

IN THE SUPREME COURT OF OHIO

CORE FUNDING GROUP, LLC,

Appellee,

vs.

DIANA McDONALD etc., et al.,

Appellants.

* Supreme Court Case No. 2006-0927
* On Appeal from the
* Lucas County Court of Appeals,
* Sixth Appellate District
* Court of Appeals
* Case No. L-05-1291
*

**APPELLEE CORE FUNDING GROUP, LLC'S
MERIT BRIEF**

Jack J. Brady (0010146) (Counsel of Record)

Email: jjbrady@bcslawyers.com

Margaret G. Beck (0059789)

Email: mgbeck@bcslawyers.com

BRADY, COYLE & SCHMIDT, LTD

4052 Holland-Sylvania Road

Toledo, OH 43623

Telephone: (419) 885-3000

Facsimile: (419) 885-1120

Jeffrey W. Morris (0061443)

Email: jmorris@porterwright.com

PORTER, WRIGHT, MORRIS & ARTHUR

One Dayton Centre

Suite 1600

One South Main Street

Dayton, OH 45402-2028

Telephone: (937) 449-6708

Facsimile: (937) 449-6820

ATTORNEYS FOR APPELLEE, CORE FUNDING GROUP, LLC

Rick E. Marsh (0002110) (Counsel of Record)

rmarsh@lah4law.com

Lane, Alton & Horst

175 South Third Street, Suite 700

Columbus, OH 43215

Telephone: (614) 228-5100

Facsimile: (614) 228-0146

Paige J. McMahon (0040755)

Paige.McMahon@Adelphia.net

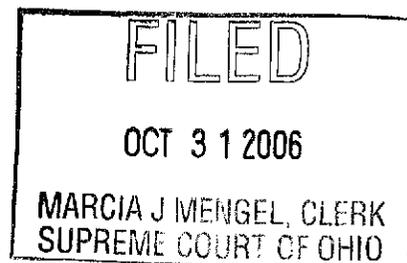
Spetnagel and McMahon

42 East Fifth Street

Chillicothe, OH 45601

Telephone: (740) 774-2142

Facsimile: (740) 774-2147



COUNSEL FOR APPELLANTS, WILLIE GARY AND GARY, WILLIAMS, PARENTI, FINNEY,
LEWIS, McMANUS & WATSON

TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 4

 I. Proposition of Law Number One. 4

 A. Appellants Were an Account Debtor under the Provisions of the UCC. 4

 B. As an Account Debtor, Appellants Were Liable to Pay Assignee
 Core upon Presentation of a Valid Assignment. 7

 II. Proposition of Law Number Two. 11

STATEMENT REGARDING PUBLIC POLICY 15

CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bluxome Street Assoc. v. Fireman's Fund Insurance Company</i> (Cal.App. 1st Dist., Div. 3 1988), 206 Cal.App.3d 1149, 254 Cal.Rptr. 198	13
<i>Dragelevich v. Kohn, Milstein, Cohen & Hausfeld</i> (N.D. Ohio, 1990), 755 F.Supp. 189.	9
<i>First Bank of Marietta v. Roslovic & Partners</i> (1999), 86 Ohio St.3d 116, 1999-Ohio-89 ...	8
<i>Gugle v. Loeser</i> (1944), 143 Ohio St. 362, 55 N.E.2d 580, 28 O.O.318.	9
<i>In re: PNC Bank, Delaware v. Berg</i> (Del. 1997), 45 UCC Rep.Serv.2d 27.	9, 11, 15, 17
<i>State v. Ducey</i> (1970), 25 Ohio App.2d 50, 266 N.E.2d 233, 54 O.O.2d 80.	5
<i>Twin City Pipe Line Co. v. Harding Glass Co.</i> (1931), 283 U.S. 353, 51 S.Ct. 476	9
 <u>Statutes</u>	 <u>Page</u>
R.C. 1301.02(B)(2)	15
R.C. 1301.02(B)(3)	4
R.C. 1309.01	3, 9, 18
R.C. 1309.01(A)(1)	5, 8
R.C. 1309.01(A)(2)	5
R.C. 1309.01(A)(15)	6, 10
R.C. 1309.01(A)(16)	6
R.C. 1309.01 to 1309.50	13

R.C. 1309.02(A)(1) 15

R.C. 1309.04 9, 11, 14

R.C. 1309.04(B) 11

R.C. 1309.04(J) 13

R.C. 1309.37 7, 18

R.C. 1309.37(C) 7, 9, 10

R.C. 1309.37(L) 10

Federal Statutes

11 U.S.C. §101(12) 5

11 U.S.C. §101(5)(A) 5

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Core Funding Group, LLC (hereinafter "Core") is an Ohio limited liability company in the business of providing attorneys with financing. (Transcript of Deposition of Thomas Emmick (hereinafter "Appellee's Supplement A, Emmick TR") at p. 20, 21.) Diana McDonald (hereinafter "McDonald") is an attorney licensed to practice and residing in Georgia who borrowed money from Core with an express and absolute obligation to repay the debt and who gave a security interest in attorneys fees she expected as a result of a contingent fee contract. (Transcript of Deposition of Diana McDonald (hereinafter "Appellee's Supplement B, McDonald TR") at pp. 7, 8, 9; Appellants' Supplement Exhibits A, B, C, D, and E.) Appellant Willie Gary (hereinafter "Gary") is an attorney licensed to practice and residing in Florida and a partner in Appellant law firm Gary, Williams, Parenti, Finney, Lewis, McManus & Watson (hereinafter "GWP"). (Affidavit of Willie Gary (hereinafter "Appellants' Supplement 30, Gary Affidavit") at pp. 1-3.)

In 1998, McDonald, Gary and GWP entered into a co-counsel contingency fee agreement with Alicia Barnes, who is the mother of an heir to a victim of the Valu Jet Airliner crash, which occurred in Florida in 1996. (Appellee's Supplement C.) In May 1999, McDonald borrowed \$100,000 from Core with the obligation to repay \$124,000 the following year. (Appellants' Supplement, Exhibits A, B, C, D, and E.) In connection with this transaction, McDonald signed multiple documents including an irrevocable assignment, a security agreement and UCC financing statement, which pledged and assigned to Core all of McDonald's rights to fees associated with the Valu Jet case and also pledged McDonald's

accounts receivable as security. (Appellants' Supplement, Exhibits A, B, C, D, and E.) Gary, individually and on behalf of GWP, signed an acknowledgment of McDonald's assignment to Core. (Appellants' Supplement, Exhibit F.)

In August 1999, McDonald entered into a second transaction in which she borrowed \$100,000 and agreed to repay \$124,000 the following year under nearly identical terms and conditions as the first transaction. (Appellee's Supplement Exhibits D, E, F, G, and H.) In connection with this second transaction, Plaintiff Core notified Gary and GWP of the second loan and required their acknowledgment; however Gary and GWP would not respond and never gave Core written acknowledgment of the assignment. (Appellee's Supplement Exhibit I; Emmick TR p. 37, ln 9-17; p. 81, ln 15-25; p. 82, ln 1-6.) On August 25, 1999, Plaintiff Core funded McDonald \$75,000.00 pursuant to the terms of the second transaction with the expectation that Core would fund the remaining \$25,000.00 upon receipt of an acknowledgment by Gary and GWP. (McDonald TR, p. 93, ln 6-9; Emmick TR p. 82, ln 1-6.) The acknowledgment of Gary and GWP was never received and, therefore, the second transaction was only funded at \$75,000.00. (McDonald TR, p. 93, ln 6-9; p. 100, ln 3-14; Emmick TR p. 81, ln 3-8; p. 83, ln 1-12.)

Pursuant to the terms of this second transaction, McDonald pledged and irrevocably assigned to Core all of McDonald's right to fees expected by McDonald associated with the ValuJet case. Further, McDonald pledged all of her accounts receivable as security for repayment. (Emmick TR p. 79, ln 23-24.)

On April 29, 2000, McDonald failed to pay Core pursuant to the first transaction documents and to date, has not paid Core any funds. (McDonald TR p. 77, ln 17-19.)

In April 2001, the Valu Jet case resolved and Gary and GWP received in excess of \$500,000 as their fee, to which McDonald was entitled to forty percent (40%). (Appellants' Supplement p. 30, Gary Affidavit, McDonald TR ¶ 140, 141.) Rather than paying McDonald's fee to Core, however, Gary and GWP paid McDonald directly. (Appellants' Supplement Gary Affidavit, ¶ 12.) Core received nothing.

When McDonald defaulted in 2000, Core filed Complaints in the Lucas County Court of Common Pleas. Those cases were consolidated and, in 2003, Core amended its Complaint to join Gary and GWP based on their breach of contract and failure to honor the assignments and UCC financing statements. Various cross-motions for summary judgment were filed and, with respect to Gary and GWP, the trial court dismissed Core's claims against them.

Core appealed and the Sixth District Court of Appeals reversed the trial court's decision as to Gary and GWP holding that lawyers, under the guise of ethics, cannot be insulated from creditors in ways not available to others; that the transactions in question were governed by the Uniform Commercial Code as set forth in former R.C. 1309.01, et seq. without exception; and, that the Gary Appellants are in fact account debtors with notice of McDonald's assignment to Core and therefore liable to Core for payment. Court of Appeals Decision ¶¶62, 51-52, 31-42, 53-55. Gary and GWP appealed the decision to this Court.

This Court accepted jurisdiction with respect to two of Appellants' propositions of law: whether a lawyer, serving as co-counsel, can be considered an account debtor and whether attorney fee-sharing agreements and accounts receivable are exempt and excluded from the law of secured transactions. Appellee argues that the Sixth District Court of Appeals was correct in its decision and, that allowing lending to lawyers to escape regulation of the Uniform

Commercial Code will have a major chilling effect on the lending and financing industry to the point where lawyers will no longer be able to receive financing for business purposes because they will be precluded from pledging accounts receivable as security.

ARGUMENT

The guiding principle of the Uniform Commercial Code (hereinafter "UCC") is uniformity, as provided by Article 9-103(a)(3), R.C. 1301.02(B)(3), which states the underlying purpose and policy of the Code is to "make uniform the law among the various jurisdictions." Every state in the nation has enacted this section, making it of extreme importance that any court deciding cases invoking the UCC give due consideration to the impact any decision might have on the uniform application of the Code.

Appellants go to great lengths to offer irrelevant information in an effort to complicate the issues involving the UCC. When the facts of this case are reviewed in conjunction with the law, it is clear that the UCC applies to the transactions in question and that Gary and GWP owed an obligation to Core. The propositions of law are attempts to escape responsibility for the mistake Appellants made in paying McDonald instead of Core. Appellants now ask this Court to deviate from established law and upset the workings of an entire industry for the sole purpose of benefitting Appellants. This cannot be allowed.

I. Proposition of Law Number One

A. Appellants Were an Account Debtor under the Provisions of the UCC.

This proposition invokes the question of whether a lawyer, serving as co-counsel, can be considered an account debtor under the terms of the UCC. Appellants argue that their

status as co-counsel in a fee sharing arrangement offers complete protection from account debtor status. Appellants claim that under their fee sharing agreement Gary and GWP owed no “debt” to McDonald, that the obligor was McDonald’s client, that Gary and GWP were McDonald’s fiduciaries, and for these reasons, the UCC does not apply. These arguments, however, are misguided.

The most efficient starting point is a definitional review of the terms employed by the UCC. First, the term “debt” is not defined anywhere in the UCC. The closest and most reasonable definition to use is contained in §101 of the United States Bankruptcy Code, which defines “debt” very broadly as any liability on a claim. 11 U.S.C. §101(12). This section also defines “claim” very broadly as any right to payment. 11 U.S.C. §101(5)(A). The Bankruptcy Code definition is also consistent with common usage of the word “debt” and with Ohio court’s definition of “debt” as “a specified sum of money owing to one person from another, including not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment.” *State v. Ducey* (1970), 25 Ohio App.2d 50, 54, 266 N.E.2d 233, 54 O.O.2d 80.

Former R.C. 1309.01(A)(1) defines “account debtor” as “the person who is obligated on an account, chattel paper, or general intangible.” Each of the specified obligations is defined in former R.C. 1309.01(A):

(2) “Chattel paper” means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. *** [w]hen a transaction is evidenced by both such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitute chattel paper. ****

(15) "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

(16) "General intangibles" means any personal property, including things in action, other than goods, accounts, chattel paper, documents, instruments, investment property, and money.

The question for this case is whether the agreement between McDonald and Appellants meets any of the above-described definitions; were Appellants obligated on an account, chattel paper or general intangible? Even a cursory review of the transaction demonstrates Appellants were obligated to McDonald.

Under the terms of the agreement between Appellants and McDonald, Appellants undertook an obligation to pay forty percent (40%) of the amount of any contingent fee received in the Valu Jet case from the client represented jointly by McDonald and Appellants. That obligation matured when the contingent fee became payable, but the obligation existed immediately upon the signing of the contract by the parties. Presumably, the fee-sharing arrangement reflected the value of the work performed by McDonald and Appellants and, in that sense, Appellants were liable to McDonald on an account even though services had not yet been rendered. Appellants' and McDonald's arrangement fits squarely within the definition of account and also fits within the context of general intangible, which offers a broad definition of transactions meant to be included within the UCC's provisions.

Another method for determining that Appellants and McDonald created either an account or a general intangible is by reviewing the rights possessed by McDonald. Had Appellants received their fee (assuming no assignments or other obligations) and not paid McDonald, she would have had a cause of action against Appellants for breach of their

agreement. The very act of Appellants in paying McDonald \$225,000.00 objectively demonstrates the debt obligation Appellants owed. There is no suggestion anywhere in the record that this payment was a gift to McDonald. Instead, the record demonstrates that the debt was owed and the obligation existed between Appellants and McDonald. McDonald's right to enforce the agreement with Appellants and the actual act of payment solidifies the fact that this was an account or, at the very least, a general intangible.

B. As an Account Debtor, Appellants Were Liable to Pay Assignee Core upon Presentation of a Valid Assignment.

Former R.C. 1309.37 of the Ohio Revised Code, in effect at the time these transactions took place, provides the procedure by which an assignee of accounts receivable may obligate an account debtor for payments made on the accounts:

The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

R.C. 1309.37(C). In this regard, Section 1309.37 of the Ohio Revised Code requires that an account debtor is only authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. Once the account debtor receives notice of the assignment, the account debtor must honor the assignment or be liable to the assignee for any funds not paid to said assignee.

If the account debtor questions the validity of the assignment, the UCC allows the account debtor to ask for proof of assignee's right to payment. It is then the assignee's responsibility to provide adequate verification of the assignment and its validity. Appellants do not argue that the assignment was invalid. There is no evidence that they ever questioned the validity of either assignment. In fact, Appellants do not dispute that Gary accepted notice of the assignment. (Appellants' Supplement, Exhibit F). Appellants had complete protection available to them within the express language of the UCC but did not challenge the assignment. Now, after "inadvertently" violating their duty to Core as assignee, Appellants look for any argument to escape liability.

What Appellants argue now is that they are not account debtors at all under the definition provided in R.C. 1309.01(A)(1); in particular, Appellants claim they are not the original obligor as used in the definition for account debtors. Appellants' reasoning, however, is flawed and the Sixth District's decision should not be overturned.

The Sixth District considered and rejected Appellants' argument that they are not the original obligor and therefore not an account debtor and instead found that Appellants are account debtors, Core Funding is the assignee and McDonald is the assignor. Court of Appeals Decision ¶ 52. In reaching this decision, the Court of Appeals applied the holding in *First Bank of Marietta v. Roslovic & Partners*, in which this Court held an account debtor liable for failing to pay an assignee after said notice of the assignment was provided. (1999), 86 Ohio St.3d 116, 1999-Ohio-89 ¶ 52. In considering Appellants' argument that the client who received McDonald's legal services is in fact the original obligor, the Sixth District held:

This ignores *Roslovic's* implicit finding that the subcontractor-assignor's accounts receivable on an underlying construction contract with the general contractor-account debtor was an "account." Although the court did not analyze the Article 9 exclusions in R.C. 1309.04 or the definitions in R.C. 1309.01, implicit in the holding of *Roslovic* is the conclusion that the subcontractor-assignor's accounts receivable or the underlying construction contract with the general contractor-account debtor falls within the purview of Article 9. Likewise, and pursuant to *PNC Bank* [PNC Bank, Delaware v. Berg (Del. 1997), 45 UCC Rep. Serv. 2d 27], McDonald's accounts receivable as the underlying fee sharing agreement with Gary falls within the purview of Article 9 and R.C. 1309.37(C). Gary is the account debtor, McDonald is the assignor and [Core] is the assignee. Gary, as the account debtor, was liable to [Core], as assignee, for payments made to McDonald, as assignor, if Gary received sufficient notice of the assignment.

¶ 52. Appellants have presented neither law nor fact sufficient to justify overturning the lower court's decision.

Appellants also claim that they were in a trust relationship with McDonald with respect to the fee-sharing agreement and cite to *Gugle v. Loese*, as support for this proposition. (1944), 143 Ohio St. 362, 55 N.E.2d 580.28 O.O.318. First, the applicability of *Gugle* is questionable because, since *Gugle*, the Ohio Supreme Court has adopted Disciplinary Rules regarding fee-splitting that have removed the precedential value of *Gugle*. See *Dragelevich v. Kohn, Milstein, Cohen & Hausfeld* (N.D. Ohio, 1990), 755 F.Supp. 189, 193-194. In addition, the *Gugle* Court found specifically that "... agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Gugle*, 143 Ohio St. at 367, citing *Twin City Pipe Line Co. v. Harding Glass Co.* (1931), 283 U.S. 353, 356, 51 S.Ct. 476.

In the instant action, Appellants had a contractual agreement with McDonald, which, had Appellants failed to honor the agreement, could have been enforced in the courts. Appellants were not fiduciaries or representatives of McDonald; they simply had a contractual

relationship under which they were obligated to pay 40% of their contingent fee payment to McDonald. McDonald had no right to sue the client once Appellants collected the fee and that is the point ignored by Appellants. Appellants attempt to make the relevant transaction the payment from the client to Appellants. That transaction, however, is immaterial. It is the time after Appellants received the fee that is relevant. Once that fee was received, the client's obligation was discharged and the only obligation remaining was Appellants' contractual duty to pay McDonald her portion. It is curious that Appellants claim the payment to McDonald and not Core was "inadvertent" rather than deliberate, because if Gary and GWP truly were not account debtors, they never would have accepted the validity of the assignment. Yet, Appellants claim this was inadvertent, a mistake, which nevertheless leaves Gary and GWP liable to Core.

Gary and GWP had a contract with McDonald; it was neither a trust agreement nor a fiduciary agreement. As correctly determined by the Sixth District, contract rights fall under the definition of "account" under Article 9 and R.C. 1309.37(C) of the UCC. Court of Appeals Decision ¶52. "Account" is defined as a right to payment or services rendered or goods sold which is not evidenced by an instrument, whether or not it has been earned by performance. R.C. 1309.01(A)(15). Clearly, Appellants' obligation to McDonald qualifies as an account.

There is no dispute that Appellants received notice of the assignment that reasonably identified the rights McDonald assigned and included specific direction that payment be made to Core. Gary and GWP, therefore, have no excuse for not paying Core and should be held liable to Core for the error, whether it was intentional or not.

II. Proposition of Law Number Two

In this proposition, Appellants attempt to expand the exclusions from secured transactions set forth in R.C. 1309.04 to include attorney fee-sharing agreements. The Court of Appeals correctly held that the exclusions cited by Gary and GWP did not apply to this case and the exclusions should not be expanded by the Court.

In particular, the Court of Appeals correctly found that an attorney's fees, whether hourly or contingent, can be pledged and assigned as security for loans under Article 9, even though the underlying obligation, the attorney's lien for services rendered, is not subject to Article 9:

*** In the present case, relative to R.C. 1309.04(B), citing a common law rule that an attorney has a special or charging lien upon an award obtained for a client, the Gary [Appellants] contend that the attorneys fees owed to McDonald under the contingent fee agreement between McDonald and Gary was not subject to assignment by McDonald. However, in *Re: PNC Bank, Delaware v. Berg* (Del. 1997), 45 UCC Rep. Serv. 2d 27, the Superior Court of Delaware rejected such an argument. The court held that a bank can claim a security interest in the hourly billing and contingent fee contracts of a law firm-debtor even though the underlying obligation, the attorney's lien for services rendered, is not subject to Article 9.

Court of Appeals Decision ¶38. It must also be kept in mind that the agreement in question was between Gary, GWP and McDonald, which was not in the nature of a lien at all, but rather a contractual fee-sharing agreement.

Interestingly, Appellants refer to the co-counsel Contingent Fee Agreement for the proposition that a lien was created with respect to McDonald's fees by quoting the language, "The Law Firm shall have a lien on said claim, suit or recovery for attorney's fees and costs advanced." (Appellants' Supplement 30, Exhibit 1.) When reviewed in context, this language

clearly applies to a lien against the client's recovery and makes no mention of how the contractual agreement between attorneys is to be secured. There are no lien rights between McDonald and Appellants, and any security or lien rights McDonald had with the client were extinguished when the fee was paid. It is the contractual agreement between Appellants and McDonald that is of primary importance here. As the Appellate Court held, Gary and GWP were account debtors on that contractual payment, and thus they are liable to Core for failure to comply with the terms of the assignment.

Next, Appellants argue that the assignment of the contingent fee owed to McDonald on the Valu Jet settlement represents a transfer of proceeds of a tort claim. This is not accurate, however, because the agreement between Core and McDonald was a financial transaction in which McDonald agreed to assign and pledge her accounts receivable to Core as security for the \$175,000 loan made to McDonald. Core was in no way involved with the Valu Jet litigation or the outcome of the case. The tort plaintiff was not a party to the agreement with Core, and the tort plaintiff made no attempt to transfer or encumber its rights in the tort recovery. Most importantly, McDonald was liable to repay Core regardless of the outcome of the Valu Jet litigation. McDonald's obligation to Core was fixed and absolute the day she signed the documents. Appeals Decision ¶¶40-41. In reversing the lower court, the Court of Appeals noted that the transfer was a transfer *by the attorney for the tort claimant* and not the tort claimant. *Id.* That is, McDonald transferred whatever interest she had in her fee as collateral for the loan from Core Funding. She could not, and did not, transfer any interest in the tort recovery.

Appellants cite to *Bluxome* to support their argument that the assignment of the contingent fee owed to McDonald on the ValuJet case is a transfer of proceeds of a tort claim. Court of Appeals Decision ¶40-41. In *Bluxome*, a legal malpractice claimant granted to a law firm “a security interest in any and all of the collateral,” defined to include the litigant’s interest in his legal malpractice action. *Bluxome Street Assoc. v. Fireman’s Fund Insurance Company* (Cal.App. 1st Dist., Div. 3 1988), 206 Cal.App.3d 1149, 1153, 254 Cal.Rptr. 198. The claimant granted the security interest to secure payment for past and future legal services rendered by the law firm for the benefit of the legal malpractice claimant, unrelated to the legal malpractice action. *Id.* at 1152. The court found that the security agreement created an enforceable contractual lien, rather than an equitable or implied lien. *Id.* at 1153-1155. Therefore, the security agreement granted to the law firm a lien on the tort claimant’s interest in the tort action, and as such, Article 9 did not apply. *Id.*

However, the Sixth District Court of Appeals correctly distinguished *Bluxome* from the instant case:

In *Bluxome*, the assignor-debtor was the tort claimant and the right transferred in the assignment directly “arose out of” the tort action. In the present case, the assignor-debtor is not the tort claimant in the ValuJet case. Instead, the assignor-debtor is an attorney who entered into a fee sharing *contract* with another attorney. Indeed, the language of R.C. 1309.04(J) that the UCC provisions do not apply to “a transfer in whole or in part of any claim arising out of a tort,” apparently recognizes the general common law rule that tort claims are not assignable. However, McDonald transferred her *contractual* rights under the contingent fee sharing agreement. The underlying litigation just happened to be a tort. R.C. 1309.04(J) does not apply to exclude McDonald’s assignment to appellant from the provisions of the UCC as provided in R.C. 1309.01 to 1309.50.

Court of Appeals Decision ¶41.

Importantly, the agreement between Core and McDonald was a financial transaction in which McDonald agreed to assign and pledge her accounts receivable to Core as security for the \$175,000 loan to McDonald. At issue here is a fee-sharing *contract* between attorneys, regardless of the nature of the underlying litigation.

Indeed, Core was in no way involved in the ValuJet litigation or its outcome, nor was the plaintiff in the ValuJet litigation a party to the agreement between McDonald and Core. McDonald's obligation to repay Core was absolute upon her signature of the documents constituting the security agreement, regardless of the outcome of the ValuJet case. The transaction between McDonald and Core is no different from any type of financing in which accounts receivable are pledge as security. The collection of outstanding accounts receivable is always uncertain, exactly as a contingent fee. The fact that ABC Company does not collect for its widgets from XYZ Corporation does not relieve ABC Company from the obligation of debt repayment. The obligation is absolute, just as McDonald's obligation to Core.

The assignment of the contingent fee owed to McDonald on the ValuJet case was not a lien, a transfer of a claim for the compensation of an employee, or a transfer of a claim arising out of tort. In fact, the assignment of McDonald's right to receive fees does not reflect any of the enumerated exceptions to secured transactions listed in R.C. 1309.04. Rather, the agreement is an account, to which the provisions of the Ohio Revised Code governing secured transactions apply.

STATEMENT REGARDING PUBLIC POLICY

R.C. 1301.02(B)(2) (UCC 9-103(a)(2)) states that the policy of the UCC is to “permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.” Article 9 is intended to apply not only to commercial transactions, but to “any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts.” R.C. 1309.02(A)(1). If this Court were to adopt the Appellants’ arguments, it would create a significant disruption in commerce in Ohio and elsewhere. A decision prohibiting attorneys from pledging and assigning accounts receivable as collateral under Article 9 would contravene the very purpose of the UCC. It would ignore custom and common usage, thereby hindering commercial practice. Indeed:

[I]t is routine practice for lenders to take security interests in the contract rights of other business enterprises. A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why a law firm should be treated differently than an accounting firm or a construction firm. The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. . . It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled.

In re: PNC Bank, Delaware v. Berg, 45 UCC Rep.Serv.2d at n. 5. *See also*, Court of Appeals Decision ¶62.

As the Court of Appeals noted, while the practice of law is a professional undertaking, it has commercial aspects. Lawyers must rent office space, purchase or lease equipment, hire and pay employees, and engage in many other actions that constitute commerce. They have

professional obligations directly to their clients, but that does not mean that the operation of their firm is not a commercial enterprise. Furthermore, even a cursory examination of the records of the Ohio Secretary of State and the records of the Secretaries of State of other states amply demonstrates that the practice of law is considered a commercial enterprise. A brief review of the website information available demonstrates that many law firms have apparently borrowed from third parties and used their accounts receivable as collateral for those loans. Among the firms that have entered into such transactions is Appellants' counsel, Lane, Alton & Horst. Searching the Secretary of State's UCC database for less than fifteen minutes turns up dozens of financing statements that show law firms granting security interests in their accounts receivable to lenders. These law firms include firms primarily engaged in Plaintiff's personal injury representation and general practice firms with significant business clients.

This form of transaction is not limited to Ohio. For example, Appellant itself has entered into such transactions and the Florida Secretary of State database includes at least two UCC-1 filings by the Appellant that include a grant by security interest in its accounts receivable to a lender. Clearly, both Appellants and their counsel assume that law firms and lawyers can grant security interests in their accounts receivable. To argue otherwise here is disingenuous.

If the Court were to hold that these transactions could not be governed by Article 9, it would create a substantial disruption in the commercial lending field. Hundreds, or perhaps thousands of transactions would be overturned. For example, lenders commonly require debtors to warrant that the security interest being granted to the lender is enforceable under applicable law. If this Court were to hold that attorneys cannot grant security interests in their

accounts receivable, each of these warranties would be violated. Typically, the loan agreements provide that the lender may declare a default if any warranty is violated. This would put hundreds, if not thousands, of lawyers and law firms in default of their loan agreements because of a change in the law. The existence of so many loans demonstrates that the custom and usage of lenders includes the use of attorneys' accounts receivable as collateral in transactions in which the parties proceed under Article 9 of the UCC as enacted in Ohio. Furthermore, in the only reported decision addressing the issue, the court in *PNC Bank, Delaware v. Berg* held that an attorney's accounts receivable are properly the subject of Article 9. 45 UCC Rep. Serv. 2d 27. Even though the transaction between the attorney and client is not an Article 9 transaction, Article 9 does apply to the transaction when the attorney takes those receivables and uses them as collateral to secure a loan to that attorney. Holding otherwise in this case would put Ohio at odds with that decision and the apparent practices throughout the country.

To the extent that Appellants have expressed concerns about the underlying transaction and its impact on the attorney-client relationship, these arguments are unfounded. First, and foremost, no Ohio attorney or Ohio client was involved in the transaction. The client appears to have been a resident of Georgia as is Diana McDonald. Appellant Gary is a Florida lawyer and GWP a Florida law firm. It would be inappropriate for this Court to issue rulings governing the bar in Georgia and Florida, just as it would be improper for the Supreme Courts of those states to issue rulings that govern the practice of law in Ohio.

Fundamentally, the transaction at issue falls squarely within the scope of Ohio's enactment of Article 9 of the Uniform Commercial Code. The Appellants owed McDonald

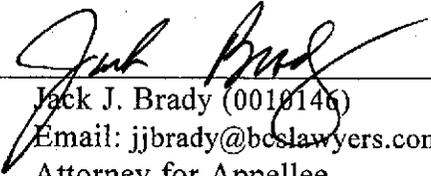
\$225,000 pursuant to the terms of its co-counsel agreement. That obligation was either an account or general intangible of McDonald, and in either event, Appellants are rendered an account debtor under the definitions set out in R.C. 1309.01. Core Funding followed the directives of R.C. 1309.37 and properly notified Appellants of Core's right to receive the payment that otherwise would have gone to McDonald. Under R.C. 1309.37, Appellants were obligated to make the payment to Core Funding unless they can show that Core Funding failed to provide adequate evidence of the assignment of that right to payment from McDonald to Core Funding. Appellants have not raised such a defense, and indeed none could be proven. Consequently, Appellants' "inadvertent" payment to McDonald did not satisfy its obligation to make that payment to Core Funding. The Court of Appeals' decision reaching this conclusion should be affirmed in all respects.

CONCLUSION

There is no need for this Court to reverse the well-reasoned opinion of the lower court. This case is really about money and Appellants' failure to honor an obligation. Appellants' attempt to avoid the consequences of their actions by circumventing the Uniform Commercial Code. This should not be allowed.

Respectfully submitted,

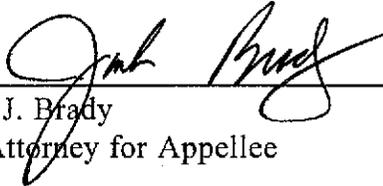
BRADY, COYLE & SCHMIDT, LTD

By: 

Jack J. Brady (0010146)
Email: jjbrady@bcslawyers.com
Attorney for Appellee
Core Funding Group, LLC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief was sent this 30th day of October, 2006, via ordinary U.S. Mail, to: Appellants Diana McDonald, 2633 Winzley Place, Duluth, Georgia 30097 and Diana McDonald, P.C., 2800 Peachtree Industrial Boulevard., Suite C, Duluth, Georgia 30097; and to Rick E. Marsh, Esq., Attorney for Appellees Willie Gary and Gary, Williams, Lane, Alton & Horst, 175 South Third Street, Suite 700, Columbus, OH 43215; and to Paige J. McMahon, Esq., Attorney for Appellees Willie Gary and Gary, Williams, Parenti, Finney, Lewis, McManus & Watson, Spetnagel & McMahon, 42 East Fifth Street, Chillicothe, Ohio 45601-3302.



Jack J. Brady
An Attorney for Appellee