IN THE SUPREME COURT OF OHIO

KISLING, NESTICO & REDICK, LLC., Appellee, vs. PROGRESSIVE MAX INSURANCE CO., *et al.*, Appellants.	Case No.: 2018-0682 On Appeal From the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. CA-16-105287

MERIT BRIEF OF AMICUS CURIAE, THE OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF APPELLEE, KISLING, NESTICO & REDICK, LLC

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IDENTIFICATION OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Ohio Association for Justice ("OAJ") is a statewide association of lawyers whose mission is to preserve Constitutional rights and to protect access to the civil justice system for all Ohioans. OAJ is devoted to strengthening the civil justice system to ensure that deserving individuals receive justice and wrongdoers are held accountable.

The decision reached by the Cuyahoga County Court of Common Pleas in this matter correctly applied the law to contingent business contracts in determining that a third party with notice of the claims to payment must honor those claims. Although the third parties in this instance – Progressive Max Insurance Company, Progressive Southeastern Insurance Company and Progressive John Doe Companies (hereinafter collectively "Progressive") – posit that attorneys only possess claims when there is (1) pending litigation, (2) judgment, award, or settlement in litigation, (3) procurement by the work of an attorney, and (4) a reasonable attorney fee therefrom (Merit Brief, p. 7), the issues raised by Progressive should not be construed so narrowly. If the application of such criteria were necessary when a third party has notice of a claims arising from a contingent business contract, the ramifications of such requirements on business relationships would impact virtually all aspects of business relationships. Simply stated, the attorney-client contingent fee contract is not unique in business and any decision espousing Progressive's criteria would necessarily impact virtually all service contracts.

The law of contingent business contracts is a basic tenet of Ohio common law reaching back to the 19th Century. For good or not, Ohio jurisprudence requires that third parties on notice of a claim derived from a valid contract be recognized and either honored or brought before the courts for an equitable determination of the rights of those contracting parties. Progressive and many other insurers have benefitted from this law for decades in asserting

claims of subrogation and cannot be heard to complain that such recognition of claims is invalid when discretely applied to contingent fee contracts involving personal injury claims.

STATEMENT OF FACTS

OAJ adopts the statement of facts as delineated by Appellee, Kisling, Nestico & Redick, LLC.

ARGUMENT

I. Proposition of Law No. I: 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.

A. Standard of Review

In this case, the trial court denied Appellants' motion for summary judgment. "[B]efore summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). There is no dispute as to the underlying facts. "This Court reviews a ruling on summary judgment de novo." *City of Dayton v. State*, 151 Ohio St. 3d 168, 2017-Ohio-6909, 87 N.E.2d 176, ¶ 12; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

B. The Jurisprudence of the Contingent Fee Contract.

This Court's jurisprudence recognizing the ability of an attorney and client to contract for fees to be paid to the attorney, contingent on the outcome of the case and from the sums recovered by the client, stretches back as far as the 19th Century.

In 1898, this Court reviewed the claim of a third party who argued that he should be absolved of paying an assignment, to an attorney, of which he was given written notice. *P., C., C. & St. L. Ry. Co. v. Volkert*, 58 Ohio St. 362, 50 N.E. 924 (1898). He claimed absolution because he paid the first party the full amount of the claim. This Court reviewed the contract in *Volkert* which promised payment in return for legal services. The Court noted that the client's assignment of the fee from the recovery to the attorney was analogous to many other legal proceedings such as attachment and garnishment. "[I]t could hardly be said that the policy of the law which would permit a debtor to be subjected to the inconvenience of garnishee process would not with equal propriety authorize an assignment of that which might be reached by attachment." *Id.* at 370. Indeed, this Court realized that "the same principle applies in a stronger sense to the remedy given to laborers and materials men under our mechanic's lien laws." *Id.* The assignee therefore has a "property right in the thing assigned, a right which is cognizable by and enforceable in a court of equity. Authorities in support of the proposition here advanced are so abundant that one is at a loss which to select." *Id.* at 372.

This Court examined the contingent fee contract between the attorney and the client and determined that the assignment of part of the monetary recovery was appropriate. "It is more probable that compensation to the attorney in the case could not be made except from the proceeds of the judgment, and there is no rule of law or of common fairness between man and man, which makes it improper for an attorney to be paid for his labor and skill in prosecuting to final judgment a claim against a railway company for personal injuries to a party, from the amount recovered." *Id.* at 373. "The attorney, like any other laborer, is worthy of his hire." *Id.*

"The books are full of cases holding that where a debt has been assigned, and a debtor has knowledge of that assignment, any attempt to settle the case with the assignor and ignore the

claims of the assignee, will be held to be futile so far as the rights of the latter are concerned." *Id.* at 374, *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. Rep. 472, and note (1887); *Field v. The Mayor*, 6 N.Y. 179, 1852 N.Y. LEXIS 54 (1852); *Brill v. Tuttle*, 81 N.Y. 454, 1880 N.Y. LEXIS 261 (1880); *McDaniel v. Maxwell*, 21 Ore. 202, 2 P. 952 (1891); *Schilling v. Mullen*, 55 Minn. 122, 56 N.W. 586 (1893); 3 Pom. Eq. Jur., section 1280; *Hughes v. Trahern*, 64 Ill. 48, 1872 Ill. LEXIS 222 (1872); *Ullman v. Kline*, 87 Ill. 268, 1877 Ill. LEXIS 443 (1877); *Stoddard, Treas. v. Benton*, 6 Col. 508, 1883 Colo. LEXIS 154 (1883). "This necessarily follows if it be once determined that the assignment, and the contract which supports it, are valid." *Volkert* at 374.

With knowledge of the assignment, the third party cannot simply extinguish the rights of the assignee by paying the assignor. "One or more of several joint creditors between whom no partnership exists cannot release the common debtor, so as to conclude their co-creditors who do not assent to such release." *Id.* at 374-74, quoting with approval *Upjohn v. Ewing*, 2 Ohio St. 13, 1853 Ohio LEXIS 159 (1853), syllabus. "[W]here the debtor himself procures the release of a part of [the joint creditors], he cannot object to the others proceeding against him in equity." *Id.* at syllabus.

"At law, joint creditors *must* join in the action; and all must recover, or none can. But the forms of equity procedure require no such joinder which justice would be defeated by it. It may be admitted, that, as a general rule, joint creditors cannot, by a division between themselves, acquire a separate right of action against the debtor, either at law or in equity; but where the debtor himself procures the release of a part of them, we do not see how he can object to the others proceeding against him in equity." (Emphasis sic.) *Upjohn* at 18-19. "How could parties be secured against 'circumvention' if the rule were established that, although a judgment debtor

have full knowledge of an assignment of part of a judgment to a third person, yet he may, without the knowledge and behind the back of that assignee, negotiate an alleged compromise with the original creditor which will discharge the entire debt? It is confidently submitted that neither by any process of right reasoning, nor upon any responsible authority, can such a proposition be maintained." *Volkert* at 377.

Similarly, this Court considered the ability of an insurance company to collect on property damage paid on behalf of its insured when that insured already settled its personal injury claims. In *Hoosier Casualty Co. v. Davis*, the Court considered the fact that the insurer had notified the tortfeasor of its subrogated interest before any litigation was filed. 172 Ohio St. 5, 11, 173 N.E.2d 349 (1961). The insurance company and its insured were found to be "parties *** united in interest" as that term was used in R.C. 2307.20, the statutory precursor to Rule 18 of the Ohio Rules of Civil Procedure. *Id.* at 11. "Where, as in the instant case, the one, against whom that single cause of action may be asserted, has knowingly waived his right to avoid an action based upon assertion of only a part of that cause of action by the owner of that part, such one cannot later question the assertion in a separate action of the remaining part of that claim by the owner of such remaining part." *Id.* at 12-13.

"The pleadings in the instant case indicate that the insurer-subrogee was not a party to the action brought by the insured against the tortfeasor and those pleadings allege that the tortfeasor knew of the interest of the insurer-subrogee in the insured's single cause of action against the tortfeasor at a time before that action was instituted. Of course, if the insurer-subrogee had originally been a party to the action of the insured against the tortfeasor (based upon the single cause of action that is also the basis of the action of the insurer-subrogee in the instant case) or had been brought in as a party to that action, then any judgment in the insured's action disposing

of that single cause of action could obviously have been pleaded as a bar to the assertion in the instant case of the interest of the insurer-subrogee in that single cause of action." *Id.* at 13. "This brings us back to [*Volkert*], which clearly indicates that, if the tortfeasor or debtor knows of the interest of the insurer-subrogee in the cause of action of the insured against the tortfeasor, the tortfeasor cannot pay or 'compromise' that claim with the insured 'alone and thus defeat the claim of the' insurer-subrogee (who is admittedly in effect a partial assignee of that claim or cause of action) 'to recover' on account of his interest in that cause of action." *Id.* at 14.

In 1971, this Court reviewed a similar appeal in which the insurer which had paid a property damage claim was claiming subrogation from personal injury litigation filed by the claimant. *Ervin v. Garner*, 25 Ohio St.2d 231, 267 N.E.2d 769 (1971). In *Ervin*, this Court reviewed a subrogation assignment executed by the insureds for property damage paid by the insurer to repair a barn. At the time the assignment was executed, no fund existed to pay that assignment. The insurer intervened as a codefendant to secure reimbursement of its prior payment. The insured attempted to cut out this reimbursement claim by amending his pleading to include only the contents of the barn. "It should be noted at the outset that the appellee's right of subrogation in this case cannot be defeated by appellant filing an amended petition to pray only for the uninsured items of loss. Appellant, at the time of the loss, had only one cause of action, and his execution of the subrogation assignment and appellee's payment of the $5,000 pursuant to the insurance policy then in force created no new cause of action in favor of the insurer." *Id*. at 235; *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599 (1958); *Hoosier*, 172 Ohio St. 5, 173 N.E.2d 349, paragraph two of the syllabus as limited by paragraph three thereof; *Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964); *Nationwide Ins. Co. v.*

Steigerwalt, 21 Ohio St.2d 87, 255 N.E.2d 570 (1970), paragraph two of the syllabus as limited by paragraph three thereof.

In *Ervin*, the insured claimed that the insurer was not cooperating and assisting in securing the recovery but the Court found the insurer's level of participation irrelevant in view of the valid contract between the parties. "This view does not exhibit a lack of concern over a possible windfall to the insurer who sits back and allows the insured to pursue the action against the tort-feasor. Obviously that could happen, but such a result should not be characterized as unfair if it is in accordance with the provisions of the policy as sold. The insured knew, or should have known, when he bought the policy that in case of any payment he would be required to assign '*all* right of recovery against any party for loss to the extent that the payment *** is made ***. That is a specific provision of the policy." (Emphasis sic.) *Ervin* at 237-38.

This Court extended this rationale allowing a subrogation right in the context of a valid contract in *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210. In *Lawson*, the right of reimbursement was asserted before any fund had been paid and before any funds for reimbursement existed. "A provider of health-insurance benefits and an insured who has been injured by an act of a third party may agree *prior to payment* of medical benefits that the insured will reimburse the insurer for any *amounts later recovered* from that third party, third party's insurer, or any other person through settlement or satisfaction of judgment upon any claims arising from the third party's act. A clear and unambiguous agreement so providing is not unenforceable as against public policy, irrespective of whether the settlement of judgment provides full compensation for the insured's total damage." (Emphasis added.) *Id.* at paragraph one of the syllabus. Furthermore, the clause at issue included funds "later recovered from the third party by way of settlement or in

satisfaction of any judgment." *Id.* at ¶ 3. The focus is on the contractual obligations of the parties. *Id.* at ¶ 18, citing *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 121, 1995-Ohio-306, 647 N.E.2d 1358. This Court added that "[a]lthough some may view a subrogation provision granting priority to the insurer as unfair, courts should not rewrite contracts." *Lawson* at ¶ 20.

Five years after this Court decided *Lawson*, the case of *W. Broad Chiropractic v. Am. Family Ins.* was reviewed on its merits. 122 Ohio St.3d 497, 2009-Ohio-3506, 912 N.E.2d 1093. The Progressive Defendants in the case at bar underscore *W. Broad Chiropractic* for the proposition that "R.C. 3929.06 bars a tort claimant's former lawyer from suing a third-party's insurer to enforce a charging lien against a settlement paid by the insurer." (Merit Brief, p. 22.) If this proposition were true, then this Court would have abrogated more than a century of common law.

This Court held that 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." (Emphasis added.) *W. Broad Chiropractic*, at ¶ 26. The holding is *not* that the proceeds exist at the time of the assignment.

Further, the Court found that the holding in *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N.E. 55 (1908) was "still persuasive a century later." *Id*. at ¶ 20. The *Thatcher* decision also involved a contingent fee contract in the wake of personal injuries sustained in a railroad accident. *Thatcher* at syllabus. Moreover, the *Thatcher* Court expressly approved and followed the decision of *Volkert*. A critical difference between the holdings in the two cases lies in the facts in *Thatcher*.

"Where such a cause of action is compromised by the tort-feasor and the injured party in the absence of the attorney of the latter, before suit commenced, and the amount agreed on is paid over to the claimant, and the attorney, who claims an interest in the proceeds of the compromise, does not follow the fund into the hands of his client, but ***in consideration of payment of a part of the fee claimed by him agrees not to prosecute his client for the balance of his fee and agrees to prosecute the tort-feasor therefor, he thereby waives his right to recover against either***." (Emphasis added.) *Thatcher*, paragraph three of the syllabus. Further, "[w]here in such case the attorney obtain from his client possession of part of the money paid, for the purpose of counting the same, and thereupon said that he would keep the money and apply it on account, but on resistance and remonstrance on part of the client handed it back to the latter, such facts do not show a payment to the attorney." *Id.* at paragraph four of the syllabus.

Assuming *arguendo* that the Court was referring to the attorney-client relationship established at the outset of the *Thatcher* decision, rather than the second assignment occurring at the household of the Thatcher family after Thatcher settled his claim with the railroad, nevertheless, it is critical to examine the nature of the relationship of the patient and the chiropractor vis-à-vis the underlying personal injury tort. Unlike an attorney, the chiropractor is not working to establish a monetary fund for the patient/client. The chiropractor is clearly entering a contract but for medical services, not for an action against the tortfeasor. The attorney, on the other hand, it expressly working to establish a fund for the client from the tortfeasor. In other words, the doctor is a stranger to the claim against the third party, while the attorney is the agent for the claimant involving the third party. This Court clearly stated that "*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 de paid in suit or settlement.'" (Emphasis added.) *W. Broad Chiropractic* at ¶ 19, quoting *Thatcher* at 175. "*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." *W. Broad Chiropractic* at ¶ 19, quoting *Thatcher* at 175.

Regarding R.C. 3929.06, the Court was also clear. "The underlying premise of RC. 3929.06 reinforces our conclusion that [the patient] had not [an] existing right to proceeds to assign to [the chiropractor]." *W. Broad Chiropractic* at ¶ 32. Clearly, "there must be an existing right in order for there to be a valid assignment.***" *Id.* at ¶ 33. A lawyer hired to represent a claimant in pursuit of a claim is not prohibited by either R.C. 3929.06 or the decision of *W. Broad Chiropractic* from enforcing a charging lien against a settlement by the insurer. That lawyer is not a stranger to the claim and is a permissible agent for the claimant.

Finally, the holding *W. Broad Chiropractic* explicitly distinguished attorneys from other creditors of a personal injury victim who attempts to satisfy creditors, like medical providers, automobile repair shops, and pharmacists, with assignments of settlement proceeds. *Id*. at ¶ 24. The Court wrote, that if it were to enforce such assignments, "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." *Id*. at ¶ 22.

Therefore, *W. Broad Chiropractic* in no way modifies this Court's long-standing precedent regarding the validity of contingent contracts, as between an attorney and her or her client.

C. Pending Litigation is not necessary to establish a Charging Lien.

"Under the law of Ohio, a client has an absolute right to discharge an attorney of law firm, at any time for any reason, subject only to the obligation to compensate the attorney or firm for services rendered prior to the discharge." *Filius v. Ohio Sports Headquarters, Inc.*, S.D. Ohio No. C-3-90-358, 1995 U.S. Dist. LEXIS 22176, *3 (May 18, 1995); *Reid v. Lansberry*, 68 Ohio St.3d 570, 629 N.E.2d 431 (1994), paragraph one of the syllabus. "When, as in the present case, the law firm and its client had a contingent fee arrangement, the firm is entitled to recover under quantum meruit for the reasonable value of its services before discharge." *Filius* at *3; *Fox & Associates Co., L.P.A. v. Purdon*, 44 Ohio St.3d 69, 541 N.E.2d 448 (1989), syllabus. Furthermore, the "discharged law firm's cause of action under quantum meruit does not arise until the contingency has been removed." *Filius* at *3-4; *Reid* at paragraph two of the syllabus.

"Ohio courts recognize an attorney's equitable right to enforce an attorney's lien for the payment of fees earned in the prosecution of litigation to judgment." *Mancino v. Lakewood*, 36 Ohio App.3d 219, 523 N.E.2d 332 (1987), paragraph three of the syllabus. "A special or charging lien may be created by an express agreement on the part of the client that the attorney shall have a lien for his compensation on the amount recovered. While, before judgment, an attorney has no lien upon or interest in the cause of action, in the absence of statute, yet where the parties have contracted that the attorney shall receive a specified amount of the recovery, such agreement will operate as an equitable lien in favor of the attorney." *Id.* at 223-24, citing 6 Ohio Jurisprudence 3d, Attorneys at Law, Sections 178-179, at 721-722; Section 183, at 725 (1978); *Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners' Ass'n*, 8th Dist. Cuyahoga No. 105556, 2017-Ohio-8069, ¶ 18; *Reid,* 68 Ohio St.3d 570 at paragraph one of the syllabus. "An attorney and client may lawfully agree upon compensation to the former contingent upon

the amount to be recovered, either by *settlement* or by judgment, and a court will recognize the validity and enforceability of contracts providing for such arrangements." (Emphasis added.) *Id.* , citing 6 Ohio Jurisprudence 3d, Attorneys at Law, Section 155, at 690.

"Charging liens are usually superior to those of other creditors." *Kerger & Hartman, LLC v. Mohamad Ajami*, 6th Dist. Lucas No. L-14-1219, 2015-Ohio-5157, ¶ 23; *Garrett v. City of Sandusky*, 6th Dist. Erie No. E-03-024, 2004-Ohio-2582, ¶ 25. "An attorney will only be allowed to enforce a charging lien in proper cases." *Kerger & Hartman* at ¶ 23; *Garrett* at ¶ 25. "Using its discretion, a trial court must decide whether to enforce a charging lien based on the facts and circumstances of the particular case." *Slater v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. Franklin No. 17AP-453, 2018-Ohio-1475, ¶ 33; *Galloway v. Galloway*, 8th Dist. Cuyahoga No. 103837, 2017-Ohio-87, ¶ 22. "[A]n attorney may have a claim upon the fruits of a judgment or decree which he has assisted in obtaining, or upon a sum of money which he has collected, and under some circumstances courts will aid him in securing or maintaining such claim." *Diehl v. Friester*, 37 Ohio St. 473, 477, 1882 Ohio LEXIS 211 (1882). "The Ohio attorney has both a retaining lien over the client's papers and a charging lien over the proceeds of a judgment." *Fire Protection Resources, Inc. v. Johnson Fire Protection Co.*, 72 Ohio App.3d 205, 209, 594 N.E.2d 146 (6th Dist.1991); *Foor v. Huntington Nat'l Bank*, 27 Ohio App.3d 76, 499 N.E.2d 1297 (10th Dist.1986). "Unlike other liens, an attorney's lien '*** has its origin in the inherent power of courts over the relations between attorneys and their clients. The power which the courts have summarily to enforce the performance by the attorney of his duties toward his client enables the court to protect the rights of the attorney as against the client.'" *Fire Protection* at 209, quoting *Foor* at 79.

"When reviewing these cases, it is clear that, in dealing with those issues, some of the primary considerations of the Ohio courts have been: (1) the right of the client to be heard on the merits; (2) the right of an attorney to invoke the equitable jurisdiction of the courts to protect his fee for services rendered; (3) the elimination of unnecessary and duplicative litigation; (4) the opportunity for the client to obtain counsel to litigate the claim for attorney fees; (5) the propriety of an order as opposed to a judgment; (6) a forum for the presentation of witnesses, if necessary; and (7) the equitable nature of the proceeding." *Fire Protection* at 210-11. A charging lien may be asserted while litigation is pending by means of invention pursuant to Civ.R. 24 or at the time of final judgment if notice is provided to the client-debtor. "Moreover, where an attorney files a motion to enforce an attorney charging lien on a final judgment, the trial court in which the judgment was rendered *must* entertain the attorney's motion." (Emphasis sic.) *Devis v. Pineview Court Condo. Ass'n*, 8th Dist. Cuyahoga No. 102147, 2015-Ohio-2704, ¶ 10; *Fire Protection* at 211.

Appellees assert that litigation must be pending at the time the lien is asserted by the discharged attorney. That assertion is inconsistent with the law which allows the lien to be asserted at the time of discharge, regardless of the status of the represented individual's claim.

D. Judgment, Award or Settlement in Litigation

Appellees assert that Appellant can only have a claim to the former client's distribution if such distribution occurred as a result of a judgment, award or settlement in pending litigation. There is no basis for limiting this assertion to the attorney-client contingent fee contract. If it were true in that context for the reasons stated by Appellees, then it would be true for virtually all service contracts and for claims of subrogation asserted before payment of any bills, much

less litigation. As all attorneys practicing personal injury law in the state of Ohio know, such a premise that litigation must be pending to assert such a claim is simply untrue.

The context for reported decisions is of little consequence. Necessarily, many of the decisions refer to the judgment obtained by the attorney—appellate review is of course impossible without an underlying judgment. It would be inappropriate to conclude that litigation is necessary for an attorney to have a claim for quantum meruit. Attorneys rarely need to resort to filing suit against clients to enforce charging liens or the terms of a contingent fee contract. This is especially true because settlements funds are payable to attorney and client, jointly.

"A charging lien in favor of an attorney is a lien upon judgment *or other proceeds* awarded to a client or former client." (Emphasis added.) *Mathews v. Eastern Pike Local Sch. Dist. Bd. of Educ.*, 4th Dist. Pike No. 12CA832, 2013-Ohio-4438, ¶ 20. "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 our of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund. Such claim, together with costs and other expenses of procuring the judgment, has priority over those general creditors of the plaintiff ***." *Cohen v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923), paragraphs one and two of the syllabus. "Although *Cohen* describes a lien attached to a judgment, courts have not interpreted this language as prohibiting the attachment of a lien to settlement proceeds." *Ohio Willow Woods Co. v. Alps S., LLC*, S.D. Ohio No. 2:04-cv-1223, 2017 U.S. Dist. LEXIS 152350, *6 (Sept. 19, 2017). "Nor have courts interpreted *Cohen's* language as prohibiting the attachment of a lien when an attorney is discharged before the lawsuit is settled (or final judgment is entered in the case)." *Id.* Indeed, for the same reasons

that pending litigation is not required for an attorney to assert a charging lien, there is no requirement that final judgment issue to recognize such a lien.

In support of their arguments, Appellees cite the decision of *In re All Cases Against Sager Corp*., 132 Ohio St.3d 5, 2012-Ohio-1444, 967 N.E.2d 1203. In that case, however, the issue was whether the trial court correctly appointed a receiver for a dissolved company. As an Illinois corporation, Sager could not be sued 5 years after dissolution pursuant to Illinois law. *Id.* at ¶ 1. Because Sager could not be sued after 2003, the appointment of a receiver after that date for claims violated the Full Faith and Credit Clause of the United State Constitution. *Id.* at ¶ 2, 28. In order to pursue Sager, the claimants necessarily would have had to have a judgment against it before five years after dissolution. "Because Sager lacks capacity to be sued, no judgment can be taken against it." *Id.* at ¶ 32. The Court references its holding in *W. Broad Chiropractic* for the application of R.C. 3929.06(B) prohibiting an injured party from a direct suit against the tortfeasor's carrier without first obtaining a judgment. *Id.* at ¶ 31. Application of the holding of *W. Broad Chiropractic* to *Sager* is appropriate. Extension of that logic to the case herein is not.

E. Procurement by the Work of an Attorney

OAJ does not dispute that the attorney must have performed work to assert a claim for quantum merit or a charging lien. Case law and the Ohio Rules of Professional Conduct on this issue are clear.

An attorney cannot contract with a client for a liquidated attorney fee in the event the client ends the representation. *Cuyahoga Cty. Bar Assn. v. Levey*, 88 Ohio St.3d 146, 148-49, 724 N.E.2d 395 (2000), citing *Reid*, 68 Ohio St.3d 570. "Consequently, such provision providing for hourly charges in the event of attorney discharge is contrary to the holding

in *Reid* and constitutes a clearly excessive fee." *Doellman v. Midfirst Credit Union, Inc.*, 12th Dist. Warren No. CA2006-06-074, 2007-Ohio-5902, ¶ 27 (citing DR 2-106(A), which preceded Prof.Cond.R. 1.5). The factors for determining whether the attorney's work procured the result obtained overlaps with those for determining the reasonable value of the attorney fee sought. "Factors to be considered by courts making this determination will vary in each case, but can include:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent.

Dickson & Campbell L.L.C. v. Marshall, 8th Dist. Cuyahoga No. 106289, 2018-Ohio-2233, ¶ 10; Prof. Cond. R. 1.5(a).

F. Reasonable Attorney Fee Sought

OAJ does not refute the criterion that the fee sought by an attorney must be reasonable in all circumstances. Again, this premise is well-established both in Ohio case law and in the Rules of Professional Conduct.

"The determination of the amount of a charging lien is a question of fact." *Mathews*, 2013-Ohio-4438, ¶ 18. "A trial court called upon to determine the reasonable value of a discharged contingent-fee attorney's services in quantum meruit should consider the totality of the circumstances involved in the situation. The number of hours worked by the attorney before the discharge is only one factor to be considered. Additional relevant considerations include the recovery sought, the skill demanded, the results obtained, and the attorney-client agreement itself." *Reid*, 68 Ohio St.3d 570, paragraph three of the syllabus. *See also*, Prof. Cond. R. 1.5(a).

II. Proposition of Law No. II: R.C. 3929.06 bars a tort claimant's former lawyer from suing a third-party's insurer to enforce a charging lien against a settlement paid by the insurer.

R.C. 3929.06 does not apply to the charging lien in this litigation or in most litigation. As stated *supra*, an attorney has several avenues for asserting a charging lien depending on the status of the former client's claim and the means by which that claim was pursued. If the client hired replacement counsel, as was the case in the 1999 decision of *Fred Siegel Co., L.P.A. v. Arter & Hadden*, the third party may be sued *regardless* of whether litigation was ever commenced. 85 Ohio St.3d 171, 707 N.E.2d 853 (1999). If litigation is already pending, the discharged attorney may intervene by means of Civ.R. 24 or file a motion for a hearing on a claim for quantum meruit. *Devis*, 2015-Ohio-2704, ¶ 10.

Essentially, Progressive claims absolution for the distribution of funds in the face of an assignment and of a claim for quantum meruit merely because Progressive is an insurance company. Using R.C. 3929.06 as a shield, Progressive argues that it is not the proper party to the litigation. Specifically, Progressive argues that this Court's decisions in *W. Broad Chiropractic* and in *Sager* stand for the proposition that Progressive cannot be sued directly. Progressive's reliance on those two decisions is misplaced for the reasons stated *supra*.

Progressive also cites four cases for the proposition that it cannot be sued directly when it pays a claim on behalf of its insurer. In doing so, Progressive wilfully ignores the procedural history of this litigation. The record clearly demonstrates that the insured tortfeasor, Todd Anthony Thornton, and Appellee's former client, Darvale Thomas, were parties to this litigation. Thornton filed a crossclaim against Progressive for contribution, indemnification and/or reimbursement of all monies, fees, costs, expenses and damages as a result of this litigation.

In its answer, Progressive amazingly sued Thomas, admitting that Progressive was provided with notice by Thomas that Appellee was originally his attorney and later the attorney-client relationship had been "terminated." Progressive then sought and obtained a settlement agreement not just to release its insured, Thornton, but also to "defend and indemnify the Progressive Defendants and Thornton for all claims presented against Defendant by Plaintiff."

This is not a case which stands for the proposition of law delineated herein. All of the possible parties involved were identified and served. Default judgment was awarded to Appellee against its former client, Thomas.

Progressive has conflated the liability of the tortfeasor insured with its own liability. R.C. 3929.06 applies in those instances when the insurance company pays for the liability of the tortfeasor. In those instances, the claimant can only file a direct action against the liability carrier as permitted by Title 39 and the common law. That area of the law is not at issue in this case.

Furthermore, R.C. 3929.06 applies only in those instances in which a trial court enters "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." R.C.

3929.06(A)(1). This particular statute is silent as to those matters which occur without commencement of litigation.

In *Marks v. Allstate Ins. Co.*, 153 Ohio App.3d 378, 2003-Ohio-4043, 794 N.E.2d 129 (5th Dist.), *cert. denied*, 100 Ohio St.3d 1508, 2003-Ohio-6161, the claimant sued the tortfeasor, settled her litigation and dismissed the case. The claimant was paid approximately sixty days later. Five years after that payment and release, the claimant sued Allstate for paying the settlement 11 days late. The Fifth Appellate District held that the insurer was merely acting on behalf of its insured in negotiating the settlement of the claim. *Id.* at ¶ 33. The court referred to an earlier decision from the same district in support. That case captioned *Layne v. Progressive Preferred Ins. Co.*, 5th Dist. Stark Nos. 2002CA00327 and 2002CA00335, 2003-Ohio-3575, also involved a claim for interest on a settlement paid a week later than promised. Upon review of the claim by this Court, the Court never reached the issue of the standing of the plaintiff to sue the tortfeasor's insurer for interest on the settlement. *Layne v. Progressive Preferred Ins. Co.*, 104 Ohio St.3d 509, 2004-Ohio-6597, 820 N.E.2d 867. Rather that decision stands for the premise that parol evidence is irrelevant in light of the settlement's integration clause. See, e.g., *Bellman v. Am. Int'l Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, 865 N.E.2d 853, ¶ 6.

"It is impossible to ignore the conduct of the defendant's insurer in any determination regarding settlement efforts, unless one is to ignore the realities of litigation." *Peyko v. Frederick*, 25 Ohio St.3d 164, 166, 495 N.E.2d 918 (1986). This Court reinforced this statement in *Bellman*, finding that the proper party to be sued for post-settlement interest was the tortfeasor, rather than its insurance carrier. *Bellman* at ¶ 20.

Progressive also cites *Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St.3d 138, 2010-Ohio-3264, 931 N.E.2d 548 in support of this proposition of law. Although the citation

provided by Appellant is unclear which part of the decision is supportive, the Court determined that the case turned on R.C. 3929.06(C)(2), "which addresses the effect of a declaratory judgment on a supplemental complaint filed pursuant to R.C. 3929.06(A)." *Id.* at ¶ 12. The Court concluded that this particular statute "unambiguously limits the binding effect of a declaratory judgment action between an insured and an insurer to those instances in which the declaratory judgment action was filed by the policyholder." *Id.* at ¶ 16. The case at bar, however, does not involve a declaratory judgment action, litigation between the insured and insurer, or R.C. 3929.06(C)(2). It is respectfully posited that this decision has no bearing on the current appeal.

Progressive also seeks support from *Chitlik v. Allstate Ins. Co.*, 34 Ohio App.2d 193, 299 N.E.2d 295 (1973). That decision issued two rulings: namely, that "[a]n injured party is not a third party beneficiary of a liability insurance contract between an insurer and its insured and may not sure the insurer under that theory", and that [a]n injured person may sue a tortfeasor's liability insurer, but only after obtaining judgment against the insured." *Id.* at syllabus. The rationale for this holding is that the insured tortfeasor "is the one whose wrongdoing is alleged to have caused the injury, and if the facts are found as alleged, he will be primarily liable." *Id.* at 198. The actions of the insured and the insurer were virtually indistinguishable to the court. "Even if the injured party were permitted to sue the insurer directly he would obtain little advantage since the same elements would have to be proved in an action against the insured, namely: negligence, proximate cause and damages; and the same defenses – contributory negligence, assumption of risk, etc., would be available to the insurer." *Id*.

In this case, the litigation involved not the collision which injured Appellee's former client but the actions of Progressive deciding to pay the settlement funds directly to that former

client despite explicit notice of Appellee's claim for quantum meruit. Further, the notion that Appellee must first obtain a judgment against the insured tortfeasor – who was also a party to this litigation – makes no sense. The tortfeasor also made his peace by settling the tort claims for monetary compensation. At no time did the tortfeasor have the funds that were paid to the other driver. There is no evidence that the tortfeasor directed his insurer to pay the other driver despite notice of a charging lien. While the insurance company may have been the party to hire counsel, to negotiate the settlement and to pay the funds, there is no evidence that the insurance company received direction from its insured or that its policy provided that the funds were to be paid in that the manner which they were. Further, the insurance companies may have been the backseat driver decades ago but now require that the insurance company be listed as a Released Party on every settlement agreement. The insurance companies are part of the settlement. It only stands to reason that as a party to the settlement, the insurance company may have liability for the manner in which it handled the transaction. Progressive cannot be heard to complain that it cannot have direct liability to law firms like Appellee, on the basis of R.C. 3929.06, when it negotiates settlement agreements with the express purpose of releasing *itself* from direct liability. Amazingly, Progressive sued the injured party in this litigation claiming that it was entitled to indemnification for its decision not to pay the charging lien.

Progressive was named as a party in this litigation for its own liability, not that of its tortfeasor-insured. Similarly to the facts in *Thatcher*, Progressive is liable for its actions occurring aside from the settlement of the underlying tort claims. A critical admission was made by Progressive in its last footnote at the end of the merit brief. Progressive notes that Appellee could not have successfully sued its insured because Progressive already paid the settlement monies.

> [A]t best, [Appellee's] equitable charging lien would give [Appellee] a right of first priority to the proceeds of the settlement if the settlement was before a court and Progressive and [its insured] were vying for a portion of the settlement proceeds. But Progressive ad [its insured] were not vying for a portion of the settlement proceeds, and there is no mechanism by [Appellee] that could have compelled [the insured] to pay its attorney's fees out of his own pocket (or Progressive's).

Progressive and its insured could only have a conflict if the other driver, Thomas, was at fault and Progressive had paid some monies to pay for property damage or for medical bills. Neither of those issues were present in this case. By paying the settlement monies to Thomas despite written notice of the claim for quantum meruit and with knowledge of the charging lien, Progressive necessarily entangled itself in this matter. In asserting that "there is no mechanism," Progressive underscores that Progressive alone decided to pay its insured's debt directly and solely to Thomas. In doing so, it could not extinguish the debt of which it was aware and that directly related to these same funds. If Progressive was acting through counsel, it would be in clear violation of Prof. Cond. R. 1.15(d) and (e) which require an accounting be made to those with claims to the funds at issue and that the party holding the funds not unilaterally resolve such claims. The solution to claim resolution is, of course, a settlement of if not possible, litigation. It was not, as Progressive did, just to pay the monies and then claim absolution.

CONCLUSION

For these reasons and those articulated in Appellee's brief, OAJ respectfully recommends that the decision of the Eighth Appellate District be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Merit Brief of Amicus Curiae The Ohio Association for Justice in Support of Appellee Kisling Nestico & Redick, LLC* was served by electronic mail pursuant to Civ.R. 5(B)(2)(f) on this 31st day of October 2018 to the following:

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