

IN THE SUPREME COURT OF OHIO

WEST BROAD CHIROPRACTIC,

Appellant,

v.

AMERICAN FAMILY INSURANCE,

Appellee.

: On Appeal from the Franklin County Court of
: Appeals, Tenth Appellate District

: Court of Appeals

: Case No. 07-AP-721

08-1396

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT WEST BROAD CHIROPRACTIC

James F. McCarthy, III (0002245)
Jerome C. Bishop (0074719)
Katz, Teller, Brant & Hild
255 East Fifth Street, Suite 2400
Cincinnati, Ohio 45202
(513) 721-4532
(513) 762-0006 (facsimile)
jmccarthy@katzteller.com

COUNSEL FOR APPELLANT WEST BROAD CHIROPRACTIC

Mark S. Maddox (0029852)
Frost, Maddox & Norman Co., L.P.A.
987 South High Street
Columbus, Ohio 43206
(614) 445-8888

COUNSEL FOR APPELLEE AMERICAN FAMILY INSURANCE

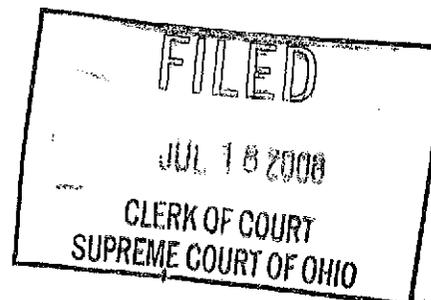


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I. **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Faced with the prospect of incurring debt to treat uninsured or underinsured patients of accidents or having those patients suffer without any treatment, healthcare providers in Ohio, from hospitals to orthopedic surgeons to chiropractic physicians, have resorted to a well-established common law contract to assure payment for healthcare services. In exchange for the assignment of the patients' future right to receive proceeds from their accident claims, hospitals, surgeons and chiropractors have provided professional medical services to those patients. "Injured parties who incur medical costs related to an injury for which another party may be liable often assign the right to potential proceeds to a treating physician." *Roselawn Chiropractic Cntr., Inc. v. Allstate Ins. Co.* (2005), 160 Ohio App.3d 297, 2005-Ohio-1327, 827 N.E.2d 331, ¶19. Six well-reasoned decisions of four different Courts of Appeal have found such assignments valid and enforceable, recognizing that such an assignment gives "some assurance to medical care providers that they will eventually be compensated." *Id.* at ¶20.

The Court of Appeals for the Ninth Appellate District recognized the benefit of such an assignment to both the accident victim and the health care provider. In *Akron Square Chiropractic v. Creps* (2004), 2004-Ohio-1988 ¶12, n. 2, the Court noted that "allowing injured persons to assign potential future insurance proceeds promotes timely medical treatment for injured persons otherwise unable to pay, and it avoids needless litigation." *Id.* This "allows indigent tort victims to obtain treatment by securing payment for medical services with an assignment of rights to insurance proceeds to the medical provider without exposing the insurance carrier to any significant risk." *Id.*

Likewise, the Court of Appeals for the First Appellate District in *Roselawn Chiropractic Cntr.* acknowledged the prevalence of such assignments to secure health care and concluded:

Allowing the creation of a valid assignment in such a situation gives some assurance to medical care providers that they will eventually be compensated. This fits with one of the purposes of assignments – to encourage the assignee to trust that an assignor who may not have cash-in-hand will be able to adequately cover his or her debts.

2005-Ohio-1327 ¶19, ¶20. The prevalence of the assignment of future proceeds of a settlement or judgment has been acknowledged by this Court’s Board of Commissioners on Grievances and Discipline. In its Opinion 2007-7, the Board opined that Rule 1.15(d) and (e) of the Ohio Rules of Professional Conduct impose an ethical duty of safekeeping funds for a third person “when the lawyer knows a third person has a lawful claim to the funds in the lawyer’s possession.” Opinion 2007-7, p. 1 (emphasis added). “A lawful claim includes a written agreement signed by a client promising payment or authorizing the lawyer to make payment to the medical provider from the proceeds of a settlement or judgment. These agreements are known by various names, such as assignments, security agreements or a doctor’s lien.” *Id.*, p. 4.

Ignoring these well-reasoned decisions of the First, the Ninth, the Eleventh and the Twelfth District Courts of Appeal, the Court of Appeals in this case has distorted the law of assignments, misread the Ohio Revised Code and injected uncertainty into the law of Ohio. The Court has chosen to declare an assignment of future proceeds made by the victim of an automobile accident to a healthcare provider in exchange for treatment as invalid and unenforceable unless the accident victim prosecutes the claim to judgment. With this decision, the Court has created uncertainty in the law and jeopardized the ability of citizens throughout Ohio from securing medical treatment for the injuries suffered in accidents. With this decision, the Court has undercut the Board of Commissioners on Grievances and Discipline, creating the prospect of conflicting ethical obligations for the Ohio Bar. With this decision, the Court has encouraged litigation. Will Columbus insurance companies now ignore the assignments made

by Cincinnati accident victims to their healthcare providers? Will Columbus attorneys have a different ethical obligation than Cincinnati or Akron attorneys? Will accident victims forego settlement to assure payment to their healthcare providers? The consequences of this decision affect every healthcare professional treating accident victims and every lawyer representing those victims. A consistent and balanced treatment of all citizens is the hallmark of the rule of law. This Court must accept jurisdiction to remedy this tear in the fabric of the law of Ohio.

II. STATEMENT OF THE CASE AND FACTS

A. The Assignment.

On July 6, 2002, Kristy Norregard ("Norregard"), was involved in an automobile accident (the "accident") and suffered injuries as a result of that accident. On July 9, 2002, Norregard sought treatment from West Broad for injuries caused by the accident. On July 9, 2002, Norregard executed a document entitled "Assignment of Right to Receive Benefits and/or Proceeds of Settlement for Judgment" (the "Assignment"). Norregard agreed to the terms of the Assignment in exchange "for the provision of medical care from West Broad ...".

Pursuant to the Assignment, Norregard irrevocably assigned her right to "receive or collect any check or monies offered for compensation to me by any person for any injury for which I received treatment from West Broad" in exchange for the treatment she received. In the Assignment, Norregard directed that payments be made directly to West Broad before any payments were made to her. West Broad provided treatment to Norregard for her injuries suffered in the accident expecting to be compensated from the monies to be paid to Norregard as a result of her injuries.

B. West Broad's notice of the Assignment.

American issued a liability insurance policy to the driver of the automobile liable for the injuries Norregard suffered as a result of the accident. On April 30, 2004, West Broad gave

notice of the Assignment to American. In the notice to American, West Broad advised American that Norregard had assigned to West Broad the right to receive any proceeds of any settlement or judgment to the extent of any outstanding balance relating to medical treatment for the injuries she suffered as a result of the accident. Further, West Broad gave notice to American that Norregard had assigned to West Broad the right to receive direct payment of settlement proceeds.

C. The settlement proceeds.

In January, 2006, Norregard settled her claim for injuries caused by American's insured. American paid valuable consideration as settlement for any claim Norregard may have had against American's insured arising from or relating to the accident. Despite the notice of the Assignment, American paid Norregard without paying or making provisions for payment to West Broad. The value of the treatment Norregard received from West Broad was \$3,830.00. No portion of the settlement proceeds was paid to West Broad.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A person who has been injured in an automobile accident but who has not yet established liability for the accident may assign his/her right to proceeds, either judgment or settlement, in whole or in part, as consideration for medical treatment.

A. The well-reasoned law of Ohio finds the Assignment valid.

An assignment is a transfer of some right or interest from one person to another, which causes to vest in another the right or interest. *Leber v. Buckeye Union Ins. Co.* (1997), 125 Ohio App.3d 321, 332, 708 N.E.2d 726, citing *Aetna Casualty & Surety Co. v. Hensgen* (1970), 22 Ohio St.2d 83, 258 N.E.2d 237. "An unqualified assignment transfers to the assignee all the interest of the assignor in and to the thing assigned." *Id.*, citing *Pancoast v. Ruffin* (1824), 1 Ohio 381. "As a general rule, an assignee stands in the shoes of the assignor . . . and succeeds to

all the rights and remedies of the latter.” *Id.*, quoting *Inter Ins. Exchange v. Wagstaff* (1945), 144 Ohio St. 457, 59 N.E.2d 373.

Pursuant to the Assignment, Norregard transferred her right to any settlement proceeds to West Broad. In particular, Norregard directed and authorized “. . . any person who may ultimately provide . . . proceeds from settlement . . . to . . . [p]rovide a separate draft directly paying . . . West Broad . . . upon the date of settlement . . . ” for its services. Additionally, Norregard authorized “. . . direct and full payment of the amounts requested by . . . West Broad from any . . . company responsible for payment of any compensation for the injuries caused by the accident” Given the language of the Assignment, Norregard was not entitled to receive the full amount of any settlement. Instead, West Broad stood in the shoes of Norregard and succeeded to all of her rights to the settlement proceeds to the extent of its account balance.

Once American received notice of the Assignment, American was obligated to pay West Broad. *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 633, 688 N.E.2d 1099. “After notice of the assignment has been given to the obligor, or knowledge thereof received by him in any manner, the assignor has no remaining power of release. The obligor must pay the assignee.” *Id.* Norregard had assigned to West Broad her prospective recovery of proceeds for her claims arising from the accident to the extent of West Broad’s outstanding balance. American was on notice of that Assignment when American entered into a settlement with Norregard in which it committed to pay Norregard. American then became legally obligated to pay Norregard. When that settlement was effected, Norregard had already assigned her right to receive the settlement proceeds to West Broad to the extent of its account balance for chiropractic services. Consequently, American became obligated to pay West Broad to the extent of its account balance.

The facts and the law in *Hsu* exemplify the operation of an assignment of settlement proceeds for medical treatment. Defendant Elaine Parker was involved in an automobile accident and suffered multiple injuries. Ms. Parker sought treatment from Dr. Hsu for her injuries related to the accident. As consideration for the treatment Dr. Hsu was to provide her, Ms. Parker executed a document entitled "Security Agreement for Medical Services." The document gave Dr. Hsu a security interest in any and all future proceeds from Ms. Parker's pending personal injury lawsuit. The document authorized her attorney to withhold sufficient funds from any settlement, judgment or verdict to pay the outstanding balance for Dr. Hsu's services. The document also directed Ms. Parker's attorney to pay any funds to Dr. Hsu. Later that year, Ms. Parker's personal injury lawsuit was settled for \$25,000.00. However, Ms. Parker instructed her attorney to transfer the settlement proceeds to her and not to pay Dr. Hsu's medical fees. Dr. Hsu filed suit against Ms. Parker and her attorney alleging that they owed him for the medical services rendered to Ms. Parker. Ms. Parker defaulted. However, her attorney argued that he had no obligation to pay consistent with the assignment. On appeal, the Court found that the document clearly authorized Ms. Parker's attorney to withhold funds from any settlement to pay Dr. Hsu for his services. Furthermore, the document explicitly directed the attorney to pay from any settlement or award the medical fees owed Dr. Hsu. Based upon these findings, the Court concluded that this document created a valid assignment of Ms. Parker's right in any future settlement proceeds in Dr. Hsu. Having received notice of this assignment, the Court concluded that Ms. Parker's attorney, who had been paid the settlement proceeds, was obligated to pay Dr. Hsu.

Commencing with *Hsu*, the Courts of Appeal have, with one aberration, consistently found the assignment of prospective proceeds for medical treatment to be valid and enforceable.

The Court of Appeals for the First Appellate District in *Mt. Lookout Chiropractic Center v. Motley* (Dec. 1, 1999), App. No. C-980987, 1999 WL 1488971, found that Motley had executed an agreement assigning to Mt. Lookout Chiropractic Center, Inc. (“Mt. Lookout”) the right to receive payment for services rendered to Motley directly from the proceeds of any insurance claim payable to Motley. Defendant USAA Insurance Company (“USAA”) paid insurance proceeds to Motley for his claim. Mt. Lookout then sued USAA seeking reimbursement of the funds that had been paid to Motley. On appeal, the Court concluded that the record below showed a valid assignment of which USAA had actual notice. “Consequently, the payment by [USAA] directly to Motley violated the assignment, and [USAA] was liable to reimburse [Mt. Lookout] in that amount.” *Id.*

The Court of Appeals for the Ninth Appellate District in *Akron Square Chiropractic v. Creps, supra.* faced a challenge to an identical assignment. The Court concluded that Creps’ right to assign potential future proceeds arose at the time of the accident. *Id.* With that assignment, Akron Square Chiropractic had an assignment of proceeds directly enforceable against the insurance company. *Id.* at ¶14. (“Allstate was obligated to pay Akron Square for the medical treatment its provided to Creps.”). Having refused to honor the assignment, “Allstate must pay Akron Square for Creps’ treatment.” *Id.*

The Court of Appeals for the First Appellate District in *Roselawn Chiropractic Center, supra.*, again affirmed the validity of an assignment of proceeds to pay for chiropractic services. The Court concluded that “once Tate had assigned to Roselawn her potential proceeds from a lawsuit, Allstate was obligated to honor the assignment and pay Roselawn the amount owed by Tate.” 160 Ohio App.3d 297, 2005-Ohio-1327 at ¶13. The Court reasoned that allowing the creation of a valid assignment by an injured party who incurs medical costs related to an injury

for which another party may be liable gives some assurance to medical care providers that they will eventually be compensated. *Id.* at ¶20. “This fits with one of the purposes of assignments - - to encourage the assignee to trust that an assignor who may not have cash-in-hand will be able to adequately cover his or her debts.” *Id.*

Once again, the Court of Appeals for the Eleventh Appellate District found an assignment of future proceeds in exchange for medical treatment of injuries suffered in an automobile accident to be valid and enforceable against the insurance company who paid proceeds to settle the personal injury claim. In *Gloekler v. Allstate Ins. Co.*, 2007-Ohio-6173, the Court held that once the insurance company had received notice of the accident victim’s assignment of “a part of any [prospective] proceeds from my claim equal to the fees incurred by me ... for all treatment and other services,” the insurance company “had a duty to pay [the health care provider] directly prior to paying any additional proceeds to [the assignee].” ¶16, ¶26.

Finally, the Court of Appeals for the Twelfth Appellate District in *Cartwright Chiropractic v. Allstate Ins. Co.*, 2008-Ohio-2623, found an assignment of future proceeds in exchange for medical treatment of injuries suffered in an automobile accident to be valid and enforceable against the tortfeasor’s insurance company. “Allowing creation of a valid assignment in such a situation gives some assurance to medical care providers that they will eventually be compensated. This fits with one of the purposes of assignments – to encourage the assignee to trust that an assignor who may not have cash in hand will be able to cover his or her debts.” *Id.* at ¶21 quoting *Roselawn*, 2005-Ohio-1327 at ¶20.

B. The Court of Appeals distorts the common law of assignments.

The Court of Appeals concluded that West Broad had no valid assignment because

there existed no “right in being” when Norregard entered into the assignment with West Broad, and, thus, at the time of the assignment, no property right vested in West Broad. Although it

was possible at the time of the assignment that Norregard could in the future obtain settlement proceeds from American, it was just a possibility. Norregard's right to obtain a settlement from American could not be properly perfected or established until Norregard first obtained a judgment against the tortfeasors, as provided by R.C. 3929.06. Therefore, the agreement between Norregard and West Broad to apply any settlement proceeds to Norregard's debt could not operate as an assignment, as it did not give West Broad a right to the funds until Norregard sought proceeds from American.

This reasoning is fundamentally flawed! At the time Norregard executed the Assignment, she had an existing right to prospective proceeds, either in settlement or from a judgment. "The cause of action existed at the time the assignment was executed. While the amount of recovery depended upon later proof, the action existed and a share of [the recovery] could be assigned." *In re Petry* (1986 N.D. Ohio), 66 B.R. 61, 63.

"In Ohio, Generally (sic), all rights, ad rem and in re, vested or contingent, possibilities coupled with an interest, and claims growing out of and adhering to property, both from contract and tort, may be assigned." *Cartwright*, 2008-Ohio-263, ¶15. From the date of Norregard's accident with the tortfeasor, she owned a claim for damages and the prospective right to obtain payment of pecuniary damages or settlement proceeds. *Id.*, ¶16, *see also Akron Square Chiropractic* ("... we have recognized the right of an injured party to assign its rights to claims which they might have pursued under an insurance policy as a result of an injured party's injury."). This Court has recognized that right to be a chose in action which is established at the time of the loss and not when reduced to a sum of money due. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* (2006), 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121 ¶20, ¶21, ¶22, ¶29 ("... a chose in action ... includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property."). A person who does not have a present right to proceeds, but who may have that right in the future, even if the future existence of the

proceeds is conditional, can assign that right, in whole or in part, to another under Ohio law.

General Excavator Co. v. Judkins (1934), 128 Ohio St. 160, 190 N.E. 389.

In *General Excavator*, an excavating contractor had assigned to his bank future payments due from the county auditor for an excavation contract. The payments had not yet been paid, and might never have been paid, as the payments were conditioned on the contractor's subsequent performance of the work. This Court held that the excavating contractor could validly assign those prospective payments because:

An equitable assignment requires no particular form. It is accomplished where there is an intention on one side to assign and an intention on the other to accept, supported by a sufficient consideration and disclosing a present purpose to make an appropriation of a debt or fund.

Id. at syl. 3. Similarly, in *Moore v. Foresman* (1962), 172 Ohio St. 559, 179 N.E.2d 349, this Court held that future and contingent beneficiaries of stock held in a trust could assign that stock to a third party, despite the fact that at the time the assignment was made, the assignors had no right in, or to, the stock held by the trust. This Court has likewise held that a potential beneficiary of a contingent future inheritance could validly assign it before it existed, as an equitable assignment. *Hite v. Hite* (1929), 120 Ohio St. 253, 166 N.E. 193.

Before the modern rules of civil procedure, the distinction between a cause of action brought in a court of equity as opposed to a court of law was crucial, and even dispositive. At common law, a future or contingent interest in property was not assignable, but it was always assignable in equity. *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 85 N.E. 55 (“equitable assignment to attorney of an interest in the proceeds of compromise, not enforceable in suit at law, his remedy being in equity”), citing *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Volkert* (1898), 58 Ohio St. 362, 50 N.E. 924. Of course, under present rules of procedure there is only “one form of action ... [a] civil action.” Rule 2, Ohio Rules of Civil

Procedure.

Given the creation of a single form of action, the distinction upon which the Court of Appeals seemed to rely has no meaning. Today, Ohio courts may enforce both an assignment at law and an equitable assignment, such equitable assignment being completely consistent with longstanding authority and case law that a prospective fund can be assigned before it even exists.

6A C.J.S., §16 ASSIGNMENTS:

In equity, there can be a valid assignment of funds or property to be subsequently acquired, and of contingent and expectant interests ... equity does not hold that an assignment of such an ... interest operates as a present transfer, but construes it as operating by way of a present contract to give a title which, as between the parties, takes effect and attaches to the subject as an equitable title or lien, which equity will enforce, as soon as it comes into existence and possession, without the necessity of any new act.

In equity, the assignee of an expectancy, possibility, or contingency acquires a present equitable right, which becomes an equitable property right over the proceeds of such expectancy, possibility or contingency as soon as they come into existence as an interest in possession. 3

POMEROY EQUITY JURIS., §1271 (1941). *See also, Bernstein v. Allstate Ins. Co.* (1968), 56

Misc.2d 341, 288 N.Y.S.2d 646:

... when the negligence action was settled, and the settlement fund came into existence, the equitable assignment became a legal assignment. It effectuated a transfer of title to that portion of the fund assigned to the doctor and Allstate was obligated to immediately turn over that portion to him.

The Court in *Costanzo v. Costanzo* (1991 N.J. Super.), 590 A.2d 268 concisely summarized the law of equitable assignment:

The purported assignment in this case was not of an expected settlement fund from an expected tort claim. It was an assignment of a right to monies from an expected settlement of an existing tort claim. The specific thing which was intended to be assigned was a sum of money from an identifiable fund arising at a future time as a result of the fulfillment of a condition (a settlement of the tort

claim). The right to the proceeds of the expected settlement is therefore assignable.

Similarly, in *In re Petry, supra.*, the bankruptcy debtor had a personal injury claim arising from a motorcycle accident, and he obtained medical treatment at Cleveland Metropolitan Hospital (the “Hospital”). In lieu of payment, the debtor executed a partial assignment to the Hospital of any future insurance settlement from his accident. Confirming the validity of the assignment, the Court dismissed the debtor’s contention that an assignment of possible future proceeds was not valid, as the proceeds did not yet exist:

The cause of action existed at the time the assignment was executed. While the amount of recovery depended on later proof, the action existed and a share of [the recovery] could be assigned ... Debtor [the patient] assigned a share of any proceeds he received for his injuries to Metro [the Hospital], and Metro became the owner of those proceeds once the insurance settlement was reached.

Id. at 63. As the Court of Appeals in *Akron Square Chiropractic* succinctly observed: “Creps’ right to assign potential future insurance proceeds arose at the time the accident with Grecni occurred.” 2004-Ohio-1988 at ¶12. Norregard, therefore, did have a “right in being” when she made the assignment of prospective proceeds to West Broad.

Proposition of Law No. II: R.C. 3929.06 does not preclude an assignee of settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such assignment, after the insurer had settled with the assignor and distributed settlement proceeds in disregard of that written assignment.

Rejecting the well-reasoned opinions of four Courts of Appeal, the Court of Appeals found the decision of the Fifth Appellate District in *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, 2003-Ohio-5021 to be more persuasive. In *Knop*, the Court abandoned or ignored the well-articulated and well-established law of Ohio. Instead, the Court found “the assignment .. not [to be] actionable against ... State Farm ...” because of R.C. 3929.06.

Contrary to the *Knop* court, that particular section of the Ohio Revised Code was enacted to postpone direct actions to recover in tort against the tortfeasor's insurer until the plaintiff had established the tortfeasor's liability. "R.C. 3929.06 merely operates to provide a judgment creditor the opportunity to assert a claim for insurance money, if the debtor was insured at the time of the loss." *Cartwright*, 2008-Ohio-2623 ¶18 (quotation omitted). However, the legislature did not intend for that section of the Revised Code to preclude a valid equitable assignment enforceable against an insurance company when it has notice of the assignment and chooses to ignore it after it becomes obligated to pay settlement proceeds. *Akron Square Chiropractic* at ¶12. The Court of Appeals in *Akron Square Chiropractic* succinctly explained:

... this Court has previously held that "[R.C. 3929.06] merely provides a judgment creditor the opportunity to assert a claim for insurance money, if the debtor was insured at the time of the loss." *Salem v. Wortman*, (Aug. 30, 1978), 9th Dist. No. 8769, at 4. This Court has never construed R.C. 3929.06 as impacting an injured party's right to assign potential or prospective proceeds from claims not yet filed. The statute makes no mention of such a prohibition and we will not stray from our precedent and read such a prohibition into the statute.

* * *

Based on the foregoing, we reject Allstate's interpretation of R.C. 3929.06 and its argument that Creps had no "right in being" until he filed suit or obtained a settlement stemming from the accident with Grecni. We find that Creps was not required to have filed suit or obtained judgment against Grecni or Allstate in order to effectuate a valid assignment of potential future insurance proceeds resulting from the accident with Grecni. We further find that Creps' right to assign potential future insurance proceeds arose at the time the accident with Grecni occurred. Therefore, Creps' assignment to Akron Square was valid.

Id. at ¶10 and ¶12. The Court of Appeals in *Cartwright* equally rejected the application of R.C. 3929.06 for an assignment as a distortion of the statute:

Due to Ohio assignment law, a prerequisite liability determination is unnecessary as prospective proceeds and claims may be assigned

as long as they are not “naked or remote.” Furthermore, R.C. 3929.06 is equally inapplicable because Allstate entered into a settlement in this case and Miller never had to file suit against Rice to even determine liability. Allstate’s argument does not take into account that this case is not a matter of establishing liability, this is a matter involving settlement. Liability is not an issue of this case, nor does liability need to be established. Allstate entered into a settlement with Miller to extinguish any potential claim she had against its insured, and Allstate as the insurer. The statutory section Allstate cites is only relevant if a lawsuit is necessary to establish liability, and even then it does not preclude a lawsuit against Allstate, it simply requires the lawsuit against Allstate be delayed.

Id. at ¶19.

Clearly, R.C. 3929.06 has no application where the insured’s liability is subsequently reduced by agreement into a settlement fund. As this Court has noted, “[a]t the point of settlement, a settlement debt is created, and the plaintiff [the claimant] becomes a creditor entitled to the settlement proceeds.” *Hartmann v. Duffey* (2002), 95 Ohio St.3d 456, 2002-Ohio-2486 at ¶11, 768 N.E.2d 1170. Certainly the claimant can sue the insurer to pay the settlement and the insurer cannot argue that R.C. 3929.06 was bar to that suit. In fact, the “direct action rule” has no application to actions brought by claimants against third party insurers for breach of settlement agreements. In *Fletcher v. Nationwide Mutual Ins. Co.*, 2003-Ohio-3038, the Court of Appeals expressly rejected the argument that the claimant to a settlement agreement had no right of action to enforce the agreement against the insurer. “Nationwide is not a third party, but a principal, to the bi-lateral contract of settlement The unrelated constraints against third parties seeking coverage from insurers have no application.” *Id.* at ¶23. Likewise, the unrelated constraints of R.C. 3929.06 have no application to an assignee, standing in the shoes of the assignor-creditor, seeking to enforce the assignment against the obligor insurance company, who is by contract indebted to pay the settlement proceeds to the creditor.

Carrying the logic of the Court in *Knop* to its absurd conclusion, no settlement agreement

would ever be enforceable against an insurance company because the plaintiff has not prosecuted the case to a final judgment awarding damages to the plaintiff. Such an anomalous result cannot be an accurate statement of the law. Yet that is exactly the result of the *Knop* case. Obviously, this decision does not correctly state the law of Ohio. Revised Code 3929.06 does not preclude enforcement of contract rights against an insurance company. Consequently, the Court of Appeals in *Knop* erroneously applied R.C. 3929.06 to preclude the assignor of contract rights from recovering in contract against the insurer. As the Court of Appeals for the First Appellate District observed

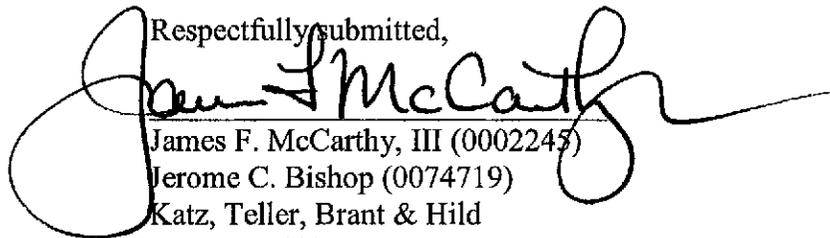
We decline to follow the *Knop* court for public-policy reasons. Under the *Knop* reasoning, Tate would have had to sue Stanton and Allstate before she could assign her rights to any proceeds from such a claim to Roselawn. We refuse to establish a rule that would force parties to litigate. Rather, the law should encourage settlement.

Roselawn at ¶16.

IV. CONCLUSION

Here, the Court of Appeals has adopted a rule that forces parties to litigate, deters timely medical treatment, injects uncertainty into the common law and misreads the Ohio Revised Code. To rectify this aberration in the law, the Court must grant jurisdiction to hear this case and review the decision of the Court of Appeals.

Respectfully submitted,



James F. McCarthy, III (0002245)

Jerome C. Bishop (0074719)

Katz, Teller, Brant & Hild

255 East Fifth Street, Suite 2400

Cincinnati, Ohio 45202

(513) 721-4532

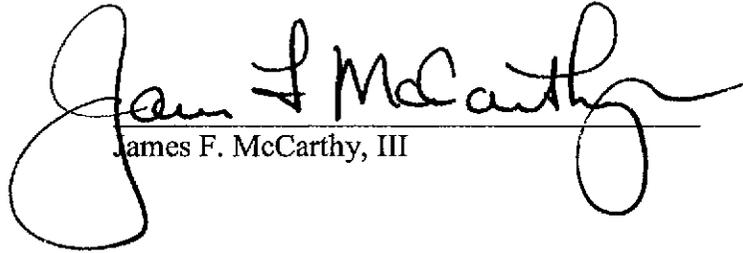
(513) 762-0006 (facsimile)

jmccarthy@katzteller.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via U.S. Mail this 17th day of July, 2008 upon Mark S. Maddox, Frost, Maddox & Norman Co., LPA, 987 South High Street, Columbus, Ohio 43206.


James F. McCarthy, III

KTBH: 4848-2325-2226, v.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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FRANKLIN CO. OHIO

TENTH APPELLATE DISTRICT

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CLERK OF COURTS

West Broad Chiropractic, :
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 Plaintiff-Appellee, :
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 v. :
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 American Family Insurance, :
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 Defendant-Appellant. :

No. 07AP-721
(M.C. No. 2006 CVH 043353)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 3, 2008, American's assignment of error is sustained, the judgment of the Franklin County Municipal Court is reversed, and this cause is remanded to that court with instructions to grant summary judgment in favor of American and deny summary judgment to West Broad. Costs are assessed against West Broad.

BROWN, J., McGRATH, P.J., & FRENCH, J.



Judge Susan Brown

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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COURT OF APPEALS
FRANKLIN CO. OHIO

2008 JUN -3 PM 3: 32

CLERK OF COURTS

West Broad Chiropractic,	:	
	:	
Plaintiff-Appellee,	:	No. 07AP-721
	:	(M.C. No. 2006 CVH 043353)
v.	:	
	:	(REGULAR CALENDAR)
American Family Insurance,	:	
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on June 3, 2008

Katz, Teller, Brant & Hild, and James F. McCarthy, III, for appellee.

Frost, Maddox & Norman Co., L.P.A., and Mark S. Maddox, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶1} American Family Insurance ("American"), defendant-appellant, appeals from a judgment of the Franklin County Municipal Court, in which the court granted the motion for summary judgment filed by plaintiff-appellee, West Broad Chiropractic ("West Broad").

{¶2} On July 6, 2002, Kristy Norregard was involved in a motor vehicle accident and sustained injuries. The tortfeasor's liability insurer was American. On July 9, 2002, Norregard received chiropractic care from West Broad for injuries caused by the accident.

On the same date, Norregard and West Broad entered into a contract ("assignment" or "assignment agreement"), in which Norregard agreed to assign to West Broad her right to settlement proceeds from any future personal injury claim. The assignment indicated that the proceeds of any insurance settlement must be made directly to West Broad before any payments were made to Norregard. On April 30, 2004, West Broad sent notice to American of the assignment, indicating that Norregard had assigned her interest in any personal injury settlement received by her from American to the extent of any outstanding balance for the medical care Norregard received from West Broad and that any settlement proceeds should be paid directly to West Broad. Norregard presented a claim to American, and she subsequently received a direct cash settlement from American in January 2006. American did not make any payment to West Broad.

{¶3} On October 10, 2006, West Broad filed an action against American, seeking \$3,830 for the costs of Norregard's medical treatment at West Broad. Both parties moved for summary judgment. On February 16, 2007, the trial court granted summary judgment to West Broad in the amount of \$3,830, plus interest and costs. In doing so, the trial court found R.C. 3929.06 did not proscribe or limit the common-law right of an injured party to assign future proceeds of a settlement to a third party. American appeals the judgment of the trial court, asserting the following assignment of error:

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S
MOTION FOR SUMMARY JUDGMENT AND DENYING
APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

{¶4} American argues in its assignment of error that the trial court erred when it granted West Broad's motion for summary judgment. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that: (1) no genuine issue as

to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408.

{¶5} In the present case, American contends that the trial court's judgment was in error because a cause of action in tort to recover for personal injuries is not assignable; even if assignable, the assignment was ineffective as to American insofar as American never was in possession of settlement proceeds; and R.C. 3929.06 prohibits West Broad's action. Although our review of Ohio case law reveals limited authority, several cases have addressed the same or similar issue. Based upon our review, we find the trial court erred when it granted summary judgment to West Broad.

{¶6} Of the several Ohio appellate courts that have addressed similar issues, we find the reasoning in *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA00148, 2003-Ohio-5021 most compelling. In *Knop*, the injured victim was involved in a vehicle collision with a tortfeasor. In exchange for treatment from a chiropractor, the injured party executed an assignment with the chiropractor assigning to the chiropractor part of any proceeds from any personal injury claim equal to the chiropractic fees incurred. The injured party subsequently made a claim against the tortfeasor for personal injury and property damage. The chiropractor sent a copy of the assignment to the tortfeasor's insurance company. The insurer settled the injured's claim

but paid the injured directly. The injured did not forward any funds to the chiropractor. The chiropractor filed an action against the insurer, and the trial court eventually granted summary judgment to the insurer, finding the assignment between the chiropractor and the injured was invalid.

{¶7} On appeal, the Fifth District Court of Appeals affirmed the trial court. The appellate court based its decision upon R.C. 3929.06, which, in general, provides that an injured party must first obtain a judgment against the tortfeasor before bringing an action against the tortfeasor's insurer seeking the entry of a judgment ordering the insurer to pay the injured the requisite amount. Citing R.C. 3929.06(B), the court found that, because the injured had not yet pursued legal action against the tortfeasor at the time he signed the assignment documents, the injured had no right to file an action against the insurer at that time. The court further noted that an assignment must be founded on a right in being. See *Knop*, supra, at ¶19, citing 6 Ohio Jurisprudence 3d Assignments, Section 17. Therefore, the court concluded that, because R.C. 3929.06(B) provides that the personal injury victim has no right to file an action against the tortfeasor's insurer until after an action has been filed against the tortfeasor, the assignment was not actionable against the tortfeasor's insurer because the assignment was created prior to the existence of a civil action by the injured against the tortfeasor.

{¶8} While several appellate courts have found similar assignments under similar factual circumstances as the present case to be valid, we find they are less persuasive than *Knop* and fail to address some of the public policy reasons cited by this court below. In *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, the First Appellate District found a similar assignment agreement valid.

In that case, an individual was injured in an automobile accident caused by the tortfeasor. The injured received treatment from a chiropractor and executed an assignment, which provided the injured was assigning to the chiropractor any proceeds the injured may receive from a claim against the tortfeasor and the tortfeasor's insurer, equal to the cost of treatment. The chiropractor sent the tortfeasor's insurer notice of the assignment. The insurer settled the matter with the injured party but sent the proceeds directly to the injured. The chiropractor filed an action against the insurer.

{¶9} On appeal of the trial court's judgment finding the assignment valid, the appellate court affirmed. The appellate court found that the insurer received notification of the assignment of the proceeds, and, thus, the document executed by the injured was a valid assignment obligating the tortfeasor's insurer to pay the chiropractor for the amount due for medical treatment.

{¶10} The court in *Roselawn* also addressed the basis cited in *Knop* in response to the insurer's argument that the assignment could not have been created prior to the existence of a civil action by the injured party against American's insured, and, therefore, at the time of the assignment, the injured had nothing to assign. The court in *Roselawn* declined to follow the *Knop* court for public policy reasons, claiming that the procedure set forth in *Knop* would force parties to litigate, in that the injured would have to sue the tortfeasor and the tortfeasor's insured prior to creating the assignment. The court in *Roselawn* cited the general tenet that the law should encourage settlement.

{¶11} In *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988, the Ninth District Court of Appeals found a similar assignment valid. In finding R.C. 3929.06 did not invalidate such an assignment, the court in *Akron Square* indicated it had

previously held that R.C. 3929.06 merely provides a judgment creditor the opportunity to assert a claim for insurance money if the debtor was insured at the time of the loss but had never construed that statute as impacting an injured party's right to assign potential or prospective proceeds from claims not yet filed. The court noted that the statute made no mention of such a prohibition and it would not stray from its precedent and read such a prohibition into the statute. *Akron Square*, at ¶10. The court also explained that public policy supported the validity of such assignments, as such promoted timely medical treatment for injured persons otherwise unable to pay and avoided additional lawsuits by medical providers who elect to provide treatment without up front payment. *Id.*, at fn. 2.

{¶12} Most recently, in *Gloekler v. Allstate Ins. Co.*, Ashtabula App. No. 2007-A-0040, 2007-Ohio-6163, the Eleventh District Court of Appeals likewise found a similar assignment valid. In *Gloekler*, a party was injured in an automobile accident with the tortfeasor. The injured party received treatment from a chiropractor and executed an assignment, giving the chiropractor the right to collect a portion of the proceeds from any personal injury claim settlement to which the injured was entitled. The chiropractor forwarded a copy of the assignment to the tortfeasor's insurer and later submitted a bill to the insurer. The insurer settled the injured's claim for \$2,050, by issuing a check directly to the injured. The chiropractor filed a complaint against the insurer seeking payment of the injured's chiropractic bill. The trial court granted the chiropractor's motion for summary judgment and ordered the insurer to pay the chiropractor \$2,050.

{¶13} On appeal, the appellate court affirmed the trial court's judgment. The court, following *Roselawn*, found the assignment valid and binding upon the tortfeasor's insurer. The court held that the chiropractor instructed the insurer to pay him pursuant to the

assignment, and, thereafter, the insurer had a duty to pay the chiropractor directly prior to paying any additional proceeds to the injured. The court noted that the insurer was free to determine that the injured's claim had no value and choose not to settle, and the insurer could also simply tender the settlement check to both the injured and the chiropractor listed as payees if a dispute between the injured and the chiropractor arose as to the payment. The court in *Gloekler* relied upon the reasoning in *Roselawn*.

{¶14} After reviewing this authority, we find the reasoning in *Knop* to be more persuasive. The decision in *Knop* was based upon R.C. 3929.06, which provides, in pertinent part:

(A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury[,] * * * and if, at the time that the cause of action accrued against the judgment debtor, the judgment debtor was insured against liability for that injury, * * * the plaintiff * * * is entitled as judgment creditor to have an amount up to the remaining limit of liability coverage provided in the judgment debtor's policy of liability insurance applied to the satisfaction of the final judgment.

(2) If, within thirty days after the entry of the final judgment referred to in division (A)(1) of this section, the insurer * * * has not paid the judgment creditor an amount equal to the remaining limit of liability coverage provided in that policy, the judgment creditor may file in the court that entered the final judgment a supplemental complaint against the insurer seeking the entry of a judgment ordering the insurer to pay the judgment creditor the requisite amount. * * *

(B) Division (A)(2) of this section does not authorize the commencement of a civil action against an insurer until a court enters the final judgment described in division (A)(1) of this section in the distinct civil action for damages between the plaintiff and an insured tortfeasor and until the expiration of the thirty-day period referred to in division (A)(2) of this section.

Accordingly, pursuant to R.C. 3929.06, the injured party must first obtain a judgment against the tortfeasor before bringing an action against the tortfeasor's insurer to recover proceeds from the tortfeasor's insurance policy. Thus, until the injured party obtains a judgment against the tortfeasor, the injured party has no right to recovery from the tortfeasor's insurer.

{¶15} Further, it is well-established that, in order for a valid assignment to exist, the assignment must be founded on a right in being. *Knop*, supra, at ¶19, citing 6 Ohio Jurisprudence 3d Assignments, Section 17. An assignment occurs "only where the transfer is of a substantial property right vested in the transferor as owner." 6 Ohio Jurisprudence 3d Assignments, Section 1. It is fundamental that the assignee stands in the shoes of the assignor and can obtain no greater rights against another than the assignor had. *Citizens Fed. Bank, F.S.B. v. Brickler* (1996), 114 Ohio App.3d 401. Thus, "a mere naked or remote possibility" cannot be assigned, and no right is assignable until it has been properly perfected or established as provided by law. 6 Ohio Jurisprudence 3d Assignments, Section 18. It is also clear that, in order to constitute an assignment in either law or equity, there must be such an actual or constructive appropriation of the subject matter assigned as to confer a complete and present right on the assignee. *Id.*, at Section 33. Therefore, a promise on the part of the promisor to apply a particular fund to pay a debt to the promisee as soon as he receives it will not operate as an assignment, as it does not give the promisee a right to the funds, except through the promisor, and looks to a future act on the promisor's part as the means of rendering it effectual. *Id.*, citing *Christmas's Admr. v. Griswold* (1858), 8 Ohio St. 558, 562.

{¶16} Applying these venerable principles to the facts in the present case, there existed no "right in being" when Norregard entered into the assignment with West Broad, and, thus, at the time of the assignment, no property right vested in West Broad. Although it was possible at the time of the assignment that Norregard could in the future obtain settlement proceeds from American, it was just a possibility. Norregard's right to obtain a settlement from American could not be properly perfected or established until Norregard first obtained a judgment against the tortfeasors, as provided by R.C. 3929.06. Therefore, the agreement between Norregard and West Broad to apply any settlement proceeds to Norregard's debt could not operate as an assignment, as it did not give West Broad a right to the funds until Norregard sought proceeds from American.

{¶17} We also note that we do not dispute the finding in *Akron Square* that R.C. 3929.06 makes no mention of a prohibition against assignments. See *Akron Square*, at ¶10. However, neither our analysis nor the analysis in *Knop* is based upon an explicit prohibition in R.C. 3929.06. Rather, it is the application of the basic principles of the law of assignments to the statute that proscribe the type of assignment attempted in the present case.

{¶18} Therefore, based upon *Knop* and R.C. 3929.06, as well as the above reasoning, we find the assignment agreement was ineffective to compel American to pay Norregard's personal injury settlement proceeds directly to West Broad. Thus, we conclude the trial court erred when it granted summary judgment to West Broad, and the trial court should have granted summary judgment to American.

{¶19} Accordingly, American's assignment of error is sustained, and the judgment of the Franklin County Municipal Court is reversed, and this cause is remanded to that

court with instructions to grant summary judgment in favor of American and deny summary judgment to West Broad.

*Judgment reversed and
cause remanded with instructions.*

McGRATH, P.J., and FRENCH, J. concur.
