

IN THE SUPREME COURT OF OHIO

WEST BROAD CHIROPRACTIC,
Appellant,
vs.
AMERICAN FAMILY INSURANCE,
Appellee.

Supreme Court Case No. 08-1396
Consolidated with Case No. 08-1489
On Appeal From The Franklin County
Court Of Appeals, Tenth Appellate District
Court Of Appeals Case No. 07-AP-721

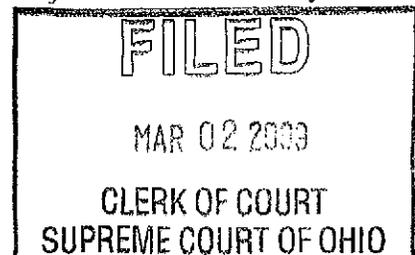
**MERIT BRIEF OF AMICUS CURIAE,
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS,
ON BEHALF OF APPELLEE AMERICAN FAMILY INSURANCE COMPANY**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization of over 600 members including attorneys, supervisory or managerial employees of insurance companies and corporate executives who devote a substantial portion of their time to the defense of civil damage suits and the management of claims brought against individuals, corporations, and governmental entities. OACTA’s mission is to provide a forum for its members to work cooperatively on common problems, and to propose and develop solutions that promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability, and consistency in Ohio’s case law and jurisprudence.

This case presents this Court with an opportunity to clarify the applicability of existing legal principles to a medical provider’s attempt to enforce a purported assignment of settlement proceeds. In particular, this appeal presents the issue of whether an injured party’s purported assignment of potential settlement proceeds is enforceable against a third-party insurer or indemnitor of the tortfeasor – with whom neither the injured party nor the medical provider has any contractual or other legally cognizable relationship. It is the position of OACTA that no such assignment can be enforceable by the medical provider directly against the tortfeasor’s insurer.

ARGUMENT

Certified Conflict Question Number One:

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 assignment, after the insurer had settled with the assignor and distributed settlement proceeds in disregard of that written assignment.

Appellant's 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.

The first certified conflict question should be answered in the affirmative, without qualification or reservation. At the time of the assignment, the injured party has no direct right of action against the tortfeasor's insurer, and *a fortiori* cannot assign any right that purports to be directly enforceable against the insurer. Until the tortfeasor's liability is established, the injured party has no right to a tortfeasor's liability insurance proceeds, and the tortfeasor's insurer has no indemnification obligation to the injured party. If and when an injured party does obtain a judgment against the insured tortfeasor, R.C. 3929.06 establishes the unique method by which the injured party can seek to enforce the judgment against the insurer. The direct right of action created by that statute is limited to the circumstances described at R.C. 3929.06. To hold otherwise is to establish an improper guaranty or suretyship relation between the insurer and the medical provider without the insurer's consent. In addition, permitting direct actions against insurers would substantially reduce the tortfeasor and/or insurer's ability to compromise and settle claims, and create uncertainty about the sufficiency of notice to the insurer needed to enforce such assignments.

A. At the Time of Assignment, The Injured Party Has No Direct Right of Action Against a Tortfeasor's Insurer

At the time a purported assignment is made to a medical provider in exchange for services, the injured party does not have a “right to settlement proceeds” separate from the claim against the tortfeasor that caused the injury. The tortfeasor “is the one who is alleged to have caused the injury, and if the facts are found as alleged, he will be primarily liable.” *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193, 197. Although payment of the “settlement proceeds” may ultimately be the obligation of the tortfeasor’s insurer, Ohio law is clear that the injured party does not have any direct right of action against an insurer or indemnitor of the tortfeasor. Likewise, the insurer has no indemnification obligation to the injured party unless and until liability of the tortfeasor has been established. The insurer’s obligations are triggered only by a finding of liability.

Until the injured party obtains a judgment against the tortfeasor, the injured party is a stranger to any insurance or indemnity agreement the tortfeasor may have. *Schneider v. Eady*, 9 Dist. App. Nos. 07CA009273, 07CA009305, 2007-Ohio-6747, ¶¶ 8-9; *Achor by Achor v. Clinton County Bd. of Mental Retardation & Developmental Disabilities*, 10 Dist. App. No. 86-AP-60 (June 5, 1986), 1986 WL 6332, at *1-2; *Chitlik*, 34 Ohio App.2d at 197. The injured party is not a third-party beneficiary of that insurance agreement, and does not stand in any special relation to the agreement that would give the injured party a direct right of action against the insurer. *Secrest Trucking, Inc. v. Szerzinski*, 5 Dist. App. No. CA-7298 (Jan. 25, 1988), 1988 WL 17839, at *1-2; *D.H. Overmyer Telecasting Co., Inc. v. American Home Assur. Co.* (1986), 29 Ohio App. 3d 31, 32-33; *Chitlik*, 34 Ohio App.2d at 197.

As such, the injured party may have a direct right of action against the tortfeasor. However, the injured party does not have a direct right of action against the tortfeasor’s insurer or indemnitor,

and therefore has no right to future “settlement proceeds” from the insurer to assign to a medical provider. *Schneider*, 2007-Ohio-6747, ¶¶ 8-9; *Achor by Achor*, 1986 WL 6332, at *1-2; *Secrest*, 1988 WL 17839, at *1-2; *D.H. Overmyer*, 29 Ohio App. 3d at 32-33; *Chitlik*, 34 Ohio App.2d at 197.

B. R.C. 3929.06 Limits Direct Actions Against A Tortfeasor to Judgment Creditors of the Insured

R.C. 3929.06 provides a unique, statutory method by which an injured party may seek to collect a judgment obtained against a tortfeasor from the tortfeasor’s insurer. That statute provides:

(A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff *** 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. R.C. 3929.06.

The terms of that statute expressly limit the circumstances under which an injured party can bring an action directly against the tortfeasor’s insurer to those in which the injured party has obtained a judgment against the tortfeasor:

(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. R.C. 3929.06(C).

Ohio courts have consistently acknowledged the limitations R.C. 3929.06 places on direct rights of action by an injured party against a tortfeasor's insurer. *See, e.g., Schneider*, 2007-Ohio-6747, ¶¶ 8-9; *Achor by Achor*, 1986 WL 6332, at *1-2; *Secrest*, 1988 WL 17839, at *1-2; *D.H. Overmyer*, 29 Ohio App. 3d at 32-33; *Chitlik*, 34 Ohio App.2d at 197.

The Fifth District Court of Appeals considered the effect of R.C. 3929.06 on an assignee-chiropractor's claim for settlement proceeds similar to the instant case in *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, 5 Dist. App. No. 2003CA00148, 2003-Ohio-5021. In *Knop*, the Fifth District observed: "[A]t the time he assigned the assignment documents, Raber had not yet pursued legal action against the alleged tortfeasor, appellee's insured, meaning he had no right to file an action against appellee at that time. R.C. 3920.06(B)." *Knop*, ¶ 19. The Court went on to hold:

"In light of the language of R.C. 3929.06(B), supra, we hold that the assignment in the case sub judice, while not necessarily forbidden under *Thatcher* and its progeny, was not actionable against Appellee State Farm based on the assignment's creation prior to the existence of a civil action by Raber against Appellee's insured. The trial court therefore did not err in granting summary judgment in favor of Appellee." *Knop*, ¶ 20.

This Court should affirm *Knop's* limitations of R.C. 3929.06 on direct actions against a tortfeasor's insurer in the context of a purported assignment of settlement proceeds. The cases on which Appellant relies have obliterated this distinction and, as explained below, essentially rendered the tortfeasor's insurer an unwitting guarantor or surety of the tortfeasor. This approach both violates existing surety law, and adversely impacts the ability of insurers to compromise and settle claims.

C. A Contrary Result Renders the Tortfeasor's Insurer an Unwitting Guarantor of the Tortfeasor

Appellant cites a series of cases that have held, contrary to all the authorities cited above, that an injured party's assignment of potential settlement proceeds to a medical provider can be enforced

directly against the tortfeasor's insurer. *See Mt. Lookout Chiropractic Center v. Motley* (Dec. 1, 1999), 1 Dist. App. No. C-980987, 1999 WL 1488971; *Akron Square Chiropractic v. Creps*, 9 Dist. App. No. 21710, 2004-Ohio-1988; *Roselawn Chiropractic Center v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-4327; *Gloekler v. Allstate Ins. Co.*, 11 Dist. App. No. 2007-A-0040, 2007-Ohio-6173; *Cartwright Chiropractic v. Allstate Ins. Co.*, 12 Dist. App. No. CA2007-06-143, 2008-Ohio-2623. However, the outcome of these cases rests on a fundamental misapplication of Uniform Commercial Code provisions and the law of suretyship.

In each of the above-cited cases, the Court relied on *First Bank of Marietta v. Roslovic & Partners, Inc.*, 86 Ohio St.3d 116, 1999-Ohio-89 for the proposition that the tortfeasor's insurer was obligated to pay a treating chiropractor once the insurer had received proper notice of the assignment. *See Mt. Lookout*, 999 WL 1488971 at *1; *Roselawn*, 160 Ohio App.3d at 299, 2005-Ohio-4327, ¶ 7; *Gloekler*, 2007-Ohio-6173, ¶ 13; *Cartwright*, 2008-Ohio-2623, ¶ 13. In so relying on *First Bank*, these courts wrongly applied Uniform Commercial Code ("UCC") provisions applicable only to secured transactions. In *First Bank*, the Ohio Supreme Court considered whether an assignee of accounts receivable could enforce a claim against an account debtor for payments made to the account assignor, where the account debtor had notice of the assignment required by R.C. 1309.37(C). The version of R.C. 1309.37(C) in effect at that time was Ohio's codification of the UCC governing secured transactions, which by its own terms applied to commercial sales of accounts and chattel paper. *See* former R.C. 1309.07(C). While these UCC provisions may "preserve[] the goals of commercial reliability and stability" in the world of UCC secured transactions, these same laudable goals do not vitiate the requirements of R.C. 3929.06 and the sound policies underlying that statute. *See Cartwright*, 2008-Ohio-2623, ¶ 13.

On the contrary, the clear effect of decisions such as *Mt. Lookout*, *Roselawn*, *Gloekler*, *Creps*, and is to render the tortfeasor's insurer a surety or guarantor for the insured tortfeasor. This is contrary to Ohio law, however, which requires that an agreement for suretyship can only arise by express consent of the parties. *Gholson v. Savin* (1941), 137 Ohio St. 551, 555-556. There is no dispute that in all of these cases the tortfeasor's insurer did not consent to pay the assignee-chiropractor any amounts it might ultimately be required to pay the assignor-injured party from the tortfeasor's insurance proceeds. On the contrary, the insurer may well dispute the medical necessity of such treatment; may challenge whether the injury underlying such treatment was proximately caused by the tortfeasor; and may dispute the reasonable value of the services claimed by the provider. Allowing the provider to directly pursue the insurer while at the same time depriving the insurer of defenses against the provider's claim has the same effect as making the insurer an unwilling guarantor of payment to the provider, and is patently unreasonable. R.C. 3929.06 protects against this unreasonable result, by precluding an injured party (or its assignee) from pursuing a claim directly against the insurer unless and until the injured party has reduced that claim to judgment following a trial in which the tortfeasor can raise its defenses.

One of the cases cited by Appellant, *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 633, demonstrates how existing surety law could support a chiropractor's right to collect for services rendered without running afoul of R.C. 3929.06. In *Hsu*, the injured party's attorney executed a "Security Agreement for Medical Services" with the injured party's medical provider. The security agreement authorized the attorney to withhold sufficient funds from any settlement, judgment or verdict and pay the same to the provider as reimbursement for the provider's services. The Court held that this constituted a valid security interest and was enforceable against the injured party's attorney. Unlike a tortfeasor's insurer, the attorney in *Hsu* was a signatory to the agreement and

consented to the obligation to repay the medical provider. *Hsu* provides a blueprint for how reimbursement agreements for medical providers can operate with repayment made out of settlement proceeds, without rendering a tortfeasor's insurer an unwitting surety or violating R.C. 3929.06. Such agreements adequately protect the interests of all parties, and courts have found them enforceable as valid assignments and suretyship agreements. *Hsu*, 116 Ohio App.3d 632-633; *Shiepis Clinic of Chiropractic, Inc. v. Stevenson*, 5 Dist. App. No. 1995CA00343 (July 8, 1996), 1996 WL 488781.

There are other avenues open to medical providers who want to ensure that they are reimbursed for services provided to a patient injured by a tortfeasor. The provider can simply require the patient (in addition to or instead of the patient's attorney) to reimburse the provider out of any judgment or settlement proceeds by a simple contractual device. The provider also has the option of suing the tortfeasor in subrogation to the extent of services provided. Since a subrogation claim expressly recognizes that the subrogee "steps into the shoes" of the subrogor to the extent of the subrogated interest, subrogation avoids the problem of divorcing the right to proceeds from the injured party's cause of action and preserves the tortfeasor's defenses to the assignee's claims.

D. Permitting Enforcement Against a Tortfeasor's Insurer Will Adversely Affect the Ability to Compromise and Settle Claims.

If an injured party is permitted to assign a direct cause of action that an assignee can directly enforce against a tortfeasor's insurer, numerous unintended consequences will complicate the ability to compromise and settle claims. The first such problem is that both the tortfeasor and insurer will lose the ability to compromise the claim in recognition of liability defenses, evidentiary problems, disputes over value of services, or other factors which may reduce the overall value of the claim. Since the assignee medical provider asserts a vested right to a fixed amount of settlement proceeds

without regard to the overall value of the injured party's claim, the provider has no incentive to negotiate or compromise the claimed value of his service. The insurer, however, must take into account the entirety of the claim in determining an amount to offer in settlement. The factors considered by the insurer include defenses to liability (including the injured party's contributory negligence), the preexisting nature of any injuries, the value of each medical service rendered, and evidentiary issues – all of which may reduce the total value of the claim. The tortfeasor and insurer will lose the ability to negotiate and compromise the claim based on these factors to the extent a medical provider has an assigned right to a fixed amount of proceeds that is directly enforceable against the insurer as soon as the insurer commits to offering a settlement. Such a distorted scheme could give the medical provider a windfall interest in the injured party's claim, to the extent valid defenses over medical necessity or value of the services exist but cannot be raised against the assignee. In some situations, the assignee's first right to proceeds could "swallow up" the entirety of the available settlement proceeds – providing further disincentives for the injured party to settle.

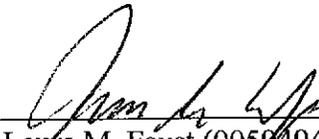
A further complication that would arise from direct enforcement against insurers is the issue of the insurer's sufficiency of notice of the assignment. Since the tortfeasor's insurer is a stranger to both the injured party and the provider (as well as any assignments they may make), the insurer has no reliable way of ensuring that it timely discovers any assignments that may have been made. A single injured party may execute multiple such assignments before even knowing the identity of the tortfeasor's insurer. Even if the insurer is later identified, the assignment could be made and forwarded to the insurer before the insurer has received a formal claim and set up a claim file for the loss. Additional litigation over what constituted proper notice to the insurer would surely be spawned, and insurers would be reluctant to settle any claims while the specter of additional liability for unknown assignments exists. Once again, the problem of divorcing the right to proceeds from

the claim giving rise to those proceeds would create unintended practical consequences that adversely impact the ability of all parties to evaluate, compromise, and settle claims.

CONCLUSION

Existing Ohio law, public policy, and the practicalities of compromise and settlement overwhelmingly favor precluding an assignee-medical provider from seeking to directly enforce a purported assignment of a right to future settlement proceeds from a tortfeasor's liability insurer. For all the foregoing and authorities, OACTA respectfully urges this Court to affirm the decision of the Tenth District Court of Appeals on this ground.

Respectfully submitted,



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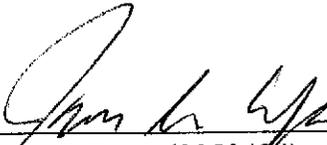
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