

IN THE SUPREME COURT OF OHIO

WEST BROAD CHIROPRACTIC, : Case No. 2008-1396 consolidated with  
: Case No. 2008-1489  
Appellant, :  
: On Appeal from the Franklin County Court of  
v. : Appeals, Tenth Appellate District  
: AMERICAN FAMILY INSURANCE, :  
: Appellee. :

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MERIT BRIEF OF APPELLANT WEST BROAD CHIROPRACTIC

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

COUNSEL FOR APPELLANT WEST BROAD CHIROPRACTIC

John P. Lowry (0034595)  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
(513) 421-2255  
[jlowry@bkllawfirm.com](mailto:jlowry@bkllawfirm.com)

COUNSEL FOR AMICUS CURIAE, OHIO STATE CHIROPRACTIC  
ASSOCIATION AND OHIO OSTEOPATHIC ASSOCIATION

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

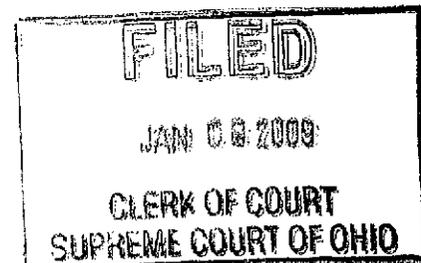


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## I. STATEMENT OF FACTS

### A. The Assignment.

On July 6, 2002, Kristy Norregard ("Norregard"), was involved in an automobile accident and suffered injuries as a result of that accident. (Supp. 11). On July 9, 2002, Norregard sought treatment from Appellant West Broad Chiropractic ("West Broad") for injuries caused by the accident. (Supp. 11). On July 9, 2002, Norregard executed a document entitled "Assignment of Right to Receive Benefits and/or Proceeds of Settlement or Judgment" (the "Assignment"). (Supp. 11). Norregard agreed to the terms and conditions of the Assignment in exchange "for the provision of medical care from West Broad ...". (Supp. 14).

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." (Supp. 14). In the Assignment, Norregard gave notice to "any person, insurance company, or other responsible party that this document irrevocably assigns my right to collect or receive payment in any form as and for compensation for any injuries for which I receive treatment from West Broad ...." (Supp. 14). In the Assignment, Norregard directed that payments be made directly to West Broad before any payments were made to her. (Supp. 14). Norregard also acknowledged that "should I never receive compensation for the injuries sustained from any person, persons or company (Insurance or otherwise), I am and will continue to be fully and personally responsible for payment for treatment received from West Broad ... for the care provided ...." (Supp. 14). In exchange, West Broad agreed "to forego any and all methods of collection directly from the undersigned unless and until" Norregard received payment. (Supp. 14). 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. (Supp. 14).

B. West Broad's notice of the Assignment.

Appellee American Family Insurance ("American") issued a liability insurance policy to the driver of the automobile liable for the injuries Norregard suffered as a result of the accident. (Supp. 10 and 12). On April 30, 2004, West Broad gave notice of the Assignment to American. (Supp. 12). 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. (Supp. 15). In the notice, West Broad advised American: "If you choose to pay Kristy Norregard you must pay West Broad .... In the event you choose to not pay Kristy Norregard, you are under no obligation to pay West Broad ...." (Supp. 15). In the notice, West Broad requested: "Pursuant to the [Assignment], please include West Broad ... as a named co-endorser [payee] on any disbursement check that you issue on this claim." (Supp. 15). American received notice of the Assignment. (Supp. 17).

C. American pays settlement proceeds to Norregard.

In January, 2006, American settled with Norregard for her injuries caused by American's insured. (Supp. 10). American paid Norregard "a cash settlement in exchange for a signed release discharging any and all claims ... Norregard may have against American ... and/or its insured." (Supp. 10). Despite the notice of the Assignment, American paid Norregard without paying or making provisions for payment to West Broad. (Supp. 12). "The settlement money was distributed directly to ... Norregard." (Supp. 10). The value of the treatment Norregard received from West Broad was \$3,830.00. (Supp. 12). No portion of the settlement proceeds was paid to West Broad. (Supp. 12).

## II. ARGUMENT<sup>1</sup>

**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.**

### SECOND ISSUE PRESENTED FOR CONFLICT

**May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?**

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.” *Leber*, 125 Ohio App.3d at 332, 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.’” *Leber*, 125 Ohio App.3d at 332, quoting *Inter Ins. Exchange v. Wagstaff* (1945), 144 Ohio St. 457, 59 N.E.2d 373.

In determining whether a document constitutes a valid assignment, and if so, what is assigned, the Court must first determine the intention of the parties from the language of the Assignment itself. “In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties. The general rule is that contracts should be construed so as to give effect to the intention of the parties.” *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920.

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<sup>1</sup> Pursuant to the Court’s order, West Broad has submitted a combined brief. West Broad has set out the propositions of law from its discretionary appeal combined with the comparable issues certified to the Court.

Scrutiny of the Assignment manifests Norregard's intent to transfer the expected proceeds from a settlement or judgment for the personal injuries she had suffered on July 6, 2002, to West Broad in exchange for medical treatment. The Assignment provided in pertinent part:

I hereby assign my 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 Chiropractic. **I HEREBY NOTIFY ANY PERSON, INSURANCE COMPANY OR OTHER RESPONSIBLE PARTY THAT THIS DOCUMENT IRREVOCABLY ASSIGNS MY RIGHT TO COLLECT OR RECEIVE PAYMENT IN ANY FORM AS AND FOR COMPENSATION FOR ANY INJURIES FOR WHICH I RECEIVE TREATMENT FROM WEST BROAD CHIROPRACTIC. YOU ARE DIRECTED HEREIN TO PAY WEST BROAD CHIROPRACTIC DIRECTLY THE AMOUNT OUTSTANDING BEFORE MAKING ANY PAYMENT TO ME.**

\* \* \*

I hereby authorize and direct full payment of the amounts requested by West Broad Chiropractic from any person, persons or company responsible for payment of any compensation *for the injuries caused by the accident on or about 7-6-02.*

(Supp. 14) (emphasis added).

A fair and reasonable reading of this document can leave little doubt that Norregard intended to transfer to West Broad only the proceeds from any monetary recovery from the accident that had occurred on July 6, 2002. Nothing in the Assignment conveyed the personal injury claim itself. Nothing in the Assignment conveyed control of the prosecution or settlement of the personal injury claim itself. West Broad could not dictate or control settlement negotiations or trial strategy. Under the Assignment, if Norregard did not pursue the personal injury claim, then she would be personally liable for the outstanding balance for the services provided by West Broad.

Once American received notice of this Assignment, American was obligated to pay West Broad when American became obligated to pay Norregard. “The account debtor must make all payments to the assignee once the account debtor has received reasonable notice of the assignment.” *First Bank of Marietta v. Roslovic & Partners, Inc.* (1999), 86 Ohio St.3d 116, 119, 712 N.E.2d 203; *see also, 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.” *Hsu*, 116 Ohio App.3d at 633. 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 in exchange for her compromise and release of any claims arising from the accident which Norregard had against American or its insured. American then became legally obligated to pay Norregard. When that settlement was effected, Norregard had already assigned her right to receive 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. *Hsu*, 116 Ohio App.3d at 633 (Failure to pay the assignee renders the obligor liable to the assignee.). Therefore, when American paid Norregard and not West Broad, American became liable to West Broad for the balance of the account due for chiropractic services rendered to Norregard. *Roslovic*, 86 Ohio St.3d at 119 (“an account debtor is liable to an assignee for payments made to an assignor after the account debtor receives sufficient notice of the assignment.”).

“As a general rule, an assignee stands in the shoes of the assignor ... and succeeds to all the rights and remedies of the latter.” *Leber*, 125 Ohio App.3d at 332 (citation omitted).

American knew that West Broad stood in the shoes of Norregard in any settlement of her claims arising from or related to the accident. When American settled with Norregard it knew that part of those proceeds were to be paid to West Broad. Pursuant to the Assignment, West Broad succeeded to Norregard's rights in the settlement agreement and American was obligated to pay West Broad the portion it was due. *Hsu*, 116 Ohio App.3d at 633.

The facts and the law in *Hsu v. Parker, supra.*, 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. The Court explained:

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, Section 890. From the language of the [Security Agreement], Ms. Parker assigned part of the proceeds of her personal injury action to [Dr. Hsu]. As shown by [her attorney's] signature on the document, [her attorney] had knowledge of the assignment. Consequently, [her attorney] was obligated to pay [Dr. Hsu] for medical services [he] provided to Ms. Parker from any settlement reached in the personal injury action.

116 Ohio App.3d at 633. Like the patient in *Hsu*, Norregard sought chiropractic treatment from West Broad. As consideration for this treatment,<sup>2</sup> Norregard executed the Assignment. Like the agreement in *Hsu*, the Assignment clearly authorized and directed that anyone paying settlement proceeds was to withhold funds from those proceeds to pay West Broad for its services. Therefore, like the agreement in *Hsu*, the Assignment is valid.

Commencing with *Hsu*, previous Courts of Appeal have, with one aberration, consistently found the assignment of prospective proceeds for medical treatment to be valid and enforceable.<sup>3</sup> 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

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<sup>2</sup> The Assignment states unqualifiedly: "I ... hereby agree to the following terms and conditions for the provision of medical care from ... West Broad Chiropractic ...". (Supp. 14).

<sup>3</sup> In addition to these cases, trial courts in Ohio recognize the validity and enforceability of an assignment of future proceeds from an accident to pay for medical care. *East Broad Chiropractic, Inc. v. Founders Ins. Co.* (Mun. Ct. Aug. 24, 2007), Case No. 2006 CVE 53881, *Sky Shelby D.C., Inc. v. Kaylan L. Mack* (Hamilton C.P. Mar. 31, 2003), Case No. A0202350, *American Chiropractic v. Huddy* (Lucas Mun. Ct. 2003), Case No. CVF-02-01146.

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*, App. No. 21710, 2004-Ohio-1988 faced a challenge to an assignment identical to this 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 v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-4327, 827 N.E.2d 331, 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.” *Id.* 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.*

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.*, App. No. 2007-A-0040, 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].” *Id.* at ¶16, ¶26.

Finally, the Court of Appeals for the Twelfth Appellate District in *Cartwright Chiropractic v. Allstate Ins. Co.*, App. No. CA2007-06-143, 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.

Even the Board of Commissioners on Grievances and Discipline of this Court has recognized the type of assignment in this case to be lawful. In Opinion 2007-7, the Board opined:

A lawyer’s duty of safekeeping funds in the lawyer’s possession extends not only to clients but also to third persons. A lawyer has an ethical duty of safekeeping funds for a third person when the lawyer knows a third person has a lawful claim to funds in the lawyer’s possession. *Not every claim of a third person triggers a*

*lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15.*

In the opinion, the Board stated that a "lawful claim" triggering a lawyer's ethical obligation to safekeep funds for a third person 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." Op. 2007-7, p. 4. Clearly, the well-reasoned law of Ohio finds the Assignment valid.

B. Public policy supports the Assignment.

Recently, the Court of Appeals for the Ninth Appellate District recognized that public policy supports the benefit of such an assignment to both the accident victim and the health care provider. In *Akron Square* at ¶12, n. 2, the Court observed:

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 (sic) 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.

Likewise, the Court of Appeals for the First Appellate District found that public policy supports such an assignment. "Many times an assignment is the only way the doctor can secure payment." *Roselawn*, 2005-Ohio-1327, at ¶19. "Allowing the creation of a valid assignment in such a situation gives some assurance to medical care providers that they will eventually be compensated." *Id.* at ¶20. Such assurance would obviously "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.*

In days preceding the Court of Appeals’ decision in this case, the Court of Appeals for the Twelfth Appellate District found public policy support for an assignment in exchange for medical care:

*In First Bank of Marietta v. Roslovic & Partners, Inc.*, the Ohio Supreme Court held that an assignment was valid and that the account debtor had become obligated to pay the assignee once the account debtor had received notice of the assignment. The court’s holding “preserves the goals of commercial stability and reliability. Lenders are willing to enter into riskier deals if a good assignment is in place that creates solid incentives for an account debtor to comply with its terms.” 86 Ohio St.3d at 120. The same principle is applicable here. “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.” *Roselawn*, 160 Ohio App. LEXIS 3d 297, 2005-Ohio-1327 at ¶20.

*Cartwright*, 2008-Ohio-2623, at ¶21.

Given the health insurance crisis plaguing Ohio, an assignment of proceeds in exchange for medical care can be the means to provide both needed treatment for the uninsured and underinsured in Ohio and payment to the health care provider. Hospital emergency rooms are burdened with the responsibility to provide primary care to the uninsured and underinsured.

*Uninsured burdening area emergency units*, December 23, 2008 at

<http://www.bucyrustelegraphforum.com>. In a study conducted by the Ohio Hospital Association, uninsured patients seeking emergency care increased by nearly 20% from 2003 to 2006. *Ohio’s ER’s see rise in patients*, Jan. 7, 2008, COLUMBUS DISPATCH. “The emergency department is their safety net for care.” *Id.* For example, Mt. Carmel West reported a 16% increase in 2007 over 2003 and Riverside Methodist reported a 20% increase for the same time period. *Id.* The

Ohio Hospital Association reported that “\$18 billion is inappropriately spent annually across the country on emergency room visits for non-emergency conditions, and Ohio ranks third largest in the U.S. with nearly \$1 billion of that total.” *Plight of Uninsured a Burden for All Ohioans*, May 2, 2006 at <http://www.ohanet.org>. “In addition, care provided for free to uninsured patients drives up the cost of health care for all Ohioans, simply shifting the cost of that care to other payers. Higher healthcare costs yield higher insurance premiums – a financial burden that has little affect on the uninsured population, but a major impact on insured Ohioans.” *Id.*

Overcrowding not only creates a financial burden, overburdened emergency facilities across the country prove dangerous to patients in need of critical care. According to studies conducted by the National College of Emergency Physicians, the uninsured receive less preventative care, are diagnosed at a more advanced stage, once diagnosed, tend to receive less therapeutic care and have a higher mortality rate. *Uninsured burdening area emergency units*, December 23, 2008 at <http://www.bucyrustelegraphforum.com>.

An assignment of future proceeds can be the palliative to provide the necessary treatment for many of these patients and payment for medical services. Patients who have been victims of automobile accidents, whether uninsured or underinsured, can provide the emergency room or the primary care physician or the chiropractic physician the assurance of payment. If given such assurance of payment, the hospital, the physician, the chiropractor may forego immediate collection efforts and thus allow the patient a measure of financial stability. As the Courts of Appeal for the both the First and the Twelfth Appellate District observed: “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.” *Cartwright*, 2008-Ohio-2623 at ¶21, quoting *Roselawn*, 2005-Ohio-1327, at ¶20.

Enforcement of such an assignment will not expose the tortfeasor or her insurer to any significant risk. In its notice to American, West Broad suggested: “... please include West Broad Chiropractic as a named co-endorser [payee] on any disbursement check that you issue on this claim.” (Supp. 15). The Court in *Gloekler* concluded that the insurance company could likewise honor the assignment without any risk:

If Allstate chose to settle Starcher’s claim for a total of \$100,000, it had a 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. 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.

2007-Ohio-6163 at ¶26. Here, American had no risk. American simply had to add West Broad as a co-payee on the check it issued to Norregard to honor the Assignment.

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

1. *A false factual premise.*

The Court of Appeals began its analysis based on an erroneous description of the Assignment. The court described the Assignment as a contract “in which Norregard agreed to assign to West Broad her right to settlement proceeds from any *future* personal injury claim.” ¶2<sup>4</sup> (emphasis added). Based upon that erroneous fact, the court concluded that West Broad had no valid assignment because

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<sup>4</sup> West Broad will refer to the paragraph numbers of the opinion of the court attached in the appendix to this brief.

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. (¶16).

This reasoning is fundamentally flawed! At the time Norregard executed the Assignment, she had already been in the accident. She had an existing right to prospective proceeds, either in settlement or from a judgment, for that personal injury claim. “A claim is ‘[t]he aggregate of operative facts giving rise to a right enforceable by a court’ or a ‘cause of action.’” *Sowers v. Luginbill*, 175 Ohio App.3d 745, 2008-Ohio-1486, 889 N.E.2d 172, at ¶32, quoting *Black’s Law Dictionary* (7th Ed. 1999). “The cause of action here accrued on the date of the accident ....” *Sowers* at ¶33. As of that date, Norregard had a claim against American’s insured which would result in proceeds, either in settlement or 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* (N.D. Ohio 1986), 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, at ¶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.* at ¶16, *see also, Akron Square Chiropractic* at ¶11 (“... 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.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, at ¶20.

This Court recognized that a chose in action includes "the right to bring in action in tort and in contract." *Id.* This Court reiterated the explanation given in *Cincinnati v. Hafer* (1892), 49 Ohio St. 60, 65, 30 N.E. 197:

[W]hile ... a 'chose in action' is ordinarily understood [to be] a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It embraces demands arising out of a tort, as well as causes of action originating in the breach of a contract.

*Pilkington*, at ¶20. In Ohio, "[i]t is permissible to assign a chose in action." *Leber*, 125 Ohio App.3d at 332, citing *Crawford v. Chapman*, (1848), 17 Ohio 449.

Clearly the Court of Appeals based its conclusion on a false factual premise. Norregard did not assign to West Broad her right to proceeds from any *future* personal injury claim, but she assigned her right to proceeds from an existing chose in action, her right to recover pecuniary damages for a wrong inflicted upon her person in the accident, which had occurred before executing the Assignment. From that chose in action, Norregard had an existing proprietary interest from which she could realize proceeds from either settlement or judgment.

## 2. *Erroneous legal analysis.*

The court compounded its factual error with a distortion of Ohio assignment law. Citing *Ohio Jurisprudence 3d*, the court reasoned "'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.” ¶15. However, the court overlooked the very preceding sentence in that section of the treatise. “A present existing right, to take effect in the future on a contingency, may be assigned.” 6 *Ohio Jur. 3d* Assignments, §18. In this case, Norregard had a present existing right, namely, a cause of action from the accident which had accrued under Ohio law, from which she would realize proceeds in the future on a contingency, either settlement or judgment. The present existing right to those proceeds, based upon the very authority cited by the court, can be assigned.

Exacerbating its error, the court further reasoned that “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.” ¶15. For this conclusion, the court cited *Christmas’s Adm’r v. Griswold* (1858), 8 Ohio St. 558, 562. The court’s reliance upon *Griswold* was simply misplaced. “The *Griswold* decision does not ... 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.” *In re Gresley*, Case No. 01-22258 (Bankruptcy N.D. Ohio, June 9, 2003).

A person who has a present right to receive proceeds, but that right will be realized 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, even dispositive. At common law, a 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 civil 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 a legal 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.

Similarly, in *In re Petry*, 66 B.R. 61, the bankruptcy debtor had a personal injury claim arising from a motorcycle accident for which 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 Grezni 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. The Assignment was valid and enforceable under Ohio law.

**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.**

#### **FIRST ISSUE PRESENTED FOR CONFLICT**

**Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?**

Rejecting the well-reasoned opinions of four Courts of Appeal, the Court of Appeals in this case found the decision of the Court of Appeals for the Fifth Appellate District in “*Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA00148, 2003-Ohio-5021 most compelling.” ¶6. Based on *Knop* and R.C. 3929.06, the Court reasoned: “... 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.” ¶14.

Based on that reasoning, the Court found that “Norregard’s *right to obtain a settlement* from American could not be properly perfected or established until Norregard first obtained a judgment against the tortfeasor, as provided by R.C. 3929.06.” ¶16 (emphasis added). This conclusion begs the questions: is the settlement between American and Norregard valid? Can

accident victims ever settle with the tortfeasors' insurance companies? Must settlements between accident victims and tortfeasors' insurance companies be supported by judgments? Of course, the court either did not appreciate the significance of its reasoning or intentionally created a barrier to the resolution of tort cases.

Undeterred, the court found that since Norregard had not obtained judgment against the tortfeasor, she had no "right in being" which could be assigned. ¶16. Consequently, "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." ¶16. This conclusion is in stark contrast to the reasoning of four Courts of Appeal and based on a distorted reading of R.C. 3929.06.

- A. Ohio Courts of Appeal have rejected *Knop* and found that R.C. 3929.06 does not bar enforcement of an assignment of future proceeds.

The Court of Appeals in *Akron Square Chiropractic v. Creps* succinctly explained its reasoning for rejecting *Knop* and R.C. 3929.06 as a bar to enforcing an identical assignment.

In support of its argument that Creps did not execute a valid assignment, Allstate has argued that, pursuant to R.C. 3929.06, an "assignment has to occur after suit is filed, or else it is not actionable against the tortfeasor's insurance company." \*\*\* However, 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, 1978 Ohio App. LEXIS 8043, 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.

*Akron Square* at ¶10, ¶12. Likewise, the Court of Appeals for the First Appellate District unqualifiedly rejected *Knop* and R.C. 3929.06 as a bar to an assignment of future settlement proceeds:

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.

In this case, without any legal action, [the insurance company] agreed to pay [the injured party] over \$4,000. But if we adopted the rule urged by [the insurance company], unless [the injured party] had sued [the alleged tortfeasor and her insurance carrier] to establish liability, the assignment [the injured party] executed directing [the insurance company] to pay [the chiropractor] was invalid. This makes no sense.

*Roselawn* at ¶16.

Similarly, the Court of Appeals for the Eleventh Appellate District unqualifiedly rejected the reasoning of *Knop* and R.C. 3929.06 as a bar to enforcing an assignment of settlement proceeds:

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. If Allstate chose to settle Starcher's claim for a total of \$100,000, it had a 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. 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 v. Allstate Ins. Co.* at ¶26.

Finally, the Court of Appeals for the Twelfth Appellate District in *Cartwright Chiropractic* at ¶17, ¶19 unqualifiedly rejected the reasoning in *Knop*:

Further, Allstate attempts to argue that because Rice's liability had not been established, Miller had nothing to assign, and since R.C. 3929.06(B) does not allow Miller to directly sue Allstate, it was uncertain that she would be receiving payment from Allstate. Under Allstate's rationale, R.C. 3929.06 would effectively preclude Miller from executing the assignment with Cartwright until Rice is found liable for the accident following a trial (or at the very least, Miller filing suit against Rice before executing the assignment).

\* \* \*

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.

Although acknowledging each of these decisions, the court elected to read into the statute a restriction that did not exist.

B. The *Knop* decision and the Court of Appeals distort R.C. 3929.06 to preclude enforcement of a valid assignment of proceeds.

Contrary to *Knop* and the Court of Appeals in this case, Section 3929.06 of the Ohio Revised Code does not preclude a direct action against a tortfeasor's insurance company to recover money obligated to be paid in settlement. Instead, R.C. 3929.06 was enacted to postpone direct actions against the tortfeasor's insurer when liability was disputed until the plaintiff had established the tortfeasor's liability. 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.

R.C. 3929.06 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, 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 provide 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.

The Ohio General Assembly enacted the current divisions (A) and (B) of R.C. 3929.06 to supersede the effect of this Court's holdings in *Krejci v. Prudential Prop. & Cas. Ins. Co.* (1993), 66 Ohio St.3d 15, 607 N.E.2d 446 and *Broz v. Winland* (1994), 68 Ohio St.3d 521, 629 N.E.2d 395; 1999 H 58, §4 eff. Sept. 24, 1999. Pursuant to the holdings in those cases, an injured victim could initiate a direct action against the tortfeasor's insurer to determine the obligation to indemnify in the event a judgment is obtained against the tortfeasor. However, a determination made in a declaratory judgment action between an insurance company and its insured does not bind persons injured by the insured's negligence who are not parties to the declaratory judgment action. In effect, the General Assembly amended R.C. 3929.06 to supersede this Court's holdings that an injured victim was an interested party under the tortfeasor's insurance policy, even before judgment against the tortfeasor was obtained. *Broz*, 68 Ohio St.3d at 525. However, nothing in those amended provisions of R.C. 3929.06 preclude either an assignment of future proceeds in exchange for medical treatment or a direct action against the insurance company once the insurance company has notice of the assignment and becomes contractually obligated to pay settlement proceeds pursuant to a settlement agreement.

The Court of Appeals in *Akron Square Chiropractic* succinctly explained: "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* at ¶12. Ironically, the Court of Appeals below even conceded: "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."

The Court of Appeals in *Cartwright* similarly explained the scope of R.C. 3929.06.

“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.

Likewise, Norregard never had to file suit against American’s insured to determine liability. American voluntarily entered into an settlement with Norregard to extinguish “... any and all claims ... Norregard may have against American ... and/or its insured.” (Supp. 10). Given American’s obligation to pay settlement proceeds to Norregard pursuant to a settlement agreement, both Norregard and West Broad, as Norregard’s assignee, may enforce that obligation to pay the settlement proceeds in a direct action against American.

Clearly, R.C. 3929.06 has no application where the insurance company has settled with the accident victim and became obligated to pay settlement proceeds. 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*, 95 Ohio St.3d 456, 2002-Ohio-2486, 768 N.E.2d 1170, at ¶11. 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.*, App. No. 02CA1599, 2003-Ohio-3038, the Court of Appeals for the Second Appellate District expressly rejected the argument that the claimant to a settlement agreement had no right of action to enforce the agreement against the insurer. Fletcher filed a declaratory judgment action to have the settlement agreement between Fletcher and Nationwide declared void because it had been fraudulently induced, citing misrepresentations of fact with respect to the effect of the agreements on Fletcher's uninsured motorist claim against his own insurer. Nationwide defended, arguing that as a third party beneficiary to an insurance contract, Fletcher had no right of direct action against it. The Court found Nationwide's argument unpersuasive. While Fletcher may have had no right of direct action against the insurance company with respect to his negligence claim against the tortfeasor, that was not the nature of his declaratory judgment claim against Nationwide. "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 of Appeals below and 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. Such an anomalous result cannot be an accurate statement of the law. Yet that is exactly the result of the *Knop* case and the decision of the Court of Appeals below. 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 assignee of settlement proceeds from recovering those proceeds from the insurer. Likewise, the Court of Appeals erred in following *Knop*. As the Court of Appeals for the First Appellate District observed

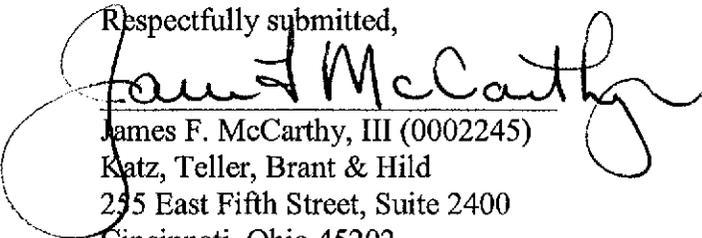
We decline to follow the *Knop* court for public-policy reasons. Under the *Knop* reasoning, Tate would have had to sue Stanton and Allstate before she could assign her rights to any proceeds from such a claim to Roselawn. We refuse to establish a rule that would force parties to litigate. Rather, the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

*Roselawn* at ¶16.

### III. 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 reverse the decision of the Court of Appeals, find that an accident victim may assign future proceeds in exchange for medical care and find R.C. 3929.06 does not bar a direct action against a tortfeasor's insurance company who ignores a valid assignment. This Court should conclude that the Assignment is valid and enforceable against any obligor, including the tortfeasor's insurance company.

Respectfully submitted,

  
James F. McCarthy, III (0002245)

Katz, Teller, Brant & Hild

235 East Fifth Street, Suite 2400

Cincinnati, Ohio 45202

(513) 721-4532

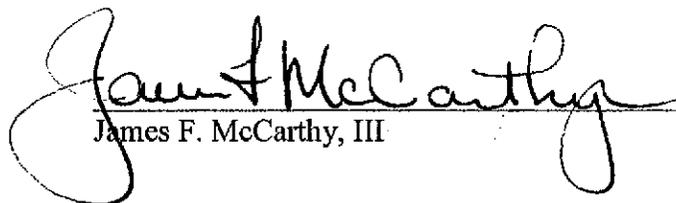
(513) 762-0006 (facsimile)

[jmccarthy@katzteller.com](mailto: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 8th day of January, 2009 upon Mark S. Maddox, Frost, Maddox & Norman Co., LPA, 987 South High Street, Columbus, Ohio 43206 and John P. Lowry, Boehm, Kurtz & Lowry, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202.

  
James F. McCarthy, III

KTBH: 4853-1539-7891, v. 1

## APPENDIX

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

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NOTICE OF APPEAL OF APPELLANT WEST BROAD CHIROPRACTIC

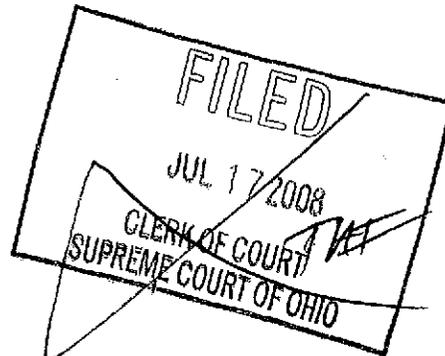
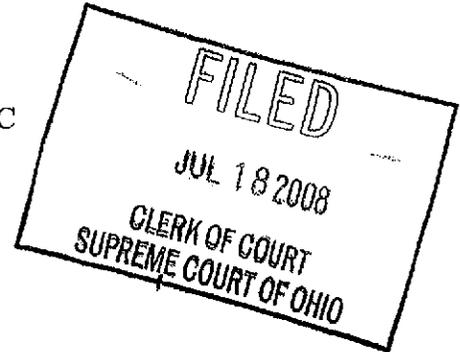
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James F. McCarthy, III (0002245)  
Jerome C. Bishop (0074719)  
Katz, Teller, Brant & Hild  
255 East Fifth Street, Suite 2400  
Cincinnati, Ohio 45202  
(513) 721-4532  
(513) 762-0006 (facsimile)  
[jmccarthy@katzteller.com](mailto:jmccarthy@katzteller.com)

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

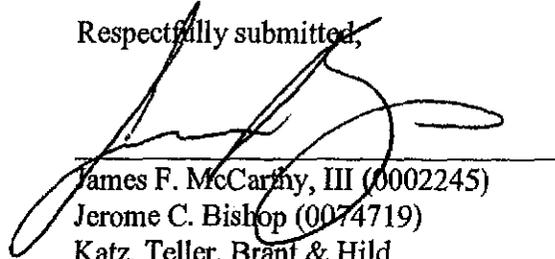


**NOTICE OF APPEAL OF APPELLANT WEST BROAD CHIROPRACTIC**

Appellant West Broad Chiropractic hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 07-AP-721 on June 3, 2008.

This case is one of public or great general interest.

Respectfully submitted,

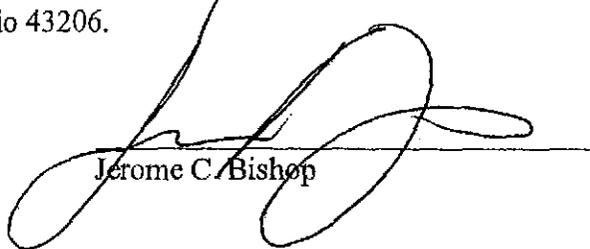


James F. McCarthy, III (0002245)  
Jerome C. Bishop (0074719)  
Katz, Teller, Brant & Hild  
255 East Fifth Street, Suite 2400  
Cincinnati, Ohio 45202  
(513) 721-4532  
(513) 762-0006 (facsimile)  
[jmccarthy@katzteller.com](mailto:jmccarthy@katzteller.com)

COUNSEL FOR APPELLANT  
WEST BROAD CHIROPRACTIC

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Notice of Appeal was served via regular United States mail this 17th day of July, 2008 upon Mark S. Maddox, Frost, Maddox & Norman Co., LPA, 987 South High Street, Columbus, Ohio 43206.



Jerome C. Bishop

KTBH: 4849-2371-8914, v. 1

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  
:  
:  
:  
:

---

AMENDED NOTICE OF CERTIFIED CONFLICT

---

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

COUNSEL FOR APPELLANT WEST BROAD CHIROPRACTIC

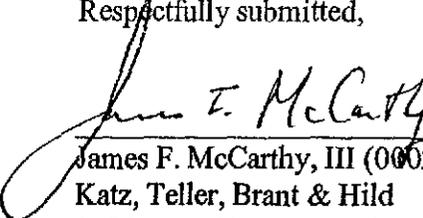
Mark S. Maddox (0029852)  
Frost, Maddox & Norman Co., L.P.A.  
987 South High Street  
Columbus, Ohio 43206  
(614) 445-8888

COUNSEL FOR APPELLEE AMERICAN FAMILY INSURANCE

**FILED**  
JUL 31 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

Pursuant to SCt R IV, Section 1, Appellant West Broad Chiropractic gives notice of a certified conflict pursuant to the order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution issued by the Court of Appeals for the Tenth Appellate District. A copy of the Court of Appeals opinion of certified conflict and the conflicting opinions are attached.

Respectfully submitted,

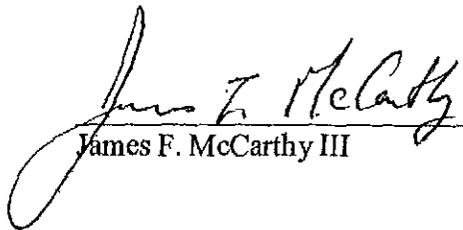
 <sup>per JCB</sup>

James F. McCarthy, III (0002245)  
Katz, Teller, Brant & Hild  
255 East Fifth Street, Suite 2400  
Cincinnati, Ohio 45202  
(513) 721-4532  
(513) 762-0006 (facsimile)  
[jmccarthy@katzteller.com](mailto: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 30th day of July, 2008 upon Mark S. Maddox, Frost, Maddox & Norman Co., LPA, 987 South High Street, Columbus, Ohio 43206.

 <sup>per JEB</sup>  
James F. McCarthy III

KTBH: 4813-4650-8034, v. 1

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2  
FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2008 JUL 23 PM 1:39

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.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on July 22, 2008, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Ninth District Court of Appeals for Summit County in *Akron Square Chiropractic v. Creps*, Summit App. No. 2007-A-0040, 2007-Ohio-6163, and the Twelfth District Court of Appeals for Butler County in *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623, upon the following issue in conflict:

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?

and the Eleventh District Court of Appeals for Trumbull County in *Hsu v. Parker* (1996), 116 Ohio App.3d 629, the First District Court of Appeals for Hamilton County in *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, *Akron Square*, and *Cartwright*, upon the following issue in conflict:

May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?

is granted, and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Ohio Supreme Court for review and final determination.

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



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Judge Susan Brown

*Antony*

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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COURT OF APPEALS  
FRANKLIN CO. OHIO

2008 JUL 22 PM 1:45

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.	:	

MEMORANDUM DECISION

Rendered on July 22, 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.*

ON MOTION TO CERTIFY CONFLICT

BROWN J.

{¶1} West Broad Chiropractic ("West Broad"), plaintiff-appellee, has filed a motion to certify conflict with regard to our opinion in *West Broad Chiropractic v. Am. Family Ins.*, Franklin App. No. 07AP-721, 2008-Ohio-2647. In our opinion, we reversed the judgment of the Franklin County Municipal Court, in which the court granted summary judgment to West Broad, and we found American Family Insurance ("American"),

defendant-appellant, was entitled to summary judgment. American has not filed a memorandum in opposition to the present matter.

{¶2} Motions seeking an order to certify a conflict are governed by Section 3(B)(4), Article IV, of the Ohio Constitution, which provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

See, also, *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, syllabus; App.R. 25; and S.Ct.Prac.R. IV.

{¶3} Before and during the certification of a case to the Ohio Supreme Court, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, three conditions must be met.

*Whitelock*, at 596. The court in *Whitelock* instructed:

\* \* \* First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. \* \* \*

(Emphasis sic.) *Id.*

{¶4} West Broad first asserts our decision is in conflict with *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327; *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988; *Gloekler v. Allstate Ins. Co.*, Ashtabula App. No. 2007-A-0040, 2007-Ohio-6163; and *Cartwright*

*Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623, and seeks to certify the following question to the Ohio Supreme Court:

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?

{¶5} R.C. 3929.06 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.

{¶6} Neither *Roselawn* nor *Gloekler* specifically addresses R.C. 3929.06.

Therefore, we can find no conflict with these cases on the question as presented by West Broad. However, we do find *Akron Square* and *Cartwright* conflict with our judgment. In *Akron Square* and *Cartwright*, the courts found that R.C. 3929.06 did not prevent an

injured party from assigning to a medical provider potential or prospective automobile insurance proceeds from claims not yet filed. To the contrary, in the present case, we found that, because an assignment must be based upon a right in being, and R.C. 3929.06 provides that a 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, an assignment is not actionable against the tortfeasor's insurer if the assignment was created prior to the existence of a civil action by the injured against the tortfeasor. The pertinent facts in *Akron Square* and *Cartwright* are nearly identical to those in the present case. Therefore, we do find *Akron Square* and *Cartwright* conflict with our judgment on the same question of law, and the cases are not distinguishable on their facts.

{¶7} Similarly, West Broad also asserts our decision is in conflict with *Hsu v. Parker* (1996), 116 Ohio App.3d 629, *Roselawn*, *Akron Square*, and *Cartwright*, and seeks to certify the following question to the Ohio Supreme Court:

May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?

{¶8} *Hsu*, *Roselawn*, *Akron Square*, and *Cartwright* all concluded that a party who has been injured in an automobile accident may assign his or her right to settlement proceeds to a medical provider even if liability and the injured's right to settlement proceeds have yet to be established. In the present case, we found that such an assignment is invalid. Upon review, we find *Hsu*, *Roselawn*, *Akron Square*, and

*Cartwright* conflict with our judgment on the same question of law and that the cases are not distinguishable on their facts.

{¶9} Therefore, we certify the following two questions to the Ohio Supreme Court:

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?

May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?

{¶10} Accordingly, the motion to certify is granted, and the above questions are certified to the Ohio Supreme Court for resolution of the conflicts pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

*Motion granted.*

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

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FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT 2008 JUN -3 PM 3:36

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. :

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

FILED  
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FRANKLIN CO. OHIO

2008 JUN -3 PM 3:32

CLERK OF COURTS

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

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O P I N I O N

Rendered on June 3, 2008

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

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

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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.

{15} 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.

{16} 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 *Rose/lawn*, 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.

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[Cite as *Akron Square Chiropractic v. Creps*, 2004-Ohio-1988.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	
 AKRON SQUARE CHIROPRACTIC		C. A. No. 21710
 Appellee		
 v.		APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 01-CVF-07451
ADAM CREPS, et al.		
 Appellants		

DECISION AND JOURNAL ENTRY

Dated: April 21, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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WHITMORE, Judge.

{¶1} Defendant-Appellant Allstate Insurance, Co., has appealed from the decision of the Akron Municipal Court granting summary judgment to Plaintiff-Appellee Akron Square Chiropractic. This Court affirms.

I

{¶2} Plaintiff-Appellee Akron Square Chiropractic (“Akron Square”) filed suit against Defendant-Appellant Allstate Insurance Company (“Allstate”) on August 9, 2001, alleging that Allstate had committed fraud, interference with

business relations, and conspiracy to commit creditor fraud against Akron Square. Allstate denied all of the claims set forth in Akron Square's complaint.

{¶3} The parties stipulated to the following facts<sup>1</sup>. On November 20, 1999, a motor vehicle driven by Adam Creps ("Creps") was struck from behind by a motor vehicle driven by Rosemary Grecni ("Grecni"). Grecni was insured by Allstate. Creps sustained bodily injury in the accident and went to Akron Square for medical treatment. As payment for his medical treatment, Creps assigned his "right to receive proceeds from any settlement with [Grecni's] insurance company or from any ultimately responsible party." The assignment also contained instructions "to any insurance company to pay to [Akron Square] such sums of money as requested."

{¶4} On December 8, 1999, Akron Square sent Allstate a copy of the assignment agreement; Allstate replied by letter "[denying] any responsibility for payment to [Akron Square] despite the written instructions from [Creps] \*\*\*." Allstate paid Creps \$865 on April 28, 2000, in exchange for his release of all claims resulting from the accident with Grecni. On December 13, 2000, Allstate notified Akron Square of its settlement with Creps, stating that Akron Square "should seek remuneration from [Creps]" for any medical treatment provided. Akron Square responded by filing suit.

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<sup>1</sup> The record reveals that the parties agreed to submit stipulated facts and briefs on the law, as well as waive a jury trial in the instant matter.

{¶5} Following discovery, Allstate filed a motion for summary judgment on May 9, 2002. Akron Square filed a cross-motion for summary judgment on May 10, 2002. On December 18, 2002, the trial court granted Akron Square's motion and denied Allstate's motion. Allstate has timely appealed the trial court's decision, asserting one assignment of error.

## II

### Assignment of Error

“THE TRIAL COURT ERRED IN GRANTING [AKRON SQUARE'S] MOTION FOR SUMMARY JUDGMENT AND DENYING [ALLSTATE'S] CROSS-MOTION FOR SUMMARY JUDGMENT, ON THE BASIS THAT THE ASSIGNMENT ENTERED INTO BETWEEN [AKRON SQUARE] AND ITS PATIENT [CREPS] IS NOT ACTIONABLE AGAINST ALLSTATE BECAUSE THE ASSIGNMENT WAS CREATED IN THE ABSENCE OF A CIVIL ACTION BY CREPS AGAINST ALLSTATE'S INSURED AND PRIOR TO THE FORMATION OF A SETTLEMENT AGREEMENT BETWEEN CREPS AND ALLSTATE; AS SUCH THE ASSIGNMENT IS NOT ACTIONABLE AGAINST ALLSTATE BECAUSE IT WAS NOT FOUNDED ON A 'RIGHT IN BEING.'”

{¶6} In its sole assignment of error, Allstate has argued that the assignment between Creps and Akron Square was invalid. Specifically, Allstate has argued that Creps was unable to enter into a valid assignment of any potential future proceeds that would flow to him as a result of the automobile accident with Grecni because he had not yet pursued legal action against Grecni and, therefore, did not have a “right in being” at the time of the assignment. We disagree.

{¶7} Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. In a motion for summary judgment, the moving party initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* at 292-93. Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material showing that a genuine dispute over material fact exists. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶8} In the case at bar, Allstate has argued that the trial court erred when it granted summary judgment in favor of Akron Square because Creps' assignment

to Akron Square was invalid and, as a result, Allstate was under no obligation to pay Akron Square for Creps' medical treatment. Akron Square has argued that the trial court did not err when it granted its motion for summary judgment because the assignment between Creps and Akron Square was valid, thus giving rise to Allstate's obligation to pay Akron Square.

{¶9} It is clear from the issues presented that this Court must first answer the question of whether the assignment between Creps and Akron Square was valid. It follows that if the assignment was valid, Akron Square was entitled to summary judgment in the instant matter because "reasonable minds can come to but one conclusion" that Allstate was obligated to pay Akron Square for Creps' medical treatment. *Temple*, 50 Ohio St.2d at 327; Civ.R. 56(C).

{¶10} In support of its argument that Creps did not execute a valid assignment, Allstate has argued that, pursuant to R.C. 3929.06, an "assignment has to occur after suit is filed, or else it is not actionable against the tortfeasor's insurance company." (Emphasis omitted.) However, 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.

{¶11} Furthermore, we have also 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 [the injured party’s] injury.” (Emphasis original.) *Fiorentino v. Lightning Rod Mut. Ins., Co* (Oct. 9, 1996), 9th Dist. No. 17728, at 5, appeal not allowed (1997), 78 Ohio St.3d 1410. Our determination in *Fiorentino* was based on several principles. First, an insurance policy is a contract between the insurance company and the insured. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 109. Second, a claim is defined as “the right, \*\*\* to collect or demand payment under [an insurance] policy based upon an incident which had already occurred and for which a claim would thus have already accrued.” *Fiorentino*, supra, at 6. As a result, the assignment of a claim merely vests the assignee with the ability to pursue a claim; it does not alter the contract between the insurer and the insured. *Id.*

{¶12} 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 Grezni. We find that Creps was not required to have filed suit or obtained judgment against Grezni or Allstate in order to effectuate a valid assignment of potential future insurance proceeds resulting from the accident with Grezni. We further find that Creps’

right to assign potential future insurance proceeds arose at the time the accident with Grecni occurred.<sup>2</sup> Therefore, Creps' assignment to Akron Square was valid.

{¶13} Next we turn to the question of whether the trial court erred when it granted summary judgment on behalf of Akron Square. We find the following stipulations dispositive of this question: (1) Creps received medical treatment from Akron Square for injuries he sustained in the accident with Grecni, (2) Allstate insured Grecni, (3) Allstate received proper notice of the assignment between Creps and Akron Square, and (4) Allstate knowingly and intentionally refused to honor the assignment.

{¶14} Based on the foregoing, we find that Allstate was obligated to pay Akron Square for the medical treatment it provided to Creps. We further find that, based on Allstate's own admission that it refused to honor the assignment,

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<sup>2</sup> We reach our result in the instant matter not just on sound legal principles, but also on sound public policy principles. As stated in *Carter v. Nationwide Ins. Co.*, (Sept. 19, 2003), Delaware Cty. M.C. No., 03CV1663, unreported, n.l., 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."

“reasonable minds can come to but one conclusion and that conclusion is adverse to [Allstate] \*\*\*[,]” namely that Allstate must pay Akron Square for Creps’ medical treatment. See Civ.R. 56(C). Therefore, the trial court did not err when it granted summary judgment to Akron Square. Allstate’s assignment of error is without merit.

### III

{¶15} Allstate’s sole assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

CARR, P. J., and SLABY, J., concur.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this

judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

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BETH WHITMORE  
FOR THE COURT

CARR, P. J.  
SLABY, J.  
CONCUR

APPEARANCES:

ROGER H. WILLIAMS and PHILLIP C. KOSLA, Attorneys at Law, 2241 Pinnacle Parkway, Twinsburg, Ohio 44087, for Appellant, Allsatt Insurance Company.

JAMES F. MCCARTHY and SHERI E. AUTTONBERRY, Attorneys at Law, 255 East Fifth Street, Suite 2400, Cincinnati, Ohio 45202, for Appellee, Akron Square Chiropractic.

ADAM CREPS, 791 Wilmont, Akron, Ohio 44306, Appellee.

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

CARTWRIGHT CHIROPRACTIC, :

Plaintiff-Appellee, :

CASE NO. CA2007-06-143

- vs - :

OPINION  
6/2/2008

ALLSTATE INSURANCE CO., :

Defendant-Appellant. :

CIVIL APPEAL FROM FAIRFIELD MUNICIPAL COURT  
Case No. 2006-CVF-981

Boehm, Kurtz & Lowry, Kurt J. Boehm, John P. Lowry, 36 East Seventh Street, Suite 1510,  
Cincinnati, OH 45202, for plaintiff-appellee

Montgomery, Rennie & Jonson, George D. Jonson, 36 East Seventh Street, Suite 2100,  
Cincinnati, OH 45202, for plaintiff-appellee

Katz, Teller, Brant & Hild, James F. McCarthy, III, 255 East Fifth Street, Suite 2400,  
Cincinnati, OH 45202, for plaintiff-appellee

Baker, Dublikar, Beck, Wiley & Mathews, Daniel J. Funk, 400 South Main Street, North  
Canton, OH 44720, for defendant-appellant

POWELL, J.

{1} Defendant-appellant, Allstate Insurance, appeals a decision granting summary judgment in favor of plaintiff-appellee, Cartwright Chiropractic. This case arose out of an

automobile accident and subsequent medical treatment of the injured party at Cartwright Chiropractic. We affirm the decision of the trial court.

{¶12} On August 15, 2005, Michael Rice, an Allstate insured, was involved in an automobile accident with Jennifer Miller. Following the accident, Miller sought treatment at Cartwright Chiropractic. At the inception of treatment, Miller executed an assignment in favor of Cartwright to pay the portion of any future proceeds she received from the accident to cover her chiropractic bills. The proceeds assignment stated:

{¶13} "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."

{¶14} Cartwright then sent a copy of the assignment to Allstate.<sup>1</sup> Thereafter, Allstate settled directly with Miller, paying the full amount of the settlement funds directly to her. After failing to reimburse Cartwright for the treatment charges, Miller filed for Chapter 13 bankruptcy in the Western Division, Southern District of Ohio. As a result, Cartwright initiated the case at bar against Allstate for failing to honor the assignment.<sup>2</sup> The parties separately moved for summary judgment. The trial court granted summary judgment in favor of Cartwright and denied Allstate's motion, ordering Allstate to pay \$1,653. Allstate timely appeals, raising one assignment of error:

{¶15} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR

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1. Allstate disputes its receipt and notice of the assignment, claiming that "Allstate never acknowledged its receipt nor promised to make payment to Cartwright." However, Cartwright has submitted a certified return receipt for this document signed by "George Athinson" on behalf of Allstate on September 18, 2005.

2. Cartwright has submitted evidence demonstrating that Allstate has honored identical or virtually identical assignments as part of its business practice. Cartwright has submitted documents from Allstate acknowledging six separate assignments. The documents generally state that, after receiving notice of an assignment, "We will proceed accordingly and honor your client's assignment of interest at the time of settlement."

SUMMARY JUDGMENT AND BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶16} The trial court in this case granted summary judgment in favor of Cartwright consistent with the First Appellate District's decision in *Roselawn Chiropractic Center, Inc. v. Allstate Insurance Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327; the Ninth Appellate District's decision *Akron Square Chiropractic v. Allstate*, Summit App. No. 21710, 2004-Ohio-1988; and the Eleventh District's decision in *Gloekler v. Allstate Insurance Co.*, Ashtabula App. No. 2007-A-0040, 2007-Ohio-6163.

{¶17} The *Roselawn* and *Gloekler* facts are almost identical. In *Roselawn*, the injured party, Mrs. Tate, was involved in a car accident with Helen Stanton, an Allstate insured. *Id.* at ¶2. Tate sought medical treatment from Roselawn Chiropractic. *Id.* Before receiving treatment, Tate signed a proceeds assignment. *Id.* After finishing the treatment, Roselawn forwarded notice of the assignment to Allstate along with an itemized statement of the treatment. *Id.* at ¶3. Allstate ultimately settled the claim directly with Tate and paid the entire settlement amount directly to her, rather than first paying Roselawn. *Id.* As a result, Roselawn sued Allstate. *Id.* at ¶4.

{¶18} The court in *Roselawn* held that "the document executed by Tate was a valid assignment obligating Allstate to pay Roselawn instead of Tate for the amount of her medical treatment." *Id.* at ¶9, citing *Hsu v. Parker* (1996), 116 Ohio App.3d 629. "Once Tate had assigned her potential proceeds from a lawsuit to Roselawn, Allstate was obligated to honor the assignment and pay Roselawn." *Id.* at ¶13.

{¶19} The First District explained the rationale for its holding finding that "the law should encourage settlement." *Id.* at ¶16. "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. 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. 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. 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." *Id.* at ¶19 and ¶20.

{¶10} Recently, the Eleventh District issued a decision on substantially similar facts adopting the First District's view. *Gloekler* at ¶26. The court reasoned, "[the injured party] 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 [the injured party]." *Id.*

{¶11} In its sole assignment of error, Allstate argues the trial court erred in granting summary judgment to Cartwright, presenting two issues for review. Allstate's first argument is based on R.C. 3929.06(B), also referred to as the "direct action rule." R.C. 3929.06(B) prohibits an injured party from directly filing a civil action against an insurance company until 30 days after liability is established for the insured tortfeasor and the insurance company has failed to pay the judgment. Allstate claims that R.C. 3929.06(B) prevents Miller from executing an assignment to Cartwright since no liability had been established for Michael Rice, Allstate's insured, and, as a result, Miller had no existing right to money from Allstate. Allstate claims that since Miller could not first directly sue Allstate, she had no existing right to money from Allstate and could not assign proceeds of her potential claim to Cartwright.

{¶12} Secondly, Allstate argues that the assignment itself is invalid under a similar rationale. Specifically, Allstate claims that "an enforceable assignment requires the existence of some fund or property" and that a "future obligation that constitutes a 'mere expectancy or

possibility' cannot be assigned."

{¶13} In regard to Allstate's first issue for review, the First District in *Roselawn* addressed this same argument. The court stated that "without any legal action, Allstate agreed to pay Tate over \$4,000. But if we adopted the rule urged by Allstate, unless Tate had sued Stanton and Allstate to establish liability, the assignment Tate executed directing Allstate to pay Roselawn was invalid. This makes no sense." *Id.* at ¶17. Relying on the Ohio Supreme Court's decision in *First Bank of Marietta v. Roslovic & Partners, Inc.*, 86 Ohio St.3d 116, 1999-Ohio-89, the court noted "that an assignment was valid and that the account debtor had become obligated to pay the assignee once the account debtor had received proper notice of the assignment," which "preserved the goals of commercial stability and reliability." *Id.* at ¶18, citing *First Bank of Marietta* at 118-119. "The same principle is applicable here." *Id.* at ¶19.

{¶14} In the recent decision of *Akron Square Chiropractic v. Creps*, the Ninth District Court of Appeals addressed the same arguments posed by Allstate under almost identical facts to the case at bar.

{¶15} In Ohio, "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 be assigned." 6 Ohio Jurisprudence 3d (2006) 50, Assignments, Section 5. Moreover, an expectancy or possibility is assignable unless it is "naked or remote."<sup>3</sup> *Id.* at Sections 7 and 18. Such assignments are equitable assignments. *Id.* A

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3. In support of its contention, Allstate cites 6 Ohio Jurisprudence 3d (2006) 57, Assignments, Section 7, claiming that a "mere expectancy or possibility cannot be assigned." That section does not apply for that proposition of law. The full citation Allstate paraphrases is that "An assignment of a debt expected to arise in the future out of a contract existing at the time of the assignment is distinguished from the assignment of a contemplated debt before execution of the agreement by which it is to be created; applying the rule of law that an expectancy or possibility is contemplated debt is *not assignable at law* before execution of the agreement, although such debt may be *assignable in equity*." (emphasis added). Allstate inserts the word "mere" into this section and claims that an expectancy or possibility is never assignable. This is incorrect. The section confirms the historical difference between an assignment enforced in law and an assignment enforced in equity. Further, this section

"present existing right, to take effect in the future on contingency, may be assigned." *Id.* at Section 18. However, a mere "naked or remote" possibility cannot be assigned because an assignment must be founded on a right in being. *Id.*

{¶16} Miller's cause of action existed at the time the assignment was executed; the date of the accident. *In re Petry* (N.D. Ohio, 1986), 66 B.R. 61, 63; See also *Fiorentino v. Lightning Rod Mut. Ins., Co.* (1996), 114 Ohio App.3d 188. 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. 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." *Akron Square Chiropractic v. Creps*, 2004-Ohio-1988 at fn. 2.

{¶17} Further, Allstate attempts to argue that because Rice's liability had not been established, Miller had nothing to assign, and since R.C. 3929.06(B) does not allow Miller to directly sue Allstate, it was uncertain that she would be receiving payment from Allstate. Under Allstate's rationale, R.C. 3929.06 would effectively preclude Miller from executing the assignment with Cartwright until Rice is found liable for the accident following a trial (or at the very least, Miller filing suit against Rice before executing the assignment).

{¶18} As examined by the Ninth Appellate District, this is not a proper reading of the statute. 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." *Salem v. Wortman* (August 30, 1978), Summit App. No. 8769, \*2. R.C. 3929.06 does not impact "an

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applies to contractual assignments, specifically arising out of a contract existing prior to the execution of the assignment. The assignment in this case was not a contractual assignment. Rather, the relationship between Miller and Allstate, and the settlement, arose out of an existing/potential tort claim, not a contract. Further, Allstate's proposition of law is misleading because expectancies or possibilities are assignable as long as they are not "naked or remote."

injured party's right to assign potential or prospective proceeds from claims not yet filed." *Akron Square Chiropractic v. Creps*, 2004-Ohio-1988 at ¶10. Furthermore, the statute makes no prohibitions or even mentions any applicability to assignments. *Id.*

{¶19} 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.

{¶20} Finally, R.C. 3929.06(A)(1) provides further certainty that Miller could recover from Allstate. R.C. 3929.06 does not extinguish or prevent Miller from suing Allstate. Rather, R.C. 3929.06(A)(1) allows an injured party to sue an insurance company 30 days after the insured is found liable in a trial, requiring the insurance company to satisfy the judgment.

{¶21} In *First Bank of Marietta v. Roslovic & Partners, Inc.*, the Ohio Supreme Court held that an assignment was valid and that the account debtor had become obligated to pay the assignee once the account debtor had received notice of the assignment. The court's holding "preserves the goals of commercial stability and reliability. Lenders are willing to enter into riskier deals if a good assignment is in place that creates solid incentives for an account debtor to comply with its terms." 86 Ohio St.3d at 120. The same principle is applicable here. "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." *Roselawn*, 2005-Ohio-1327 at ¶20.

{¶22} Allstate's sole assignment of error is overruled.

{¶23} Judgment affirmed.

YOUNG, P.J. and WALSH, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

LEXSEE 116 OA3D 629

WI I. HSU, M.D., Plaintiff-Appellant, -vs- ELAINE PARKER, Defendant, JOSEPH D. OHLIN, Defendant-Appellee.

ACCELERATED CASE NO. 95-T-5375

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

116 Ohio App. 3d 629; 688 N.E.2d 1099; 1996 Ohio App. LEXIS 5643

December 16, 1996, Decided

**PRIOR HISTORY:** [\*\*\*1]

CHARACTER OF PROCEEDINGS: Civil Appeal from Warren Municipal Court. Case No. 94 CVF 170.

**DISPOSITION:** JUDGMENT: Reversed and remanded.

**LexisNexis(R) Headnotes*****Contracts Law > Performance > Novation***

[HN1] An assignment is a transfer to another of all or part of one's property in exchange for valuable consideration. No particular words are required to create an assignment. Rather, any word or transaction that shows an intention on the one side to assign and on the other to receive, if there is a valuable consideration, will operate to create an assignment.

***Commercial Law (UCC) > Secured Transactions (Article 9) > General Overview***  
***Legal Ethics > Client Relations > Client Funds***

[HN2] Ohio Code Prof. Resp. DR 9-102(B)(4) states that a lawyer shall promptly pay or de-

liver to a client as requested by the client the funds, securities, or other properties in the possession of the lawyer that the client is entitled to receive.

***Contracts Law > Performance > Novation***

[HN3] 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.

**COUNSEL:** ATTY. ROBERT S. MEERMANS, 159 East Market Street, # 100, Warren, OH 44481, (For Plaintiff-Appellant).

ATTY. JAMES R. SCHER, 309 Washington Street, N.E., Warren, OH 44483, (For Defendant-Appellee).

**JUDGES:** HON. JOSEPH E. MAHONEY, P.J., HON. ROBERT A. NADER, J., HON. MARY CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment. NADER, J., CACIOPPO, J., concur.

**OPINION BY:** JOSEPH E. MAHONEY

**OPINION**[\*631] [\*\*1100] **OPINION**

MAHONEY, J.

In this accelerated calendar appeal, submitted to this court upon the record and briefs of the parties, plaintiff-appellant, Wi I. Hsu, M.D., appeals from the judgment of the Warren Municipal Court, Civil Division, in favor of defendant-appellee, Joseph D. Ohlin. For the reasons that follow, we reverse the judgment of the trial court and remand this case for the trial court to enter judgment for appellant and assess costs.

The facts pertinent to this appeal are not in dispute. On October 21, 1991, defendant, Elaine Parker, was involved in an automobile accident and suffered [\*\*\*2] multiple injuries. In February of 1992, Ms. Parker sought treatment from appellant for her injuries related to the accident. Prior to consulting appellant, Ms. Parker had retained the services of appellee, an attorney, to assist her in pursuing a personal injury action against the party responsible for her injuries.

On February 12, 1992, Ms. Parker executed a document entitled "Security Agreement for Medical Services," which granted appellant a security interest in any and all proceeds from Ms. Parker's pending personal injury action. The document authorized appellant to furnish appellee with complete reports of appellant's examinations, diagnoses, treatment, and prognosis of Ms. Parker in regard to the motor vehicle accident. The document further authorized her attorney, appellee, to withhold sufficient funds from any settlement, judgment, or verdict as may be due appellant for his services to Ms. Parker, and directed appellee to pay such funds to appellant. [\*\*1101] Appellee signed the document acknowledging receipt.

On or about March 3, 1992, appellant performed surgery on Ms. Parker's right knee. Ms. Parker also received additional treatment for her injuries and made additional [\*\*\*3] visits

to appellant's office. Pursuant to the February 12, 1992 security agreement, appellant furnished the reports of Ms. Parker's visits to appellee. The fee for appellant's services to Ms. Parker, totaling \$ 1,446, has not been paid.

On June 4, 1992, Ms. Parker's personal injury action was settled for \$ 25,000. Ms. Parker instructed appellee to transfer the settlement proceeds to her and not to pay appellant's medical fees. Appellee, citing an ethical obligation to his client, did not pay appellant for his services.

On January 14, 1994, appellant filed a complaint against Ms. Parker and appellee alleging that they owed him \$ 1,446 for medical services rendered to Ms. Parker. Ms. Parker failed to answer appellant's complaint and the Warren Municipal Court entered a default judgment against her.

Pursuant to Civ.R. 53, appellant's action against appellee, Ohlin, was submitted to a referee. Before the referee, appellant argued that the "Security Agreement [\*632] for Medical Services" operated as an equitable assignment of any settlement proceeds from Ms. Parker to appellant. Appellee argued that, as an attorney, his duty was to follow his client's instructions concerning the [\*\*\*4] transfer of the settlement proceeds. On February 22, 1995, the referee filed a report recommending judgment in favor of appellant and against appellee.

Appellee filed a timely objection to the referee's report and, on November 20, 1995, the trial court rejected the referee's recommendation and entered judgment in favor of appellee. Although acknowledging that portions of the "Security Agreement for Medical Services" (directing appellee to pay appellant out of any proceeds recovered from the personal injury action) would "appear to create an assignment," the trial court held that the remainder of the document was ambiguously drafted. Construing ambiguities in favor of appellee, the court determined that the document established an equi-

table lien against any monies recovered from the personal injury action and that, until appellant took some action to enforce his lien upon the proceeds, appellee was obligated to follow the instructions of his client.

From this judgment, appellant has filed a timely appeal. In his sole assignment of error, appellant asserts that the trial court erred in disregarding the recommendation of the referee when it determined that a valid assignment was not [\*\*\*5] created between Ms. Parker and appellant by the "Security Agreement for Medical Services" executed on February 12, 1992. We agree.

[HN1] An assignment is a transfer to another of all or part of one's property in exchange for valuable consideration. See *Christmas' Estate v. Griswold* (1858), 8 Ohio St. 558, 563-564; Black's Law Dictionary (6 Ed. 1990) 119. No particular words are required to create an assignment. Rather, "any word or transaction which shows an intention on the one side to assign and on the other to receive, if there is a valuable consideration, will operate [to create an assignment]." *Grogan Chrysler-Plymouth, Inc. v. Gottfried* (1978), 59 Ohio App. 2d 91, 96, 392 N.E.2d 1283; see, also, 4 Corbin on Contracts (1951) 528, Section 879.

The trial court, although acknowledging that portions of the "Security Agreement for Medical Services" would "appear to create an assignment," concluded that the parties created a mere security interest and that no assignment was created. The trial court based this decision on our opinion in *Fabrizio v. Hendricks* (1995), 100 Ohio App. 3d 352, 654 N.E.2d 127, which required that "if there is any doubt or ambiguity in the [\*\*\*6] language of a contract it will be construed strictly against the party who prepared it." *Id.* at 356. (Emphasis added.) In the case *sub judice*, there is no evidence of ambiguity in the "Security Agreement for Medical Services." While the document did create a security interest in any proceeds recovered as a [\*633] result of the personal injury lawsuit, the

document also clearly authorized Ms. Parker's attorney, appellee, to withhold funds from such settlement to pay appellant for his services. Furthermore, the document explicitly directed appellee [\*\*1102] to pay, from any settlement or award, medical fees owed by Ms. Parker to appellant. The trial court interpreted the provisions for a security agreement and for an assignment as being in conflict where no such conflict existed. It is clear from the document that the parties intended a security interest as well as an assignment, and we see no valid reason why both provisions cannot exist in the same document. Furthermore, the actions of the parties reinforced their intentions. Appellant provided his medical services, including an operation on Ms. Parker's right knee and numerous office visits, only after the document [\*\*\*7] had been executed.

We also reject appellee's argument that Ms. Parker's instruction not to pay appellant from the proceeds of the settlement gave rise to an ethical obligation to follow Ms. Parker's most recent instruction pertaining to the disbursement of the funds to appellant. Appellee cites DR 9-102(B)(4) for this proposition. [HN2] That rule states that a lawyer shall: "promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive." (Emphasis added.) Based on our ruling that a valid assignment had occurred, the client was not entitled to receive the full amount of the settlement. [HN3] "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, Section 890. From the language of the "Security Agreement for Medical Services," Ms. Parker assigned part of the proceeds of her personal injury action to appellant. As shown by appellee's signature on this document, appellee had knowledge of the assignment. [\*\*\*8] Consequently, appellee was obligated to pay

appellant for medical services appellant provided to Ms. Parker from any settlement reached in the personal injury action. When a dispute arose over who was entitled to the \$ 1,446 from the settlement proceeds, appellee, to avoid paying the wrong party, should have filed a complaint in interpleader. Thus, a court of competent jurisdiction could have resolved any conflict which existed as a result of Mr. Parker's initial instructions and subsequent instructions to appellee.

Appellant's sole assignment of error has merit.

Based on the foregoing, we reverse the judgment of the trial court and remand this case for the trial court to enter judgment for appellant and assess costs.

PRESIDING JUDGE JOSEPH E. MAHONEY

NADER, and CACIOPPO, JJ., concur.

[\*634] CACIOPPO, J., retired, of the Ninth Appellate District, sitting by assignment.

LEXSEE 160 OA3D 297

ROSELAWN CHIROPRACTIC CENTER, INC., Plaintiff-Appellee, vs.  
ALLSTATE INSURANCE CO., Defendant-Appellant, and TIFFANY A. TATE, De-  
fendant.

APPEAL NO. C-040306

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON  
COUNTY

160 Ohio App. 3d 297; 2005 Ohio 1327; 827 N.E.2d 331; 2005 Ohio App. LEXIS  
1267

March 25, 2005, Date of Judgment Entry on Appeal

**NOTICE:** THESE ARE NOT OFFICIAL  
HEADNOTES OR SYLLABI AND ARE NEITHER  
APPROVED IN ADVANCE NOR ENDORSED BY  
THE COURT. PLEASE REVIEW THE CASE IN  
FULL.

**SUBSEQUENT HISTORY:** Discretionary appeal not  
allowed by Roselawn Chiropractic Ctr., Inc. v. Allstate  
Ins. Co., 2005 Ohio 4605, 2005 Ohio LEXIS 1936  
(Ohio, Sept. 7, 2005)

**PRIOR HISTORY:** Civil Appeal From: Hamilton  
County Municipal Court. TRIAL NO. 03CV-14334.

**DISPOSITION:** Affirmed.

#### LexisNexis(R) Headnotes

##### *Contracts Law > Performance > Assignment > General Overview*

[HN1] An assignment is a transfer to another of all or  
part of one's property in exchange for valuable consid-  
eration. No particular words are required to create an  
assignment. Rather, any word or transaction that shows  
an intention on the one side to assign and on the other to  
receive, if there is a valuable consideration, will operate  
to create an assignment.

##### *Contracts Law > Performance > Assignment > General Overview*

[HN2] An account debtor is authorized to pay an as-  
signor until the account debtor receives notification that  
the account has been assigned and that payment is to be  
made to the assignee. The assignee is entitled to exercise

collection rights against the account debtor as long as the  
account debtor receives (1) an indication that the account  
has been assigned, (2) a specific direction that the pay-  
ment is to be made to the assignee rather than the as-  
signor, and (3) a reasonable identification of the rights  
assigned.

##### *Contracts Law > Performance > Assignment > General Overview*

##### *Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians*

[HN3] There is no reason to force a person to file a law-  
suit before he or she can assign the right to potential pro-  
ceeds from a claim.

#### HEADNOTES: INSURANCE

**SYLLABUS:** The trial court properly entered judgment  
for a chiropractor on its claim against an insurer to re-  
cover the amount due under an assignment by a car-  
accident victim of that portion of the insurer's settlement  
payment equal to the cost of the chiropractor's treatment  
of the victim: An injured person who has incurred medi-  
cal costs for which another party may be liable may as-  
sign to a treating physician the right to potential proceeds  
from a claim. And the evidence supported the trial court's  
determination that a valid assignment existed between  
the victim and the chiropractor.

**COUNSEL:** Timothy A. Fischer, for Appellee.

Daniel J. Funk, Niki Domenick DiCola, and Baker, Dub-  
likar, Beck, Wiley, & Matthews, for Appellant.

**JUDGES:** MARK P. PAINTER, Judge.  
HILDEBRANDT, P.J., and GORMAN, J., concur.

OPINION BY: MARK P. PAINTER

OPINION:

[\*298] [\*\*\*331] *DECISION.*

MARK P. PAINTER, Judge.

[\*\*P1] Defendant-appellant Allstate Insurance Co. appeals the trial court's determination that defendant Tiffany A. Tate executed a valid assignment to plaintiff-appellee Roselawn Chiropractic Center, Inc., of a portion of Allstate's payment to her of a settlement for damages she sustained in a car accident. We affirm. [\*\*\*332]

### *I. Accident and Medical Treatment*

[\*\*P2] Tate was in a car accident with Helen Stanton, who was insured by Allstate. Tate went to Roselawn Chiropractic Center for medical treatment. Before receiving any treatment, Tate signed a form titled "Assignment." The form stated that Tate was assigning to Roselawn any proceeds that she would receive from a claim against Stanton and Allstate, equal to the cost of her treatment.

[\*\*P3] A few months later, after Tate had finished her treatment, Roselawn sent Allstate several documents. Roselawn sent a copy of the assignment form Tate had signed, a paper titled "Notice of Assignment," and an itemized statement of Tate's treatment at Roselawn. Allstate acknowledged receipt of the documents. But when Tate settled her claim with Allstate, Allstate paid all the settlement money directly to Tate.

[\*\*P4] Denied any compensation for the medical treatment it had provided to Tate, Roselawn sued both Tate and Allstate. Roselawn received a default judgment against Tate. Allstate claimed that it was not obligated by the "assignment" [\*299] that Tate had signed with Roselawn. The trial court concluded otherwise and held that it was a valid assignment, and that Allstate was liable to Roselawn for the amount of Tate's medical bills.

[\*\*P5] Allstate now brings two assignments of error. Allstate argues that the trial court erred when it denied its motions for summary judgment and for a directed verdict. Allstate's reasoning is that there was never a valid assignment between Tate and Roselawn. Whether a valid assignment existed is the sole issue we must decide.

### *II. Assignment*

[\*\*P6] [HN1] An assignment is a transfer to another of all or part of one's property in exchange for valuable consideration. n1 No particular words are required to create an assignment. Rather, "any word or transaction which shows an intention on the one side to

assign and on the other to receive, if there is a valuable consideration, will operate [to create an assignment]." n2

n1 See *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 632, 688 N.E.2d 1099.

n2 See *Grogan Chrysler-Plymouth, Inc. v. Gottfried* (1978), 59 Ohio App.2d 91, 96, 392 N.E.2d 1283.

[\*\*P7] [HN2] An account debtor, such as Allstate, is authorized to pay the assignor, Tate, until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee, in this case, Roselawn. n3 The assignee is entitled to exercise collection rights against the account debtor as long as the account debtor "receives (1) an indication that the account has been assigned, (2) a specific direction that the payment is to be made to the assignee rather than the assignor, and (3) a reasonable identification of the rights assigned." n4

n3 See *Surety Savings & Loan Co. v. Kanzig* (1978), 53 Ohio St.2d 108, 112, 372 N.E.2d 602.

n4 See *First Bank of Marietta v. Roslovic & Partners, Inc.* (1999), 86 Ohio St.3d 116, 118-119, 712 N.E.2d 703.

[\*\*P8] It is undisputed that Allstate received notification from Roselawn that Tate had assigned to Roselawn the proceeds from any claim against Stanton and Allstate. The assignment itself stated, "I hereby direct any insurance company, attorney or other person who holds or later holds any proceeds from my claim to pay such proceeds directly to Roselawn Chiropractic Center, Inc., up to the outstanding [\*\*\*333] balance of my account." And the right assigned--the right to receive a specific amount of any settlement sum--was clearly identified in the assignment.

[\*\*P9] [\*300] Therefore, we conclude that the document executed by Tate was a valid assignment obligating Allstate to pay Roselawn instead of Tate for the amount of her medical treatment.

[\*\*P10] Our conclusion is in accord with that of the Eleventh District Court of Appeals in *Hsu v. Parker*. n5 In *Hsu, Parker* was involved in a car accident and sought medical treatment from Hsu. Before consulting

Hsu, Parker had retained an attorney to assist her in suing the party responsible for her injuries. Parker executed a document that granted Hsu a security interest in the proceeds from Parker's pending personal-injury action. The document authorized the attorney to withhold sufficient funds from any settlement, judgment, or verdict to pay Hsu for his services to Parker, and it directed the attorney to pay such funds to Hsu. The attorney acknowledged that he had received the document.

n5 See *Hsu v. Parker*, supra.

[\*\*P11] After Parker had settled her personal injury action, she instructed the attorney to give her the settlement money and to not pay Hsu's medical fees. The attorney, citing an ethical obligation to his client, did not pay Hsu. Hsu sued both Parker and the attorney.

[\*\*P12] The court of appeals determined that the document executed by Parker had clearly created both a security interest and a valid assignment. n6 Therefore, the court held that after he had received notice of the assignment, the attorney, as the obligor, was liable for the money owed the assignee, Hsu. The court stated, "The assignor has no remaining power of release. The obligor must pay the assignee." n7

n6 Id. at 633.

n7 Id.

[\*\*P13] Likewise, in the present case, 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.

### III. No Need for Litigation

[\*\*P14] In its defense, Allstate argues that at the time Tate made her assignment, she had nothing to assign. Allstate claims that the assignment could not have been created until Tate had sued Stanton and Allstate and had proven liability.

[\*\*P15] Allstate relies on *Knop Chiropractic, Inc. v. State Farm Ins. Co.* n8 In a factually similar situation to the present case, the *Knop* court held that an [\*301] insurance company was not liable for failing to honor an assignment when the assignor had not yet pursued legal action against the alleged tortfeasor at the time that he made the assignment. n9

n8 See *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, 5th Dist. No. 2003CA00148, 2003 Ohio 5021.

n9 Id.

[\*\*P16] 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.

[\*\*P17] In this case, without any legal action, Allstate agreed to pay Tate over \$ 4,000. But if we adopted the rule urged [\*\*\*334] by Allstate, unless Tate had sued Stanton and Allstate to establish liability, the assignment Tate executed directing Allstate to pay Roselawn was invalid. This makes no sense.

[\*\*P18] In *First Bank of Marietta v. Roslovic & Partners, Inc.*, the Ohio Supreme Court held that an assignment was valid, and that the account debtor had become obligated to pay the assignee once the account debtor had received proper notice of the assignment. n10 The concurrence noted that the court's holding "preserves the goals of commercial stability and reliability. Lenders are willing to enter riskier deals if a good assignment is in place that creates solid incentives for an account debtor to comply with its terms." n11

n10 See *First Bank of Marietta v. Roslovic & Partners, Inc.*, supra.

n11 Id. at 120 (Stratton, J., concurring).

[\*\*P19] The same principle is applicable here. As Roselawn argued, 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. 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. We see [HN3] no reason to force a person to file a lawsuit before he or she can assign the right to potential proceeds from a claim.

[\*\*P20] Allowing the creation of a valid assignment in such a situation gives some assurance to medical care providers that they will eventually be compensated.

160 Ohio App. 3d 297, \*, 2005 Ohio 1327, \*\*;  
827 N.E.2d 331, \*\*\*; 2005 Ohio App. LEXIS 1267

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.

[\*\*P21] 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 [\*302]

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.

Judgment affirmed.

**HILDEBRANDT, P.J., and GORMAN, J., concur.**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO

2008 JUL 23 PM 1:39

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.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on July 22, 2008, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Ninth District Court of Appeals for Summit County in *Akron Square Chiropractic v. Creps*, Summit App. No. 2007-A-0040, 2007-Ohio-6163, and the Twelfth District Court of Appeals for Butler County in *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623, upon the following issue in conflict:

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?

and the Eleventh District Court of Appeals for Trumbull County in *Hsu v. Parker* (1996), 116 Ohio App.3d 629, the First District Court of Appeals for Hamilton County in *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, *Akron Square*, and *Cartwright*, upon the following issue in conflict:

May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?

is granted, and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Ohio Supreme Court for review and final determination.

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



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Judge Susan Brown

*Atty*

IN THE COURT OF APPEALS OF OHIO

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

TENTH APPELLATE DISTRICT

2008 JUL 22 PM 1:45

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.	:	

MEMORANDUM DECISION

Rendered on July 22, 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.*

ON MOTION TO CERTIFY CONFLICT

BROWN J.

{¶1} West Broad Chiropractic ("West Broad"), plaintiff-appellee, has filed a motion to certify conflict with regard to our opinion in *West Broad Chiropractic v. Am. Family Ins.*, Franklin App. No. 07AP-721, 2008-Ohio-2647. In our opinion, we reversed the judgment of the Franklin County Municipal Court, in which the court granted summary judgment to West Broad, and we found American Family Insurance ("American"),

defendant-appellant, was entitled to summary judgment. American has not filed a memorandum in opposition to the present matter.

{¶2} Motions seeking an order to certify a conflict are governed by Section 3(B)(4), Article IV, of the Ohio Constitution, which provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

See, also, *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, syllabus; App.R. 25; and S.Ct.Prac.R. IV.

{¶3} Before and during the certification of a case to the Ohio Supreme Court, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, three conditions must be met.

*Whitelock*, at 596. The court in *Whitelock* instructed:

\* \* \* First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. \* \* \*

(Emphasis sic.) *Id.*

{¶4} West Broad first asserts our decision is in conflict with *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327; *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988; *Gloekler v. Allstate Ins. Co.*, Ashtabula App. No. 2007-A-0040, 2007-Ohio-6163; and *Cartwright*

*Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623, and seeks to certify the following question to the Ohio Supreme Court:

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?

{¶5} R.C. 3929.06 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.

{¶6} Neither *Roselawn* nor *Gloekler* specifically addresses R.C. 3929.06.

Therefore, we can find no conflict with these cases on the question as presented by *West Broad*. However, we do find *Akron Square* and *Cartwright* conflict with our judgment. In *Akron Square* and *Cartwright*, the courts found that R.C. 3929.06 did not prevent an

injured party from assigning to a medical provider potential or prospective automobile insurance proceeds from claims not yet filed. To the contrary, in the present case, we found that, because an assignment must be based upon a right in being, and R.C. 3929.06 provides that a 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, an assignment is not actionable against the tortfeasor's insurer if the assignment was created prior to the existence of a civil action by the injured against the tortfeasor. The pertinent facts in *Akron Square* and *Cartwright* are nearly identical to those in the present case. Therefore, we do find *Akron Square* and *Cartwright* conflict with our judgment on the same question of law, and the cases are not distinguishable on their facts.

{¶7} Similarly, *West Broad* also asserts our decision is in conflict with *Hsu v. Parker* (1996), 116 Ohio App.3d 629, *Roselawn*, *Akron Square*, and *Cartwright*, and seeks to certify the following question to the Ohio Supreme Court:

May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?

{¶8} *Hsu*, *Roselawn*, *Akron Square*, and *Cartwright* all concluded that a party who has been injured in an automobile accident may assign his or her right to settlement proceeds to a medical provider even if liability and the injured's right to settlement proceeds have yet to be established. In the present case, we found that such an assignment is invalid. Upon review, we find *Hsu*, *Roselawn*, *Akron Square*, and

*Cartwright* conflict with our judgment on the same question of law and that the cases are not distinguishable on their facts.

{¶9} Therefore, we certify the following two questions to the Ohio Supreme Court:

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?

May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?

{¶10} Accordingly, the motion to certify is granted, and the above questions are certified to the Ohio Supreme Court for resolution of the conflicts pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

*Motion granted.*

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

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FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT      2008 JUN -3 PM 3:36

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.	:	

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

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

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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. :

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O P I N I O N

Rendered on June 3, 2008

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

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

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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.

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IN THE FRANKLIN COUNTY MUNICIPAL COURT  
COLUMBUS, OHIO

WEST BROAD CHIROPRACTIC.,  
Plaintiff,

vs.

AMERICAN FAMILY INSURANCE,  
Defendant.

Case No. 2006 CVH 043353

ENTRY

The Court has been presented with cross motions for summary judgments pending in this matter. Defendant American Family Insurance filed a motion for summary judgment on February 16, 2007 followed by the Plaintiff's motion for summary judgment on February 20, 2007. A memorandum in opposition to the Defendant's motion for summary judgment followed on March 1, 2007. In response, a reply brief to the memorandum was filed by the Defendant on March 7, 2007 supporting its original motion and opposing the Plaintiff's motion of February 20, 2007.

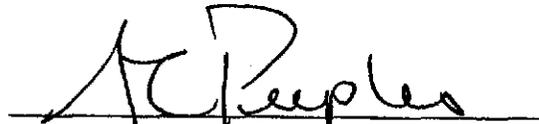
At issue is the liability of Defendant American Family Insurance to pay the proceeds of a settlement to the Plaintiff subsequent to notice of assignment of the proceeds to the Plaintiff by the injured party.

Pursuant to Revised Code 3929.06, which allows an injured party to institute supplemental proceedings for the satisfaction of a judgment against an insurer after obtaining a judgment in tort against the insured, the Defendant has laid claim that the injured party did not institute proceedings for a judgment in this manner. The Court's claim in this matter is that said reference to the Code does not promulgate the common law right of an injured party to assign future proceeds of a settlement to a third party, much less does it purport to limit that right in any way.

The Court finds the terms of the Assignment are enforceable under Ohio law against the Defendant in this matter and grants the Plaintiff's motion for summary judgment to be entered in favor of the Plaintiff in the amount of \$3,830.00 plus interests and costs.

The Court hereby directs the Municipal Court Clerk to serve upon all parties notice of this judgment and its date of entry upon the journal.

August 9, 2007



JUDGE ANDREA C. PEEPLES

Copies to:

JAMES F. MCCARTHY, III  
SHERI E. AUTTONBERRY  
KATZ, TELLER, BRANT & HILD  
255 EAST FIFTH STREET, SUITE 2400  
CINCINNATI, OH 45202

ATTORNEYS FOR PLAINTIFF

BRIAN D. MARK  
MARK S. MADDOX  
FROST, MADDOX & NORMAN CO., LPA  
987 S HIGH STREET  
COUMBUS, OH 43206

ATTORNEYS FOR DEFENDANT

**§ 3929.06. Rights of judgment creditor of insured tortfeasor; binding legal effect of judgment between insurer and insured**

(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.

# *The Supreme Court of Ohio*

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OFFICE OF SECRETARY

## **OPINION 2007-7**

Issued December 7, 2007

**SYLLABUS:** A lawyer's duty of safekeeping funds in the lawyer's possession extends not only to clients but also to third persons. A lawyer has an ethical duty of safekeeping funds for a third person when the lawyer knows a third person has a lawful claim to funds in the lawyer's possession. *Not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15.* Examples of lawful claims are provided in this opinion.

When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.

When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer is unclear whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession. But, when a dispute arises as to funds in a lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to

arbitrate a dispute between a client and a third person. If efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking a court to resolve the dispute.

**OPINION:** This opinion addresses a lawyer's ethical duties as to safekeeping funds in the lawyer's possession when a third person claims an interest.

1. Under Rule 1.15(d) and (e), when does a lawyer have an ethical duty of safekeeping funds in the lawyer's possession for a third person claiming interest in the funds?
2. Under Rule 1.15(d) and (e), when a dispute arises what are a lawyer's safekeeping duties to a client and a third person claiming interest in funds in the lawyer's possession and how should a dispute be resolved?

### Introduction

A lawyer's duty of safekeeping funds in the lawyer's possession extends not only to clients but also to third persons. Upon adoption of Rule 1.15(d) and (e) of the Ohio Rules of Professional Conduct, effective February 1, 2007, this duty is axiomatic.

Ohio lawyers seek clarification of when the duty of safekeeping funds for third persons arises and how disputes between clients and third persons regarding funds in a lawyer's possession should be resolved. Proceeds of a personal injury settlement or judgment are a common example of funds that come into a lawyer's possession during representation of a client for which disputes may arise.

### Applicable Rules of Professional Conduct

#### Rule 1.15 Safekeeping Funds and Property

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

Comment [4] to Rule 1.5 is also pertinent to this opinion.

Division(e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

A lawyer's safekeeping duties under Rule 1.15(d) and (e)

A lawyer is required by Rule 1.15(d) to do the following: (1) *to promptly notify* a client or third person claiming an interest in the funds, upon receiving the funds; 2) *to promptly deliver* the funds which a client or third person is entitled to receive; and 3) *to render a full accounting* when requested by a client or third person. A lawyer is required by Rule 1.15(e) to *hold disputed funds* in a trust account until entitlement to the funds is resolved.

Under Rule 1.15(a) there are three exceptions to the duty to promptly deliver the funds in a lawyer's possession to a client or a third person: 1) the exceptions stated in the rule; 2) the exceptions permitted by law; and 3) the exceptions permitted by agreement with the client or third person, confirmed in writing.

A determinative issue for a lawyer is what constitutes an "interest" that triggers a lawyer's safekeeping duties to a third person.

The rule does not define "interest," but Comment [4] to Rule 1.15 provides insight into the meaning of "interest" and the application of the rule. "[T]hird parties may have *lawful claims* against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a *duty under applicable law* to protect such third party-claims against a wrongful interference by the client. In such cases, when

the third-party claim is *not frivolous under applicable law*, the lawyer must refuse to surrender the property to the client until the claims are resolved." [Emphasis added].

ABA Comment [4] to ABA Rule 1.15 is identical to Ohio's Comment [4] to Rule 1.15. Professors Hazard and Hodes state that use of the phrases "lawful claims" and "duty under applicable law" "suggest that the third party must have a *matured* legal or equitable claim, such as a lien on specific funds, in order to trigger the lawyer's duty to hold the funds apart from *either* claimant, pending resolution of the dispute." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, §19.6 (3d ed. Supp. 2005-2).

This Board's view of the meaning of an "interest" sufficient to trigger safekeeping duties under Ohio's Rule 1.15 is guided by Comment [4]. A *lawful claim* of a third person against *specific funds in a lawyer's custody* that is *not frivolous under applicable law* is an *interest* subject to a lawyer's ethical duty of safekeeping for which a lawyer may have a *duty under applicable law to protect*. In short, a lawful claim of a third person to specific funds in a lawyer's possession is an "interest" for purposes of Rule 1.15.

A third person's lawful claim is an "interest" subject to safekeeping

*Not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15. " [K]nows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.*" Rule 1.0(g): Terminology.

What constitutes a lawful claim is a matter of substantive law. Examples of lawful claims of third persons subject to safekeeping by a lawyer are as follows.

- A lawful claim includes a valid statutory subrogation right as to the specific funds in the lawyer's possession.
- A lawful claim includes a valid judgment lien or other order of a court regarding the specific funds in the lawyer's possession.

A lawyer as an officer of the court is required to comply with court orders. As required by Rule 3.4(c), a lawyer shall not *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists."

- 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.

See *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 633; *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 301, 2005-Ohio-1327.

- A lawful claim includes a letter from a lawyer to a medical provider promising to uphold the client's agreement to pay the medical provider for services from proceeds of a settlement or judgment. These letters are known as letters of protection. These letters in essence promise to honor an assignment made by a client, or as sometimes stated are said to honor a doctor's lien.

See *Solon Family Physicians, Inc. v. Buckles* (1994), 96 Ohio App.3d 460, 462-63. See also, OhioSupCt., Bd Commr's on Grievances & Discipline, CPR Op. 95-12 (1995).

- A lawful claim includes a written agreement between an insured individual and a health-benefits provider, entered into prior to the payment of medical benefits, to reimburse the health benefits provider for any amount recovered through settlement or satisfaction of judgment upon claims arising from a third party's act.

See *Northern Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 192, 2004-Ohio-4886.

- A lawful claim includes a secured claim by a creditor that is specific to the funds in a lawyer's possession. It is not a lawyer's responsibility to pay general unsecured creditors of a client, including judgment creditors who have not attached or garnisheed the funds.

See Comment [4] to Rule 1.15 which provides as an example of a lawful claim, a lien by a creditor on funds recovered in a personal injury action.

This Board's view is that a claim by a creditor must be a secured claim and it must be specific to the funds in the lawyer's possession in order to be subject to a lawyer's safekeeping under Rule 1.15. It is implausible that a lawyer would be required to protect all claims of all creditors of a client. A claim by an unsecured creditor that is not specific to the funds in the lawyer's possession is not a Rule 1.15 "interest" in the funds in the lawyer's possession.

Advice offered by other states as to the application of Rule 1.15

For purposes of understanding how other states approach application of the duty of safekeeping funds of third persons, the views of other states are reviewed.

The Connecticut Bar Association advises there are four exceptions to the principle that a lawyer has a constitutional obligation to deliver property of the client to the client, on demand, despite third-party claims: (a) If the lawyer knows of a valid judgment concerning disposition of the property; (b) If the lawyer knows of a valid statutory or judgment lien against the property; or (c) If the lawyer knows of a letter of protection or similar obligation that is both: (i) directly related to the property held by the lawyer; and (ii) an obligation specifically entered into to aid the lawyer in obtaining the property; (d) The lawyer knows of a written assignment, signed by the client, conveying an interest in the funds or other property to another person or entity. Connecticut Bar Assn., Informal Op. 01-08 (2001) (Revising Informal Opinions 95-20 and 99-6).

The District of Columbia Bar advises that "[i]n general, a 'just claim' that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client." District of Columbia Bar, Op. 293 (Revised) (adopted 1999, revised 2000). The committee notes that problems most commonly arise in the context of disbursement of settlement funds or proceeds of a transaction. Several types of claims that are illustrative of "just claims" that require the lawyer to give notice, make disbursements promptly when there is no dispute, and safeguard funds in the event of a dispute until the dispute is resolved are: 1) an attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer, regardless of whether the attachment or garnishment is related to the matter being handled by the lawyer; 2) a statutory lien that applies to the proceeds of the suit being handled by the lawyer; 3) a court order relating to the specific funds in the lawyer's possession; 4) a contractual agreement made by the client and joined in or ratified by the lawyer to pay certain funds in the possession of the lawyer to a third party, regardless of whether such an agreement arises from the matter being handled by the lawyer. *Id.*

The State Bar of Nevada notes that their rule does not create third party interests in funds, but requires the lawyer to honor the interests that the law recognizes. State Bar of Nevada, Formal Op. 31. The opinion does not list or identify all of the claims that give rise to an "interest" but provides examples: a common law assignment of such funds; an attachment or garnishment upon the specific funds, a statutory attorney's lien, and a court order relating to specific funds. The opinion notes that a medical provider may have an interest when there has been no formal assignment of the funds to the medical provider, such as obligations created by a letter of protection. Other examples provided are medical liens, hospital liens, and subrogation liens. *Id.*

The Utah State Bar renders the following advice in Op. 00-04 as to a lawyer's ethical duties to a third person who claims an interest in the proceeds of a personal injury settlement or award received by the lawyer.

When a lawyer receives funds or property and knows a third person claims an interest in the funds or property, the lawyer must first determine whether the third person has a sufficient interest to trigger the duties stated in Rule 1.15(b). Only a matured legal or equitable claim—such as a valid assignment, a judgment lien, or a statutory lien—constitutes an interest within the meaning of Rule 1.15 so as to trigger duties to third persons under Rule 1.15. If no such interest exists, the lawyer may disburse the funds or property to the client. If such an interest exists, the lawyer must comply with the duties stated in Rule 1.15. Where the client does not have a good-faith basis to dispute the third person's interest, the lawyer must promptly notify the third person, promptly disburse any funds or property to the third person to which that person is entitled, and render a full accounting when requested. If the client has a good-faith basis to dispute the third person's interest, and instructs the lawyer not to disburse the funds or property to the third person, the lawyer must promptly notify the third person that the lawyer has received the funds or property and then must protect the funds or property until the dispute is resolved.

Utah State Bar, Op. 00-04 (2000).

#### Conclusion to Question One

In summary, the Board's advice as to Question One is as follows.

*A lawyer's duty of safekeeping funds in the lawyer's possession extends not only to clients but also to third persons. A lawyer has an ethical duty of safekeeping funds for a third person when the lawyer knows a third person has a lawful claim to funds in the lawyer's possession. Not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15. Examples of lawful claims are provided in this opinion.*

#### Safekeeping duties when a dispute arises

Comment [4] to Rule 1.15 explains a lawyer's duties when a dispute arises regarding a lawful claim of a third person. Although Comment 4 is set forth earlier in this opinion, Comment [4] is set forth again to assist the reader of this opinion.

Division (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty

under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Under Rule 1.15(d) and (e) a lawyer has an ethical duty not to give in to a client's demands for delivery of all of the funds to the client when a lawyer knows of a third person's lawful claim to the funds. This ethical duty respects the legal duties a lawyer may have under applicable law to protect a third person's interest in funds.

Likewise, under Rule 1.15(d) and (e), a lawyer has an ethical duty not to give in to a third person's demands for delivery of funds when the lawyer knows that the client disputes the lawful claim. This ethical duty respects the lawyer's duty of loyalty to a client.

A lawyer's safekeeping duties under Rule 1.15 are summarized in these guidelines. These guidelines arise from Rule 1.15(d) and (e) and Comment [4].

- When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.
- When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.
- When a lawyer is unclear whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.
- When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

#### Resolving disputes

Resolution of a dispute is guided by both Rule 1.15(e) and Comment [4].

A lawyer's duties as to resolution of a dispute require a lawyer to hold disputed funds to which a third party has a lawful claim in a trust account until resolution of the dispute, but a lawyer must disburse promptly the portion of the funds not in dispute.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession.

When a dispute arises as to funds in the lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to arbitrate a dispute between a client and a third person.

If such efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking a court to resolve the dispute.

#### Conclusion to Question Two

In summary, the Board's advice as to Question Two is as follows.

When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.

When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer is unclear as to whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession. But, when a dispute arises as to funds in a lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to arbitrate a dispute between a client and a third person. If efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking a court to resolve the dispute.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
2020-03-15

COURT OF APPEALS  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 01-22258  
)  
FRANK X. GRESLEY and ) Chapter 13  
LETHA A. GRESLEY, )  
) Judge Pat E. Morgenstern-Clarren  
Debtors. )  
) MEMORANDUM OF OPINION

Letha Gresley was treated at Four Points Neck and Back Clinic, Inc. (Four Points) for injuries suffered in a car accident. She did not pay for the services rendered, but instead entered into an assignment agreement with Four Points. A few months later, she and her husband Frank filed this Chapter 13 case. After the debtors reached a tentative settlement of the personal injury claim, they moved for authority to settle the claim and distribute the proceeds in a fashion that would not pay any funds to Four Points. Four Points objected on the ground that a portion of the settlement proceeds (\$4,060.00) belongs to Four Points under the assignment. (Docket 17, 19).

The parties agreed to allow the settlement to be approved and some of the proceeds distributed. The disputed funds are being held in escrow pending resolution of the objection. The parties submitted the issue for decision on stipulated facts and briefs. (Docket 21, 22, 23, 24). For the reasons stated below, Four Points's objection to the motion is sustained.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

## FACTS

The debtors and Four Points stipulated that:

1. On or about February 22, 2001, Letha A. Gresley . . . sustained injuries in an automobile accident.
2. After the automobile accident, [Letha Gresley] sought treatment from Four Points Neck and Back Clinic, Inc., an Ohio professional corporation engaged in the practice of chiropractic medicine . . . Such treatment commenced in or about March 2001, and was completed in or about August 2001. Four Points invoiced Debtor \$4,060.00 for treatment, of which \$310.00 is the subject of dispute between the parties and is being separately negotiated.
3. In consideration for the agreement of Four Points to not require payment for treatment when rendered, [Letha Gresley], on March 23, 2001, executed the agreement captioned "Assignment" attached hereto as Exhibit A. [Letha Gresley] has not paid Four Points for invoiced services.
4. In 2001, as expressly permitted under Paragraph 1 of the Assignment, which states

I now assign, without any right to later revoke, a part of any proceeds from my claim equal to the fees incurred by me to [Four Points] for all treatment and other services rendered by [Four Points]. I am not assigning any legal cause of action in My Claim above, but only prospective proceeds. I also assign to [Four Points] my right to enforce the obligation of any insurance company to pay settlement proceeds for any settlement agreement made by or for me in exchange for my signing such insurance company's release of claim. Prior to settlement or other disposition of My Claim, I understand and permit [Four Points] to pursue payment from any other source but me personally, including medical payments coverage in an automobile liability policy. (first emphasis in original; second emphasis added)(.)

an employee of Four Points billed the Debtors['] auto insurer for "med-pay" for services rendered. The insurer sent a check for \$914.00 to Four Points (the "Geico Payment").

5. Debtors notified Geico that they disagreed with the Geico Payment being made to Four Points. Geico then notified Four Points that Geico had issued a stop payment order on the check Geico sent to Four Points. Geico then issued a new check for \$914.00 to Debtors.
6. Four Points was listed as an unsecured creditor in Debtors' Chapter 13 proceeding.
7. Four Points did not object to the Debtors' Chapter 13 plan.
8. Four Points did not file a proof of claim in the Debtors' Chapter 13 plan.

(Docket 23).

#### THE ISSUE

Is Four Points entitled to be paid from the settlement proceeds?

#### THE POSITIONS OF THE PARTIES

Four Points asserts that it is entitled to be paid from the settlement proceeds based on Letha Gresley's assignment of a portion of the settlement proceeds to it. The debtors argue that Four Points is not entitled to be paid because the assignment: (1) is not valid under Ohio law; (2) is invalid under bankruptcy law; and (3) if valid, was waived.

The validity of the assignment is key because Four Points did not file a claim in the debtors' bankruptcy case. As a result, if Four Points is merely an unsecured creditor it will not be paid under the plan.

## DISCUSSION

Although the parties have not analyzed the matter in this fashion, the critical question is whether the disputed funds are property of the bankruptcy estate (in which case Four Points is not entitled to the money) or whether the funds instead became the property of Four Points at the time of the assignment (in which case Four Points is entitled to the money).

Property of a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). A debtor's unliquidated prepetition personal injury claim is property of the bankruptcy estate. *See Cottrell v. Schilling (In re Cottrell)*, 876 F.2d 540, 542 (6<sup>th</sup> Cir. 1989). When the proceeds of such a claim are received postpetition by a Chapter 13 debtor, the proceeds are also property of the estate. *See for example In re Graham*, 258 B.R. 286, 288 (Bankr. M.D. Fla. 2001). The question here is whether Letha Gresley's prepetition agreement with Four Points changes this result.

### A. The Validity of the Assignment

The debtors argue that the agreement was not an assignment, but was instead only a contract to assign the proceeds in the future. Under their theory, Four Points does not have a property interest in the proceeds. State law controls this determination of property rights unless there is a countervailing federal interest. *See Kitchen v. Boyd (In re Newpower)*, 233 F.3d 922, 928 (6<sup>th</sup> Cir. 2000); *In re Richardson*, 216 B.R. 206, 215 (Bankr. S.D. Ohio 1997) ("Unless some paramount federal law controls the validity of [an] assignment, the validity of the assignment is determined by the law of the state in which the transfer takes place.").

## B. Ohio Law

The parties agree that Ohio provides the relevant state law for these purposes. Under Ohio law:

An assignment is a transfer to another of all or part of one's property in exchange for valuable consideration . . . No particular words are required to create an assignment. Rather, "[a]ny word or transaction which shows an intention on the one side to assign and on the other side to receive, if there is valuable consideration, will operate [to create an assignment]."

*Hsu v. Parker*, 688 N.E.2d 1099, 1101, 116 Ohio App.3d 629, 632 (Ct. App. 1996) (quoting *Grogan Chrysler-Plymouth, Inc. v. Gottfried*, 392 N.E.2d 1283, 1286, 59 Ohio App.2d 91, 96 (Ct. App. 1978)) (citations omitted). In this case, the agreement unequivocally states that Letha Gresley intended to—and did—assign a part of the proceeds of her personal injury claim to Four Points in exchange for the medical services performed. The debtors' argument to the contrary flies in the face of the simple, direct language of the agreement.

Undeterred, the debtors next argue that a partial assignment of this type did not give Four Points a present property interest in the personal injury claim proceeds under Ohio law. In support, they rely on *Christmas's Adm's v. Griswold*, 8 Ohio St. 558 (Ohio 1858). 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. Ohio law provides that a partial assignment conveys a property right in the assigned property at the time the assignment is made. See *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Volkert*,

50 N.E. 924, 58 Ohio St. 362 (Ohio 1898) (Syllabus ¶ 2) ("Such assignment will convey to the assignee a property right in the judgment."); *Hsu v. Parker*, 688 N.E.2d at 1102 ("Based on our ruling that a valid assignment had occurred, the client was not entitled to receive the full amount of the settlement."). See also *In re Petry*, 66 B.R. 61 (Bankr. N.D. Ohio 1986) (discussing Ohio law on this issue). Consequently, Four Points acquired a property interest in the personal injury claim proceeds at the time Letha Gresley entered into the assignment. *Id.*

Four Points's interest in the proceeds may be enforced: (1) in a suit at law with the consent of the debtor on the assigned debt; or (2) in equity as an equitable assignment. See *Volkert*, 50 N.E. at Syllabus ¶ 2. Ohio law also provides that a constructive trust will be imposed to protect an assignee to the extent it is necessary to prevent unjust enrichment:

If . . . the assignor does collect the claim, he is trustee of the proceeds for the assignee, because of a constructive trust which then arose to prevent unjust enrichment rather than because of any trust relationship created by the assignment itself.

6 Ohio Jur.3d , Assignments § 41 (1978). Under state law, therefore, a constructive trust exists to insure that Four Points is paid from the settlement proceeds and to prevent unjust enrichment.

### C. The Bankruptcy Code

The debtors argue alternatively that if the assignment is valid under Ohio law, the equitable property interest which Four Points acquired cannot be recognized in bankruptcy. This argument, which is based on *XL/Datacomp, Inc. v. Wilson (In re Omega Group, Inc.)*, 16 F.3d 1443 (6<sup>th</sup> Cir. 1994), is not persuasive.

Under Bankruptcy Code § 541(d), a debtor's estate does not include an equitable interest in property which is not the debtor's.<sup>1</sup> This provision would appear to exclude Four Points's interest in the settlement proceeds from the bankruptcy estate. The debtors contend, however, that the *Omegas Group* decision requires a different result. In *Omegas Group*, the Sixth Circuit stated that "a creditor's claim of entitlement to a constructive trust is not an 'equitable interest' in the debtor's estate existing prepetition, excluded from the estate under § 541(d)." *Id.* at 1451. The decision has been cited for the proposition that "a bankruptcy court cannot impose a constructive trust upon the debtor's assets unless a state court has determined . . . that one exists prior to the filing of the bankruptcy case." *In re Richardson*, 216 B.R. 206, 218 (Bankr. S.D. Ohio 1997). At first look, these decisions support the debtors' contention that this Court may not impose a constructive trust on the settlement proceeds to benefit Four Points.

The Sixth Circuit, however, later examined and explained the *Omegas Group* decision in *Poss v. Morris* (*In re Morris*), 260 F.3d 654 (6<sup>th</sup> Cir. 2001), a case not cited by either party. The *Morris* decision makes it clear that while a mere claim of entitlement to the equitable remedy of a constructive trust does not place property outside the bankruptcy estate, a right to property based on a constructive trust that arises by operation of law before the bankruptcy filing is so excluded:

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<sup>1</sup> Section 541(d) provides that:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) . . . of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

Essentially, Ohio courts will use the remedy of constructive trust "where there is some ground . . . upon which equity will grant relief." In these situations, Ohio law creates an equitable duty to convey property. Accordingly, every wrongful acquisition or holding of property will not give rise to a constructive trust. For example, breach of contract or failure to pay a debt without more cannot give rise to a constructive trust. Yet, a wrongful acquisition of or retention of property cognizable in equity will. Where an equitable duty to convey property exists, it is not necessary for a court to impress a constructive trust by decree. Rather, in Ohio it attaches by operation of law.

*Morris*, 260 F.3d at 668 (internal citations omitted). While the *Morris* decision dealt with the equitable duty to convey real property under Ohio law, the same logic applies to impose a similar duty with respect to the disputed settlement proceeds in this case.

In sum, Four Points obtained a property interest in the settlement proceeds under Ohio law before the debtors filed their bankruptcy case. Additionally, as a result of the assignment,

a trust [was] created in favor of [Four Points] on the fund, and [it] constitute[s] an equitable lien upon it. By other of the authorities such transfer is said to create an interest in the fund in the nature of an equitable property. By others it is denominated an equitable assignment. But whatever term is applied to it by way of description, the result reached is to give to [Four Points] a property right in the thing assigned, – a right which is cognizable and enforceable in a court of equity.

*Volkert*, 50 N.E. at 926 (citations omitted). Letha Gresley's personal injury claim proceeds were subject to a constructive trust for the benefit of Four Points before the debtors filed this Chapter 13 case. Consequently, the assigned settlement proceeds did not become property of the bankruptcy estate. See 11 U.S.C. § 541(d).

#### D. Waiver

The debtors' final alternative argument is that Four Points waived its rights under the assignment when it delivered the Geico Payment to Letha Gresley. Four Points, on the other hand, argues that it did not waive its rights but simply accommodated Letha Gresley. "Waiver as applied to contracts is a voluntary relinquishment of a known right." *White Co. v. Canton Transp. Co.*, 2 N.E.2d 501, 131 Ohio St. 190 (Ohio 1936) (Syllabus ¶ 1). The party asserting a waiver must prove it. *Id.* (Syllabus ¶ 4).

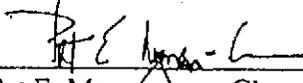
The parties' stipulations simply state that Four Points received a check for \$914.00 from Geico and that Geico stopped payment on the check when the debtors complained. (Stipulation ¶¶ 4 and 5). This stipulation is insufficient to prove that Four Points knowingly relinquished its assignment rights. Certainly it does not support the debtors' argument that "[after] Four Points was notified by [debtors'] counsel that [it] had no right to proceed against any funds without the consent of counsel, Creditor returned those funds to the Debtors." (Debtors' memorandum in opposition at page 6). The debtors failed to establish that Four Points waived its assignment rights.

#### CONCLUSION

For the reasons stated, the objection of Four Points Neck and Back Clinic, Inc. to the debtors' motion for authority to settle personal injury claim is sustained. Four Points is entitled

to be paid from the settlement proceeds.<sup>2</sup> A separate Order will be entered in accordance with this Memorandum of Opinion.

Date: 9 June 2003

  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Burl Robinette, Esq.  
Peter Igel, Esq.  
John Lowry, Esq.  
Craig Shopneck, Trustee

By: Joyce L. Gordon, Secretary

Date: 06/9/03

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<sup>2</sup> The amount will be at least \$3,750.00. See Stipulation ¶2 concerning a dispute over the remaining \$310.00.