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IN THE SUPREME COURT OF IOWA

CASE NO. 19-0678

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33 CARPENTERS CONSTRUCTION, INC.,

Appellant/Plaintiff

v.

IMT INSURANCE COMPANY,

Appellee/Defendant

Appeal from the Honorable Mary E. Howes of the Iowa District Court
in and for Scott County District Court Case No. LACE130323

FINAL BRIEF OF APPELLANT/PLAINTIFF

33 CARPENTERS CONSRUCTION, INC.

August 1, 2019

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the District Court properly granted IMT Insurance Company's Motion for Summary Judgment, when 33 Carpenters Construction had contracted for a valid post-loss assignment with the original homeowner-insured.

ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(2)(c), this case would be appropriate for retention by the Iowa Supreme Court, as it presents a substantial issue of first impression. Further, in a case involving the same issues the Iowa Supreme Court decided to retain the case. 33 Carpenters Construction, Inc. v. State Farm Fire and Casualty Company, No. 18-1354.

STATEMENT OF THE CASE

Appellant – Plaintiff 33 Carpenters Construction, Inc. "33 Carpenters" filed a breach of contract claim against the Appellee-Defendant IMT Insurance Company "IMT" on May 24, 2018. The Petition was filed as an Expedited Civil Action. The Petition claimed a post-loss assignment of an insurance claim for property damage. The insured was Brandon Gordon of Davenport, Scott County, Iowa. The property damage occurring on March 6, 2017. The Defendant IMT Insurance Company (Appendix pp. 13-15).

Appellee-Defendant "IMT" denied it breached the insurance contract (Appendix pp. 17-18).

Appellee-Defendant IMT filed a Motion for Summary Judgment (Appendix pp. 20-21). "33 Carpenters" filed a resistance to the Motion for Summary Judgment (Appendix pp. 82). Summary Judgment was granted April 4, 2019 (Appendix pp. 92-99). "33 Carpenters" timely filed its Notice of Appeal on April 25, 2019 (Appendix pp. 100-101).

STATEMENT OF THE FACTS

Appellant-Plaintiff 33 Carpenters Construction, Inc. ("33 Carpenters") filed a breach of contract claim against the Defendant IMT Insurance Company ("IMT"). 33 Carpenters alleged in its Petition that an "IMT" insured, Brandon Gordon ("Gordon"), suffered a hail loss on March 6, 2017 to his residence at 7402 North Pine Street, Davenport, Scott County, Iowa. Mr. Gordon had in place a homeowner's policy with "IMT". The policy was in full force and effect at the time of the storm. Mr. Gordon executed a post-loss assignment of his claim against "IMT" to "33 Carpenters". Under the policy "IMT" agreed to pay for direct physical loss to Mr. Gordon's premises from any peril not excluded from the policy (Appendix pp. 14; 17). The Petition alleged all post-loss duties were complied with. Pursuant to the insurance contract, "IMT" had a contractual obligation to pay the full amount of the losses incurred as a result of the storm including the cost to repair restore and/or replace the damage minus deductible. "IMT" admitted it insured the premises (Appendix p. 17). It admitted the premises

was damaged by the storm (Appendix p. 17). It admitted it agreed to pay for direct physical loss to the insured's premises and that the policy was in effect at the time of the accident (Appendix p. 17). "IMT" denied it breached the contract and asked that the Petition be dismissed (Appendix p. 18).

"IMT" filed a Motion for Summary Judgment offering twelve (12) exhibits, Exhibits A – L (Appendix pp. 20-21; 34-81). "IMT" admitted in its motion that post-loss assignments are valid under Iowa law (Appendix p. 26-27). Its sole basis for filing the summary judgment motion was that "33 Carpenters" was acting as a public adjuster on behalf of the homeowner Gordon (Appendix p. 20; 26-27). Thus, "IMT" argued the post-loss assignment was therefore unenforceable and the claim should be dismissed.

The exhibits offered showed a letter by "IMT" dated April 6, 2017 acknowledging wind damage to the Gordon premises. In the letter "IMT" stated the damage was $2,362.67 and, after subtracting the deductible of $1,000.00, sent a check for $1,362.67 to Mr. Gordon (Appendix p. 53).

Not satisfied with "IMT's" payment, Mr. Gordon assigned his claim to "33 Carpenters" through an Assignment of Claim and Benefits dated May 1, 2017 (Appendix p. 57). On the same date, an "Insurance Contingency" was signed by Mr. Gordon with "33 Carpenters" explaining that "33 Carpenters" would meet with the insurer "IMT" and discuss the damages. It also explained to Mr. Gordon

that "33 Carpenters" would proceed with repairing the roof once an agreement was reached with the insurer concerning the amount of necessary repairs (Appendix p. 58). In the Insurance Contingency agreement, "33 Carpenters" agreed it would not charge Mr. Gordon anymore then was agreed to by "IMT" without Mr. Gordon's consent. Mr. Gordon would always be responsible for his deductible (Appendix p. 58).

To properly calculate the loss, "33 Carpenters" prepared a Precise Aerial Measurement Report (Appendix p. 61). Approximately, one year later "IMT" re-evaluated the claim. Its new estimate has a replacement cost of $7,724.72, actual cash value of $5,502.31 with a $1,000.00 deductible. This included the loss to the dwelling and garage (Appendix p. 70). On April 9, 2018 Mr. Gordon signed an authorization which authorized "33 Carpenters" to speak with his mortgage company concerning the loss and payment (Appendix p. 72). On April 10, 2018 "33 Carpenters" issued a "Roof Production Form" which detailed the loss and time cost to replace. The estimate was $13,016.72 (Appendix pp. 73-74). In answering Interrogatory No. 9, "33 Carpenters" admitted it had no licensed public adjusters on staff (Appendix p. 80).

The exhibits "A-L" failed to show any direct contact between "33 Carpenters" and "IMT".

ARGUMENT I

The District Court improperly granted IMT Insurance Company's Motion for Summary Judgment.

ERROR PRESERVATION

33 Carpenters timely filed Notice of Appeal from the District Court's grant of Summary Judgment on April 25, 2019, in compliance with Iowa R. App. P. 6.101(1)(b). Given that the April 4, 2019, Order was a final judgment on "IMT's" Summary Judgment Motion, no other steps were necessary to perfect this appeal.

SCOPE AND STANDARD OF REVIEW

The standard for reviewing Summary Judgment Motions is well settled in Iowa. Appellate courts should scrutinize Summary Judgment Motions for correction of errors at law. Carr v. Bankers Tr. Co., 546 N.W.2d 901, 903 (Iowa 1996). Further, Summary Judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* Importantly, the evidence is examined in the light most favorable to the nonmoving party, namely 33 Carpenters Construction Inc. Mason v. Vision Iowa Bd., 700 N.W.2d 349, 353 (Iowa 2005).

A. APPELLANT-PLAINTIFF "33 CARPENTERS" OBTAINED A VALID POST-LOSS ASSIGNMENT FROM INSURED BRANDON GORDON

It is undisputed that the relevant loss is due to a hail and wind storm that occurred on March 6, 2017 in or near Davenport, Scott County, Iowa (Appendix pp. 13; 17). Similarly, it is undisputed that Gordon granted a complete assignment to Plaintiff on May 1, 2017 (Appendix pp. 31; 57-59).

Iowa law unequivocally supports one's ability to assign a right to sue after loss. Furthermore, "once the loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy. See Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799, 804–05 (Iowa 1973); Smith v. Buege, 387 S.E.2d 109, 116 (W.Va. 1989). Unless a contrary intention is manifest or inferable, an assignment ordinarily carries with it all rights remedies and benefits which are incidental to the things assigned. Kintzel, 203 N.W.2d at 206. It is a transfer of a chose in action under the policy. See St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co., 543 P.2d 147, 149 (Ariz. Ct. App. 1975); Kintzel, 203 N.W.2d at 805. At this point, the insurer-insured relationship is more analogous to that of a debtor and creditor, with the policy serving as evidence of the amount of debt owed. Antal's Rest., Inc. v. Lumbermen's Mut. Cas. Co., 680 A.2d 1386, 1389 (D.C. 1996); Elat, Inc. v. Aetna Cas. & Sur. Co., 654 A.2d 503, 505 (N.J. Super. Ct. App. Div. 1995); see Straz v. Kansas Bankers

Sur. Co., 986 F. Supp. 563, 569 (E.D. Wis. 1997), aff'd, 165 F.3d 33 (7th Cir. 1998).

Moreover, if courts permitted an insurer to avoid its contractual obligations by prohibiting all post-loss assignments, courts could be granting the insurer a windfall. See Int'l Rediscount Corp. v. Hartford Acc. & Indem. Co., 425 F. Supp. 669, 673 (D. Del. 1977); St. Paul Fire & Marine Ins. Co., 543 P.2d at 149-50; Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 857 P.2d 540, 541 (Colo.Ct.App.1993); Elat, Inc., 654 A.2d at 506.

The assignment in question simply states in its pertinent part:

FOR VALUE RECEIVED, the Assignor hereby sells and transfers to the Assignee and its successors, assigns and personal representatives, any and all claims, payment drafts, demands, and cause or causes of action of any kind whatsoever which the Assignee has or may have against IMT (insurance company), arising from the following claim:

> Type of Claim: Storm Damage (wind and hail)
> Homeowner's Claim #: 3/6/17 2017N8370
> Date of Loss: 3/6/17
> Address of Loss: 7402 N. Pine Street, Davenport, IA 52806
>
> The undersigned Assignee may in its own name and for its own benefit prosecute, collect, settle, compromise and grant releases on said claim as it, in its sole discretion, deems advisable. Please make all future payments or settlements for the above referenced claim directly to the Assignee.

(Appendix p. 16).

Nothing in the assignment requires, or even discusses, adjusting activities will be undertaken as part of the assignment. See Iowa Code 522C. It very simply is an assignment of a claim against an insurance company. While insurance companies like "IMT" do not like assignments because it tends to level the playing field, they are allowed under Iowa law.

B. NO PROOF EXISTS THAT "33 CARPENTERS" ACTUALLY ACTED AS A PUBLIC ADJUSTER

The timing of events is important in deciding this dispute. The relevant storm event, and insured loss, occurred on March 6, 2017 (Appendix pp. 13; 17; and 31). Brandon Gordon ("Gordon") the original homeowner-insured, reported the claim to his insurer, "IMT", who investigated the claim. The first involvement by the Plaintiff "33 Carpenters" was not until, May 1, 2017 when its representative accepted an assignment from "Gordon," and completed the contracting process (Appendix p. 31). Plaintiff "33 Carpenters" was then the sole owner of the claim. Any alleged actions undertaken by "33 Carpenters" after accepting the Assignment were not public adjusting, but instead were an effort to negotiate the proper scope **of its own claim**. Certainly, there is nothing wrongful about an assignee of a claim negotiating its own dispute with the insurer. The record for summary judgment showed no contact between "33 Carpenters" and "IMT". The trial court didn't care as it seemed solely fixed on throwing the case out under the rationale of 33

Carpenters Construction, Inc. v. The Cincinnati Insurance Company, 2017 WL 47824 (Table 2019) (Appendix pp. 97-98). [1]

The Defendant relies heavily upon the case of 33 Carpenters Construction, Inc. v. The Cincinnati Insurance Company, 2017 WL47824 (Table) (2019) (Appendix pp. 26-29). The Cincinnati case is distinguishable. In the present matter, there is absolutely no evidence of any contact of any kind between the Plaintiff's representatives and the Defendant's representatives before the assignment. Essentially, Defendant is requesting the Court to throw out longstanding Iowa law permitting post-loss assignments under the guise of a violation of laws that the Iowa Insurance Commissioner is to enforce concerning public adjusters.

One can understand why cases such as these are important to "IMT". Prior to "33 Carpenters" getting involved, it was able to adjust the claim for $2,362.67 (Appendix p. 53). "IMT" probably assumed the claim was finished and it could keep the coveted windfall. After "33 Carpenters" got involved "IMT" had to hire a claims adjuster and paid $4,502.31 (Appendix p. 70). Further, "33 Carpenters" report shows the actual damages are $13,016.72 (Appendix p. 74). If "IMT" can

[1] This case is currently under appeal to the Iowa Supreme Court from the Iowa Court of Appeals. See Iowa Case No. 18-1354.

prevail it cannot only obtain a windfall in this case, but use this decision to discourage assignments and obtain further windfalls in the future.

C. IN THE ALTERNATIVE, THE TRIAL COURT USED THE "BRIGHT LINE" TEST RATHER THAN THE "BALANCING TEST" RESULTING IN SUMMARY JUDGMENT BEING IMPROPERLY GRANTED

The trial court found "33 Carpenters" was acting as a public adjuster. The court then applied a "bright line" test holding that contracts which "... violate public policy [are] invalid and unenforceable" (Appendix p. 97). Thus, the trial court used the "bright line" test which has been specifically rejected in cases allegedly involving the violation of licensing. See Fausal v. JRJ Enterprises, Inc., 603 N.W.2d 612 (Iowa 1999); Mincks Agri Center, Inc. v. Bell Farms, 611 N.W.2d 270 (Iowa 2000). The Mincks court noted that there were two approaches as to whether a recovery can be made under a contract requiring performance in violation of a licensing statute. The court stated:

> The initial decision that this court must make, then, is whether to adhere to our bright-line rule that there can be no recovery under a contract requiring performance in violation of a licensing statute. The alternative is to apply the Restatement factors to determine on a case-by-case basis whether a party's failure to comply with a licensing requirement renders the contract unenforceable on public policy grounds. We think a more flexible rule is preferable. Therefore, we

> turn now to a review of the principles set forth in the Restatement (Second) of Contracts.

611 N.W.2d at 274-75.

The Mincks court then went through the analysis necessary using the "balancing test". The Mincks court turned to the principles set forth in the Restatement (Second) of Contracts:

> C. Restatement principles. Restatement (Second) of Contracts section 178 states the general principle governing the unenforceability of contracts on public policy grounds: A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms. Restatement (Second) of Contracts § 178(1), at 6 (1981) (emphasis added) [hereinafter "Restatement"]; see also Rogers v. Webb, 558 N.W.2d 155, 156 (Iowa 1997) ("Contracts that contravene public policy will not be enforced."); Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331, 335 (Iowa 1980) (same); Beneficial Finance, 179 N.W.2d at 580 (noting that where the illegality "is of such nature that the public interest and welfare of those persons for whose protection the particular element has been

declared to be illegal will be best subserved by denying plaintiff a remedy it would be [the court's] province to do so"). A more specific application of the public policy aspect of this principle is found in section 181, which provides: If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if (a) the requirement has a regulatory purpose, and (b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement. Restatement § 181, at 21.

Restatement section 178 provides helpful guidance in determining whether the interest in enforcing the contract is outweighed by the public policy at stake: 2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) and forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. 3) In weighing a public policy against enforcement of a term, account is taken of (a) The strength of that policy as manifested by legislation or judicial decisions, (b) The likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct

involved and the extent to which it was deliberate, and (d) The directness of the connection between that misconduct and the term. Restatement § 178(2)-(3), at 6-7.

611 N.W2d at 275.

The Mincks court analyzed the Grain Dealer Licensing Statute and concluded it was to provide protection from insolvent grain dealers. 611 N.W.2d at 276. After reviewing and balancing the "various relevant factors," it found the unlicensed grain dealer could not enforce the contract. The result being the farm corporation was able to sell the corn in dispute at a higher price and come out financially ahead. 611 N.W.2d at 278, n.4, 281.

In this case, the opposite will occur. The financial winner will be "IMT" and the main loser will be the completely innocent insured, Mr. Gordon.

In weighing the interest in enforcing the contract, the Mincks court looks at:

a) The parties unjustified expectations;

b) Any forfeiture that would result if enforcement was denied; and

c) Any special public interest in enforcement of the particular term.

In looking at those factors, the factor that seems to be overwhelming is that Mr. Gordon will be without any claim for his roof to be fixed. The windfall winner will be 'IMT" which was not even a party to the assignment.

In weighing the public policy against enforcement the following are to be taken into account:

a) The strength of that policy as manifested by legislation or judicial decisions;

b) The likelihood that a refusal to enforce the term will further that policy;

c) The seriousness of any misconduct involved and the extent to which it was deliberate; and

d) The directness of the connection between that misconduct and the term.

In looking at the factors against allowing the assignment, nothing seems to rise to the level of indirectly punishing Mr. Gordon to the advantage of "IMT". The risk to Mr. Gordon is that the assignment is invalidated and his claim is barred by a contractual statute of limitations. [2]

At a minimum, the case should be returned to the district court with instructions to use the 'balancing test" and not the "bright line" test as was applied in this case and the case of 33 Carpenters Construction, Inc. v. Cincinnati Ins. Co., 2017 WL 47824 (Table).

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[2] While "IMT" represented to the court that Exhibit "B" is a copy of the insurance policy it is not like any insurance the undersigned as ever seen. Presumably, if Mr. Gordon now tried to sue on his own the full policy will appear with probably a one year or two year contractual statute of limitations as seems standard in the industry.

"33 Carpenters" believes any alleged violation of the public adjusters statute concerning public adjusters should be handled by the Iowa Insurance Commissioner. The Iowa Insurance Commissioner has in fact exercised such authority with regularity: In The Matter Of Dansco Contracting, Dan Glasgow, and Joel Manley, 2013 WL 40398892011 and WL 75621668 (Defendant construction company cited for acting as unlicensed adjuster and proving misleading advertising in violation of Iowa Code Chapters 522C and 507A, fined $3,000.00 and ordered to cease and desist, later overturned after full hearing); In The Matter Of Glaze Roofing and Remodeling Joe Glaze, 2010 WL 2324606, (Defendant construction company cited for acting as unlicensed adjuster and proving misleading advertising in violation of Iowa Code Chapters 522C and 507A, fined $10,000.00 and ordered to cease and desist); and In The Matter Of Tierney Brothers Construction LLC, Sean Tierney, Tracy Tierney, 2010 WL 2324608 (Defendant construction company cited for acting as unlicensed adjuster and proving misleading advertising in violation of Iowa Code Chapters 522C and 507A, fined $20,000.00 and ordered to cease and desist).

CONCLUSION

The Iowa District Court in and for Scott County improperly granted the Motion for Summary Judgment brought by IMT Insurance Company. Thus, the Court should overturn the District Court's granting of Summary Judgment and

remand this matter to the Scott County District Court for further proceedings.

REQUEST FOR ORAL SUBMISSION

Appellants request to be heard in oral argument in this appeal upon submission of the case either to the Supreme Court of Iowa or Iowa Court of Appeals.

CERTIFICATE OF COST

I hereby certify that the cost of printing this document was $0.00.

CERTIFICATE OF COMPLAINCE

This brief complies with the type-volume limitation of Iowa R. App. P 6.903(1)(g)(1) because this brief contains 4,030 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 for Macintosh in 14 point Times New Roman style.

Signature: *<u>/s/ Edward F. Noethe</u>* Date: August 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, I served this document by electronic filing via Iowa Appellate EDMS to:

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I further certify that on the 1st day of August, 2019, I filed this document via Iowa Appellate EDMS to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

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