COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

2015-CW-_____

NEW ORLEANS REGIONAL PHYSICIAN HOSPITAL ORGANIZATION, INC.,
D/B/A PEOPLES HEALTH NETWORK,

versus

HOSPITAL SERVICE DISTRICT OF ST. BERNARD,
D/B/A ST. BERNARD PARISH HOSPITAL

On application for supervisory writ
to the 19th Judicial District Court, Parish of East Baton Rouge
The Honorable R. Michael Caldwell, Judge
No. C-636,402, Div. "I", Section 24

Application for Supervisory Writ by New Orleans Regional Physician Hospital Organization, Inc., d/b/a Peoples Health Network

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Certificate of Verification and Service

State of Louisiana
Parish of Orleans

I certify that the allegations in the application for supervisory writ are true to the best of my knowledge, information, and belief.

A copy of this writ application has been served by e-mail or U.S. Mail on the following persons:

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Statement of Jurisdiction

This Court has supervisory jurisdiction to review the judgment complained of under La. Const. art. V § 10(A), La. Code Civ. P. art. 2201, and La. Ct. App. Unif. R. 4-2 and 4-3.

The trial court rendered the judgment complained of in open court on March 30, 2015, and ordered the judgment to be reduced to writing.[1] The written judgment was signed on April 14, 2015.[2] Although the notice of judgment is dated April 17, 2015, a certificate on the bottom margin of the judgment itself states that notice of judgment was mailed on April 20, 2015.[3] The plaintiff-relator filed its notice of intent to seek a supervisory writ on April 30, 2015, and the respondent judge set a return date of Monday, May 18, 2015.[4] All the above actions were timely under La. Ct. App. Unif. R. 4-3, and this writ application has been filed within the return date set by the trial court.

Statement of the Case

1. Status in the trial court.

The 19th Judicial District Court, Parish of East Baton Rouge, has sustained the defendant's declinatory exception and transferred this case to the 34th Judicial District Court, Parish of St. Bernard. No date has been set for trial on the merits.

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[1] *See* p. 22 below (hearing transcript); p. 129 below (minute entry, "Judgment to be signed accordingly upon presentation.").

[2] *See* p. 16 below (notice of judgment); p. 17 below (dated and signed judgment).

[3] *Compare* p. 16 below (notice of judgment dated Apr. 17, 2015) *with* p. 17 below (stamped certificate on bottom margin of judgment indicating mailing date of Apr. 20, 2015).

[4] *See* pp. 130–32 below (notice of intent and return-date order).

2. Procedural history.

The New Orleans Regional Physician Hospital Organization, Inc., d/b/a Peoples Health, brought this civil action against the Hospital Service District of St. Bernard Parish (sometimes referred to below as "the hospital"), which owns and operates St. Bernard Parish Hospital. Peoples Health alleges that it has overpaid the hospital millions of dollars and is seeking to recover the overpayment. The contract between Peoples Health and the hospital includes a forum-selection clause, under which any litigation related to or arising from the contract must be brought in Baton Rouge. In response to the suit, the hospital pleaded declinatory exceptions of improper venue and insufficiency of service of process. The basis of the hospital's venue exception was La. R.S. 46:1063, under which venue for a suit against a hospital service district is the district's domicile, which in this case is St. Bernard Parish. Before the hearing of the exceptions, the hospital abandoned its exception of insufficiency of service of process. At the conclusion of the hearing, the district court sustained the hospital's venue exception and transferred this action to St. Bernard Parish. Peoples Health now seeks this Court's supervisory review of the district court's ruling.

Issue Presented for Review

Under Louisiana law, a hospital service district has the same freedom of contract that a corporation has. The Louisiana Supreme Court has held that contractual forum-selection clauses are generally valid and enforceable. Is a forum-selection clause in a contract made by a hospital service district equally valid and enforceable?

Assignment of Error

The 19th Judicial District Court erred by sustaining the hospital's venue exception and transferring this action to the 34th Judicial District Court, St. Bernard Parish.

Facts

Peoples Health is a managed-care organization that provides Medicare beneficiaries in Louisiana with Medicare benefits and services. Peoples Health operates under a contract with the Centers for Medicare and Medicaid Services to provide an insurance product for Medicare-eligible members, known as a Medicare Advantage plan. Its principal office is in Jefferson Parish.

The Hospital Service District of the Parish of St. Bernard, State of Louisiana, was created under Title 46, Chapter 10 of the Revised Statutes (La. R.S 46:1051 et seq.) by the St. Bernard Parish Council in November 2007. Its boundaries are co-extensive with those of St. Bernard Parish. Its purpose is to own and operate a hospital in St. Bernard Parish. In creating the district, the St. Bernard Parish Council designated St. Bernard Parish as its domicile.

By statute, a hospital service district is a political subdivision of the state. La. R.S. 46:1064(A). It is deemed to "constitute a body corporate in law with all the powers of a corporation," including the power to enter into contracts. La. R.S. 46:1060. According to La. R.S. 46:1063, a hospital service district's domicile is the proper venue for any suit against the district.

After its creation, the hospital service district took steps to construct a hospital. That hospital, known as St. Bernard Parish Hospital, opened its doors to patients in September 2012.

Around the same time, the hospital and Peoples Health entered into a Hospital Services Agreement, effective November 1, 2012. The contract was negotiated for the hospital by the Franciscan Missionaries of Our Lady Health System, which, at the time, was under contract to manage the hospital. FMOL Health System operates five hospitals in Louisiana, located respectively in Bogalusa, Baton Rouge, Lafayette, Gonzales, and Monroe. Its headquarters are in Baton Rouge. Thus, acting on behalf of the hospital, FMOL Health System negotiated for Baton Rouge to be the exclusive venue for any litigation arising from or related to the contract. Peoples Health agreed to FMOL Health System's desired forum.[5]

In 2014, a dispute arose between the hospital and Peoples Health. The source of the dispute was Peoples Health's discovery that it had overpaid the hospital by millions of dollars. The overpayments resulted from two things: (1) paying claims based on materially inaccurate cost-to-charge ratios, which were based on information provided by the hospital; and (2) paying capital costs that were passed on to Peoples Health to pay, but which Peoples Health did not contractually agree to pay. On September 24, 2014, Peoples Health gave the hospital formal written notice of the dispute and exercised its right to terminate the contract without cause on 60 days' notice, effective November 30, 2014. [6]

The contract requires the parties to attempt an amicable resolution of any dispute arising from or related to the contract before filing suit. A party who believes that the other party has breached the contract must give the other party written notice of the dispute's existence. Within 10 days after this notice, the parties are to meet to attempt to resolve the dispute. If the meeting is unsuccessful,

[5] *See* p. 64 below, § 7.9.

[6] *See* p. 96 below, Ex. 1 attached to opposition to exceptions.

the parties are to participate in mediation within 30 days after the meeting. The contract specifies Baton Rouge as the forum for the mediation. If the mediation is unsuccessful, any litigation by the parties is to be conducted "exclusively in the federal or state courts in Baton Rouge, Louisiana."[7]

The 10th day following Peoples Health's September 24 notice of a dispute was Sunday, October 4, 2014. The parties, however, were unable to schedule a meeting within that time because (a) the hospital's lead counsel was out of the country until October 2, and (b) after October 2, the hospital's representative Wayne Landry was unavailable until October 6.[8] So the parties held the meeting on October 14, 2014, and a second one after that. Both meetings were unsuccessful.

Because the parties were unable to resolve the dispute on their own, the next step was mediation. Although the contract called for the mediation to be held in Baton Rouge, the parties agreed to hold the mediation in New Orleans because, by the time the dispute arose, FMOL Health System no longer managed the hospital. The parties were unable to hold the mediation in December 2014 because the hospital's interim chief financial officer, Joseph Kemka, was unavailable until January 2015.[9] So they agreed to hold the mediation on January 14, 2015, a date originally proposed by the hospital.[10]

When the mediation failed, Peoples Health filed suit in the 19th Judicial District Court in Baton Rouge. The hospital responded with declinatory exceptions of improper venue and insufficiency of service of process. The hospital later abandoned the latter exception but pressed forward with its venue exception.

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[7] *See* p. 64 below, § 7.9.

[8] *See* p. 99 below (Jack Stolier out of the country until October 2; Wayne Landry unavailable until October 6).

[9] *See* pp. 79, 111, and 114 below (e-mail from Mr. Kemka to the hospital service district's attorney).

[10] *See* pp. 78–79 and 113–14 below.

Peoples Health opposed the hospital's venue exception, arguing that, under the parties' contract, Baton Rouge is the exclusive venue for any dispute arising from or related to the contract. Despite the hospital's contractual consent to venue in Baton Rouge, the trial court sustained the hospital's venue exception and ordered this case to be transferred to the 34th Judicial District Court in St. Bernard Parish.

Summary of the Argument

A forum-selection clause is *prima facie* valid, legal, and binding in Louisiana. It should be enforced unless the resisting party clearly proves that enforcement would be unjust, that the clause arose from fraud or overreaching, or that enforcement would contravene a strong public policy of the forum where the suit is brought. None of these exceptions applies here.

Baton Rouge, the parties contractually chosen forum, is a reasonable place to try this case. Since neither of the parties is domiciled in Baton Rouge, it is a neutral forum. It is within reasonable driving distance of the New Orleans area, where the parties are located. Because the venue will not affect where discovery occurs, trying the case in Baton Rouge will not add significantly to the cost of litigation.

There is not even an allegation, much less evidence, that the forum-selection clause was the product of overreaching. Rather, it was originally put in the contract for the hospital's benefit—the company that managed the hospital at the time is located in Baton Rouge. And both the hospital and its former manager, who negotiated the contract on the hospital's behalf, are commercially sophisticated.

Finally, the state has no strong public policy to litigate a suit against a hospital service district in its domicile. Although the venue provision in La. R.S. 46:1063 has been labeled "mandatory," both statutory and jurisprudential law allow a political subdivision such as a hospital service district to waive a

mandatory venue provision. The only public policy at stake here is the hospital district's freedom of contract. The Legislature has decreed that a hospital service district has the same power as a corporation to incur contractual obligations. This freedom of contract—an important public policy in Louisiana—carries with it the freedom to choose the forum in which suit may be filed. Holding the forum-selection clause unenforceable would conflict with public policy by curtailing a hospital service district's freedom of contract.

Argument

1. The merits of this writ application should be decided by this Court under de novo review.

The judgment complained of—sustaining the defendant's exception to venue and transferring the case to another parish—is particularly suitable for review under this Court's supervisory jurisdiction. An error in a trial court's venue ruling causes irreparable injury because, as a practical matter, the error cannot be corrected on appeal after final judgment. *See White Oak, Inc. v. Katz & Simone*, 515 So. 2d 476, 476–77 (La. App. 1 Cir. 1987). Therefore, a supervisory writ is the only procedure available for appellate review of this judgment.

Venue is a question of law, which this Court reviews de novo. *Price v. Roy O. Martin Lumber Co.*, 2004-0227 p. 11 (La. App. 1 Cir. 4/27/05), 915 So. 2d 816, 824. De novo review is especially appropriate when, as here, the facts bearing on venue are not disputed. *See Bridges v. Mosaic Global Holdings, Inc.*, 2008-0113 p. 20 (La. App. 1 Cir. 10/24/08), 23 So. 3d 305, 317–18.

For these reasons, this Court should decide the merits of this application. And in deciding the merits, this Court should apply de novo review.

2. The forum-selection clause in the contract between the hospital service district and Peoples Health is valid and enforceable.

Forum-selection clauses, or choice-of-exclusive forum clauses, are *prima facie* valid, legal, and binding in Louisiana, and a party seeking to set aside such a provision bears a heavy burden of proof. *Vallejo Enterprise, L.L.C. v. Boulder Image, Inc.*, 2005-2649 p. 3 (La. App. 1 Cir. 11/3/06), 950 So. 2d 832, 835. Such a clause should be enforced unless the resisting party clearly proves one of the following:

- that enforcement would be unreasonable and unjust;
- that the clause arises from fraud or overreaching; or
- that enforcement would contravene a strong public policy of the forum where the suit is brought.

Shelter Mut. Ins. Co. v. Rimkus Consulting Group, Inc., 2013-1977 p. 17 (La. 7/1/14), 148 So. 3d 871, 881; *Vallejo Enterprise* p. 3, 950 So. 2d at 835. For reasons explained below, the hospital cannot carry its heavy burden of proving that the forum-selection clause should not be enforced.

A. Baton Rouge is a reasonable forum.

The parties originally selected Baton Rouge as the exclusive forum for disputes like this as an accommodation to the hospital. The company that managed the hospital at the time, FMOL Health System, has its headquarters in Baton Rouge. It can hardly be called "unjust" to enforce a contractual clause originally intended to benefit the hospital. And though FMOL Health System no longer manages the hospital, Baton Rouge remains a reasonable forum for several reasons.

First, it is a neutral forum. Peoples Health's principal office is in Jefferson Parish. The hospital is located in St. Bernard Parish. Hence, neither party will have a home-field advantage if the case is tried in Baton Rouge.

Second, litigating the case in Baton Rouge will not cause significant inconvenience to any party. The 19th Judicial District Court is about an 80-minute drive from downtown New Orleans and a 92-minute drive from the hospital. New Orleans lawyers frequently appear in Baton Rouge courts, usually commuting from New Orleans rather than reserving a hotel room. While some discovery, regardless of venue, may occur in Baton Rouge, most of it will occur in Orleans, Jefferson, or St. Bernard Parish.

Finally, trial in Baton Rouge will not impair the hospital's ability to care for its patients. The case is not about the appropriateness of patient care, so doctors and nurses will not be called as witnesses. The dispute concerns the amount of money the hospital should have been paid under its contract with Peoples Health and applicable Medicare regulations. The witnesses will be accountants and administrators. Their appearances in a Baton Rouge court will have no effect on patient care.

In the trial court, the hospital argued that enforcement of the forum-selection clause in this case would require it "to defend suits all over the State of Louisiana, thereby draining public resources through the attendant cost and expenses involved in such litigation …."[11] This argument greatly overstates the hospital's case. Enforcing one forum-selection clause in one contract for one case will not invalidate the venue provision in La. R.S. 46:1063 for all other cases. The hospital can avoid being sued outside of its domicile simply by not consenting to another contract with a forum-selection clause.

[11] Page 43 below, memo. p. 4.

B. The forum-selection clauses did not result from fraud or overreaching.

No one alleges that the forum-selection clause resulted from fraud. Nor can anyone seriously argue that it was the product of overreaching. Quite the opposite: it was deliberately put in the contract for the convenience of the hospital's former manager, FMOL Health System.

The parties to the contract were and are commercially sophisticated. The hospital district owns and operates a 113,000-square foot state-of-the-art hospital.[12] According to its February 15, 2015 financial statement, its assets are worth more than $92 million. The contract was negotiated on the hospital's behalf by FMOL Health System. FMOL is a "leading health care innovator in Louisiana," operating five hospitals across the state.[13] According to its most recent annual report, its total assets for fiscal year 2014 were worth over $2.6 billion, with net assets over $1.3 billion. Its net patient-services revenue for fiscal year 2014 was over $1.4 billion.[14]

This is not a case where a party with overwhelming bargaining power imposed a forum-selection clause on someone who had no choice but to accept it. Rather, this is a case where the party now resisting the forum-selection clause was responsible for placing it in the contract.

C. Public policy favors enforcement of the forum-selection clause.

In pleading its exception to venue, the hospital cited La. R.S. 46:1063, which provides that a hospital service district "shall be sued" at its domicile. The hospital

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[12] This information comes from the hospital's web site, www.sbph.net/about-sbph.

[13] This information comes from FMOL Health System's web site, fmolhs.org/Pages/About-FMOLSH.aspx.

[14] The annual report can be found on the Internet at fmolhs.org/Documents/2014-Annual-Report.pdf.

argued (and the trial court agreed) that this statute expresses a public policy of this state sufficient to defeat a forum-selection clause. Although the venue provision in La. R.S. 46:1063 has been deemed "mandatory" by the Louisiana Supreme Court,[15] it does not express such a strong public policy as to nullify a forum-selection clause.

First, there is no strong public policy behind venue statutes. As the Louisiana Supreme Court has explained, venue provisions are based on legislative considerations for allocating cases among the various parishes with an interest in the action, according to the particular action and the particular parties. *Black v. St. Tammany Parish Hosp.*, 2008-2670 p. 6 (La. 11/6/09), 25 So. 3d 711, 715. Although the original concept of venue was that "one must be sued before his own judge," that concept has become anachronistic with the ever-increasing number of legislative exceptions to venue at the party's domicile. *Id.* Today's rules of venue are less designed to protect the defendant—who has no constitutional right to be tried in a particular forum—and more designed to allocate cases among parishes with an interest in the proceeding so as to provide for efficient disposition of caseloads. *Id.* Thus, the idea that the hospital has a fundamental right to be sued only in its own domicile is fiction.

Second, legislation allows the hospital service district to waive venue in its domicile. The Legislature has decreed certain venue provisions to be unwaivable. *See* La. Code Civ. P. art. 44(B). Revised Statute 46:1063 is not among them. The omission of La. R.S. 46:1063 from art. 44(B)—thus making the statute's venue provision waivable—shows that the state has no strong interest in making sure that a hospital service district is sued only in its own domicile.

[15] *Black v. St. Tammany Parish Hosp.*, 2008-2670 p. 13 (La. 111/6/09), 25 So. 3d 711, 719.

Third, a hospital service district is a political subdivision, and both this Court and the Louisiana Supreme Court have held that a political subdivision may waive a mandatory venue provision. *Franques v. Evangeline Parish Police Jury*, 625 So. 2d 157 (La. 1993) ("The venue requirement of La. R.S. 13:5104(B) is mandatory but waivable."); *accord, McKenzie v. Imperial Fire & Cas. Ins. Co.*, 2012-1648 p. 15 (La. App. 1 Cir. 7/30/13), 122 So. 3d 42, 53 (citing *Franques*). As these cases show, a venue provision's "mandatory" nature does not make it unwaivable. In the same vein, another Court of Appeal has upheld a forum-selection clause agreed to by a political subdivision. *See Piqué-Weinstein-Piqué Architects, Inc. v. New Orleans Aviation Bd.*, 99-1231 pp. 4–5 (La. App. 5 Cir. 4/25/00), 762 So. 2d 76, 78.

Fourth—and most compelling—the Louisiana Supreme Court has long recognized that freedom of contract is an important public policy. *Shelter Mut. Ins. Co., supra*, 2013-1977 p. 17, 148 So. 3d at 881. And this state's public policy, as enacted by the Legislature, is for a hospital service district to have the same freedom of contract that a corporation has. "A hospital service district … shall constitute a body corporate in law with all the powers of a corporation" and "shall have the power and right to incur debts and contract obligations …." La. R.S. 46:1060; *see also* La. R.S. 12:1-302(7) (giving corporations the power to "make contracts" and to "incur liabilities").

As recognized by the Supreme Court in *Shelter Mutual*, "The right of parties to freely contract must encompass the correlative power to agree to bring suit under that contract in a particular forum." 2013-1977 p. 17, 148 So. 3d at 882. By giving a hospital service district the same freedom of contract that a corporation has, the Legislature has given it the correlative power to agree to a contractual forum-selection clause. Thus, contrary to the hospital's argument and the district

court's reasoning, public policy favors enforcement of a forum-selection clause consented to by a hospital service district.

D. The parties substantially complied with contractual provisions requiring them to attempt an amicable resolution of this dispute.

In the trial court, the hospital argued that the forum-selection clause should not be enforced because the parties did not strictly adhere to the timetable for amicable dispute resolution contained in the contract (i.e. 10 days from written notice of a dispute to a meeting to resolve the dispute, 30 days from an unsuccessful meeting to mediation).[16] The hospital even took the position that the parties' agreement to hold the mediation in Jefferson Parish instead of Baton Rouge rendered the forum-selection clause ineffective, arguing that mediation *in Baton Rouge* was a prerequisite to litigation in Baton Rouge.[17]

The trial court did not accept these arguments, and for good reason.[18] Parties to a contract are always free to modify the contract by mutual consent. Here, Peoples Health agreed to extend the 10-day period for the parties' pre-mediation meeting to accommodate the hospital's counsel and, later, the hospital's representative.[19] Later still, Peoples Health agreed to extend the 30-day period for the mediation because the hospital's interim chief financial officer was unavailable within the 30-day period.[20] The hospital has never explained why Peoples Health should be penalized for being flexible and agreeing to reasonable extensions of

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[16] *See* p. 44 below (hospital's memo. p. 5); pp. 123–24 below (hospital's reply memo. pp. 3–4).

[17] *See* p. 44 below (hospital's memo. p. 5); p. 124 below (hospital's reply memo. p. 4).

[18] *See* p. 21 below ("I'm not so sure as I would go that far in requiring such explicit compliance with the contract to activate the clause.").

[19] *See* p. 99 below (Peoples Health Ex. 3); p. 102 below (Peoples Health Ex. 5).

[20] *See* p. 111 below (Peoples Health Ex. 9) (Joseph Kemka "not available any of those dates in December.").

contract deadlines. Nor has the hospital explained why the parties were powerless to agree to change the location of the mediation.

Besides failing to support its argument with common sense and logic, the hospital disregarded the contract's "no waiver" provision, under which a waiver of one provision does not constitute waiver of anything else:

> No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.[21]

Thus, assuming that Peoples Health waived its right to a meeting within 10 days, a mediation within 30 days, or a Baton Rouge location for the mediation, Peoples Health never waived its right to enforce the forum-selection clause.

In short, the parties substantially complied with the contract's pre-suit procedures for attempting amicable resolution of their dispute. They merely agreed to alter the timetable to accommodate the schedules of the persons involved. Their reasonable flexibility about dates and places to hold the meetings and the mediation is not a valid reason to nullify the forum-selection clause.

Prayer for Relief

Peoples Health prays that the Court grant a supervisory writ, reverse the trial court's judgment, enforce the forum-selection clause, overrule the hospital's declinatory exception of improper venue, and return this action to the 19th Judicial District Court.

[21] Page 63 below (contract § 7.3).

Respectfully submitted:

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