IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DOUGLAS BRIAN MANN, SR.,

Appellant,

v. Case No. 5D11-3762

STACEY A. YEATTS,

Appellee.
_____/

Opinion filed April 5, 2013

Non-Final Appeal from the Circuit Court
for Putnam County,
Scott Dupont, Judge.

Stephen E. Hilker of Stephen E. Hilker, P.A., Palatka, for Appellant.

S. Grant Halliday, Tampa, for Appellee.

TORPY, J.

Appellant challenges the order transferring his supplemental petition to modify child support from Putnam County to Hillsborough County. The supplemental petition sought to modify support orders entered in a paternity action that originated in Hillsborough County. We affirm.

In 1996, Appellee filed a paternity action against Appellant in Hillsborough County. The Hillsborough court determined paternity and ordered Appellant to pay child support. In 2010, Appellant filed a petition in Hillsborough County to reduce child

support, claiming that he had become permanently disabled. The Hillsborough court denied Appellant's petition and ordered him to pay Appellee's attorney's fees and costs.

In early 2011, Appellee's counsel informed Appellant that Appellee intended to file a supplemental petition in Hillsborough County seeking an increase in child support. Appellee's counsel contacted Appellant as a courtesy in an effort to resolve the dispute prior to further litigation. In response, Appellant hired counsel, who filed the instant petition in Putnam County. The petition named Appellee as "Plaintiff" and Appellant as "Defendant." Appellant claimed that the circumstances had changed since the 2010 order in that he had now been "declared" disabled and was unable to pay child support without a reduction. The alleged declaration was apparently made by the Social Security Administration.[1] Curiously, Appellant's petition also contained allegations regarding venue, including that the witnesses and doctors who would testify resided in "Northeast Florida," and that Appellant was not physically able to travel to Hillsborough County.

Appellee then filed her supplemental petition to increase child support in Hillsborough County. She also filed a verified motion to transfer in Putnam County, requesting that court to transfer Appellant's petition to modify child support to Hillsborough County. The motion to transfer outlined the procedural history of the paternity action since it was filed in 1996. It alleged that the proper forum for the action was in Hillsborough County, where the court had retained jurisdiction for the purpose of modifying and enforcing its orders and judgments.

[1] Appellee contends that the declaration by the Social Security Administration does not give rise to a change of circumstances and is irrelevant and inadmissible hearsay evidence. We need not address these points in this appeal.

On August 2, 2011, the Putnam court held an evidentiary hearing on the motion to transfer. Appellee's counsel tendered the verified motion in lieu of evidence and both counsel presented argument that included factual assertions offered without objection. Appellee argued that venue in Hillsborough County was proper and all related proceedings should remain in Hillsborough County. Appellant countered that the Putnam court should transfer the Hillsborough County, arguing:

> And the *Resor*[2] case does change the law regarding the venue in paternity action, and does allow the court to consider a change of venue based on 47.122, and what has been popularly known as *forum non conveniens*, or what, in the interests of justice, for the convenience of the parties or witnesses, is to be relevant, as far [as] transferring a civil action. The only issue . . . that the court would have to consider is whether or not [Appellant] does have a medical condition which no longer permits him to earn the monies that he previously earned that was the basis for the existing support order. With that, your honor, the witnesses to this issue are all in Northeast Florida . . . .

The trial court agreed to reserve ruling on the motion to transfer venue until after August 17, because the parties represented that they were close to resolving the matter.

After the parties failed to announce a settlement, the Putnam court scheduled a case management conference for September 27, 2011. During the conference, Appellant's counsel attempted to file a partial deposition of Appellant's doctor in support of his venue argument. The trial court sustained Appellee's objection to the deposition because the venue hearing had closed in August. Thereafter, the trial court entered a written order changing venue to Hillsborough County. In its order, the trial court made the following finding:

> The evidence shows that the case was originally filed in 1996 in Hillsborough County and that is where all litigation

[2] *Resor v. Welling*, 44 So. 3d 656 (Fla. 5th DCA 2010).

> has been held. At the beginning of this year [Appellee] planned to file a Supplemental Petition in the case. However, out of professional courtesy, her counsel contacted [Appellant] in an attempt to work out the issue. Upon being informed of the motion, [Appellant] immediately filed a Supplemental Petition here in Putnam County to take jurisdiction from Hillsborough County. The court finds [Appellant's] actions to be legal posturing through gamesmanship and an attempt to be clever in two counties . . . .

In its order, the trial court addressed the legal issue Appellant framed and argued it. The court reiterated Appellant's contention that, based on section 47.122, it could transfer the action to Putnam County to accommodate the convenience of the witnesses. It concluded, however, that Appellant's argument was erroneous because Appellant's requested change of venue should have been filed in Hillsborough County. The trial court said:

> Based on [Appellant's] own case law, the proper procedure would be for [Appellant] to file this motion in Hillsborough County seeking to transfer the case to Putnam. On the contrary, [Appellant] is asking the Putnam Court to transfer the case from Hillsborough to Putnam. Only the Hillsborough Court has the jurisdiction to transfer the case from Hillsborough to Putnam . . . .

It is axiomatic that our review is limited to the issues properly presented to the trial court and that Appellant raised in his brief. *Herskovitz v. Hershkovich*, 910 So. 2d 366 (Fla. 5th DCA 2005). Absent fundamental error, arguments not presented to the trial court may not be considered for the first time on appeal. *Gliszczynski v. State*, 654 So. 2d 579, 580 (Fla. 5th DCA 1995). Nor can we consider errors that the complaining party invited. *Tate v. Tate*, 91 So. 3d 199 (Fla. 2d DCA 2012). Here, Appellant raises two issues on appeal, regarding (1) the August 2, 2011 hearing, and (2) venue. First, Appellant presents a generalized claim that the trial court erred by not taking evidence

at the August 2, 2011 hearing. This claim of error is not preserved for review because Appellant did not object when the court considered the verified motion and counsel's factual assertions at the hearing. *See Reddick v. Reddick*, 728 So. 2d 374, 376 (Fla. 5th DCA 1999) (opining that trial court's reliance on document not in evidence, contents of which were argued without objection, not preserved for review). Appellant further claims that the trial court erred by refusing to reopen the hearing to consider his doctor's deposition. Appellant fails to demonstrate an abuse of discretion on this point. The trial court patiently allowed both parties to conclude their presentations at the August 2, 2011 hearing. The court clearly communicated its intent to rule on the merits of the motion without further hearing if settlement could not be reached. Appellant never requested that the hearing remain open until after the completion of discovery. Finally, the deposition, even if considered, would not have affected the outcome on the venue issue.

Secondly, citing *P.A.G. v. A.F.*, 602 So. 2d 1259 (Fla. 1992), Appellant argues that venue was proper in Putnam County because a modification of a paternity support order is maintained under section 61.14, Florida Statutes, which provides several alternative venues, including where either party resides. Although this argument is premised on a correct statement of the law, it is not preserved for our review because it was not argued below, and the purported error was invited by Appellant's incorrect argument to the trial court.[3] Appellant's entire argument below was based on his assumption of the burden to justify a transfer of the action from Hillsborough County to

[3] We may consider lack of preservation as a basis to affirm even in the absence of a specific argument on that point by Appellee. *Food Lion, L.L.C. v. Henderson*, 895 So. 2d 1207 (Fla. 5th DCA 2005).

Putnam County. Appellant never argued that his petition was a new action and that venue was proper in Putnam County. The trial court ruled that Appellant's request for transfer should have been made in Hillsborough County.[4] That was the correct ruling on the argument presented.

Assuming Appellant had preserved his argument and not invited the error, we would affirm nevertheless. Although venue in Putnam County was not improper, pursuant to section 47.122, Florida Statutes, the trial court had the discretion to transfer the action to Hillsborough County in the interest of justice. *Stewart v. Coleman*, 413 So. 2d 93, 93 (Fla. 1st DCA 1982). Based on the findings made by the trial court, the decision to transfer the action back to Hillsborough County fell within the bounds of the court's discretion.

AFFIRMED.

LAWSON, J., concurs.

GRIFFIN, J., dissents with opinion

[4] The trial court also determined that Appellant did not satisfy his burden.

I respectfully dissent.

Mann filed his petition for modification of a paternity support order, pursuant to section 61.14, Florida Statutes, in his home county of Putnam. Indisputably, this was a statutorily authorized venue choice. Venue was proper in Putnam County. The majority concedes this point.

In response to the filing of Mann's petition in Putnam County, Yeatts did two things: she filed her own action in Hillsborough County, where she resided, and she filed a motion to transfer Mann's case to the Thirteenth Judicial Circuit. Yeatts' motion to move the case to Hillsborough was based on a single proposition: that because the proceedings between the parties began as a paternity action in Hillsborough County, the Putnam County Circuit Court "lacked jurisdiction" to hear Mr. Mann's newly filed modification petition. This argument was also the only argument asserted by Yeatts' counsel during the hearing. Yeatts' counsel specifically argued that section 61.14 did not apply to the case because it was a paternity action. Yeatts' counsel made no mention of moving the case to Hillsborough County pursuant to section 47.122, Florida Statutes ("*forum non conveniens*"). The trial court accepted Yeatts' "improper venue" argument and expressly ruled in the appealed order:

> Based on the evidence presented, argument of the parties, and prevailing case law, the court finds the petitioner should have filed his motion in Hillsborough County, rather than Putnam.

Not content with this erroneous ruling, however, the trial judge went on to rule further:

> Even if Putnam were the proper filing location, the respondent [Mann] failed to prove a substantial inconvenience or undue expense.

This ruling is nonsensical on its face. If Putnam County were the proper filing location, Mann would have no burden to prove anything, much less a substantial inconvenience or undue expense in order to move the case to Putnam County pursuant to section 47.122. The case was already in Putnam County. It was not Mann who would be seeking to transfer venue out of Putnam County; it would have to be Yeatts who would be attempting to move the case from Putnam County to Hillsborough County. The burden would be on Yeatts, not Mann. Yeatts, however, never made a *forum non conveniens* motion or a *forum non conveniens* argument at the hearing. Not one iota of *forum non conveniens* evidence was offered. Transferring the case to Hillsborough County, based upon what was before the court, was (or should have been) a legal impossibility. The venue privilege to file in Putnam belonged to Mann and the (unmet) burden to transfer the case was on Yeatts. The appealed order was completely wrong and should be reversed.

In *Brown v. Nagelhout*, 84 So. 3d 304, 308-09 (Fla. 2012), the Supreme Court of Florida recently affirmed that:

> A defendant wishing to challenge the plaintiff's selection has "the burden of pleading and proving that the venue is improper." *Inverness Coca-Cola Bottling Co. v. McDaniel*, 78 So. 2d 100, 102 (Fla. 1955). "When a trial court is presented with a motion to transfer venue based on the impropriety of the plaintiff's venue selection under section 47.011, the trial court must resolve any relevant factual disputes and then make a legal decision whether the plaintiff's venue selection is legally supportable. *McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc.,* 39 So. 3d 504, 508 (Fla. 4th DCA 2010) (citing *Pricewaterhouse-Coopers LLP v. Cedar Resources, Inc.*, 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999)). "The trial

> court's legal conclusions in this regard are reviewed de novo." *Id.*

With this mandate in mind, a recap is in order.

> 1. Did Yeatts plead and prove that venue was improper? -- Plead -- yes; prove -- no.
>
> 2. Did the trial court resolve any relevant factual disputes? -- No.
>
> 3. Did the trial court make a legal decision whether the plaintiff's venue selection is supportable? -- Yes, albeit the wrong one.
>
> 4. Has this court reviewed the trial court's legal conclusion that venue was improper de novo? -- No.

This Court has concluded that these errors do not matter because, during the hearing, Mann's counsel failed to tell the trial court that his client's choice of venue was legal.

Contrary to the majority's view, this is not a "preservation of error" problem. When a defendant files a motion to change an improper venue, the question is purely a legal one. That is why the supreme court says we are to review it *de novo*. If venue is not improper, we must affirm. It is ironic that Mann lost his venue privilege because, according to the majority, Mann's counsel made the wrong argument. Yeatts' motion was based on the wrong law, Yeatts' counsel's argument was completely erroneous and the trial judge was 100% wrong, but it is Mann -- who had no burden at the hearing -- who loses his venue choice because his lawyer kept telling the trial judge the cases needed to be in Putnam because his client was too ill to litigate in Hillsborough and all his witnesses were in northeast Florida. Admittedly, counsel for Mann made a garbled argument, but he never waived the right to a correct ruling on Yeatts' motion, and he

certainly never waived his client's venue rights.[5] Perhaps if Yeatts' attorney had filed a legally supportable venue motion, i.e., one that raised the only viable ground, which was a section 47.122 transfer, the hearing would have gone differently. Instead, after hearing counsel for Yeatts' "improper venue" argument, the trial court announced that Yeatts, not Mann, had the discretion to decide where the case should go . . . and things went downhill from there.

The majority also errs in its final conclusion that, notwithstanding the trial court's erroneous ruling on Yeatts' motion and the nonsensical allocation of the burden of showing inconvenience on the non-moving party, the trial court had the discretion to transfer the action to Hillsborough County "in the interest of justice." First, the trial court never made such a ruling. Second, Yeatts made no motion on this basis and no evidence was offered.

The majority cites *Stewart v. Coleman*, 413 So. 2d 93 (Fla. 1st DCA 1982), for the unremarkable proposition that venue may be changed for the convenience of the parties or witnesses or in the interest of justice. That is what section 47.122 says; but as *Stewart* points out, venue can only be changed under section 47.122 "upon a proper showing." (Emphasis added).

A trial court may *sua sponte* raise the issue of *forum non conveniens* under section 47.122; however, it is a denial of due process for a trial court to take such an action without proper notice and opportunity for both parties to be heard. Where a defendant moves to transfer a case based solely on improper venue, but the trial court decides to change venue for reasons of convenience and judicial economy, the trial

[5] In defense of Mann's counsel, it should be pointed out that he and Yeatts' counsel had filed an agreed motion to continue the venue hearing because of outstanding discovery, but the trial court insisted on going forward.

court has to give the parties notice and the right to be heard on the section 47.122 criteria. *McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc.,* 39 So. 3d 504, 510-11 (Fla. 4th DCA 2010). This was never done.

What makes this case truly unique is that it is the appellate court that *sua sponte* has decided that the "interest of justice" requires a venue transfer to Hillsborough County. No notice, no hearing, no evidence -- not a problem. Here, the trial court's order never mentioned the "interest of justice," much less that it could be a basis to move the case to Hillsborough County. The trial court simply ruled that the case should have been filed in Hillsborough County and that Mann failed to prove a substantial inconvenience or undue expense sufficient to warrant moving the case to Putnam County.

So, a lawsuit filed in Putnam County, in accordance with the venue privilege set forth in Florida Statutes, has been moved to Hillsborough County based on the appellate court's *sua sponte* conclusion that it would be "in the interest of justice" to do so. Presumably, the majority is of the view that this case should be in Hillsborough County since the earlier litigation was in Hillsborough County. I respectfully suggest that this is not a decision we are empowered to make. On the bright side, however, there is no doubt that this decision will make venue appeals much easier to review. We only need ask ourselves, "Where, in the interest of justice, should this case be tried?"