IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

THE OPEN MRI GUYS OF PALM BEACH, LLC, a/a/o Kevin Gier,

Appellant,

v.

PROGRESSIVE SELECT INSURANCE COMPANY,

Appellee.

CASE NO.: 3D23-1935

L.T. No. 2023-033037-CC-23

APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

INTRODUCTION

Appellee/Defendant, PROGRESSIVE SELECT INSURANCE COMPANY, is referred to as "**Progressive**"; Appellant/Plaintiff, THE OPEN MRI GUYS OF PALM BEACH, LLC, a/a/o Kevin Gier, is referred to as "**OMG.**" "**A**" designates citation to OMG's Appendix on Appeal appearing as (A. 1). **"AA"** designates citation to Progressive's Appendix on Appeal appearing as (AA. 1). Citations to the Initial Brief are designated as **"IB"** and appear as (IB. 1).

STATEMENT OF THE CASE AND FACTS

This cause of action arose after Kevin Gier, a Progressive insured, received medical treatment from OMG for injuries he allegedly sustained in a motor vehicle accident on April 19, 2022. (A. 4). OMG submitted a medical bill for $5,500 to Progressive as assignee of Gier's PIP benefits, and Progressive paid $2,710.63. (A. 2-4). In the underlying Complaint, which was filed in April 2023, OMG asserts that Progressive underpaid and seeks a declaratory judgment regarding whether Progressive applied the proper Medicare reimbursement formula. (A. 3-12; 3-6). OMG also asserts, "There is a bona fide, actual, present, and practical need for this Declaration, as Plaintiff needs to determine the availability of benefits **and coverage** . . . ." (A. 6) (Emphasis added).

OMG filed the Complaint in Miami-Dade County, Florida, and asserted as a basis for venue that Progressive was authorized to conduct business in Miami-Dade County and did in fact do so. (A. 3). In response to the Complaint, Progressive filed a Second Amended Motion to Dismiss or Transfer Venue and to Enforce Mandatory Venue Clause ("Motion to Dismiss or Transfer") asserting improper venue and arguing that the Policy's venue selection clause required that suit be brought in the county

where Gier, as the named insured, lived at the time of the accident, which was Palm Beach County. (A. 13-17). Progressive argued that OMG, as a plaintiff proceeding under an alleged assignment from Gier as the named insured, "stands in the shoes" of Gier and was therefore subject to the Policy's venue selection clause. (A. 15).

The Policy's venue selection clause provides as follows:

> Unless **we** agree otherwise, any legal action against **us** must be brought in a court of competent jurisdiction for the county and state where the person seeking coverage from this policy lived at the time of the accident.

(A. 79). The Policy defines the bolded terms of "**we**" and "**us**" as "the underwriting company providing the insurance, as shown on the **declarations page**." (A. 31). The "underwriting company" as shown on the declarations page is Progressive. (A. 23).

In support of its Motion to Dismiss or Transfer, Progressive filed an Amended Declaration and Certification of Business Records ("Amended Declaration") together with: (1) Gier's complete auto policy ("Policy"); (2) a Health Insurance Claim Form ("HCFA"), and (3) the Florida Traffic Crash Report ("Crash Report"). (A. 18-89). The Amended Declaration verifies that at the time of the accident on April 19, 2022, as well as at the

inception of the Policy, the named insured, Gier, lived in Palm Beach County. (A. 23, 82, 87).

Specifically, the Policy's Declarations Page reflects a Palm Beach County address for Gier on December 22, 2021, on Mockingbird Trail, Jupiter, FL 33478. (A. 23). The "Garaging ZIP Code" on the Policy is 33478. *Id.* Additionally the HCFA reveals a Palm Beach County address for Gier on June 6, 2022, on Mocking Bird Trail,[1] Jupiter, FL 33478. (A. 82). The verified Amended Declaration provides that Gier "did not update the policy address to reflect an address other than that on the policy declaration page and/or HCFA's and said address is the current policy address." (A. 20). And while the Crash Report reflects an address at 4300 San Marino Blvd., West Palm Beach, FL 33409,[2] on the date of the accident, which was April 19, 2022, that address, too is in Palm Beach County. (A. 87).

[1] The Policy lists Gier's address as *9608* Mockingbird Trail, Jupiter, FL 33478, while the HCFA lists Gier's address as *968* Mockingbird Trail, Jupiter, FL 33478. The latter address is clearly a typographical error because there is no residence located at 968 Mockingbird Trail in Jupiter. A simple search of the property tax records at www.pbcgov.org can confirm this. Either way, however, both listed addresses are in Palm Beach County.

[2] The Crash Report reflects this as both Gier's work address and the address where the accident occurred (Gier was allegedly struck by a vehicle as a pedestrian). (A. 84, 88).

OMG filed a Memorandum in Opposition to Progressive's Motion to Dismiss or Transfer asserting five bases against enforcement. (A. 90-105). OMG argued that the venue selection clause: (1) only applies to actions in which the plaintiff is "seeking coverage," not declaratory judgment actions, (2) only requires the action to be filed where the *plaintiff* lived at the time of the accident, and even if the clause required the action to be filed where the *insured* lived, Progressive's evidence was insufficient to establish that fact, (3) does not apply to OMG because OMG is not a "person," but a business entity (LLC), (4) is not legally authorized and is unenforceable as a matter of public policy, and (5) is permissive, as opposed to mandatory, and therefore unenforceable. *Id.*

The Honorable Myriam Lehr conducted a hearing on the Motion to Dismiss or Transfer at which the parties articulated their written arguments. (A. 106-72). On September 29, 2023, the trial court entered an Order Granting Progressive's Motion to Transfer and denying its Motion to Dismiss. (A. 173-76). In the Order, the court made the following findings:

- "[B]ecause the clause states '***any***' legal action, the Court finds that a declaratory action is contemplated by the clause. Therefore, the Court finds that the clause does include declaratory actions." (A. 174).

- "Plaintiff stands in the shoes of the insured/claimant and has no

greater rights or benefits than the insured/claimant under the terms of the Policy." (A. 173). "[T]he language of the policy here is clear, unambiguous and mandatory- "any legal action against us must be brought . . . . where the person seeking coverage from this policy lived at the time of the accident." (A. 174).

- "The verified evidence filed by Defendant as to Claimant's residence at the time of loss clearly established that the Claimant in this case lived in Palm Beach County, Florida. The Court finds that this evidence meets Defendant's burden of proof for transferring the case." (A. 173-74).

- The Court finds that the language means exactly what it says: that an action brought against this carrier under the policy must be brought in the jurisdiction where the Claimant lived at the time of the accident, unless Defendant agrees otherwise. Defendant has not agreed otherwise, so the policy indicates suit must be brought in Palm Beach County, Florida." (A. 174).

- "The Court finds Plaintiff's contention that no law permits a mandatory selection clause in PIP cases unpersuasive. While there is no provision expressly allowing such provisions, nor is there any provision prohibiting them. Given the lack of any mandatory authority prohibiting these clauses, the numerous orders of persuasive authority supporting them, and the general contract case law which not only allows them, but considers it reversible error to ignore them, the Court finds no reason to declare mandatory venue provisions inherently invalid in PIP cases. *Id.* (citations omitted).

- "Plaintiff makes public policy arguments against a forum selection clause in PIP cases, specifically that PIP policies are contracts of adhesion and because the law requires PIP coverage, venue selection clauses in PIP policies are contrary to public policy. However, the Court is unpersuaded given the many options consumers have in selecting their insurance provider." *Id.*

OMG filed a timely Notice of Appeal on October 27, 2023.

SUMMARY OF THE ARGUMENT

OMG, as assignee of Kevin Gier's PIP benefits under a Progressive automobile insurance Policy, filed a declaratory judgment action regarding its right to reimbursement for medical bills Gier allegedly incurred in a motor vehicle accident. Even though the Policy contains a mandatory venue selection clause that plainly requires the filing of any action against Progressive in the county where Gier lived at the time of the accident, which is Palm Beach County, OMG filed the action in Miami-Dade County. The trial court properly granted Progressive's Motion to Transfer the action to Palm Beach County based on improper venue and rejected the five arguments raised by OMG against enforcement of the clause.

First, the plain language of the venue selection clause applies to declaratory judgment actions as well as disputes over coverage. The clause provides:

> Unless **we** agree otherwise, *any legal action* against **us** must be brought in a court of competent jurisdiction for the county and state where the *person seeking coverage* from this policy lived at the time of the accident.

(A. 79) (Italicized emphasis added). The policy expressly provides that it applies to "any legal action," which would include the declaratory judgment action filed herein. OMG's argument that the term "person seeking

coverage" limits the clause to "any legal action . . . seeking coverage" is not supported by the rules of statutory and contractual construction.

Second, Progressive presented competent, substantial evidence to establish that Gier lived in Palm Beach County at the time of the accident. Progressive provided a verified Amended Declaration that certified three business records reflecting a Palm Beach County address for Gier: (1) the Policy dated December 22, 2021; (2) the Crash Report that was filled out on the date of the accident, which was April 19, 2022, and (3) the HCFA dated June 6, 2022. Contrary to OMG's argument, Progressive was not required to exclude other hypotheses the evidence could support.

Third, the portion of the venue selection clause providing that legal action must be brought in the county "where the person seeking coverage from this policy lived at the time of the accident" does not preclude application of the clause to OMG because it is an LLC, as opposed to a "person." As the assignee of Gier's PIP benefits under the Policy, OMG stands in Gier's shoes and has no greater rights than he would. Because the venue selection clause applies to Gier as a "person seeking coverage," it also applies to OMG as Gier's assignee, regardless of the fact that OMG is an LLC.

Fourth, the fact that there is no law expressly permitting an insurer to

impose a mandatory venue selection clause in regard to a PIP claim does not make the clause unenforceable. Indeed, venue selection clauses are presumptively valid and will be enforced unless the party seeking to avoid them establishes that enforcement would be unreasonable or unjust. OMG has failed to meet this burden. Similarly, OMG's argument that the clause should not be enforced because PIP policies are contracts of adhesion has no support in the law.

Fifth, the venue selection clause is mandatory, and not permissive, as shown by its plain language requiring that "any legal action against **us** must be brought" exclusively in the county "where the person seeking coverage from this policy lived at the time of the accident." Even though the clause also allows Progressive to choose a different venue, it is still mandatory as to the claimant. The lack of mutuality does not make the clause permissive, and "'[u]nless **we** agree otherwise" cannot be read without providing meaning to the remainder of the clause.

In sum, the trial court properly found the venue selection clause to be both mandatory and enforceable, and this Court should affirm the Order Granting Progressive's Motion to Transfer.

STANDARD OF REVIEW

The trial court's construction of a venue selection clause presents a question of law subject to de novo review. *EcoVirux, LLC v. BioPledge, LLC,* 357 So. 3d 182, 185 (Fla. 3d DCA 2022); *Buck v. Glob. Fid. Bank Ltd.*, 341 So. 3d 430, 433 (Fla. 3d DCA 2022); *Antoniazzi v. Wardak*, 259 So. 3d 206, 209 (Fla. 3d DCA 2018); *Citigroup, Inc. v. Caputo*, 957 So. 2d 98, 100 (Fla. 4th DCA 2007). Similarly, orders ruling on motions to dismiss based on the interpretation of a venue selection clause are subject to de novo review. *Antoniazzi*, 259 So. 3d at 209; *Am. K-9 Detection Servs., Inc. v. Cicero*, 100 So. 3d 236, 238 (Fla. 5th DCA 2012).

However, when the trial court's decision on whether to enforce a venue selection clause is based in part on factual findings, the findings are subject to a clearly erroneous standard and should be affirmed when supported by competent, substantial evidence. *Hendel v. Internet Escrow Servs., Inc.,* 317 So. 3d 1175, 1177 (Fla. 3d DCA 2021); *Caputo*, 957 So. 2d at 100; *PricewaterhouseCoopers, LLC v. Cedar Res., Inc.*, 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999).

ARGUMENT

Progressive is before this Court seeking only to enforce the venue selection clause at issue without prejudice to, or deprivation of, OMG's ability to proceed in its legal action. It is well-settled that parties may agree to a venue selection clause requiring submission of actions to a particular jurisdiction. *EcoVirux, LLC v. BioPledge, LLC,* 357 So. 3d 182, 185 (Fla. 3d DCA 2022). "Forum selection clauses serve the laudatory purpose 'of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.'" *Id.* (quoting Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991)). "Placing a high premium on freedom of contract," Florida courts enforce venue selection unless there is "a showing that enforcement would be unjust or unreasonable." *Id.* (citing *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986)).

I. BASED ON ITS PLAIN LANGUAGE, THE MANDATORY VENUE SELECTION CLAUSE APPLIES REGARDLESS OF WHETHER COVERAGE IS DISPUTED.

The plain language of the Policy's venue selection clause provides

that it applies to "*any legal action*," which would include the declaratory judgment action OMG filed in this case. OMG argues that the clause does not apply because its application is limited to cases in which a party is "seeking coverage" and OMG is not seeking coverage. However, OMG's interpretation of the venue selection clause is based on an erroneous grammatical parsing of the clause and is not supported by case law.

The venue selection clause provides:

> Unless **we** agree otherwise, *any legal action* against **us** must be brought in a court of competent jurisdiction for the county and state where the *person seeking coverage* from this policy lived at the time of the accident.

(A. 79) (italicized emphasis added). Under the clause, "any legal action" filed against Progressive "must be brought in" the county "where the person seeking coverage from this policy lived at the time of the accident." The dispute herein lies in whether the term "person seeking coverage" limits the clause to "any legal action . . . seeking coverage."

The court must start its legal interpretation of the Policy terms in the venue selection clause "by establishing whether the *meaning* of the agreement can be factually determined from the intent of the parties, the usage of language in the contract as a whole, or other pertinent facts." *Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So.

2d 273, 275 (Fla. 1987). Courts should give words in the clauses their ordinary meaning in relation to their subject matter and the facts involved in the case. *Id.* Thus, the contractual analysis begins with the plain language of the clause. *See Buck v. Glob. Fid. Bank Ltd.*, 341 So. 3d 430, 433 (Fla. 3d DCA 2022).

In terms of statutory and contractual construction, the term "any" is broadly construed and does not include a limited amount, like "some," but means "all." *Stewart v. Hartford Life & Acc. Ins. Co.*, 43 F.4th 1251, 1258 (11th Cir. 2022); *Acceleration Nat'l Serv. Corp. v. Brickell Fin. Servs. Motor Club, Inc.*, 541 So. 2d 738, 739 (Fla. 3d DCA 1989); *Baker v. Econ. Rsch. Servs., Inc.*, 242 So. 3d 450, 453 (Fla. 1st DCA 2018); *Dows v. Nike, Inc.*, 846 So. 2d 595, 601 (Fla. 4th DCA 2003). "The word 'any,' that is, expresses a lack of restriction when choosing something from a specified class." *Stewart*, 43 F.4th at 1258.

And according to the nearest-reasonable-referent doctrine, the word "any" modifies its nearest noun, verb, or other element of a sentence, which in this case is "legal action." *See State v. Lauriston*, 295 So. 3d 281, 284 (Fla. 4th DCA 2020). Thus, under its plain language, the venue selection clause applies to *all* legal actions, which would include declaratory judgment actions.

OMG argues that because the clause is to be applied to a "*person seeking coverage,*" it is necessarily limited to coverage determinations. Because Progressive has not disputed coverage, OMG reasons that the clause is inapplicable. But OMG's interpretation fails to consider the placement of the phrase "person seeking coverage" within the clause. The phrase is used to establish the location for filing suit, not to designate the type of suit to which the clause applies. According to its plain language, the proper forum is "the county or state *where the person seeking coverage* from this policy lived at the time of the accident." (Emphasis added).

Again, under the nearest-reasonable-referent doctrine, the nearest noun, verb, or other element to the phrase is modified by that phrase. *See Lauriston*, 295 So. 3d at 284. Here, the nearest noun to the phrase "seeking coverage" is "*person*," not "any legal action." And the nearest noun, verb, or other element to "person seeking coverage" is "county or state." Thus, the phrase "seeking coverage" does not modify "any legal action" or limit the applicability of the clause to coverage determinations. It simply establishes the proper location for the suit.

Moreover, as used in the venue selection clause, "coverage" obviously refers to not just disputes over whether a loss is covered, but to

coverage issues in general, which include the payment of benefits. Indeed, OMG itself described its action as one "to determine the availability of benefits and coverage" in the Complaint. If the drafter wanted to limit the venue selection clause to disputes over whether a loss is covered, it would have said so.

S. Viroja, P.A. v. United Auto. Ins. Co., 28 Fla. L. Weekly Supp. 629 (Fla. 15th Cir. Ct. Sept. 1, 2020), the county court case on which OMG relies, is a prime example of such drafting. In *S. Viroja,* the venue selection clause provided, **"*Any legal action against us to determine coverage under this policy shall be filed and maintained in the county where the policy was issued*."** *Id.* at 629. The trial court concluded that the phrase "to determine coverage" required that the *legal action* be for the purpose of determining coverage. *Id.* Under the nearest-reasonable-referent doctrine, the phrase "to determine coverage" as used in *S. Viroja* modifies "legal action" because "legal action" is the nearest noun, verb, or other element of the sentence that can be modified. *See Lauriston*, 295 So. 3d at 284.

But *S. Viroja*, which of course has no precedential value in this Court, is distinguishable from this case for two reasons. First, the wording and placement of the phrases is completely different. In this case, the phrase

is **not** "any legal action against us *to determine coverage* under this policy"; it is "any legal action against **us** must be brought in a court of competent jurisdiction for the county and state where the person *seeking coverage* from this policy lived " (italicized emphasis added). But in this case, the phrase "seeking coverage" does not modify "any legal action"; it simply establishes the proper location for the suit.

Moreover, the policy in *S. Viroja* used the terms "benefits" and "coverage" distinctly throughout, even providing under "Duties After An Accident or Loss," and "A person seeking *coverage or benefits* . . . must . . . ." 28 Fla. L. Weekly Supp. at 629. The Policy in this case does not make this distinction. Accordingly, *S. Viroja* is not analogous and, therefore, not persuasive, and there is no merit in this argument.

II. THE VERIFIED EVIDENCE FILED BY PROGRESSIVE WAS SUFFICIENT TO ESTABLISH THAT GIER LIVED IN PALM BEACH COUNTY AT THE TIME OF THE ACCIDENT.

"[W]hen a trial court is presented with a motion to transfer venue based on the impropriety of the plaintiff's venue selection, the defendant is arguing that, as a matter of law, the lawsuit has been filed in the wrong forum. In order to rule on such a motion, 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." *Cedar Resources*, 761 So. 2d at 1133. Appellate courts review the trial court's factual decisions in this context to determine whether they are clearly erroneous, and those findings should not be disturbed if they are supported by competent, substantial evidence. *Id.*

"Competency of evidence refers to its admissibility under legal rules of evidence. 'Substantial' requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, 'tending to prove')." *Schreiber v. Schreiber*, 331 So. 3d 874, 876 (Fla. 5th DCA 2021) (quoting *Lonergan v. Est. of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996)).

In support of its Motion to Dismiss or Transfer, Progressive provided an Amended Declaration that certified the following business records reflecting a Palm Beach County address for Gier: (1) the Policy dated December 22, 2021; (2) the Crash Report that was filled out on the date of the accident, which was April 19, 2022, and (3) the HCFA dated June 6, 2022. The Policy and the HCFA reflect an address for Gier on Mockingbird Trail in Jupiter, Florida 33478 four months before the accident and two

months after the accident. The "Garaging ZIP Code" on the Policy is located in that same zip code. Additionally, the Crash Report reflects an address for Gier on the date of the accident on San Marino Blvd., West Palm Beach, FL 33409. These addresses are all in Palm Beach County.

For all three of these forms, Gier would have provided his address to the person completing the form. This evidence establishes that, just four months before the accident took place, Gier provided a Palm Beach County address as his residence. And while the Policy expressly provides a duty for Gier to "promptly report" any change in his mailing or residence address, he failed to do so as attested in the verified Amended Declaration. Furthermore, the addresses provided for Gier at the scene of the accident itself and two months later were in Palm Beach County. As the trial court expressly determined, "The verified evidence filed by Defendant as to Claimant's residence at the time of loss clearly established that the Claimant in this case lived in Palm Beach County, Florida." (A. 173-74).

OMG argues that Progressive's evidence failed to establish that Gier actually lived in Palm Beach County at the time of the accident. OMG asserts that "[t]here are numerous circumstances where one might have a listed address but did not live at that address," and provides examples to

this Court. (IB. 13). However, OMG misapplies the standard of review. As state above, competent, substantial evidence only requires *some* relevant evidence that is *more than a scintilla* and is not speculative or merely theoretical and that *tends to prove* the matter asserted. *Schreiber*, 331 So. 3d at 876. This standard does *not* require Progressive to exclude any other hypotheses the evidence could support. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Hawkinson*, 235 So. 3d 1017, 1017 (Fla. 1st DCA 2018) ("Although there was conflicting evidence that reasonably could have supported a contrary finding regarding Ms. Hawkinson's emancipation status, we are constrained to affirm because the finding made by the trial court is supported by competent substantial evidence.").

OMG's argument that the Crash Report would be inadmissible under the accident report privilege in section 616.066(4), Florida Statutes (2021), is well-taken but a red herring. Even without the Crash Report, the evidence establishes that Gier provided a Palm Beach County address on Mockingbird Trail when he applied for the Policy in December 2021 and two months after the accident in June 2022 when he was treated. Absent any indication that Gier lived anywhere else, this evidence is sufficient in itself to meet OMG's burden of proof.

III. BECAUSE THE VENUE SELECTION CLAUSE APPLIES TO GIER AS A "PERSON SEEKING COVERAGE," IT ALSO APPLIES TO OMG AS GIER'S ASSIGNEE, REGARDLESS OF WHETHER OMG IS A "PERSON."

OMG, which is an LLC, argues that the venue selection clause does not apply to it because "Progressive chose to make its venue selection clause applicable only to 'persons' and not business entities." (IB. 7). OMG bases this argument on the language in the clause providing that legal action must be brought in the county "where the **person** seeking coverage from this policy lived at the time of the accident." (Emphasis added). OMG argues that because Gier assigned his rights under the policy to OMG, he is no longer "the person seeking coverage." Because it is a business entity and not a "person," OMG argues that the venue selection clause is therefore inapplicable.

OMG's argument presents a misconception of its status as an assignee of Gier's post-loss insurance benefits. A post-loss assignee of insurance benefits "'stands in [the] shoes' of the assignor and 'has the same rights and status' that the assignor did." *Sabran v. Rockhill Ins. Co.*, 558 F. Supp. 3d 1203, 1212 (M.D. Fla. 2021) (quoting *Pro. Consulting Servs., Inc. v. Hartford Life & Accident Ins. Co.,* 849 So. 2d 446, 447 (Fla. 2d DCA 2003)). And "assignment of an insured's right to payment by the

insured does not eliminate the duty of compliance with the contract conditions." *Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC,* 349 So. 3d 965, 970 (Fla. 2d DCA 2022).

Thus, assignees are required to comply with the terms of the insurance policy as they would apply **to the insured**. *See Kostelac v. Allianz Glob. Corp. & Spec. AG*, 517 F. App'x 670, 676 (11th Cir. 2013). In *Kostelac*, the Eleventh Circuit applied Florida and federal law to analyze an assignee's challenge to the validity of a forum selection clause. *Id.* at 674-77. In so doing, the court applied the test set forth by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972), and adopted by the Florida Supreme Court in *Manrique*, 493 So. 2d 437, as discussed herein in issue IV. *Kostelac*, 517 F. App'x at 675-77.

Under *Bremen*, "a forum-selection clause is 'prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.'" *Id.* at 675 (quoting *Bremen*, 407 U.S. at 10). In applying this standard, the Eleventh Circuit noted that assignees "stand in the shoes of" the insured and "do not possess any rights greater than what [the insured] formerly possessed under the agreement." *Id.* at 675, 676. "Because [the assignees] function as [the insured's] stand-in under the insurance policy, the relevant inquiry is to

apply the *Bremen* factors **to the actual parties of the contract—[the insured] and [the insurer]**." *Id.* at 676 (emphasis added); *see also Benefit Ass'n Int'l, Inc. v. Mount Sinai Comprehensive Cancer Ctr*., 816 So. 2d 164, 169 (Fla. 3d DCA 2002) (holding that the assignee failed to establish that enforcement of the venue selection clause would be unjust or unfair based on the circumstances of **the original insured's** execution of the insurance policy).

In interpreting the venue selection clause under Florida law then, courts should apply its terms to **the actual parties of the contract**, in this case, Grier and Progressive. In the words of the trial court below, "Plaintiff stands in the shoes of the insured/claimant and has no greater rights or benefits than the insured/claimant under the terms of the Policy." (A. 173). Because the venue selection clause applies to Gier as a "person seeking coverage," it also applies to OMG as Gier's assignee, regardless of whether OMG is a "person."

IV. OMG HAS NOT ESTABLISHED THAT ENFORCEMENT OF THE VENUE SELECTION CLAUSE WOULD BE UNREASONABLE OR UNJUST.

OMG frames this issue as, "There Is No Law Permitting An Insurer To Impose a Mandatory Venue Selection Clause In Regard to a PIP

Claim," placing the burden of proof on the wrong party and incorrectly stating the standard for evaluating the validity of venue selection clauses in so-called contracts of adhesion. (IB. 16). Venue selection clauses are presumed to be valid, and courts are generally reluctant to interfere with parties' contracts because any inconvenience to the plaintiff from being forced to litigate in the forum to which it had agreed is clearly foreseeable. *Corsec, S.L. v. VMC Int'l Franchising, LLC*, 909 So. 2d 945, 947 (Fla. 3d DCA 2005).

Mandatory forum selection clauses "should be enforced, 'unless [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons such as fraud or overreaching.'" *Benefit Ass'n Int'l*, 816 So. 2d at 169 (quoting *Bremen*, 407 U.S. at 15); *see also EcoVirux*, 357 So. 3d at 185 ("Placing a high premium on freedom of contract, the courts of this state enforce [venue selection] clauses absent a showing that enforcement would be unjust or unreasonable."); *Venus Concept, USA, Inc. v. Angelic Body, LLC,* 362 So. 3d 258, 262 (Fla. 2d DCA 2023) ("Absent a showing that application of the forum selection clause is unreasonable or unjust, forum selection clauses should be enforced.").

It is the objecting party's burden to make this showing, and

mandatory venue selection clauses should be enforced if the objecting party fails to meet this burden. *Benefit Ass'n Int'l,* 816 So. 2d at 169.

> [I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Corsec, 909 So. 2d at 947 (quoting *Manrique*, 493 So. 2d at 440 n.4).

OMG argues that the mandatory venue selection clause here should not be enforced because there is no provision in the PIP statute "authorizing an insurer to include and impose a venue selection clause in a PIP insurance policy." (IB. 20). But OMG is attempting to shirk its burden of proof by asserting the lack of authority authorizing the inclusion of a venue selection clause instead of establishing why enforcement of the clause would be unreasonable or unjust as is required.

The only argument OMG makes that comes close to alleging that enforcement would be unreasonable or unjust is, "Often the assignee medical provider is not located in the same county as where the accident occurred. And often an assignee medical provider must enforce its rights in a court of law. If a medical provider is forced to enforce its rights under

a PIP insurance policy in a county inconvenient to it, that provider would be less likely to agree to treat the insured." (IB. 21).

First of all, as explained by the Eleventh Circuit in *Kostelac,* as an assignee, OMG stands in Gier's shoes and does not possess any rights greater than those Gier formerly had under the Policy. 517 F. App'x at 675-76; *see also Benefit Ass'n Int'l*, 816 So. 2d at 169 (holding that the assignee failed to establish that enforcement of the venue selection clause would be unjust or unfair based on the circumstances of *the original insured's* execution of the insurance policy). Because assignee OMG functions as Gier's stand-in under Policy, the relevant inquiry is whether enforcement *as to Gier* would have been unjust or unfair based on the circumstances under which he executed the policy. *See Kostelac,* 517 F. App'x at 676. Because OMG makes no such argument as to Gier, enforcement is required. *See id.*

Regardless, OMG's argument regarding the "inconvenience" medical providers face with enforcement of the venue selection clause is a far cry from establishing "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Corsec*, 909 So. 2d at 947 (quoting *Manrique*, 493 So. 2d at 440 n.4). In fact, the Florida Supreme Court has expressly

determined "that the test of unreasonableness is not mere inconvenience or additional expense." *Manrique*, 493 So. 2d at 440 n.4; *see also Baker*, 242 So. 3d at 454 n.3 (rejecting the argument that forum selection clauses were unreasonable because they forced inconvenient, piecemeal litigation in different forums).

OMG also argues that the mandatory venue selection clause should not be enforced because "PIP insurance policies are among the most severe of those contracts of adhesion." (AB. 17). In support of this assertion, OMG relies on three county court decisions. *See Emergency Physicians, Inc. v. USAA Cas. Ins. Co.*, 29 Fla. L. Weekly Supp. 677 (Fla. Volusia Cty. Ct. Oct. 20, 2021); *S. Viroja,* 28 Fla. L. Weekly Supp. at 629; *Hallandale Beach Orthopedics, Inc. v. United Auto. Ins. Co.*, 28 Fla. L. Weekly Supp. 353 (Fla. Broward Cty. Ct. June 15, 2020).

It is true that these cases appear to support OMG's argument, but they do little to explain their reasoning that, because PIP contracts are contracts of adhesion, their venue selection clauses are not enforceable. *Emergency* Physicians, 29 Fla. L. Weekly Supp. 677, contains no reasoning at all but simply cites to *Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543, 544 (Fla. 3d DCA 1995).

In *Hallandale,* 28 Fla. L. Weekly Supp. at 354, the court reasoned as

follows:

> [I]t would be unjust to enforce the venue selection clause as the terms and conditions of a PIP policy are dictated by the No Fault Statute and the No [F]ault Statute does not include any provision to allow an insurer to include a venue selection clause. The Defendant's forum selection clause is overwhelmingly one-sided as the Defendant knew when it sold the policy of insurance that its insureds can get into a crash in any county in the State, receive treatment in any county, receive repairs to its car in any county in the State, insureds can move to any county in the State, and its insureds can get sued in any county in the State. The court finds it would be "unjust" to enforce this one sided language.

But this does not explain why a venue selection clause would deprive Florida insureds of their day in court.

And neither of the district court decisions relied on in these cases is on point. In *Pasteur*, 658 So. 2d at 544, this Court held that an HMO plan (not a PIP policy) was a contract of adhesion. However, the court did not decline to enforce a venue selection clause or even address a venue selection clause in any manner. Instead, it simply applied the rule "that all ambiguities in insurance contracts, as contracts of adhesion, should be construed in the light most favorable to the insured." *Id.* at 545.

In fact, at least two other Miami-Dade County Court judges have rejected this "contract of adhesion" argument against enforcement of the

exact same venue selection clause. *See Open MRI Guys of Palm Beach v. Progressive Am. Ins. Co.*, No. 2022-038761-CC-23 (Oct. 13, 2023);[3] *Precision Diagnostic of Lake Worth, LLC v. Progressive Am. Ins. Co.*, No. 2022-002527-SP-21 (Oct. 13, 2022). (AA. 3-6, 7-9). In *Open MRI Guys of Palm Beach,* Judge Natalie Moore reasoned as follows:

> Plaintiff seems to argue that the contract is a contract of adhesion and, therefore, the clause is automatically rendered invalid or unenforceable. A contract of adhesion is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength [insurer], relegates to the subscribing party [insured] only the opportunity to *adhere* to the contract or *reject* it." *Seaboard Fin. Co. v. Mutual Bankers Corp.*, 223 So. 2d 778, 782 (Fla. 2d DCA 1969). Finding that a contract is one of adhesion does not render the contract void, but instead only means that any ambiguities would be resolved or construed against the drafter. There are no ambiguities in the mandatory forum selection clause at issue here.
>
> The Court cannot refuse to enforce a mandatory forum selection clause solely because the parties had unequal bargaining power. *Bombardier Capital Inc. v. Progressive Mktg. Group, Inc.,* 801 So. 2d 131, 135 (Fla. 4th DCA 2001); *Ware Else, Inc. v. Ofstein*, 856 So. 2d 1079 (Fla. 5th DCA 2003). Instead, Florida courts may decline to enforce a contract or its provisions when there is a showing of unconscionability. . . . Merely concluding the contract is one of adhesion does not settle the issue.

[3] This case is on appeal before this Court in Case No. 3D28-2008.

Open MRI Guys of Palm Beach, No. 2022-038761-CC-23, at 2-3.

Furthermore, in *Bombardier Capital, Inc. v. Progressive Marketing Group, Inc.*, 801 So. 2d 131, 135 (Fla. 4th DCA 2001), the Fourth District expressly rejected the argument that venue selection clauses in contracts of adhesion were unenforceable. The court explained that the plaintiff's actual argument should be that enforcement of the clause "would be 'unreasonable or unjust.'" *Id.* And then the court concluded that the terms of the clause did **not** support such a finding because "Appellee, a Texas corporation, suffers no additional disadvantage by litigating in New York rather than Florida." *Id.* at 136.

The trial court herein correctly stated the law on the issue when it held as follows:

> While there is no provision expressly allowing such provisions, nor is there any provision prohibiting them. Given the lack of any mandatory authority prohibiting these clauses, the numerous orders of persuasive authority supporting them, and the general contract case law which not only allows them, but considers it reversible error to ignore them, the Court finds no reason to declare mandatory venue provisions inherently invalid in PIP cases.
>
> Plaintiff makes public policy arguments against a venue selection clause in PIP cases, specifically that PIP policies are contracts of adhesion and because the law requires PIP coverage, venue

> selection clauses in PIP policies are contrary to public policy. However, the Court is unpersuaded given the many options consumers have in selecting their insurance provider.

(A. 174) (citations omitted).

V. THE VENUE SELECTION CLAUSE IS MANDATORY AS SHOWN BY ITS "WORDS OF EXCLUSIVITY," A PLAIN LANGUAGE READING, AND THE REQUIRED CONSTRUCTION OF THE POLICY AS A WHOLE.

To distinguish between the types of clauses, mandatory venue selection clauses provide that a chosen forum is the exclusive venue for litigation while permissive venue selection clauses merely constitute consent to venue in a chosen forum but do not exclude other proper forums. *EcoVirux,* 357 So. 3d at 185; *Buck*, 341 So. 3d at 433; *Michaluk v. Credorax (USA), Inc.*, 164 So. 3d 719, 722 (Fla. 3d DCA 2015).

Generally, a forum selection clause will be deemed mandatory if it uses words of exclusivity like 'must,' or 'shall,' or 'exclusive.' *Buck*, 341 So. 3d at 433; *Michaluk*, 164 So. 3d at 722-23; *S&S Directional Boring & Cable Contractors, Inc. v. Am. Nat'l Bank of Minn*., 961 So. 2d 1046, 1047 (Fla. 2d DCA 2007). "For example, '[i]f the forum selection clause 'states or clearly indicates that any litigation **must or shall** be initiated in specified forum,' then the clause is mandatory and must be honored by the trial court in the absence of a showing that the clause is unreasonable or unjust."

Michaluk, 164 So. 3d at 722-23 (emphasis added) (quoting *Travel Exp. Inv. Inc. v. AT&T Corp.*, 14 So. 3d 1224, 1226 (Fla. 5th DCA 2009)).

Courts have even referred to the terms "must" and "shall" as **"**magic words**"** that indicate exclusivity. *Antoniazzi v. Wardak*, 259 So. 3d 206, 209 (Fla. 3d DCA 2018) ("[T]he absence of the term 'shall' or 'must' does not necessarily render a forum selection clause permissive. Even in the absence of such 'magic words'" . . .); *Celistics, LLC v. Gonzalez*, 22 So. 3d 824, 826 (Fla. 3d DCA 2009) (noting that "the forum selection clause in the Agreement does not use the 'magic words' 'shall' or 'must'").

Here, the venue selection clause in the Policy includes the magic word "must," indicating exclusivity of the required forum. The Policy provides that "any legal action against **us** *must* be brought in a court of competent jurisdiction for the county and state where the person seeking coverage from this policy lived at the time of the accident." (Italicized emphasis added).

The venue selection clause should be read as mandatory by requiring the claimant to initiate "any legal action" against Progressive exclusively in the county where the claimant lived at the time of the accident. *See, e.g., Rogers v. Ascension Health, Inc.*, 2018 WL 7351691,

at *1 (N.D. Fla. May 16, 2018) (concluding that a venue selection clause was mandatory because it "expressly provides that any suit brought by a Plan participant or beneficiary relating to or arising under the Plan must be brought in the [specified venue]"); *Messmer v. Thor Motor Coach, Inc.*, 2017 WL 933138, at *3 (M.D. Fla. Feb. 28, 2017) ("Indeed, it is clear that the forum-selection clause in this case is mandatory, as it states that 'any legal action to enforce warranty rights against [Defendant] *must* be brought within the [specified venue]").

Despite the use of these express words of exclusivity, however, OMG argues that the venue selection clause is permissive because it begins with the phrase, "Unless **we** agree otherwise." **"We"** is defined by the Policy as "the underwriting company providing the insurance, as shown on the **declarations page**," which is solely **Progressive**. **"We"** does not include "the person seeking coverage," who "must" bring the legal action against Progressive in an exclusive venue, the county where the person seeking coverage lived at the time of the accident. Thus, the plain language reading of the clause provides that **only Progressive** can choose a different venue. The "person seeking coverage" should have no "legitimate expectations" otherwise. *See Manrique*, 493 So. 2d at 440.

Here, the phrase "[u]nless **we** agree otherwise" does not affect the mandatory requirement that the person seeking coverage bring any legal action against Progressive in the county where the claimant lived at the time of the accident. The phrase provides that **only Progressive** can choose a different venue. This phrase, in fact, provides **more** words of exclusivity by emphasizing that the claimant does not have any choice regarding venue.

The term "[u]nless **we** agree otherwise" is in fact a phrase of exclusivity. To review, the word "**we**" is controlled by the Policy definition to mean exclusively Progressive. The word "agree" is defined (at https://www.merriam-webster.com/dictionary/agree#dictionary-entry-1) to mean "to consent to as a course of action" as a transitive verb.[4] Thus, this too shows that the venue selection is exclusive as it is Progressive and Progressive alone that can get to "agree" to a change in the mandatory venue.

This reading is wholly consistent with Florida Rule of Civil Procedure

[4] An undefined term in a policy "should be given its plain and ordinary meaning, and courts may look to legal and non-legal dictionary definitions to determine such a meaning." *Gov't Emps. Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017) (quoting *Botee v. S. Fid. Ins. Co.*, 162 So.3d 183, 186 (Fla. 5th DCA 2015)).

1.140(b) requiring a defendant to state the defense of improper venue with particularity in a responsive pleading or motion. The "one who would assert the venue privilege should, at the earliest possible time, and no later than the filing of his answer, plead all matters then known to him which would negative proper venue." *Inverness Coca-Cola Bottling Co. v. McDaniel*, 78 So. 2d 100, 103 (Fla. 1955).

The critical language is "any legal action against **us** must be brought" and not "[u]nless **we** agree otherwise." On this point, the language "any legal action against **us** must be brought" provides that the exclusive venue at the time the suit is initiated can only be the "county and state where the person seeking coverage from this policy lived at the time of accident." The phrase "[u]nless we agree otherwise" does not offer an alternative venue absent action, or inaction, by Progressive.

OMG argues that because the venue selection clause does not apply to litigation initiated *by Progressive*, it is somehow not mandatory. However, "the lack of mutuality in the forum selection clause" does not render it permissive. *Antoniazzi*, 259 So. 3d at 210. Thus, when a venue selection clause provides that "the exclusive jurisdiction for all legal action and the venue for legal proceedings if the client is resident abroad is [the

chosen venue]," it is mandatory despite the fact that the clause also provides, "The Bank nevertheless reserves the right to instigate proceedings in the courts of the client's place of residence or before any other competent court." *Id.*

In support of its argument, OMG relies on a quote taken from the *Buck* case to assert that the "clause does not meet the requirement of being mandatory **'that a particular forum be the exclusive jurisdiction** *for litigation concerning the contract*.'" (IB. 23-24). But OMG takes this quote out of context. The entire quote reads as follows:

> *Mandatory forum selection clauses require or unequivocally specify . . .* ***that a particular forum be the exclusive jurisdiction*** *for litigation concerning the contract.* Whereas, permissive forum selection clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum. Hence, forum selection clauses that lack mandatory or exclusive language are generally found to be permissive.

Buck, 341 So. 3d at 433 (quoting *Rudman v. Numismatic Guar. Corp. of Am.*, 298 So. 3d 1212, 1214 (Fla. 3d DCA 2020)).

OMG's argument fails to recognize the reason behind the courts' refusal to enforce permissive forum selection clauses: the distinction between the claimant's *consenting* to be subject to jurisdiction in a

particular forum and being *required* to submit to jurisdiction in that forum. *See Granados Quinones*, 509 So. 2d at 274-75 ("Permissive clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum.").

The focus is on whether **the claimant has the ability** to file a lawsuit in any other forum. *See, e.g., Mgmt. Comput. Controls, Inc. v. Charles Perry Constr., Inc*., 743 So. 2d 627, 631 (Fla. 1st DCA 1999) ("A permissive forum selection clause may provide an alternative to the statutory choices of venue but it does not require the plaintiff to file suit in the forum referred to in the agreement."). In this case, the forum selection clause requires that the claimant, or his assignee, bring any action where the claimant lived at the time of the accident. It does not provide for the claimant's "consent" to jurisdiction.

In *Linder v. BiscayneAmericas Advisers, LLC*, 214 F. Supp. 3d 1307, 1312 (S.D. Fla. 2016), the Southern District of Florida construed an analogous venue selection clause, which provided:

> Any action or proceeding arising out of or relating to this Agreement . . . **must** be brought in the courts of the State of Florida, County of Miami-Dade **or if, and only if, such courts do not have jurisdiction,** in the United States District Court for

the Southern District of Florida.

Linder, 214 F. Supp. 3d at 1310 (emphasis added). In concluding that the use of the term "must" established that the clause was mandatory, the court stated, "The term 'must,' like the term 'shall,' is language of requirement." *Id.* at 1312. The court explained that this language differed from language other courts found permissive, citing to cases which used the terms "consent to" or "submit to." *Id.* Importantly, the *Linder* court rejected the argument that the clause was permissive because it provided for a potential alternate forum in federal court without designating a single, exclusive court should the state courts lack jurisdiction. *Id.* at 1313 n.7. The court's reasoning shows that a venue clause requiring that an action "must" be brought in a certain court or venue is still considered mandatory even if there is a potential for an alternative venue.

The venue selection clause in this appeal contains analogous language to the clause in *Linder*. First, the venue selection clause herein contains language of exclusivity by requiring that **"any** legal action against [Progressive] **must** be brought" in the county where the claimant lived at the time of the accident. (Emphasis added). As stated previously, "any" modifies "legal action" in a way that expands it to include "any and all" legal actions. *See Stewart,* 43 F.4th at 1258; *Brickell Fin. Servs.*, 541 So. 2d at

739; *Dows*, 846 So. 2d at 601. Simply put, the exclusive venue to initiate any legal action is the county where the claimant lived at the time of the accident. The word "must," in its plain language application, requires that OMG bring its legal action in Palm Beach County. *See Michaluk*, 164 So. 3d at 722-23.

Further, the clause stating "[u]nless **we** agree otherwise" is subordinate to the mandatory requirement that "any legal action against **us** must be brought in a court of competent jurisdiction for the county and state where the person seeking coverage from this policy lived at the time of the accident." The plain language still requires that the legal action "must" be brought in one and only one venue—where the person seeking coverage lived at the time of the accident. *See Matter of Hapag-Lloyd Aktiengesellschaft*, 573 F. Supp. 3d 934, 966 (S.D.N.Y. 2021) (holding that a venue selection clause which provided as follows was mandatory: "Unless otherwise agreed by [ONE], any action against [ONE] hereunder must be brought exclusively before the [chosen venue].").

Next, the phrase "[u]nless **we** agree otherwise" cannot be read without providing meaning to the remainder of the clause. When interpreting a contract, "[a] single term or group of words must not be read

in isolation." *Perez-Gurri Corp. v. McLeod*, 238 So. 3d 347, 350 (Fla. 3d DCA 2017). Instead, the contract should be construed as a whole in order to give effect to all of its provisions. *Id.*

The next rule of contractual interpretation supporting Progressive is that the mandatory clause cannot be read to render it meaningless. The phrase "[u]nless **we** agree otherwise" must be read together with the adjoining "words of exclusivity." To do otherwise would render the clause meaningless, a result that this Court does not permit. *See, e.g*., *Quick Cash, LLC v. Tradenet Enter. Inc.*, 211 So. 3d 1113, 1114 (Fla. 3d DCA 2017) (enforcing venue selection clause as mandatory when, read as a whole, the clause contained "words of exclusivity" including "shall"); *World Vacation Travel, S.A., de C.V. v. Brooker*, 799 So. 2d 410, 412 (Fla. 3d DCA 2001) ("To interpret this portion of the clause in any other way than to remove the possibility of territorial jurisdiction on the basis of the party's residency, necessarily renders this portion utterly meaningless . . . .").

Examining the phrase "[u]nless **we** agree otherwise" in its plain meaning, proper context, and in light of the governing rule of law, shows that the trial court herein ruled correctly in determining that the venue selection clause was mandatory. When read to afford the clause its plain meaning, the introductory phrase along with the word "must" leads to only

one outcome: Unless Progressive agrees otherwise, OMG's legal action must be brought in Palm Beach County. As the trial court expressly determined, "[T]he language means exactly what it says: that an action brought against this carrier under the policy must be brought in the jurisdiction where the Claimant lived at the time of the accident, unless Defendant agrees otherwise. Defendant has not agreed otherwise, so the policy indicates suit must be brought in Palm Beach County, Florida." (A. 174).

CONCLUSION

Based on the facts and arguments presented, the trial court correctly found the forum selection clause to be both mandatory and enforceable, and Progressive respectfully requests that this Court affirm the Order Granting Progressive's Motion to Transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service through the e-filing portal to: **Douglas H. Stein, Esquire,** dhs@steinappeal.com; DOUGLAS H. STEIN, P.A., 121 Alhambra Plaza, Suite 1500, Coral Gables, Florida 33134; and **Kenneth J. Dorchack, Esquire**, Buchalter, Hoffman & Dorchak, pleadings@bhdlawfirm.com; kdorchak@bhdlawfirm.com; 1075 N.E. 125th Street, Suite 202, North Miami, FL 33161; this **29th** day of **December**, **2023**.

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