ORIGINAL

IN THE SUPREME COURT OF OHIO

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

APPELLEE AMERICAN FAMILY INSURANCE COMPANY'S MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

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A. APPELLANT IGNORES OVER 150 YEARS OF OHIO LAW

West Broad Chiropractic's claim that the Court's Decision "radically emasculates the law of assignments and eliminates equitable assignments. . . ." (Motion to Reconsider, p. 2) necessarily ignores over 150 years of Ohio Jurisprudence. First, the law of Ohio has never enforced assignments of non-existent rights against insurers or any other parties. Ohio courts long have recognized an assignment of a right-in-being, even if it is contingent or takes effect only in the future, but a bare hope or mere possibility that a right to proceeds may arise at some future time is not assignable. The Court's Decision that the purported assignment is invalid was correct insofar as the "assignment" attempted to convey something that did not exist: a direct or contingent right in being to possible future insurance proceeds.

The cases cited in West Broad Chiropractic's Motion are largely irrelevant to the issues presented herein. The case law discusses assignments of a cause of action that the assignor had an existing right to bring, not assignments of possible future proceeds or prospects as to which the assignor had no existing right. While West Broad Chiropractic argues that "Norregard had a cause of action" (Motion to Reconsider, p. 5), that is not relevant here because West Broad concedes that "[n]othing in the Assignment conveyed the personal injury claim itself" in this case. (Merit Brief of Appellant, at 4; emphasis added). This Court's response to the first certified question is expressly limited to assignments of future "proceeds" and does not address assignments of existing "claims," "causes of action," or "choses of action."

American Family does not dispute that "[i]t is permissible to assign a chose of action" (but not personal injury claims) under some circumstances, Leber v. Buckeye Union Ins. Co. (6th Dist. 1997), 125 Ohio App. 3d 321, 332, appeal dismissed (1998), 84 Ohio St. 3d 1423, but that is not the

issue in this case. The present case involves an assignment of hypothetical future proceeds from a hoped-for judgment or settlement, not an assignment of an existing cause of action.

Only one legal authority cited by West Broad addresses the assignability of a right that did not exist at the time of assignment, Christmas's Adm. v. Griswold (1858), 8 Ohio St. 558, and it repudiates West Broad Chiropractic's contention that possible future proceeds can be assigned:

> "It is necessary...in order to constitute an assignment, either in law or equity, that there should be such an actual and constructive appropriation of the subject matter assigned, as to confer a complete and present right on the assignee, even when the circumstances do not admit of its immediate exercise."

8 Ohio St. at 562, quoting Hare And Wallace's Notes to Leading Cases in Equity, Vol. 2, at 2233 (original emphasis). If a debtor has no present existing right or legal interest in the possible future fund, "'(a) covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment, for it does not give the covenantor a right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual.'" (Id.; original emphasis). For that reason, the Court concluded that the parties' attempted transfer of a right to the future fund "cannot operate as an equitable assignment." (Id.) (emphasis added).

The holding in Griswold is consistent with other decisions by the Court on this issue. In Needles v. Needles (1857), 7 Ohio St. 432, the Court noted that the doctrine of equitable assignment was inapplicable to the plaintiff's allegations:

> It is true, as a general thing, that all contingent and executory interests, and contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, are assignable and releaseable. But it is also a general rule, that a naked or remote possibility can not be assigned, for the reason that a release must be founded on a right in being, vested or contingent.

(Id., 7 Ohio St. at 442, 443; original emphasis in part.) The crucial distinction between an existing contingent right (which is assignable) and a possible future right (which is not assignable) was also addressed in Jeffers v. Lampson (1859), 10 Ohio St. 101, 105:

> "An expectancy, or chance, is a mere hope unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir apparent has of succeeding to an ancestor's estate. This is sometimes said to be a bare or mere possibility... It is a possibility in the popular sense of the term. But it is less than a possibility in the specific [legal] expectancy, nothing has been done to create an obligation in any event; and where there is no obligation, there can be no right..."

(Original emphasis; citation omitted.)

In Jeffers, the plaintiff was entitled by the terms of his father's will to inherit one-half of his father's estate when his mother's life interest in the estate terminated, but he signed a release of his one-half interest to another person prior to his mother's death. The Court upheld the release because the son's interest in the estate, although contingent upon outliving his mother, "was not a mere expectancy. It had a foundation in the provision, the 'legal act' of his father's will, and was not a mere hope." 10 Ohio St. at 106 (emphasis added). In other words, the son's interest was an existing legal right even though it was contingent and would take effect, if at all, only in the future.

In the present case, Ms. Norregard had a personal injury cause of action against American Family's insured from the date of her accident. But she did not assign her cause of action, and she had no existing legal right, contingent or otherwise, to proceeds from a hypothetical future settlement or judgment that she could assign. Nothing had been done to create a legal obligation on the part of American Family to create a fund and to pay its proceeds to Ms. Norregard. Future proceeds from a judgment or settlement may have been a "possibility" in the popular sense of the term, but they were an unassignable "bare possibility," without any existing legal foundation, under the previous

decisions of this Court.

The other authorities cited in West Broad's Motion also involve a right-in-being that existed at the time of the assignment. In General Excavator Co. v. Judkins (1934), 128 Ohio St. 160, 164, the Court held that "money due and to become due under an existing contract is subject to equitable assignment" where the contract gave the assignor the present legal right to receive the money in the future. (Emphasis added.) Similarly, Appellant cites to the restatement of the Law of Contracts and White & Summers (Motion to Reconsider, pp. 4-6) for the proposition that existing contract rights can be assigned. Finally, in Pittsburg, C.C. & St. L. Ry. Co. v. Volkert (1898), 58 Ohio St. 362, 372, the Court upheld an equitable assignment of a portion of an existing judgment because it was "an ascertained debt then due." In the present case, by contrast, Ms. Norregard had no right-in-being to possible future insurance proceeds, contingent or otherwise, under any existing contract, judgment, settlement agreement, deed, or will, and had no other legal basis for any existing right. She could not assign a non-existent right to West Broad Chiropractic.

According to West Broad Chiropractic, contingent interests have always been assignable. However, the present case does not involve a contingent right or interest with an existing legal foundation in a contract, will or judgment. Moreover, Appellant necessarily ignores the fact that an assignment of a portion of proceeds from a claim cannot be enforced in equity because "[s]uch assignments admittedly operate only when some fund or property comes into existence," and the assignee's recourse therefore is against the assignor who received the full settlement proceeds, not the party who paid the settlement to the assignor:

> Where a composition is made between the tortfeasor and the person wronged, on the basis of payment for a release, the fund does not come into existence until the payment and the release are simultaneously exchanged. Then the fund thus created

is in the hands of the releaser, and the assignee may follow it there...

(Pennsylvania v. Thatcher (1908), 78 Ohio St. 125, 192-192. See also Davy v. Fidelity & Caves. Ins. Co. (1908), 78 Ohio St. 256, 266 ("an interest in the proceeds of a settlement is an interest in a fund which has no existence until the settlement is agreed upon . . . and therefore the [assignee's] interest is in the fund in the hands of the [assignor].")

These cases do not support West Broad Chiropractic's apocalyptic conclusion that the Court's decision "has obliterated equitable assignments from Ohio Law." (Motion to Reconsider, p. 6). To the contrary, the Court's decision upholds the traditional rule that a future fund can be subject to an equitable assignment only if the assignor had an existing right-in-being to the fund at the time of the assignment. Here, Ms. Norregard had a chose in action, but she had no existing direct or contingent right to possible future insurance proceeds and, thus, could not assign such a right to West Broad Chiropractic.

B. A CAUSE OF ACTION IS STILL A CHOSE IN ACTION.

Appellant argues that the Court's recognition of the bare possibility Ms. Norregard might recover hypothetical, future settlement proceeds deprives "a cause of action of its constitutionally protected property interest." (Motion to Reconsider, p. 6). Appellant refuses to recognize that Ms. Norregard had only a possibility of recovery settlement proceeds and instead insists that as of the date of the accident "Norregard had a claim against American's insured which would result in proceeds, either in settlement or proceeds." Motion to Reconsider, p. 7, emphasis added). West Broad Chiropractic assumes too much, however. There is no evidence in the record as to the nature of Ms. Norregard's claim or the facts underlying her claim. The mere fact Ms. Norregard could file a lawsuit does not mean she "would" win. She might lose. The Court recognized this fact when

determining her "right" to future proceeds was a mere possibility.

Curiously, West Broad Chiropractic argues that the Court's Decision precludes assignments of a chose in action. (Motion to Reconsider, p.7). First, causes of action for personal injury never have been assignable under Ohio law. Second, and more importantly, West Broad Chiropractic has gone to great lengths to assure the Court that its assignment is not one involving the cause of action, but merely the "proceeds". It remains unexplained as to how a decision not addressing the assignment of a cause of action can be read to prohibit the assignment of all causes of action.

Appellant's citation to Logan v. Zimmerman Brush Co. (1982), 455 U.S. 422, likewise is misplaced. The Logan case involved an employment dispute in which Logan had been afforded a cause of action under laws of Illinois. The United States Supreme Court presumed the cause of action could be "surrendered for value...." Id. at p. 565. It did not address the issue of whether the cause of action was assignable under Illinois law, nor did it address assignments in any way.

C. COMMERCIAL LOANS ARE NOT IMPACTED BY THE COURT'S DECISION

The only "commercial loans" that are affected by the Court's decision are those in which the purported assignee of personal injury proceeds attempts to enforce its rights against third parties. Contrary to the exhortations of West Broad Chiropractic, assignments governed by the Uniform Commercial Code may continue to be enforced under the applicable provisions of Revised Code.

Appellant's arguments again proceed from a false premise: that Ms. Norregard had an existing right to "proceeds" at the time of the purported assignment. Ms. Norregard had no existing right to "proceeds", however, because her "right" to recover was a mere possibility and the proceeds did not exist until the settlement monies were received by Ms. Norregard.

Appellant's citation to First Bank of Marietta v. Roslovic & Partners, Inc. (1999), 86 Ohio

St. 3d 113 likewise offers no solace. Roslovic involved the assignment of future proceeds due under a contract which existed at the time of the assignment. Here, Ms. Norregard had no contract or other existing right when she made the purported assignment to her chiropractor. This major factual distinction acts to prevent enforcement of Norregard's purported assignment. As noted by West Broad Chiropractic, "accounts and other rights under contracts have become the collateral which secure an ever increasing number of financial transactions...." (Motion to Reconsider, p. 8 citing White & Summers). White & Summers obviously is not contemplating the assignment of hypothetical tort proceeds.

Similarly, Article 9 of the Uniform Commercial Code addresses the granting of a security interest in collateral if the "debtor has rights in the collateral...." R.C 1309.203(B)(2). Since Norregard had no present "right" to the hypothetical, future settlement proceeds, she had no "rights in the collateral". More importantly, R.C. 1309.109(D)(12) provides:

> (D) This Chapter does not apply to the following:
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> .
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> .
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> .
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> (12) An assignment of a claim arising in tort . . . ."

This Court's Decision has absolutely no impact on matters arising under the UCC.

D. R.C. SECTION 1349.55 IS UNAFFECTED BY THIS COURT'S DECISION.

R.C. Section 1349.55 governs non-recourse civil litigation advance contracts. A non-recourse civil litigation advance" is defined as a transaction in which a company advances money to a consumer in exchange for the right to receive an amount out of the proceeds of "any realized settlement, judgment, award or verdict the consumer may receive . . . ." R.C. Section 1349.55

(A)(1). The statute applies only to consumers who are represented by an attorney who also must provide written acknowledgment of the non-recourse agreement. R.C. Section 1349.55 (A)(3). The consumer's attorney is obligated to make payments to the lender from the attorney's trust account. R.C. 1349.55(B)(6)(C). Neither a tortfeasor nor a tortfeasor's insurance company nor any other third party has any obligation to the lender under the statute. Nothing in this Court's decision impacts "non-recourse civil litigation advance contracts" insofar as they are not "assignments" which can be enforced against third parties.

E. THE COURT HAS A CLEAR VISION FOR THE FUTURE.

West Broad Chiropractic claims this Court is engaging in "speculation" when it postulated that enforcement of the purported assignment in this case will lead to cases where multiple assignments are given, forcing the third party insurer to attempt to prioritize the assignments and distribute settlement monies in a pro rata fashion. West Broad Chiropractic does not offer any reasonable argument as to why that would not be so; it offers only the argument that no "study" has been produced to support that conclusion. (Motion to Reconsider, pp. 11-12).

West Broad Chiropractic notes that in the 13 years since Hsu v. Parker, 116 Ohio App.3d 629 (11th Dist. 1996), no reported case has confronted multiple assignments. West Broad Chiropractic conveniently ignores the fact that every reported Ohio case dealing with attempts to enforce such "assignments" against third parties involves chiropractors only. Hsu, for instance, involved an attempt by the patient's doctor to recover from the patient's attorney, who had received settlement monies on the patient's behalf. Dr. Hsu did not attempt to enforce his contract with Parker against an unrelated third party. Only chiropractors have attempted that in Ohio, with uneven results as demonstrated by the certified conflict in this matter. If the Court approved "assignments" such as

that advanced by West Broad Chiropractic, however, it would be foolish for any medical provider not to seek similar protection, leading inevitably to the problem of multiple assignments identified by the Court. The Court did not speculate, but engaged in logical reasoning.

F. INSURANCE COMPANIES REMAIN LIABLE FOR CONTRACTS THEY MAKE.

West Broad Chiropractic lastly argues the obvious, that the Court's Decision precludes enforcement against liability insurance companies of assignments of personal injury proceeds. West Broad Chiropractic then leaps to the conclusion that R.C. Section 3929.06 now precludes a direct action against insurance companies "to recover money obligated to be paid in settlement." (Motion to Reconsider, p. 13).

The issue of whether a liability insurance company is a "principal" to an agreement to settle a tort victim's claim against an insured alleged tortfeasor is not presented in this matter. Logic would indicate the Plaintiff would file an action to enforce the settlement against the tortfeasor. It appears only one lower court has addressed that issue, however. In Fletcher v. Nationwide Mutual Ins. Co., 2003-Ohio-3038, the Second District Court of Appeals found that although the liability insurance company was "acting as agent" for the insured in negotiating a settlement agreement, it nevertheless was a "principal to the bilateral contract of settlement." Id. at paragraphs 21-23. No explanation or citation is offered by the Court to support the unique conclusion that the insurance company was not only an agent for the principal, but also the principal.

Moreover, this Court's decision in Hartmann v. Duffey, 95 Ohio St. 3d 456, 2002-Ohio-2486, cited by West Broad Chiropractic at page 13 of its Motion, does not support that conclusion. In Hartmann, this Court found that a plaintiff who enters into a settlement agreement is entitled to interest, pursuant to R.C. 1343.03(A) and (B), from the date of the settlement. Id. at syllabus.

"Hartmann, however, does not specify the party against whom a motion for post settlement interest may be pursued." Bellman v. Am. Internatl. Group, 113 Ohio St. 3d 323, 2007-Ohio-2071, paragraph 17 (2007). In Bellman, this Court found such a motion must be brought against the tortfeasor, not the tortfeasor's liability insurance company. Thus, it remains an open question as to whether a liability insurance company can be sued directly by a plaintiff to recover settlement monies. The only basis for such a finding necessarily would be that the insurance company has entered into the settlement contract as a "principal." Fletcher, supra. There is no such claim presented herein and the Court's Decision in no way relates to that issue. To the extent a liability insurance can be found to have entered into a settlement contract as a principal, nothing in this Court's Decision would prevent an action on that contract.

CONCLUSION

The Court's Decision is premised on over 150 years of Ohio law. There is no need for the Court to rewrite fundamental principles of Ohio law in order to help West Brad Chiropractic to collect fees owed to it by its patient, Ms. Norregard. West Broad's Motion for Reconsideration should be denied.

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 and **George D. Johnson**, Montgomery, Rennie & Johnson, 36 E. Seventh Street, Suite 2100, Cincinnati, OH 45202 this 13th day of August, 2009.

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