

IN THE SUPREME COURT OF IOWA

Case No. 17-1979

33 CARPENTERS CONSTRUCTION, INC.,

Appellant/Cross-Appellee/Plaintiff/Counterclaim Defendant,

v.

THE CINCINATTI INSURANCE COMPANY,

Appellee/Cross-Appellant/Defendant/Counterclaim Plaintiff.

Appeal from the Honorable Henry W. Latham II of the Iowa District Court
in and for Scott County

Scott County District Court Case No. LACE128760

FINAL BRIEF OF APPELLANT
33 CARPENTERS CONSTRUCTION, INC.

April 28, 2018

Kyle J. McGinn
Attorney for Appellant
McGinn, Springer & Noethe PLC
20 North 16th Street Council Bluffs, IA 51501
Telephone: 712.328.1566
Facsimile: 712.328.3707
Email: kmcginn@mcginnlawfirm.com

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Statutes

Iowa Code § 522C.2

Iowa Code § 522C.6

Other Authorities

Iowa R. App. P. 6.101(1)(b)

Iowa R. App. P. 6.1101(2)(c)

In the Matter of Dansco Contracting, Dan Glasgow, and Joel Manley, 2013 WL 4039889 and 2011 WL 75621668

In the Matter of Glaze Roofing & Remodeling and Joe Glaze, 2010 WL 2324606

In the Matter of Tierney Brothers Construction LLC, Sean Tierney, and Tracy Tierney, 2010 WL 2324608

Statement of Issues Presented for Review

- I. Whether the District Court properly granted The Cincinnati Insurance Company's Motion for Summary Judgment, when 33 Carpenters Construction had contracted for a valid post-loss assignment with the original homeowner-insured and subsequently negotiated its own claim with the insurer.

Routing Statement

Pursuant to Iowa R. App. P. 6.1101(2)(c), this case is appropriate for retention by the Iowa Supreme Court, as it seemingly presents a substantial issue of first impression.

Statement of the Case

33 Carpenters Construction, Inc. (hereinafter: "33 Carpenters") a Bettendorf, Scott County, Iowa based storm restoration contractor, agreed to provide exterior repair work to the Bettendorf, Scott County, Iowa residence of Gregg Whigham (hereinafter: "Whigham") following from a hail and windstorm that struck that area on March 15, 2016. As consideration, 33 Carpenters agreed with the homeowner to provide all materials and labor necessary for any exterior repairs, in exchange for any proceeds they were otherwise to receive from their home insurance policy paid relative to the event from The Cincinnati Insurance Company (hereinafter: "Cincinnati").

Cincinnati is the Ohio Corporation that provided insurance coverage for the residence during the relevant period. On October 6, 2016, the homeowner and a 33 Carpenters representative placed an initial telephone call to Cincinnati to notify them of the claim. As part of its contract with the homeowner, 33 Carpenters then accepted a post-loss assignment of his claim on October 10, 2016. Thereafter, on a date uncertain, 33 Carpenters began repairing the residence. In February 2017 a dispute arose between the parties to this case concerning the scope of the claim. In March 2017, with the dispute still unresolved, 33 Carpenters filed suit, claiming that Cincinnati had breached the insurance policy. (Petition, App. 3-6). On August 3, 2017, Cincinnati filed a Motion for Summary Judgment, claiming that 33 Carpenters' contract with the homeowner contravenes Iowa's licensure requirement for public adjuster, and was thus invalid, necessitating dismissal of the suit. (Defendant/Counterclaim Plaintiff's Motion for Summary Judgment, App. 21-23). The matter was heard before the Honorable Henry W. Latham II of the District Court of Scott County, on November 9, 2017, who granted Cincinnati's Motion via written ruling issued on November 28, 2017. (Order Granting Summary Judgment, App. 135-139). Thereafter 33 Carpenters filed a Notice of Appeal on December, 5, 2017. (Notice of Appeal, App. 140). Cincinnati filed a Notice of Cross Appeal concerning the

Expedited Civil Action Rule matter on December 18, 2017. (Notice of Cross Appeal, App. 141).

Statement of the Facts

Cincinnati issued an insurance policy to homeowner Whigham concerning his residence located at 5577 Kristi Lane, Bettendorf, Scott County, Iowa, Policy Number H01 0480531. The policy provided coverage for direct physical loss to the residence and other covered loss caused by or resulting from a covered cause of loss. (Dft.’s Summ. J. Ex. B, App. 30-104). Generally, “damage from a storm is a covered cause of loss.” (Defendant/Counterclaim Plaintiff’s Statement of Undisputed Material Facts p. 1, App. 24). It is undisputed that this policy was in effect on March 15, 2016, when a hail and windstorm wrought widespread damage in the Quad Cities area, including to the Whigham home. At an unspecified time later in 2016, 33 Carpenters first came into contact with Whigham. On October 6, 2016, Tony McClannahan, a 33 Carpenters representative and Whigham phoned a representative of Cincinnati to first “report the storm damage to the aluminum siding along the south-side of the Whigham’s home and that some shingles flew off.” (Dft.’s Summ. J. Ex. G p. 1, App. 119). McClannahan purportedly “advised Cincinnati that 33 Carpenters was the contractor working with the insured and that he would attend the insurance inspection.” *Id* p. 2, App. 120). Importantly, this was the entirety of the October 6 exchange, as retold by Cincinnati’s claim representative in a later sworn

statement. The Cincinnati representative never asserts that McClannahan advocated or negotiated the Whigham claim during this brief telephone conversation.

Sometime during this period, 33 Carpenters agreed with Whigham to perform the repairs to his residence in exchange for the proceeds of the insurance claim. While Cincinnati insists that this agreement between 33 Carpenters and Whigham violates Iowa law concerning public adjusting, the actual complete contract between 33 Carpenters and Whigham does not appear in the District Court record.

On October 10, 2016, 33 Carpenters received an “Assignment of Claim and Benefits” from Whigham for his insurance claim with Cincinnati, Claim No. 2763806. (Petition p. 4, App. 6). 33 Carpenters thereafter commenced work on the Whigham residence, on a date uncertain. Later in February 2017, a dispute arose concerning the proper scope of the repairs. Austin Nelson, Co-Owner of 33 Carpenters, advised Cincinnati it was necessary to replace all the siding and gutters due to a matching issue. (Defendant/Counterclaim Plaintiff’s Statement of Undisputed Material Facts p. 4, App. 25; Dft.’s Summ. J. Ex. H, App. 122-134). Cincinnati re-opened its file as a response. *Id.* 35 Carpenters inspected the siding and provided Cincinnati photographs to demonstrate why the siding needed replaced. *Id.*

Cincinnati refused to negotiate with 33 Carpenters, and inexplicably insisted on attempting to address any disagreement with Whigham. *Id.* During this period, Nelson of 33 Carpenters admittedly sent several emails to Cincinnati representatives, amongst other contacts. *Id.* Unable to resolve the matter informally, and concerned over an unknown potential contractual limitations period, 33 Carpenters filed suit on March 13, 2017 alleging a breach of the insurance contract by Cincinnati. (Petition, App. 3-6).

Again, on August 3, 2017, Cincinnati filed a Motion for Summary Judgment, claiming that 33 Carpenters' contract with the homeowner contravenes Iowa's licensure requirement for public adjuster, and was thus invalid, necessitating the dismissal of the suit. (Defendant/Counterclaim Plaintiff's Motion for Summary Judgment, App. 21-23). The matter was heard before the Honorable Henry W. Latham II of the District Court of Scott County, on November 9, 2017, who granted the Motion via written ruling issued on November 28, 2017. (Order Granting Summary Judgment, App. 135-139). Thereafter 33 Carpenters filed a Notice of Appeal on December 5, 2017, and Cincinnati filed a Notice of Cross Appeal on December 18, 2017. (App. 140-141). 33 Carpenters largely accepts Cincinnati's Statement of Facts as it relates to its Cross Appeal.

Argument

Argument: The District Court improperly granted The Cincinnati Insurance Company's Motion for Summary Judgment for 33 Carpenters Construction Inc. did not violate any Iowa statutes in contracting for a valid post-loss assignment and subsequently negotiating its own claim directly with the insurer.

Error Preservation, Scope of Review, and Standard of Review

33 Carpenters timely filed Notice of Appeal on December 5, 2017 from the District Court's grant of Summary Judgment earlier on November 28, 2017, in compliance with Iowa R. App. P. 6.101(1)(b). Given that the November 28, 2017 Order was a final judgment on Cincinnati's Summary Judgment Motion, no other steps or actions were necessary of 33 Carpenters to perfect this appeal.

The standard for reviewing Summary Judgment Motions is well settled. Iowa appellate courts should scrutinize Summary Judgment rulings for correction of errors at law. *Carr v. Bankers Tr. Co.*, 546 N.W.2d 901, 903 (Iowa 1996). Further, a grant of 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). Lastly, in reviewing the grant of summary judgment:

“The question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. An issue of fact is ‘material’ only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law. The requirement of a ‘genuine’ issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004) (quoting *Junkins v. Branstad*, 421 N.W.2d 130, 132–33 (Iowa 1988)); accord *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004); *Hynes v. Clay County Fair Ass'n*, 672 N.W.2d 764, 766 (Iowa 2003).

33 Carpenters accepted a valid post loss assignment from Whigham on October 10, 2016. 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). Instead, 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. *See 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.

While Cincinnati's policy did contain a unilateral non-assignment clause, the majority of State Courts also follow the rule that clauses in insurance policies prohibiting assignments do not prevent an assignment

after the loss has occurred. (Dft.'s Summ. J. Ex. B p. 40, App. 69). This rule has been widely applied to include homeowners insurance policies, property insurance policies, fire insurance policies, automobile insurance policies, liability insurance policies (including pollution liability insurance, directors and officers liability insurance, excess and umbrella liability insurance, employer's liability insurance, comprehensive general liability insurance) and other variations of liability or indemnity insurance, builder's risk insurance. industrial life insurance and annuities issued pursuant to a structured settlement agreement. Treatises and other authoritative texts also support the rule. *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419, 427–29, 889 N.W.2d 596, 601–02 (2016). The justification being “that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.” *Id.* at 603 (2016).

Thus, as of October 10, 2016, 33 Carpenters owned Whigham’s claim in its entirety, as is permitted by well settled Iowa law. **Therefore any attempt by 33 Carpenters to communicate with Cincinnati after this**

date was merely an attempt to negotiate its own claim, rather than an attempt to adjust or negotiate Whigham's claim. Undoubtedly, there is no prohibition on one negotiating their own insurance claim directly with an insurer, as 33 Carpenters freely admits it did. Further, no state licensure or certification is required to engage in such behavior. Whigham no longer had any legal relationship to the claim as of October 20, 2016, and Cincinnati's insistence on dealing with him directly during the Spring of 2017 was wholly misguided.

Admittedly, neither 33 Carpenters itself nor any of its representatives are licensed public adjusters in the State of Iowa, nor have they been at any time. Public adjuster is statutorily defined in Iowa, to include:

“Any person who for compensation or any other thing of value acts **on behalf of an insured** by doing any of the following:

- a. Acting for or aiding an insured in negotiating for or effecting the settlement of a first-party claim for loss or damage to real or personal property of the insured.
- b. Advertising for employment as a public adjuster of first-party insurance claims or otherwise soliciting business or representing to the public that the person is a public adjuster of first-party insurance claims for loss or damage to real or personal property of an insured

- c. Directly or indirectly soliciting business investigating or adjusting losses, or advising an insured about first-party claims for loss or damage to real or personal property of the insured.”

Iowa Code § 522C.2 (Emphasis Added).

Clearly, after October 10, 2016 Carpenters was not acting **on behalf of an insured**, but instead advocating for its own claim. It is axiomatic that an insured may negotiate the scope of its own claim, without the need for a public adjusting license.

The only contact prior October 10, 2016, when 33 Carpenters took ownership of the claim, was the aforementioned October 6, 2016 telephone call. This is the only juncture at which 33 Carpenters could have possibly contravened the Iowa public adjusting statute. Crucially, Cincinnati’s own representative does not claim that McClannahan negotiated the scope or otherwise advocated for the Whigham during this telephone call in his sworn statement provided to the District Court in support of Cincinnati’s Motion. There was further no such evidence in front of the District Court.

Even if 33 Carpenters had contravened Iowa law during this limited exchange, there is a proper body to regulate such behaviors, namely the Iowa Insurance Commission, which alone may enforce the provisions of Iowa Code Chapter 522C (concerning “Licensing of Public Adjusters”).

Iowa Code § 522C.6 prescribes specific penalties the Iowa Insurance Commissioner may impose on those acting in violation of the “Licensing of Public Adjusters Act” including notably the following:

2. A person acting as a public adjuster without proper licensure or a public adjuster who willfully violates any provision of this chapter or any rule adopted or order issued under this chapter is guilty of a serious misdemeanor.

...

3(b). A person who, after hearing, is found to have violated this chapter by acting as a public adjuster without proper licensure may be ordered to cease and desist from engaging in the conduct resulting in the violation and may be assessed a civil penalty according to the provisions of chapter 507A.

The Iowa Insurance Commissioner has indeed exercised such authority with regularity. See: IN THE MATTER OF DANSCO CONTRACTING, DAN GLASGOW, AND JOEL MANLEY, 2013 WL 4039889 and 2011 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).

Notably, this Commission has not never brought any action against 33 Carpenters.

Neither Iowa Code Chapter 522C nor Iowa Code Chapter 507A make mention of Cincinnati's supposed remedy of reaching back in time to negate valid assignment contracts. Despite the fact that the contract never appeared in the District Court record, Cincinnati asked the District Court to invalidate that agreement, supposing that it required 33 Carpenters to engage in adjusting Whigham's claim.

Lastly, Cincinnati cited to portions of 33 Carpenter's then existing website as further evidence that it had violated or attempted to violate Iowa public adjusting requirements. (Dft.'s Summ. J. Ex. E, App. 115). However,

Cincinnati offers no indication as to how such statements allegedly impacted this particular transaction, or were incorporated into the contract between 33 Carpenters and Whigham. Referencing to general sections of a website, without further assertion as to how they are specifically implicated in this matter, is not probative.

Conclusion

The Iowa District Court in and for Scott County improperly granted the Motion for Summary Judgment brought by Cincinnati, for 33 Carpenters Construction Inc. did not violate any Iowa code provisions in contracting for a valid post-loss assignment and thereafter negotiating its own claim directly with the insurer. Thus the reviewing Court should overturn the District Court's earlier grant of Summary Judgment, and remand this matter to the Scott County District Court for further proceedings, which should continue under the Expedited Civil Action Rule.

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 \$2.00.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Iowa R. App. P 6.903(1)(g)(1) because this brief contains 3,815 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. 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: s/ Kyle J. McGinn

Date: April 28, 2018

Certificate of Service

I hereby certify that on the 28th day of April, 2018, I served this document by electronic filing via Iowa Appellate EDMS to:

Shawn M. O'Brien
Catherine M. Lucas
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Obrien.Sean@bradshawlaw.com
Lucas.Catherine@bradshawlaw.com

I further certify that on the 28th day of April 2018, 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.

s/ Kyle J. McGinn
KYLE J. MCGINN