IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant,

v.

PASCO-PINELLAS HILLSBOROUGH COMMUNITY HEALLTH SYSTEM d//b/a FLORIDA HOSPITAL WESLEY CHAPEL a/a/o Melissa Horvat,

Appellee.
_____/

CASE NO.: 2017-CV-000150-A-O
Lower Case No. 2017-SC-012800-O

Appeal from the Order of
Eric H. DuBois,
Orange County Judge.

Rebecca O'Dell Townsend, Esq. &
Kimberly A. Sandefer, Esq.,
Attorneys for Appellant.

Robert J. Hauser, Esq.,
Attorney for Appellee.

Before SCHREIBER, BLECHMAN, ROCHE, JJ.

PER CURIAM.

Appellant, Garrison Property and Casualty Insurance Company, appeals from the trial court's "Order on Defendant's Amended Motion to Dismiss or in the alternative Motion to Transfer" entered on December 15, 2017. Pursuant to Rule 9.040(c), Fla. R. App. P., this Court treats Appellant's appeal, filed December 27, 2017, as a Writ for Petition of Certiorari and **GRANTS** the Writ for the reasons described below.

Relevant Facts

Appellee, Pasco-Pinellas Hillsborough Community Health System, as assignee of Melissa Horvat ("Insured"), brought suit against Appellant seeking payment of personal injury protection ("PIP") benefits under Insured's policy. Appellant filed a Motion to Dismiss or Alternatively Transfer Venue to Pasco County pursuant to a forum selection clause in the insurance policy. The motion included a copy of the bill submitted by Appellee to Appellant for payment, as well as the relevant insurance policy. The forum selection clause stated under General Provision in Part E that "unless we agree otherwise, any legal action against us must be brought in a court of competent jurisdiction in the county and state where the covered person lived at the time of the accident."

Appellant's motion was set for hearing on November 30, 2017. At the hearing, the parties argued over the sufficiency of the insurance policy and bill as evidence of Insured's address and whether the forum selection clause was mandatory or permissive. On December 15, 2017, the trial court issued its "Order on Defendant's Amended Motion to Dismiss or in the alternative Motion to Transfer" and denied Appellant's motion. The trial court concluded that the forum selection clause was unambiguous and mandatory, and that Insured clearly resided in Pasco County. However, the trial court also concluded that enforcement of the forum selection clause was "unreasonable and unjust." This appeal followed.

Appellate Jurisdiction over Non-final Orders

This Court determines that it does not have jurisdiction to consider Appellant's claims as an appeal from a non-final order. *See Shell v. Foulkes*, 19 So. 3d 438 (Fla. 4th DCA 2009) (finding a lack of jurisdiction under the appellate rules and general law for circuit courts to review non-final orders). In response to this Court's "Order Directing Appellant to Show Cause Why Appeal Should Not Be Dismissed for Lack of Jurisdiction," Appellant submitted no general law as a basis for interlocutory appellate jurisdiction and instead cited to a number of cases demonstrating the

general lack of consensus in this area. Appellant cited to the nearly twenty year old opinion of this Court in *MTM Diagnostic, Inc., v. Geico General Insurance Company*, 7 Fla. L. Weekly Supp. 578b (Fla. 9th Cir. Ct. 2000), which did not specify any specific general law granting jurisdiction as required by Florida Rule of Appellate Procedure 9.030(c)(1). More recently in *Fitzmartin Investments, LLC v. Forbes*, No. 2017-CV-95-A-O (Fla. 9th Cir. Ct. Jun. 5, 2019), this Court relied on the Fourth District Court of Appeal's decision in *Shell v. Foulkes* to conclude that it did not have jurisdiction to consider a non-final appeal in the absence of applicable general law.

Certiorari Analysis

Based on Rule 9.040(c), Fla. R. App. P., this Court considers this appeal as a Petition for Writ of Certiorari. Petitions for Writ of Certiorari may only be granted where there is a clearly irreparable harm and the trial court has departed from the essential requirements of the law. *Kissimmee Health Care Associates v. Garcia*, 76 So. 3d 1107 (Fla. 5th DCA 2011). The question of irreparable harm should be considered first, as it is a threshold jurisdictional question and, even where there is a departure from the essential requirements of law, if the resulting harm is correctable on final appeal there is no certiorari jurisdiction. *See Citizens Property Ins. Corp. v. San Perdid Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012).

Irreparable Harm

In the case of interlocutory petitions for certiorari, such as the instant case, the Florida Supreme Court determined that an erroneous interlocutory order only results in irreparable harm in "exceptional cases." *Kaufman v. King*, 89 So. 2d 24, 26 (Fla. 1956). The *Kaufman* court considered erroneous orders concerning venue to be one such type of "exceptional case" often involving irreparable harm because the remedy on final appeal would mean re-litigating the entire case in the more appropriate venue, which the court deemed "inadequate." *Id.* The Supreme Court's specific concern regarding interlocutory venue transfer decisions is also evident in the

Florida Rules of Appellate Procedure, 9.130, which place venue transfer orders on the list of allowable interlocutory appeals from the Circuit Court to the District Courts of Appeal. While the same rule does not apply to allow a similar interlocutory action from County Court to the Circuit Court other than by certiorari, *See Blore v. Fierro*, 636 So. 2d 1329, 1332 (Fla. 1994), it does inform this Court's analysis regarding whether erroneous venue transfer orders satisfy the jurisdictional requirement of irreparable harm.

While there has not been much occasion for this specific issue to be considered in the District Courts of Appeal, there is authority to support the conclusion that an erroneous venue transfer order creates irreparable harm. The Second DCA followed *Kaufman* in *Largen v. Greenfield*, 363 So. 2d 573, 573 (Fla. 2d DCA 1978) specifically holding that venue transfer orders are "sufficiently serious to pose a potential for irreparable injury for which there would be no adequate remedy." This precedent, as well as *Kaufman,* has been cited in orders granting certiorari in the Twentieth Judicial Circuit in *Steve Unser Cabinetry, Inc. v. Donahue*, 25 Fla. L. Weekly Supp. 870a (Fla. 20th Jud. Cir. App. Nov. 7, 2017), as well as in the Fifteenth Judicial Circuit in *Amlong & Amlong, P.A. v. Semo*, 23 Fla. L. Weekly Supp. 694a (Fla. 15th Cir. Ct. Nov. 9, 2015). Accordingly, because an erroneous interlocutory venue transfer order could result in irreparable harm, it is appropriate to move on to consideration of whether the trial court's order departed from the essential requirements of law.

Departure from the Essential Requirements of the Law

The Florida Supreme Court has held that in a certiorari case review is appropriate "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). As recently as January of this year, the Fifth DCA has reiterated that the departure from the essential requirements of the

law necessary for granting a writ of certiorari is something more than "a simple legal error." *See Dept. of Highway Safety and Motor Vehicles v. Morrical*, 262 So. 3d 865 (Fla. 5th DCA 2019).

Mandatory Forum Selection Clauses and the *Manrique* Exception

The Fifth DCA has consistently made it clear that a trial court commits reversible error if it ignores a mandatory forum selection clause. *See Texas Auto Mart, Inc. v. Thrifty Rent-A-Car System Inc.*, 979 So. 2d 360, 362 (Fla. 5th DCA 2008) (citing *Ware Else, Inc. v. Offstein*, 856 So. 2d 1079, 1081 (Fla. 5th DCA 2003); *See also Travel Exp. Inv. Inc. v. AT&T Corp.*, 14 So.3d 1224, 1226 (Fla. 5th DCA 2009). However, there is an exception to this general rule where there is a showing that enforcement of an unambiguous, mandatory forum selection clause would be unreasonable or unjust. *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986). It was under this specific exception that the trial court denied Appellant's Amended Motion to Dismiss or in the Alternative Transfer to Pasco County in the instant case. The trial court, in its order, specifically stated that it did "not find any ambiguity in language" before going on to cite to the *Manrique* exception as its basis for refusing to enforce the otherwise mandatory clause. The court concluded that "based on the record evidence and argument presented at the hearing, it would be unreasonable and unjust to require the medical provider to chase all around the state to recover monies it believes it is due and owed." Accordingly, the proper scope of this review is focused on whether the trial court's application of the *Manrique* exception involved a departure from the essential requirements of law, as discussed below, we believe it did.[1]

As described by the Fourth DCA in *Farmers Group, Inc. v. Madio & Co., Inc.*, 869 So. 2d 581, 583 (Fla. 4th DCA 2004), in order for a mandatory forum selection clause to be considered

[1] As a preliminary note, Appellee, despite prevailing below, does not offer any argument in support of the trial court's rationale in applying the *Manrique* exception. Instead, Appellee argues that there are "several reasons" supporting the trial court's denial and invokes the "tipsy coachman" rule that this Court is "bound to uphold the trial court for any reason supported by the record, even if it disagrees with the trial court's stated reasoning."

unreasonable or unjust, it is not enough to show that litigation in another forum "would result in additional expense or inconvenience." Instead, the party challenging the application of the clause must establish that trial in the contractual venue "would be so gravely difficult as to effectively deprive it of its day in court." *Id.* In the instant case, the trial court concluded that the mandatory forum selection clause at issue was unreasonable or unjust because enforcement of the clause would "require the medical provider to chase all around the state to recover monies it believes it is due and owed." This rationale falls far short of the *Farmers* standard. Even if Appellee were required to "chase all around the state" to pursue its claims, it is difficult to see how that result goes beyond an "additional expense or inconvenience" to become an effective deprivation of Appellee's day in court. Accordingly, the trial court departed from the essential requirements of law by applying the incorrect standard to conclude that the *Manrique* exception applied in this case.

Further, the case law governing the *Manrique* exception places the burden of establishing the exception on the party seeking relief from the mandatory forum selection clause. The Third DCA in *Allstate Fire and Cas. Ins. Co. v. Hradecky*, 208 So. 3d 184, 187-188 (Fla. 3rd DCA 2016), cited to *Farmers* and *Manrique* when it reversed a trial court order refusing to enforce a mandatory forum selection as unreasonable or unjust. In *Hradecky*, the court noted that while the trial court made no explicit finding that the mandatory selection clause at issue was unreasonable or unjust, it could not have made such a finding because "Hradecky neither argued below that the Endorsement's clause was unreasonable or unjust, nor presented any evidence to that effect." *Id.* Similarly, in the instant case, Appellee did not argue that enforcement of the clause was unreasonable or unjust and did not present any evidence that being forced to bring the case in Pasco County "would be so gravely difficult as to effectively deprive it of its day in court."

Farmers Group, Inc., 869 So. 2d at 583.[2] Instead, Appellee argued that the clause was not mandatory, but rather permissive, or in the alternative that Appellant had not established with sufficient evidence the residence of the Insured in Pasco County. The trial court correctly disagreed with those arguments ruling conclusively that the language of the clause was not ambiguous and that the Insured was a resident of Pasco County. However, the trial court departed from the essential requirements of law by applying the *Manrique* exception where the Appellee did not offer any argument or evidence in support of its application.

"Tipsy Coachman" Arguments

Nonetheless, Appellee argues that this Court should uphold the trial court's order on the basis of the "tipsy coachman" rule that "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). Appellee suggests three broad reasons to uphold the trial court's decision. First, that Appellant had previously waived its venue motion under Florida Small Claims Rule 7.060. Second, that the insurance policy was ambiguous and therefore permissive, rather than mandatory. Finally, that Appellant never proved the Insured's residence in Pasco County.

With regard to the first argument, the record indicates that Small Claims Rule 7.060 did not apply in this case. While it is true that the case originated in Small Claims Court, as noted by Appellee at the trial court's hearing on the transfer motion, a then-existing administrative order automatically invoked the Florida Rules of Civil Procedure in the context of PIP insurance cases originating in Small Claims Court. Accordingly, although Appellant may well have sufficiently indicated its objection to venue, Appellee's arguments invoking this rule lack merit.

[2] As noted above, the Appellee has not sought to advance any argument that enforcement of the mandatory forum selection was unreasonable or unjust in this appeal.

Appellee next suggests that the trial court erred in its conclusion that the language of the forum selection clause was unambiguous and therefore mandatory. This Court considers questions regarding contract interpretation *de novo*. *Golden Palm Hospitality, Inc. v. Stearns Bank Nat. Ass'n*, 874 So. 2d 1231, 1233-34 (Fla. 5th DCA 2004).

The prevailing view is that forum selection clauses are considered presumptively valid. *Golden Palm Hospitality, Inc.*, 874 So. 2d at 1235. The *Golden Palm* court described the process for deciding whether a forum selection clause is enforceable and binding as dependent on whether the clause is "permissive or mandatory." *Id.* at 1236. The Fifth DCA has established a general test for determining whether a specific clause is permissive or mandatory. *Id; see also Shoppes Ltd. P'ship v. Conn*, 829 So.2d 356, 358 (Fla. 5th DCA 2002). Mandatory forum selection clauses are characterized by a clear and unambiguous requirement that a particular forum be the exclusive jurisdiction for litigation concerning the contract. *Id*. The use of "words of exclusivity" such as "shall" or "must" in a clause tend to support the conclusion that it is mandatory. *Id.* A clause which does nothing more than consents to jurisdiction but does not exclude jurisdiction in another forum is not mandatory. *Id.*

In *Operadora Seryna, S.A. de C.V. v. Banco Bilbao Vizcaya-Mexico, S.A.*, 762 So. 2d 595 (Fla. 5th DCA 2000), the Fifth DCA acknowledged that, although courts had been reluctant to deem forum selection clauses mandatory, Florida Supreme Court precedent required that where "such construction cannot be avoided" the agreements are "within the power to contract protected by our constitution." *See also Manrique* 493 So. 2d at 437. The court elaborated that a clause in which the parties "agree to a specific forum and, at the same time, waive all other possible forums, is mandatory." *Operadora Seryna,* 762 So. 2d at 596.

The disputed forum selection clause stated that "unless we agree otherwise, any legal action against us must be brought in a court of competent jurisdiction in the county and state where the

covered person lived at the time of the accident." This text clearly contains "words of exclusivity" stating that the action "must" be brought in the designated venue. Appellee argues that the modifying clause "[u]nless we agree otherwise" renders the clause as a whole permissive. However, the modifying phrase may be considered merely an explicit statement of the implicit right of the parties to a contract to agree to waive an otherwise mandatory and enforceable provision. *See* Fla. R. Civ. P. 1.140(b), *Carnival Corp. v. Booth*, 946 So. 2d 1112, 1114 (Fla. 3d DCA 2016), *Levy County v. Diamond*, 7 So. 3d 564, 566 (Fla 1st DCA 2009). On the other hand, Appellee cites to and our independent research identified, no legal authority for classifying a forum selection clause which includes mandatory language as permissive. In each of the cases cited to by Appellee in which a court concluded the provision was permissive, there was a clear lack of mandatory language. *See Lopez v. United Capital Fund, LLC*, 88 So. 3d 421, 426 (Fla. 4th DCA 2012), *Early Auction Co. v. Koelzer*, 114 So. 3d 1038, 1040 (Fla. 4th DCA 2013), *Am. Boxing & Athletic Ass'n, Inc. v. Young*, 911 So. 2d 862, 865-66 (Fla. 2d DCA 2005). Accordingly, it was not a departure from the essential requirements of the law for the trial court to conclude the forum selection provision was mandatory on this ground.

Appellee also forwarded several sub-arguments regarding perceived ambiguities in the language of the provision. Appellee suggests that the term "covered person" and the designated location were ambiguous and should therefore have rendered the provision unenforceable. However, these arguments lack merit. Regarding the identification of the appropriate "covered person" the Appellee contends that because under the definition multiple individuals could be a "covered person" it is not possible to identify to whom the term applies in the forum selection clause. This argument is flawed because the identity of the relevant "covered person" is fundamental to Appellee's ability to bring this case as an assignee. Further, the fact that there may be other individuals who could qualify as "covered persons" under the definition does not render

the provision ambiguous because in the event of a suit, such as this one, the provision is only relevant as to the covered person bringing the litigation.

Regarding any ambiguity with the provision's designation of the appropriate mandatory forum, Appellee suggests that because the provision does not designate a specific location it is ambiguous. However, Florida courts have consistently upheld such "floating forum selection clauses" as enforceable. *See Lopez*, 88 So. 3d at 422 (distinguishing the clause in question from a "floating forum selection clause" such as found in *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W. 2d 312 (Iowa Ct. App. 2007). In *Lopez*, the court approved of such "floating forum selection clauses" because despite being "indefinite" they tied forum selection to "certain mutable and knowable facts." *Id.* at 424. *See also Bovis Homes, Inc. v. Chmielewski*, 827 So. 2d 1038 (Fla. 2d DCA 2002). Accordingly, the trial court did not depart from the essential requirements of law by concluding that the instant forum selection provision was unambiguous and mandatory.

Finally, Appellee suggests that the Insured's address contained in the insurance policy or on the provider's own bill, constitutes hearsay or hearsay within hearsay, or at the very least can only prove the Insured's address at the time of policy formation, and not at the time of the accident. As pointed out by the Appellant, an insurance policy, as issued and accepted, is prima facie the contract of the parties. *Continental Cas. Co. v. City of Ocala*, 127 So. 894, 895 (Fla. 1930). Further, contractual provisions "are non-hearsay because they have independent legal significance." *A.J. v. State*, 677 So. 2d 935, 937 (Fla. 4th DCA 1996). Where, as here, a contractual party's address is not only a term of the contract, but a material term because the Insured was required to update her address, it is a stretch to suggest that the address contained in the policy is inadmissible hearsay. Accordingly, the trial court was well within its discretion and did not depart from the essential requirements of the law by relying on the Insured's address in the insurance policy to conclude that Pasco County was the Insured's county of residence.

Conclusion

In conclusion, the trial court did not depart from the essential requirements of law either by concluding that the forum selection clause at issue was unambiguous and mandatory or by concluding that the Insured's county of residence was Pasco County. However, the trial court did depart from the essential requirements of law by nonetheless refusing to enforce the mandatory forum selection clause and denying Appellant's Amended Motion to Dismiss or in the Alternative to Transfer to Pasco County. This departure resulted in irreparable harm to Appellant for which remedy on plenary appeal is insufficient. Appellant's construed Petition for Writ of Certiorari is **GRANTED**. Accordingly, Appellee's "Provider's Motion for Appellate Attorneys' Fees," filed February 5, 2018, is **DENIED**.

DONE AND ORDERED in Chambers, at Kissimmee, Osceola County, Florida, on this _____ day of _____, 2019.

_____
MARGARET H. SCHREIBER
Presiding Circuit Judge

BLECHMAN and ROCHE, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Opinion has been furnished on this ____ day of _____ 2019, to **Judge Eric H. DuBois**, 425 N. Orange Avenue, Orlando, FL 32801; **Rebecca O'Dell Townsend, Esq.**, Dutton Law Group, PA, P.O. Box 260697, Tampa, FL 33685 at service.ROT@duttonlawgroup.com; **Kimberly A. Sandefer, Esq.**, Dutton Law Group, PA, P.O. Box 260697, Tampa, FL 33685 at service.KAS@duttonlawgroup.com; **Robert J. Hauser, Esq.**, Pankauski Hauser PLLC, 415 South Olive Avenue, West Palm Beach, FL 33401 at hauser@phflorida.com & courtfilings@phflorida.com.

_____
Judicial Assistant