

IN THE SUPREME COURT OF OHIO

West Broad Chiropractic, :
 :
 Appellant, :
 :
 vs. : Case No. 2008-1396/2008-1489
 : (Consolidated)
 :
 : On Appeal from the Franklin County
 American Family Insurance, : Court of Appeals, Tenth Appellate
 : District, Case No. 07-AP-721
 :
 Appellee. :

MERIT BRIEF OF APPELLEE AMERICAN FAMILY INSURANCE

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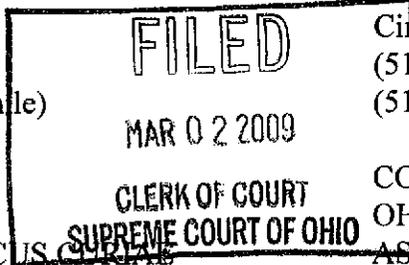
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I. STATEMENT OF FACTS

Appellee accepts Appellant's Statement of Facts.

II. ARGUMENT

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?

Appellee's Proposition of Law No. 1: 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 may not assign a portion of the conditional, future settlement proceeds to another under Ohio law.

A. The Assignment is invalid under Ohio law.

A cause of action for personal injury never has been assignable under Ohio common law. Core Funding Group, LLC v. McDonald 2006-Ohio-1625 (Lucas Cty.) appeal dismissed as improvidently accepted 113 Ohio St.3d 1254 (2007). This common law rule was reaffirmed recently in this Court's decision in Rancman v. Interim Settlement Funding Corp., 99 Ohio St.3d 121 2003-Ohio-2721.

Recognizing the common law prohibition against the assignment of personal injury claims, Appellant West Broad Chiropractic claims its "assignment" conveys only the "proceeds" of the personal injury claim, not "the personal injury claim itself." Appellants' Merit Brief, p. 4. The Supreme Court of Indiana has noted this is "a distinction without a difference." Midtown Chiropractic v. Illinois Farmers Ins. Co. 847 N.E.2d 942, 946 (2006), quoting Karp v. Speizer, 132 Ariz. 599, 601, 647 P.2d 1197, 1199 (Ariz. Ct. App. 1982). The Indiana Supreme Court noted it would not "allow clients to sell off their claims for pursuit by others." 847 N.E.2d 942, 945. See also Town & Country Bank v. Country Mut. Ins., 121 Ill. App.3d 216 (1989); Harvey v. Clemen 65

Wash. 2d 853, 858, 400 P.2d 87 (1965); Quality Chiropractic, PC v. Farmers Ins. Co. of Arizona, 132 N.M. 518, 151 P.3d 1172 (Ct. App. 2002). Obviously, the only value of personal injury claim is its ultimate conversion into settlement proceeds or a judgment. To suggest the assignment of “proceeds” is different from the assignment of the personal injury claim itself is to indulge in a fiction.

Appellants cite this court to a number of cases which uphold chiropractic assignments. See Hsu v. Parker (1996), 116 Ohio App.3d 629; Mt. Lookout Chiropractic Center v. Motley (Dec. 1, 1999), App. No. C-980987, 1999 WL 148897; 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; Akron Square Chiropractic v. Creps No. 21710, 2004-Ohio-1988; Roselawn Chiropractic Center v. Allstate Ins. Co., 160 Ohio App.3d 297, 2005-Ohio-4327, 827 N.E.2d 331; Gloekler v. Allstate Ins. Co. App. No. 2007-A-0040, 2007-Ohio-6173; and Cartwright Chiropractic v. Allstate Ins. Co., App. No. CA2007-06-143, 2008-Ohio-2623. None of the cases cited, however, directly address the issue raised by the Second Issue Presented for Conflict, namely whether a purported assignment of personal injury “proceeds” violates the common law prohibition against the assignment of personal injury claims. More importantly, none of the cases cited discuss the issue of when money to be paid in settlement of personal injury cases becomes “proceeds.”

The issue presented herein was addressed by this Court in Pennsylvania v. Thatcher (1908), 78 Ohio St.175. In that case, Thatcher was a tort victim’s personal injury lawyer. In return for his services, Thatcher received an assignment of one-third of the proceeds from the lawsuit.

When the client settled with the tortfeasor, Thatcher agreed to accept partial payment from the client and to pursue the balance against the tortfeasor. The Supreme Court noted that even if one assumed that the alleged assignment “does not interfere with the right of the assignor to compromise with the tortfeasor” and further, that it constituted an “equitable assignment” it was not enforceable at law. 78 Ohio St. at 188.

Even more significantly, however, the Ohio Supreme Court went on to quote from the New Jersey Equity Court to the effect that even in equity, such assignments could not be enforced against the tortfeasor:

“Nor will such assignment fall within the reason of the doctrine respecting equitable assignments of choses in action under the circumstances disclosed in this bill. Such assignments admittedly operate only where some fund or property comes into existence arising out of a previous possibility. He who holds such a fund may then be liable to account to the assignee thereof. Where a composition is made between the tortfeasor and the person wronged, on the basis of a payment for a release, the fund does not come into existence until the payments and the release are simultaneously exchanged. Then the fund thus created is in the hands of the relator, and the assignee may follow it there; but it never existed in the hands of the releases.” Welder v. Jersey City, Hoboken & Paterson St. Ry. Co., 66 N.J. Eq., 11, 18-19.

If this reasoning is entirely sound, it would seem to result inevitably that under such an agreement as this the assignee could not maintain an action against the tortfeasor, but must work out his remedy through the assignor; and so it was held in that case, which was upon a demurrer to a bill in equity against the tortfeasor only

78 Ohio St. at 191-192 (Emphasis added). Thus, Thatcher stands for the proposition that, even if one assumes a claim such as Ms. Norregard’s legally could be assigned, an assignment such as advanced by Appellant cannot be enforced against the tortfeasor in either law or equity because the tortfeasor never possessed the settlement “proceeds.” Indeed, the very definition of “proceeds” underscores this fact. “Proceeds” are defined as “the net amount received (as for a check or insurance settlement) . . .” Merriam-Webster Online Dictionary (2009). Until the money is released

by the tortfeasor, it is not “proceeds.” It becomes “proceeds” only upon receipt by the tort victim. See O. Jur.3d Assignments, Section 6 (1978). See generally, Andrea G. Nadel, Annotation, Assignability of Proceeds of Claim for Personal Injury or Death, 33 A.L.R. 4th 82 (1984 and 2006 Supplement). The chiropractor can pursue the funds held by his patient, but has no claim against the tortfeasor.

This was the holding of the Eighth District Court of Appeals in Meros v. Rorapaugh, 8th Dist. No. 77611 (Nov. 22, 2000). In Meros, the attorney for tort victims filed suit against Grange Mutual Insurance Company seeking to recover legal fees from a judgment paid by Grange to Meros’ clients. In upholding the dismissal of Meros’ claims, the Court of Appeals made the following observations:

It is not contested that Meros, by virtue of his having rendered professional legal services pursuant to a contingency fee contract with the Youssefs in the Youssef/Grange matter, enjoyed an equitable lien on the funds resulting from the Youssef/Grange judgment for the payment of those fees, and could file an action to enforce that lien. See Mancino v City of Lakewood (Cuyahoga 1987), 36 Ohio App.3d 219.

The problem with Meros’ approach to enforcing his equitable lien is that his remedy is through the client (the Youssefs) and not through parties releasing funds to the client (Grange, Powell, Rorapaugh, and Buckingham, Doolittle & Burroughs). See Pennsylvania Co. v. Thatcher (1908), 78 Ohio St. 175. By issuing the judgment amount directly to the Youssefs in the Youssef/Grange action, and not including Meros or Meros LPA as a payee on the check representing the judgment amount, the defendants committed no wrong against Meros, individually, or Meros LPA. Id. Absent a valid claim against these defendants, an evidentiary hearing on the motion for relief from judgment was unwarranted.

Id. at p. 14.

Appellant’s citation to the Board of Commissioners or Grievances and Discipline’s Opinion 2007-7 not only does not support Appellant’s position, but lends credence to the arguments advanced by American Family. It is telling that the Board of Commissioners’ opinion plainly is directed not

to attorneys for tortfeasors or their insurance companies, but to only to the attorneys for tort victims or other ultimate recipients of settlement monies. See Comment 4 to Ohio Rule of Professional Conduct 1.15: “[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 received in a personal injury action.” (Emphasis added). Thus, the Board of Commissioners recognizes that settlement monies received by a tort victim or her lawyer may be subject to assignment, but nothing in the opinion purports to place any obligation on the part of the tortfeasor’s attorney to “protect” the creditors of the tort victim.

B. Public Policy Does Not Support the Assignment.

Moreover, Ohio’s long-standing public policy dictates against the enforcement of Assignments such as advanced by West Broad Chiropractic. In Davy v. Fid. & Casualty Ins. Co. (1908), 78 Ohio St. 256, 85 N.E. 504 this Court noted “that the law of Ohio will tolerate no lien in or out of the [legal] profession, as a general rule, which will prevent litigants from compromising, or setting their controversies, or which, in its tendencies, encourages, promotes or extends litigation.” Id. at p.268-269. “Assignments” such as advanced by West Broad Chiropractic will serve to encourage litigation, discourage settlements and otherwise place increased burdens on tortfeasors’ ability to compromise personal injury claims.

One of the issues frequently raised by tortfeasors in personal injury cases is the reasonableness and necessity of medical (especially chiropractic) treatment. It is no secret that jurors routinely discount medical bills (especially chiropractic bills) in personal injury cases. If tortfeasors (and their liability insurance companies) are forced to pay the full amount of the chiropractic bills directly to the chiropractor when attempting to settle claims, fewer claims will be settled. Presently,

chiropractors (and other health care providers) will consider discounting their bills in order to facilitate settlement, knowing their bills may be discounted by the jury if the case goes to trial. If the “assignment” of proceeds is enforced, however, chiropractors will be less inclined to discount their bills as the assignment will operate as a “guarantee” of payment in full regardless of the jury’s determination that treatment is unreasonable or unnecessary. This will tend to force more victims and tortfeasors to engage in litigation to attempt to prove and/or disprove the reasonableness and necessity of such charges. Ultimately, it allows the interests of a non-party to influence resolution of the dispute. See Rancman, supra, 2003-Ohio-2721, paragraph 19.

Permitting the assignment of personal injury “proceeds” will have a disproportionate impact on small claims and those where liability is questionable. With respect to relatively small claims, enforcement of chiropractic assignments could well result in a restriction of patients’ access to the courts. In Yorgan v. Durkin 2006-WI-60, 715 N.W.3d 160 the Supreme Court of Wisconsin noted such assignments may “deter attorneys from accepting personal injury cases and negatively impact injured parties’ access to courts. This would be particularly true, as here, when it appears that a claim is relatively small” Id. at paragraph 31. If a case is worth only a few thousand dollars, a \$4,000 chiropractor assignment may leave little incentive for a lawyer to take the case. As the Wisconsin Supreme Court noted, “we must bear in mind that it is the willingness of attorneys to take these types of cases that helps ensure compensation not only for patients who are tort victims, but also for health care providers who are their creditors.” Id.

In cases where liability is questionable, enforcement of chiropractor assignments will act as a disincentive to settle. Why would a putative potential victim accept a nuisance-value settlement offer if it all must be paid to the chiropractor? In this scenario, the putative victim has no incentive

to settle and will be more inclined to “roll the dice” with a jury trial than to accept nothing by way of settlement.

Assignments are enforceable only if they do not increase the burden on the obligor. Restatement (Second) of Contracts, section 317(2)(a); 6 Am. Jur. 2d Assignments, Section 17 (1999). Chiropractor assignments of personal injury “proceeds” increase the burden on the tortfeasor. Not only do such assignments add unnecessary complications to the settlement of relatively straightforward cases, Quality Chiropractic, *supra* 51 P.2d at 1180-1181, paragraph 25, they will force tortfeasors to join the holders of such assignments to pending lawsuits as the real parties in interest/indispensable parties. Again, this unnecessarily complicates matters for the tortfeasor. 51 P.2d at 1180-1181, paragraph 25. Also, one should consider those cases in which the tort victim has seen numerous doctors and other health care providers. Requiring tortfeasors to deal with all of these providers unquestionably would hinder settlement efforts and would needlessly complicate the settlement process. Appellant argues such assignments will “not expose the tortfeasor or her insurer to any significant risk . . . Here, American had no risk. American simply had to add West Broad as a co-payee on the check it issued” Appellant’s Merit Brief, p. 13. Appellant ignores the fact that the assignment language utilized by West Broad purports to require the tortfeasor or her insurer “to do any and all of the following . . . 2. Provide a separate draft directly paying West Broad Chiropractic. . . 4. Any other action deemed necessary and appropriate by West Broad Chiropractic” Supplement, p. 7. Moreover, the amount of West Broad’s interest in the “proceeds” is not set forth in the assignment, leaving it to the tortfeasor to contact West Broad to determine the amount of its claimed interest. It defies logic and common sense for Appellant to deny that the “assignment” at issue increases the tortfeasor’s burdens and risks. There simply is no reason

to abrogate Ohio's common law rule prohibiting the assignment of personal injury claims in order to provide additional protection to chiropractors who are perfectly capable of protecting their interests by pursuing the patient who has failed to pay them as agreed. Allowing chiropractors to speculate on the outcome of tort actions not even filed and the merits of which are unknown to the chiropractor at the time of assignment does nothing to advance the public policy of this state.

Moreover, if the assignment of personal injury "proceeds" is permitted, there will be no "discernable stopping point." Yorgan, supra at paragraph 32, 33. In Yorgan, the Wisconsin Supreme Court took notice of an instance in which the tort victim assigned a portion of anticipated personal injury proceeds to his landlord to avoid eviction. It takes little imagination to foresee the proliferation of such assignments to nearly every profession, from the local car dealer who provides a handicap-accessible vehicle to the hot tub dealer who provides a therapeutic whirlpool. Forcing a tortfeasor to negotiate and/or protect the interests of the tort victims' creditors unquestionably increases the tortfeasor's burden and complicates settlement.

Appellant argues that permitting chiropractic assignments will "promote timely treatment" and give "some assurance to medical care providers that they will eventually be compensated." Appellant's Merit Brief, pp. 10-11. Neither of these proposed justifications are sufficient to overcome the public policy against such assignments, however. For instance, there simply is no evidence that tort victims are going untreated due to the lack of enforceable assignments of settlement proceeds, and common experience demonstrates the contrary. Nearly everyone involved in an automobile accident has experienced the phenomenon of receiving, unsolicited, offers for treatment from medical providers, especially chiropractors.

In addition, medical providers routinely accept “letters of protection” from counsel for tort victims in return for treating those who are uninsured or underinsured.

With respect to the claim that assignments of personal injury proceeds will give assurance of payment, the Court in Quality Chiropractic, *supra*, noted that since medical providers are permitted to execute against monies received by patients in settlement, “[w]hy then would we continue an exception to the general rules of assignment, which merely grants the cosignee additional protection in ensuring its debt is paid.” 51 P.2d at 1181, paragraph 28. There is no evidence that chiropractors need the “assignments” to protect their interest in receiving compensation for reasonable and necessary medical treatment. Logic and experience lead one to conclude chiropractors are using “assignments” in a speculative effort to guarantee payment of bills which juries frequently discount as unreasonable or unnecessary. No public policy is served by requiring a tortfeasor to pay a chiropractor for unreasonable and/or unnecessary treatment.

C. A mere naked or remote possibility cannot be assigned.

Appellant makes the claim that the Court of Appeals in this case engaged in an erroneous legal analysis. Appellant’s Merit Brief, p. 15. Appellant’s note, correctly, that Ms. Norregard had a present, existing right to bring a cause of action against the tortfeasor. Appellant’s claim that a present right to bring a cause of action is tantamount to a present right to proceeds such that it can be assigned. *Id.* at p. 16. This argument presents two problems. First, if a present right to bring a cause of action is tantamount to a present right to proceeds, then assignment of “proceeds” is tantamount to assignment of the cause of action. Yet Appellant has previously argued that assignment of “proceeds” is different than assignment of a cause of action because it recognizes a cause of action for personal injury cannot be assigned. *Id.* at p. 4.

Second, Appellant's argument fails to recognize that Ms. Norregard, at the time of "assignment," had no present right to bring any cause of action against American Family and no present right to "proceeds". Pursuant to R.C. 3929.06, she would first have to pursue a claim to judgment against the tortfeasor, wait 30 days, then prove the tortfeasor had insurance coverage available from American Family to which American Family had no policy or other defense. Since Ms. Norregard had no right at the time of the assignment to bring an action against American Family, and since no right is assignable until it has been properly perfected or established, no property right vested in West Broad with respect to American Family. As noted by the Court of Appeals in this case, the agreement between Norregard and West Broad "could not operate as an assignment, as it did not give West Broad a right to the funds until Norregard sought proceeds from American." Paragraph 16.

Similarly, Ms. Norregard had no present right to "proceeds" at the time of the purported assignment. At best, she had a mere possibility that she could recover a judgment against American Family's insured and thereafter successfully bring an action against American Family pursuant to R.C. 3929.06. As noted by this Court in Pennsylvania v. Thatcher, supra, equitable assignments "operate only where some fund or property comes into existence arising out of a previous possibility." Id. at 191 (emphasis added). In this case, until the settlement proceeds come into existence in the hands of Ms. Norregard, there was no enforceable equitable assignment.

The cases cited by Appellant in support of the assignment have no application to the case at bar. Instead of addressing the assignment of personal injury proceeds, the cases cited by Appellant address the assignment of rights under existing contracts (General Excavator Co. v. Judkins (1934), 128 Ohio St. 160), rights to existing judgments (Pittsburgh, C.C. St. L. Ry. Co. v. Volkert (1898),

58 Ohio St. 362) and rights under a will (Moore v. Foresman (1962), 172 Ohio St. 559). Moreover, the other decisions cited by Appellant - Hsu, Akron Square, Roselawn, Mt. Lookout, Gloekler and Cartwright, supra - fail to properly analyze the claims presented. All of these decisions wrongly assume, without discussion or analysis, that a cause of action for personal injury can be assigned, and all thereafter wrongly conclude that since tort victims have a present cause of action against the tortfeasor they also have a present right to “proceeds” that can be enforced against the tortfeasor’s liability insurance company. In other words, these courts treat the right to bring a cause of action against the tortfeasor as the equivalent of a present right to “proceeds” from the liability insurance company. Thus, these courts not only fail to acknowledge the common law prohibition against the assignment of personal injury claims, they also fail to recognize that the tort victims have no present right to bring a direct action against the tortfeasor’s insurance company.

Appellant’s citation to the above authorities is all the more confusing when one realizes these decisions, in effect, reject the distinction advanced by West Broad that there is a significant difference between the assignment of a personal injury cause of action and its proceeds. A personal injury cause of action and personal injury proceeds are but two sides of the same coin and neither is the proper subject of assignment under Ohio law. Permitting the assignment of personal injury proceeds will restrict access to the courts for some and will otherwise act to discourage settlement and encourage litigation. Accordingly, this Court should answer the second certified question in the negative.

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?

Appellee's Proposition of Law No. 2: R.C. 3929.06 precludes 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

A. R.C. 3929.06 bars the direct enforcement against a liability insurance company of an assignment of hypothetical, possible future personal injury settlement proceeds.

Although Ohio Revised Code Section 3292.06 does not expressly prohibit chiropractic assignment, it does prohibit direct actions by tort victims against a tortfeasor's liability insurance company. Chitlik v. Allstate Ins. Co. (1973), 34 Ohio App.2d 193. As noted by the Court of Appeals in this case:

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 paragraph 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.

In R.C. 3929.06, the legislature set forth a specific procedure to be followed by tort victims seeking to recover from a tortfeasor's liability insurance company. That procedure requires the tort victim to first recover a judgment against the tortfeasor, wait 30 days, and then initiate an action subject to the defenses the liability insurance company could raise against its insured. This statutory scheme prevents tort victims from having a "present cause of action" against a liability insurance company until the statutory requirements have been fulfilled. Chitlik, supra.

The cases cited by Appellant do not even attempt to explain how a putative tort victim, possessing no present right to bring a direct action against the putative tortfeasor's liability insurance company, can nevertheless assign the "right" to a chiropractor. Nor do the cases cited attempt to explain how permitting such an assignment is consistent with the public policy underlying R.C. 3929.06's prohibition against direct actions against liability insurance companies. Indeed, the Cartwright decision cited by Appellant ignores the statute as "irrelevant." Ultimately, the decisions cited by Appellant appear to be grounded on weak public policy considerations regarding a chiropractor's ability to collect its fee, at the expense of the well-established public policy considerations against such assignments as articulated by this Court and by R.C. 3929.06.

In Knopf Chiropractic, Inc. v. State Farm Ins. Co., Stark App. No. 2003CA00148, 2003-Ohio-5021 the Fifth District Court of Appeals noted:

"[A]t the time he assigned the assignment documents, Raber (the tort victim) 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."

Id. at paragraph 19. As found by the Court of Appeals in this case, since tort victims do not have a "right in being" until the statutory requirements have been fulfilled, and since "mere naked or remote possibilities cannot be assigned", their rights have not been "properly perfected or established as provided by law." Paragraph 15. These principles, coupled with R.C. 3929.06, formulate the basis for the Court of Appeal's holding below. In addition, the same public policy considerations discussed above relative to the Second Issue Presented for Conflict bolster the conclusion of the Court of Appeals below. Assignments such as West Broad's will not only serve to restrict access to the courts for those with smaller or riskier claims because lawyers will be hesitant to take them, but also will complicate and discourage settlements. It is apparent that the legislature wanted to

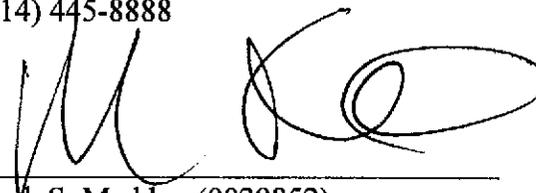
insulate liability insurance companies from tort victims interfering with their decision-making process unless and until the tort victims had recovered a judgment against the insured and could otherwise prove coverage existed. Liability insurance companies should remain free to compromise claims against their insureds without being required to act as a de facto collection agent for the chiropractor. The Court should answer the first certified question in the affirmative.

CONCLUSION

Insofar as the chiropractic assignment at issue herein is contrary to the long-standing common law and public policy of this state and will serve only to complicate and discourage settlements if upheld, the Court should declare such assignments invalid and unenforceable as against tortfeasors and their liability insurance companies. Accordingly, the Court should answer the first certified question in the affirmative and the second certified question in the negative.

Respectfully submitted,

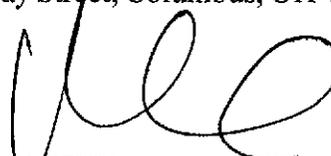
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was served by ordinary U.S. Mail, postage prepaid, on **James F. McCarthy**, Attorney for Plaintiff, 255 E. Fifth Street, Suite 2400, Cincinnati, OH 45202; **John P. Lowry**, Boehm, Kurtz & Lowry, 36 East Seventh Street, Suite 1510, Cincinnati, OH 45202; **Laura M. Faust/Jerome G. Wyss**, Roetzel & Andress, 222 S. Main Street, Akron, OH 44308; **George D. Johnson**, Montgomery, Rennie & Johnson, 36 E. Seventh Street, Suite 2100, Cincinnati, OH 45202; **Thomas E. Szykowny/Michael Thomas**, Vorys, Sater, Seymour & Pease, 52 E. Gay Street, Columbus, OH 43216-1008 this 2nd day of March, 2009.



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