[Cite as *Mercedes-Benz of W. Chester v. Am. Family Ins.*, 2010-Ohio-2307.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MERCEDES-BENZ OF WEST CHESTER dba Elite Collision,	:	
Plaintiff-Appellant,	:	CASE NOS. CA2009-09-244 CA2009-09-245 CA2009-09-246
- vs -	:	O P I N I O N 5/24/2010
AMERICAN FAMILY INSURANCE,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY AREA III COURT
Case Nos. CVF0700713, CVF0701809, and CVF0701810

Becker & Cade, Dennis A. Becker, 526 A Wards Corner Road, Loveland, Ohio 45140, for plaintiff-appellant

Freund, Freeze, & Arnold, L.P.A., Michael C. Mahoney, One Dayton Centre, 1 S. Main Street, Suite 1800, Dayton, Ohio 45042-2017, for defendant-appellee

HENDRICKSON, J.

{¶1} Plaintiff-appellant, Mercedes-Benz of West Chester dba Elite Collision (Elite), appeals the decision of the Butler County Area III Court granting summary judgment to defendant-appellant, American Family Insurance (American Family). We affirm the decision of the trial court.[1]

{¶2} Three of American Family's insureds took their damaged vehicles to Elite

seeking repairs. Elite's management explained to the insureds that by signing an assignment of proceeds, American Family would pay Elite directly for the repairs and the insureds would avoid paying out of pocket expenses other than their deductibles. Once American Family reviewed the damage to each vehicle, it estimated the amount it would pay to repair the vehicles according to the insurance policy. However, Elite's repair charges in each case surpassed the amount American Family agreed to pay.

{¶3} In all three cases, American Family paid Elite the amount of money it estimated was necessary to repair the damages pursuant to the insurance contract. After American Family refused to pay the remaining charges, Elite brought three separate actions in Butler County Area III Court.[2]

{¶4} American Family, citing an anti-assignment clause in the insurance contract, filed a motion for summary judgment. The magistrate overruled the motion, finding that the anti-assignment provision did not apply and that genuine issues of material fact remained to be litigated. In sustaining American Family's objections to the magistrate's ruling, the trial court overruled the magistrate's decision and granted American Family's motion for summary judgment. Elite now appeals the trial court's decision, raising a single assignment of error.

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT IN GRANTING THE MOTION OF AMERICAN FAMILY INSURANCE FOR SUMMARY JUDGMENT."

{¶6} In its sole assignment of error, Elite asserts that the trial court erred in granting American Family's motion for summary judgment because the anti-assignment

1. Pursuant to Loc.R. 6(A), this case is hereby removed, sua sponte, from the accelerated calendar and placed on this court's regular calendar.
2. This court sua sponte consolidated the three cases for the sole purpose of this appeal.

clause within the insurance policy is not applicable to bar Elite's claim. This argument lacks merit.

{¶7} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶8} According to American Family's insurance contract, "interest in this policy may be assigned only with our written consent." While it is undisputed that American Family did not consent to the assignment, Elite nonetheless argues that summary judgment was inappropriate. Elite asserts that the trial court erred because the clause does not bar assignments. In support of its assertion, Elite relies primarily on two supreme court cases that review Ohio's law on assignment of insurance proceeds.

{¶9} *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co*., 112 Ohio St.3d 482, 2006-Ohio-6551, sets forth the general principle that all contract rights may be assigned except under certain conditions. *W. Broad Chiropractic v. American Family Insurance*, 122 Ohio St.3d 497, 2009-Ohio-3506, settled a split between Ohio's appellate districts and held that a person may not assign the rights to future proceeds if the right does not exist at the time of the assignment. Because neither case is directly on point nor dispositive of this appeal, we will discuss each case in greater detail and consider the

general insurance law principles discussed therein.

{¶10} *Pilkington* was before the Ohio Supreme Court on certified questions of law from the United States District Court for the Northern District of Ohio. The court's answer to the second question is particularly applicable to this case and addresses when an anti-assignment clause bars an assignment. However, the case is not factually on point because *Pilkington* dealt primarily with a duty to indemnify the originally-insured company's successor in interest, rather than assignment of proceeds to a third-party service provider.

{¶11} In the second certified question, the court reviewed the basic principle that "an insurance policy is a contract between an insured and the insurer. We should not disturb the plain language of such a contract when the intent of the parties is evident." Id. at ¶31. In order to determine whether the insurance policy permitted assignment, the court stated, "it is long-standing tradition in the common law that all contract rights may be assigned except under three conditions." Id. at ¶36.

{¶12} According to *Pilkington*, those three conditions are: (1) "if there is clear contractual language prohibiting assignment;" (2) if the assignment "materially change[s] the duty of the obligor, materially increase[s] the insurer's burden or risk under the contract, materially impair[s] the insurer's chance of securing a return on performance, or materially reduce[s] the contract's value;" or (3) "if it is forbidden by statute or by public policy." Id.

{¶13} The court went on to review the importance of anti-assignment clauses, including the proposition that such a clause protects the insurer against unforeseen increases in risk.

{¶14} The supreme court further clarified its anti-assignment jurisprudence in the

West Broad Chiropractic case by discussing the necessity of a vested right in the assigned property before valid assignment. Unlike *Pilkington's* discussion of assigning a duty to indemnify, *West Broad* involved the assignment of insurance proceeds that an injured driver expected to receive from the tortfeasor's insurance company. The court invalidated the assignment because at the time the injured driver agreed to assign the prospective proceeds to West Broad in return for medical services, no settlement proceeds actually existed and the injured driver had no rights to assign.

{¶15} The court found that "a vested right in the assigned property is required to confer a complete and present right on the assignee." *West Broad* at ¶14. In reaching its conclusion, the court also relied on *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, in which the court noted that assignments are not legally binding "in a suit for money damages against a third party who had not agreed to the terms of the assignment." *West Broad* at ¶18. After reviewing the relationship between the injured driver, West Broad, and the tortfeasor's insurance company, the court held that "West Broad had a contract that may be enforceable against [the injured driver], but it is not legally binding upon [the tortfeasor's insurer]." Id. at ¶20.

{¶16} The existence of a third party was also a factor the court considered when reviewing the public policy of anti-assignment clauses. After stating that several districts have upheld assignments in order to encourage settlement and avoid litigation, the court focused on circumstances where an assignment might actually produce the opposite effect. The court reasoned that "a chiropractor or other assignee expects full payment and lacks interest in negotiating the amount of debt. Likewise, the third-party insurer lacks the ability to dispute the amount or reasonableness of the charges." Id. at ¶22. Especially applicable to the case at bar, the court also reasoned that "upholding the

legality of such assignments opens the door for other creditors to seek debt protection through assignments: the pharmacy, the *automobile repair shop*, and other medical providers." Id. at ¶24. (Emphasis added.)

{¶17} Elite essentially argues that the anti-assignment clause did not bar the assignment of proceeds and that summary judgment is inappropriate because a trier of fact should determine the proper amount of damages to which Elite was entitled. By overruling the magistrate, and in granting American Family's motion for summary judgment, the trial court disregarded Elite's arguments and found instead that the anti-assignment clause invalidated the insured's assignment to Elite. In doing so, the trial court relied on *Pilkington* to determine that the anti-assignment clause invalidated any assignment absent American Family's consent, as well as the supreme court's public policy assessment in *West Broad*.

{¶18} Regarding the validity of the anti-assignment clause, the trial court properly applied *Pilkington* to determine that the clause was valid. Although Ohio's long-standing tradition is that all contractual rights may be assigned, the *Pilkington* court noted three exceptions, the first being clear contractual language prohibiting assignment.

{¶19} As referenced above, American Family's insurance contract contained an anti-assignment clause, which unambiguously stated that "interest in this policy may be assigned only with our written consent." Because an insurance policy is a contract between an insured and the insurer, we will not disturb the plain language of the contract when the intent of the parties is evident, as it is in this clause. Since American Family did not consent to the assignment, any attempt to assign interest in the policy is invalid. See *J.G. Wentworth LLC v. Christian*, Mahoning App. No. 07 MA 113, 2008-Ohio-3089, ¶38 (upholding anti-assignment clause where contract contained clear

language that rights could not be assigned).

{¶20} Secondly, we note that had the assignment been validated, it would have materially changed American Family's duty and materially increased its burden or risk under the contract. Specifically, had Elite been assigned the insured's interest in the policy to seek proceeds for their damaged vehicles, American Family would have no recourse to challenge or dispute Elite's declaration of the proper amount of damages. While the insureds have a general right to contest a coverage estimate from American Family, the right to negotiate is markedly different than a third party's demand for payment in full. Supplanting the right of negotiation between an insured and its insurer with an obligation to pay an invoice increases an insurer's burden and risk under any policy.

{¶21} If the anti-assignment clause were not to stand, and as demonstrated in the case at bar, American Family would be forced to pay whatever amount is charged by a third party or face litigation. The threat of facing increased litigation certainly raises the burden and risk under any contract should the anti-assignment be invalidated.

{¶22} We also note that American Family never agreed to insure or owe duties to Elite, as it did the insureds. By seeking assignment, Elite tried to create contractual privity between itself and American Family, and now claims that American Family owes it money simply because it charged a certain amount for repairs. At best, and as is stated in *West Broad*, the only contractual privity that existed is between Elite and its three insureds. Without conforming to proper contract formation requirements, Elite cannot impute a legally binding obligation to pay against American Family based simply on an invalid assignment. To find otherwise would place an undue risk and burden on American Family, and would violate the legal principles found in *Pilkington.*

{¶23} Regarding the third condition, the assignment is also prohibited by public policy. The *West Broad* court declined to uphold the assignment in that case based on several public policy concerns that have played themselves out in this case. Primarily, Elite's attempt to receive the insured's interests in their policy encourages litigation in lieu of settlement. Like the chiropractor in *West Broad*, Elite expects full payment for its services, and is not in the business of negotiating its customers' debt. Instead, Elite demanded payment in full for the repairs it performed on the vehicles. When it did not receive full payment from American Family, Elite filed multiple suits seeking the outstanding balance in each situation. Assigning the right to seek proceeds to Elite, therefore, increases the likelihood of litigation rather than relying on any negotiation settlement the insureds could have achieved with their insurer.

{¶24} The supreme court's prophetic inclusion of "the automobile repair shop" in its warning against the legality of assignments as a means for seeking debt protection is also confirmed in the case at bar. Although Elite lacked any contractual privity with American Family, it demanded payment from American Family based solely on what charges it considered reasonable. Instead of seeking the balance from American Family insureds, Elite filed suit against American Family itself even though the anti-assignment clause barred any assignment of interest to Elite.

{¶25} The court noted this factor when considering the impact assignments would have on an insurer should another party demand payment in full of its charges. "Likewise, the third-party insurer lacks the ability to dispute the amount or reasonableness of the charges." *West Broad* at ¶22. Although American Family directly insured the three parties who took their vehicles to Elite, the warning remains the same because once American Family received Elite's demand for payment, its only means to

contest the amount or reasonableness of Elite's charges was to limit its payment to its original coverage estimation. As a result, Elite then filed suit, and brought before the courts a matter that should have been resolved between American Family and its insureds according to their insurance contract.

{¶26} Elite argues that American Family would not be required to "blindly pay over whatever funds are demanded" by Elite as was suggested by the trial court in its decision to grant summary judgment. Instead, Elite suggests that a trier of fact could determine that American Family's estimation was sufficient to restore the insureds' vehicles to their pre-loss condition, thereby denying Elite's request for payment in full. However, Elite's assertion disregards the supreme court's warning that upholding assignments in the face of a valid anti-assignment clause opens the door for creditors to seek assignments as a means of debt protection. Elite's theory of litigating every anti-assignment provision because a court *could* determine what estimates and charges are reasonable would subject the courts to resolve issues that are rightfully left to negotiations between the insurer and its insured according to their contract.

{¶27} Beyond the validity of the non-assignment provision, we also note that several errors occurred in the implementation of the assignments. For example, the assignment from one insured, David Stephen, was completed by Elite's office manager, rather than the insured. Out of the 12 blanks on the assignment page, only four were filled in, leaving blank other information such as the date of the accident or where it occurred. Notably, Elite also left the section stating the dollar amount of the loss blank so that American Family had no idea how much Elite was trying to collect or what the insured seemingly agreed to assign. Elite also filled in the wrong policy number on the assignment form, and Stephen's signature was not witnessed as was required by the

form.

{¶28} More disturbingly, the assignment made by Stephanie Nett is invalid in that she was not insured by American Family. Instead, the insured was Anthony Clemens, who did sign on the insured line in addition to Nett's signature. However, according to the assignment form, Nett was designated as the undersigned and the form is written as if Nett was agreeing to assign interest in the American Family policy. Most importantly, the form states that "I hereby assign any outstanding claim I may have against American Family Insurance Company****" and "I hereby assign unto Elite *** any and all claims, demands, causes of action of whatever kind and nature which I have had or now have against American Family Insurance Company ***." While Elite asks this court to treat Nett and Anthony Clemens as "one in the same," the assignment is facially invalid in that it was not specific to Clemens, who was the rightfully insured under American Family's policy.

{¶29} Having found that the anti-assignment clause is valid under *Pilkington* and comports with public policy according to *West Broad*, the clause invalidates the insureds' attempt to assign their contractual rights to Elite. As there are no genuine issues of material fact to be litigated, the trial court's grant of summary judgment was correct, and Elite's assignment of error is overruled.

{¶30} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.