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

GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant,

v.

TAMPA BAY EMERGENCY PHYSICIANS, P.L.
a/a/o Alessandra Parker,

Appellee.
_____/

CASE NO.: 2018-CV-000048-A-O
Lower Case No. 2016-SC-018601-O

Appeal from the Order of
David Johnson,
Orange County Judge.

Rebecca O'Dell Townsend, Esq.,
Suzette M. Alfonso, Esq., &
Scott W. Dutton, Esq.,
Attorneys for Appellant.

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

Before LEBLANC, APTE, O'KANE, JJ.

PER CURIAM.

Appellant, Garrison Property and Casualty Insurance Company, appeals from the trial court's "Order Denying Defendant's Motion to Dismiss or to Transfer Venue Based on Mandatory Forum Selection Clause" entered on March 26, 2018. Pursuant to Rule 9.040(c), Fla. R. App. P., this Court treats Appellant's appeal, filed April 19, 2018, as a Writ for Petition of Certiorari and **GRANTS** the Writ for the reasons described below.

FACTS

On or about November 2, 2016, Appellee, Tampa Bay Emergency Physicians, P.L., as assignee of Alessandra Parker ("Insured"), brought suit against Appellant seeking payment of personal injury protection ("PIP") benefits under Insured's policy. Appellant timely filed a Motion to Dismiss or Transfer Venue Based on Mandatory Forum Selection Clause pursuant to a forum selection clause in the insurance policy. The motion included a copy of the insurance policy accompanied by a notarized statement that the policy was an exact duplicate of the original issued on December 29, 2015. It also included an affidavit of a claims adjuster certifying the claim file, including the insurance policy, a Florida Traffic Crash Report, the insurance claim form, and some other documents. There is no dispute that Insured's address is listed in the insurance policy. The forum selection clause in the policy 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 March 16, 2018. 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 March 26, 2018, the trial court issued its order denying Appellant's motion. The trial court concluded that the forum selection clause was unambiguous and mandatory, but refused to enforce the clause because it did not believe there was competent, record evidence of Insured's address. This appeal followed.

DISCUSSION

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 the recent opinion *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

The Appellant alternately argued for review on the basis of this Court's certiorari jurisdiction. 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).

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). Here, the trial court entered an "Order Denying Defendant's Motion to Dismiss or to Transfer Venue Based on Mandatory Forum Selection Clause." In the order, the trial court finds that the referenced clause "constitutes a mandatory forum selection clause" but goes on to conclude that "Defendant failed to submit competent record evidence reflecting where the insured lived at the time of the accident." In the course of its hearing on the motion, the trial court reasoned that the only suitable evidence of Insured's address would be an affidavit or sworn testimony from the Insured herself. Accordingly, the proper scope of this review is whether the trial court's conclusion that Appellant "failed to submit competent record evidence reflecting where the insured lived at the time of the accident" amounted to a departure from the essential requirements of law. As discussed below, we believe it did.

The trial court properly concluded that the forum selection clause in question was mandatory and therefore enforceable. The clause as written states, "[u]nless 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." Based on the language of this clause, there is a factual question as to the "county and state where the covered person lived at the time of the accident."

The record of the hearing on Appellant's motion below indicates that there was substantial discussion regarding this question. Appellant argued below, and has reiterated its argument on appeal, that the all of the evidence in the case, including, but not limited to, Insured's insurance contract, Appellee's claims form, and the Florida Traffic Crash Report, was properly admitted as a business record. In addition, Appellant argues that these documents represent competent, substantial evidence that Insured resided in Hillsborough County at the time of the accident. Appellant argues that the trial court departed from the essential requirements of law when it concluded that the evidence of Insured's address was only supported by hearsay evidence, and that the only sufficient evidence would have been an affidavit or sworn testimony by Insured specifically regarding her address.

The Insurance Contract

The relevant insurance contract is fundamental to this case. Presumably Appellee agrees to the admission of the contract as evidence, at least in part, since its case for PIP benefits on behalf its assignor Insured would be difficult to prove without the admission of the contract between Insured and Appellant. To the extent that Appellee would seek to diminish the admissibility of the insurance contract, while at the same time seeking benefits under the same contract, it runs the risk of implicating the doctrine of judicial estoppel. In any event, Appellant

undertook the necessary steps to admit the insurance contract, as well as its other evidence (Appellee's claims form, Appellee's agreement with Insured, and the Florida Traffic Crash Report), as business records pursuant to section 90.803(6)(a), Florida Statutes. A litigation adjuster employed by Appellant provided both deposition testimony and an affidavit satisfying the elements for admission of a business record as outlined by *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272, 1275 (Fla. 4th DCA 2016).

However, Appellee maintains its contention is that Insured's address information contained in the contract is inadmissible hearsay or hearsay within hearsay. Appellee analogizes reliance on the policy to picking up a phonebook and offering its address information as evidence in a courtroom. This analogy, made during the course of the trial court's hearing on the motion to dismiss or transfer venue, is not well taken. There is a clear difference between a third-party-created document involving little to no input directly from an individual and the formation of the insurance contract directly between Insured and Appellant.

Insured's address contained in the insurance contract was not hearsay and therefore could be relied on as competent, substantial evidence of Insured's county of residence. 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). In this case, Insured'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 clear from the policy itself that the address provided by Insured was a factor in determining Appellant's risk calculations, as well as the premium ultimately charged to Insured. As a result, far from being as unreliable as a phonebook, the address contained in the policy was competent and substantial evidence of the

Insured's address sufficient to answer the factual question and enforce the mandatory forum selection clause of the contract.

Having determined that the address information contained in Insured's contract with Appellant was not hearsay, it is clear that Appellant did submit competent, substantial evidence that Insured resided in Hillsborough County at the time of the relevant accident. Accordingly, the trial court departed from the essential requirements of the law by failing to enforce what it determined to be a mandatory forum selection clause in the contract. It is unnecessary for this Court to engage in additional analysis regarding whether Appellant's other evidence, including the Appellee's claim form and the Florida Traffic Crash Report, also constituted competent evidence regarding Insured's address. However, we note that both of these documents, as well as all of the other documentary evidence in the record corroborates Insured's residence in Hillsborough County at the relevant time. In fact, there appears to be no contradictory evidence in the record at all. Appellee, as the assignee of Insured, did not offer any evidence to refute Appellant's factually supported assertion of residence in Hillsborough County.

"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 two alternate reasons to uphold the trial court's decision. First, that Appellant did not establish that it did not previously "agree" with the Insured or Appellee upon venue in Orange County. Second, that Appellant never contradicted Appellee's venue allegations with sworn evidence. However, this second argument is related to the discussion above. Because we have

determined that, at the very least, the insurance contract contained admissible, competent evidence of Insured's address, Appellant's motion to dismiss or transfer based on the forum selection provision was a clear and controlling contradiction of Appellee's asserted venue supported by adequate evidence.

Regarding their first argument, Appellee suggests that the language of the initial clause of the forum selection provision which reads, "unless we agree otherwise" creates a requirement that Appellant prove with evidence that it did not agree to venue in Orange County. However, this language is 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). Accordingly, Appellant's filing of its motion to dismiss or transfer the action pursuant to the clause is more than sufficient to indicate it was not waiving its contractual right to enforce the forum selection provision. Neither of Appellee's suggested alternate reasons support upholding the trial court's decision under the "tipsy coachman" doctrine.

CONCLUSION

Based on the analysis above, the trial court did not depart from the essential requirements of law by concluding that the forum selection clause at issue was unambiguous and mandatory. However, the trial court did depart from the essential requirements of the law by concluding that there was insufficient competent, record evidence regarding Insured's address and therefore refusing to enforce the mandatory forum selection clause. This departure resulted in irreparable harm to Appellant for which remedy on plenary appeal is insufficient. Appellant's construed

Petition for Writ of Certioari is **GRANTED**. Accordingly, Appellee's "Emergency Provider's Conditional Motion for Appellate Attorneys' Fees," filed May 10, 2019, is **DENIED**.

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

_____
BOB LEBLANC
Presiding Circuit Judge

APTE and O'KANE, 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 David Johnson**, 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; **Suzette M. Alfonso, Esq.**, Dutton Law Group, PA, P.O. Box 260697, Tampa, FL 33685 at service.sma@duttonlawgroup.com; **Scott W. Dutton, Esq.**, Dutton Law Group, PA, P.O. Box 260697, Tampa, FL 33685 at service.swd@duttonlawgroup.com; **Robert J. Hauser, Esq.**, Pankauski Hauser PLLC, 415 South Olive Avenue, West Palm Beach, FL 33401 at courtfilings@phflorida.com.

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Judicial Assistant