Supreme Court of Ohio Clerk of Court - Filed October 01, 2018 - Case No. 2018-0682

IN THE SUPREME COURT OF OHIO

CASE NO. 2018-0682

On appeal from the Eighth Appellate District
Cuyahoga County, Ohio

Court of Appeals Case No. 16-105287

KISLING, NESTICO, & REDICK, LLC

Plaintiffs-Appellees

vs.

PROGRESSIVE MAX INSURANCE CO., *et al.*,

Defendants-Appellants

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS PROGRESSIVE MAX INSURANCE CO., PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY, AND PROGRESSIVE JOHN DOE COMPANIES
(Oral Argument Requested)

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PROPOSITION OF LAW NO. 1

A lawyer's charging lien is an in rem equitable rule of priority that gives a lawyer a right to be compensated out of a fund which is created by the lawyer's services and skills in a pending litigation. (*Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 88 N.E. 55 (1908), explained).

PROPOSITION OF LAW NO. 2

R.C. 3929.06 bars a lawyer from directly suing a third-party's insurer to enforce a charging lien without a judgment against the insured. (*West Broad Chiropractic v. Am. Family Ins*., 122 Ohio St.3d 497, 2009-Ohio-3506, followed).

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of civil defense attorneys and corporate executives engaged in the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. The mission of OACTA is to ensure fairness and integrity within civil proceedings. Its broad-based membership provides a unique prospective within which to advocate for the continued development of Ohio jurisprudence regarding the enforcement of charging liens in the civil context, especially as it applies to insurers defending their insureds against civil claims.

A patchwork of legal precedent has developed over the past several decades on the nature and enforceability of equitable liens asserted by an unpaid attorney. This case provides the Court with the opportunity to continue to weave a logical and consistent thread through the patchwork of legal authority and once again conclude that a charging lien is a property interest that can only be enforced in an in rem proceeding. In other words, such a lien only attaches to the judgment or funds that an attorney's services helped create and is not enforceable against a third-party insurer which merely pays the settlement on behalf of its insured. Such a determination provides clarity, uniformity, and decreases needless litigation against insurance providers that regularly pay judgments and settlements on behalf of their insureds.

II. STATEMENT OF THE CASE AND FACTS

This appeal arises out of a motor vehicle accident between Appellee Kisling, Nestico, and Redick, LLC ("KNR")'s client, Darvale Thomas ("Thomas"), and Appellant Progressive Max Insurance, Co., et al. ("Progressive")'s insured, Todd Anthony Thornton ("Thornton"). *Kisling, Nestico, & Redick, L.L.C. v. Progressive Max Insurance Co.*, 8th Dist. No. 105287, 2018-1207, ¶ 3. Thomas, alleging negligence on the part of Thornton, retained KNR and entered into a contingent

fee agreement. However, Thomas discharged KNR prior to resolving his claims against Thomas and retained new counsel. *Id.*

To recover legal fees it believed it was owed by Thomas, KNR notified Progressive that it had a "lien" upon any settlement funds that Progressive paid to Thomas on behalf of its insured, Thornton. Progressive expressly disavowed any obligation to pay KNR any portion of a subsequent settlement and there was no agreement, written or otherwise, between Progressive or KNR giving rise to such an obligation. *Id.* at ¶ 4.

Following Thomas' settlement with Thornton, Progressive paid Thomas an agreed amount of $13,044 on behalf of its insured. The settlement occurred without Thomas filing a lawsuit against Thornton. Thomas, KNR's former client and party to their contingent fee agreement, failed to pay KNR any fees owed under the agreement. KNR brought the underlying action against Progressive, Thomas, and Thornton to recover legal fees arising out its relationship with Thomas. Specifically, KNR alleged claims of (1) declaratory judgment, (2) breach of contract, (3) breach of fiduciary duty, (4) bad faith, (5) quantum meruit, and (6) unjust enrichment against Thomas. Against Thornton and Progressive, by virtue of its status as Thornton's insurer, KNR alleged claims of (1) failure to protect a charging lien; and (2) tortious interference with contract. *Id*. at ¶¶ 5, 6.

Thomas failed to appear or otherwise defend the action and default judgment was entered against him, leaving only Progressive and Thornton as parties, neither of which were parties to the contingency agreement. Thornton was subsequently dismissed from the lawsuit and KNR proceeded only against Progressive, attempting to hold Progressive liable for KNR's own client's failure to pay his legal fees. *Id*. at ¶ 7.

After both parties moved for summary judgment, the trial court awarded summary judgment to KNR, finding it was entitled to $3,411.48 in legal fees. On appeal, a divided Eighth District Court

of Appeals affirmed, reasoning that a charging lien "is completely different from the assignment of rights to receive settlement benefits" and a charging lien "becomes binding on a third party when the party has notice of the lien." *Kisling, Nestico, & Redick, L.L.C. v. Progressive Max Insurance Co., et al*., 8th Dist. No. 105287, 2017-Ohio-8064, ¶ 26.

Following this ruling, Progressive moved for reconsideration en banc. The Eighth District upheld its prior decision, concluding that a charging lien has "superpriority" and is distinguishable from an assignment because "it is a charge upon property, while an assignment creates an interest in property." *Kisling, Nestico, & Redick, L.L.C.*, 2018-1207 at ¶¶ 23, 30. Thus, a lien is "completely different" and became binding upon Progressive upon notice by KNR. *Id*. at ¶ 31. In a dissenting opinion, Judge Larry A. Jones agreed with Progressive "that any action KNR had in regard to the lien vested with Thomas." *Id*. at ¶ 34. Further, the dissent reasoned that the majority "muddled" an assignment and a lien, noted that there is no meaningful difference between the two terms, and concluded that R.C. 3929.06 precludes KNR from bringing a direct action against Progressive after Progressive distributed the settlement proceeds to KNR's former client. *Id*. at ¶ 35. This Court accepted jurisdiction to review Progressive's propositions of law concerning whether a charging lien can only be brought in rem and whether R.C. 3939.06 precludes an interested party from bringing an independent action against a third-party insurer.

III. LEGAL ANALYSIS

PROPOSITION OF LAW NO. 1

A lawyer's charging lien is an in rem equitable rule of priority that gives a lawyer a right to be compensated out of a fund which is created by the lawyer's services and skills in a pending litigation.

PROPOSITION OF LAW NO. 2

R.C. 3929.06 bars a lawyer from directly suing a third-party's insurer to enforce a charging lien without a judgment against the insured.

Ohio recognizes two types of attorney liens: (1) general, or retaining liens, and (2) special, or charging liens. *Fire Protection Resources, Inc. v. Johnson Fire Protection Co*., 72 Ohio App.3d 205, 209, 594 N.E.2d 146 (6th Dist.1991). A "charging lien" is a lien upon a judgment, decree, or award obtained for a client." *Id*. An attorney has an equitable, not a statutory, right to enforce the lien. *Mancino v. Lakewood*, 36 Ohio App.3d 219, 523 N.E.2d 332 (8th Dist.1987). This right "is founded on the equitable principle that an attorney is entitled to be paid his or her fees out of the judgment rendered in the case." *Id*.

A. A charging lien must be asserted in rem as a property right in the funds obtained as a result of the unpaid attorney's efforts.

A charging lien attaches to an interest in tangible property, whether it be a monetary recovery or real property, but does not create an equitable right against any specific party or person. *Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners' Ass'n.,* 8th Dist. Cuyahoga No. 105556, 2017-Ohio-8069 (8th Dist.), ¶ 19. Indeed, "[a]ctually, it is not a true lien. 'The right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund.'" *Hill Hardman Oldfield, LLC v. Gilbert*, 190 Ohio App.3d 743, 748, 2010-Ohio-5733, 944 N.E.2d 264 (9th Dist.) (quoting *Coehn v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923), at syllabus). It is well-settled that equitable liens are enforceable in rem. *JPMorgan Chase Bank, N.A.*, 1st Dist. Licking No. 13-CA-41, 2014-Ohio-320, ¶ 33; *see State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218 (10th Dist.), ¶ 43 ("[A]ctions in rem are usually defined as proceedings against property itself, or as is said, directed primarily against things themselves.").

As this Court reasoned more than a century ago, an interest of an attorney, which is "equal to the former's fees," is a property interest that attaches to the fund created:

> An assignment to an attorney by a client, of an interest in the subject-matter of a claim for personal injuries equal to the former's fees, and a portion of which may be recovered in case of settlement, by some authorities creates an interest in the fund in the nature of an equitable property; by others it is denominated an equitable assignment. **But, whatever term is applied to it by way of description, the result reached is to give to the assignee a property right in the thing assigned, a right which is cognizable and enforceable in a court of equity.**

Pennsylvania Co. v. Thatcher, 78 Ohio St. 175, 85 N.E. 55 (1908), at syllabus.

On point here, an attorney brought suit against his former clients, a third-party insurance company, and the insurance company's counsel, seeking unpaid legal fees from a judgment. *Meros v. Rorapaugh*, 8th Dist. Cuyahoga No. 77611, 2000 Ohio App. LEXIS 5477, *1-2. Specifically, the attorney's former clients obtained a judgment in an underlying suit, paid by the third-party insurer. *Id*. However, the insurer failed to name the attorney as a co-payee on the judgment check. *Id.* at *2. After the attorney settled individually with his former clients, the insurance company filed a motion to dismiss, arguing that this settlement extinguished the attorney's claim, which was granted by the trial court. *Id*. at *4. On appeal, the Eighth District held, in part, that the attorney could only file an action against the settlement fund, which was held by the client, to recover upon his equitable lien:

> [t]he problem with Meros' approach to enforcing his equitable lien is that his remedy is through the client (the Youssefs), and not through parties releasing funds to the client[.] *** By issuing the judgment amount directly to the Youssefs in the Youssef/Grange action, and not including Meros or Meros LPA as a payee on the check representing the judgment amount, the defendants committed no wrong against Meros, individually, or Meros LPA.

Id. at 17-18.

The Eighth District ruled similarly several years later in *Charles Gruenspan Co. v. Thompson*, 8th Dist. Cuyahoga No. 80748, 2003-Ohio-3641. The attorney, Gruenspan, previously

represented defendants and negotiated several settlements on their behalf, which were rejected by defendants. *Id*. at ¶ 2. The defendants subsequently discharged Gruenspan and hired another attorney, who negotiated a settlement that included similar, if not the same, terms negotiated by Gruenspan. *Id*. Gruenspan then brought suit against the defendants, their new attorney, the Cleveland Metropolitan Housing Authority, which was a defendant in the underlying litigation, its counsel, and two accounting firms, one of which had paid out a judgment to the former client-defendants in the underlying litigation. *Id*.

Specifically regarding the accounting firm which had paid out a judgment to the former clients, the Eighth District again refused to allow an attorney to recover from anywhere but the "fund", reasoning: "[t]he analysis we used in *Meros* applies here. Gruenspan had every right to enforce his equitable lien against the Thompsons, but he could not hold Seikel liable for paying settlement proceeds to the Thompsons." *Id*. at ¶ 53. Indeed, the only valid claim Gruenspan had for recovery of legal fees was against his former clients, the Thompsons: "[H]is contractual right to fees earned prior to the termination of his legal services did not translate into an equitable lien" against a non-client that paid out a judgment to an attorney's former clients. *Id*. at ¶ 52.

Here, the same reasoning applies. Attorneys are limited to their recovery in rem when asserting a charging lien. Whatever right an attorney or firm like KNR has to recover unpaid legal fees attaches to the settlement itself, as this amount represents the skill and services rendered. Instead, KNR has asserted claims against the entity which was tasked only with paying the settlement amount agreed to by Thomas and Thornton. This action goes against the very nature of charging liens by allowing an attorney and/or legal firm to assert claims against a third party rather than the fund created by the attorney's skill or services, so long as the attorney or firm gives "notice."

By allowing KNR to pursue its claim in personam against Progressive, the Eighth District's decision wrongfully allows a charging lien to be satisfied outside of the property interest KNR has in the settlement proceeds. The only equitable manner of enforcing a charging lien is for it to be paid out of the amount to which the attorney actually contributed and which gave rise to the lien in the first place. This is because the very purpose of a charging lien is to compensate an attorney for the legal services rendered. If the purpose of a charging lien is abrogated, and if the Eighth District's decision is allowed to stand, the floodgates of litigation will open as attorneys and law firms across the state will be incentivized to sue insurance companies in lieu of seeking recovery from the actual settlement fund itself. Moreover, the potential for collusion to seek double recovery is very real. Normally, a plaintiff's lawyer working on a contingent fee receives only a portion of the settlement. Under the lower court's approach, however, the lawyer's former client can receive the full settlement, and the lawyer can then pursue the tortfeasor's insurer for fees. In such cases, the insurer will be required to pay up to a third more than the negotiated settlement. Such an outcome is not only inequitable, as it holds a third-party insurer liable for another party's debts, a party it is not in privity with, but it presents a dichotomy to insurers. An insurer is contractually obligated to indemnify and defend its insured. However, if it does this, and properly pays out a settlement or judgment on its insured's behalf, it then opens itself up to liability to parties it owes no legal duty to, solely as a result of satisfying its obligation to its insured. Such an outcome does not meet the intended purpose of charging liens.

An attorney is entitled to recover from the fund or judgment his or her services helped create. There is no dispute about this. However, an attorney or law firm should not be allowed to independently sue an insurer, in the complete absence of privity or a legal duty owed between the two, to recover in personam. Such an allowance creates an unreasonable and inequitable duty and

places it upon third-party insurance companies to guarantee that attorneys get paid and in complete disregard of where the money comes from. Accordingly, the only equitable solution, as held by courts prior to the Eighth District's decision, is to allow actions to recover upon a charging lien to only be brought in rem and seek recovery from the fund itself.

B. Mere notice is not enough to allow an independent suit to be brought against a third-party insurer.

First and foremost, the Ohio Supreme Court rejected the argument that notice of an assignment of legal proceeds was enough to obligate a third party to pay a portion of a settlement or judgment to the assignee, reasoning:

> Where composition is made between the tort-feasor and the person wronged, on the basis of a payment for a release, the fund does not come into existence until the payments and the release are simultaneously exchanged. **Then the fund thus created is in the hands of the releaser, and the assignee may follow it there; but it never existed in the hands of the releasee.**

(Emphasis added.) *Thatcher*, 78 Ohio St. at 190-92. Indeed, the Legislature enacted R.C. 3929.06 to prevent this very occurrence, providing that an injured party cannot commence a civil action against an insurer until (1) an injured party has first obtained a judgment for damages against the insured and (2) the insurer has failed to pay the judgment within thirty days. R.C. 3929.06(B). In applying this statutory provision, this Court held first that "the legal reasoning of *Thatcher* [is] still persuasive a century later" and, second, that R.C. 3929.06 precludes an assignee of 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." *West Broad Chiropractic v. Am. Family Ins.*, 122 Ohio St.3d 497, 2009-Ohio-3506, 912 N.E.2d 1093, ¶ 32.

In *West Broad Chiropractic*, a chiropractic clinic attempted to bring suit against a third-party insurer, seeking a declaration that its assignment of any settlement proceeds was valid. *Id*. at ¶ 11. This Court held that R.C. 3929.06 prohibits this kind of claim against a third-party insurer.

Id. at ¶ 31. Specifically, when an injured party has no right to pursue a cause of action under R.C. 3929.06, then a party with an interest in the settlement proceeds also has no such right. *Id.* at ¶ 32.

Further, in attempting to distinguish *W. Broad Chiropractic* from the underlying suit, the Eighth District rested upon its conclusion that a charging lien is given "superpriority" and is distinguishable from an assignment; however, this is simply not the case. The Eighth District relied upon *Cuyahoga County Bd. of Comm'rs v. Maloof*, 197 Ohio App.3d 712, 2012-Ohio-470, 968 N.E.2d 602 (8th Dist.). At issue in *Maloof* was whether or not an attorney's charging lien took priority over other creditors, **not whether such a lien could be asserted against a third party which was tasked only with paying out a settlement**. *Id*. In contrast to the settlement that occurred in the underlying case, the trial court in *Maloof* held a hearing following the entry of judgment to determine how the judgment should be divided amongst named creditors. *Id*. at ¶ 7. The issue revolved singularly upon whether a charging lien of a discharged attorney still attached to a judgment rendered following trial. *Id*. at ¶ 8. Upon review of this narrow issue, the Eighth District Court of Appeal reasoned that an attorney "may enforce his interest against the judgment debtor if he has notified the judgment debtor of his interest." *Id*. at ¶ 18. The court ultimately ruled that the trial court erred in failing to assign proceeds from the judgment to the discharged attorney. *Id*. at ¶ 24. This scenario is easily distinguishable from the issue presented by the Eighth District's reasoning in this case.

Here, Progressive was merely an insurer which had a contractual obligation to pay the settlement amount on behalf of its insured. As in *Maloof*, the lien asserted by KNR attached to the settlement, not to Progressive. The dispute here is not whether KNR has a right to be paid, as was the sole issue presented in *Maloof*, but whether KNR can bring a separate civil suit against an insurer that paid the settlement merely by giving notice of its charging lien. It cannot. As reasoned

in *Thatcher* "the fund thus created is in the hands of the releaser, and the assignee may follow it there; but it never existed in the hands of the releasee." An insurer that is not a party to an agreement between a client and an attorney, but rather only has a duty to defend and indemnify its insured, cannot be sued directly for payment owed by the client, except pursuant to R. C. 3929.06 after judgment, regardless of any notification it has that payment is owed to an attorney for services rendered to that client. This is because an attorney's remedy is not through a third-party insurer, but rather solely through its client (by breach of contract)—the party to whom gained the benefit of the attorney's services—or through the settlement fund (by an equitable lien).

On review, the Eighth District sets dangerous precedent where a former client can (1) retain funds subject to a charging lien and (2) allow an attorney, instead of recovering from the funds to which the lien actually attaches, to drag an insurer into court, in violation of R.C. 3929.06 and despite the fact that the insurer has already satisfied its only legal duty to defend and indemnify its insured. Such a holding is inequitable and in contrast to the very purpose of charging liens. Further, it creates a legal duty where otherwise none exists. There is no privity between a third-party insurer and an attorney representing a client who has obtained a judgment or settlement. What the Eighth District's opinion suggests is that if notice of a charging lien is given to a third-party insurer that pays out a judgment or settlement, then this unilaterally creates a legal duty between these two unrelated parties. In other words, mere notice would be enough to hold a third-part insurer liable for another's debts and to be the ultimate guarantor of an attorney's pay day. This is illogical and conflicts with the reasoning propounded by this Court a century ago.

This Court should hold that an insurer's notice of a charging lien is not enough to create an independent legal duty between the insurer and an attorney. The only equitable solution is to limit

the scope of a charging lien in rem and only allow attorneys to recover from the judgment or fund their services helped obtain.

IV. CONCLUSION

Based on the foregoing, OACTA submits that the Eighth District Court of Appeal improperly allowed KNR to recover upon its charging lien from Progressive. Such a holding debases the equitable nature of a charging lien and will open the floodgates of litigation for claims seeking recovery of legal fees from a third-party insurer for merely paying out an obligated judgment or settlement amount. OACTA respectfully requests that this Court overturn the Eighth District's decision and hold that a charging lien is a property interest that can only be enforced in an in rem proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2018, a copy of the foregoing document was filed electronically and a service copy was served by regular U.S. Mail to:

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