

ORIGINAL

IN THE SUPREME COURT OF OHIO

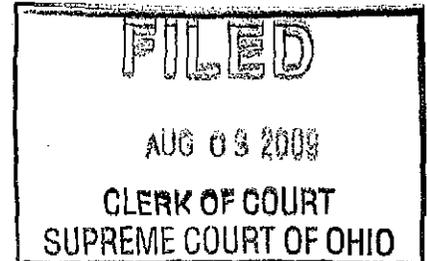
WEST BROAD CHIROPRACTIC,	:	Case No. 2008-1396 consolidated with
	:	Case No. 2008-1489
Appellant,	:	
	:	On Appeal from the Franklin County Court of
v.	:	Appeals, Tenth Appellate District
	:	
AMERICAN FAMILY INSURANCE,	:	
	:	
Appellee.	:	

APPELLANT WEST BROAD CHIROPRACTIC'S MOTION TO RECONSIDER THE
COURT'S MERIT DECISION

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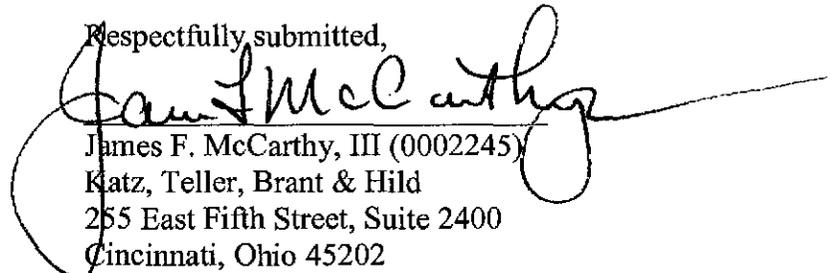
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MOTION TO RECONSIDER THE COURT'S MERIT DECISION

Appellant West Broad Chiropractic ("West Broad") respectfully moves this honorable Court to reconsider its decision on the merits. The decision abolishes equitable assignments from Ohio law, deprives a cause of action of its constitutionally protected property dimension, jeopardizes assignments of executory interests given as security for commercial loans and eviscerates a newly enacted statute. Therefore, the Court should reconsider its merit decision and adopt the dissenting opinion authored by the Chief Justice as the opinion of the Court. This motion is made pursuant to S. Ct. Prac. R. XI, Section 2(B)(4) and the accompanying memorandum.

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MEMORANDUM

A. The merit decision abolishes equitable assignments from Ohio law.

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.

Embracing its outdated decision in *Christmas v. Griswold* (1858), 8 Ohio St. 558, the Court has adopted a new stringent and debilitating requirement for assignments under Ohio law. To effect a valid and enforceable assignment, an assignor must now have a present vested right in the assigned property or interest at the time of the assignment. (“A vested right in the assigned property is required to confer a complete and present right on the assignee.”). ¶14¹ The adoption of such a requirement radically emasculates the law of assignments and eliminates equitable assignments from the law of Ohio.

Prior to the Court’s merit decision, 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, could be assigned under Ohio law. *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. 2007-06-143, 2008-Ohio-263 at ¶15. Even “[a] present existing right, to take effect in the future on a contingency, may be assigned.” *Id.* citing 6 Ohio Jur.3d

¹ West Broad will cite to the particular paragraphs of the Court’s slip opinion.

Assignments §18. “Such assignments are equitable assignments.” *Cartwright* at ¶15. Prior to the Court’s merit decision, Ohio law, therefore, recognized both a legal assignment and an equitable assignment. The fundamental distinction between a legal assignment and an equitable assignment is the nature of the assigned res. “A legal assignment relates to a thing in being, whereas an equitable assignment relates to contingent interests, expectancies, and things potential.” 6 Am. Jur.2d §5 “Equitable assignment.”

Therefore, a person who had a present right to receive proceeds, but that right would be realized in the future, even if the future existence of the proceeds was conditional, could 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.

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. *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.

Prior to its merit decision, Ohio courts could enforce both an assignment at law and an equitable assignment, such equitable assignment being consistent with long standing authority and case law that a prospective fund could 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.

Id.

Prior to the Court's merit decision, Ohio law was also consistent with the *Restatement of the Law Contracts*, 2d. (the "*Restatement*"). The *Restatement* clearly provided for assignment of both conditional and future rights. Section 320 of the *Restatement* provided for assignment of conditional rights:

The fact that a right ... is otherwise conditional does not prevent its assignment before the condition occurs.

Section 321 of the *Restatement* provided for assignment of future rights:

(1) Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an existing right.

(2) Except as otherwise provided by statute and as stated in Subsection (1), a purported assignment of a right expected to arise under a contract not in existence operates only as a promise to assign the right when it arises and as a power to enforce it.

In Comment b to §321 of the *Restatement*, the drafters provided the rationale underlying the assignment of future rights:

The conceptual difficulty posed by transfer of a right which does not exist can be met by giving effect to the attempted transfer when the right later arises. Uniform Commercial Code §9-204, for example, provides that with certain exceptions a security agreement may provide that all obligations covered by the security agreement are to be secured by after-acquired collateral; in an appropriate case, the security interest is said by §9-203 to “attach” when it becomes enforceable against the debtor with respect to the collateral.

In Comment c to §321 of the *Restatement*, the drafters expressly explained that an assignment of future rights was not conditioned on a continuing relationship:

Even where there is no continuing relationship, a purported assignment of a right expected to arise out of a subsequent transaction may sometimes become part of the subsequent transaction and take effect as such a part.

The drafters then provided the following examples of effective assignments of future rights:

2. B employs A from week to week in his factory at a salary of \$50 a week. A, in the first week of January, assigns to C any salary which he may earn during the last week in that month in his employment by B. The assignment is effective, and if A works for B during that week B will come under a duty to C to pay him \$50.

3. B employs A at a stated rate of pay from day to day. A assigns to C whatever A may become entitled to from work done for B during the ensuing month. During the ensuing month A not only earns his regular pay but acquires a right to extra compensation in the course of his employment. The assignment is effective both as to the right to regular pay and the right to extra compensation.

Restatement, §321, Illustrations.

Like the examples in the *Restatement*, Norregard had an existing right which could result in a contract obligating a payment of proceeds. Norregard had a cause of action. That cause of action could give rise to a settlement contract, which was not then in existence. Consequently, Norregard could assign the expected settlement proceeds and such assignment would operate to assign those proceeds when they came into existence and a power to enforce it. *Restatement* §321(2).

Relying upon a century-old precedent, which the merit decision proclaims to be “still persuasive,” the Court has moved Ohio law back into the 19th century. ¶20. The observation of two leading commentators poignantly illustrates the reversal this merit decision has made on Ohio law:

The assignment of contractual rights was ... prohibited at early common law because it was thought to commit “maintenance” – the offense of tending to spur litigation. With the rise of commercial business in the seventeenth century, these rules began to erode. With the Uniform Commercial Code, outright sales of contractual rights are common. The drafters of the UCC explain that “as accounts and other rights under contracts have become the collateral which secure an ever increasing number of financial transactions, it has been necessary to reshape the law so that these intangibles *** can be freely assigned.

White & Summers, *Uniform Commercial Code* §3-13. Now that progress has been regrettably retarded.

With its merit decision, the Court has obliterated equitable assignments from Ohio law. Now only legal assignments are recognized because a vested right in the assigned property is mandated for a valid assignment. Concomitantly, the Court has repudiated the *Restatement*, a resource this Court has regularly consulted in framing Ohio law. See *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Industrial Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

B. The Court’s merit decision deprives a cause of action of its constitutional property interests.

In its merit decision, the Court abrogated its precedent recognizing a cause of action as a chose in action and effectively depriving a cause of action of its constitutionally protected property interest. In its merit decision, the Court refused to recognize a cause of action as an existing right to proceeds, either in settlement or from a judgment. Rather, Norregard’s right to any settlement proceeds was considered a mere possibility. ¶17. Such reasoning abrogates well

established case law and effectively denies the existing constitutionally protected property right in a cause of action.

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. 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.

The 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. Such an assignment,

however, is no longer possible under this Court's merit decision.

The consequences of this decision undercut the constitutionally protected property dimension of a cause of action. The United States Supreme Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 428. The Supreme Court has reasoned that a claim has the characteristic of a recognized property right because "[a] claimant has more than an abstract desire or interest in redressing his grievance" *Id.* at 431. Instead, that claim can be surrendered for value and, therefore, "is at least as substantial as the right to an education labeled as property in *Goss v. Lopez* [(1975), 419 U.S. 565]." *Id.* In its merit decision, however, this Court strips a cause of action of that property dimension. The Court's merit decision deprives a cause of action of any value, finding instead that a cause of action has no present existence which can be surrendered for value.

C. The Court jeopardizes existing security of commercial loans throughout Ohio.

With its merit decision, the Court has jeopardized commercial loans throughout Ohio. In typical commercial loans, the debtor has assigned future accounts receivable, future income, future rent and future proceeds to secure the debt. White & Summers, *Uniform Commercial Code* §3-13 ("... accounts and other rights under contracts have become the collateral which secure an ever increasing number of financial transactions"). Examples of such loans abound. In *Great-West Life & Annuity Assurance Co. v. Parke Imperial Canton, Ltd.* (1994), 177 B.R. 843, the United States District Court for the Northern District of Ohio was confronted with an assignment of "any and all of Debtor's accounts arising from all the rents and revenues of the Real Estate, including those now due, past due, or to become due by virtue of any lease or other agreement for the occupancy or use of all or part of the Real Estate." *Id.* at 848. In the

bankruptcy proceeding, the creditor claimed the assignment reached hotel room revenues and other operating revenues of the hotel property including banquets, realized after the filing of bankruptcy. In its analysis of the assignment, the District Court found Ohio law permitted the assignment of future room revenues and banquet revenues from the hotel operation. *Id.* at 858.

While this Court may think that the real property might provide viability for the assignment, the Court should be aware that the District Court expressly held that hotel room revenue was not rent under Ohio law. Rather, “[w]hen a patron of an Ohio hotel acquires the rights of a ‘transient guest’ upon striking a bargain to stay at the hotel, the patron does not acquire any interest in the real estate, but is a mere guest licensee. Since the rental of a hotel room does not equate with the rental of a real estate interest in Ohio, any security interest created in the revenue collected from that transaction remains governed by Article 9.” *Id.*

Under Article 9 of the Uniform Commercial Code, the debtor may grant a security interest in collateral if the “debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party.” R.C. 1309.203(B)(2). However, Article 9 does not determine whether a debtor has a property interest. Rather, “[o]ther law determines whether a debtor has a property interest and the nature of that interest.” Official Comment, R.C. 1309.408.

Consequently, an assignment of accounts, revenues and proceeds under the UCC is predicated on the common law. The very foundation of the UCC is the type of common law decision the Court has made in this case. A review of this Court’s decision in *First Bank of Marietta v. Roslovic & Partners, Inc.* (1999), 86 Ohio St.3d 113, 712 N.E.2d 703 illustrates the ramifications of the merit decision. First Bank asserted rights in property assigned to it by its borrower, Mascrete, Inc. Roslovic was a contractor that hired Mascrete as a subcontractor. Before Mascrete ever began performance of its contract with Roslovic, it borrowed money from First Bank, and

assigned over to First Bank the “amounts receivable by Mascrete under its contract with Roslovic.” With this Court’s merit decision, the debtor no longer has a sufficient interest in this type of collateral, and consequently, its lender has no security in it. Clearly, the Court’s merit decision jeopardizes the security for such loans and has caused a seismic crack in the foundation of the UCC.

Even the Congress of the United States has recognized the critical importance of an assignment of future fees, charges, and accounts for financing debt. The legislative history to 11 U.S.C. §552, as amended by the Bankruptcy Reform Act of 1994, states that:

Section 214 [which amended §552(b)] also clarifies the bankruptcy treatment of hotel revenues, which have been used to secure loans to hotels and other lodging accommodations. These revenue streams, while critical to a hotel’s continued operations, are also the most liquid and most valuable collateral the hotel can provide to its financiers.

140 Cong. Rec. H. 10,768 (Oct. 4, 1994). Clearly, the Congress realized that an assignment of future revenue from a future patron occupying some room was a valid security given for a debt. However, under this Court’s merit decision such security would not be valid because the revenue did not exist at the time the assignment was made.

As businesses throughout Ohio struggle to secure credit, generate revenue and provide services, this Court has delivered a devastating blow. The contractor in *Judkins, supra.*, could not now secure the loan because he could not assign future income. The hotel in *West Life* could not secure the loan because it could not assign future hotel room revenue. The hospital, orthopedic surgeon and chiropractor cannot extend credit to patients with any reasonable assurance of payment. Traditional forms of security, an assignment of future proceeds, revenue, or income, have been eliminated. Given the myopic view of the merit decision, credit will likely be even scarcer in Ohio because of the elimination of this modern security.

D. The merit decision eviscerates R.C. 1349.55.

Effective August 27, 2008, the Ohio General Assembly passed House Bill 248 enacting R.C. 1349.55, as part of Ohio's Uniform Commercial Code. This new code section specified the requirements for non-recourse civil litigation advance contracts, overruling this Court's decision in *Rancman v. Interim Settlement Funding Corp.* (2003), 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217. R.C. 1349.55(A)(1) defines a "non-recourse civil litigation advance" "as a transaction in which a company makes a cash payment to a consumer who has a pending civil claim or action in exchange for the right to receive an amount out of the proceeds of any realized judgment, award or verdict the consumer may receive in the civil lawsuit." With the passage of H.B. 248, the General Assembly has authorized and legitimized a commercial transaction in which future proceeds from a settlement, judgment, award or verdict may be pledged to satisfy a debt.

With its merit decision, the Court has eviscerated R.C. 1349.55. Despite the General Assembly's clear intent to specify the requirements for non-recourse civil litigation advance contracts and overrule *Rancman*, the Court has concluded that an assignment, which is a contract, of proceeds of any realized settlement, judgment, award or verdict are analogous to "champertous agreements that are void as a matter of law." ¶25. Given this reasoning, the Court is effectively finding a non-recourse civil litigation advance contract to be champertous. While the assignment in this case was given in exchange for medical treatment, a civil litigation advance has no purpose but to fund the litigation. Given the merit decision, this Court would deem a non-recourse civil litigation advance contract champertous, eviscerating R.C. 1349.55.

E. The Court engages in speculation.

In finding the assignment unenforceable, the Court speculated:

Furthermore, if an injured person executes multiple assignments to a variety of creditors, the third-party insurer may be faced with determining the priority of assignments and how to distribute settlement proceeds pro rata among numerous assignees if the debt exceeds the amount of the settlement. ***

Upholding the legality of such assignments opens the door for other creditors to seek debt protection through assignments: the pharmacy, the automobile repair shop, other medical providers. If the injured person executes an assignment to satisfy a debt that is not related to the accident, i.e., a landlord or consumer debt, the insurer would be thrust into a credit situation that is completely unrelated to the underlying accident, and the non-related third party becomes a de facto collection agent that must prioritize and pay debts to avoid personal liability.

¶23, ¶24. The Court's speculation, however, is not based upon any demonstrated fact. Since 1996, when the Court of Appeals for the Eleventh Appellate District decided *Hsu v. Parker*, 116 Ohio App.3d 629, 688 N.E.2d 1099, assignments of future proceeds arising from a realized settlement, judgment, verdict or award have been available to medical providers. In the 13 years, not one reported case has confirmed the speculative hyperbole articulated in the merit decision. More telling, this Court was not presented with any survey, study or report demonstrating a history of any such imposition. American Family Insurance, for example, was not confronted with multiple assignments. It simply chose to dishonor the Assignment. Rather, the case law history demonstrates that these assignments do not present any of the speculated burdens suggested in the merit decision.

Given the extensive use of assignments of future revenue or proceeds, a leading commentator on contracts has observed:

A simple right to the payment of money is clearly assignable because it has no material effect on the obligor's duty. It should make little or no difference to the obligor whether he pays money to the original holder of the right or her assignee. Even if the assignee is *persona non grata* to the obligor, this is not a sufficient reason to deny the free assignability of the right. The act of

payment can be performed with no personal interaction between the assignee and the obligor.

9 *Corbin on Contracts* Rev. Ed. §49.3.

F. The Court has immunized insurance companies to preclude enforcement of a valid assignment of proceeds.

Section 3929.06 of the Ohio Revised Code now precludes a direct action against a tortfeasor's insurance company to recover money obligated to be paid in settlement. Now, R.C. 3929.06 applies even when the insurance company has settled with the accident victim and became obligated to pay settlement proceeds. While this Court has previously held, “[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, the plaintiff has no ability to enforce the obligation and recover the settlement proceeds. The claimant cannot now sue the insurer to pay the settlement because the insurer can argue that R.C. 3929.06 was bar to that suit.

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

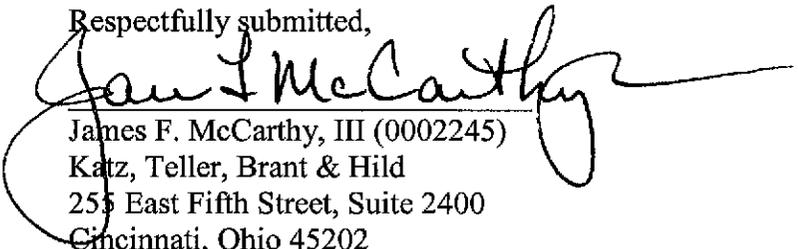
not a third party, but a principal, to the bi-lateral contract of settlement The unrelated constraints against third parties seeking coverage from insurers have no application.” *Id.* at ¶23. This Court has clearly rejected such reasoning. Now Nationwide and every other insurance company in Ohio may refuse to pay a settlement, dishonor a check issued to settle or otherwise breach a settlement agreement with impunity.

Carrying the logic of the Court to its 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 merit decision of the Court. R.C. 3929.06 now precludes enforcement of contract rights against an insurance company.

CONCLUSION

Here, the Court 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 reconsider its merit decision and adopt the dissenting opinion authored by the Chief Justice as the decision of the Court.

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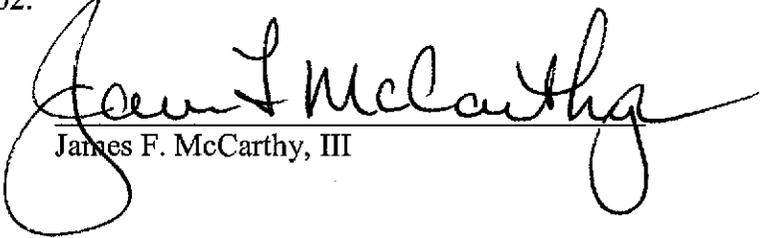
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via U.S. Mail this 3rd day of August, 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

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *W. Broad Chiropractic v. Am. Family Ins.*, Slip Opinion No. 2009-Ohio-3506.]

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SLIP OPINION NO. 2009-OHIO-3506

**WEST BROAD CHIROPRACTIC, APPELLANT, v. AMERICAN FAMILY
INSURANCE, APPELLEE.**

[Until this opinion appears in the Ohio Official Reports advance sheets,
it may be cited as *W. Broad Chiropractic v. Am. Family Ins.*,
Slip Opinion No. 2009-Ohio-3506.]

Assignment of settlement proceeds — Relevance of R.C. 3929.06 — Judgment affirmed.

(Nos. 2008-1396 and 2008-1489 — Submitted April 21, 2009 — Decided
July 23, 2009.)

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County,
No. 07AP-721, 2008-Ohio-2647.

LUNDBERG STRATTON, J.

{¶ 1} We must determine whether Kristy Norregard, who was injured in an automobile accident but who did not file suit or obtain a judgment against the tortfeasor, may assign her right to proceeds from a prospective settlement or judgment to appellant, West Broad Chiropractic (“West Broad”), in exchange for

medical care she received from West Broad for injuries resulting from the accident.

{¶ 2} The Tenth District Court of Appeals refused to enforce the assignment of proceeds. The appellate court certified that its judgment was in conflict with the judgments of other appellate districts. We agreed and accepted the following two certified conflicts for review:

{¶ 3} “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?”

{¶ 4} “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?” *W. Broad Chiropractic v. Am. Family Ins.*, 119 Ohio St.3d 1469, 2008-Ohio-4911, 894 N.E.2d 330.

{¶ 5} For the reasons that follow, we answer the first question in the negative. A person who has been injured in an accident but who has not yet established liability for the accident and a present right to settlement proceeds may not assign the right to future proceeds of a settlement if the right does not exist at the time of the assignment.

{¶ 6} We answer the second question in the affirmative. R.C. 3929.06 precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer distributed settlement proceeds.

{¶ 7} Consequently, we affirm the judgment of the court of appeals.

Facts and Procedural History

{¶ 8} Kristy Norregard was injured in an automobile accident on July 6, 2002. Three days later, she sought treatment for her injuries at West Broad Chiropractic. At that time, she executed a document entitled “Assignment of Right to Receive Benefits and/or Proceeds of Settlement or Judgment” to assign her right to receive from the tortfeasor’s insurance company compensation for these injuries in exchange for her treatment. Payment was to be made directly to West Broad before any payment was made to Norregard.

{¶ 9} Almost two years later, on April 30, 2004, West Broad gave notice of the assignment to appellee, American Family Insurance (“AFI”), which was believed to have insured the driver of the automobile involved in the accident with Norregard. The notice requested that AFI name West Broad as a co-endorser on any disbursement check issued or to issue a separate check payable to West Broad directly. The notice did not identify the amount due West Broad.

{¶ 10} In January 2006 and prior to filing any lawsuit, Norregard settled her claim for injuries with AFI. AFI disbursed the settlement proceeds directly to Norregard.

{¶ 11} West Broad filed an action against AFI seeking a declaration that the assignment was valid and enforceable and that AFI was obligated to pay West Broad for the treatment provided to Norregard valued at \$3830. The trial court held that the assignment was enforceable and entered judgment for West Broad.

{¶ 12} The Tenth District Court of Appeals reversed the judgment of the trial court, concluding that Norregard had no “right in being” when she made the assignment. *W. Broad Chiropractic v. Am. Family Ins.*, Franklin App. No 07AP-721, 2008-Ohio-2647, ¶ 6. Instead, West Broad had only a possibility of future settlement proceeds from AFI. *Id.* Furthermore, the court determined that Norregard had no enforceable rights against AFI under R.C. 3929.06 until she obtained a judgment against the tortfeasor. Thus, the court concluded, the

assignment was ineffective, and it remanded the cause with instructions to enter judgment in favor of AFI. *Id* at ¶18.

{¶ 13} The appellate court certified that its judgment was in conflict with judgments of the courts of appeals in the First, Ninth, Eleventh, and Twelfth Districts. We determined that a conflict does exist on both issues. We accepted West Broad's discretionary appeal on the same issues and consolidated the cases. *W. Broad*, 119 Ohio St.3d 1469, 2008-Ohio-4911, 894 N.E.2d 330.

Assignment of Settlement Proceeds

{¶ 14} An assignment is a transfer to another of all or part of one's property in exchange for valuable consideration. *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 632, 688 N.E.2d 1099. A vested right in the assigned property is required to confer a complete and present right on the assignee. *Christmas v. Griswold* (1858), 8 Ohio St. 558, 563-564.

{¶ 15} When Norregard entered into the agreement with West Broad, she had a cause of action against the tortfeasor that had accrued at the time of the accident. See *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121; *Cincinnati v. Hafer* (1892), 49 Ohio St. 60, 65, 30 N.E. 197. However, Norregard had not filed a claim based on that cause of action. She had not established liability or the right to damages. No settlement proceeds existed at the time of the assignment.

{¶ 16} Nevertheless, Norregard executed a document that purportedly assigned to West Broad her "right to receive or collect any check or monies offered for compensation to [her] by any person for any injury for which [she] received treatment from West Broad Chiropractic." Because no settlement proceeds existed at the time of the assignment and Norregard then had no right to any funds, she had no rights to assign. Thus, we hold that the agreement could not operate as an assignment because Norregard had no right in any settlement proceeds to transfer to West Broad.

{¶ 17} West Broad contends that Norregard's expectation of a settlement was assignable even though it was contingent upon proving liability and damages. West Broad, however, relies on cases in which the expected interest was based upon real property or contingent estates of inheritance – a property interest that was in existence. See *Moore v. Foresman* (1962), 172 Ohio St. 559, 565, 18 O.O.2d 123, 179 N.E.2d 349; *Hite v. Hite* (1929), 120 Ohio St. 253, 260-261, 166 N.E. 193. In this case, Norregard had not asserted a claim against the tortfeasor and had not established liability or the right to damages. The right to proceeds of a future settlement was unresolved. Consequently, Norregard's right to any settlement proceeds was merely a possibility at the time she executed the assignment to West Broad.

{¶ 18} In *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 85 N.E. 55, syllabus, the court held that an equitable assignment in the prospective proceeds of a settlement could not be enforced by the assignee against the tortfeasor in a suit at law. In *Thatcher*, the victim of a railroad accident attempted to assign to his attorney the proceeds of his claim, although no cause of action had been filed. The court acknowledged that the assignee may have a right to recover from the assignor; however, the assignment was not legally binding in a suit for money damages against a third party who had not agreed to the terms of the assignment. *Id.* at 189.

{¶ 19} *Thatcher* rejected the notion that notice of an assignment could legally obligate an unrelated third party in the absence of a contractual or other relationship between the parties, particularly when the notice assigned “a portion of whatever may be paid in suit or settlement.” *Id.*, 78 Ohio St. at 175, 85 N.E. 55. The court held that a notice so indefinite was insufficient to reach the funds in the hands of a third-party tortfeasor. *Id.* at paragraph two of the syllabus. *Thatcher* also reasoned that giving effect to such an assignment would introduce the interests of a third party who had not been involved in the accident into

settlement negotiations and may compromise a settlement between the injured person and the tortfeasor. *Id.* at 191. In addition, an assignment occurs only when the fund or property to be transferred exists. However, there are no settlement proceeds until the tortfeasor simultaneously pays funds in exchange for a release. *Id.*

{¶ 20} We find the legal reasoning of *Thatcher* still persuasive a century later. Consistent with *Thatcher*, because Norregard had no present right to any settlement funds at the time of the assignment, she had no rights to assign. West Broad had a contract that may be enforceable against Norregard, but it is not legally binding upon AFI.

{¶ 21} The conflict cases relied on public policy reasons to justify upholding such assignments. Some districts believed that such assignments would encourage settlement and avoid litigation. See *Roselawn Chiropractic Clinic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, 827 N.E.2d 331, ¶ 16; *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623, ¶ 9. They also reasoned that the assignments would promote timely medical treatment for injured persons who may not otherwise be able to pay, while at the same time assuring medical-care providers that they will be compensated. *Cartwright* at ¶ 9, 16; *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988, ¶ 12, fn. 2; *Roselawn*, ¶19-20.

{¶ 22} On the other hand, there are circumstances under which such assignments might encourage and promote litigation and discourage settlement. A chiropractor or other assignee expects full payment and lacks interest in negotiating the amount of the debt. Likewise, the third-party insurer lacks the ability to dispute the amount or reasonableness of the charges. The insurer must take these factors into account when settling the claim, and the result may be less to the injured party, forcing him or her to litigate in hopes of obtaining a greater

recovery. Attorneys may therefore be deterred from taking smaller claims when the proceeds are taken by assignees, leaving little to no funds for the injured party or the attorney's fee.

{¶ 23} Furthermore, if an injured person executes multiple assignments to a variety of creditors, the third-party insurer may be faced with determining the priority of assignments and how to distribute settlement proceeds pro rata among numerous assignees if the debt exceeds the amount of the settlement. Generally, the injured person is represented by counsel, who receives the settlement funds and who may negotiate a lesser payment with his client's creditors. West Broad's proposition, however, places the obligation on the insured to identify and locate each assignee at the time of settlement to determine the current liability and may subject the insurer to multiple lawsuits.

{¶ 24} Upholding the legality of such assignments opens the door for other creditors to seek debt protection through assignments: the pharmacy, the automobile repair shop, other medical providers. If the injured person executes an assignment to satisfy a debt that is not related to the accident, i.e., a landlord or consumer debt, the insurer would be thrust into a credit situation that is completely unrelated to the underlying accident, and the nonrelated third party becomes a de facto collection agent that must prioritize and pay debts to avoid personal liability.

{¶ 25} Finally, we disfavor such assignments based upon their similarities to champertous agreements that are void as a matter of law. See *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217, ¶ 19. Here, West Broad agreed to forgo payment for Norregard's treatment in exchange for an interest in future settlement proceeds. Although Norregard would remain liable for her medical bills if she did not settle, under the circumstances of this case, West Broad's interest in potential future proceeds could influence Norregard's interest in resolving her case, including delaying and

holding out for a greater settlement because she had no current obligation to pay for her medical treatment.

{¶ 26} Therefore, our answer to the first certified question is no. A person may not assign the right to the future proceeds of a settlement if the right to the proceeds does not exist at the time of the assignment. Norregard had no present right to any settlement funds at the time of the assignment and thus had no rights to assign. West Broad had a contract that may be enforceable against Norregard, but it is not legally binding upon AFI.

Application of R.C. 3929.06

{¶ 27} The second question for review asks whether R.C. 3929.06 precludes an assignee from bringing a direct action against the third-party insurer who had prior notice of the assignment but nevertheless paid the settlement proceeds contrary to the written assignment.

{¶ 28} R.C. 3929.06(B) precludes an injured person from bringing a civil action against the tortfeasor's insurer until the injured person has first obtained a judgment for damages against the insured and the insurer has not paid the judgment within 30 days.

{¶ 29} West Broad contends that R.C. 3929.06 applies only when the insurer does not pay insurance proceeds after liability has been judicially determined. The conflict cases likewise interpreted R.C. 3929.06 more literally. *Akron Square* notes that the statute does not mention assignments, and the court of appeals refused to read into the statute a prohibition on assigning potential settlement proceeds. 2004-Ohio-1988, ¶ 10. *Cartwright* rejected the application of R.C. 3929.06 because the injured party in that case settled without having to file suit. Thus, that court considered the statute inapplicable to the facts. 2008-Ohio-2623, ¶ 18-19.

{¶ 30} The court of appeals in this case acknowledged that the statute does not directly address written assignments. *W. Broad*, 2008-Ohio-2647, ¶ 17.

Nevertheless, the court, applying the law of assignments to the statute, reasoned that if an injured person has no direct action against the tortfeasor's insurer until 30 days after judgment and an injured person may assign only those rights that presently exist, then it follows that at the time of the assignment, Norregard had no direct right of recovery against AFI that could be assigned to West Broad. *Id.* at ¶ 16.

{¶ 31} This approach was also applied in *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA00148, 2003-Ohio-5021. In that case, a chiropractor filed an action to enforce a patient's assignment of prospective claim proceeds against a third-party automobile insurer. *Knop* concluded, per R.C. 3929.06, that the assignment was not enforceable against State Farm because it was created before the injured person had filed a civil action against the tortfeasor. Thus, the assignment was not founded on a right in being and was not enforceable. *Id.* at ¶ 19, 20.

{¶ 32} The underlying premise of R.C. 3929.06 reinforces our conclusion that Norregard had no existing right in proceeds to assign to West Broad. Therefore, our answer to the second certified question is yes: R.C. 3929.06 precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer has distributed settlement proceeds in disregard of the written assignment.

Conclusion

{¶ 33} When Norregard executed the agreement with West Broad, she had no right in proceeds from a prospective settlement or judgment. Because there must be an existing right in order for there to be a valid assignment, Norregard had nothing to assign that would have created a right in the assignee. At most, West Broad had a contractual right against Norregard for medical bills, but no legal right to enforce the agreement against AFI.

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{¶ 34} In addition, Norregard had no direct right of action against AFI at the time of the assignment because she had not met the terms of R.C. 3929.06. Thus, because West Broad's rights as assignee are no greater than Norregard's, West Broad was also prohibited from filing a direct action against AFI.

{¶ 35} Consequently, we affirm the judgment of the court of appeals.

Judgment affirmed.

O'DONNELL, J., concurs.

O'CONNOR and LANZINGER, JJ., concur in the judgment and the answers to the certified questions only.

MOYER, C.J., and PFEIFER and CUPP, JJ., dissent.

MOYER, C.J., dissenting.

{¶ 36} I dissent from the majority opinion because I find the assignment between Kristy Norregard and West Broad Chiropractic ("West Broad") to be enforceable. Therefore I would hold that West Broad should be permitted to recover from American Family Insurance for its failure to pay West Broad pursuant to the assignment. Additionally, I would hold that R.C. 3929.06 does not prohibit an assignee of an injured person from filing suit to collect from the insurer on the assignment when the insurer has disregarded the assignment while distributing settlement proceeds.

I

*Assignment of the right to contingent future settlement proceeds
is permitted as an equitable assignment*

{¶ 37} In the first certified-conflict issue, we are asked whether an injured party may assign its right to conditional, future compensation for its injuries when the injured party has not yet established the liability of the tortfeasor or a present right to such compensation. I would answer this question in the affirmative,

based upon our prior cases concerning assignments of future interests. Therefore, I dissent from the majority's holding on the first certified-conflict issue.

{¶ 38} The majority holds that in order to validly assign a contingent interest, the assignor must have a "property right that [is] in existence." According to the majority, Norregard's assignment of any future compensation for her personal injuries to West Broad for chiropractic care is invalid, because Norregard had no present right to settlement proceeds, nor did any proceeds exist. However, in attempting to explain our precedent, the majority actually imposes requirements for an equitable assignment that do not exist in our case law. These new requirements unduly constrict the ability to assign a future interest.

{¶ 39} A contingent, future property interest is an uncertain right at best. This is so because the existence of the property in question is speculative, its existence depending not only on the occurrence of some specified future condition, but also of the caprice of fate. Additionally, contingent interests, by definition, do not vest a present property right in the holder of the interest, although they may give rise to rights enforceable in equity. Therefore, in general, such assignments were not enforced as contracts at law because an expectancy was deemed too intangible. *Hite v. Hite* (1929), 120 Ohio St. 253, 262-264, 166 N.E. 193; and *Moore v. Foresman* (1962), 172 Ohio St. 559, 566, 18 O.O.2d 123, 179 N.E.2d 349; *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 188, 85 N.E. 55. However, a right to enforce assignments of future interests was recognized in equity. *Id.* at 188-189. In order for an assignment to be enforced in equity, we require that the assignor have an "expectancy" in the object of the assignment. *Hite*, 120 Ohio St. at 260-261, 166 N.E. 193. At common law, assignments were held to a stricter requirement: that the assignor have a "right in being" in the object of the assignment. *Needles v. Needles* (1857), 7 Ohio St. 432, 442-443. A right in being is a cognizable expectation, founded on some provision

of law or instrument or some legal act, that in the future, the assignor will possess the object of the assignment. *Id.*

{¶ 40} When such an expectancy or right in being exists, certain privileges belong to the holder of the contingent interest, such as the ability to assign the contingent interest. *Id.*; *Hite*, 120 Ohio St. at 260-261, 166 N.E. 193. These assignments will be enforced in equity once the contingency has occurred and property rights to the subject matter of the assignment vest in the assignor. *Hite* at 262-264; *Moore*, 172 Ohio St. at 566, 18 O.O.2d 123, 179 N.E.2d 349; *Thatcher*, 78 Ohio St. at 188-189, 85 N.E. 55. (Here, Norregard is the “assignor,” West Broad is the “assignee,” and American Family is the “debtor.”)

{¶ 41} In this case, Norregard’s expectation of compensation for her injury rested on the cognizable provision at law of the right to seek redress for injuries already sustained. Norregard had an expectancy and a right in being in the nature of a legally recognized remedy for her injuries. Her future interest was contingent on her success in pursuing that right. Thus, her expectation is founded in relief recognized in law and may be assigned.

{¶ 42} The premise of the majority—that property or a property interest must exist—is contradicted by our precedent concerning equitable assignments. In *Gen. Excavator Co. v. Judkins* (1934), 128 Ohio St. 160, 166, 190 N.E. 389, which is ignored by the majority, we enforced an equitable assignment for the future proceeds of a contract, although the work had not yet been performed and no proceeds were due. We held that an equitable assignment is created by “an intention on one side to assign and an intention on the other to accept, supported by sufficient consideration, and disclosing a present purpose to make an appropriation of a debt or fund.” *Id.* at 165.

{¶ 43} As is apparent from the facts in *Gen. Excavator*, the assignor did not have a present right to the property at issue, nor was the property in existence at the time the assignment was made. *Gen. Excavator Co.*, 128 Ohio St. at 165-

166, 190 N.E. 389. No work had been performed on the contract, so the assignor had received no payment and had no right to payment. *Id.* Thus, as to the first element of the assignment—the “debt or fund”—the assignor had merely an expectation interest. Yet the *General Excavator* court held that the assignment was valid. *Id.* at 167. It was apparently sufficient for the court that the property would exist upon the exercise of an expectancy or right in being, namely the assignor’s privilege to perform the work specified in a contract. That is, the assignor had an assignable interest in the future proceeds of the contract, although those proceeds would not exist until the assignor performed work under the contract and received payment for that work. Thus, as long as the assignor has the present purpose to make an appropriation from a fund—even a fund that does not exist and to which the assignor has no present right—then the first element of *General Excavator* is met.

{¶ 44} In this case, no one questions the existence of the other elements of a valid equitable assignment under *General Excavator*: the intent of the parties to create an assignment or the underlying consideration. *Gen. Excavator Co.*, 128 Ohio St. at 165, 190 N.E. 389. Rather, the appellee and the majority deny the right of Norregard to the funds at issue. However, *General Excavator* indicates that the assignor need not have a present right to funds, nor do the funds need to be in existence. *General Excavator* is analogous to this case. There is no meaningful difference between assigning the right to the uncertain proceeds of a future contract and assigning the right to proceeds of a future lawsuit or settlement. In either case, the subject property depends for its existence on the assignor’s successful pursuit of “rights in being.” Accordingly, as in *General Excavator*, we have here a valid equitable assignment without a present property interest or property in existence. Therefore, I would hold that the elements of an equitable assignment under *General Excavator* have been met in this case.

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{¶ 45} The cases cited by the majority, *Hite*, 120 Ohio St. at 253, 166 N.E. 193, and *Moore*, 172 Ohio St. at 559, 18 O.O.2d 123, 179 N.E.2d 349, do not alter this result. Neither *Hite* nor *Moore* supports the premise of the majority that the only expectations that may be assigned are those in which the future interest is based upon “a property right that was [already] in existence.” In fact, both *Hite* and *Moore* recognized that a future interest based on rights and property not in actual existence could be assigned in equity. *Hite* at 260-261; *Moore*, paragraph one of the syllabus.

{¶ 46} In *Hite*, the assignor assigned his expected inheritance from his mother’s estate to his sister, the assignee. *Hite*, 120 Ohio St. at 256, 166 N.E. 193. The *Hite* court held that the assignment was not enforceable at law, but was enforceable in equity, because it would have been inequitable to allow the assignor to retain both the inheritance and the consideration given by the assignee in the event that the assignor actually inherited the res, i.e. the subject matter, of the assignment. *Hite*, 120 Ohio St. at 260-261, 166 N.E. 193. The *Hite* court enforced the assignment, even though at the time of the assignment, the assignor had no present rights to the property, the property did not exist when the assignment was made, and the assignor’s expectancy had only “potential existence,” contingent on the occurrence of a future event. *Id.* Thus, *Hite* is no support for the majority’s conclusion that an expectation interest can be assigned only when it is a “property interest [already] in existence.”

{¶ 47} In *Moore*, we came to the unsurprising conclusion that because Ohio law recognized a protectable right to equitable or beneficial ownership of property held in trust (although the beneficiary had no present legal ownership), the beneficiary could assign that interest in equity. *Moore*, 172 Ohio St. at 566, 18 O.O.2d 123, 179 N.E.2d 349. The holding in *Moore* was premised on the already established rule that a contingent future interest was alienable and the widely recognized rule that “[e]quitable or beneficial ownership and interest in

securities is alienable and may be conveyed.” *Id.* at paragraph two of the syllabus. Simply put, *Moore* did nothing more than recognize that an equitable ownership in securities is alienable and therefore can be assigned in equity. *Moore* does not impact the issue before us, beyond providing another example of the assignability of a contingent future interest.

{¶ 48} The majority reads *Hite* and *Moore* to require a present interest in property or the existence of the property before a contingent interest may be assigned. Yet, as *Hite* and *Moore* illustrate, contingent interest will rarely—if ever—involve presently existing property rights or property in actual existence. The *Hite* court expressly recognized that the assignor’s right to property was based upon a “mere expectancy” of that right, that the assignor had no existing right, and that no property existed at the time of the assignment. *Hite*, 120 Ohio St. at 260-261, 166 N.E. 193. It is hard to imagine which, if any, contingent interests will remain assignable following the majority’s opinion.

{¶ 49} Furthermore, it is apparent from the number of cases addressing this type of assignment that such an assignment is a common means for injured persons to receive medical treatment while waiting for monetary relief.¹ Injured persons have an expectation of relief that equity recognizes without first requiring instigation of courtroom proceedings.

1. The parties have cited six Ohio court of appeals cases, two cases from the courts of last resort of other states, and several state and federal trial court cases, including the following: *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988; *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623; *Fletcher v. Nationwide Mut. Ins. Co.*, Darke App. No. 02CA1599, 2003-Ohio-3038; *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA0018, 2003-Ohio-5021; *Mt. Lookout Chiropractic Ctr., Inc. v. Motley* (Dec. 1, 1999), Hamilton App. No. C-980987, 1999 WL 1488971; *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, 827 N.E.2d 331; *Charlotte-Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.* (1995), 340 N.C. 88, 455 S.E.2d 655; *Hernandez v. Suburban Hosp. Assn., Inc.* (1990), 319 Md. 226, 572 A.2d 144; *Midtown Chiropractic v. Illinois Farmers Ins. Co.* (Ind.2006), 847 N.E.2d 942; *Bernstein v. Allstate Ins. Co.* (1968), 56 Misc.2d 341, 288 N.Y.S.2d 646; and *In re Petry* (Bankr.N.D. Ohio 1986), 66 B.R. 61.

{¶ 50} Therefore, I would hold that the law permits West Broad to enforce its equitable assignment. Courts have historically enforced such assignments once the contingency has occurred and the object of the assignment has come into existence. *Hite*, 120 Ohio St. at 262-264, 166 N.E.2d 193; *Moore*, 172 Ohio St. at 566, 18 O.O.2d 123, 179 N.E.2d 349; *Thatcher*, 78 Ohio St. at 188, 85 N.E. 55. The question remains whether West Broad may enforce the assignment against American Family Insurance, a third party to the assignment.

*After notice, the assignee may sue a third-party debtor
who did not pay pursuant to the assignment*

{¶ 51} The majority holds that equitable assignments cannot be enforced against third parties who did not consent to the agreements. But this holding is directly contrary to precedent established in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Volkert* (1898), 58 Ohio St. 362, 367, 50 N.E. 924, and *Gen. Excavator*, 128 Ohio St. 160, 190 N.E. 389. Furthermore, the majority’s reliance on the reasoning in *Thatcher*, 78 Ohio St. 175, 85 N.E. 55, is misplaced, because *Thatcher* addressed only money damages in an action at law, and the reasoning cited from *Thatcher* by the majority is dicta. *Id.* at syllabus.

{¶ 52} In *Volkert*, an attorney had assigned his fee from an unpaid judgment to the assignee, but the judgment debtor disregarded the assignment and paid the attorney’s client instead. *Volkert*, 58 Ohio St. at 368, 50 N.E. 924. We held that the attorney’s assignment was enforceable in equity. *Id.* at 369-371, 50 N.E. 924. We also held that equity permitted the assignee to enforce the assignment against the third-party debtor, even though it had not consented to pay pursuant to the assignment. *Id.* at 372. Indeed, we required the debtor, which knew of the assignment, to pay the assignee, despite having already paid the full debt amount to the client; “the [debtor], while it had a full right to compromise, was simply required to deal with all parties in interest, including those holding a

valid property interest in the judgment, and entitled to a portion of the proceeds.”
Id. at 377.

{¶ 53} We applied the rule in *Volkert* in *General Excavator* in an opinion issued well after *Thatcher*, 78 Ohio St. 175, 85 N.E. 55. *Gen. Excavator*, 128 Ohio St. at 165, 190 N.E. 389. In *General Excavator*, we held, “The consent of a debtor, i.e., the one obligated to an assignor, is not required to an assignment, even though it be for only a part of an entire debt or claim. Such assignment will be enforced against the debtor in equity.” Id., citing *Volkert*, 58 Ohio St. at 362, 50 N.E. 924. The majority’s holding today improperly displaces the rule of law announced in these cases.

{¶ 54} Moreover, *Thatcher* is not controlling or even applicable. The holding of *Thatcher*—that equitable assignments must be enforced in equity and cannot be enforced in actions at law—has no bearing on this case, particularly because of the now defunct distinction between actions at law and at equity. See *Thatcher*, 78 Ohio St. at 187, 85 N.E. 55; Civ.R. 2 (“There shall be only one form of action, and it shall be known as a civil action”).

{¶ 55} The *Thatcher* court noted in dicta that under the facts of that case, the suit was “questionable” in equity as well, because of the circumstances of the particular assignment in that case, in which it appeared that a portion of the underlying claim—not the proceeds of settlement—had been assigned (i.e., the assignor had assigned a “chase in action,” giving the right to pursue a portion of her cause of action to a third party). Id. at 192, 85 N.E. 55, citing *Weller v. Jersey City, Hoboken & Paterson Street Ry. Co.* (1904), 66 N.J.Eq. 11, 18-19, 57 A. 730. The *Thatcher* court suggested that under such circumstances, the assignee would have no right in equity to enforce his assigned “portion” of the underlying cause of action against the debtor alone because (1) doing so would interject the interests of an uninjured third-party into settlement negotiations, undermining the needs of the injured party; and (2) the subject fund of the resulting assignment

would not come into existence until the tortfeasor had been released from liability. *Id.* at 190-192, 85 N.E. 55.

{¶ 56} This viewpoint likely stems from the then existing rule that although choses in action were generally assignable, choses in action for personal injury were generally not. *Cincinnati v. Hafer* (1892), 49 Ohio St. 60, 66, 30 N.E. 197. And the dicta of *Thatcher* reflect the general policy against champerty and maintenance (i.e., the interference with the maintenance of a lawsuit by a third party who has agreed to assist in the litigation in exchange for a portion of the proceeds) by prohibiting assignments that may undermine the needs of the injured party, needlessly complicate litigation, and frustrate settlement by introducing a self-interested third party to the litigation and settlement process. See, e.g., *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217, at ¶ 10.

{¶ 57} Thus, *Thatcher* addresses, in dicta, the undesirability of permitting equitable assignment of choses in action (or portions of the underlying cause of action) for personal-injury torts. Yet Norregard did not assign her injury or right of action against the tortfeasor; she assigned her right to settlement proceeds. There is an important difference between assigning a cause of action and assigning the proceeds from future pursuit of that cause of action. The former would insert a self-interested third party into the litigation and raise concerns of champerty. The latter imparts no cognizable right in the litigation of the cause of action to the third party and gives the third party an enforceable right only to the extent that there are proceeds from resolution of the cause of action. This distinction has been recognized as significant by the courts of last resort of at least three other states, as appellant points out. *Charlotte-Mecklenburg Hosp. Auth.*, 340 N.C. at 91, 455 S.E.2d 655; *Achrem v. Expressway Plaza Ltd. Partnership* (1996), 112 Nev. 737, 740-741, 917 P.2d 447; *Hernandez*, 319 Md. at 235, 572

A.2d 144. Each of those courts has permitted assignments similar to those in this case.

{¶ 58} Accordingly, the assignment in this case—of the proceeds of a future settlement—does not raise the concerns noted in *Thatcher* and *Rancman*: the assignee will not have a right to be involved in the litigation of the injury claim or the resulting settlement discussion, and the assignment will not compromise the ability of the tortfeasor to settle with the injured party.

{¶ 59} Therefore, I would hold that the rule in *Volkert* is the proper rule to apply and that West Broad may recover from American Family Insurance, which had notice of the assignment but did not pay according to its terms.

II

R.C. 3929.06 does not bar a lawsuit by an assignee against a third-party insurer who paid settlement proceeds in disregard of an assignment of which it had notice

{¶ 60} With regard to the second certified issue, the majority reasons that R.C. 3929.06 precludes an assignee from suing an insurer who paid settlement proceeds in disregard of an assignment of which it had notice. I disagree. Courts are charged to apply statutes as plainly written. *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, 906 N.E.2d 1125, ¶ 9 (“When construing a statute, we first examine its plain language and apply the statute as written when the meaning is clear and unambiguous”). And R.C. 3929.06(B) is plainly inapplicable to the situation at hand.

{¶ 61} R.C. 3929.06 provides:

{¶ 62} “(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.

{¶ 63} “(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.

{¶ 64} “(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.”

{¶ 65} R.C. 3929.06(B) is the portion of the statute at issue. That portion of the statute requires an injured party to wait 30 days after judgment against a tortfeasor before filing suit against the tortfeasor's insurer to collect on that judgment. The majority does not dispute this reading of R.C. 3929.06. Thus, the statute confines itself to one type of lawsuit—a suit by an injured person to collect from an insurer after a judicial determination of the liability of a tortfeasor—and the prohibition in the statute pertains only to the filing of a lawsuit to collect on such a judgment after 30 days have passed from the final judgment of damages.

{¶ 66} I cannot follow the rationale that stretches the words of R.C. 3929.06 to preclude a suit by an assignee to collect on an assignment when the

insurer distributed settlement money in disregard of the assignment. R.C. 3929.06(B) simply does not apply to such a cause of action.

{¶ 67} Moreover, the statute has no application to the facts of this case. The statute applies to suits to collect on a judgment and has no application unless a civil judgment has been entered as described in R.C. 3929.06(A)(1). In this case, there was no judgment or need to collect on a judgment—the insurer settled with the injured party out of court. When the assignee files suit because the insurer paid in disregard of the assignment, the statute, by its own terms, has no application to such a suit.

{¶ 68} At best, the majority’s holding with regard to R.C. 3929.06 is a non sequitur. The majority determines that the “underlying premise” of R.C. 3929.06 confirms the conclusion that the assignment was invalid, because Norregard had no existing property or property rights to assign. The majority then answers the second certified question “yes,” concluding that R.C. 3929.06 precludes an assignee from bringing a direct action against a third-party insurer after the insurer has distributed settlement proceeds in disregard of the written agreement. This conclusion is odd because if the majority’s reasoning is correct and the assignment was invalid, then West Broad never had a cause of action, and there is nothing for R.C. 3929.06 to preclude. If the majority’s view were carried to its logical conclusion, then we should not reach the second certified question—the statute does not preclude the action; rather, the lack of a valid assignment precludes the action against the insurer, and the second certified question is moot. As argued above, I do not agree that the assignment was invalid; therefore, I cannot agree with the majority’s holding with regard to R.C. 3929.06.

{¶ 69} Furthermore, the majority ignores the settled law on suits to collect on an improperly paid assignment. An assignee of an equitable assignment may sue a third-party debtor who had notice of the assignment but did not pay accordingly. *Volkert*, 58 Ohio St. 362, 50 N.E.2d 924, paragraphs one, two, and

three of the syllabus; *Gen. Excavator*, 128 Ohio St. at 165, 190 N.E. 389. We have held that the third-party debtor is liable in such circumstances, even when that debtor did not consent to pay pursuant to the assignment. *Volkert*, 58 Ohio St. 362, 50 N.E.2d 924, paragraph three of the syllabus.

{¶ 70} Therefore, I would hold that R.C. 3929.06(B) does not prohibit an assignee from suing an insurer who distributed settlement proceeds in disregard of an assignment of which it had notice.

III

{¶ 71} Norregard had a right in being to seek a remedy for her injuries. Therefore, I would hold that her future interest in the proceeds of a lawsuit or settlement was assignable. West Broad, the assignee, is entitled to enforce the assignment against American Family Insurance, the third-party debtor, under settled law. R.C. 3929.06 does not apply to prohibit West Broad from suing American Family for failure to properly distribute the proceeds under the terms of the assignment.

{¶ 72} Therefore, I dissent.

PFEIFER and CUPP, JJ., concur in the foregoing opinion.

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

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

Boehm, Kurtz & Lowry and John P. Lowry; and Montgomery, Rennie & Jonson and George D. Jonson, urging reversal for amici curiae Ohio State Chiropractic Association and Ohio Osteopathic Association.

Roetzel & Andress, Laura M. Faust, and Jerome G. Wyss, urging affirmance for amicus curiae Ohio Association of Civil Trial Attorneys.
