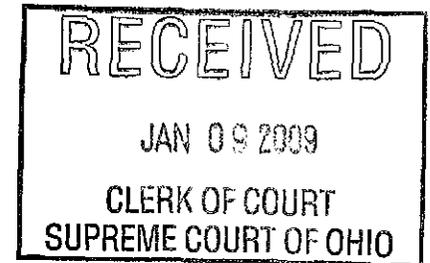


IN THE SUPREME COURT OF OHIO

WEST BROAD CHIROPRACTIC, : Supreme Court Case No. 08-1396
Appellant, :
v. : On Appeal from the Franklin County Court of
: Appeals, Tenth Appellate District
: AMERICAN FAMILY INSURANCE, : Court of Appeals
Appellee. : Case No. 07-AP-721

**MERIT BRIEF
OF AMICUS CURIAE, OHIO STATE CHIROPRACTIC ASSOCIATION AND
OHIO OSTEOPATHIC ASSOCIATION,
ON BEHALF OF APPELLANT WEST BROAD CHIROPRACTIC**

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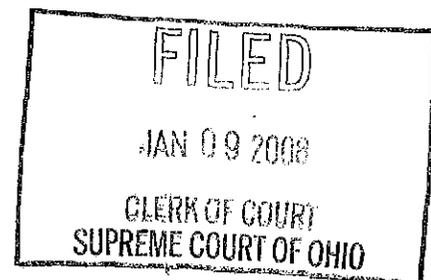


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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio State Chiropractic Association is a trade organization consisting currently of approximately 900 members, representing the Ohio chiropractic profession to promote its contributions to health care in Ohio and at the national level. The Ohio Osteopathic Association is a trade organization consisting of approximately 3,000 members, similarly representing its members' interests in promoting their contributions to health care in Ohio and nationally.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the Statement of Facts set forth in Appellant West Broad Chiropractic's Merit Brief as if fully set forth here.

ARGUMENT

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.

This case involves a common payment mechanism that has permitted countless patients to receive health care they cannot afford to pay for. This payment mechanism has permitted hospitals, chiropractic physicians, surgeons, and other healthcare providers to provide health care to uninsured patients without incurring unsecured debt.

In exchange for prompt health care, individuals injured in an accident routinely assign a portion of future tort claim proceeds to the health care provider as a source of future payment for their care:

“... assignments such as the one made by Tate are common. 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 at ¶19.

The proceeds assignment is an efficient contractual solution which greatly benefits patients and health care providers, and poses no detriment to the assignment obligor, the tortfeasor’s insurer, who remains free to determine the amount of settlement with the patient-claimant. Recently the Court of Appeals for the 11th District in finding such an assignment valid, observed:

“Simply stated, Gloekler [the assignee medical provider] was entitled to the first \$2,050 that Allstate determined Starcher was entitled to. If Allstate chose to settle Starcher’s claim for a total of \$100,000, it had duty to pay \$2,050 directly to Gloekler and \$97,950 directly to Starcher. On the other hand, if Allstate determined that Starcher’s claim had no value and chose not to settle, it would not have a duty to pay Gloekler, unless and until Starcher obtained a judgment against Allstate or Muto.”

Gloekler v. Allstate Ins. Co., 2007-Ohio-6163, ¶26.

The appellate courts for 18 counties in Ohio have recognized the validity of these medical proceeds assignments. *Roselawn Chiropractic Cntr., Inc. v. Allstate Ins. Co.* (1st Dist., 2005), 160 Ohio App.3d 297, 2005-Ohio-1327, 827 N.E.2d 331; *Akron Square Chiropractic v. Creps* (9th Dist., 2004), 2004-Ohio-1988; *Hsu v. Parker* (11th Dist., 1996), 116 Ohio App.3d 629, 688 N.E.2d 1099; *Mt. Lookout Chiropractic Center v. Motley* (1st

Dist., Dec. 1, 1999), App. No. C-980987, 1999 WL 1488971; *Gloekler v. Allstate Ins. Co.*, (11th Dist., 2007) 2007-Ohio-6163; and *Cartwright v. Allstate Ins. Co.*, (12th Dist., 2008) 2008-Ohio-2623. The First and Ninth District specifically endorsed the public policy favoring the use of such assignments in Ohio:

“Many times an assignment is the only way the doctor can secure payment. And assignments are often signed prior to the making of a formal claim... 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 cover his or her debts.”

Roselawn, 2005-Ohio-1327 at ¶19, 20.

“... 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. [This] reasoning * * * 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. * * * [The insurance company’s] claim that such assignment should be unenforceable by the assignee would prevent some insured persons from obtaining timely medical treatment, and lead to additional lawsuits by medical providers who elect to provide treatment without ‘up front’ payment, without serving any advantage to any party, including the insurance carrier.” (Brackets in original)

Akron Square, 2004-Ohio-1988 at ¶12.

The prevalence of the assignment of future proceeds of a settlement or judgment has also 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. “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.

In contravention of the six Ohio appellate decisions referenced above, the Court of Appeals below found an assignment of future proceeds to be invalid, both under the general common law of assignment, and particularly as applied to an insurer pursuant to R.C. 3929.06. This decision distorts over one hundred years of Ohio assignment case law, and utterly misreads R.C. 3929.06, (the "direct action rule"). The effect of this decision is to strip away an efficient and necessary means for health care delivery to uninsured accident victims in Franklin County, and to create a conflict between this appellate district and the four other districts who have considered the same assignments and found them to be valid. This Court should take this opportunity to make it clear that these assignments are valid and enforceable throughout Ohio.

A. Ohio appellate decisions correctly upholding medical proceeds assignments.

In *Roselawn Chiropractic Cntr., Inc. v. Allstate*, the victim of an automobile accident assigned some of the proceeds of her personal injury claim to a chiropractic clinic in exchange for care. Allstate was put on notice of the proceeds assignment prior to settlement, but when settlement of the personal injury claim was reached, Allstate paid all of the proceeds of the settlement directly to the claimant/patient in disregard of the proceeds assignment. Allstate argued that at the time the claimant/patient made her assignment, she had nothing to assign, since she had not yet sued the insured tortfeasor

and proven liability. The First District Appellate Court found that the assignment was valid and Allstate was held liable to the chiropractic clinic for the lesser of the amount of the settlement or the patient's treatment fees. The Court explained:

“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. ... and assignments are often signed prior to the making of a formal claim. We see no reason to force a person to file a lawsuit before he or she can assign the right to potential proceeds from a claim.

* * *

We conclude that the trial court did not err when it determined that Tate had executed a valid assignment. Allstate had sufficient notice of the assignment and was obligated to pay Roselawn the amount Tate owed for her medical treatment. Therefore, we overrule both of Allstate's assignments of error and affirm the trial court's judgment.”

Roselawn, 2005-Ohio-1327 at ¶19, 21.

In *Mt. Lookout Chiropractic Center, Inc. v. Motley, et. al.*, a chiropractic patient, Defendant Victor Motley, executed an assignment of prospective proceeds from his pending tort claim over to Mt. Lookout Chiropractic Center, Inc. USAA Insurance Company paid the entire settlement amount to Mr. Motley. Mr. Motley then failed to pay Mt. Lookout Chiropractic Center, Inc. The First District Appellate Court held:

“The record clearly shows a valid assignment, of which appellant [USAA Insurance Company] had actual notice ... Consequently, the payment by appellant directly to Motley violated the assignment, and appellant was liable to reimburse appellee in that amount. *Hsu, supra*, at 633, 688 N.E.2d at 1101.”

Mt. Lookout 1999 WL 1488971 at p. 2.

In *Akron Square Chiropractic v. Creps*, Adam Creps was injured in an auto accident caused by an insured of Allstate Insurance Co. Mr. Creps sought treatment from Akron Square Chiropractic. As a source of payment for his treatment, Mr. Creps

executed a proceeds assignment in favor of Akron Square Chiropractic. Akron Square sent Allstate a copy of the proceeds assignment. Allstate responded with a letter denying responsibility for payment to Akron Square, and later paid Mr. Creps \$865.00 in exchange for a release. *Akron Square*, 2004-Ohio-1988 at ¶4. Akron Square sued Allstate and the trial court ordered Allstate to pay the treatment fees of \$865 plus attorney fees of \$2,468.75. The Ninth District, affirming the trial court, held that Allstate was directly liable for disregarding the proceeds assignment from Mr. Creps. *Id.* at ¶ 14, 15.

In *Cartwright Chiropractic v. Allstate Insurance Co.*, 2008-Ohio-2623, the Twelfth District specifically agreed with the reasoning and conclusions of the Ninth District in *Akron Square* and the First District in *Roselawn*. In *Cartwright*, an Allstate insured injured Jennifer Miller in an auto accident. Miller sought medical treatment from Cartwright Chiropractic. At the start of her treatment, Miller executed a proceeds assignment in favor of Cartwright Chiropractic. That proceeds assignment stated in pertinent part:

"NOTICE: I DIRECT ANY INSURANCE COMPANY, ATTORNEY, OR OTHER PERSON WHO HOLDS OR LATER HOLDS ANY PROCEEDS FROM MY CLAIM TO APPLY ANY PROCEEDS FROM MY CLAIM TO MY TOTAL ACCOUNT BALANCE OUT OF THE TOTAL PROCEEDS HELD IN MY BEHALF."

Cartwright, 2008-Ohio-2623 at ¶3.

Although Allstate received notice of the proceeds assignment prior to settlement, it paid the full amount of agreed upon settlement proceeds directly to Miller, disregarding the assignment. Miller then filed bankruptcy. Cartwright Chiropractic sued Allstate for disregarding the proceeds assignment, and the trial court found Allstate liable to Cartwright for the amount of its outstanding treatment fees, to the extent of the total

settlement amount. The Twelfth District affirmed, finding that the proceeds assignment was a valid assignment of Miller's prospective future proceeds from her existing automobile accident:

“... ‘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.’ 6 Ohio Jurisprudence 3d (2006) 50, Assignments, Section 5. Moreover, an expectancy or possibility is assignable unless it is ‘naked or remote.’ *Id.* at Sections 7 and 18. Such assignments are equitable assignments. *Id.* A ‘present existing right, to take effect in the future on contingency, may be assigned.’”

Cartwright, 2008-Ohio-2623 at ¶15.

In 2007, in *Gloekler v. Allstate Ins. Co.*, the Eleventh District also enforced a proceeds assignment against Allstate Insurance Company under facts similar to those present in *Roselawn, Akron Square*, and *Cartwright*. The *Gloekler* Court specifically agreed with the First District's analysis in *Roselawn*, and specifically rejected the decision of the Fifth District in *Knop Chiropractic v. State Farm Insurance Co.*

“We agree with the First District's analysis. In this matter, Starcher specifically instructed Allstate to pay Gloekler pursuant to the assignment agreement. At that time, Allstate had a duty to pay Gloekler directly prior to paying any additional proceeds to Starcher. Simply stated, Gloekler was entitled to the first \$2,050 that Allstate determined Starcher was entitled to..... In addition, if a dispute developed between Starcher and Gloekler, such as whether or not the chiropractor was legally required to submit the bills to Starcher's medical insurance or claims of overcharging, Allstate could simply tender the settlement check with both Starcher and Gloekler listed as payees.”

Gloekler, 2007-Ohio-6163 at ¶26¹.

¹ In another earlier case involving an assignment of future proceeds to a medical provider, the Eleventh District Court of Appeals had held that a patient's attorney was directly liable to pay the patient's surgeon, because he had prior notice of a proceeds assignment:

“Parker [the patient] assigned part of the proceeds of her personal injury action to appellant [Dr. Hsu]. As shown by appellee's [patient's attorney] signature on this document, appellee had

The same facts have been presented to several Ohio trial courts, which have almost uniformly held third party insurers liable for ignoring medical proceeds assignments at settlement. *American Chiropractic v. American Family Insurance, et al.*, (January 30, 2003), Case No. CVF-02-01146, Toledo Municipal, (unreported); *Carter v. Nationwide Ins. Co.*, (Sept. 19, 2003), Case No. 03CV1663, Delaware Cty., (unreported); *Sky Shelby, D.C., Inc. v. Mack and American Standard Insurance Company of Ohio, dba American Family Insurance Group*, (March 31, 2003), Case No. A0202350, Hamilton County Common Pleas, (unreported); *Sky Shelby D.C., Inc. v. Farmer's Insurance of Columbus, Inc., et. al.*, (March 23, 1998), Case No. 97-CV04407, Hamilton County Municipal, (unreported); *Roselawn Chiropractic Center, Inc. v. Citizens Insurance Company of America, et. al.*, (February 20, 2003) Case No. 02 CV 27296, Hamilton County Municipal, (unreported); *East Broad Chiropractic, Inc. v. Founders Insurance Company of Michigan*, (August 23, 2007), Case No. 2006 CVE 53881, Franklin County Municipal, (unreported).

knowledge of the assignment. Consequently, appellee [patient's attorney] was obligated to pay appellant [Dr. Hsu] for medical services appellant provided to Parker from any settlement reached in the personal injury action." *Hsu v. Parker, supra* at 633.

* * *

"Based on our ruling that a valid assignment had occurred, the client was not entitled to receive the full amount of the settlement. '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.' 4 Corbin On Contracts (1951) 577-578, §890." *Id.* at 633.

B. Prospective future proceeds have long been assignable, so long as the expected source of the proceeds exists at the time of assignment.

1. Ohio Supreme Court authority has historically upheld the valid assignment of a prospective fund.

A person who does not have a present right to obtain proceeds or a fund from an existing payment source, but who may have that right in the future, can assign the prospective fund or a portion of it to another. *General Excavator Co. v. Judkins* (1934), 128 Ohio St. 160, 190 N.E. 389. In *General Excavator*, an excavating contractor assigned to his bank future proceeds from an executory excavation contract. No money was owed to the contractor at the time of assignment, and, as payment was conditional on the assignor-contractor's subsequent performance of the work, payment might never have become due. Nonetheless, this Court held this assignment was valid as it met the requirements of an "equitable assignment":

"The consent of a debtor, i.e., the one obligated to an assignor, is not required to an assignment, even though it be for only part of an entire debt or claim. Such assignment will be enforced against the debtor in equity. *Pittsburgh, C.C. & St. L. Ry. Co. v. Volkert*, 58 Ohio St. 362, 50 N.E. 924; 80 A.L.R., note beginning at page 414".

General Excavator, 128 Ohio St. 160 at 165.

* * *

"An equitable assignment needs no particular form and may even be oral. So long as there is an intention on one side to assign and an intention on the other side to accept, supported by sufficient consideration and disclosing a present purpose to make an appropriation of a debt or fund, it is enough. 2 Ruling Case Law, 614; 5 Corpus Juris, 910."

Id.

See also, *Volkert* (1898), 58 Ohio St. 362.

“... the question here is not whether such an assignment can be recognized and enforced at law, but whether it can be made the basis of a proceeding in equity. ... Authorities in support of the proposition here advanced are so abundant that one is at a loss which to select.”

In *Moore v. Foresman* (1962), 172 Ohio St. 559, 179 N.E. 2d 349, this Court also held that future contingent beneficiaries of a trust could assign stock owned by the trust 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 also held that a potential beneficiary of a contingent future inheritance could validly assign it as an equitable assignment. *Hite v. Hite*, (1929), 120 Ohio St. 253, 166 N.E. 193.

In the three decisions cited immediately above, the assignment of prospective future proceeds were “founded” or based on a source which currently existed. In *General Excavator*, the contract which existed between an excavating contractor and the county auditor was the existing source from which the prospective proceeds could be produced. Importantly, the excavating contractor had not assigned his *contract* to his bank; rather, he assigned future proceeds that he expected would flow from his future performance of work for the county auditor. In *Moore v. Foresman*, the trust which was presently in existence provided the source necessary for assignment by contingent beneficiaries of assets that they did not own at the time of assignment, but which they could own upon satisfaction of a future condition. In *Hite v. Hite*, the will of the decedent was the existing source of the assignor’s future inheritance, which this Court held could be validly assigned before such inheritance rights ever vested in the potential beneficiaries. The *Roselawn*, *Cartwright*, *Mt. Lookout*, *Akron Square*, *Gloekler* and *Hsu v. Parker*

appellate decisions are consistent with this Court's existing decisions upholding equitable assignments of prospective funds. The *Akron Square* Court held, "we further find that Creps' right to assign potential future insurance proceeds arose at the time the accident with Grezni occurred. Therefore, Creps' assignment to *Akron Square* was valid." *Id.*,

¶12. See also, *Cartwright*, 2008-Ohio-2623 at ¶16:

"Miller's cause of action existed at the time the assignment was executed; the date of the accident. ... Moreover, while the exact amount of the recovery was uncertain, the claim and the source were clear. Specifically, Miller knew the proceeds that were being assigned were from her claim against Rice following the accident and the source of the proceeds would be Rice's insurance company, Allstate."²

See also, *In re: Petry*, (1986, Bkrcty. N.D. Ohio), 66 B.R. 61. In *Petry*, the bankruptcy debtor had a personal injury claim arising from a motorcycle accident, which required his treatment at Cleveland Metropolitan Hospital. In lieu of payment, the debtor executed a partial assignment to the hospital of any future insurance settlement from his accident. The trial court dismissed the debtor's contention that an assignment of the right to payment of proceeds was not valid because "the right to payment was only a mere possibility":

"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 and Metro became the owner of those proceeds once the insurance settlement was reached."

In re: Petry, 66 B.R. 61 at 63, citing with approval *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Volkert*, (1898) 58 Ohio St. 362.

² Every assignor of a right to a prospective future fund is assigning future proceeds which he/she does not possess at the time of assignment. As set forth herein, it has been consistently held that this is binding, so long as the source of the prospective fund currently exists.

2. Other longstanding legal authority has consistently held that a prospective fund can be assigned before it exists.

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 Jurisprudence, §1271 (1941). See also,

Bernstein v. Allstate Insurance Company:

“... 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.”

Bernstein, (1968) 56 Misc. 2d 341 at 342, 288 NY S.2d 646 at 648.

The United States Supreme Court has acknowledged the historical validity of equitable assignments: “... an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all of the requirements of the law.” *Christmas v. Russell* (1871), 81 US 69, 20 L.Ed. 762. “An equitable assignment creates, on the property, a present equitable charge which equity recognizes as vested, but which the law does not recognize as vested or valid, and which, when the right become existent, ripens into a preferred and enforceable right.” *Gintel v. Green* (1958, Ca. App.) 165 Cal. App. 2d 723, 332 P.2d 298. See also, *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 85 N.E. 55 (“equitable assignment to attorney of an interest in the proceeds of [future] 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." (Ohio R. Civ. P., Rule 2.).

3. The *West Broad* Court materially misconstrues Ohio assignment law.

The *West Broad* decision is based on two conclusions. That decision first analyzes and agrees with the *Knop* Court's unwarranted expansion of R.C. 3929.06, (discussed in detail in Proposition Of Law II below). The Court then broadly misconstrues decades of Ohio assignment jurisprudence to conclude that Ms. Norregard's assignment of future proceeds from the settlement of her auto accident was an invalid transfer, because, at the time she made assignment, she did not then have proceeds in hand or the current right to sue the insurer to collect settlement or judgment proceeds. The Court of Appeals based its holding almost exclusively on Ohio Jurisprudence 3d, Assignments, referencing general propositions of law which specifically do not apply to equitable assignments of future proceeds.

At paragraph 15 of its opinion, the Court cites 6 Ohio Jur. 3d, Assignments, §1 for the proposition that "an assignment occurs 'only where the transfer is of a substantial property right *vested* in the transferor as owner'". This is a completely inapplicable statement, when the issue concerns the transfer of future, prospective proceeds founded on a current source. 6 Ohio Jur. 3d, Assignments more specifically states, four sections later: "Generally, all rights, ad rem and in re, vested *or contingent*, ... and claims growing out of and adhering to property, both from contract and tort, may be assigned." 6 Ohio Jur. 3d (2006) 50, Assignments, §5. Moreover, an expectancy or possibility is

assignable unless it is “naked or remote”. *Id.* at Sections at 7 and 17. These Ohio Jur. sections were correctly quoted by the Court in *Cartwright Chiropractic v. Allstate Insurance Co.*, 2008-Ohio-2623 at ¶15:

“... 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.’ 6 Ohio Jurisprudence 3d (2006) 50, Assignments, Section 5. Moreover, an expectancy or possibility is assignable unless it is ‘naked or remote.’ *Id.* at Sections 7 and 18. Such assignments are equitable assignments. *Id.* A ‘present existing right, to take effect in the future on contingency, may be assigned’³

The *West Broad* decision also states, at paragraph 15 that “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.” *West Broad*, 2008-Ohio-2647 at ¶15, citing *Citizens Fed. Bank v. Brickler* (1996), 114 Ohio App. 3d 401, 683 N.E. 2d 358. The health care provider-assignee of future proceeds from an existing tort claim does, in fact stand in the shoes of his patient – he has the same right, subject to future exercise, to receive his assigned portion of settlement proceeds from the insurer or his portion of judgment proceeds from the insurer after the judgment is unpaid after 30 days:

“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 [R.C. 3929.06] 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.”

Cartwright, 2008-Ohio-2623 at ¶15.

Every assignor of prospective proceeds is assigning a right that cannot *yet* be collected, which is not the same as the circumstances in *Citizens Fed Bank v. Brickler*. In

³ The Court’s citation to Section 18 should be to Section 17.

the *Citizens* case, the predecessor bank had modified a note and mortgage by its conduct, then those instruments transferred by law to a successor bank. The Second District correctly held that the successor bank could never pursue the terms of the original note and mortgage, since those terms had been permanently changed by the predecessor bank, before it ever transferred rights in the instruments. The rights in the original note and mortgage attempting to be asserted by the successor or "assignee" had been permanently extinguished before the "assignment", and could never reappear, hence the Court's observation "that the assignee...can obtain no greater rights against another than the assignor had". By contrast, in the *General Excavator* case, at the moment of assignment, the excavating contractor assigned to his bank his rights to payment for future performance--thus he was assigning a right which he could not assert *yet*. Naturally, the assignee of prospective proceeds is required to wait for the right to 'ripen', exactly as would the assignor, had no assignment ever been made.

Next, the *West Broad* decision cites 6 Ohio Jur. 3d Assignments, §18 for the principle that "*no right is assignable until it has been properly perfected or established as provided by law.*" *Id.* However, this purported legal principle is nowhere referenced in the Ohio Jur. section cited as support. However, Sections 7, 17 and 19 each clarify that contingent rights could be validly assigned in equity. See also, 6 Ohio Jur. 3d Assignments, §5:

"Assignments are now freely made of a large body of rights which were unassignable under the rules of the early common law. Generally, 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 pass by assignment."

Finally, the *West Broad* decision refers to 6 Ohio Jur. 3d, Assignments, §33, and states: “a promise on the part of a 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 the future acts on the promisor’s part as a means of rendering it effectual.” *West Broad*, 2008-Ohio-2647 at ¶15, citing *Christmas’s Adm’r v. Griswold* (1958), 8 Ohio St. 558, 562. This general proposition of law again has no application to this case. The *Christmas* case had nothing to do with the effect of an actual assignment on assigned proceeds. Rather, *Christmas’s Adm’r v. Griswold* decided that a debtor’s bare promise to pay certain amounts in the future out of money that would first be paid over to him never amounted to an assignment. In *Christmas*, William Christmas made a written promise to Thomas Fassit to repay a debt to him of \$ 7,435 from money that Christmas might receive in hand from his sale of land, which they had earlier acquired together. The Court held that this remained only a promise to apply money to Fassit after Christmas first received it:

“A covenant on the part of the debtor, to apply a particular fund in payment of the debt **as soon as he receives it**, will not operate as an assignment ... and **looks to a future act on his part** as a means of rendering it effectual.” *Id.* at ppg. 563 and 564 (emphasis added).

The assignment at issue in the instant case contains the patient’s direction to the obligor to pay the assignee directly, and the express relinquishment of the assigned proceeds. Federal Bankruptcy Judge Pat E. Morgenstern-Clarren recently upheld the validity of a medical proceeds assignment of tort claim settlement proceeds in response to the same argument:

“The *Griswold* decision does not, however, address the effect of an assignment. Instead, it distinguishes (1) a covenant to apply a particular fund to pay a debt, from (2) an assignment, and holds that such a covenant does not operate as an assignment. That is not the situation in this case.”

In re: Gresley, (April 1, 2003, Bkrcty. ND, Ohio) Case No. 01-22258.

From these various Ohio Jurisprudence citations which it had assembled in the preceding paragraphs, the *West Broad* Court then drew the following fundamentally flawed conclusions:

1. There existed no “right in being” when Norregard entered into the assignment with West Broad. (In fact, Norregard assigned a portion of expected damage proceeds from her existing tort claim over to West Broad).
2. At the time of the assignment, no property rights vested in West Broad. (Contingent as well as vested rights can be made the subject of an equitable assignment).
3. It was just a possibility that Norregard could obtain settlement proceeds from American Family Insurance, the tortfeasor’s insurer. (An expectancy or possibility is assignable so long as the right upon which it is based exists at the time of assignment).
4. Norregard’s right to obtain a settlement from American Family Insurance Company could not be “property perfected or established” until Norregard first obtained a judgment against the tortfeasor, which is required by R.C. 3929.06. (Norregard’s right to assign possible damage proceeds from her existing tort claim are not required in assignment law to be first “properly perfected or established”).

The Court’s holding completely misconstrues Ohio assignment law that permits the assignment of prospective proceeds. The test to which the *West Broad* Court subjected this proceeds assignment would have wrongly invalidated every assignment of a right to prospective or contingent proceeds which has ever been upheld by this Court, and every other Ohio Court. For example, at the moment of his assignment of future payment proceeds over to his bank, the excavating contractor in *General Excavator* had

an executory contract with the county auditor, but payment proceeds for work not yet performed did not exist, were still not "vested" in the contractor, nor were his rights to obtain payment "established" or "perfected". But his assignment met the elements for an equitable assignment – he had an expectancy of payment from an existing source of payment. Ohio courts, including this Court, have upheld for many decades assignments of rights to prospective future funds or proceeds. The *West Broad* Court ignored the well-established elements of such an assignment, and in its place set out a completely erroneous test based almost exclusively on inapposite references to Ohio Jurisprudence. Its error in failing to correctly apply the well-established common law elements for such an assignment is particularly significant, since the Court acknowledged that the second basis for its holding, R.C. 3929.06, does not *expressly* apply to invalidate such assignments:

"...neither our analysis nor the analysis in *Knop* is based on 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 proscribes the type of assignment attempted in the present case."

West Broad, 2008-Ohio-2647 at ¶17.

We respectfully submit that the Court has not, in fact, applied those basic principles of the law of assignments, and, as will be set out below, R.C. 3929.06 does not apply to shield an insurer from the ordinary duties owed by any obligor, with prior notice of an assignment, who holds assigned funds.

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.

Despite its specific rejection by four Courts of Appeal, the *West Broad* Court found that R.C. §3929.06, as it was expansively applied in *Knop Chiropractic, Inc. v. State Farm Ins. Co.* (5th Dist., 2003), 2003-Ohio-5021, rendered the medical proceeds assignment ineffective against American Family Insurance.

R.C. 3929.06 provides:

“(A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff or another person for whom the plaintiff is a legal representative 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, death, or loss, the plaintiff or the plaintiff’s successor in interest 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 that issued the policy of liability insurance 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. Subject to division (C) of this section, the civil action based on the supplemental complaint shall proceed against the insurer in the same manner as the original civil action against the judgment debtor.

(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.

(C)(1) In a civil action that a judgment creditor commences in accordance with divisions (A)(2) and (B) of this section against an insurer that issued a particular policy of liability insurance, the insurer has and may assert as an affirmative defense against the judgment creditor any coverage defenses that the insurer possesses and could assert against the holder of the policy in a declaratory judgment action or proceeding under Chapter 2721. of the Revised Code between the holder and the insurer.

(2) If, prior to the judgment creditor's commencement of the civil action against the insurer in accordance with divisions (A)(2) and (B) of this section, the holder of the policy commences a declaratory judgment action or proceeding under Chapter 2721. of the Revised Code against the insurer for a determination as to whether the policy's coverage provisions extend to the injury, death, or loss to person or property underlying the judgment creditor's judgment, and if the court involved in that action or proceeding enters a final judgment with respect to the policy's coverage or noncoverage of that injury, death, or loss, that final judgment shall be deemed to have binding legal effect upon the judgment creditor for purposes of the judgment creditor's civil action against the insurer under divisions (A)(2) and (B) of this section. This division shall apply notwithstanding any contrary common law principles of *res judicata* or adjunct principles of collateral estoppel". (Emphasis added).

Ohio law prevents an injured person from asserting a tort claim for the insured's conduct directly against the tortfeasor's insurer. See, *Chitlik v. Allstate Insurance Co.* (1973), 34 Ohio App. 2d 193, 299 N.E. 2d 295. However, *Chitlik* construed R.C. §3929.06, which, as set out above, is limited to delaying direct actions against an insurer by a plaintiff "for injury, death, or loss to the personal property of the plaintiff" until 30 days has elapsed from an entry of judgment in that "distinct civil action for damages between the plaintiff and the insured tortfeasor". R.C. §3929.06 (B). Ms. Norregard did not sue American Family Insurance Company directly for her tort claims against Allstate's insured, and she did not assign any right to sue American Family Insurance Company directly for tortious acts committed by American Family's insured. It was only after Ms. Norregard's claim was settled and American Family ignored the proceeds assignment by paying the entire settlement to Norregard that West Broad brought suit.

This statute has no application where the insured's liability is reduced by agreement into a settlement fund, and then paid by the insurer. As the Ohio Supreme Court has recently noted, "at the point of settlement, a settlement debt is created, and the plaintiff becomes a creditor entitled to the settlement proceeds." *Hartmann v. Duffey*, (2002) 95 Ohio St. 3d 456, 459, 2002-Ohio-2486, 768 N.E. 2d 1170. At the point of settlement, an insurer is nothing more than the holder of a fund, part of which it knows has been validly assigned. It is undeniable that there is no payment to any claimant until there is a settlement agreement. Once there is an agreement – a contract to settle – it is as enforceable as any other contract. Should the insurer fail to honor its obligation to pay, it is susceptible to direct suit, notwithstanding the statute.

Obviously, an insurer, who fails to deliver a settlement check to a claimant after reaching agreement, or an insurer whose settlement check is subsequently dishonored, has breached the settlement contract and is susceptible to suit. Certainly, the claimant could sue the insurer to pay the settlement. The insurer could not argue that *Chitlik v. Allstate* or R.C. §3929.06 acts as a bar to the claimant's suit for breach of the obligation to pay the agreed settlement amount. Unfortunately, this is only one incongruous result of the Court's misreading of R.C. 3929.06:

"Accordingly, pursuant to R.C. 3929.06, the injured party must first obtain 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."

West Broad, 2008-Ohio-2647 at ¶14.

There is no support in the plain language of R.C. 3929.06, or in *Chitlik* or its progeny for this reading of the statute. As *Roselawn, Akron Square, Gloekler*, and *Cartwright* have emphatically recognized, R.C. 3929.06 is a specific remedy for a specific circumstance--providing a tort plaintiff with the right to file a supplemental petition against a defendant's insurer, where liability has been judicially determined, if the insurer does not apply insurance proceeds to the recovery of that final judgment:

“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 injured 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.”

Akron Square, 2004-Ohio-1988 at ¶10.

“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 [R.C. 3929.06] 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.”

Cartwright, 2008-Ohio-2623 at ¶19.

See also, *East Broad Chiropractic v. Founders Insurance*, Case No. 2006 CVE 53881, Franklin County Municipal, at page 6:

“So, while the general proposition that assignees stand in the assignor's shoes to collect assigned funds is true, see, e.g., *State ex rel. Cincinnati Life Ass'ns Assignee v. Matthews* (1901), 64 Ohio St.419, 60 N.E. 605, since R.C. 3929.06 does not require Zielienski to have first sued the

tortfeasor in tort to force defendant Founders to pay a settlement to which it agreed, neither is such an undertaking required of the plaintiff [the proceeds assignee] to enforce its contractual right to receive the proceeds of settlement.”

In fact, courts have specifically held that the direct action rule has no application to direct actions brought by claimants against third-party insurers for breach of settlement agreements. *Fletcher v. Nationwide Mutual Ins. Co.*, (2003, Montgomery App.), 2003-Ohio-3038, 2003 WL 21360646 at ¶23:

“Nationwide argues that, as a third party beneficiary to an insurance contract, Fletcher has no right of action to enforce coverage. That may be correct with respect to Fletcher's negligence claim against Knoop, but that is not the nature of Fletcher's declaratory judgment claim against Knoop and Nationwide. Nationwide is not a third party, but a principal, to the bi-lateral contract of settlement with Fletcher. The unrelated constraints against third parties seeking coverage from insurers have no application.”

See also, *Rommel v. West Am. Ins. Co.*, (1960, D.C. App.), 158 A.2d 683. Not surprisingly, insurers are permitted to bring claims against plaintiffs to enforce the terms of the settlement agreement. See, *Med. Assurance Co. of Miss. v. Jackson*, (1994, S.D. Miss.), 864 F. Supp. 576. The Alabama Supreme Court offered this common sense basis for a claimant's right to bring a direct action against an insurer for violating a settlement agreement: “[A]n insurance carrier is no less liable under the law for the breach of its own contract obligations or for its own tortious conduct than is any other party.” *Howton v. State Farm Mut. Ins. Co.*, (1987, Ala.), 507 So. 2d 448, 451. When American Family Insurance Company settled with Ms. Norregard, it knew that part of those proceeds were assigned to West Broad Chiropractic, and, like any other obligor of a creditor, with notice of the assignment of those proceeds by the creditor, it was not entitled to disregard the

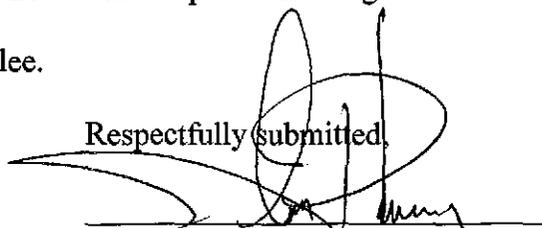
assignment and pay all of the proceeds directly to her.

The *West Broad* Court failed to recognize that an equitable assignment does not fail simply because the assignor, by assigning prospective proceeds, is assigning the attendant right to sue for settlement proceeds in the future. It's specific error is it's belief that R.C. 3929.06 implicitly (rather than expressly) renders the proceeds assignment invalid, by incorrectly concluding that if R.C. 3929.06 prevented Norregard from suing American Family for a finite amount of settlement proceeds on the date she made the proceeds assignment over to West Broad, then the assignment must therefore be void at inception. The lesson of this Court's decisions in *General Excavator*, *Moore*, *Hite*, and the abundant other historical authority, is that one can assign the right to future proceeds, so long as it is based out of the assignor's contract, inheritance status, tort claim, or other right existing at the moment of assignment.

CONCLUSION

With this case, the Court of Appeals has adopted a rule that will foster litigation across many counties in Ohio, deters timely medical treatment to uninsured Ohioans, creates unexplainable disparity in the common law and misreads the Ohio Revised Code. To correct this significant misinterpretation of the law, the Court must reverse the decision of the Court of Appeals and hold that the proceeds assignment at issue in this case is valid and binding on the Appellee.

Respectfully submitted,



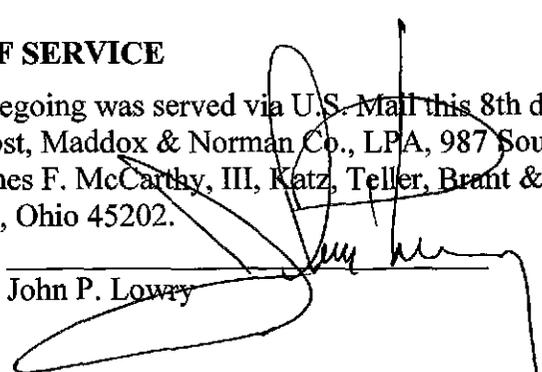
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served via U.S. Mail this 8th day of January, 2009 upon Mark S. Maddox, Frost, Maddox & Norman Co., LPA, 987 South High Street, Columbus, Ohio 43206 and James F. McCarthy, III, Katz, Teller, Brant & Hild, 255 East Fifth Street, Suite, Cincinnati, Ohio 45202.



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