Filing # 149601497 E-Filed 05/15/2022 02:56:42 PM

FLORIDA DISTRICT COURT OF APPEAL
FIRST DISTRICT

Case Number: 1D22-601

Lower Tribunal Number: 2019-4225-CA
The Honorable William S. Henry

MONARCH CLAIMS CONSULTANTS, INC.,
Appellant,

v.

CLIFF FLEMING
and
JANE K. FLEMING,
Appellees.

APPELLEE'S,
CLIFF AND JANE FLEMING,
ANSWER BRIEF

RECEIVED, 05/15/2022 02:57:21 PM, Clerk, First District Court of Appeal

Charles M-P "Chip" George, Esq.
Law Offices of Charles M-P George
1172 South Dixie Highway 508
Coral Gables, Florida 33146
305-661-7686
e-services@cmpg-law.com

R. Waylon Thompson, Esq.
Lauren K. Dodge, Esq.
Manuel & Thompson, PA
314 South Magnolia Avenue
Panama City, Florida 32401
850-785-5555
waylon@manuelthompson.com
lauren@manuelthompson.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Rules

PRELIMINARY STATEMENT

Appellees, Cliff Fleming and Jane K. Fleming, will be referred to as the Flemings or Appellees. Monarch Claims Consultants, Inc., will be referred to as Monarch or Appellant. Citations to Appellees Appendix are designated [A. #]. Except where noted, all *emphasis* is ours.

STATEMENT OF THE CASE AND FACTS

Statement of the Case.

The Flemings' home was destroyed by Hurricane Michael. [A. 4, ¶ 6]. In June of 2019, during a declared state of emergency, Monarch agreed to act as the Flemings' public insurance adjuster ("Agreement"). [A. 4, ¶ 8]. Two months later, after Monarch failed to do anything on the claim, [A. 6, ¶¶ 15-20], the Flemings fired Monarch. [A. 7, ¶ 23].

The Flemings hired an attorney, sued their insurer and, in October of 2020, settled their insurance claim. [A. 7, ¶¶ 23-28]. Monarch did nothing to advance the litigation or settlement of the Flemings' insurance lawsuit. [A. 7, ¶ 26]. Fourteen months after being fired; Monarch learned of the settlement and demanded full payment under the Agreement. [A. 8, ¶¶ 29-30].

The Flemings then sought a judicial declaration of their rights and obligations under the Agreement. [A. 3]. Citing venue language buried in an unrelated paragraph, in the middle of the Agreement, [A. 12, ¶ 7], Monarch moved to dismiss for lack of venue. [A. 21].

At hearing on February 9, 2021, [A. 148, ¶ 3], the court denied Monarch's motion without prejudice to raising the issue anew after conducting discovery and briefing the enforceability of the Agreement. [A. 147-149]. There is no transcript of February 9th hearing, and there is no approved Fla. R. App. P. 9.200(b)(5) substitute.

Ten months later, the Flemings noticed an evidentiary hearing, for December 20, 2021, for the purpose of determining whether the Agreement and incorporated venue language was enforceable. [A. 152, ¶ 1]. There is no transcript of the December 20th hearing, and there is no approved Fla. R. App. P. 9.200(b)(5) substitute.

On January 28, 2022, the trial court entered a "SUPPLEMENTAL ORDER ON MONARCH'S MOTION TO DISMISS AND/OR TO TRANSFER", in which the court again denied Monarch's motion to dismiss for improper venue. [A. 154-158]. Monarch then appealed the December 20, 2021 order.

Statement of the Facts.

Monarch's preprinted Agreement states in pertinent part:

> The above referenced Policyholder(s) (collectively referred to as "POLICYHOLDER") and Public Insurance Adjuster ("PUBLIC ADJUSTER") (collectively referred to as "Parties") enter into this Public Insurance Adjuster Services Agreement (this "Agreement") for the following described services (the "Service") relating to the above referenced loss (the "LOSS"), pursuant to the following terms and conditions, which are incorporated herein for all purposes:
>
> **1. SERVICES**: PUBLIC ADJUSTER will act as a public insurance adjuster on behalf of POLICYHOLDER for the services provided and fees will be paid upon the preparation and / or presentment of the claim for loss, damage, and recovery for the LOSS under any insurance policies including those listed above relating to the following insurance coverage provided in the policy(ies). This does not include assisting in any appraisal / mediation / arbitration or legal proceedings whether contractual or extra contractual.
> . . .
>
> **4. FEES FOR SERVICES**: POLICYHOLDER understands and agrees that PUBLIC ADJUSTER shall recover its fees based on the amount recovered from an insurance company for the LOSS including, but not limited to, compromise, confession of liability, appraisal awards, judgments, awards and/or settlements of damages, costs, interest, fees, and/or payments of POLICYHOLDER's liens, bills, or claims. PUBLIC ADJUSTER's fee shall be computed as follows:

A. 20% percent of the amount of claim payments by any insurance company for the LOSS or;

B. 10% percent of the amount of claim payments by any insurance company for the LOSS, if the claim is based on events that are the subject of a declaration of emergency.

POLICYHOLDER and PUBLIC ADJUSTER understand and agree that the percentage provided in this Agreement comply with Florida law in effect as of the date of this Agreement. If the provision of any state or federal rule or statute rule or statue requires payment of fees in a lesser amount than those set forth above, then POLICYHOLDER and PUBLIC ADJUSTER understand that POLICYHOLDER will be charged only the lesser amount provided for in said rule or statute.
. . .

7. PROVISIONS CONCERNING SERVICES: POLICYHOLDER AND PUBLIC ADJUSTER understand and agree that neither party shall settle any claims arising out of the LOSS without first communicating with the other. POLICYHOLDER's deposit or negotiation of a claim payment is evidence of POLICYHOLDER's consent to settlement. POLICYHOLDER agrees to cooperate with PUBLIC ADJUSTER to be available for preparation of the claim, conferences, appraisal, and/or mediation, and to keep PUBLIC ADJUSTER fully informed on all matters relating to this LOSS. POLICYHOLDER acknowledges that PUBLIC ADJUSTER has made no guarantees regarding the disposition or results of any stage of the claims process, and all expressions made on behalf of PUBLIC ADJUSTER are the opinion of PUBLIC ADJUSTER based on information known at that time. This Agreement provides the complete and only agreement between POLICYHOLDER and PUBLIC ADJUSTER with respect to the above referenced

LOSS, and supersedes all prior written and oral offers, proposals, and agreements. No modification, waiver, amendment, discharge, or change of this Agreement shall be valid unless the same is in writing. In the event a dispute between the parties arises and suit is filed, the venue of such suit shall be in the Miami-Dade County, Florida where PUBLIC ADJUSTER's above address is located. The substantive law of the State of Florida shall govern this Agreement. Any failure by either party to comply with any provision of this Agreement may be waived, but only if such waiver is in writing and signed by the other party. Any failure to insist upon or enforce compliance with any provision of this Agreement shall not operate as a waiver of, or estoppel with respect to, any other or subsequent failure. Any notice required or permitted to be given under this Agreement shall be sufficient if in writing, and if hand delivered, sent by Federal Express or similar overnight carrier, or sent by registered or certified United States Mail, return receipt requested, to the addresses set forth in this Agreement, or to such other address as a party may designate in accordance with this provision, unless specified otherwise for a particular provision in this Agreement. This Agreement shall not be construed more strictly against PUBLIC ADJUSTER simply because it was the party responsible for preparing this Agreement. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one in the same instrument. A copy of this Agreement transmitted by telefacsimile, email, and/or other electronic form shall be deemed an original.

. . .

10. APPRAISER APPOINTMENT: POLICYHOLDER agrees to appoint the PUBLIC ADJUSTER as the appointed appraiser should the LOSS go to appraisal. While conducting appraisal, the PUBLIC ADJUSTER

> shall function solely as the appraiser, and not as a public adjuster. The appraisal cost shall be an additional 10% of recovery. Notwithstanding, the PUBLIC ADJUSTER shall retain any and all liens pursuant to the public adjuster agreement. This section is applicable whether or not the claim ultimately goes to litigation.

On motion to dismiss, [A. 20], Monarch argued that venue was proper in Miami-Dade County, Florida, [A. 22, ¶ 5; 24]; and that the Flemings' lacked standing to argue that Paragraph 10, the Agreement's Appraiser Appointment clause, invalidated the Agreement. [A. 25].

In response, the Flemings explained that the Agreement's venue language was unenforceable against Cliff Fleming because he did not sign the Agreement, [A. 39], and that the Agreement was unenforceable because it violates the 10% fee cap imposed by Fla. Stat. § 626.854(10)(b)1, the statute prohibiting public adjusters from charging, agreeing to, or accepting from any source compensation, payment, commission, fee or any other thing of value in excess of 10%. [A. 41].

The Flemings further explained that the venue language was unenforceable because it was the product of unequal bargaining power, [A. 142]; that the venue provision was unenforceable because

it was meant to punish Panhandle residents who dared to dispute the Agreement in court, [A. 143]; and that the venue language was unenforceable because it is buried in an unrelated clause, in the middle of the Agreement. [A. 144].

After taking evidence and hearing argument of counsel, the trial court found that Cliff Fleming did not sign the Agreement, [A. 155, ¶ 4]; that a declared state of emergency was in effect at the time the Agreement was executed, [A. 156, ¶ 2]; that § 626.854(10)(b)1 caps a public adjuster's fee to 10% during a declared state of emergency, [A. 156, ¶ 1]; and that Monarch, in exchange for providing public adjusting services, agreed to accept as compensation 10% of the Flemings insurance recovery plus another thing of value, the Flemings promise to appoint Monarch their appraiser. [A. 156, ¶¶ 1, 3].

The trial court further found that Florida law capped Monarch's fee at 10% of the Flemings' insurance recovery; that Florida law prohibited Monarch from charging, agreeing to, or accepting anything of value in excess of 10% of the Flemings' insurance recovery; and that the Flemings promise to appoint Monarch their appraiser was a thing of value. [A. 156, ¶ 4].

Applying these findings to the case at hand, the trial court denied Monarch's motion to dismiss on the grounds that the Agreement was an illegal contract and, since it was, the venue language was unenforceable. [A. 157-158].

From that order, Monarch appeals.

ISSUE ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE VENUE LANGUAGE CONTAINED WITHIN THE AGREEMENT WHERE THE AGREEMENT IS ILLEGAL AND VOID AB INITIO?

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO ENFORCE THE VENUE LANGUAGE CONTAINED WITHIN THE AGREEMENT WHERE THE AGREEMENT IS ILLEGAL AND VOID AB INITIO.

Monarch seeks to enforce venue language contained within its public adjuster's Agreement with the Flemings. The Agreement is illegal and void because Monarch, in exchange for providing public adjusting services, asked for and agreed to accept, in violation of § 626.854(10)(b)1's fee cap, money and other things of value exceeding 10% of the Flemings Hurricane Michael insurance recovery.

Since the Agreement is illegal and void, the order on review must be affirmed because the trial court cannot be faulted for refusing to enforce venue language contained within that illegal and void agreement.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO ENFORCE THE VENUE LANGUAGE CONTAINED WITHIN THE AGREEMENT WHERE THE AGREEMENT IS ILLEGAL AND VOID AB INITIO.

A. Standard of Review.

Discretionary decisions regarding venue are reviewed under the abuse of discretion standard. *Hu v. Crockett*, 426 So. 2d 1275, 1281 (Fla. 1st DCA 1983).

Where a venue decision turns on a question of law, appellate review is de novo. *See Dive Bimini, Inc. v. Roberts*, 745 So. 2d 482, 483-84 (Fla. 1st DCA 1999).

B. The Agreement is Unenforceable, Illegal and Void Ab Initio Because It Violates § 626.854(10)(b)1's Cap on Public Adjusting Fees.

Sometimes it seems like Florida is the fraud capital of the nation. From carpetbaggers in the 1800's, to swampland hustlers in

the 1900's, to modern day hurricane scammers, Florida has been plagued by grifters, opportunists and bounders.

For reasons unknown to this writer, the practices of the public adjusting industry have, over the years, attracted the particular attention of Florida's legislature: "The Legislature finds that it is necessary for the protection of the public to regulate public insurance adjusters . . . ." *Preamble* Fla. Stat. § 626.854.

Section 626.854, which regulates the public adjusting industry, has been amended numerous times by our legislature to address various sharp practices employed by Florida's public adjusters. In 2008, subsection (11) was added to the statute. New subsection (11) prohibited public adjusters from, during a declared state of emergency, charging, agreeing to accept, or accepting anything of value exceeding 10% of the insured's insurance recovery:

> A public adjuster may not charge, agree to, or accept any compensation, payment, commission, fee, or other thing of value in excess of:
>
> > 1. Ten percent of the amount of insurance claim payments by the insurer for claims based on events that are the subject of a declaration of a state of emergency by the Governor. This provision applies to claims made during the period of 1 year after the declaration of emergency. **. . .**

Fla. Stat. § 626.854(11)(b)1 (2008).[1]

One would think that an express, statutory fee cap would put a end to fee gouging by public adjusters. Apparently, it did not because in 2013 our legislature found it necessary to add subsection (11)(c) to § 626.854. Subsection (11)(c) imposes penalties up to $5,000.00 on public adjusters who, through creative payment schemes and artful contractual language, seek to evade § 626.854(10)(b)'s fee cap.[2]

> *A Public Adjuster's Agreement Which, on Its Face, Violates, § 626.854(10)(b) is Unenforceable, Illegal and Void.*

Despite the statutory fee cap, and despite the specter of a $5,000.00 fine, some public adjusters continue to include creative payment schemes and artfully drafted terms in their agreements. *See Gables Insurance Recovery, Inc. v. Citizens Property Insurance, Corp.*, 261 So. 3d 613 (Fla. 3d DCA 2018).

In *Gables Recovery*, Ethel Matusow's home suffered water damage. *Id.*, at 616. Gables Insurance Recovery, Inc. ("Gables") agreed to adjust Matusow's insurance claim. *Id.*, at 617. Gables

---

[1] In 2017, Fla. Stat. § 626.854 was amended and subsection 11 was relocated, unaltered, to subsection 10. We are traveling under Fla. Stat. § 626.854(10)(b)1 (2017).

[2] In 2017, Fla. Stat. § 626.854 was amended and subsection 11(c) was relocated, unaltered, to subsection (10)(d).

agreed to accept as payment 20% of Matusow's recovery from her insurer, Citizens Property Insurance Corp. ("Citizens").[3] *Id.*

After Gables failed to negotiate a settlement, Matusow entered into a new agreement assigning her insurance claim to Gables and engaging Gables to pursue and collect that claim for her. *Id.* Under the new agreement, Gables agreed to accept as compensation 20% of the insurance recovery plus something else of value, Matusow's agreement, *i.e.*, promise, that Gables would keep any prevailing party attorney's fees and costs recovered. *Id.*, at 617. Gables then sued Citizens and Citizens raised as an affirmative defense lack of standing, arguing that the Matusow assignment violated § 626.854(10)(b)2's 20% fee cap. *Id.* Citizens later moved for and was granted summary judgment on its fee cap defense. *Id.*, at 617.

On appeal, Gables argued that § 626.854(10)(b) did not apply because it was not acting as Matusow's public adjuster. *Id.*, at 620.

---

[3] *Gables Recovery* is not a hurricane / state of emergency case and the operative statute, § 626.854(11)(b)2 (2014), allowed for a 20% fee. The instant action is a hurricane / state of emergency case and the operative statute, § 626.854(10)(b)1 (2017), caps the fee at 10%. While the 2014 and 2017 versions of the statute use different subsection numbering, *i.e.*, (10) & (11), the operative language in each subsection is the same. *See* footnote 4, *supra*.

The *Gables Recovery* Court disagreed, finding that pursuant to § 626.854(1) Gables was acting as Matusow's public adjuster in seeking recovery from Citizens under Matusow's insurance policy.[4] *Id.*, at 620-21.

Gables next argued that judgment was improper because it had not yet been paid the prevailing party fees and costs contemplated by the agreement. *Id.*, at 622. Rejecting this argument, the *Gables Recovery* Court found that Florida "prohibited public adjusters from agreeing to not only 'compensation' in excess of twenty percent, but also '*payment[s], commission[s], fee[s], or other thing[s] of value.*'". *Id.*, at 624 (*emphasis* and [additions] in original). The court also found that "section 626.854(11)(b) prohibits more than just accepting in excess of twenty percent." *Id.*, at 624. "The statute says that a 'public adjuster may not charge, *agree to, or* accept . . . any . . . thing of value in excess of . . . twenty percent of the amount of the insurance claim payments made by the insurer.'" *Id.*, at 623 (*emphasis* in original).

[4] Section 626.854(1) defines public adjuster as ". . . any person for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured . . . or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured . . . in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract . . .".

The court further found that "[t]he twenty percent cap prohibits public adjusters from *even 'agree[ing] to' more compensation than is allowed by law", Id.*, at 623 (*emphasis* added), and "[w]e don't have to wait for Gables Recovery to 'accept' money, as the dissenting opinion suggests, to know the Matusow agreement violates section 626.854(11)(b) because Gables Recovery 'agree[d] to' be paid more than twenty percent of the insurance claim." *Id.*, at 624. Applying this reasoning to the case at hand, the *Gables Recovery* Court affirmed, holding that "[t]he Matusow assignment violated a state statute, section 626.854(11)(b), because it agreed to give Gables Recovery more than twenty percent of what is collected on the insurance claim." *Gables Recovery*, 261 So. 3d at 627.

Here, in exchange for providing public adjusting services to the Flemings, Monarch asked for and agreed to accept two things of value: the Flemings promise to hire Monarch as their appraiser, and their promise to pay Monarch 10% of their insurance recovery. Put another way, the Agreement both charges, *i.e.*, asks for, and agrees to accept 10% of the Flemings insurance recovery, *plus something else of value*, the Flemings promise to hire Monarch as their appraiser in the future.

Here, as in *Gables Recovery*, the Agreement, on its face, unambiguously shows that Monarch both charged and agreed to accept compensation exceeding § 626.854(10)(b)1's 10% fee cap. Here, as in *Gables Recovery*, the Agreement is unenforceable, because it violates the statutory fee cap.

Which leads us to our next point . . .

> *A Promise to Do or Refrain from Doing Something is A Thing of Value.*

It is black letter law that a promise to do or refrain from doing something is a thing of value. *Cintas Corp. No. 2 v. Schwailer*, 901 So. 2d 307, 309 (Fla. 1st DCA 2005) ("A promise, no matter how slight, qualifies as consideration if the promisor agrees to do something that he or she is not already obligated to do."); *Bhim v. Rent-A-Center*, 655 F.Supp.2d 1307, 1312 (Fla. S.D. Fla. 2009) ("Under Florida law, '[a] promise, no matter how slight, qualifies as consideration if the promisor agrees to do something that he or she is not already obligated to do.'") (internal citation and quotation omitted).

In exchange for performing public adjusting services, Monarch asked for and agreed to accept from the Flemings two things of value:

10% of their insurance recovery, *plus something else of value*, the Flemings promise to hire Monarch as their appraiser. While some may see great value in the Flemings' promise, and others may not, the value of that promise is not relevant. The relevant question is this: Is the Flemings promise a thing of value? And the answer is unequivocally: YES, a promise is a thing of value. *Cintas*, 901 So. 2d at 309.

Here, Monarch asked for and agreed to accept as compensation for providing public adjusting services 10% of the Flemings insurance recovery and *a thing of value*, their promise to hire Monarch as their appraiser. No matter how one looks at it, Monarch's Agreement is illegal because it violates § 626.854(10)(b)1's prohibition against *charging or agreeing to accept anything of value* exceeding 10% of the insured's insurance recovery.

Finally, Monarch's attempt to distinguish public adjusters from appraisers misses the mark. The fact that Monarch might have, at some point in the future, been hired to appraise the loss is irrelevant. In determining whether the Agreement violates the statutory fee cap, the only relevant question is this: Did the public adjuster *charge or agree to accept* as payment for public adjusting services something

of value exceeding 10% of the insured's insurance recovery? If the answer is YES, as it is in this case, the agreement violates the statute.[5]

Which leads us to our final point . . .

Agreements that Violate a Law or Statute are Void Ab Initio.

Agreements that violate a law or statute are illegal and void ab initio. E*dwards v. Trulis*, 212 So. 2d 893, 895-96 (Fla. 1st DCA 1968). In *Edwards*, appellant sued to recover on a brokerage commission agreement. *Id.*, at 894. Appellant was not licensed as required by law. *Id.* The issue on appeal was whether the agreement was enforceable or illegal and void ab initio. *Id.*, at 895.

While *Edwards* is distinguishable by the fact that it delt with a licensing statute and an agreement to pay a commission, the court's legal analysis regarding illegal contracts is equally applicable to the instant action.

[5]"A public adjuster *may not charge*, *agree to*, or accept any compensation, payment, commission, fee, or other thing of value in excess of . . . Ten percent of the amount of insurance claim payments . . .". § 626.854(10)(b)1 (*emphasis* added).

In determining whether the agreement was illegal and void, the *Edwards* Court, citing *McManus v. Fulton*,[6] found, "[w]here a statute is made for the protection of the public, a contract in violation of its provisions is void . . .". Citing *Zerr v. Lawlor*,[7] the court found that where the fee charged exceeds the amount allowed by law, the fee was illegal and unenforceable. *Id.* Citing *Local No. 234 v. Henley & Beckwith, Inc.*[8] the *Edwards* Court found that "an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void." "And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice." *Id.*, at 896. Finally, citing *Schaal v. Race*,[9] the court found, "when we consider the purposes of the law violated . . . it would serve no purpose to pass

---

[6] *McManus v. Fulton* (1929), 85 Mont. 170, 278 P. 126, 130, 131, 67 A.L.R. 690.
[7] *Zerr v. Lawlor*, (Tex.Civ.App.1927) 300 S.W. 112, 114.
[8] *Local No. 234, etc. v. Henley & Beckwith, Inc.*, (Fla.1953) 66 So.2d 818, 821, 823.
[9] *Schaal v. Race*, (Fla.App.1961) 135 So.2d 252, 257, 258.

such regulatory acts if parties could with impunity violate them." *Edwards*, 212 So. 2d at 897. Applying these legal principles to the case at hand, the *Edwards* Court held that the commission agreement sued on was an unenforceable, illegal, void contract.

Here, as in *Gables Recovery*, *supra*, Monarch's Agreement violates § 626.854(10)(b)1's fee cap. Since the Agreement violates the statutory fee cap, the Agreement is, as in *Edwards*, unenforceable, illegal and void. Finally, since the Agreement is void, the venue language contained within the Agreement is unenforceable; "an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void [and] when a contract or agreement, express or implied, is tainted with the vice of such illegality, *no alleged right founded upon the contract or agreement can be enforced in a court of justice*." *Edwards*, 212 So. 2d at 896 (*emphasis* added).

Here, trial court properly denied the motion to dismiss for lack of venue because the venue language is contained within an unenforceable illegal, void agreement. Moreover, the order on review must be affirmed because the trial court cannot be faulted for

refusing to enforce venue language contained within that illegal, void agreement.

C. Lack of a Hearing Transcript Compels Affirmance.

"In appellate proceedings the decision of a trial court has the presumption of correctness, and the burden is on the appellant to demonstrate error." A*pplegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, while "[t]he written final judgment by the trial court could well be wrong in its reasoning, [] the decision of the trial court is primarily what matters, not the reasoning used [and, thus,] [e]ven when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." *Id.*

Contrary to Appellant's contention, the Flemings *did argue* that the Agreement's venue provision was the product of unequal barging power, [A. 142]; that it was meant to punish Panhandle residents who dared to dispute the Agreement, [A. 143]; and that the venue provision was unenforceable because it is buried in the middle of the Agreement, in an unrelated clause. [A. 144]. And, while we do not know what happened at the evidentiary hearing, we do know that the Flemings, in response to Monarch's motion, raised valid defenses to

enforcement of the venue clause.[10] [A. 142-144]. We also know that the order on review comes to this Court clothed with the presumption of correctness and that without the hearing transcript, the Court "cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory." A*pplegate*, 377 So. 2d at 1152.

The order on review must be affirmed because Monarch has failed to provide a record demonstrating that the trial court's ruling is not supported by the evidence or an alternative theory.

CONCLUSION

Since the Agreement Monarch seeks to enforce is unenforceable, illegal and void, the order on review must be affirmed because the trial court cannot be faulted for refusing to enforce venue language contained in that illegal, void agreement.

---

[10] *Haws & Garrett General Contractors v. Panhandle Custom Decorators & Supply*, 500 So. 2d 204, 205 (Fla. 1st DCA 1989) (finding that forum selection clauses will not be upheld where the forum chosen was the result of unequal bargaining power, the agreement contravened public policy, or where the purpose of the venue clause was to transfer a local dispute to a seriously inconvenient forum).

CERTIFICATE OF SERVICE

WE CERTIFY that in accordance with Rule 2.516 of the Florida Rules of Judicial Administration, a true and correct copy of the foregoing was filed with the Clerk of Courts and served *via email* through the Florida Courts e-Filing Portal on all counsel of record, *to wit*: **Henry E. Marinello, Esq.** and **Jessica M. Marinello, Esq.**, Henry Marinello Law Office, P.A., P.O. Box 562516, Miami, Florida 33256, Electronic Mail: hmarinello@hemlaw.com jmarinello@hemlaw.com, on **May 15, 2022**.

LAW OFFICES OF CHARLES M-P GEORGE

By: */s/ Charles M-P George*
CHARLES M-P GEORGE
Florida Bar Number: 996718
1172 South Dixie Highway #508
Coral Gables, Florida 33146
Telephone: 305-661-7686
E-Service Email: e-service@cmpg-law.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the font utilized in this brief is Bookman Old Style, the type size is 14-point, and the word count is _____.

by: */s/Charles M-P George*
Charles M-P George