

 F. Appellee’s cause of action for defamation, if one exists, did not accrue in Collier County. 8

CONCLUSION..... 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE..... 11

TABLE OF CITATIONS

Cases

<i>Bradley v. Waldrop</i> , 611 So. 2d 31 (Fla. 1st DCA 1992).....	6
<i>Eth-Wha, Inc. v. Blankenship</i> , 483 So.2d 872 (Fla. 2d DCA 1986)	10
<i>Holiday Truck & Car Sales, Inc. v. Coldewey</i> , 434 So.2d 344 (Fla. 2d DCA 1983)	10
<i>Holland v. Gross</i> , 89 So. 2d 255 (Fla. 1956).....	6
<i>Hu v. Crockett</i> , 426 So. 2d 1275 (Fla. 1st DCA 1983).....	5
<i>J.L.S. v. R.J.L.</i> , 708 So. 2d 293 (Fla. 2d DCA 1998)	5
<i>Perdue v. Miami Herald Publishing Co.</i> , 291 So.2d 604 (Fla. 1974).....	7, 9
<i>PricewaterhouseCoopers LLP v. Cedar Resources, Inc.</i> , 761 So. 2d 1131 (Fla. 2d DCA 1999)	5, 6
<i>Tropicana Products, Inc. v. Shirley</i> , 501 So.2d 1373 (Fla. 2d DCA 1987)	10
<i>Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan</i> , 629 So.2d 113, 115 (Fla. 1993).....	10
<u>Statutes</u>	
<i>Fla. Stat. § 35.03</i> (2011).....	5
<i>Fla. Stat. § 770.05</i> (2011).....	4, 6

Rules

Fla. R. App. P. 9.130 1, 5

Fla. R. App. P. 9.220 1

PRELIMINARY STATEMENT

The Appellant, Dr. Mario Sánchez, shall be referred to herein as “Dr. Sánchez.” Dr. Sánchez’s online newspaper located at <http://marcoislandblog.blogspot.com> shall be referred to as the “Online Newspaper.”

Pursuant to Fla. R. App. P. 9.130(e), an Appendix conforming to the requirements of Fla. R. App. P. 9.220 is submitted contemporaneously with this Initial Brief. References to the Appendix shall be indicated as “[App. ____]” with further reference to specific tabs or pages within the Appendix as appropriate.

STATEMENT OF THE CASE AND FACTS

This action is a Strategic Lawsuit Against Public Participation (a “SLAPP” suit), in which Appellee seeks to assert frivolous defamation claims, not for the purpose of addressing some injury in fact, but instead to silence one of his critics through forced participation in expensive litigation. In his haste to begin this war of financial attrition, Appellee selected the wrong venue in which to file his Complaint – perhaps knowing that it would unnecessarily increase Dr. Sánchez’s costs in defending Appellee’s SLAPP suit, or maybe out of an attempt to litigate in a forum more convenient for Appellee. No matter the reason, Appellee’s choice of court for his SLAPP suit does not satisfy Florida’s venue statute for defamation actions. Accordingly, the lower court’s order denying Dr. Sánchez’s motion to correct the situation should be reversed.

Dr. Sánchez is a journalist. [App. pp. 61, 97.] He writes editorial and investigative pieces on matters of public concern, which pieces are published via the Online Newspaper every one to three days. [App. pp. 61.] The central focus of the Online Newspaper is Dr. Sánchez's former hometown of Marco Island, where Dr. Sánchez witnessed numerous acts of local government corruption and abuse of authority. As a staunch supporter of environmental preservation, Dr. Sánchez took particular interest in (and wrote numerous articles about) the federal Environmental Protection Agency ("EPA") investigation that was initiated during Appellee's employment as Marco Island's city manager.

On August 31, 2011, Appellee filed his complaint against Dr. Sánchez alleging two claims for defamation, one for tortious interference with a business relationship, and one seeking prior restraint of free speech through injunction. [App. tab 2.] In response to Appellee's complaint, Dr. Sánchez filed a motion [App. tab 4] asserting several grounds for dismissal, including the fact that Appellee's Complaint was filed in an improper venue. In support of his motion, Dr. Sánchez submitted an affidavit [App. tab 3] establishing facts concerning his residence and the relevant facts surrounding publication of the statements Appellee claims constitute defamation of his character, and a Memorandum of Law [App. tab 5] setting forth the appropriate standard for determining the proper venue for Appellee's Complaint.

Despite Dr. Sánchez's affidavit, and without asking a single question at oral argument, the lower court denied Dr. Sánchez's motion to dismiss at the hearing, declining to transfer the action, and inviting Appellee's counsel to draft a suitable order. Appellee then submitted a proposed order [App. tab 1] to Dr. Sánchez, which affirmatively stated that venue was proper in Collier County, without any discussion concerning the predicate factual determinations required for such a ruling. After counsels for the parties were unable to agree on a suitable proposed order, and after Appellee's counsel refused to submit two proposed orders together, Dr. Sánchez provided his own version to chambers separately. [See App. tab 13.]

On December 20, 2011, the lower court endorsed Appellee's proposed order without revision, and Dr. Sánchez has noticed this appeal seeking review of the trial court's order.

SUMMARY OF THE ARGUMENT

Collier County is an improper venue for Appellee's defamation claims. Under *Fla. Stat.* § 770.05, Appellee's choice of venue for defamation claims against Dr. Sánchez are limited, and Collier County does not satisfy any of those choices. None of the allegedly defamatory statements was first published in Collier County. Dr. Sánchez does not maintain an office for conducting the business of the Online Newspaper in Collier County, nor does he operate an office there for distribution of the Online Newspaper. Assuming Appellee could articulate a valid cause of action for any statement published by Dr. Sánchez to any third party, that cause of action would not have accrued in Collier County.

Upon *de novo* review of the record evidence that establishes all of the foregoing facts, this Court should reverse the lower tribunal's determination that Appellee's claims can be maintained in Collier County.

ARGUMENT

A. Jurisdictional Basis for Appeal

This Court is empowered to review non-final orders concerning venue, which orders have been rendered by the Twentieth Circuit Court in and for Collier County, Florida. *See Fla. Stat.* § 35.03 (2011); Fla. R. App. P. 9.130(a)(1)(3)(A).

B. Standard of Review

In appeals of lower court orders involving questions of venue, there are two possible types – each requiring a different standard of review. *PricewaterhouseCoopers LLP v. Cedar Resources, Inc.*, 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999). In the first type, where the lower court has chosen between two or more venues, where all are satisfactory under the law, that choice is within the sound discretion of the lower court and will only be reversed in cases where it is clear that its discretion has been abused. *Id.*; *see Hu v. Crockett*, 426 So. 2d 1275, 1281 (Fla. 1st DCA 1983); *and J.L.S. v. R.J.L.*, 708 So. 2d 293 (Fla. 2d DCA 1998). The instant action, however, is not one of this first type.

When a trial court is presented with a motion to transfer venue based on the impropriety of the plaintiff's venue selection, the defendant is arguing that, as a matter of law, the lawsuit has been filed in the wrong forum. *PricewaterhouseCoopers*, 761 So. 2d at 1133. In order to rule on such a motion, the trial court needs to resolve any relevant factual disputes and then make a legal

decision whether the plaintiff's venue selection is legally supportable. *PricewaterhouseCoopers*, 761 So. 2d at 1133. A trial court's factual decisions in this context are reviewed by an appellate court to determine whether they are supported by competent, substantial evidence or whether they are clearly erroneous. *Id.*; see *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *Bradley v. Waldrop*, 611 So. 2d 31, 32 (Fla. 1st DCA 1992). The trial court's legal conclusions are reviewed *de novo*. *PricewaterhouseCoopers*, 761 So. 2d at 1133.

Accordingly, this Court should assess the lower court's factual determinations in this action to determine if they constitute clear error, and the lower court's order denying Dr. Sánchez's motion to dismiss should be reviewed *de novo*.

C. *Florida's venue statute limits where Appellee may bring his defamation claims, and Collier County does not meet the statutory requirements in this instance.*

Florida has a specific statute that governs choice of venue in defamation actions. See *Fla. Stat.* § 770.05 (2011) ("No person shall have more than one choice of venue for damages for libel or slander, invasion of privacy, or any other tort founded upon any single publication . . ."). This statute limits actions arising out of a single publication or single cause of action to four choices of venue: (1) where the allegedly defamatory material was first published; (2) the county or counties where the publisher has an office used for conducting business; (3) where

the publisher keeps an office for distribution; or (4) where the cause of action came into existence. *Perdue v. Miami Herald Publishing Co.*, 291 So.2d 604, 607 (Fla. 1974). As discussed in more detail below, the record amply demonstrates that Collier County satisfies none of these four choices with respect to Appellee's claims.

D. Dr. Sánchez has provided sufficient evidence to show that none of the allegedly defamatory statements was first published in Collier County.

A review of Appellee's complaint reveals three categories of statement, written and spoken, that form the basis for his defamation claims. [App. pp. 2-3.] For each of these categories, Dr. Sánchez has presented evidence showing that none was first published in Collier County.

The statements made to a television reporter for Fox 4 were made by phone, with Dr. Sánchez in Miami-Dade County and the reporter, Mike Mason, in Lee County, Florida. [App. pp. 14-15, 72-74, 102.] The statements made in the article Appellee has claimed defames him were published on the Online Newspaper from Miami-Dade County and first read in Santa Clara County, California. [App. pp. 12-13, 67-71, 87, 95-96, 102-103.] The email statements Appellee has claimed defame him were first read in Transylvania County, North Carolina. [App. pp. 16-17, 75-81, 90-93, 104.]

Appellee has failed to present any evidence on any location where the any allegedly defamatory statement made by Dr. Sánchez was first published.

Accordingly, it would be clearly erroneous for the lower court to determine that the defamations alleged in Appellee's Complaint were first published in Collier County, Florida.

E. Dr. Sánchez does not operate or distribute the Online Newspaper from Collier County.

Under § 770.05, Appellee could have brought his claims for defamation against Dr. Sánchez and the Online Newspaper in any county where offices are maintained for conducting the Online Newspaper's business or from which the Online Newspaper is distributed. *Perdue*, 291 So.2d at 607. Dr. Sánchez has presented record evidence that the Online Newspaper is operated and distributed from Miami-Dade County, Florida. [App. p. 102.]

Appellee has failed to present any evidence on any location where the Online Newspaper is operated or from which it is distributed. Accordingly, it would be clearly erroneous for the lower court to determine that an office was maintained by Dr. Sánchez for operating or distributing the Online Newspaper in Collier County, Florida.

F. Appellee's cause of action for defamation, if one exists, did not accrue in Collier County.

The final choice that Appellee has for venue is the county where his asserted defamation claims accrued. According to the plain language of Florida's statute, the cause of action for damages founded upon a single publication or exhibition or

utterance shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state. *Fla. Stat.* § 770.07 (2011); *see also Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So.2d 113, 115 (Fla. 1993). Dr. Sánchez has presented record evidence that each and every statement that Appellee claims as defamatory was published, exhibited or uttered in venues other than Collier County, Florida. [App. pp. 12-17, 67-81, 87, 90-93, 95-96, 102-104.]

Once a defendant has challenged venue with evidence controverting a plaintiff's venue allegation, the burden is upon the plaintiff to prove that the selection of venue is proper. *Tropicana Products, Inc. v. Shirley*, 501 So.2d 1373, 1375 (Fla. 2d DCA 1987); *Eth-Wha, Inc. v. Blankenship*, 483 So.2d 872, 873 (Fla. 2d DCA 1986); *Holiday Truck & Car Sales, Inc. v. Coldewey*, 434 So.2d 344, 345 (Fla. 2d DCA 1983). The failure by Appellee to meet his burden mandates that this action should be dismissed or transferred.

CONCLUSION

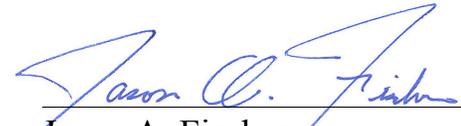
For all of the reasons set forth above, this Court should reverse the lower tribunal's Order stating that venue is proper in Collier County and remand this action with instructions to either dismiss Appellee's Complaint or transfer to a county that satisfies the requirements imposed by Florida's defamation statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery on this 30th day of January, 2012, to:

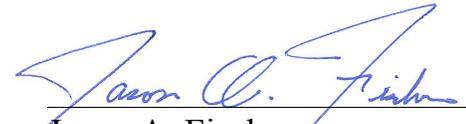
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.210(a)(2).


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