STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0156

Keene Auto Body Inc. v. State Farm Mutual Automobile Insurance Company

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RULE 7 APPEAL FROM MOTION TO DISMISS
ORDER OF THE 8TH CIRCUIT – DISTRICT DIVISION – KEENE,
SMALL CLAIMS DIVISION
(Judge James D. Gleason)

APPENDIX TO BRIEF OF APPELLEE STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Brendan D. O'Brien (N.H. Bar No. 267995)
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Brendan D. O'Brien will present oral argument on behalf of State Farm Mutual Automobile Insurance Company

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

8th Circuit - District Division - Keene
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Keene NH 03431-0364

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Case Name: **Keene Auto Body Inc. v. Concord General Mutual Insurance Company**
Case Number: **449-2020-SC-00051**

11/30/20 -MOTION HEARING ORDER

After hearing oral argument on this matter, the case is dismissed.

Ordered by the Court: DEC 07 2020

James D. Gleason

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

8th Circuit - District Division - Keene
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Keene NH 03431-0364

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Case Name: **Keene Auto Body Inc. v. David Doyle, Allstate and Fire and Casualty Insurance Comp**
Case Number: **449-2020-SC-00052**

11/30/20-MOTION HEARING ORDER

After hearing oral argument, this matter is dismissed.

Ordered by the Court: DEC 07 2020

James D. Gleason

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2019-SC-00576

Keene Auto Body Inc.

v.

David Doyle & Allstate Fire and Casualty Insurance Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINT WITH PREJUDICE

NOW COME the defendants, David Doyle ("Doyle") and the Allstate Fire and Casualty Insurance Company ("Allstate" and, collectively with Doyle, "Defendants"), by and through their attorneys, Primmer Piper Eggleston & Cramer PC, and hereby move to dismiss the small claims complaint filed against them by plaintiff Keene Auto Body Inc. ("Keene Auto Body"). In support thereof, Defendants state as follows:

1. This small claims action arises out of Allstate's alleged failure to pay the full amount charged by Keene Auto Body to repair Ginnette Ranfos's ("Ranfos's") vehicle. According to the small claims complaint, Ranfos entered "into a repair contract to repair her Jeep in the amount of $5236.86 with Keene Auto Body, the Jeep was insured with Allstate." The small claims complaint does not allege that Allstate ever agreed to pay this amount, stating only that "Allstate's opinion for the amount of the loss is $4213.35." At the time of these repairs, Ranfos's vehicle was insured by Allstate.

2. Keene Auto Body has no direct cause of action against Allstate to recover the additional $1023.71 that Keene Auto Body claims that it is owed as Keene Auto Body

is not the owner of the damaged vehicle, is not insured by Allstate, and has no contractual relationship with Allstate that could make Allstate obligated to pay that amount. Although Ranfos is insured by Allstate, Ranfos is not Allstate's agent and has no authority to enter into a contract on behalf of Allstate. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by its terms... ."). Accordingly, Ranfos could not bind Allstate to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

3. Likely recognizing that Keene Auto Body has no direct cause of action against Allstate to recover the additional $1,023.71 that Keene Auto Body claims that it is owed, Keene Auto Body alleges that Ranfos "assigned the rights of her insurance policy" to Keene Auto Body.[1] This alleged assignment, however, is invalid based on the plain language of Ranfos's policy with Allstate. Ranfos's policy includes the following provision:

> **Transfer**
> This policy can't be transferred to anyone without **our** written consent. However, if **you** die, coverage will be provided until the end of the premium period for:
> 1. **your** legal representative while acting as such; and
>
> 2. persons covered on the date of **your** death.

Allstate Auto Insurance Policy (the "Policy"), Transfer Provision, attached hereto as Exhibit A, p. 2 (bold in original). Neither Ranfos, nor Keene Auto Body ever sought or received Allstate's written consent for Ranfos to transfer her rights under the Policy to

[1] Keene Auto Body also indicates that Ranfos assigned her rights under the Policy in exchange for Keene Auto Body releasing "the lien on the insured's Jeep."

Keene Auto Body. Without Allstate's consent, Ranfos could not transfer her rights under the Policy to Keene Auto Body, and Keene Auto Body therefore has no right to bring a claim against Allstate based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

4. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-transfer language in the Policy is clear: **without Allstate's consent, Ranfos cannot transfer the Policy to anyone.** There is also no question that Keene Auto Body's claim is premised on recovering pursuant to the Policy as the small claims complaint states that Ranfos "assigned the rights of her insurance policy." As Ranfos never received Allstate's consent to assign her rights under the Policy to Keene Auto Body, Keene Auto Body cannot maintain this action.

5. Even if the alleged assignment by Ranfos to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against Allstate. In New Hampshire, "an assignee obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted). As the amount of Allstate's estimate was reached through a procedure consistent with New Hampshire law, neither Ranfos, nor her alleged assignee, Keene Auto Body, can succeed on a claim against Allstate with respect to the excess cost allegedly owed to Keene Auto Body.

6. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to her vehicle and submits a claim to her insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that she wishes to use, the insured will take her vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

7. If an agreement is not reached, the insured then has a choice: she can leave her vehicle at her chosen repair facility, but only receive the amount reflected on the insurer's estimate, or she can send her vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g.*, *Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do

the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

8. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services... . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services...**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

9. Keene Auto Body appears to be rejecting the choices available under New Hampshire law in favor of its own desired outcome: keeping the business of repairing Ranfos's vehicle and trying to force Allstate to pay whatever price Keene Auto Body

wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with Allstate's estimate for the repairs to Ranfos's vehicle, Keene Auto Body could have elected not to perform the work on Ranfos's vehicle. Having chosen to do the work without an agreement with Allstate, Keene Auto Body can either accept the Allstate estimate amount it has already been paid or it can attempt to recover the excess cost from Ranfos if Ranfos agreed to pay that excess amount. Allstate has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Ranfos's vehicle.

10. Finally, Keene Auto Body has also named Doyle as a defendant in this matter, but identified no theory under which he could be liable. Although Keene Auto Body is apparently dissatisfied with Allstate's handling of a claim, that dissatisfaction does not support any claim against Doyle, an employee of Allstate who happened to be involved in the handling of that claim. The small claims complaint is devoid of any fact that could support a claim against Doyle individually, and Keene Auto Body's claim description does not even mention Doyle. For these reasons, Doyle should be dismissed as he has no individual liability to Keene Auto Body. As Keene Auto Body has no claim against the Defendants, the small claims complaint should therefore be dismissed with prejudice.

WHEREFORE, Defendants respectfully request that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the small claims complaint with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

DAVID DOYLE and
ALLSTATE FIRE AND CASUALTY
INSURANCE COMPANY

By Their Attorneys:

PRIMMER PIPER EGGLESTON &
CRAMER, PC

Dated: March 13, 2020

/s/ Brendan D. O'Brien
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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served through the Court's electronic filing system on the plaintiff, Keene Auto Body Inc.

/s/ Brendan D. O'Brien
Brendan D. O'Brien

DEC 07 2020
GRANTED

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2020-SC-00463

Keene Auto Body Inc.

v.

State Farm Fire and Casualty Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINT WITH PREJUDICE

NOW COMES the defendant, State Farm Fire and Casualty Company ("State Farm"), by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the small claims complaint filed against it by plaintiff Keene Auto Body Inc. ("Keene Auto Body"). In support thereof, State Farm states as follows:

1. This small claims action arises out of State Farm's alleged failure to pay Keene Auto Body for repairs to Gary Wood's ("Wood's") vehicle. According to the Complaint, State Farm issued an auto policy that provides collision damage to Wood's auto. (See Claims Description).

2. Wood's auto was damaged, and State Farm agreed to pay Wood $3,516.55 for repairs. (See Claims Description). Wood then (apparently) hired Keene Auto Body to perform the auto repairs. Keene Auto Body claims the repairs cost $4,604.24.

3. According to the Complaint, Wood "assigned" to Keene Auto Body his rights under the State Farm insurance policy to collect the difference between what State

Farm agreed to pay for covered property damage and the repair costs charged by Keene Auto Body. (See Claims Description).

4. Keene Auto Body's complaint should be dismissed for three reasons. First, Keene Auto Body has no direct cause of action against State Farm because Keene Auto Body is not the owner of the damaged vehicle, is not insured by State Farm, and has no contractual relationship with State Farm. Second, Keene Auto Body has no direct cause of action against State Farm because Wood's policy bars assignment of his rights without State Farm's consent. Third, under New Hampshire law, State Farm has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs it made to Wood's vehicle.

5. Keene Auto Body's Complaint should be dismissed because the facts and allegations, as pled by the Plaintiff and as tested against the applicable law, are not reasonably susceptible of a construction that would permit recovery. *See, e.g., Berry v. Watchtower Bible & Tract Soc.*, 152 N.H. 407, 410 (N.H. 2005).

6. Keene Auto Body has no direct cause of action against State Farm to recover the $1,087.69 that it claims it is owed because Keene Auto Body is not the owner of the damaged vehicle, is not insured by State Farm, and has no contractual relationship with State Farm that could make it obligated to pay that amount. Although Wood is insured by State Farm, he is not State Farm's agent and has no authority to enter into a contract on behalf of State Farm. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by

its terms..."). Accordingly, Wood could not bind State Farm to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

7. Likely recognizing that Keene Auto Body has no direct cause of action against State Farm to recover the additional $1,087.69 that Keene Auto Body claims it is owed, Keene Auto Body indicates that Wood "assigned" his rights under his State Farm policy to Keene Auto Body. (See Claim Description). This alleged assignment, however, is invalid based on the plain language of Wood's policy with State Farm. Wood's Policy includes the following provision:

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

See State Farm Insurance Policy #0467980-C29-29F (the "Policy"), attached hereto as Exhibit A, p. 30 (bold in original).

8. Absent an allegation that Wood received State Farm's approval to transfer of his rights under the policy to Keene Auto Body, Wood could not transfer his rights and Keene Auto Body therefore has no right to bring a claim against State Farm based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability

under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

8. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-transfer language in the Policy is clear: **without State Farm's consent, Wood cannot transfer the Policy to anyone.**

9. Even if the alleged assignment by Wood to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against State Farm. In New Hampshire, "an assignee obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted).

10. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to his vehicle and submits a claim to his insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that he wishes to use, the insured will take his vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

11. If an agreement is not reached, the insured then has a choice: he can leave his vehicle at his chosen repair facility, but only receive the amount reflected on the insurer's estimate, or he can send his vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g., Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

12. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services... . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services...**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent

> repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

13. Keene Auto Body appears to have rejected the choices available under New Hampshire law in favor of keeping the business and attempting to force State Farm to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with State Farm's estimate for the repairs to Wood's vehicle, Keene Auto Body could have elected not to perform the work on Wood's vehicle. Having chosen to do the work without an agreement with State Farm, Keene Auto Body can either accept the State Farm estimate amount it has already been paid or it can attempt to recover the excess cost from Wood if Wood agreed to pay that excess amount. State Farm has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Wood's vehicle.

WHEREFORE, State Farm respectfully requests that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the small claims complaint with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

STATE FARM FIRE AND CASUALTY COMPANY

By Its Attorneys:

PRIMMER PIPER EGGLESTON & CRAMER, PC

Dated: 10-1-2020

By: /s/ Doreen F. Connor
Doreen F. Connor, #421
PO Box 3600
Manchester, NH 03105
(603) 626-3600

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served through the Court's electronic filing system on the plaintiff, Keene Auto Body Inc.

/s/ Doreen F. Connor
Doreen F. Connor

DEC 07 2020

GRANTED

James D. Gleason

Complaint DISMISSED.

Judge James D. Gleason

04/14/2021

STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

8TH CIRCUIT - DISTRICT DIVISION - KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2021-SC-00138

Keene Auto Body, Inc. a/k/a Keene Auto Body

v.

Vermont Mutual Insurance Company a/k/a Vermont Mutual Insurance

DEFENDANT'S MOTION TO DISMISS

NOW COMES defendant Vermont Mutual Insurance Company a/k/a Vermont Mutual Insurance ("Vermont Mutual"), by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the Small Claim Complaint filed against it by plaintiff Keene Auto Body, Inc. a/k/a Keene Auto Body ("Keene Auto Body"). In support thereof, Vermont Mutual states as follows:

1. This small claims action arises out of Vermont Mutual's alleged failure to pay the full amount charged by Keene Auto Body to repair Michelle Smith's ("Smith's") vehicle. According to the small claims complaint, Keene Auto Body refuses to accept the amount that Vermont Mutual has agreed to pay to repair Smith's vehicle. The small claims complaint further indicates that Smith assigned her right to recover the difference between the amount charged by Keene Auto Body and the amount that Vermont Mutual agreed to pay to Keene Auto Body. The small claims complaint does not allege that Vermont Mutual ever agreed to pay the additional amount charged by Keene Auto Body. At all relevant times, Smith's vehicle was insured by Vermont Mutual.

2. As an initial matter, this case should be dismissed as it is premised on a theory that this Court has rejected in the many other cases brought by Keene Auto Body: that Keene

Auto Body can force insurance carriers to pay a unilaterally-imposed price for vehicle repairs. In repeatedly dismissing these cases, the Court has recognized that Keene Auto Body cannot maintain such claims. *See, e.g.*, Orders Dismissing Keene Auto Body's Small Claims Complaints, attached hereto as Exhibit A. As this Court has recognized time and again, Keene Auto Body has no viable claim against Vermont Mutual under these circumstances.

3. Keene Auto Body has no direct cause of action against Vermont Mutual to recover any additional amount that Keene Auto Body claims that it is owed as Keene Auto Body is not the owner of the damaged vehicle, is not insured by Vermont Mutual, and has no contractual relationship with Vermont Mutual that could make Vermont Mutual obligated to pay that amount. Although Smith is insured by Vermont Mutual, Smith is not Vermont Mutual's agent and has no authority to enter into a contract on behalf of Vermont Mutual. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by its terms… ."). Accordingly, Smith could not bind Vermont Mutual to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

4. Likely recognizing that Keene Auto Body has no direct cause of action against Vermont Mutual to recover any additional amount, Keene Auto Body indicates that Smith assigned her rights under her policy with Vermont Mutual to Keene Auto Body. This alleged assignment, however, is invalid based on the plain language of Smith's policy. In pertinent part, Smith's policy provides that "[y]our rights and duties under this policy may not be assigned without our written consent." Vermont Mutual Personal Auto Policy (the "Policy"), attached hereto as Exhibit B, PP 00 01 06 98, p. 12. Neither Smith, nor Keene Auto Body ever sought or received Vermont Mutual's approval for Smith to transfer her rights under the Policy to Keene

Auto Body. Without Vermont Mutual's approval, Smith could not transfer her rights under the Policy to Keene Auto Body, and Keene Auto Body therefore has no right to bring a claim against Vermont Mutual based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

5. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-assignment language in the Policy is clear: **without Vermont Mutual's approval, Smith cannot transfer the rights or duties of the Policy to anyone.** There is also no question that Keene Auto Body's claim is premised on recovering pursuant to the Policy as the small claims complaint indicates that Smith was insured by Vermont Mutual and assigned her rights under the Policy to Keene Auto Body. As Smith never received Vermont Mutual's approval to assign her rights under the Policy to Keene Auto Body, Keene Auto Body cannot maintain this action.

6. Even if the alleged assignment by Smith to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against Vermont Mutual. In New Hampshire, "an

assignee obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted). As the amount of Vermont Mutual's estimate was reached through a procedure consistent with New Hampshire law, neither Smith, nor her alleged assignee, Keene Auto Body, can succeed on a claim against Vermont Mutual with respect to the excess cost allegedly owed to Keene Auto Body.

7. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to her vehicle and submits a claim to her insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that she wishes to use, the insured will take her vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

8. If an agreement is not reached, the insured then has a choice: she can leave her vehicle at her chosen repair facility, but only receive the amount reflected on the insurer's estimate, or she can send her vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g., Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

9. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services… . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services…**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

10. Keene Auto Body appears to be rejecting the choices available under New Hampshire law in favor of its own desired outcome: keeping the business of repairing Smith's vehicle and trying to force Vermont Mutual to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with Vermont Mutual's estimate for the repairs to Smith's vehicle, Keene Auto Body could have elected not to perform the work on Smith's vehicle. Having chosen to do the work without an agreement with Vermont Mutual, Keene Auto Body can either accept the Vermont Mutual estimate or it can attempt to recover the excess cost from Smith if Smith agreed to pay that

excess amount. Vermont Mutual has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Smith's vehicle.

11. Vermont Mutual is also entitled to recover its attorney's fees and costs for having to defend against a lawsuit premised on a theory that has been repeatedly rejected by this Court. No justification can support Keene Auto Body's repeated filing of matters based on an argument that the Court has consistently rejected. Keene Auto Body's conduct has been "unreasonably obdurate or obstinate," and its refusal to accept that its theory of liability is not supported by New Hampshire law has forced Vermont Mutual to defend against another frivolous lawsuit. *Harkeem v. Adams*, 117 N.H. 687, 691 (1977). Accordingly, Vermont Mutual is entitled recover its attorney's fees and costs for having to defend this matter. *See generally id.*

WHEREFORE, Vermont Mutual respectfully requests that this Honorable Court:

A. GRANT this Motion to Dismiss;

B. DISMISS the Small Claim Complaint;

C. AWARD defendant attorney's fees and costs; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

VERMONT MUTUAL INSURANCE COMPANY A/K/A VERMONT MUTUAL INSURANCE

By Its Attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC

Dated: April 8, 2021

By: /s/ Gary M. Burt

Gary M. Burt, Esquire
NH Bar ID #5510
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03105
(603) 626-3300
gburt@primmer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded to the plaintiff through the court's electronic filing system.

Dated: April 8, 2021

By: /s/ Gary M. Burt
Gary M. Burt

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2021-SC-00001

Keene Auto Body Inc.

v.

State Farm Mutual Automobile Insurance Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINT WITH PREJUDICE

NOW COMES the defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the small claims complaint filed against it by plaintiff Keene Auto Body Inc. ("Keene Auto Body"). In support thereof, State Farm states as follows:

1. This small claims action arises out of State Farm's alleged failure to pay the full amount charged by Keene Auto Body to repair Sy Creamer's ("Creamer's") vehicle. According to the small claims complaint, Creamer refuses to accept the amount that State Farm has agreed to pay to repair her vehicle. The small claims complaint further asserts that Creamer "assigned her insurance proceeds to [Keene Auto Body]." The small claims complaint does not allege that State Farm ever agreed to pay for the additional repairs mentioned by Keene Auto Body. At all relevant times, Creamer's vehicle was insured by State Farm.

2. As an initial matter, this case should be dismissed as it is premised on a theory that this Court has rejected in the many other cases brought by Keene Auto

Body: that Keene Auto Body can force insurance carriers to pay a unilaterally-imposed price for vehicle repairs. In repeatedly dismissing these cases, the Court has recognized that Keene Auto Body cannot maintain such claims. *See, e.g.*, Orders Dismissing Keene Auto Body's Small Claims Complaints, attached hereto as Exhibit A. As this Court has recognized time and again, Keene Auto Body has no viable claim against State Farm under these circumstances.

3. Keene Auto Body has no direct cause of action against State Farm to recover any additional amount that Keene Auto Body claims that it is owed as Keene Auto Body is not the owner of the damaged vehicle, is not insured by State Farm, and has no contractual relationship with State Farm that could make State Farm obligated to pay that amount. Although Creamer is insured by State Farm, Creamer is not State Farm's agent and has no authority to enter into a contract on behalf of State Farm. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by its terms… ."). Accordingly, Creamer could not bind State Farm to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

4. Likely recognizing that Keene Auto Body has no direct cause of action against State Farm to recover any additional amount, Keene Auto Body alleges that Creamer "assigned her insurance proceeds to [Keene Auto Body]." This alleged assignment, however, is invalid based on the plain language of Creamer's policy with State Farm. Creamer's policy includes the following provision:

Assignment

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

State Farm Car Policy (the "Policy"), Assignment Provision, attached hereto as Exhibit B, p. 30 (bold and italics in original). Neither Creamer, nor Keene Auto Body ever sought or received State Farm's approval for Creamer to transfer her rights under the Policy to Keene Auto Body. Without State Farm's approval, Creamer could not transfer her rights under the Policy to Keene Auto Body, and Keene Auto Body therefore has no right to bring a claim against State Farm based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

5. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-assignment language in the Policy is clear: **without State Farm's approval, Creamer cannot transfer the**

rights or benefits of the Policy to anyone. There is also no question that Keene Auto Body's claim is premised on recovering pursuant to the Policy as the small claims complaint states that Creamer was insured by State Farm and "assigned her insurance proceeds to [Keene Auto Body]." As Creamer never received State Farm's approval to assign her rights under the Policy to Keene Auto Body, Keene Auto Body cannot maintain this action.

6. Even if the alleged assignment by Creamer to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against State Farm. In New Hampshire, "an assignee obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted). As the amount of State Farm's estimate was reached through a procedure consistent with New Hampshire law, neither Creamer, nor her alleged assignee, Keene Auto Body, can succeed on a claim against State Farm with respect to the excess cost allegedly owed to Keene Auto Body.

7. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to her vehicle and submits a claim to her insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that she wishes to use, the insured will take her vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then

compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

8. If an agreement is not reached, the insured then has a choice: she can leave her vehicle at her chosen repair facility, but only receive the amount reflected on the insurer's estimate, or she can send her vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g.*, *Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

9. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services… . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services…**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

10. Keene Auto Body appears to be rejecting the choices available under New Hampshire law in favor of its own desired outcome: keeping the business of repairing Creamer's vehicle and trying to force State Farm to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with State Farm's estimate for the repairs to Creamer's vehicle, Keene Auto Body could have elected not to perform the work on Creamer's vehicle. Having chosen to do the work without an agreement with State Farm, Keene Auto Body can either accept the State Farm estimate or it can attempt to recover the excess cost from Creamer if Creamer agreed to pay that excess amount. State Farm has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Creamer's vehicle.

WHEREFORE, State Farm respectfully requests that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the small claims complaint with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

by its attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC

Dated: February 16, 2021 by: /s/ Brendan D. O'Brien

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Manchester, NH 03105-3600
603.626.3300
amordecai@primmer.com
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Certificate of Service

I hereby certify that a copy of the foregoing motion was forwarded this day to the plaintiff via the Court's ECF system.

/s/ Brendan D. O'Brien
Brendan D. O'Brien

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2021-SC-00017

Keene Auto Body Inc.

v.

Allstate Fire and Casualty Insurance Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINT WITH PREJUDICE

NOW COMES the defendant, Allstate Fire and Casualty Insurance Company ("Allstate"), by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the small claims complaint filed against it by plaintiff Keene Auto Body Inc. ("Keene Auto Body"). In support thereof, Allstate states as follows:

1. This small claims action arises out of Allstate's alleged failure to pay the full amount charged by Keene Auto Body to repair Michael Collins's ("Collins's") vehicle. According to the small claims complaint, Collins hired Keene Auto Body to repair his vehicle. Keene Auto Body claims that the repairs total $6,965.59. Allstate's estimate for the repairs is $4,522.06. Keene Auto Body refuses to accept the amount that Allstate has agreed to pay to repair Collins's vehicle. The small claims complaint further asserts that Collins "assigned the proceeds of his insurance loss to [Keene Auto Body]." The small claims complaint does not allege that Allstate ever agreed to pay the additional amount claimed by Keene Auto Body. At all relevant times, Collins's vehicle was insured by Allstate.

2. As an initial matter, this case should be dismissed as it is premised on a theory that this Court has rejected in the many other cases brought by Keene Auto Body: that Keene Auto Body can force insurance carriers to pay a unilaterally-imposed price for vehicle repairs. In

repeatedly dismissing these cases, the Court has recognized that Keene Auto Body cannot maintain such claims. *See, e.g.*, Orders Dismissing Keene Auto Body's Small Claims Complaints, attached hereto as Exhibit A. As this Court has recognized time and again, Keene Auto Body has no viable claim against Allstate under these circumstances.

3. Keene Auto Body has no direct cause of action against Allstate to recover any additional amount that Keene Auto Body claims that it is owed as Keene Auto Body is not the owner of the damaged vehicle, is not insured by Allstate, and has no contractual relationship with Allstate that could make Allstate obligated to pay that amount. Although Collins is insured by Allstate, Collins is not Allstate's agent and has no authority to enter into a contract on behalf of Allstate. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by its terms… ."). Accordingly, Collins could not bind Allstate to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

4. Likely recognizing that Keene Auto Body has no direct cause of action against Allstate to recover any additional amount, Keene Auto Body alleges that Collins assigned his insurance proceeds to Keene Auto Body. This alleged assignment, however, is invalid based on the plain language of Collins's policy with Allstate. Collins's policy includes the following provision:

> **Transfer**
> **You** may not transfer this policy to another person without **our** written consent. However, if **you** die, this policy will provide coverage until the end of the policy period, but only for **your** legal representative while acting as such and for persons covered on the date of **your** death.

Allstate Auto Policy (the "Policy"), Transfer Provision, attached hereto as Exhibit B, p. 5 (bold in original). Neither Collins, nor Keene Auto Body ever sought or received Allstate's approval for

Collins to transfer his rights under the Policy to Keene Auto Body. Without Allstate's approval, Collins could not transfer his rights under the Policy to Keene Auto Body, and Keene Auto Body therefore has no right to bring a claim against Allstate based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

5. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-assignment language in the Policy is clear: **without Allstate's approval, Collins cannot transfer the rights or benefits of the Policy to anyone.** There is also no question that Keene Auto Body's claim is premised on recovering pursuant to the Policy as the small claims complaint states that Collins was insured by Allstate and assigned his insurance proceeds to Keene Auto Body. As Collins never received Allstate's approval to assign his rights under the Policy to Keene Auto Body, Keene Auto Body cannot maintain this action.

6. Even if the alleged assignment by Collins to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against Allstate. In New Hampshire, "an assignee

obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields,* 150 N.H. 332, 336-37 (2003) (quotation omitted). As the amount of Allstate's estimate was reached through a procedure consistent with New Hampshire law, neither Collins, nor his alleged assignee, Keene Auto Body, can succeed on a claim against Allstate with respect to the excess cost allegedly owed to Keene Auto Body.

7. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to his vehicle and submits a claim to his insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that he wishes to use, the insured will take his vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

8. If an agreement is not reached, the insured then has a choice: he can leave his vehicle at his chosen repair facility, but only receive the amount reflected on the insurer's estimate, or he can send his vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g., Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

9. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services… . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services…**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

10. Keene Auto Body appears to be rejecting the choices available under New Hampshire law in favor of its own desired outcome: keeping the business of repairing Collins's vehicle and trying to force Allstate to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with Allstate's estimate for the repairs to Collins's vehicle, Keene Auto Body could have elected not to perform the work on Collins's vehicle. Having chosen to do the work without an agreement with Allstate, Keene Auto Body can either accept the Allstate estimate or it can attempt to recover the excess cost from Collins if Collins agreed to pay that excess amount. Allstate has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Collins's vehicle.

WHEREFORE, Allstate respectfully requests that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the small claims complaint with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

By Its Attorneys:

PRIMMER PIPER EGGLESTON & CRAMER, PC

Dated: February 23, 2021

/s/ Brendan D. O'Brien
Brendan D. O'Brien, Esq. #267995
900 Elm Street, 19th Floor
PO Box 3600
Manchester, NH 03105
(603) 626-3300
bobrien@primmer.com

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served through the Court's electronic filing system on the plaintiff, Keene Auto Body Inc.

/s/ Brendan D. O'Brien
Brendan D. O'Brien

Based on the information and argument provided in the motion and noting that no objection was filed, motion is GRANTED and the petition is DISMISSED.

Judge Patricia B. Quigley
03/26/2021

Granted

Judge James D. Gleason

12/07/2020

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2020-SC-00516

Keene Auto Body Inc.

v.

State Farm Fire and Casualty Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINT WITH PREJUDICE

NOW COMES the defendant, State Farm Fire and Casualty Company ("State Farm"), by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the small claims complaint filed against it by plaintiff Keene Auto Body Inc. ("Keene Auto Body"). In support thereof, State Farm states as follows:

1. This small claims action arises out of State Farm's alleged failure to pay Keene Auto Body for repairs to Timothy Weeks' ("Weeks") vehicle. According to the Complaint, State Farm issued an auto policy that provides collision damage to Weeks' auto. (See Claims Description).

2. According to the small claims action, Weeks' auto was damaged, and Weeks hired Keene Auto Body to perform the auto repairs. Keene Auto Body claims there is an outstanding repairs bill totaling $684.84.

3. According to the Complaint, Weeks "assigned" to Keene Auto Body his rights under the State Farm insurance policy to collect the difference between what State

Farm agreed to pay for covered property damage and the repair costs charged by Keene Auto Body. (See Claims Description).

4. Keene Auto Body's complaint should be dismissed for three reasons. First, Keene Auto Body has no direct cause of action against State Farm because Keene Auto Body is not the owner of the damaged vehicle, is not insured by State Farm, and has no contractual relationship with State Farm. Second, Keene Auto Body has no direct cause of action against State Farm because Weeks' policy bars assignment of his rights without State Farm's consent. Third, under New Hampshire law, State Farm has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs it made to Weeks' vehicle.

5. Keene Auto Body's Complaint should be dismissed because the facts and allegations, as pled by the Plaintiff and as tested against the applicable law, are not reasonably susceptible of a construction that would permit recovery. *See, e.g., Berry v. Watchtower Bible & Tract Soc.*, 152 N.H. 407, 410 (N.H. 2005).

6. Keene Auto Body has no direct cause of action against State Farm to recover the $684.84 that it claims it is owed because Keene Auto Body is not the owner of the damaged vehicle, is not insured by State Farm, and has no contractual relationship with State Farm that could make it obligated to pay that amount. Although Weeks is insured by State Farm, he is not State Farm's agent and has no authority to enter into a contract on behalf of State Farm. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by

its terms…"). Accordingly, Weeks could not bind State Farm to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

7. Likely recognizing that Keene Auto Body has no direct cause of action against State Farm to recover the additional $684.84 that Keene Auto Body claims it is owed, Keene Auto Body indicates that Weeks "assigned" his rights under his State Farm policy to Keene Auto Body. (See Claim Description). This alleged assignment, however, is invalid based on the plain language of Weeks' policy with State Farm. Weeks' Policy includes the following provision:

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

See State Farm Insurance Policy #0467980-C29-29F (the "Policy"), attached hereto as Exhibit A, p. 30 (bold in original).

8. Absent an allegation that Weeks received State Farm's approval to transfer of his rights under the policy to Keene Auto Body, Weeks could not transfer his rights and Keene Auto Body therefore has no right to bring a claim against State Farm based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability

under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

8. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-transfer language in the Policy is clear: **without State Farm's consent, Weeks cannot transfer the Policy to anyone.**

9. Even if the alleged assignment by Weeks to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against State Farm. In New Hampshire, "an assignee obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted).

10. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to his vehicle and submits a claim to his insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that he wishes to use, the insured will take his vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

11. If an agreement is not reached, the insured then has a choice: he can leave his vehicle at his chosen repair facility, but only receive the amount reflected on the insurer's estimate, or he can send his vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g., Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

12. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services… . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services…**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent

> repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

13. Keene Auto Body appears to have rejected the choices available under New Hampshire law in favor of keeping the business and attempting to force State Farm to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with State Farm's estimate for the repairs to Weeks's vehicle, Keene Auto Body could have elected not to perform the work on Weeks's vehicle. Having chosen to do the work without an agreement with State Farm, Keene Auto Body can either accept the State Farm estimate amount it has already been paid or it can attempt to recover the excess cost from Weeks if Weeks agreed to pay that excess amount. State Farm has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Weeks's vehicle.

WHEREFORE, State Farm respectfully requests that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the small claims complaint with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

STATE FARM FIRE AND CASUALTY COMPANY

By Its Attorneys:

PRIMMER PIPER EGGLESTON & CRAMER, PC

Dated: 11/6/2020

By: /s/ Doreen F. Connor
Doreen F. Connor, #421
PO Box 3600
Manchester, NH 03105
(603) 626-3600

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served through the Court's electronic filing system on the plaintiff, Keene Auto Body Inc.

/s/ Doreen F. Connor
Doreen F. Connor

Granted

Judge James D. Gleason

06/03/2020

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No.: 449-2019-SC-00475

Keene Auto Body Inc.

v.

Allstate Fire and Casualty Insurance Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINT WITH PREJUDICE

NOW COMES the defendant, the Allstate Fire and Casualty Insurance Company ("Allstate"), by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the small claims complaint filed against it by plaintiff Keene Auto Body Inc. ("Keene Auto Body"). In support thereof, Allstate states as follows:

1. This small claims action arises out of Allstate's alleged failure to pay the full amount charged by Keene Auto Body to repair Robert Tiebout's ("Tiebout's") vehicle. According to the small claims complaint, "Robert Tiebout and Keene Auto Body entered into an agreement and contract to repair his 2015 Honda Pilot… ." Keene Auto Body alleges that "[t]he necessary repair charges that the insured and Keene Auto Body agreed upon was $2274.04." At the time of these repairs, Tiebout's vehicle was insured by Allstate. The small claims complaint does not allege that Allstate ever agreed to pay $2,274.04, stating only that Allstate "had a stated value amount of the loss of $1594.87."

2. Keene Auto Body has no direct cause of action against Allstate to recover the additional $679.17 that Keene Auto Body claims that it is owed as Keene Auto Body

is not the owner of the damaged vehicle, is not insured by Allstate, and has no contractual relationship with Allstate that could make Allstate obligated to pay that amount. Although Tiebout is insured by Allstate, Tiebout is not Allstate's agent and has no authority to enter into a contract on behalf of Allstate. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by its terms… ."). Accordingly, Tiebout could not bind Allstate to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

3. Likely recognizing that Keene Auto Body has no direct cause of action against Allstate to recover the additional $679.17 that Keene Auto Body claims that it is owed, Keene Auto Body indicates that Tiebout assigned his rights under his Allstate policy to Keene Auto Body. This alleged assignment, however, is invalid based on the plain language of Tiebout's policy with Allstate. Tiebout's policy includes the following provision:

> **Transfer**
> This policy can't be transferred to anyone without **our** written consent. However, if **you** die, coverage will be provided until the end of the premium period for:
> 1. **your** legal representative while acting as such; and
>
> 2. persons covered on the date of **your** death.

Allstate Auto Insurance Policy (the "Policy"), Transfer Provision, attached hereto as Exhibit A, p. 2 (bold in original). Neither Tiebout, nor Keene Auto Body ever sought or received Allstate's written consent for Tiebout to transfer his rights under the Policy to Keene Auto Body. Without Allstate's consent, Tiebout could not transfer his rights under the Policy to Keene Auto Body, and Keene Auto Body therefore has no right to bring a

claim against Allstate based on the Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

4. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-transfer language in the Policy is clear: **without Allstate's consent, Tiebout cannot transfer the Policy to anyone.** There is also no question that Keene Auto Body's claim is premised on recovering pursuant to the Policy as the small claims complaint indicates that Keene Auto Body received an assignment from Tiebout. As Tiebout never received Allstate's consent to assign his rights under the Policy to Keene Auto Body, Keene Auto Body cannot maintain this action.

5. Even if the alleged assignment by Tiebout to Keene Auto Body were valid, Keene Auto Body would still not have a viable claim against Allstate. In New Hampshire, "an assignee obtains the rights of the assignor at the time of the assignment. The assignee's

rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted). As the amount of Allstate's estimate was reached through a procedure consistent with New Hampshire law, neither Tiebout, nor his alleged assignee, Keene Auto Body, can succeed on a claim against Allstate with respect to the excess cost allegedly owed to Keene Auto Body.

6. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to his vehicle and submits a claim to his insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that he wishes to use, the insured will take his vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

7. If an agreement is not reached, the insured then has a choice: he can leave his vehicle at his chosen repair facility, but only receive the amount reflected on the insurer's estimate, or he can send his vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g., Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge

and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

8. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services… . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services…**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

9. Keene Auto Body appears to be rejecting the choices available under New Hampshire law in favor of its own desired outcome: keeping the business of repairing Tiebout's vehicle and trying to force Allstate to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto

Body was unhappy with Allstate's estimate for the repairs to Tiebout's vehicle, Keene Auto Body could have elected not to perform the work on Tiebout's vehicle. Having chosen to do the work without an agreement with Allstate, Keene Auto Body can either accept the Allstate estimate amount it has already been paid or it can attempt to recover the excess cost from Tiebout if Tiebout agreed to pay that excess amount. Allstate has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Tiebout's vehicle.

WHEREFORE, Allstate respectfully requests that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the small claims complaint with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

By Its Attorneys:

PRIMMER PIPER EGGLESTON & CRAMER, PC

Dated: March 13, 2020

/s/ Brendan D. O'Brien

Brendan D. O'Brien, Esq. #267995
900 Elm Street, 19th Floor
PO Box 3600
Manchester, NH 03105
(603) 626-3300
bobrien@primmer.com

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served through the Court's electronic filing system on the plaintiff, Keene Auto Body Inc.

/s/ Brendan D. O'Brien
Brendan D. O'Brien

Granted

Judge James D. Gleason

09/22/2020

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. 8TH CIRCUIT - DISTRICT DIVISION – KEENE
SMALL CLAIMS DIVISION

Docket No. 449-2019-SC-00452

Keene Auto Body Inc.

v.

Vermont Mutual Insurance

****

Docket No. 449-2020-SC-00050

Keene Auto Body

v.

Timothy J. Murray and
Vermont Mutual Insurance Company

MOTION TO DISMISS SMALL CLAIMS COMPLAINTS WITH PREJUDICE

NOW COME the defendants, Vermont Mutual Insurance Company ("Vermont Mutual") and Timothy J. Murray[1] ("Murray"), by and through their attorneys, Primmer Piper Eggleston & Cramer PC, and hereby moves to dismiss the small claims complaints filed against them by plaintiff Keene Auto Body Inc. ("Keene Auto Body") in the above-captioned matters.[2] In support thereof, Vermont Mutual and Murray state as follows:

1. These small claims actions arise out of Vermont Mutual's alleged failure to pay the full amount charged by Keene Auto Body to repair Joshua Carrasquillo's

[1] Murray should also be dismissed for the reasons articulated in the motions to dismiss previously filed on his behalf, which are incorporated herein by reference.

[2] The above-captioned matters were consolidated, and a telephonic hearing on the merits is scheduled for both matters on October 22, 2020.

("Carrasquillo's") and Richard Collins's ("Collins's") vehicles. According to the small claims complaint regarding Carrasquillo's vehicle, "Keene Auto Body and Joshua Carrasquillo entered into an agreement to complete his repairs to his 2017 Honda Ridgeline on 8/26/19." Keene Auto Body alleges that Carrasquillo has a "policy with Vermont Mutual to cover his damages" and that he "assigned the rights of his loss to Keene Auto Body." Although Keene Auto Body claims that "Vermont Mutual is withholding money that is owed to cover the necessary repair charges determined by the repair professionals at Keene Auto Body," Keene Auto Body does not allege that Vermont Mutual ever agreed to pay the repair amount agreed to by Carrasquillo.

2. According to the small claims complaint regarding Collins's vehicle, "Richard Collins entered into a repair contract with Keene Auto Body to repair his damaged vehicle." Keene Auto Body alleges that the repair charges totaled $5,651.40. Keene Auto Body further states that "Vermont Mutual stated their opinion & amount on this loss to be $4984.50." Keene Auto Body also claims that Collins "assigned the rights and proceeds of their policy to" Keene Auto Body. Again, Keene Auto Body does not allege that Vermont Mutual ever agreed to pay the repair amount agreed to by Collins.

3. Keene Auto Body has no direct cause of action against Vermont Mutual to recover any additional amounts that Keene Auto Body claims that it is owed to repair Carrasquillo's and/or Collins's vehicles as Keene Auto Body is not the owner of the damaged vehicles, is not insured by Vermont Mutual, and has no contractual relationship with Vermont Mutual that could make Vermont Mutual obligated to pay those amounts. Although Carrasquillo and Collins are insured by Vermont Mutual, they are not Vermont

Mutual's agents and have no authority to enter into a contract on behalf of Vermont Mutual. *See Lowell v. U.S. Sav. Bank of Am.*, 132 N.H. 719, 725 (1990) ("The law is well settled that the parties to a contract freely and openly entered into are bound by its terms… ."). Accordingly, Carrasquillo and Collins could not bind Vermont Mutual to pay the amount charged by Keene Auto Body simply by agreeing to pay that amount.

4. Likely recognizing that Keene Auto Body has no direct cause of action against Vermont Mutual to recover the additional amounts that Keene Auto Body claims that it is owed, Keene Auto Body indicates that Carrasquillo and Collins assigned their rights under their Vermont Mutual policies to Keene Auto Body. These alleged assignments, however, are invalid based on the plain language of Carrasquillo and Collins's policies with Vermont Mutual. Those policies include the following provision:

> **TRANSFER OF YOUR INTEREST IN THIS POLICY**
>
> A. Your rights and duties under this policy may not be assigned without our written consent. However, if the named insured shown in the Declarations dies, coverage will be provided for:
>
> 1. The surviving spouse if resident in the same household at the time of death. Coverage applies to the spouse as if the named insured shown in the Declarations; and
>
> 2. The legal representative of the deceased person as if a named insured shown in the Declarations. This applies only with respect to the representative's legal responsibility to maintain or use "your covered auto."

Carrasquillo's Vermont Mutual Personal Auto Policy (the "Carrasquillo Policy"), attached hereto as Exhibit A, p. 12 (bold in original); Collins's Vermont Mutual Personal Auto

Policy (the "Collins Policy"), attached hereto as Exhibit B, p. 12 (bold in original). Neither Carrasquillo, Collins, nor Keene Auto Body ever sought or received Vermont Mutual's written consent for Carrasquillo and/or Collins to transfer their rights under their Vermont Mutual policies to Keene Auto Body. Without Vermont Mutual's consent, Carrasquillo and Collins could not transfer their rights under the Vermont Mutual policies to Keene Auto Body, and Keene Auto Body therefore has no right to bring a claim against Vermont Mutual based on the Carrasquillo Policy or the Collins Policy. *See Farm Bureau Auto. Ins. Co. v. Martin*, 97 N.H. 196, 201 (1951) ("An assignee of the named insured is not covered by the policy until the company's consent is endorsed thereon. No provision of the policy or of the Statute provides for any coverage for an assignee until there is consent, which is a new agreement, by the insurer."); *Employers' Liab. Assur. Corp. v. Sweatt*, 95 N.H. 31, 35 (1948) (explaining that a seller's attempted assignment of insurance to a buyer of a truck did not estop the insurer from denying liability under an automobile liability policy issued to the seller, in absence of the insurer's knowledge of or consent to such an assignment).

5. The New Hampshire Supreme Court has ruled that the language of an insurance policy is to be interpreted in the same manner as any other contract. *See Hudson v. Farm Family Mutual Ins. Co.*, 142 N.H. 144, 146 (1997). "The interpretation of insurance policy language is a question of law for the court." *Attorneys Liab. Protection Society, Inc. v. Whittington Law Assocs., PLLC*, 961 F. Supp. 2d 367, 371-72 (D.N.H. 2013). Here, the anti-transfer language in the Carrasquillo Policy and the Collins Policy is clear: **without Vermont Mutual's consent, Carrasquillo and Collins cannot transfer their Vermont Mutual policies to anyone.** There is also no question that Keene Auto

Body's claims are premised on recovering pursuant to the Carrasquillo Policy and the Collins Policy as the small claims complaints indicate that Keene Auto Body received assignments from Carrasquillo and Collins. As neither Carrasquillo, nor Collins ever received Vermont Mutual's consent to assign their rights under their Vermont Mutual policies to Keene Auto Body, Keene Auto Body cannot maintain the above-captioned actions.

6. Even if the alleged assignments by Carrasquillo and/or Collins to Keene Auto Body were valid, Keene Auto Body would still not have viable claims against Vermont Mutual. In New Hampshire, "an assignee obtains the rights of the assignor at the time of the assignment. The assignee's rights are the same as those of the assignor at the time of the assignment." *Stateline Steel Erectors, Inc. v. Shields*, 150 N.H. 332, 336-37 (2003) (quotation omitted). As the amount of Vermont Mutual's estimates were reached through a procedure consistent with New Hampshire law, neither Carrasquillo or Collins, nor their alleged assignee, Keene Auto Body, can succeed on a claim against Vermont Mutual with respect to the excess cost allegedly owed to Keene Auto Body.

7. When an insured driver in New Hampshire (as in all other jurisdictions) is involved in an accident causing property damage to his vehicle and submits a claim to his insurer, a triangular relationship emerges between the insured, the insurer, and the repair facility chosen to fix the damage. If an insured has a repair facility that he wishes to use, the insured will take his vehicle to that shop where an estimate will be prepared. The insurer will also prepare a preliminary repair estimate of its own. The insurer and the

insured's chosen repair facility will then compare estimates and if there is a discrepancy, will attempt to negotiate an agreed-upon repair cost.

8. If an agreement is not reached, the insured then has a choice: he can leave his vehicle at his chosen repair facility, but only receive the amount reflected on the insurer's estimate, or he can send his vehicle to a repair shop identified by the insurer as willing to do the repair work for the insurer's estimated price. *See, e.g.*, *Chick's Auto Body v. State Farm Mut. Auto. Ins. Co.*, 168 N.J. Super. 68, 84 (1979); *see also* N.H. Rev. Stat. Ann. § 417:4, XX(c); Ins. 1002.17. The repair shop has a similar choice: it is free to do the work for the insured at the insurer's estimated price or it can turn the insured's business away. *See Chick's Auto Body*, 168 N.J. Super. at 84. The repair shop is also free to charge and collect from the insured any part of the repair price that exceeds the amount the insurer determines is appropriate. *Id.*

9. New Hampshire law endorses this procedure and the options that an insured and a repair shop have after an accident. N.H. Rev. Stat. Ann. § 417:4, XX(c) provides that:

> [n]othing shall prohibit any insurance company... from providing to such insured person or entity the name of an... automobile repair company with which arrangements may have been made with respect to automobile glass or repair prices or services… . **[T]he insurer may limit payment for such work based on the fair and reasonable price in the area by repair shops or facilities providing similar services…**

N.H. Rev. Stat. Ann. § 417:4, XX(c) (emphasis added). Similarly, New Hampshire Insurance Department Regulation 1002.17 provides that if an independent repair shop and an insurer are unable to agree on a price, then:

> [t]he price shall be the price available from any other recognized, competent, and conveniently located independent repair shop or facility that is willing and able to repair the damaged motor vehicle within a reasonable time.

Ins. 1002.17. Nothing in New Hampshire law supports that a repair facility can unilaterally impose a price for repairs on an insurer.

10. Keene Auto Body appears to be rejecting the choices available under New Hampshire law in favor of its own desired outcome: keeping the business of repairing Carrasquillo and Collins's vehicles and trying to force Vermont Mutual to pay whatever price Keene Auto Body wishes to charge for the work. Such an outcome is contrary to New Hampshire law, *see* RSA 417:4, XX(c); Ins. 1002.17, and to elemental principles of contract. If Keene Auto Body was unhappy with Vermont Mutual's estimates for the repairs to Carrasquillo and Collins's vehicles, Keene Auto Body could have elected not to perform the work on those vehicles. Having chosen to do the work without an agreement with Vermont Mutual, Keene Auto Body can either accept the Vermont Mutual estimates' amounts or it can attempt to recover the excess costs from Carrasquillo and/or Collins if they agreed to pay those excess amounts. Vermont Mutual has no obligation to pay Keene Auto Body its unilaterally-imposed price for the repairs to Carrasquillo and Collins's vehicles.

WHEREFORE, Vermont Mutual respectfully requests that this Honorable Court:

A. GRANT this motion to dismiss;

B. DISMISS the above-captioned small claims complaints with prejudice;

C. SCHEDULE a hearing on this motion, if necessary; and

D. GRANT any other relief it deems just and proper.

Respectfully submitted,

TIMOTHY J. MURRAY and
VERMONT MUTUAL INSURANCE COMPANY

By Their Attorneys,

PRIMMER PIPER
EGGLESTON & CRAMER PC

Dated: August 14, 2020

by: /s/ Gary M. Burt

Gary M. Burt, Esquire
NH Bar ID #5510
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03105
(603) 626-3300
gburt@primmer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded to the plaintiff through the court's electronic filing system.

Dated: August 14, 2020

by: /s/ Gary M. Burt
Gary M. Burt