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Court of Appeals of Texas, Houston (14th Dist.).

SAFECO INSURANCE COMPANY
OF AMERICA, Appellant
v.
CLEAR VISION WINDSHIELD REPAIR, LLC, Elizabeth Dutson, Bruce Houck, Greg Hineman, Matthew O'Neill, and James McCubbin, Appellees

NO. 14-17-00103-CV
|
Opinions filed November 27, 2018

On Appeal from the 269th District Court, Harris County, Texas, Trial Court Cause No. 2015-03748

Attorneys and Law Firms

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Andrew A. Bergman, Jay K. Gray, Dallas, for Appellee.

Panel consists of Chief Justice Frost and Justices Busby and Wise

OPINION

J. Brett Busby, Justice

***1** This case concerns waiver of anti-assignment clauses in insurance policies. Appellee Clear Vision Windshield Repair, LLC repaired chips in the windshields of appellant Safeco Insurance Company's insureds, the individual appellees. Clear Vision submitted invoices to Safeco for the cost of the windshield repairs. Clear Vision asserted it was entitled to payment because Safeco's insureds had assigned their right to payment under their insurance policies to Clear Vision. When Safeco refused to pay four of Clear Vision's invoices, Clear Vision sued Safeco alleging numerous causes of action, including breach of contract. During the resulting bench trial, Safeco argued Clear Vision did not have standing because the insurance policies at issue contained anti-assignment clauses. Clear Vision responded that it had standing because, among other reasons, Safeco had waived enforcement of the clauses. The trial court agreed with Clear Vision and signed a final judgment in its favor.

Safeco challenges that judgment in four issues. We need only address Safeco's third issue because it is dispositive. In that issue, Safeco argues that the evidence is legally and factually insufficient to support the trial court's finding that it had waived enforcement of the anti-assignment clauses in the insurance policies. Because we conclude sufficient evidence supports the trial court's waiver finding, we overrule Safeco's third issue and affirm the trial court's judgment.

BACKGROUND

Safeco is an automobile insurance company operating in Texas and other states. Safeco designates an exclusive third-party administrator, Safelite, to handle its insureds' claims of automobile glass damage nationwide. Safeco authorizes Safelite to pay glass repair vendors directly. Despite having an exclusive third-party administrator, Safeco will also handle and pay directly any glass repair claims submitted to it rather than to Safelite. Julian Winfield, Safeco's only witness at trial, testified that Safelite does not have the authority to enforce an anti-assignment clause for any glass repair claim submitted to it for payment. Winfield also testified that during his time at Safeco, he had never experienced the anti-assignment clause being enforced as to any glass repair claim.

Clear Vision is in the business of repairing chips in automobile windshields. Clear Vision conducts business inside automobile dealership repair shops. When a customer with a chipped windshield comes into a dealership where Clear Vision operates, a Clear Vision representative asks if the customer would like the windshield repaired. Clear Vision charges a flat rate of $150 to repair a chipped windshield. If the customer agrees to the repair and has insurance, Clear Vision verifies the insurance information from the customer's insurance card. Clear Vision does not confirm insurance coverage with Safeco before performing the repairs. Clear Vision makes the repair after the customer signs an assignment of

his right to payment under the policy, as well as any cause of action he might have if the insurance company fails to pay. Once the repair is completed, Clear Vision submits an invoice to each customer's insurance company seeking direct payment for the repair. Because Clear Vision does not contact the insurance company before it makes a windshield repair, Clear Vision knows it runs the risk that it might not be paid when it takes an assignment of rights from its customers.

***2** According to Douglas Stroh, president of Clear Vision, Clear Vision has submitted thousands of glass repair claims to Safeco since 2011. Clear Vision does not have a contractual relationship with Safeco as a preferred provider or otherwise. As a result, for each windshield Clear Vision repairs, its first contact with Safeco is when it sends an invoice for the completed repair. Stroh estimated that when Clear Vision submits invoices directly to Safeco, Safeco pays those invoices about eighty-five percent of the time despite the lack of a contractual relationship between Clear Vision and Safeco. Safeco usually pays the full amount of the invoice. As to the unpaid invoices, Safeco did not give the anti-assignment clause as the reason for non-payment. When Clear Vision submits invoices to Safelite, Safelite typically does not pay the full amount. According to Stroh, Safelite has never informed Clear Vision that it could not pay Clear Vision's invoices. Nor has Safelite raised the anti-assignment clause as a reason to not pay a Clear Vision invoice. Safeco does not dispute that it sometimes pays Clear Vision's invoices directly, but it asserts that it does so only as a convenience to its insureds.

Clear Vision repaired chips in the windshields of automobiles owned by individual appellees Elizabeth Dutson, Bruce Houck, Matthew O'Neill, and James McCubbin. It is undisputed that Safeco issued automobile insurance policies to these four individual appellees, the policies were in effect on the dates of loss and provided coverage for windshield repairs, and this coverage was not subject to a deductible. Each of the insureds' policies contained the following anti-assignment clause: "Your rights and duties under the policy may not be assigned without our [i.e., Safeco's] written consent." All four of the insureds signed documents assigning to Clear Vision their right to payment for the windshield repairs, as well as their causes of action in the event Safeco failed to pay for the repairs. It is undisputed that Safeco did not consent in writing to any of the insureds' assignments. It is also undisputed that Clear Vision did not contact Safeco seeking permission for an assignment of the insureds' policy benefits.

After Clear Vision had repaired the insureds' windshields, Clear Vision submitted invoices directly to Safeco for payment. The invoices included the assignments from the insureds. Safeco eventually paid Clear Vision $150 each on the invoices for the Dutson, Houck, and McCubbin repairs. Safeco did not pay the O'Neill invoice. The trial court found that Safeco rejected the O'Neill invoice because it did not include sales tax. Safeco did not notify Clear Vision that it was refusing to pay the O'Neill invoice because of the anti-assignment clause in O'Neill's policy.

Clear Vision filed suit on its own behalf and on behalf of the individual insureds against Safeco, alleging breach of contract. Regarding the invoices Safeco paid, Clear Vision argued Safeco had breached the insurance policies because the payments were not timely. The dispute went to trial before the bench. At the conclusion of the one-day bench trial, the trial court signed a final judgment in favor of Clear Vision. The judgment awarded Clear Vision damages of $150, prejudgment and post-judgment interest, and $14,000 in attorney's fees.

The trial court subsequently filed findings of fact and conclusions of law. Among other findings, the trial court found that Safeco had waived enforcement of the anti-assignment clauses in the insurance policies at issue here. It also found that the four Safeco insureds had assigned to Clear Vision their right to insurance benefits available for their windshield repairs, as well as their causes of action for any failure by Safeco to pay for the repairs. The trial court also concluded that Safeco had failed to comply with the four individual plaintiffs' insurance policies. This appeal followed.

ANALYSIS

Safeco raises four issues on appeal. Because we ultimately conclude that Safeco waived enforcement of the anti-assignment clauses, we need only address Safeco's third issue, which challenges the legal and factual sufficiency of the evidence supporting the trial court's waiver finding. [1]

1 Safeco's first two issues address the enforceability of the anti-assignment clauses. Safeco's fourth issue

challenges the trial court's finding that Clear Vision had an implied-in-fact contract with Safeco, an alternative basis supporting the judgment. Because we conclude Safeco waived the anti-assignment clauses and Clear Vision had standing as a result of the insureds' assignments, we need not reach these issues. *See* Tex. R. App. P. 47.1.

I. Standard of review

***3** When a trial court makes specific findings of fact and conclusions of law following a bench trial and a reporter's record is before the appellate court, the findings will be sustained if there is evidence to support them, and the appellate court will review the legal conclusions drawn from the facts found to determine their correctness. *Trelltex, Inc. v. Intecx, L.L.C.*, 494 S.W.3d 781, 789 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Findings of fact have the same force and dignity as a jury's verdict and are reviewable under the same standards of legal and factual sufficiency. *Foley v. Capital One Bank, N.A.*, 383 S.W.3d 644, 646 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate on appeal that there is no evidence to support the adverse finding. *Univ. Gen. Hosp., L.P. v. Prexus Health Consultants, LLC*, 403 S.W.3d 547, 550 (Tex. App.—Houston [14th Dist.] 2013, no pet.). In conducting a legal sufficiency review, we consider the evidence in the light most favorable to the appealed finding and indulge every reasonable inference that supports it. *Id.* at 550–51 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 821–22 (Tex. 2005)). The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the decision under review. *Id.* at 551. This Court must credit favorable evidence if a reasonable trier of fact could and disregard contrary evidence unless a reasonable trier of fact could not. *Id.* The trier of fact is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Id.* If there is more than a scintilla of evidence supporting a finding of fact, we will overrule a legal sufficiency challenge. *CA Partners v. Spears*, 274 S.W.3d 51, 69 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

When a party challenges the factual sufficiency of the evidence supporting a finding on which it did not have the burden of proof, we may set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998); *Nip v. Checkpoint Sys., Inc.*, 154 S.W.3d 767, 769 (Tex. App.—Houston [14th Dist.] 2004, no pet.) In reviewing the factual sufficiency of the evidence, we must examine the entire record, considering the evidence both in favor of and contrary to the challenged finding. *See Ellis*, 971 S.W.2d at 406–07; *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The amount of evidence necessary to affirm is far less than the amount necessary to reverse a judgment. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 616 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

This Court is not a factfinder. *Ellis*, 971 S.W.2d at 407. Instead, the trier of fact, in this case the trial court, is the sole judge of the credibility of the witnesses and the weight to afford their testimony. *Pascouet*, 61 S.W.3d at 615–16. Therefore, we may not pass upon the witnesses' credibility or substitute our judgment for that of the trial court, even if the evidence would support a different result. *Id.* If we determine that the evidence is factually insufficient, we must detail the evidence relevant to the issue and state in what regard the contrary evidence greatly outweighs the evidence in support of the challenged finding; we need not do so when we affirm. *See Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (per curiam).

***4** We review a trial court's conclusions of law de novo. *Trelltex, Inc.*, 494 S.W.3d at 790. When performing a de novo review, we exercise our own judgment and redetermine each legal issue. *Id.* To make this determination, we consider whether the conclusions are correct based on the facts from which they are drawn. *Id.*

II. Sufficient evidence supports the trial court's finding that Safeco waived enforcement of the anti-assignment clauses found in the insurance policies.

Individual appellees Dutson, Houck, O'Neill, and McCubbin had automobile insurance policies with Safeco, and the trial court concluded that these policies covered the glass repairs that Safeco performed. In Texas, insurance policies are interpreted according to the general rules governing construction of contracts. *Gastar Expl. Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Each individual appellee assigned his or her right under these contracts to receive payment from Safeco for the repairs —as well as their causes of action for any non-payment —to Clear Vision. As assignee, Clear Vision can sue

Safeco to enforce these contractual rights unless the anti-assignment clauses of the policies apply. *See generally Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 WL 6750047, at *14–15 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (discussing assignee's ability to sue on contract).

Anti-assignment clauses are enforceable unless rendered ineffective by a statute or through the application of contract law. *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 721 (Tex. App.—Dallas 2004, no pet.). Under contract law, a party may waive rights included in the contract for its benefit. *Id.* at 722. In particular, an anti-assignment clause in an insurance contract can be waived. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Puget*, 649 F.Supp.2d 613, 623 (S.D. Tex. 2009); *Johnson*, 148 S.W.3d at 722; *see also Hermann Hosp. v. MEBA Med. & Benefits Plan*, 959 F.2d 569, 574 (5th Cir. 1992), *overruled on other grounds by Access Mediquip, L.L.C. v. UnitedHealthcare Ins. Co.*, 698 F.3d 229 (5th Cir. 2012). "[A] waiver is unilateral in character; it results as a legal consequence from some act or conduct of the party against whom it operates; and no act of the party in whose favor it is made is necessary to complete it." *Johnson*, 148 S.W.3d at 722.

The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish that right, or intentional conduct inconsistent with claiming that right. *Zarate v. Rodriguez*, 542 S.W.3d 26, 40 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).[2] Safeco challenges the third element here. Waiver generally is a question of fact to be resolved by the trier of fact. *Straus v. Kirby Court Corp.*, 909 S.W.2d 105, 108 (Tex. App.—Houston [14th Dist.] 1995, writ denied). A party's express renunciation of a known right can establish waiver. *Johnson*, 148 S.W.3d at 722. A party's silence or inaction for a period of time long enough show an intention to yield the known right is also enough to establish waiver. *Id.*

2 Safeco argues on appeal that Clear Vision also had to show prejudice from enforcement of the right. But prejudice is only a necessary component of waiver in certain situations, and Safeco has not cited—nor have we found—any cases requiring a showing of prejudice before finding waiver of an anti-assignment clause.

***5** The trial court found that Safeco waived the right to enforce the anti-assignment clauses, and we conclude this finding is supported by legally and factually sufficient evidence. The record shows—and the court found—that Safeco paid Clear Vision's invoices for the Dutson, Houck, and McCubbin repairs. Safeco's intentional conduct in paying Clear Vision for these repairs is inconsistent with Safeco's later claim that it owed Clear Vision nothing because it had not consented to Dutson, Houck, and McCubbin assigning Clear Vision their rights to payment under the policies. *See Zarate*, 542 S.W.3d at 40 (explaining that waiver may be based on "intentional conduct inconsistent with [claiming a party's existing] right"); *Trelltex, Inc.*, 494 S.W.3d at 793 (holding intentional conduct in accepting payment of certain percentage commission was inconsistent with later claim of contractual right to receive higher percentage); *see also Encompass Office Sol., Inc. v. La. Health Serv. & Indem. Co.*, No. 3:11-CV-1471-P, 2013 WL 12310676, at *10 (N.D. Tex. Sept. 17, 2013) (holding fact issue existed whether health insurer waived anti-assignment clause by paying assignee directly).

As to the O'Neill repair, the trial court found that Safeco rejected Clear Vision's invoice "because the invoice did not include sales tax." There is no evidence that Safeco's rejection was a refusal to pay the claim under any circumstances, that Safeco rejected the invoice because it had not consented to O'Neill assigning Clear Vision his right to payment under the policy, or that Clear Vision was aware of the anti-assignment clause until Safeco asserted it in this litigation. To the contrary, the trial court found that "Safeco did not inform Clear Vision or the Individual Plaintiffs that it consider[ed] the assignments signed by its insureds to be void until it made such arguments in the course of defending this lawsuit." Safeco does not argue that this finding is unsupported by the evidence.

Other courts have held that a fact issue exists on waiver of an anti-assignment clause when one party to a contract (1) refuses to pay another party's assignee, (2) gives an explanation for its refusal that does not rely on the anti-assignment clause, and (3) fails to invoke the clause until litigation ensues. *Tex. Dev. Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 883–85 (Tex. App.—Eastland 2003, no pet.); *see also La. Health Serv. & Indem. Co.*, 2013 WL 12310676, at *10 (holding fact issue existed whether health insurer waived anti-assignment clause by denying claim on different basis). Likewise, we conclude that Safeco's

decision not to pay Clear Vision's invoice on the ground that it did not include sales tax, as well as Safeco's failure to invoke the anti-assignment clause until Clear Vision sued, supports the trial court's finding that Safeco waived enforcement of the anti-assignment clause in O'Neill's policy. *Id.*

Although this evidence alone is legally and factually sufficient to support the trial court's waiver finding as to the O'Neill repair, we note there is additional evidence indicating that Safeco's delay in invoking the anti-assignment clause was unreasonable. *See* *Encompass Office Sol., Inc. v. Conn. General Life Ins. Co.*, No. 3:11-CV-02487-L, 2017 WL 3268034, at *13 (N.D. Tex. July 31, 2017) (holding health insurer waived anti-assignment clause where it "delay[ed] unreasonably in asserting the existence of the anti-assignment clause in response to a request for payment pursuant to an unambiguous assignment"); *Johnson*, 148 S.W.3d at 722 (explaining that silence or inaction for period long enough to show intention to yield known right is enough to prove waiver of anti-assignment clause). Safeco has not challenged the trial court's finding that it "had notice of the claim for repairs to the O'Neill vehicle no later than July 16, 2014." Yet Safeco did not raise the anti-assignment clause until after Clear Vision filed this suit in January 2015.

Safeco's six-month delay in raising the anti-assignment clause was atypical. The record includes evidence that Safeco's policy is to issue payment within 30 days of determining coverage and receiving all necessary information. *See also* Tex. Ins. Code § 541.060(a)(2)(A) (West 2009) (defining as an unfair settlement practice an insurer's failure to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim for which the insurer's liability is reasonably clear). In addition, Stroh testified that Clear Vision had billed Safeco directly for approximately 2,500 windshield repairs since 2011, and Safeco paid eighty-five percent of the invoices. Regarding the fifteen percent of invoices that were not paid, Safeco never gave the anti-assignment clause as the reason for non-payment. According to Stroh, Safeco never informed Clear Vision that it needed Safeco's written consent for any assignments of insureds' claims. Under these circumstances, the fact-finder could conclude that Safeco's delay of six months in asserting its anti-assignment right—which it had never before asserted in connection with similar claims involving other policies—was unreasonable and showed Safeco's intention to yield that right. *See* *Conn. General Life Ins. Co.*, 2017 WL 3268034, at *13; *Johnson*, 148 S.W.3d at 722.

***6** We do not address whether—as some courts have held—an insurer can waive its right to enforce anti-assignment clauses in the policies at issue through a "course of dealing" of paying the same assignee under similar policies issued to different insureds. *E.g.*, *La. Health Serv. & Indem. Co.*, 2013 WL 12310676, at *10. Rather, we conclude only that the trier of fact could consider Safeco's practice regarding other policies when deciding whether Safeco delayed unreasonably in invoking the anti-assignment clause of the O'Neill policy.

Having reviewed the entire record, we hold there is legally and factually sufficient evidence supporting the trial court's finding that Safeco waived enforcement of the anti-assignment clauses in the individual appellees' insurance policies. *See* *Zarate*, 542 S.W.3d at 40 (waiver by intentional conduct inconsistent with claiming a right); *Johnson*, 148 S.W.3d at 722 (waiver by silence or inaction for period long enough to show intention to yield known right). Given these waivers, the assignments signed by the individual appellees provided Clear Vision with standing to assert their claims for breach of contract against Safeco.[3] We overrule Safeco's third issue.

3 Because the evidence supports the trial court's finding that Safeco waived enforcement of the anti-assignment clauses, we do not reach the trial court's alternative conclusion that the anti-assignment clauses apply only to "rights and duties under the policy" and thus did not prevent the individual appellees from assigning causes of action arising from breach of the policy. *See* *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith P'ship*, 323 S.W.3d 203, 211–12 (Tex. App.—El Paso 2010, pet. denied); *but cf.* *Tex. Farmers Ins. Co. v. Gerdes ex rel. Griffin Chiropractic Clinic*, 880 S.W.2d 215, 218–19 (Tex. App.—Fort Worth 1994, writ denied) (holding clause prohibiting assignment of "rights and duties" barred post-loss assignment of cause of action against insurer).

CONCLUSION

Having overruled Safeco's third issue, the only issue necessary for a final disposition of this appeal, we affirm the trial court's judgment.

(Frost, C.J., dissenting).

DISSENTING OPINION

Kem Thompson Frost, Chief Justice

For parties seeking to avoid enforcement of a contract term, waiver by conduct stands as a high hurdle. To clear it, the conduct must be "unequivocally inconsistent" with the contract right.[1] Today, in holding the insurer waived the insurance policy's anti-assignment clause, this court dilutes the legal standard so that the high hurdle becomes a low bar. Even under the majority's thinning of the Supreme Court of Texas's unequivocally-inconsistent standard, the "waiver conduct" on which the majority relies fails as a matter of law because it is not at odds with enforcing the anti-assignment right. In tacit recognition of this fact, the majority fails to even address the insurer's argument that under the alternatively-pled implied-contract scenario, neither the policyholders' purported assignments nor the insurer's anti-assignment rights would come into play and so could not possibly conflict. The record evidence is legally and factually insufficient to prove that the insurer waived its right to enforce the anti-assignment clause. Rather than affirm the trial court's judgment, this court should reject the waiver-by-conduct theory and address the remaining issues. Because it does not, I respectfully dissent.

1 *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 353 (Tex. 2005).

The Contractual Relationships in Issue

***7** Appellant Safeco Insurance Company of America has no express contract with appellee Clear Vision Windshield Repair, LLC. The individual appellees/policyholders Matthew O'Neill, Elizabeth Dutson, Bruce Houck, and James McCubbin (the "Four Individuals") each purchased insurance policies that contain anti-assignment clauses, binding themselves to this term of their respective insuring agreements with Safeco. Despite this contractual prohibition in their respective policies, each of the Four Individuals purported to assign certain policy benefits to Clear Vision without getting Safeco's written consent, as their respective contracts required. When Clear Vision filed suit, Safeco asserted its rights under the policies' anti-assignment clauses.

In its lawsuit, Clear Vision asserted two theories of recovery against Safeco: (1) breach of an implied contract with Safeco and (2) as the purported assignee of the Four Individuals. Notably, the majority does not consider whether Safeco and Clear Vision formed an implied contract or, if so, whether Safeco breached it. Instead, the majority addresses only the assignment theory of recovery and finds that Safeco waived enforcement of the anti-assignment provisions by its conduct. In reaching this holding, the majority conflates the two theories, using conduct that could be relevant to a Safeco-Clear Vision implied-contract analysis as evidence of waiver in the respective contractual relationships between Safeco and the Four Individuals. This approach skews the waiver analysis.

Because today's decision turns on the strength of the conduct alleged to constitute waiver, it is crucial for the court to assess the conduct through the lens of waiver rather than through the lens of implied contract. In assessing possible waiver by conduct, the court must look to Safeco's actions with respect to each individual policyholder. The majority, finding very little there, turns to Safeco's actions *vis-à-vis* other contractual relationships. While that evidence would be appropriate to an implied-contract analysis, the court should not use it to find waiver by conduct. By relying upon evidence of Safeco's actions in other contractual relationships in its waiver-by-conduct analysis, the majority takes Texas's waiver-by-conduct doctrine to a new place, one that is out of step with the high court's precedent.

Today's Expansion of the Waiver-by-Conduct Doctrine

If we do not ask the right questions, we will not get the right answers. In analyzing waiver by conduct, we first must ask, "What is the contract right at issue?" Then, we must ask, "What conduct operates to waive that right?"

The first question is easily answered: The contract rights at issue are Safeco's rights to enforce the anti-assignment clauses as to O'Neill, Dutson, Houck, and McCubbin based on Safeco's respective insuring agreements with these individuals. In laying the groundwork for answering

the second question, the majority points to conduct unrelated to these individuals' respective insuring agreements as if Safeco's conduct in other contractual relationships with other people under other policies operates to waive its rights in its contracts with the Four Individuals. [2] Safeco's conduct in other contractual relationships has no bearing on the waiver analysis applicable to the Four Individuals. Yet, largely on the strength of this extra-contractual-relationship evidence the appellees urge the court to hold the evidence legally and factually sufficient to support the trial court's finding that Safeco waived enforcement of the anti-assignment clauses in the Four Individuals' insurance policies.

2 *See ante* at 3 (noting Clear Vision has submitted thousands of claims to Safeco since 2011; stating Safeco pays submitted invoices about 85% of the time, and that as to unpaid invoices, Safeco did not give the anti-assignment clause as the reason for non-payment.)

***8** The waiver conduct must be tied to the contract right. Random waiver conduct does not suffice — the conduct must go to the particular rights at issue, in today's case, the rights to enforce the anti-assignment clause as to each of the Four Individuals. It is not enough that the one entitled to enforce the right has waived the same type of right in other contractual relationships for other, similarly situated people. Two sets of contracting parties might enter into identical contracts but that does not mean that a waiver in one operates as a waiver in both. Because waiver of contractual rights must be rooted in intentional conduct, the law does not infer waiver of a contract right from evidence that the party seeking enforcement waived the same type of right in a similar contract with someone else. [3] Like fingerprints or snowflakes, contracts may look alike but they are distinct agreements.

3 *See* *Certain Underwriters at Lloyd's v. PV Housing Group, L.P.*, No. H-10-3024, 2012 WL 10688348, at *9 (S.D. Tex. Jan. 9, 2012).

Under Texas law, we are to analyze waiver by conduct on an individual basis, considering what specific facts show the right-holder's intent to give up the right to enforce a specific provision against a specific party. Waiver as to one is not necessarily waiver as to all. Waiver by conduct turns on the facts and circumstances in each contractual relationship. For example, in the borrower-lender context, a lender's waiver of a late fee in a form contract as to one or two (or even many) borrowers does not waive the late-fee right as to all borrowers who have the same form loan documents. Likewise, in the landlord-tenant context, a landlord's waiver of a notice provision for one tenant (or even for many tenants) does not waive the provision as to all tenants who have the same form lease. Simply put, individual contracts demand individual waiver analyses.

Though many insurance policies may contain the same or similar provisions, they do not form a unitary contract among policyholders. Each individual that purchases an insurance policy forms a separate, stand-alone agreement with the insurer. Though contracts with standard provisions, such as an anti-assignment clause may be commonplace, the law does not carve out short-cuts for litigants asserting waiver by conduct.

Under Texas law, for a contract party to establish waiver of a contract right, the "waiver conduct" must be tied to the contract right by a showing that the one entitled to enforcement of the right intentionally forfeited the right as to the other party to that contract. [4] The individualized showing of waiver falls short in this case. To bridge the gap, appellees urge the court to look to facts relevant in an implied-contract analysis but not germane to the waiver determination. The majority looks to generic conduct that might amount to waiver of some right as against some party in some context, but does little to tie that conduct to Safeco's contract rights with the Four Individuals.

4 *Van Indep. Sch. Dist.*, 165 S.W.3d at 353.

Though conduct relating to other policyholders would be relevant to the implied-contract analysis Clear Vision urges as an alternative theory of recovery, today's decision does not rest on any contract, implied or express, between Clear Vision and Safeco. (The majority expressly declines to undertake an implied-contract analysis.) The majority instead bases its waiver analysis on Clear Vision's purported role as an assignee of the Four Individuals.

No Conduct "Unequivocally Inconsistent" with Enforcement of Anti-Assignment Clause in the Four Individuals' Policies

Though sometimes waiver of a contract provision may be established by conduct alone, for the proponent of this defensive theory to clear that high hurdle, the conduct must be "unequivocally inconsistent" with claiming the right — a heavy lift under Texas law.[5] Fuzzy actions fall short of meeting the waiver-by-conduct standard. Yet, the majority relies on conduct, vague at best, to form the core of its waiver finding.

5 *Id.*

***9** The unequivocally-inconsistent legal standard demands conduct that is so clear, so obvious, and so undeniable that it substitutes for words. No evidence in the record meets that standard. The record contains nothing from which to infer intentional relinquishment of a known right.[6] The nebulous acts and omissions on which the appellees and the majority rely (addressed individually below) do not suffice for waiver.

6 *See Jernigan v. Langley,* 111 S.W.3d 153, 156–57 (Tex. 2003).

Failure to Raise the Anti-Assignment Clause

The majority's waiver analysis for the O'Neill policy rests mostly on Safeco's purported failure to raise the anti-assignment clause at the time Clear Vision presented its invoice.[7] First, the O'Neill-Safeco insurance policy did not obligate Safeco to affirmatively raise the anti-assignment clause and Safeco's failure to do so reflects no inconsistency.[8] Second, the majority fails to take account of all the possibilities. For example, if the O'Neill transaction were the product of a Clear Vision-Safeco implied contract for Clear Vision to repair Safeco's policyholders' windshields, as Clear Vision alleges and as the trial court found, there would be no reason for Safeco to raise the anti-assignment clause as the services would be performed under a contract, not by assignment. So, either way, Safeco's failure to raise the anti-assignment clause would not be inconsistent with enforcing it, and certainly not "unequivocally inconsistent."

7 *See ante* at —— – ——.

8 *See Van Indep. Sch. Dist.*, 165 S.W.3d at 353; *cf. In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (orig. proceeding) (concluding General Electric did not waive its previously asserted contractual right by not complaining sooner, even though the "circumstances here may indicate inattention or a certain lack of care on the part of General Electric," because no evidence of specific intent to waive its contractual right existed).

The same holds true for Safeco's alleged failure to raise the anti-assignment clause in connection with Clear Vision's invoices for the Houck, Dutson, and McCubbin transactions. If there were no Safeco-Clear Vision implied contract, the majority points to nothing in these individuals' insuring agreements that would require Safeco to tell Clear Vision anything or to respond to a purported assignment that lacked the requisite consent. If there were a Safeco-Clear Vision implied contract, as the trial court found, then the anti-assignment clause would not be implicated and a failure to raise it would not be at odds with enforcing it.

Failure to Cite to Anti-Assignment Clause as Reason for Non-Payment

The majority states that "Safeco never gave the anti-assignment clause as the reason for non-payment"[9] and instead rejected Clear Vision's demand for payment of the O'Neill invoice based on the lack of sales tax. But rejecting the proffer based on missing sales tax is wholly consistent with the implied-contract scenario. If Safeco and Clear Vision had an implied contract (as the trial court found), then the anti-assignment clause would not be at issue and giving the sales-tax reason for non-payment would not be inconsistent with enforcing the anti-assignment provision.

9 *See ante* at ——.

Moreover, neither this court nor the Supreme Court of Texas has ever held that a party waives a contractual right by not citing it as a reason for its actions. Nor would that requirement promote Texas's freedom-of-contract principles.

***10** A contracting party may have many reasons for not accepting a proffered assignment. Giving no reason, or giving a reason other than a reason that would implicate the anti-assignment right, is not inconsistent with asserting the right to reject a non-complying assignment. First, the parties did not put that requirement in their contract. Second, the law does not require a

contract party to provide an exhaustive recitation of all the other party's failures to preserve contract rights. A party presented with a non-complying assignment and demand for payment might have a dozen reasons the proffer fails. In the majority's world of waiver, telling the erstwhile assignee/presenter "we're closed" or the "signature is illegible" or "our computer is down" would waive every contract right not given in the first exchange. The Supreme Court of Texas does not put that burden on the contract right-holder. Texas law puts the burden on the one seeking to avoid enforcement of the contract right to show waiver by unequivocally inconsistent conduct. [10] Unless the contract provides otherwise, saying "no" to a stranger's demand for payment or giving a different reason (e.g., no sales tax) for the "no," or giving no reason at all, is not unequivocally inconsistent with claiming the anti-assignment right.

10 *See Van Indep. Sch. Dist.*, 165 S.W.3d at 353.

Under the majority's reasoning a non-signatory to a bank's depositor agreement who demanded to make a withdrawal on the account could recover against the refusing bank on the theory that by doing nothing the bank waived its right to insist on a valid signature before releasing deposited funds. If the bank instead had given as a reason for not funding the withdrawal that the non-signatory did not have the proper form of identification, then, under today's analysis, the bank would have waived its right to insist on a valid signature because it did not give *that* as a reason for not permitting the withdrawal. Just as the bank would not waive its contract right to insist on a valid signature for withdrawals by giving a different reason for rejecting the proffer, Safeco did not waive its right to enforce the anti-assignment clause by not raising the non-complying assignment.

Waiver must be based on more than the unrequited communique of a non-party to the contract. Presuming for argument's sake that when Clear Vision presented the assignment to Safeco, it was asking for Safeco's consent and that Safeco stood silent, this silence is no evidence of waiver. [11] Just as an offeree's silence is no evidence of acceptance of the contract's terms, an insurer's silence in response to a would-be assignee's request for consent is no evidence of acceptance or waiver of the non-complying assignment. [12]

11 *See Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 26 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

12 *See id.*

The Supreme Court of Texas has emphasized that waiver is largely a matter of intent. [13] So, for implied waiver to be found through Safeco's conduct, intent must be demonstrated by the surrounding facts and circumstances. The appellees submitted no evidence of any positive act, representations, or affirmative action by Safeco to show Safeco intentionally relinquished its right to confine the Four Individuals to the contract terms and thus demand strict adherence to the written policy.

13 *Van Indep. Sch. Dist.*, 165 S.W.3d at 353.

The False Premise of "Unreasonable Delay"

Without citing any law, the majority considers evidence of Safeco's conduct with other insureds on the ground that the trial court could consider Safeco's practice regarding other policies in deciding whether Safeco "delayed unreasonably" in invoking the anti-assignment clause of O'Neill's policy. In making this leap, the majority fails to consider that no evidence shows that the 2,500 claims were paid based on non-complying assignments. Indeed, according to Stroh, Safeco never once raised the anti-assignment right, so none of the 2,500 cases on which the majority relies would be germane to unreasonable delay in the context of a non-complying assignment. And, as noted above, the 2,500 claims paid could have been based on a Clear Vision-Safeco implied contract. The majority cannot rule out this possibility without addressing the implied-contract theory. Nowhere in its opinion does the majority dispute that if Clear Vision and Safeco had an implied contract, Safeco's failure to raise the anti-assignment provision would not be inconsistent with enforcing it.

***11** The majority cites no law that says a contracting party need respond to a stranger-to-the-contract's presentation of a non-operative assignment or that silence in these circumstances equates to relinquishment of the anti-assignment contract right. It is not a matter of delay; it is a matter of non-compliance. Nothing in the contract requires Safeco to respond to strangers who present

putative assignments to which no written consent has been given.

Our supreme court has signaled heightened protection for contract rights when parties spell out their respective entitlements. Today's case presents a situation analogous to waiver of anti-waiver provisions. In that context, the high court held that a landlord did not waive its rights under the anti-waiver provision in a lease because the facts and circumstances did not show that the landlord engaged in conduct unequivocally inconsistent with claiming the landlord's right to rely upon the anti-waiver provision. [14] Similarly, in today's case, the facts and circumstances surrounding each of the four insurance policies do not show that Safeco engaged in conduct unequivocally inconsistent with claiming its right to rely upon the anti-assignment clauses. [15]

14 *See* Shields Ltd. P'ship v. Bradberry, 526 S.W.3d 471, 485–86 (Tex. 2017).

15 *See id.*

Clear Vision and the Four Individuals, as the ones seeking to avoid enforcement of the anti-assignment clauses, have the burden to show waiver. The concept of unreasonable delay as evidence of waiver finds roots in the notion that the delaying party has a contractual obligation to take action. For the majority, the triggering event to measure "unreasonable delay" is presentment of the non-complying assignment — an assignment that on its face does not meet the policy's demand for written consent. The majority does not explain how a non-complying assignment even starts the clock. Given Clear Vision's stranger-to-the-policy status, why does Safeco have any obligation to respond at all? Does Clear Vision even have standing to assert a breach-of-insurance policy claim when Clear Vision never presented a policy-sanctioned assignment?

Payment of Invoices

Testimony that Clear Vision directly billed Safeco for approximately 2,500 windshield repairs since 2011, and that Safeco paid 85% of them is no evidence that Safeco waived the anti-assignment clause as to the Four Individuals. Waiver turns on facts, not odds. Evidence that Safeco paid 85% of the invoices Clear Vision presented might be evidence of an implied contract between the two, but it is no evidence of waiver of the anti-assignment clauses. The evidence does not satisfy the unequivocally-inconsistent element.

Payment of the Dutson, Houck, and McCubbin invoices is not necessarily conduct inconsistent with Safeco's claiming the anti-assignment rights. Other possibilities exist for that action. For example, Safeco might have paid Clear Vision under an implied contract with Clear Vision. The majority does not conduct an implied-contract analysis, nor does the majority undertake to refute this alternative that would be consistent with enforcement of the anti-assignment clauses. Evidence of even one alternative hypothesis makes it impossible for the appellees to meet the unequivocally inconsistent standard.

Silence during Transactions with Non-Parties to the Policies in this Case

The appellees suggest that Safeco's alleged silence in transactions with strangers to the O'Neill, Duston, Houck, and McCubbin policies somehow amounts to waiver of Safeco's right to enforce the anti-assignment clauses against these individuals. Our record contains no evidence that Safeco stood silent in the face of conduct that would suggest Safeco intended to waive its right to enforce the anti-assignment provisions in its contracts with O'Neill, Dutson, Houck, or McCubbin. In sum, the record contains no evidence of conduct "unequivocally inconsistent" with Safeco's claiming its rights under the anti-assignment provision of its respective contracts with the Four Individuals. [16] Waiver requires a positive act — something that shows unequivocally that the right-holder intended to forfeit the right. [17] And, the right-holder's conduct must be so clear, so explicit, so unmistakable that it fairly substitutes for a written expression. [18] We do not have that in this case. The record evidence would not enable reasonable and fair-minded people to find waiver. [19] Moreover, the waiver finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. [20]

16 *See* Van Indep. Sch. Dist., 165 S.W.3d at 353 ("[w]hile waiver may sometimes be established by conduct, that conduct must be unequivocally inconsistent with claiming a known right."); Jernigan v. Langley,

111 S.W.3d 153, 156 (Tex. 2003) (waiver requires an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right).

17 *See* *Van Indep. Sch. Dist.*, 165 S.W.3d at 353; *Jernigan*, 111 S.W.3d at 156.

18 *See* *Shields Ltd. P'ship*, 526 S.W.3d at 485–86; *Van Indep. Sch. Dist.*, 165 S.W.3d at 353; *Jernigan*, 111 S.W.3d at 156.

19 *See* *City of Keller v. Wilson*, 168 S.W.3d 802, 823, 827 (Tex. 2005).

20 *See* *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998).

***12** Though waiver generally presents questions of fact to be resolved by the trier of fact, in today's case the only proffered proof of waiver fails as a matter of law. The only evidence grounded in conduct that arises from the parties' contractual relationships does not amount to waiver because it is not "unequivocally inconsistent" with claiming the right.[21] The record lacks legally and factually sufficient evidence to support the trial court's finding that Safeco waived enforcement of the anti-assignment clauses in the Four Individuals' insurance policies.

21 *See* *Shields Ltd. P'ship*, 526 S.W.3d at 485–86; *Van Indep. Sch. Dist.*, 165 S.W.3d at 353; *Jernigan*, 111 S.W.3d at 156.

Unwelcome Consequences of Expanding the Waiver-by-Conduct Doctrine

By looking to evidence of other people's contracts and contractual relationships with Safeco and citing to what happened some percentage of the time, the majority takes Texas waiver-by-conduct law beyond the borders of longstanding jurisprudence. In the process, the majority opens the door to unwelcome consequences — at the courthouse and in the marketplace.

In expanding the scope of waiver, the majority expands the scope of discovery in waiver cases. By creating a backdoor for otherwise irrelevant evidence of other contractual relationships, the majority effectively opens the discovery floodgates to a torrent of requests for irrelevant data that, under today's holding, arguably will be germane whenever a litigant raises a waiver-by-conduct defense. Indeed, instead of focusing on the conduct in the contractual relationship at issue, those resisting enforcement of contract provisions will seek to discover percentages, arguing that what happened in other contractual relationships informs the waiver-by-conduct analysis in the unrelated-contract dispute being litigated.

Texas law does not support looking to an insurer's conduct with other insureds to find waiver of the anti-assignment clause in its contracts with individuals who are strangers to those transactions. The majority cites no authority to support the notion that a party's conduct in one contractual relationship can provide evidence of waiver of a contractual provision with a different party, and this court should not enlarge waiver doctrine (or discovery in waiver cases) to so hold today. Today's holding brings uncertainty to the marketplace, frustrates reliance interests, and undermines freedom-of-contract principles. By diminishing the intent component of the waiver-by-conduct analysis, the court effectively finds contract rights forfeited without any evidence of the right-holder's intention to relinquish them. Given Texas's paramount public policy favoring freedom of contract, this court should not lightly find waiver of contract rights,[22] especially when doing so means expanding settled doctrine.

22 *Shields Ltd. P'ship*, 526 S.W.3d at 481; *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013).

By applying the traditional rules of waiver, the court would protect the parties' reliance interests, honor their legitimate expectations, preserve freedom-of-contract principles, avoid discovery problems, and achieve greater certainty and predictability in the law and in the marketplace.

Conclusion

The Supreme Court of Texas's demanding waiver-by-conduct standard protects legitimate contract rights and promotes freedom-of-contract principles. Today's holding does neither. The record contains nothing to suggest that Safeco ever did anything that would show an unequivocal intent to give up its rights to enforce the anti-assignment clause in its contracts with the Four

Individuals. Because the evidence does not support the trial court's finding that Safeco waived enforcement of the anti-assignment clauses, this court should (1) sustain Safeco's legal-sufficiency and factual-sufficiency challenges and (2) address the trial court's alternative conclusion that the anti-assignment clauses apply only to "rights and duties under the policy" and so did not preclude the individual appellees from assigning claims arising from breach of the policy. Unless the anti-assignment clause fails on public-policy grounds (an issue the majority declines to address), the court should enforce the parties' insurance agreements as written.

All Citations

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