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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000395-MR

AMERICAN GENERAL LIFE INSURANCE COMPANY AND AMERICAN GENERAL ANNUITY SERVICE CORPORATION — APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 15-CI-00843

DRB CAPITAL, LLC AND RAY THOMAS, JR. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND D. LAMBERT; JUDGES.

LAMBERT, D., JUDGE: This is an appeal from a Boyd Circuit Court order approving the transfer of payment rights in a workers' compensation structured settlement to appellee DRB Capital, LLC (DRB). After review, we affirm the circuit court's order.

I. BACKGROUND

Appellee Ray Thomas, Jr. settled a workers' compensation claim with his employer and its insurers. Under the settlement agreement, the parties agreed that Thomas would receive periodic payments through the purchase of an annuity. His employer's insurer assigned its obligation to make those payments to appellant American General Annuity Service Corporation (AGASC) via qualified assignment. AGASC then purchased the annuity from American General Life Insurance Company (AGLIC) to fulfill the obligation.

Following these events, Thomas sought to transfer his rights in the periodic payments to a third party in exchange for one lump-sum payment. Thomas contracted with DRB for this purpose. DRB in turn filed an application to approve the transaction, which AGASC and AGLIC (collectively "American General") contested.

In opposition, American General argued that the language of the settlement agreement, the qualified assignment to AGASC, and the annuity contract each proscribed an assignment of Thomas' payment rights. They also argued that the provisions of Kentucky's Structured Settlement Protection Act (SSPA), found at KRS 454.430 *et seq.*, do not apply to structured settlements resulting from workers' compensation claims. After considering the parties' arguments at a hearing, the circuit court ultimately approved Thomas' assignment to DRB. The circuit court concluded the SSPA applies to workers' compensation

settlements and further found that the assignment was in Thomas' best interest. This appeal followed.

II. STANDARD OF REVIEW

"The construction and application of statutes is a matter of law and may be reviewed *de novo*." *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

III. DISCUSSION

On appeal, American General cites unpublished *Liberty Assignment Corp. v. Bluegrass Capital Group, LLC*, 2011-CA-000852-MR, 2013 WL 1352095, at *1 (Ky. App. Apr. 5, 2013), in support of its position that Kentucky law requires the enforcement of the anti-assignment provisions included in the various settlement agreements and the annuity contract. American General further argues, as it did before the lower court, that the SSPA does not authorize a circuit court to approve the transfer of workers' compensation awards. For the following reasons, we disagree with American General.

KRS 454.430 to 454.435 sets forth the procedure one must follow when seeking to transfer payment rights under a structured settlement. Namely, he must petition and receive approval from a circuit court of competent jurisdiction. *See* KRS 454.435. KRS 454.431 supplies the findings the competent circuit court must make in approving the transfer. Among them, is that the transfer "does not contravene other applicable law[.]" *See* KRS 454.431(1).

In *Kentucky Employers' Mut. Ins. v. Novation Capital, LLC*, 361 S.W.3d 320, 322 (Ky. App. 2011), another panel of this Court considered whether KRS 454.435 conferred jurisdiction on circuit courts to approve the factoring of a workers' compensation award. That panel construed the statutory language in light of the entire SSPA and answered in the affirmative. As that decision squarely addressed American General's contention regarding the applicability of the SSPA in a workers' compensation context, we find the case dispositive as to the issue and will proceed to the dispute over the anti-assignment provisions.

Based on the language of KRS 454.431(1) providing for "other applicable law" to apply, we agree with American General that the SSPA does not displace common law contract principles. We also specifically acknowledge American General's citation to *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001), which compels this Court to enforce duly executed agreements. Accordingly, we must address whether the anti-assignment provisions provided in the contracts between the payee, the insurer, and the annuity issuer were enforceable. *Liberty Assignment*, *supra*, suggests such provisions should be enforced because of Kentucky's preference for duly executed contracts and because of the reasoning in *Wentworth v. Jones*, 28 S.W.3d 309, 313 (Ky. App. 2000), a case where the particular settlement agreements at issue implicated Internal Revenue Code 26 U.S.C. § 104(a)(2) 130. In contrast, appellants argue the anti-assignment provisions are void as a matter of public policy under *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680, 688 (Ky. 2012).

The *Wehr* decision considered the enforceability of an anti-assignment clause in an insurance policy that required the insured to obtain prior written consent from the insurer before assigning a claim under the policy. Our Supreme Court held "that a non-assignment clause in an insurance policy, while certainly enforceable *prior* to an occurrence of a covered loss, is not enforceable for assignments made *after* the occurrence." *Wehr Constructors, Inc.*, 384 S.W.3d at 688. The Supreme Court further stated that it adopted this rule in the spirit of its "prior holdings adverse to contractual provisions tending to restrain the alienability of choses in action[.]" *Id.* Earlier in the opinion, the Supreme Court characterized a "chose in action" as a type of personal property that "may not, ordinarily, be restrained from alienability." *Id.* at 685.

Here, despite American General's attempts to distinguish this case from *Wehr* by arguing Mr. Thomas did not have a personal property right in the settlement proceeds, we are persuaded by the reasoning provided in *Wehr*. As the payee under the structured settlement agreement, Mr. Thomas had a legitimate claim to his periodic payments just like any creditor in a debtor-creditor relationship. That claim is the hallmark of a personal property interest and under *Wehr*, "may not, ordinarily, be restrained from alienability." The anti-assignment provisions in this case were accordingly unenforceable, and Mr. Thomas was able to avail himself of the SSPA procedures. The Boyd Circuit Court's order is affirmed.

DIXON, JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

CLAYTON, JUDGE, DISSENTING: Respectfully, I dissent. I agree with the majority that the Kentucky Structured Settlement Protection Act does not displace common law contract principles. The only issue before us, then, is whether the anti-assignment clause is enforceable. It is. The anti-assignment clause was created *after* Mr. Thomas prevailed on his workers' compensation claim and *after* damages had been assessed. As public policy only prohibits enforcing an anti-assignment clause that was created *before* the chose in action arose and *before* the claim had been asserted and settled and *before* damages had been assessed, Mr. Thomas' chose in action was never restrained from alienability, and the anti-assignment clause can be validly enforced pursuant to common law contract principles.

The majority opinion reads too broadly the holding in *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680 (Ky. 2012) by holding that the instant anti-assignment clause violates public policy. In *Wehr,* the Kentucky Supreme Court had to determine whether an insurance contract's anti-assignment clause, which pre-existed a covered loss, could be enforced after the loss occurred. The Court ultimately held that public policy would be violated if parties were allowed to contract away the assignability of a claim *before* that claim arose. In stark contrast stands the instant case, where the anti-assignment clause was created *after* the covered loss occurred, *after* Mr. Thomas prevailed on his

claim, and *after* damages had been assessed. A comparison of the facts and holding of *Wehr* illuminates the discrepancy.

In *Wehr*, the Murray Calloway County Hospital Corp. (Hospital) decided to add onto its facilities. The hospital purchased a "builder's risk" insurance policy from Assurance Company of America. The policy stated that "Your rights and duties under this policy may not be transferred without [Assurance's] written consent except in the case of death of an individual named insured." *Id.* at 681.

The Hospital then contracted with Wehr Constructors, Inc. (Wehr) for the installation of concrete sub surfaces and vinyl floors as part of the building project. However, after the installation by Wehr, a portion of the floors and sub surface was damaged. The Hospital claimed a loss which exceeded the policy and sought compensation under their builders risk policy with Assurance. Assurance denied the claim. A payment dispute arose between the Hospital and Wehr. Wehr filed suit to recover money that it alleged was due to the company.

Eventually, Wehr and the Hospital settled the claim. As part of that settlement, the Hospital assigned to Wehr any claim or rights the Hospital had against Assurance arising out of the builder's risk insurance policy. This assignment occurred *after* the damage to the floors had occurred. If the loss was covered under the builders risk policy, then Assurance was liable for payment under the contract. The court determined that the insurance contract's anti-

assignability clause was only enforceable before the loss occurred. Because of public policy reasons, the restriction was not enforceable after the loss occurred:

> In summary, the courts that have considered this issue have overwhelmingly concluded that once an insured occurrence has transpired, the insured's claim then ripens into a chose in action, a type of personal property, which, pursuant to fundamental principles of debtor-creditor relationships, may not, ordinarily, be restrained from alienability.

Id. at 685 (footnote omitted).

In the case at bar, when Mr. Thomas was injured, he had a chose in action ripen under workers' compensation. A chose in action is defined as "[p]ersonal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit[,]" or "[a] proprietary right *in personam*, such as . . . a claim for damages in tort." BLACK'S LAW DICTIONARY (10th ed. 2014). He pursued a claim and prevailed. He recovered his damages, and his employer agreed to pay the claim.

It was only *after* Mr. Thomas obtained his property right to the damages – *after* his chose in action was resolved – that an anti-assignment clause entered the scene. Mr. Thomas signed an "Agreement As to Compensation and Order Approving Settlement" with National Union Fire Insurance Company (National Union). As the insurer, National Union agreed to make the payments which the employer was obligated to pay to Mr. Thomas. Mr. Thomas agreed that National Union could make a qualified assignment within the meaning of Section 130 (c) of the Internal Revenue Code (IRC) of 1986. Just as in *Wehr*, this

assignment was valid. Mr. Thomas was not restrained in his ability to enter into this agreement and the subsequent assignment.

The agreement stated that either the insurer or the assigned, American General Annuity, "shall be the sole owner of the annuity policy and shall have all rights of ownership." The annuity policy that was issued by American General stated that "no payee or beneficiary" had the power to assign any payments of policy. Under the terms of the policy, any assignment by the payee was void. This restriction was consistent with Section 130 of the IRC. In relevant part, that section states:

> **(c) Qualified assignment.**--For purposes of this section, the term "qualified assignment" means any assignment of a liability to make periodic payments as damages (whether by suit or agreement), or as compensation under any workmen's compensation act, on account of personal injury or sickness (in a case involving physical injury or physical sickness)—
>
> **(1)** if the assignee assumes such liability from a person who is a party to the suit or agreement, or the workmen's compensation claim, and
>
> **(2)** if—
>
> **…**
>
> **(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,…**

(emphasis added). The IRC does not allow the payments of a qualified assignment to be changed by the recipient of the payments. Further, a party can enter into a

contract and agree to an anti-assignability clause. The Restatement (Second) of Contracts § 317 states:

> … (2) A contractual right can be assigned unless
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.

To counter the necessary conclusion under common law contract principles that the anti-assignment provision is valid, DRB Capital, relying upon the holding in *Wehr*, argues that the assignment is void against public policy. If that is the position of DRB Capital, it is interesting to note that the language in its contract with Mr. Thomas precludes his assignment of their policy. In DRB Capital's "Absolute Sale and Security Agreement" paragraph "O" 1, the agreement reads: "I understand and agree that I have no right or power to assign my rights or obligations under this Agreement. I further agree that the Purchaser (DRB Capital) may assign or transfer its rights and/or obligations, without my prior approval…" In paragraph 5 of the same agreement, DRB Capital requires Mr. Thomas to disavow any previous underlying settlement or annuity which prohibits an assignment of a structured payment settlement. That paragraph continues with Mr.

Thomas agreeing that he "knowingly waives any such provision and claim he may have relating to that provision."

Just as in *Wehr*, Mr. Thomas' assignment to American General was and should have been approved. As a result of the valid assignment, Mr. Thomas was no longer the owner of the annuity contract. So, after that right was assigned, what was left? The case of *Wentworth v. Jones*, 28 S.W.3d 309 (Ky. App. 2000) is illustrative.

Our Court in *Wentworth* considered whether an anti-assignment clause in an annuity policy issued pursuant to a qualified assignment was enforceable. J.G. Wentworth (a limited partnership) appealed an order of the circuit court invalidating orders of garnishment that had been challenged by Integrity Life Insurance Company and National Integrity Life Insurance Company. The appellees, McCollum and the Estate of Johnnie Mae Jones, entered into structured settlement agreements with their respective tortfeasors. The appellee insurance companies issued annuities to fund those structured settlements. J.G. Wentworth is in the business of purchasing from tort victims their alleged right to receive monthly payments in exchange for a one-time lump-sum payment. The appellees relied on an anti-assignment provision in their original structured settlement agreement as a bar to the enforceability of their assignments to Wentworth. Our Court reasoned that while a contractual right to receive a future stream of payment is generally assignable, the annuity contracts in *Wentworth* were "of a unique character and, therefore, distinguishable from all other species of

contracts – especially with respect to the issue of assignability." *Id*. at 313 (citing E. Allan Farnsworth, *Farnsworth on Contracts* § 11.2 (1990)). The Court analyzed the IRC, Kentucky garnishment statutes, the Kentucky Insurance Code, and public policy considerations and was "persuaded that the attempt by Wentworth to enforce its putative assignments from these tort victims must fail[.]" *Id*. at 313.

Thereafter, the *Wentworth* court held:

> Appellees contend that since they had absolutely no ownership interest in the annuity contracts, they had no interest susceptible of assignment. We agree. The interest obtained by Wentworth by its attempted assignment agreements with these payees was wholly illusory. *Allstate Insurance Company v. American Bankers Insurance Company of Florida,* 882 F.2d 856, 860 (4th Cir.1989). Furthermore, they argue that Equitable alone had the exclusive right to assign these agreements. We are persuaded that they are correct both as to the terms of the agreements themselves and as to the restrictions imposed by Section 130 of the Internal Revenue Code stripping the plaintiff-payees of all legal interest in the annuity contracts. We are without jurisdiction to tamper with Internal Revenue Code restrictions that form the basis or genesis for the tax concessions built into these agreements.

Id. at 314.

Just like the tort victims in *Wentworth*, Mr. Thomas also has no interest susceptible of assignment. His right to assign did not exist with his contract with American General and apparently, DRB Capital believes that his

right to assignment does not exist with them either. In his appearance before this Court, Mr. Thomas explained his need for the new payment arrangement with DRB Capital. I appreciate his comments and understand his current need for the money. However, when he entered into the qualified assignment, Mr. Thomas relinquished his "ownership" of his claim. He is now a beneficiary and not an owner. A beneficiary does not have the right to change the terms of a policy or create a new policy.

I would reverse and remand the decision of the trial court, and vacate the order approving the transfer of the structured settlement payment rights.

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