THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0156

KEENE AUTO BODY, INC.
Plaintiff / Appellant

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Defendant / Appellee

BRIEF OF *AMICI CURIAE* NEW HAMPSHIRE AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF PETITIONER / APPELLANT FILED BY CONSENT OF THE PARTIES

Appeal Pursuant to Supreme Court Rule 7 from
8th Circuit – District Division – Keene, Small Claims Division
Docket No. 449-2021-SC-00079

Attorneys for New Hampshire Automobile Dealers Association

Bernstein, Shur, Sawyer & Nelson, P.A.
Edward J. Sackman, Esq., Bar No. 19586
Hilary H. Rheaume, Esq., Bar No. 265510
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
nsackman@bernsteinshur.com
hrheaume@bernsteinshur.com
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Oral Argument by Edward J. Sackman, Esq.

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IDENTITY OF *AMICI CURIAE*

The New Hampshire Automobile Dealers Association ("NHADA") is a voluntary nonprofit association of New Hampshire collision repair shops and mechanical repair shops as well as farm equipment, construction equipment, power equipment, motor vehicle, truck, motorcycle, snowmobile, and off-highway vehicle dealers that exists to represent the repair shop owners and dealers in many facets of their business operations. NHADA has served as the voice of its members since 1921 and represents over 550 businesses with over 13,000 employees.

NHADA has worked over the years to make the automotive retail and service industry responsive to the needs of the motoring public. NHADA has worked with the legislature as well as administrative agencies, including the New Hampshire Department of Safety, the New Hampshire Division of Motor Vehicles, the New Hampshire Department of Insurance, and the New Hampshire Attorney General's Office on issues involving the safety of vehicles, repair procedures, repair reimbursement, warranty disclosures and disclaimers, consumer relations and complaints. The issues in this case regarding post-loss assignments and an insurance company's refusal to pay for repairs required by an original equipment manufacturer, including repairs that could impact the safety of a vehicle, are issues that are vital to the NHADA and its membership, and in particular to the more than 100 NHADA member businesses involved in collision repair.

Both parties to the matter on appeal consent to the NHADA's submission of this brief.

QUESTIONS PRESENTED

1. Did the 8th Circuit – District Division – Keene, Small Claims Division (the "Trial Court") err when it granted the Defendant / Appellee, State Farm Mutual Automobile Insurance Company's ("State Farm") Motion to Dismiss on the basis that the Insured's post-loss assignment of an insurance claim to the Plaintiff / Appellant, Keene Auto Body, Inc. ("Keene Auto") was barred by an anti-assignment provision in the applicable insurance policy (the "Policy")? *See Mot. to Dismiss, Appendix (hereinafter referred to as "App") at 6-8; Obj. to Mot. to Dismiss ("Obj. to Mot. to Dismiss"), App. at 100-01, 103-04; Reply to Obj. to Mot. to Dismiss ("Reply"), App. at 107-08; Sur-reply to Reply to Obj. to Mot. to Dismiss ("Sur-reply"), App. at 16.*

2. Does the anti-assignment provision in the Policy prevent an Insured from assigning the Insured's right to recover claim proceeds from State Farm to a third party after the loss has occurred, i.e., post-loss? *See Mot. to Dismiss, App. at 6-8; Obj. to Mot. to Dismiss, App. at 100-01, 103-04; Reply, App. at 107-108; Sur-reply, App. at 116.*

3. Did the Trial Court err in applying the motion to dismiss standard when it accepted factual allegations asserted by State Farm in the Motion to Dismiss that were not supported by the record pled in the Complaint? *See Sur-reply, App. at 116-17.*

4. Did the Trial Court err when it granted State Farm's Motion to Dismiss on the basis that State Farm paid a fair and reasonable price for the repairs? *See Sur-reply, App. at 116-17.*

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

The Plaintiff / Appellant, Keene Auto Body, Inc. ("Keene Auto") filed a lawsuit, *pro se*, against the Defendant / Appellee, State Farm Mutual Automobile Insurance Company ("State Farm") in the 8th Circuit – District Division – Keene, Small Claims Division to recover insurance proceeds that Keene Auto asserts are due to Keene Auto, pursuant to a post-loss assignment by the Insured, Caleb Meagher (the "Insured"), to Keene Auto. (*See* App. at 5.)

State Farm subsequently moved to dismiss Keene Auto's claims for two reasons. (*See* App at 6-11.) First, State Farm argued that Keene Auto did not have standing to assert the claim on the basis that the Insured's post-loss assignment of the claim was invalid because the Insured's automobile insurance policy (the "Policy") included an anti-assignment provision. (*See* App. at 6-9.) Second, State Farm argued that it acted in accordance with New Hampshire law when it paid a "fair and reasonable price" for the repairs to the vehicle and, thus, the Insured and / or Keene Auto were not entitled to any additional insurance proceeds. (*See* App. at 9-11.)

Keene Auto filed an Objection to the Motion to Dismiss, in which it primarily made two points. First, Keene Auto explained that its standing to assert a claim against State Farm for the disputed insurance proceeds arose out of the Insured's post-loss assignment of the claim to Keene Auto. (App. at 100-01, 103-04, 116.) Further, Keene Auto argued that the anti-assignment provision did not bar the Insured's ability to assign the right to collect on a claim to a third-party after the loss giving rise to that claim occurred. (*See id.*) Second, Keene Auto argued that State Farm did not pay a fair and reasonable

price for the repairs, since State Farm refused to remit payment for repairs that were required by the original equipment manufacturer ("OEM"). (*See* App. at 99-106, 116-17.)

State Farm filed a Reply to Keene Auto's Objection, in which it reiterated the arguments set forth in its Motion to Dismiss. (*See* e.g., App. 107-10.) In response, Keene Auto filed a Sur-reply, in which Keene Auto re-asserted that the anti-assignment provision does not bar a post-loss assignment and State Farm refused to pay a fair and reasonable price for the repairs. (*See* e.g., App. 116-17.)

On April 5, 2021, the Trial Court (*Gleason*, J.) granted State Farm's Motion to Dismiss without a hearing. The Court did not issue a narrative order, but rather included a margin order that the Motion to Dismiss was "Granted." (*See* App. at 6.) Keene Auto now appeals the Trial Court's decision to grant State Farm's Motion to Dismiss. Because it is unclear which of State Farm's arguments the Trial Court accepted, NHADA will address both.

II. Statement of the Facts

The Insured has an automobile insurance policy (the "Policy") with State Farm for his vehicle (the "Vehicle"). (*See* App. at 5.) At some point, the Vehicle was damaged, and pursuant to the Policy, the Insured submitted a claim to State Farm. (*Id.*)

In relevant part, the Insured's Policy with State Farm includes the following type of coverage for damage to the Vehicle:

> **Physical Damage Coverages**
>
> Any amount payable for the repair or replacement of the ***covered vehicle*** under the **Limits and Loss Settlement –**

> **Comprehensive Coverage and Collision Coverage** provision of this policy will be limited to the cost to repair or replace the ***covered vehicle*** in the United States of America.

(*See* App. at 85 (emphasis in original.)) In other words, in the event of a loss, State Farm, at its election, must pay the Insured either (1) the cost to repair the vehicle to pre-loss condition, or (2) the cost to replace the covered vehicle. (*See id.*) The Parties are less than clear about which of these two options applied to the repairs of the Vehicle, but as discussed below, either one would require a finding of fact in order to determine the correct amount owed for the repair.

The Insured brought the Vehicle to Keene Auto for repairs. (App. at 5.) Although State Farm never inspected the Vehicle, it prepared a repair estimate for Keene Auto. (App. at 104.) Keene Auto discovered that the State Farm repair estimate failed to comply with the original equipment manufacturer's ("OEM") procedures, so Keene Auto provided an "errors and omissions" statement to State Farm for review. (*Id.*) The errors and omissions statement listed the additional repairs that Keene Auto needed to perform, in accordance with the OEM procedures, to return the Vehicle to its pre-loss condition, including:

OEM Required Task	Price
Application of disinfectant to avoid the spread of COVID-19	$80.00
Pre- and post-repair exterior wash	$30.00
Technology and software scan	$169.95
Replace pad and emblem parts	$45.52
Headlamp	$269.76
Replace absorbers	$238.95
Disable airbags for repairs	$21.00
Perform an occupant classification system recalibration	$21.00
Finish, sand and buff the Vehicle	$36.00
Aim millimeter wave radar	$131.25

Transport for aim radar	$100.00
Tint color for paint match of Vehicle	$30.00

(App. at 102.)[1]

Simultaneously, the Insured authorized Keene Auto to repair the Vehicle in accordance with the OEM procedures to ensure the safety of the Vehicle. (App. at 100-02.) As a result, Keene Auto performed the authorized repairs on the Vehicle, including the repairs that were required by the OEM procedures, even though such repairs were pending authorization from State Farm. (*Id.*)

Upon performing the repairs, Keene Auto obtained a labor lien on the Vehicle by operation of New Hampshire law. (*See* App. at 100); *see also* R.S.A. 450:2. Since Keene Auto held a labor lien on the Vehicle, the Insured was not authorized to remove the repaired Vehicle from Keene Auto without paying for the authorized repairs in full. *See id.*

Keene Auto presented the Insured with an alternative solution: Keene Auto would allow the Insured to pick-up the Vehicle, in exchange for (1) payment of the repairs authorized by State Farm, and (2) a post-loss assignment of the disputed funds that State Farm owed to the Insured for the "actual cash value" of the Vehicle. (*See* App. at 100.) The Insured agreed with Keene Auto's alternate proposal and assigned his rights to recover the disputed funds to Keene Auto. (*See* App. at 5, 100.)

[1] This list does not include all of the items listed in Keene Auto's Objection. (*See* App. at 102.)

Despite the foregoing, State Farm refused to pay the disputed costs to Keene Auto.[2] (App. at 5.) As a result, Keene Auto, as an assignee under the Policy, filed a Small Claims Complaint for breach of contract against State Farm in the 8th Circuit – District Division – Keene, entitled *Keene Auto Body, Inc. v. State Farm Mutual Automobile Insurance Company*, Docket No. 449-2021-SC-00079, on February 10, 2021. (*See* App. at 3-5.) As set forth above, State Farm has relied on the following anti-assignment provision in the Policy to argue that the Insured could not perform a post-loss assignment of the disputed funds to a third party:

> **Assignment**
>
> No assignment of benefits or other transfer of rights is binding upon ***us*** unless approved by ***us***.

(*See* App. at 6-8, 88.) In the instant litigation, the Parties dispute the applicability of the anti-assignment provision to the Insured's post-loss assignment of his right to recover the disputed funds to Keene Auto. Additionally, the Parties dispute whether State Farm violated its obligations under the Policy when it refused to pay for OEM required repairs on the Vehicle.

STANDARD OF REVIEW

"On an appeal from an order granting a motion to dismiss, the only issue raised is whether the allegations are reasonably susceptible of a construction that would permit recovery. We will assume the truth of both the facts alleged in the plaintiff's pleadings and all reasonable inferences therefrom as construed most favorably to the plaintiff." *Trahan-Laroche v.*

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[2] State Farm also refused to pay the disputed funds to the Insured. (*See* App. at 5.)

Lockheed Sanders, Inc., 139 N.H. 483, 485 (1995). Notably, the Court may not consider "'factual defenses' in reviewing motions to dismiss for failure to state a cause of action." *Mountain Springs Water Co., Inc. v. Mountain Lakes Village Dist.*, 126 N.H. 199, 201 (1985). In civil cases where the plaintiff appears *pro se*, the court must construe the pleadings liberally and afford the *pro se* plaintiff the benefit of any doubt. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

The Court "must reverse the trial court's decision if, when viewing [the plaintiff]'s writ in the light most favorable to the [plaintiff] and construing all inferences therefrom in the [plaintiff]'s favor, the writ states any cause of action upon which relief may be granted." *Russell v. Philip D. Moran, Inc.*, 122 N.H. 708, 709 (1982).

SUMMARY OF ARGUMENT

The NHADA first argues that the Court should adopt the majority rule on anti-assignment provisions, which refuses to enforce such provisions when the assignment occurs after the loss giving rise to liability. Courts adopting the rule note that anti-assignment provisions exist to allow the insurer to control its risk of a claim under the policy, but the assignment of the right to receive proceeds on a claim does not increase the risk to the insurer. Jurisdictions throughout the country have adopted the rule with only limited exceptions. This Court has not, to NHADA's knowledge, adopted the rule, but two decisions from the New Hampshire courts support its adoption. If the rule is adopted, the Trial Court's decision must be reversed because, although the Trial Court did not provide a written analysis, its order granting dismissal appears to have accepted State Farm's argument that Keene Auto's claim failed because of the anti-assignment provision in the Insured's Policy.

The Trial Court's decision must also be reversed because it rested upon findings of fact that were either inappropriate on a motion to dismiss or unsupported by the record. The second argument in State Farm's motion to dismiss asserted that State Farm complied with New Hampshire law by paying a "fair and reasonable price" for the repair of the Insured's Vehicle. To the extent the Trial Court accepted that argument, it necessarily would have had to make factual findings regarding how State Farm determined a price that was fair and reasonable. Such findings are inappropriate on a motion to dismiss, where the Trial Court was bound to take all facts that Keene Auto asserted as true and ask whether Keene Auto stated a valid breach of contract claim, which it did. Further, the Trial Court could not have properly made this factual determination based upon the facts in the record before it, and its decision must be reversed for that reason as well.

ARGUMENT

I. The Court should adopt the majority rule on anti-assignment provisions in insurance contracts and refuse to apply them when the assignment occurs post-loss.

1. The great majority of decisions in other jurisdictions support adoption of the rule.

The enforceability of anti-assignment provisions when the assignment occurs post-loss has been a topic of litigation across the country for nearly a century. A majority position has emerged from these decisions such that "[a]n overwhelming number of jurisdictions around the country accept the legal rule voiding restrictions on post-loss claim assignments." *Givaudan Fragrances Corp. v. Aetna Cas. & Surety Co.*, 151 A.3d 576, 579 (N.J. 2017). "Most courts and commentators agree that post-loss assignment of payment under an insurance

policy is not subject to a consent-to-assignment clause for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising thereunder." *In re Ambassador Ins. Co., Inc.*, 965 A.2d 486, 490 (Vt. 2008) (*citing* Couch on Insurance § 35.7). The majority rule makes sense because "the purpose of the no-assignment clause in insurance contracts [ ] is to protect the insurer from increased liability," but "once an event occurs that triggers an insurer's liability, the insurer's risk cannot be increased by a change in the insured's identity." *Id.* at 490-91 (*internal citations and quotations omitted*).

Thus, the highest courts in jurisdictions from Maine to California have recognized the post-loss assignment rule. *See, e.g., Givaudan*, 151 A.3d at 579 (New Jersey); *Millard Gutter Co. v. Farm Bur. Prop. & Cas. Ins. Co.*, 889 N.W. 2d 596, 605 (Neb. 2016); *In re Viking Pump, Inc.*, 148 A.3d 633, 652 (Del. 2016) (applying New York law); *Fluor Corp. v. Superior Court*, 354 P.3d 302, 330 (Cal. 2015); *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 688 (Ky. 2012); *In re Ambassador Ins. Co.*, 965 A.2d at 490 (Vermont); *Pilkington North America, Inc. v. Travelers Cas. & Surety Co.*, 861 N.E.2d 121, 129 (Ohio 2006); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1223 (Pa. 2006); *Bolz v. State Farm Mut. Auto. Ins. Co.*, 52 P.3d 898, 908 (Kan. 2002); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001); *Antal's Restaurant v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388 (D.C. 1996); *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 881 P.2d 1020, 1027-28 (Wash. 1994); *see also Utica Mutual Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 468 A.2d 315, 317 (Me. 1983) ("Under the doctrine of assignment, after the fire loss had occurred, the [insureds] were free to sell to a third party whatever claim they may have had against their insurer.").

Caselaw from lower courts around the country is consistent. *See, e.g.*, *Millard Gutter Co.*, 889 N.W.2d at 427-28 (collecting cases and organizing them by subject matter); *Conrad Bros.*, 640 N.W.2d at 237 (citing cases from Delaware, Florida, Illinois, Michigan, Missouri, New Jersey, North Carolina, Pennsylvania, Texas, Washington, Wisconsin and West Virginia); *Antal's Restaurant*, 680 A.2d at 1388 (citing cases from Alabama, California, Georgia, Illinois, Maine, New York, and Wisconsin); *see also Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 170 (2d Cir. 2006) ("As a general matter, New York follows the majority rule that such a provision is valid with respect to transfer that were made prior to, but not after, the insured-against loss has occurred."). The rule has also been applied in cases involving automobile insurance policies. *See Gutter Co.*, 889 N.W.2d at 427 n.22 (collecting cases). The highest courts in Maine and Vermont have applied the rule, and at least one court in Massachusetts has done so as well. *See In re Ambassador Ins. Co.*, 965 A.2d at 490 (Vermont); *Utica Mutual Ins. Co.*, 468 A.2d at 317 (Maine); *Mass. Elec. Co. v. Commercial Union Ins.*, 20 Mass. L. Rptr. 145, at *2 (Mass. Super. Ct. 2005). As the Supreme Court of Iowa put it, "[t]he great weight of authority supports the rule that an anti-assignment clause does not apply to the assignment of claims arising after the loss." *Conrad Bros.*, 640 N.W.2d at 237. Notably, that quotation is from twenty years ago, and the march towards near universal adoption of the rule has only continued since then.

There are a handful of jurisdictions that take the opposite approach, typically relying on principles of contract construction. *See Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund*, 183 P.3d 734, 747 (Haw. 2007); *In re Katrina Canal Breaches Litig.*, 63 So.3d 955, 959 (La. 2011); *Holloway v. Republic Indemnity Co. of America*, 147 P.3d 329, 333-34 (Ore. 2006). As the California

Supreme Court notes, however, they are very much in the minority, and they have been subject to "scathing criticism" by academic commentators. *Fluor*, 354 P.3d at 327 n.46. For the reasons discussed below, the majority rule is the better rule and the one more in accord with prior New Hampshire decisions.

2. The rule is based on sound public policy considerations.

There are several policy rationales for the rule voiding anti-assignment clauses as applied to post-loss assignments. The most frequently cited one is that, although maintaining control over the assignment of a personal contract is an appropriate way for insurers to manage their risk, once the loss has occurred assignment of the right to collect does not increase the insurer's risk. This reason was most notably articulated in *Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co.*, 100 F.2d 441 (8th Cir. 1939) (applying Missouri law), *cert. denied*, 306 U.S. 658 (1939), in which the Eighth Circuit explained:

> It is generally true that an executory contract in which the personal character of one of the parties is an important element is not assignable without the consent of the parties….But generally, again, after the event occurs giving rise to the liability the reason for the rule disappears and the cause of action arising under the policy is assignable.

Id. at 444. Other decisions have noted that the rule in *Ocean Accident* "was quickly and nearly universally adopted by courts around the country." *Givaudan Fragrances Corp.*, 151 A.3d at 588; *see also Fluor*, 354 P.3d at 325. The absence of any increased risk to the insurer continues to play a role in decisions adopting the rule today. *See, e.g., Givaudan Fragrances Corp.*, 151 A.3d at 588; *Millard Gutter Co.*, 889 N.W. 2d at 602-03; *Fluor*, 354 P.3d at 325.

Although the lack of prejudice to the insurer seeking to enforce the clause is the primary basis provided for the rule, the caselaw reveals several

others. More than one court has characterized the right sought to be assigned as a "chose in action," meaning a "right to bring an action to recover a debt, money, or thing." *Star Windshield Repair, Inc. v. Western Nat'l Ins. Co.*, 768 N.W.2d 346, 351 (Minn. 2009) (Barry, J., concurring) (*citing* Black's Law Dictionary 258 (8th ed. 2004)).[3] Having so characterized the right, courts have justified their adoption of the rule on the grounds of the "deeply rooted public policy against allowing restraints on alienation of choses in action." *Givaudan Fragrances Corp.*, 151 A.3d at 586-87(*citing Wehr Constructors, Inc.*, 384 S.W.3d at 688 and *Bolz*, 52 P.3d at 908). Another court has noted that if an insurer were permitted "to avoid its contractual obligations by prohibiting all post-loss assignments, we would be granting the insurer a windfall." *Conrad Bros.*, 640 N.W.2d at 238. And recently, the California Supreme Court explained that "the rule has been acknowledged as contributing to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement." *Fluor*, 354 P.3d at 330. Thus, any serious consideration of the case law must acknowledge that the rule barring anti-assignment clauses as applied to post-loss assignments stands on firm policy grounds.

[3] The Supreme Court of Minnesota considered application of an anti-assignment provision in the context of a post-loss assignment, and a majority of the Court concluded that the clause was unenforceable based upon the statutory framework of Minnesota's No Fault Automobile Insurance Act, and declined to answer the broader question of whether anti-assignment clauses are enforceable. *Star Windshield Repair, Inc.*, 768 N.W.2d at 350. The Court noted that its decision was in accordance with the majority rule on post-loss assignments, *see id.* at 350 n.6, and Justice G. Barry Anderson authored a concurrence indicating he would have adopted the rule. *Id.* at 351-52.

3. The rule applies in a broad range of scenarios.

Over the years courts have applied the rule in multiple scenarios. The Nebraska Supreme Court collected the varying types of actions in which the rule has applied in its recent decision adopting the rule. *See Millard Gutter Co.*, 889 N.W. 2d at 601-02. One distinction that several courts have noted when examining the rule is the difference between first party and third party insurance policies. First party insurance covers damage to the person or property of the insured, such as in a fire insurance policy. *Fluor*, 354 P.3d at 312 n.14. Third party insurance, on the other hand, covers damages that the insured causes to other parties. *Id.* at 312 n.15. Some courts have noted that, although assigning a claim post-loss is straightforward in the case of first party insurance policies, it becomes more complicated when third party insurance policies are involved. *See, e.g., Givaudan Fragrances Corp.*, 151 A.3d at 587; *Fluor*, 354 P.3d at 312. Nevertheless, these courts have applied the rule to cases involving third party insurance, tracing their approach back to *Ocean Accident*, in which the Eighth Circuit explained that "[t]he reason of the restriction is, that the company might be willing to write a risk for one person of known habits and character and not for another person of less integrity and prudence, but after loss this reason no longer exists." *Givaudan Fragrances Corp.*, 151 A.3d at 588 (*quoting Ocean Accident*, 100 F.2d at 446); *see also Fluor*, 354 P.3d at 323-26.

Courts have also considered the application of the post-loss assignment rule in cases where the assignment occurs by operation of law. In those cases, the "assignment" is said to occur by operation of law when one company merges with another company, purchases its assets, and assumes its liabilities, including its obligations to make payments under existing insurance policies.

See, e.g., Imperial Enterprises, Inc. v. Firemen's Fund Ins. Co., 535 F.2d 287, 289 (5th Cir. 1976). When claims arise that occurred during the period of the prior company's insurance policy, the insurers have sought to avoid their coverage obligations by arguing that they never consented to the assignment since it occurred by operation of law. This argument frequently comes up in cases involving long tail liabilities for claims arising from environmental or asbestos injuries. *See, e.g., Givaudan Fragrances Corp.*, 151 A.3d at 579-80 (environmental claims); *Fluor*, 354 P.3d at 307-08 (asbestos claims). As with the third party policy arguments, courts have rejected these arguments by noting that the risk the insurer agreed to protect against pre-transfer does not change post-transfer. As the Ninth Circuit Court of Appeals explained, the rationale for enforcing a consent-to-assignment provision "vanishes when liability arises from presale activity" because "regardless of any transfer the insurer still covers only the risk it evaluated when it wrote the policy." *Northern Ins. Co. of New York v. Allied Mut. Ins.*, 955 F.2d 1353, 1358 (9th Cir. 1992); *see also Givaudan Fragrances Corp.*, 151 A.3d at 588; *Fluor*, 354 P.3d at 330; *Ocean Accident*, 100 F.2d at 446.

Insurance carriers have also sought to avoid coverage by redefining when the "loss" occurs, but with limited exceptions, courts have consistently rejected those attempts. For example, in *Fluor*, the defendant insurance company argued that the loss did not occur at the time of the accident, but rather once the loss was reduced to a fixed sum. *Fluor*, 354 P.3d 316. *Fluor* was considering the question in the context of construing a California statute, but other courts have considered the same argument in cases where no state statute applied. *See, e.g., Givaudan Fragrances Corp.*, 151 A.3d at 588; *Viking Pump*, 148 A.3d at 652; *Public Util. Dist. No. 1*, 881 P.2d at 1027. These

authorities hold that the loss occurs at the time of the event giving rise to liability. In *Fluor*, the California Supreme Court buttressed its holding with an exhaustive discussion of the treatment of the issue over the years, beginning with *Ocean Accident* and carrying forward to the present. *See Fluor*, 354 P.3d at 326-27 (collecting modern cases citing to *Ocean Accident* for this principle from Delaware, Illinois, Minnesota, Ohio, Pennsylvania, South Carolina, and Vermont).[4] The primary argument that the insurance companies have advanced in favor of waiting until the loss has been reduced to a sum certain is that future events may yet impact the amount of the loss. But, as the Supreme Court of Pennsylvania noted, the insurers' arguments in this regard "confuse[ ] loss with the subsequent fixing of a precise amount of damages for that loss." *Eggers*, 903 A.2d at 1227. That is, the loss and the liability that comes with it occur at the time of the accident or other liability-creating event, and regardless of what the loss ultimately turns out to be, the risk of that loss is something the insurer agreed to assume when it wrote the policy. Driving this point home, some of the decisions rejecting the insurers' argument have noted that the policy was an occurrence-based policy, meaning that it was the occurrence of the loss that triggered coverage, not final judgment. *See, e.g., Givaudan Fragrances Corp.*, 151 A.3d at 579. The Policy at issue here is an occurrence-based policy. (*See* App. at 85.)

[4] Indiana appears to be the only jurisdiction in which the highest court has accepted the insurer's arguments. *See Travelers Casualty & Surety Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1179-80 (Ind. 2008).

4. The rule applies independently of traditional principles of construction for insurance policies.

NHADA acknowledges the usual rule that in New Hampshire insurance policies are construed in order to carry out the intent of the contracting parties by reviewing the plain meaning of the terms of the policy. *E.g., Russell v. NGM Ins. Co.*, 170 N.H. 424, 428 (2017). The post-loss assignment rule is not a rule of construction, however. It applies where the policy language unambiguously prohibits post-loss assignments. The other authorities adopting the rule do not do so by finding ambiguity in the policy language and construing it against the insurer. Rather, they justify their application of the rule by reference to the policy considerations that animate it, and with the knowledge that it "contradict[s] the clear text of many insurance policies and the courts' expressed fidelity to contract language." *Fluor*, 354 P.3d at 330 (*quoting* 1 Stempel on Insurance Contracts § 3.15[D]).

5. Adopting the rule would be consistent with prior New Hampshire decisions involving similar issues.

Finally, although NHADA is not aware of any New Hampshire Supreme Court decision adopting the proposed rule, there are two decisions from New Hampshire courts that are relevant to the discussion. In *Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co.*, 52 A. 860, 71 N.H. 445 (1902), this Court considered whether the transfer of the right to insurance proceeds to a mortgagee of the subject property voided the policy, and concluded it did not. In that case, the plaintiff, Breeyear, obtained a fire insurance policy on certain buildings that was payable to a third party known as Dearborn, who held a mortgage on the buildings. *Id.* at 860. Dearborn then transferred the mortgage to another third party known as Beaudry, and with it the right to the

insurance proceeds. *Id.* Beaudry subsequently borrowed money from Pittsfield Savings Bank and pledged the Dearborn mortgage as security, assigning with the mortgage the rights to collect on the policy. *Id.* The buildings were then destroyed in a fire, and the defendant insurance company refused payment of the policy proceeds to Pittsfield Savings Bank because the insurance policy contained a clause voiding it if assigned without the insurer's consent. *Id.*

This Court rejected the insurer's argument. It explained that the anti-assignment provision should not apply because the "[t]he object of the provision…was to prevent an increase of the moral risk by the substitution of a person for the insured in whose custody and care the property would become more likely to be burned," and "[t]he assignments made no such substitution." *Id.* at 860-61. In other words, just as in the cases discussed above, because the risk to the insurer did not increase, the anti-assignment clause did not apply. There is no analytical reason why the rule would not apply here to bar State Farm from enforcing the anti-assignment clause in its policy since the assignment occurred post-loss.

Similarly, the New Hampshire federal district court refused to apply an anti-assignment provision in a case where the assignment arose by operation of law. *See Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994). In that case, the plaintiff, Total Waste Management ("TWM"), brought a declaratory judgment action seeking coverage from multiple insurance carriers in connection with an underlying case in which Kleen Laundry sought to hold TWM liable for contamination at its facility. *Id.* at 142. In the underlying action, the court had found evidence potentially linking one of TWM's predecessors, a company known as George West &

Sons ("George West"), to contamination at the site, and at the time of the *Total Waste Mgmt.* opinion there were open questions as to whether it would be proven that George West caused the contamination in the underlying action and whether TWM would be established as its successor in liability. *Id.* at 142-43. TWM argued that, if the court in the underlying action concluded that TWM was George West's successor in liability, it should also conclude that TWM succeed to George West's assets, including coverage under an insurance policy written by defendant Maine Bonding, which covered George West. *Id.* at 150. For its part, Maine Bonding argued that the policy could not be assigned because it contained an anti-assignment clause. *Id.* at 152.

The federal district court (*DiClerico*, J.) noted that assignments could occur by operation of law. *Id.* at 150. It then rejected Maine Bonding's argument, explaining that "[t]he rationale for consent to assignment clauses is to protect insurers from unforeseen risks." *Id.* at 152. Further, "[c]ourts refuse to apply no assignment clauses to transfers occurring by operation of law because these transfers do not entail any increase in the risk or hazard assumed by the insurer…An insurer's risk does not increase where the loss or liability arose prior to the transfer." *Id.* Thus, it appears that in at least one decision a New Hampshire court has applied the rule proposed. Although *Total Waste Management* is not binding on this Court, it represents persuasive local authority consistent with the national trend.

6. New Hampshire should adopt the rule and reverse the Trial Court's decision on that basis.

For the reasons set forth above outlining the policy rationale for the rule, and in view of the *Breeyear* and *Total Waste Management* decisions, New Hampshire should join the majority of jurisdictions and adopt the rule that

anti-assignment provisions in insurance policies cannot bar post-loss assignments.

Applying that rule here, this Court must reverse the Trial Court's decision. The Complaint alleges that State Farm's Insured did not assign his claim to Keene Auto until after the loss occurred. (*See* App. at 5, 7.) Although it is unclear which of State Farm's arguments the Trial Court accepted in granting the motion to dismiss, the anti-assignment provision in State Farm's policy was its primary argument and therefore most likely the one that the lower court relied upon in issuing its ruling. If the Court adopts the proposed rule, the Trial Court should not have dismissed the case on the basis of State Farm's anti-assignment provision and its decision must be reversed.

II. The Court should reverse the Trial Court Order because (1) Keene Auto alleged sufficient facts to survive dismissal, and (2) the Trial Court misapplied the motion to dismiss standard.

In addition to the foregoing, the Trial Court erred when it granted the Motion to Dismiss for at least two other reasons. First, Keene Auto alleged sufficient facts in the Complaint to establish a breach of contract claim and, thus, survive dismissal. Second, the Trial Court misapplied the motion to dismiss standard when it made factual determinations, and when it entertained a factual defense that was unsupported by the record.

1. Keene Auto alleged sufficient facts in the Complaint to establish a breach of contract claim.

The Trial Court erred when it granted the Motion to Dismiss because Keene Auto alleged sufficient facts in the Complaint to establish a breach of contract claim against State Farm. The legal standard that applies to the Trial Court's review of the Motion to Dismiss is set forth as follows:

> In ruling on a motion to dismiss, the trial court must take all facts pleaded as true, and all reasonable inferences must be construed in the plaintiff's favor. In determining whether the facts alleged constitute a basis for recovery, the trial court must scrutinize the writ to determine whether a cause of action has been asserted.

DiFruscia v. New Hampshire Dept. of Public Works and Highways, 136 N.H. 202, 203-04 (1992) (internal citations omitted). Further, since Keene Auto appeared *pro se*, the court must construe the pleadings liberally and afford Keene Auto the benefit of the doubt. *See Haines*, 404 U.S. at 520-21. In other words, the Trial Court was required to compare the elements for a breach of contract claim against the facts alleged by Keene Auto in the Complaint. Upon doing so, it would have been apparent to the Trial Court that Keene Auto alleged sufficient facts to overcome dismissal.

Under New Hampshire law, a breach of contract occurs "when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." *Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442, 447 (2020). The elements for a breach of contract claim are (1) a valid, binding contract, (2) the defendant's breach of that contract, and (3) as a result of the defendant's breach, the plaintiff suffered damages. *See id.*

Here, Keene Auto alleged sufficient facts to establish a breach of contract claim against State Farm. First, Keene Auto alleged sufficient facts to establish that it has a valid, binding contract with State Farm. For example, Keene Auto alleged that the Insured assigned his right to recover certain insurance proceeds under the Policy to Keene Auto. (*See* App. at 5.) As a result, Keene Auto has a right, under the Policy, to recover the insurance proceeds from State Farm. State Farm can hardly dispute that the Policy is a binding contract since it is seeking to enforce the anti-assignment provision in

the same document. Therefore, there is a valid, binding contract between Keene Auto and State Farm.

Second, Keene Auto alleged sufficient facts to establish that State Farm breached its contractual obligations under the Policy. For example, Keene Auto alleged that State Farm failed to uphold its contractual obligations under the Policy when it failed to remit payment for the "repair costs to properly repair" the Vehicle. (*See id.*)

Third, Keene Auto alleged sufficient facts to establish that State Farm's breach of the Policy caused Keene Auto to suffer damages. In the Complaint, Keene Auto explained that it incurred costs to perform necessary repairs on the Vehicle, including, but not limited to, safety related repairs and replacement of damaged parts. (*See id.*) Since State Farm refused to remit payment for these necessary repairs, Keene Auto incurred damages in the amount of the unpaid repairs that it was required to perform on the Vehicle in accordance with the OEM procedures. (*See id.*)

Based on the foregoing, Keene Auto alleged sufficient facts to establish a breach of contract claim against State Farm. Therefore, the Trial Court erred when it granted, without written analysis, State Farm's Motion to Dismiss for failure to state a claim. Accordingly, the Court must reverse and remand the case to the Trial Court for further proceedings.

2. The Trial Court misapplied the motion to dismiss standard to the extent that it accepted State Farm's arguments concerning fair and reasonable pricing.

The Trial Court erred when it granted the Motion to Dismiss because its decision was premised upon factual determinations that were not supported by the record or appropriate at this stage of the pleadings. In its

Motion to Dismiss, State Farm argued, in relevant part, that Keene Auto's breach of contract claim should be dismissed because State Farm paid a "fair and reasonable price" for the repairs and, thus, does not owe any other insurance proceeds to Keene Auto. (*See* App. at 8-10.) Since the Trial Court granted the Motion to Dismiss without a narrative order, it is unclear whether the Trial Court dismissed Keene Auto's claims on the basis that State Farm paid a "fair and reasonable price" for the repairs. However, to the extent the Trial Court dismissed Keene Auto's claim for this reason, then such a decision would have required an improper application of the motion to dismiss standard.

In ruling on the Motion to Dismiss, the Trial Court was required to apply the motion to dismiss standard, which requires the Trial Court to "take all facts pleaded as true" and construe "all reasonable inferences" in favor of Keene Auto. *See DiFruscia*, 136 N.H. at 203. Notably, the motion to dismiss standard prohibits the Trial Court from considering "factual defenses." *Mountain Springs Water Co., Inc*, 126 N.H. at 201 ("[w]e may not consider … 'factual defenses' in reviewing motions to dismiss for failure to state a cause of action.")

Despite the foregoing, State Farm presented a factual defense in its Motion to Dismiss, which was not supported by the record. Specifically, State Farm argued that it does not owe Keene Auto any insurance proceeds because it paid for the repairs in accordance with R.S.A. 417:4, XX(c), which, in relevant part, provides that an:

> insurer may limit payment for [repair] work based on the *fair and reasonable price* in the area by repair shops or facilities providing similar services…

(App. at 9-10 (emphasis added.)) In other words, State Farm argues that Keene Auto's breach of contract claim should be dismissed because State Farm paid a fair and reasonable price for the repairs and, thus, no further insurance proceeds are due under the Policy.

However, the issue of whether State Farm paid a fair and reasonable price for the repairs is a factual defense that cannot be decided on a motion to dismiss. *See Mountain Springs Water Co., Inc.*, 12 N.H. at 201 (declining to consider the defendant's factual defenses on a motion to dismiss, since the motion to standard precludes a court from making factual determinations).

To the extent the Court concludes that the Trial Court could consider State Farm's factual defense, then the Motion to Dismiss should still have been denied because State Farm failed to identify material in the record before the Trial Court that supported its factual defense. For example, State Farm did not direct the Trial Court to any facts establishing the "fair and reasonable price" for the repairs made on the Vehicle, which would have required facts concerning the prices "in the area [used] by repair shops or facilities providing similar services." *See* R.S.A. 417:4, XX(c). Further, State Farm failed to identify any facts establishing that it paid the amount that was deemed the "fair and reasonable price." Absent such facts, the Trial Court could not properly decide the Motion to Dismiss in favor of State Farm. *See Gardner v. City of Concord*, 137 N.H. 253, 259-60 (1993) (reversing trial court's order on a motion to dismiss because it made a factual determination that was unsupported by the record); *Russell v. Philip D. Moran, Inc.*, 122 N.H. 708, 710 (1982) (reversing trial court's order on a motion to dismiss, in part, because it made a factual determination that was impermissible under the motion to dismiss standard).

Based on the foregoing, the Trial Court erred when it granted the Motion to Dismiss. Therefore, the Court must reverse the Trial Court's Order and remand for further proceedings.

CONCLUSION

For these reasons, the Court should reverse the Trial Court's Order, dated April 5, 2021, granting State Farm's Motion to Dismiss and remand for further proceedings in the Trial Court.

ORAL ARGUMENT

The NHADA requests fifteen (15) minutes for oral argument. Edward J. Sackman, Esq. will argue on behalf of the NHADA.

Respectfully Submitted,
New Hampshire Automobile Dealers Association

By and through its counsel,

/s/ Hilary H. Rheaume

Edward J. Sackman, Esq., Bar No. 19586
Hilary H. Rheaume, Esq., Bar No. 265510
Bernstein, Shur, Sawyer & Nelson, P.A.
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
nsackman@bernsteinshur.com
hrheaume@bernsteinshur.com

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STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,049 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Hilary H. Rheaume
Hilary H. Rheaume, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 23rd day of July, 2021 through the electronic-filing system on the Appellant and counsel of record for the Appellee.

/s/ Hilary H. Rheaume
Hilary H. Rheaume, Esq.