NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BREANNA JEAN JOHNSON, Appellant, v. JOSEPH BRENDAN JOHNSON, Appellee.	)	Case No. 2D19-847

Opinion filed December 27, 2019.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Jared E. Smith, Judge.

William S. Graessle and Jonathan W. Graessle of William S. Graessle, P.A., Jacksonville, for Appellant.

Carla M. Sabbagh and Gregory D. Jones of Rywant, Alvarez, Jones, Russo & Guyton, P.A., Tampa, for Appellee.

LaROSE, Judge.

Breanna Jean Johnson appeals a nonfinal order granting her ex-husband Joseph Brendan Johnson's motion to transfer venue from Hillsborough County to Pasco County. Specifically, the order transferred Ms. Johnson's January 2019 petition for protection against domestic violence on behalf of the couple's minor son. We have

jurisdiction, see Fla. R. App. P. 9.130(a)(3)(A) (permitting appeals from nonfinal orders "concern[ing] venue"), and we affirm.

Background

Since the dissolution of their marriage in 2016, the couple remains in a fraught and contentious relationship. We need not detail their legal history; suffice it to say that all their prior proceedings (dissolution, emergency motions and petitions, and modifications) have been heard in Pasco County. We also note that Ms. Johnson filed the January 2019 petition in Hillsborough County three days after a Pasco County trial court denied her December 2018 petition for injunction against domestic violence. In doing so, that trial court found that Ms. Johnson was not credible and was using the litigation as a weapon against her ex-husband.

In response to the January 2019 petition,[1] Mr. Johnson filed an unsworn "Motion for change of venue," seeking to transfer the case to Pasco County. Mr. Johnson recited that

> [a]lthough . . . the [January 2019 petition] could have been filed in both Hillsborough and Pasco Counties, the matter should be transferred to Pasco County as it is not only the most convenient forum, not just for the witnesses and the parties involved, but also the most appropriate forum in regards to the interests of justice and judicial economy.

See § 741.30(1)(k), Fla. Stat. (2018) ("Notwithstanding any provision of chapter 47, a petition for an injunction for protection against domestic violence may be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the domestic violence occurred. There is no minimum requirement of

[1]The January 2019 petition alleged that both parties lived in Hillsborough County.

residency to petition for an injunction for protection."); see also § 47.011, Fla. Stat. (2018) ("Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.").

At the hearing on the transfer motion,[2] the trial court heard argument from counsel; the parties offered no testimony. Mr. Johnson stressed that "everything is still in Pasco County." Ms. Johnson countered that the parties live in Hillsborough County. Interestingly, though, when Ms. Johnson filed the December 2018 petition in Pasco County, both parties were living in Hillsborough County. She also contended that the therapists who would testify at the injunction hearing have offices in Hillsborough, and "[t]he majority of the acts alleged in this petition also occurred in Hillsborough."

At the conclusion of the hearing, the trial court found that the "interest of justice" required the transfer of the case to Pasco County because all of the parties' prior and existing family law cases had been litigated or remained to be litigated there:

> [H]owever we slice it, the case is in Pasco County. . . . You've got the dissolution action there, timesharing is there, knowledge base is there, case history is there. I don't have any of that benefit. And it sounds like there's even motions for contempt filed [in Pasco County] based on prior timesharing agreements.
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> For me to get up to speed on all that would be – it would be a disservice to both parties to make everybody wait around for this court to try to do that, and then you would be getting two different [forums], two different looks at this. I think in the interest of justice it definitely needs to go to the same place, wherever the nucleus is. If the nucleus in Pasco, which it is right now, then . . . the venue is properly in Pasco. And by that, it's in the interest of justice. Obviously, the parties live here, so technically this is a proper place for

[2]Ms. Johnson filed her petition pro se. At the hearing, she was represented by counsel.

> venue. But in the interest of justice . . . I'm finding its [sic] not the proper place for it right now.

On appeal, Ms. Johnson argues that Mr. Johnson failed to carry his burden to justify a transfer because he failed to submit an affidavit with the transfer motion or present any testimony or other evidence at the hearing. See Loiaconi v. Gulf Stream Seafood, Inc., 830 So. 2d 908, 909-10 (Fla. 2d DCA 2002) ("It is the defendant's burden to plead and prove that venue is improper."); Kinetiks.Com, Inc v. Sweeney, 789 So. 2d 1221, 1223 (Fla. 1st DCA 2001) ("A motion by the defendant to dismiss or transfer on the ground of improper venue raises issues of fact which must be resolved by an evidentiary hearing, unless the complaint shows on its face that venue is improper."). In her view, the trial court's order is not supported by competent substantial evidence and constitutes an abuse of discretion.

Analysis

"A trial court's decision on whether to change venue under section 47.122 is subject to an abuse of discretion standard of review." Fla. Health Scis. Ctr. v. Elsenheimer, 952 So. 2d 575, 578 (Fla. 2d DCA 2007); see ILD Corp. v. New Link Network, LLC, 157 So. 3d 501, 502 (Fla. 2d DCA 2015) ("The trial court exercises its discretion in determining whether to transfer venue under section 47.122." (citing RJG Envtl., Inc. v. State Farm Fla. Ins. Co., 62 So. 3d 678, 679 (Fla. 2d DCA 2011))). Ms. Johnson faces a daunting task to receive relief. See 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. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.").

Section 47.122 "sets forth three bases for transferring venue: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice." Universal Prop. & Cas. Ins. Co. v. Long, 157 So. 3d 382, 383 (Fla. 2d DCA 2015). Generally, witness convenience is of paramount importance. See Fla. Health Scis. Ctr., 952 So. 2d at 578 ("With respect to the three statutory factors of convenience of the parties, convenience of the witnesses, and the interests of justice, the convenience of the witnesses is the most important factor."). However, the inimitable "interest of justice" motivated the trial court's decision here.

This "third factor . . . is a catch-all consideration including many considerations, and in some close cases this factor may be determinative." Hu v. Crockett, 426 So. 2d 1275, 1280 (Fla. 1st DCA 1983). The trial court seemingly recognized the need to streamline the parties' litigation, prevent the duplication of testimony, and guard against the issuance of inconsistent or conflicting orders, which was a very real concern in light of the parties' preexisting and ongoing litigation over parental responsibility and timesharing. See Universal Prop. & Cas. Ins. Co., 157 So. 3d at 384 ("The interests of justice also militate in favor of a venue transfer. . . . Moving the suit against Universal to Brevard County will avoid duplication of testimony.").

Mr. Johnson did not submit affidavits or other evidence in opposition to the January 2019 motion. See generally Fla. Health Scis. Ctr., 952 So. 2d at 578-79 ("To overcome a plaintiff's venue choice, the defendant must submit affidavits or other sworn proof."); Loiaconi, 830 So. 2d at 910 ("That burden is not met where a defendant files an unsworn motion and does not present affidavits or other sworn proof in support of the motion. Moreover, while a trial court has broad discretion in dealing with matters of

venue, the party challenging venue must provide a sufficient factual basis for the exercise of that discretion." (citations omitted)). This is important because "a plaintiff's forum selection is presumptively correct and the burden is on the defendant to show either substantial inconvenience or that undue expense requires change for the convenience of the parties or witnesses." Eggers v. Eggers, 776 So. 2d 1096, 1098 (Fla. 5th DCA 2001); see also Fla. Fam. L. R. P. 12.060(b) ("When any action is filed placing venue in the wrong county, the court may transfer the action in the manner provided by Florida law to the proper court in any county in which it might have been brought in accordance with the venue statutes. When the venue might have been placed in 2 or more counties, the person bringing the action may select the county to which the action is transferred.").

But Ms. Johnson lodged no objection to or argument concerning the lack of evidence. Cf. Fla. Fam. L. R. P. 12.530(e) ("When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection to it in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment." (emphasis added)). Ordinarily, "in the absence of a stipulation, a trial court cannot make a factual determination based on an attorney's unsworn statements. A trial court, as well as this court, is also precluded from considering as fact unproven statements documented only by an attorney." Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd., 636 So. 2d 838, 840 (Fla. 2d DCA 1994) (citation omitted). This is significant because, where a defendant moves to transfer venue, "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." Blackhawk Quarry Co. of Fla. v. Hewitt Contracting Co., 931 So. 2d 197, 199 (Fla. 5th DCA 2006). Yet, there is no dispute between the parties that their prior and ongoing litigation was, and is, conducted in Pasco County.

Assuredly, the trial court could take judicial notice of and consider the volume and substance of the couple's Pasco County litigation in determining the suitable venue for Ms. Johnson's January 2019 petition. See § 90.202(6), Fla. Stat. (2018) (permitting a trial court to take judicial notice of the "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States"). And, certainly, the fact that the parties' litigation had all taken place in Pasco County was an important, if not the controlling, factor for the trial court. Moreover, the lack of a timely objection or argument on this point below prevents us from reviewing it, for the first time, on appeal. See Hornsby v. State, 680 So. 2d 598, 598 (Fla. 2d DCA 1996) ("The defendant's failure to present any argument to the trial court bars our review of the [sufficiency of the evidence] issue on appeal.");[3] cf. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) (stating that the purpose of the contemporaneous objection rule is to place "the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings"); Crumbley v. State, 876 So. 2d 599, 601 (Fla. 5th DCA 2004) ("Commonly referred to as the contemporaneous objection rule, the rationale for its

[3]We recognize that the court's decision in F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003), calls into question our categorical holding in Hornsby. However, none of the scenarios enunciated in F.B. that otherwise excuse the need for contemporaneous objection are present in the instant case.

application is two-fold: 1) to require an objection at the time the error is committed to give the trial court the opportunity to correct it; and 2) to prevent a litigant from allowing an error to go unchallenged so it may be used as a tactical advantage later.").

Ms. Johnson emphasizes that as the petitioner, she is entitled to her choice of forum. Of course, she is entitled to some measure of deference. See J.L.S. v. R.J.L., 708 So. 2d 293, 295 (Fla. 2d DCA 1998) ("Whether to order a venue change on [section 47.122] grounds is a matter within the sound discretion of the court. When making that determination, the court must give due deference to the plaintiff's forum selection; while it is not the paramount consideration, it is a meaningful one in assessing the convenience of the parties."); P.V. Holding Corp. v. Tenore, 721 So. 2d 430, 431 (Fla. 3d DCA 1998) ("It is well established that where venue is proper in more than one county, the choice of forum rests with the plaintiff."). However, when the other factors enumerated in section 47.122 outweigh the initial forum choice, transfer is proper. See Universal Prop. & Cas. Ins. Co., 157 So. 3d at 384 ("[A] plaintiff's choice of venue is not a paramount consideration; it is merely a 'meaningful one in assessing the convenience of the parties.' " (quoting Darby v. Atlanta Cas. Ins. Co., 752 So. 2d 102, 103 (Fla. 2d DCA 2000))); P.V. Holding Corp., 721 So. 2d at 431 ("[W]hile a plaintiff's choice of forum is entitled to respect, that choice is not paramount. The plaintiff's venue privilege will not be honored where the convenience of the parties or witnesses, or the interests of justice, require the action to be transferred.").

We also wish to point out that the crux of Mr. Johnson's transfer motion was that all of the parties' prior litigation had taken place in Pasco County and that, as a result, the trial court there was familiar with the parties and their case. This argument

was consistent with that made by Mr. Johnson at the hearing. Thus, there was no prejudice visited upon Ms. Johnson by the trial court entertaining an unpleaded basis for relief. See Hall v. Animals.com, L.L.C., 171 So. 3d 216, 218 (Fla. 5th DCA 2015) ("Because Animals did not file a motion to transfer based on forum non conveniens, the trial court erred in entertaining this argument without giving Hall advance notice."); Utilicore Corp. v. Bednarsh, 730 So. 2d 853, 854 (Fla. 3d DCA 1999) ("The trial court's oral pronouncement suggests that the court believed venue should be transferred because Miami-Dade County was an inconvenient forum. The defendants had not filed a motion to transfer under section 47.122, Florida Statutes (1997), nor had the court given advance notice that it desired to entertain such a claim on its own motion." (footnote omitted)).

Lastly, we are compelled to note the curious timing of Ms. Johnson's decision to seek relief in Hillsborough County. Recall that Ms. Johnson filed the January 2019 petition in Hillsborough County, three days after the dressing-down she received in the Pasco County trial court's order finding that she had weaponized the litigation against her ex-husband. This fact certainly supports Mr. Johnson's argument that transfer was necessary to prevent forum shopping. See Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So. 2d 86, 87 (Fla. 1996) ("Forum non conveniens is a common law doctrine addressing the problem that arises when a local court technically has jurisdiction over a suit but the cause of action may be fairly and more conveniently litigated elsewhere. Forum non conveniens also serves as a brake on the tendency of some plaintiffs to shop for the 'best' jurisdiction in which to bring suit . . . ." (emphasis added) (footnote omitted)).

Conclusion

Because we see no abuse in the trial court's exercise of its discretion to transfer Ms. Johnson's January 2019 petition to Pasco County, we affirm.

Affirmed.

SALARIO, J., and CASE, JAMES R., Associate Senior Judge, Concur.