

**IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA**

CASE NO.: CACE-16-017269

LEONARDO VELA,

Plaintiff,

v.

JAMES RIVER INSURANCE COMPANY,
a Foreign Insurer Authorized in Florida,

Defendant.

**PLAINTIFF'S VERIFIED MEMORANDUM AND EXHIBITS OPPOSING
MOTION TO DISMISS AND/OR TRANSFER**

Plaintiff, LEONARDO VELA, by and through undersigned counsel, opposes Defendant's Motion to Dismiss and/or Transfer and states:

Background

1. On or about March 28, 2015, in Raleigh, North Carolina, Plaintiff Leonardo Vela and three other individuals were passengers in an "Uber" vehicle which was struck from behind by another vehicle. Plaintiff Vela suffered injuries and sued the driver at fault, Mr. Cooper, for damages. Rather than defend the lawsuit, the insurance company for the Uber driver at fault, USAA, tendered the full policy limits to Plaintiff.

2. James River Insurance Company ("James River") provides Underinsured Motorist (UIM) coverage for Rasier LLC, d/b/a/ Uber. Plaintiff Vela is an insured and intended beneficiary of that policy. James River was placed on notice of the North Carolina state law suit

shortly after it was filed. And, rather than immediately intervene in the North Carolina state court litigation, James River commenced an investigation into the tortfeasor's assets. Prior to Plaintiff accepting the tender of the policy limits from USAA, Defendant James River Insurance Company expressly waived its right of subrogation against the at fault (drunk) driver and agreed to release the tortfeasor from liability. A true and correct copy of the April 15, 2016 email in which James River Insurance waives its right of subrogation is attached to Plaintiff's Complaint as Exhibit B.

3. Pursuant to the Underinsured Motorist ("UIM") insurance contract between James River Insurance Company and Rasier LLC (d/b/a/Uber), Plaintiff Leonardo Vela is an insured and entitled to a monetary award in an amount to make him fully compensated for the injuries and damages he suffered as a result of the crash - less an offset of the money paid to him by USAA.

4. Plaintiff alleges that an underinsured situation now exists were the Plaintiff, Leonardo Vela, has not been fully compensated for the injuries he suffered in the crash including his past, present, and future medical expenses, loss of income, loss of capacity for the enjoyment of life, and mental anguish - even with the money tendered by USAA.

5. As a direct and proximate cause of the crash, Plaintiff Leonardo Vela sustained immediate injuries to his head, neck, back, and shoulder and was immediately taken to Johnston Memorial Hospital in North Carolina for treatment. After that initial treatment, Plaintiff Vella has resided and convalesced in Florida where he has received nearly all his post-accident medical treatment. See, Table of Medical Providers and Treatment attached hereto as Exhibit A. Plaintiff Vela has not formally changed his domicile of record from North Carolina to Florida, but has resided in Florida the vast majority of time over the past year since the accident.

Defendant's Motion

6. Defendant has brought his Motion pursuant to Fla. R Civ. P. 1.060 and Rule 1.061. Rule 1.060 is not applicable because it deals with transfers of venue within the State and need not be addressed since movant is not requesting such relief. Rather, movant seeks dismissal and transfer to a forum outside Florida, namely North Carolina, and relies on Rule 1.061 which provides 4 steps of analysis the court must follow when deciding the motion:¹

RULE 1.061 CHOICE OF FORUM

(a) Grounds for Dismissal. An action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida when:

- (1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;
- (2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;
- (3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and
- (4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

The decision to grant or deny the motion for dismissal rests in the sound discretion of the trial court, subject to review for abuse of discretion.

The defendant bears the burden of persuasion as to each of the four steps above. See, *Woods v. Nova Companies Belize Ltd*, 739 So.2d 617 (Fla. 4th DCA 1999) citing *Carenza v. Sun Int'l Hotels, Ltd.*, 699 So.2d 830, 832 (Fla. 4th DCA 1997); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379 (5th Cir. 1988).

¹ Defendant also asserts: Lack of Subject Matter Jurisdiction; Failure to Name an Indispensable Party, and; Improperly Naming an Insurance Company as a Party Defendant, all without any supporting argument or authority. Since this is a contract action against James River Insurance Company, clearly the insurance company must be named. It is hard to conceive who else would be required to be joined in this suit since James River has waived its subrogation rights.

Grounds

7. Step (a)(1) Adequate alternate forum. For purposes of argument, Plaintiff will concede that he may still be subject to *in personam* jurisdiction of North Carolina courts, as is defendant James River. North Carolina would be an adequate alternate forum only to the extent it may also possess *in personam* jurisdiction over the parties. However, as will be demonstrated below, Florida courts also have jurisdiction over both parties in this action.

8. Step (a)(2) Relevant factors of private interest **do not** favor the alternate forum. Several factors actually weigh against the alternate forum, North Carolina:

9. This is an action in contract for underinsured motorist coverage and damages sustained by an Uber rider in North Carolina against the insurer of an Uber passenger. Defendant James River Insurance (“James River”) asserts that this action should be brought in North Carolina because “that is where the alleged tort accrued.” Plaintiff alleges no tort against Defendant James River. Case law cited by Defendant regarding tort venue is not germane to this action. Plaintiff sues for insurance coverage under the policy. As in Florida, it is long recognized in North Carolina that an insurance policy is a contract between the parties. *Hawley v. Indemnity Insurance Co. of North America*, 126 SE 2d 161 (N.C. 1962).

10. Insurer James River is present in Florida as foreign corporation authorized to due business by the Florida Division of Insurance pursuant to Fla. Stat. §624.401 (James River is assigned Florida company code S1228). See Exhibit B attached hereto. As such, James River has availed itself of Florida jurisdiction by designating a registered agent in Florida pursuant to Fla. Stat. §624.422. “A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.” Fla.

Stat. §48.193(2) In *Mann v. Goodyear, etc., et al.*, 300 So.2d 666 (Fla. 1974), the Florida Supreme Court applied Florida's venue Statute §47.051 concluding that, "When suing a foreign corporation, one has the right to bring one's action anywhere business is transacted in Florida subject to the forum non conveniens statute."

The Florida non-conveniens statute §47.122 provides:

Change of venue; convenience of parties or witnesses or in the interest of justice.
- For 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.

11. Convenience of parties. As to Defendant James River, there is no difference whether James River is summoned before a Florida Court or North Carolina Court. Neither is more or less convenient to James River because it has no office in North Carolina and no office in Florida. James River's home address is 6641 West Broad Street, Suite 300 Richmond, VA 23230 and it has offices in Arizona and Georgia. See Exhibit C attached hereto. James River has no agents licensed in North Carolina. See Exhibit D attached hereto. However, James River has 17 agents licensed in Florida, although they are physically located out of state. See Exhibit E attached hereto. Rasier, LLC (d/b/a/ Uber) operates in both North Carolina and Florida. See, Exhibits F and G attached hereto. James River insures Rasier LLC (d/b/a Uber) in both North Carolina (Policy No. CA21161013) and Florida (Policy No. CA436100FL-00). See, Exhibits H and I attached hereto.

12. Although the North Carolina policy is applicable to this action, Plaintiff is confident this Florida Court is entirely capable of applying North Carolina law to that contract and that interests of justice will be served in Florida. Choice of law has no bearing on convenience of the venue for parties or witnesses under Rule 1.061.

13. Convenience of Witnesses. In its Motion, Defendant James River confuses damages with liability.² James River agreed to the release of the tortfeasor and waived its rights of subrogation. Liability of the tortfeasor is not an issue. Moreover, the insurance contract expressly covers the passenger, Vela, for his injuries regardless of liability of the tortfeasor. See, Exhibit B to Defendant's Motion to Dismiss and/or Transfer. That insurance contract is the gravamen of this litigation, not the automobile accident. Thus, witnesses to the accident who are located in North Carolina have little, if anything, to offer. Any such lay witness testimony regarding the Plaintiff's injuries or force of impact would be of little value and possibly inadmissible at trial for lack of expert foundation.

14. Conversely, the accident report measures out distances the vehicles travelled after impact from which force of impact can be deduced by experts in Florida should they be necessary. See, Exhibit J attached hereto. Photographs of vehicle damage are also available. More importantly, medical reports by treating physicians in Florida provide the bulk, if not entirety, of evidence to establish the seriousness and monetary amount of Plaintiff's insurance claim.

15. All these providers treated Plaintiff on a regular basis in Florida during the course of the past year and a half: Robert Martinez, MD; Harlan D. Chiron, MD; Daniel Rivera, MD; Nicholas Suite, MD; Mark Bridges, MD, as well as; Richard Hamilton, PhD, and; Dr. Leon Mandler, Psychologist. One physician saw Plaintiff in North Carolina during that period - Sarah

² Movant states: "Before considering any damage issue, the court must consider liability issues, including severity of impact, rescue personal, amount of property damage to the vehicles involved in the accident, injuries, if any to both drivers, investigators and investigating police officers. All of this testimony need be obtained from the two drivers of each motor vehicle involved the accident, and other fact witnesses, all of whom reside in North Carolina. The amount of any repairs to the vehicles would involve testimony of repair shop employees located in North Carolina." The testimony referred to above regarding liability is irrelevant because passenger coverage exists by contract regardless of which driver was at fault. Testimony of rescue personnel, police, drivers and repair shop employees is at best *deminimus* when compared to the weight and extent of testimony to be proffered by the Florida physicians who treated the Plaintiff's injuries on a regular and sustained basis. Plaintiff does not intend to call any of those North Carolina witnesses referenced by movant.

Jean Mills, MD one day in October 2015. See, Table of Medical Providers and Treatment attached hereto as Exhibit A.

16. It is unduly burdensome to require all those Florida expert witnesses to travel from Florida to trial in North Carolina. (Notwithstanding the fact that North Carolina courts would not have subpoena power to compel their attendance in North Carolina, thus potentially prejudicing Plaintiff contrary to Rule 1.061(a)(4)).³ And, it is an enormous cost burden to place on the Plaintiff. The potential testimony of one North Carolina doctor who provided brief treatment on one occasion (and who is not an intended witness by Plaintiff) is far outweighed by the number of treating practitioners in Florida who are necessary to Plaintiff's case and can be compelled to testify in a Florida court.

17. Regarding subpoenas for out-of-state discovery, Florida adheres to the Uniform Foreign Depositions Act (UFDA), adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1920. Fla. Stat. §92.251. However, Florida has not yet adopted the more recent (2007) Uniform Interstate Depositions and Discovery Act (UIDDA), which was expressly modeled on Fed. R. Civ. Proc. 45. North Carolina has adopted the UIDDA. But it cannot be utilized unless both states have adopted. This means that it is laborious for a North Carolina party to obtain and properly serve a subpoena issued by a North Carolina court on a Florida resident. In addition to following North Carolina rules and obtaining a commission there, Florida courts require a filing fee of \$401 to assign a case tracking number, filing of the commission (court order) along with coversheet before an out-of-state subpoena can issue and be served. It is far easier, procedurally and logistically, for James River to depose the Plaintiff's

³ The inability to call a treating physician as a live witness is troublesome if this case is transferred to North Carolina. Plaintiff prefers live testimony at trial instead of introducing tedious deposition designations into evidence. It is difficult to keep a jury's attention throughout lengthy depositions (even those recorded on video) and easy for jurors to miss key points that are buried within the testimony.

numerous Miami experts when the action is situated close to Miami in Broward County, Florida. See, Miami-Dade Clerk information sheet attached hereto as Exhibit K.

18. (a)(3)The balance of private interests is significantly in favor of the Florida Venue. Thus, an analysis of factors of public interest is not triggered under part (3) of the Rule.

19. (a)(4)Undue inconvenience or prejudice would be suffered by Plaintiff. Likewise, due to the location of all the Plaintiff's treating physicians, (and the Plaintiff himself) the Plaintiff cannot reinstate his suit in the alternate forum, North Carolina, without undue inconvenience or prejudice. The relief sought by movant would be contrary to part (4) of the Rule. Dismissing this lawsuit in order to require plaintiffs to litigate in North Carolina would on balance significantly disadvantage Plaintiff. On the other hand, litigating this case in Florida would not significantly disadvantage defendant. Only "[i]f the relative conveniences and inconveniences to the parties are 'at or near equipoise'" does the court proceed to the third and fourth steps of Rule 1.061. *Woods v. Nova Companies Belize Ltd*, 739 So.2d 617 (Fla. 4th DCA 1999), citing *Kinney Sys. Inc. v. Continental Ins. Co.*, 674 So.2d 86, 87 (Fla.1996) In *Woods* the plaintiffs were residents of Belize who were injured in an airplane crash in Costa Rica. The Plaintiffs' medical treatment occurred in the United States with a substantial amount of treatment taking place in Florida. The court concluded that because a portion of Wood's medical treatment was in Florida, their choice of Florida as a forum for filing their lawsuit was reasonable and that dismissing the lawsuit in order to require plaintiffs to litigate in either Belize or Costa Rica would on balance significantly disadvantage plaintiffs.

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Conclusion

20. Although North Carolina would be an adequate alternate forum only to the extent it may also possess *in personam* jurisdiction over the parties, analysis under steps (2), (3) and (4) of Rule 1.061(a) cannot justify a transfer of venue to North Carolina. This Florida court has both subject matter and *in personam* jurisdiction. Plaintiff would be prejudiced and inconvenienced by a dismissal and transfer of this case to North Carolina. The Defendant did not meet its burden of persuasion. And, their Motion to Dismiss and/or Transfer should be denied under the sound discretion of the Court.

Submitted this 12th day of December 2016.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing instrument was sent via Email on December 12, 2016 to:

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Dated: December 12, 2016.

/s/ Brent F. Sibley
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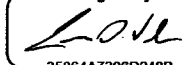
VERIFICATION

I, LEONARDO VELA, declare the above factual statements and exhibits contained in the Plaintiff's Memorandum Opposing Motion to Dismiss and/or Transfer to be true and correct to the best of my knowledge and belief under penalty of perjury under the laws of the State of Florida.

12/12/2016

Dated this __ day of December, 2016 at Hollywood, Florida.

DocuSigned by:



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LEONARDO VELA
