COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NOS. 2008-SC-000037; 2008-SC-000044

ASSOCIATED INSURANCE SERVICE, INC.

and

AON RISK SERVICES, INC. OF OHIO **APPELLANTS**

v. **ON DISCRETIONARY REVIEW FROM COURT OF APPEALS CASE NO. 2006-CA-001737, AN APPEAL FROM JEFFERSON CIRCUIT COURT CASE NO. 02-CI-09027**

DANIEL GARCIA, M.D.

and

RITA GARCIA **APPELLEES**

BRIEF FOR APPELLANT, ASSOCIATED INSURANCE SERVICE, INC.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this brief was served via regular mail this 7th day of November, 2008 upon the following persons: Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601-9230; Hon. Geoffrey P. Morris, Jeff. Cir. Ct., 700 West Jefferson St., Louisville, KY 40202; Lee E. Sitlinger, Esq., Sitlinger, McGlincy, Theiler & Karem, 370 Starks Building, 455 S. Fourth St., Louisville, KY 40202; Larry B. Franklin, Esq., Franklin Hance, PSC, 5050 W. Ormsby, Louisville, KY 40203; Mark S. Riddle, Esq. and P. Blaine Grant, Esq., 3500 National City Tower, 101 S. Fifth St., Louisville, KY 40202; and Gene Price, Esq., 400 W. Market, 32nd Floor, Louisville, KY 40202. I further certify that the record on appeal has not been checked out.

Counsel for Appellant

INTRODUCTION

This is a professional negligence case against an insurance agent and broker in which the Court of Appeals reversed the trial court's order granting summary judgment to the agent and broker. The trial court had granted summary judgment to the agent and broker because the plaintiffs have no right to assert professional negligence claims that were obtained through an invalid assignment.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is requested because this case involves important questions of insurance and tort law in Kentucky. The plaintiff-appellees seek to make significant changes to Kentucky law which would result in the creation of a new class of claims that the defendant-appellants believe are against public policy.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. The Star of Louisville Obtains an Insurance Policy with HIH.

In October 1997, the Star of Louisville ("the Star") obtained an insurance policy with HIH Casualty and General Insurance Ltd ("HIH"). (TR 403, Insurance Policy, attached hereto as Appendix Exhibit 4.) The policy had been obtained for the Star by an insurance broker, AON Risk Services, Inc. of Ohio ("AON"). James Wetterer, an agent of Associated Insurance Service, Inc. ("Associated"), served as agent of record in Kentucky on the policy.

Among other things, the policy provided "Protection & Indemnity" for "Premises Liability." Under the terms of this indemnity policy, the Star's right to be indemnified by HIH would not arise until the Star had actually paid for whatever liability it had incurred.

> In consideration of the premium and subject to the warranties, terms and conditions herein mentioned, this Company hereby undertakes to pay up to the amount hereby insured and in conformity with lines 5 and 6 hereof, such sums as the assured, as owner of the FLEET PER SCHEDULE ***shall have become legally liable to pay and shall have paid*** on account of:
>
> Loss of life of, or injury to, or illness of, any person;
>
> Hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of , injury to , or illness of any member of the crew of the vessel named herein; ....

(TR 427, Insurance Policy, Apx. Ex. 4) (emphasis supplied.) Thus, if an injured person obtained a judgment against the Star, the Star would have no right to look to its insurer HIH for payment until the Star had satisfied the judgment itself.

B. The Garcias File a Personal Injury Lawsuit Against the Star.

On April 18, 1998, during the evening of Thunder Over Louisville, Daniel and Rita Garcia were injured while aboard the Star. Their injuries occurred when their legs became trapped beneath a motorized lift near a stairwell on the boat. On April 14, 1999, the Garcias filed a personal injury lawsuit against the Star. The Star was defended by counsel chosen by HIH.

In 2001 -- four years after the policy had been obtained -- HIH became insolvent and, presumably, unable to indemnify the Star for any judgment the Garcias might have obtained against the Star. There is no reason to believe that Associated should have known in 1997 that HIH would become insolvent in 2001. No evidence of record in this case suggests that Associated was negligent in procuring insurance through HIH, an extremely large and well-established insurance provider, in 1997.

There is also no evidence of record suggesting that the Star itself lacked sufficient assets to satisfy any judgment the Garcias might have obtained against the Star. Nonetheless, both the Garcias and the Star apparently viewed the insolvency of HIH as having changed the outlook of the Garcias' personal injury suit against the Star. Thus, in 2002, the Garcias and the Star contrived a plan to settle their litigation and to arrange for the Garcias to attempt to sue the Star's insurance broker, AON, and its insurance agency, Associated.

C. The Garcias and the Star Contrive an "Agreement" Under Which They Attempt to Hold Certain Non-Parties Liable to a Settlement.

On February 28, 2002, the Garcias and the Star executed the "Agreement Between Daniel Garcia, Rita Garcia, and Star of Louisville" (hereafter, the "Agreement"). (TR 436, Agreement, attached hereto as Appendix Exhibit 5.) Neither

Associated nor AON was a party to the Agreement, nor did they have any knowledge of it when it was negotiated.

The Agreement provides that the Star shall admit liability for the Garcias' injuries, that an arbitrator shall determine the amount of damages to which the Garcias are entitled, and that the arbitrator's determination shall be bound by a high-low range of $200,000 to $800,000. The Agreement also provides, however, that the Garcias shall not attempt to collect the arbitration award from the Star – meaning the Star would suffer no damage as a result of the personal injury case. Rather, the Garcias expressly reserve the right to attempt to collect the arbitration award from certain non-parties to the Agreement, specifically, Mr. Wetterer, Associated, AON, and HIH. The Star agreed to assign to the Garcias all claims it purportedly had against those non-parties. Finally, the Star agreed to notify those non-parties sought to be bound thirty days prior to the date of the arbitration. (*Id.*)

The Star invited Mr. Wetterer and Associated to participate in the arbitration. Naturally, Mr. Wetterer and Associated declined to participate in an arbitration that could not bind them in any way. Mr. Wetterer and Associated further explained to the Star the gross inequity of what the Garcias hoped to accomplish, namely, binding non-parties to an arbitration to which they had never agreed, failing to provide them sufficient notice, failing to advise them of the arbitration until after the Star already admitted to liability of at least $200,000, and failing to give them any role in the defense of the underlying claim against the Star. (TR 440-449).

The Garcias and the Star submitted the issue of damages to the arbitrator, former Jefferson Circuit Court Judge Ken Corey, without Associated or AON present.

On June 11, 2002, Judge Corey submitted his findings, noting at the outset that the Star had admitted liability, then determining that the Garcias were entitled to a total of $742,193.10 in damages. A judgment for that amount was entered in Jefferson Circuit Court on December 9, 2002. The Star has never paid the judgment.

D. Pursuant to a Purported "Assignment" of Claims, the Garcias File Suit Against Associated and AON.

On November 27, 2002, the Star and the Garcias executed an assignment document in which the Star purported to assign to the Garcias, pursuant to their collusive Agreement, "any and all claims" the Star may have had against Associated and the other non-parties to the arbitration. (TR 455, attached hereto as Appendix Exhibit 6.) That same day, the Garcias filed this lawsuit against Mr. Wetterer and Associated. The lawsuit alleged professional negligence against Mr. Wetterer and Associated for procuring insurance from an insurer, HIH, that ultimately became insolvent. The complaint asserts that as a result of the arbitration and assignment the Garcias had acquired all claims of the Star against Mr. Wetterer and Associated, that they now assert the Star's claims of professional negligence against Mr. Wetterer and Associated, and that they judgment "in the amount of $742,193.10" -- the amount of the arbitration award to which the Star agreed and to which Mr. Wetterer and Associated were non-parties. (Complaint, TR 4.)

By unopposed motion, Mr. Wetterer was dismissed on March 31, 2003. Associated filed a third-party complaint against AON, in April 2003, and the Garcias filed an amended complaint against AON in December 2003.

E. Associated and AON Obtain Summary Judgment on the Garcias' Claims.

After some discovery, both Associated and AON moved for summary judgment. Both defendants argued that the purported assignment from the Star to the Garcias was invalid under Kentucky law. The trial court heard oral argument on those motions on May 1, 2006.

On June 21, 2006, the trial court granted Associated's and AON's motions for summary judgment, holding, in substance, that a professional negligence claim against an insurance agent and broker is not assignable. (See Opinion and Order of Honorable Geoffrey P. Morris of June 21, 2006, attached hereto as Appendix Exhibit 2.) The trial court rejected the Garcias' attempt to liken a professional negligence claim to an assignable claim of bad faith. The trial court held that a professional negligence claim, unlike a bad faith breach of contract claim, sounds in tort. As such, under settled Kentucky law, the claim is not assignable. Moreover, the trial court held that public policy disfavors the assignment of such claims under such collusive circumstances as occurred here.

The Garcias moved the trial court to alter, amend or vacate its order, which the trial court denied. In its order denying the motion, the trial court not only upheld its previous ruling that a professional negligence claim against an insurance agent is not assignable, but also emphasized that the arbitration award is not enforceable against Associated and AON because they were not parties to that arbitration and that the assignment was invalid as a collusive assignment that offends public policy. (See Opinion and Order of Honorable Geoffrey P. Morris of August 16, 2006, attached hereto as Appendix Exhibit 3.)

F. The Court of Appeals Reverses the Trial Court's Ruling, Relying on Cases from Other Jurisdictions Rather than Kentucky Law.

On appeal, the parties presented essentially the same arguments to the Court of Appeals as had been presented to the trial court. The Court of Appeals reversed the trial court's decision, holding that a claim of professional negligence is assignable because it sounds in contract, and that the assignment from the Star to the Garcias did not offend public policy. (Court of Appeals Opinion, attached hereto as Appendix Exhibit 1.) In concluding that the assignment did not offend public policy, the Court of Appeals relied on opinions from other jurisdictions, rather than on its own opinion in *Coffey v. Jefferson Cty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. App. 1988), in which the Court of Appeals held an assignment void under essentially identical circumstances.

Although the Court of Appeals reversed the trial court, it did not agree entirely with the Garcias. The Court of Appeals held that the Agreement between the Star and the Garcias was only partially enforceable. While the Court of Appeals upheld the validity of the assignment itself, the Court of Appeals invalidated the arbitration component of the Agreement.

ARGUMENT

The Court should reverse the decision of the Court of Appeals and affirm the trial court's decision granting summary judgment to Associated and AON. The Court of Appeals erred in at least three ways.

First, the Court of Appeals misapplied and, in effect, overruled precedent of this Court by abandoning the distinction in Kentucky law between (1) *assignable contract claims* and, (2) *non-assignable tort claims*. Because a professional negligence claim sounds in tort, it is not and should not be assignable.

Second, the Court of Appeals erroneously ignored its own precedent in which it had already held that an assignment such as occurred here is legally ineffective. In *Coffey*, 756 S.W.2d at 157, the Court of Appeals held that an inherently collusive assignment such as this violates public policy. In this case, the Court of Appeals completely ignored the *Coffey* decision and instead followed cases from other jurisdictions.

Third, the Court of Appeals erroneously rewrote the Garcias' Agreement with the Star. Having held that the Agreement was only partially enforceable, the Court of Appeals was required to invalidate the whole Agreement. The Agreement by its terms is non-severable, mandating that if one part fails the entire Agreement must fail.

A. The Court of Appeals Erred by Misapplying and Effectively Overruling Precedent of this Court.

The long-standing rule in Kentucky is that a tort claim is not assignable. *Grundy v. Manchester Ins. & Indem. Co.*, 425 S.W.2d 735, 736-737 (Ky. 1968) ("[A] cause of action for tort is not assignable. . . . [T]his rule is sound Kentucky law...."); *State Farm Mut. Auto Ins. Co. v. Roark*, 517 S.W.2d 737, 739 (Ky. 1974) ("we followed the common

law principle that an unliquidated claim for personal injuries cannot be assigned. We continue to adhere to that principle....") As a species of tort claim, a professional malpractice claim also is not assignable. *Am.Jur.2d*, Assignments, §57 ("A claim for the breach of a fiduciary duty, like a malpractice claim, may not be assigned"). Kentucky's appellate courts have had the opportunity to consider whether one specific kind of professional negligence claim, a legal malpractice claim, is assignable, and have held that such a claim is not assignable. *Coffey*, 756 S.W.2d at 157.

In *Grundy*, Kentucky's highest court addressed whether a bad faith claim against an insurer is assignable. Holding that such a claim is assignable, the court discussed the distinction between non-assignable tort claims and assignable contract claims. *Id.* at 736-737. The Court held that a bad faith claim is assignable because it sounds in contract rather than tort. *Id.*; *see also Texaco, Inc. v. Melton*, 463 S.W.2d 301, 308 (Ky. 1970) (citing *Grundy* for the proposition that "[w]e have heretofore approved assignments of ***contractual*** rights") (emphasis supplied). Applying *Grundy* to this case, the Garcias' purported professional negligence claim is not assignable because it sounds in tort, not in contract.

Although it claimed to follow *Grundy*, the Court of Appeals effectively overruled *Grundy's* long-standing distinction between assignable contract claims and non-assignable tort claims. The Court held that a professional negligence claim, like a bad faith claim, sounds in contract and, as such, may be assigned. (Court of Appeals Opinion, p. 5.) However, no professional negligence claim can be fairly characterized as sounding in contract. The elements of such a claim are the traditional elements of the tort of negligence – "(1) duty, (2) breach, (3) causation, and (4) damage." *Marrs v.*

Kelly, 95 S.W.3d 856, 860 (Ky. 2003) (Cooper, J., concurring in part and dissenting in part). If, as the Court of Appeals held, a claim with the basic elements of negligence is now assignable, then the distinction from *Grundy* between assignable contract claims and non-assignable tort claims no longer exists.

To uphold the Court of Appeals decision would effectively overrule precedent of this Court by eliminating from Kentucky law the distinction between assignable contract claims and non-assignable tort claims. The Court of Appeals cited no compelling reason to abandon this precedent because clearly there is none. This Court should follow its own precedent, reverse the Court of Appeals, and affirm the trial court's order granting summary judgment to Associated and AON.

B. The Court of Appeals Erred Because, Even if Kentucky Law Permitted the Assignment of a Professional Negligence Claim, the Purported Assignment Here Was Legally Ineffective.

After concluding that a professional negligence claim against an insurance agent may be assigned, the Court of Appeals analyzed whether the circumstances of the assignment in this case rendered the assignment void. In conducting this analysis, the Court reviewed case law from states such as New Hampshire and Massachusetts. Oddly, the Court did not review the case of *Coffey*, 756 S.W.2d at 157, a Kentucky Court of Appeals decision addressing the precise issue before the Court.[1] *Coffey* held, properly, that an assignment occurring under circumstances such as occurred here is legally ineffective.

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[1] The Court of Appeals cited *Coffey* only with regard to *Coffey*'s holding that a claim for legal malpractice is not assignable. (Court of Appeals Opinion, p. 5.) The Court of Appeals failed to address any of *Coffey*'s analysis regarding the collusive nature of the assignment at issue there.

Although this Court has never analyzed the propriety of an assignment such as occurred in the *Coffey* case, Associated respectfully submits that the *Coffey* decision comports with established Kentucky law and reflects sound judgment, and that the principles set forth in *Coffey* should be applied to invalidate the purported assignment from the Star to the Garcias in this case.

I. In *Coffey*, the Court of Appeals Voided an Assignment Under Essentially Identical Circumstances as Occurred Here.

In *Coffey*, the estate of a child who had died while playing on school playground equipment initiated a wrongful death action against the school board and its individual members. *Coffey*, 756 S.W.2d at 155. All defendants except one were dismissed on summary judgment. The remaining defendant confessed judgment in the amount of $1,000,000.00 and purported to assign to the plaintiff all claims he might have for legal malpractice against his attorneys. Pursuant to the assignment, the plaintiff then filed a legal malpractice action against the attorneys in the underlying wrongful death action.

The Court of Appeals held the assignment legally ineffective. The Court of Appeals indicated that at the time of the assignment the assignor did not even have a claim to assign because she had suffered no damage:

> This jurisdiction has adopted the principle of law that a malpractice claim against an attorney cannot be maintained in the absence of proof that the alleged negligent conduct resulted in specific damage to the client. *Mitchell v. Transamerica Insurance Co.*, Ky. App., 551 S.W.2d 586 (1977). In the case at bar, the entire transaction involving the confession and acceptance of judgment, covenant not to execute and to indemnify, and assignment are not any indication of the actual damage, if any there was, as a result of legal malpractice.

Id. at 156-157. This passage stands for the obvious proposition that, in the absence of damage, the assignor has no claim to assign. Because an assignor can only assign existing rights or claims – no more – a purported assignment of a claim that has not yet arisen is legally ineffective. *See, e.g., Am.Jur.2d*, Assignments, §108 ("[A]n assignee of a nonnegotiable chose in action generally acquires no greater right than was possessed by the assignor, and simply stands in the shoes of the assignor. The assignee cannot recover more than the assignor could recover, and the assignee has no greater rights than the assignor.")

The *Coffey* Court then concluded that an assignment under such "collusive" circumstances must be held void against public policy. *Id.* at 157. The assignment in *Coffey* was nothing more than a "contrived and elaborate scheme" which, as the Court pointed out, resulted in a sham judgment bearing no relation to any actual liability or damages. *Id.*

In voiding the assignment, the *Coffey* court referenced the case of *Doser v. Middlesex Mutual Ins. Co.*, 101 Cal.App.3d 883, 890 (Cal.App.2.Dist.1980). A brief review of the *Doser* case sheds further light upon and lends further support for the *Coffey* decision. In *Doser*, certain heirs of a person who had died in an airplane crash brought a wrongful death lawsuit against the estate of the pilot, which had available to it the proceeds of an insurance policy potentially applicable to the heirs' claims. The insurer denied coverage for the estate. As in *Coffey*, the parties to the wrongful death action devised a scheme in which the plaintiffs agreed to settle their claims against the defendant for $980,000, but also agreed that the claim would be satisfied and the defendant released upon assignment to the plaintiffs of the defendant's claim against its

insurer for bad faith denial of coverage. *Id.* at 888. Pursuant to the assignment, the plaintiffs then attempted to sue the insurer for bad faith.

The California Court of Appeal held the assignment invalid. The court acknowledged the general rule that a bad faith claim is assignable. However, the court pointed out that a claim does not arise – and therefore may not be assigned -- until the assignor has actually suffered damage.

> [I]t is fundamental that a valid cause of action must exist in the assignor insured before an assignee can prevail against the insurer. The assignee "stands in the shoes" of the assignor and merely acquires the interest of the assignor.

Id. at 890. Because "no judgment had been rendered" and "[n]o legal liability was ever imposed as a result thereof," "no cause of action ever arose" in the purported assignors. *Id.* at 891. Without a claim to assign, the purported assignment had no legal effect. In the court's words, the purported assignment "was invalid because the liability of [the insurer] to the Estate had not been determined in a manner approved by the case law or contemplated by the insurance contract." *Id.* at 894.

Thus, a reading of *Coffey* and *Doser* yields these principles: (1) a purported assignment of a claim has no legal effect if no such claim has yet arisen in that the assignor has suffered no damage; (2) an assignment coupled with a stipulated judgment and covenant not to execute is inherently collusive and therefore void as against public policy.

II. Under *Coffey*, the assignment from the Star to the Garcias was legally ineffective.

The Court should apply the principles of *Coffey* to invalidate the assignment here. First, at the time of the purported assignment, the Star had suffered no damage

as a result of any purported negligence of Associated or AON. As such, the Star had no professional negligence claim to assign to the Garcias. Second, the collusive circumstances of the purported assignment render it void against public policy.

a. The Star could not assign a claim that had never arisen.

It is black-letter law that the Star could only assign rights or claims that existed at the time of the purported assignment. *Am.Jur.2d*, Assignments, §108 ("[A]n assignee of a nonnegotiable chose in action generally acquires no greater right than was possessed by the assignor, and simply stands in the shoes of the assignor. The assignee cannot recover more than the assignor could recover, and the assignee has no greater rights than the assignor.") On November 27, 2002, the Star purported to assign a claim for professional negligence against Associated to the Garcias. (TR 455, Assignment, Apx. Ex. 6.) However, a claim of professional negligence, like any other tort claim, does not arise until the plaintiff suffers damage. *Marrs*, 95 S.W.3d at 860 ("damage" is an essential element of a professional negligence claim). Here, the Star had suffered no damage at the time of the assignment. The Star had admitted liability for the Garcias' injuries and had agreed to an arbitration process which resulted in entry of a money judgment against the Star, but the Garcias agreed not to enforce the judgment against the Star. (TR 436, Agreement, Apx. Ex. 5.) This means that the Star could not be required to pay the judgment. Logically, therefore, the Star suffered no damage as a result of any purported negligence by Associated. *See Coffey*, 756 S.W.2d at 156 -157 (noting that the assignment was invalid in part because it was "not any indication of the actual damage, if any there was...."); *Doser*, 101 Cal.App.3d at 890 (invalidating

assignment because claim had not yet arisen in that no judgment had been rendered against the insured).

The language of the Star's insurance policy with HIH demonstrates even more clearly why the Star had suffered no damage at the time of the assignment. The theory of the Star's case against Associated and AON is that, because of alleged negligence on the part of Associated and AON, the Star did not have a solvent insurer available to pay for a judgment against the Star. However, the Star had no expectation of coverage for such a judgment unless and until the Star first paid the cost of the judgment itself. (TR 427, Insurance Policy, Apx. Ex. 4.) ("...[HIH] hereby undertakes to pay up to the amount hereby insured and in conformity with lines 5 and 6 hereof, such sums as [the Star] ... ***shall have become legally liable to pay and shall have paid*** ...") (Emphasis supplied.) That is the nature of the indemnity contract for which the Star bargained and to which it agreed. Under the policy, the insurer's obligation to indemnify, and the insured's right to indemnification, is not triggered until the insured first satisfies the judgment itself. Because the Star did not pay the judgment, its right to indemnification under the policy never arose. Because the Star's right to indemnification never arose, the Star cannot claim it was damaged by the absence of a solvent insurer.

Thus, at the time of the Star's purported assignment to the Garcias, the Star had not suffered any damage. This means that the Star had no professional negligence claim to assign. Without a claim to assign, the purported assignment was legally ineffective.

b. The assignment should be held void as against public policy.

In addition to the fact that a professional negligence claim is not assignable under *Grundy*, and that the assignment here was ineffective because no claim existed, the assignment should be voided as against public policy. In *Coffey*, the Court of Appeals characterized an assignment under essentially identical circumstances as these as a "contrived and elaborate scheme" and held that an assignment under such "collusive" circumstances is void as against public policy.

The concerns of the *Coffey* Court are well-founded. Associated respectfully suggests that, on public policy grounds, this Court should void the assignment between the Star and the Garcias. The type of assignment contrived by the Star and the Garcias, and struck down in *Coffey*, does not serve any of the ends of justice. Two parties which had been adverse suddenly became collaborators in a scheme to bind to a money judgment strangers to their litigation. Instead of defending itself, the Star admitted liability and agreed to submit the issue of damages to arbitration. Instead of pursuing the Star, the Garcias agreed not to enforce the subsequent arbitration award against the Star. Because the Garcias had agreed not to pursue the Star, the Star lost any motive to defend the arbitration proceeding. This whole arrangement, in which adversaries reverse course and act contrary to their interests, turns the adversary system of justice on its head. And the goal of all this non-adversarial behavior is purely collusive – to hold strangers to the personal injury action liable for a judgment that the Star does not want to pay and that the Garcias, for whatever reason, do not want to seek from the Star.[2] The Star and the Garcias completed their scheme by assigning the

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[2] On the subject of collusion, one could fairly ask:

1. Did the Star take ***any*** depositions of the Garcias' treating physicians before the "arbitration"?

Star's purported claims against those strangers (Associated and AON) to the Garcias, and expressly agreeing that the Garcias may enforce the judgment against those strangers. (TR 436.)

In upholding the assignment, the Court of Appeals suggested that the assignment finds some support in cases such as *O'Bannon v. Aetna Casualty & Surety Co.*, 678 S.W.2d 390 (Ky. 1984). There, as in *Medical Protective Co. of Fort Wayne v. Davis*, 581 S.W.2d 25 (Ky. App. 1979), the Court upheld an insured's assignment of claims against its insurer to an adversary in litigation. The Court was not concerned about the risk that the insured and its adversary would work together "to create an inflated collusive judgment" because the insurer could attack the amount of the judgment as collusive when sued by the assignee. *Id.* at 393.

Relying on *O'Bannon*, the Court of Appeals in this case said, "Because of our highest Court's repeated validation of an insured's assignment of claims against his insurer," upholding the assignment from the Star to the Garcias "is more consistent with Kentucky law." (Court of Appeals Opinion, p. 9.) That is incorrect. There is a clear policy reason for allowing an assignment in cases such as *O'Bannon* that does not

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2. Did the Star arrange for a medical examination of the allegedly injured parties?

3. Were any witnesses called at the "arbitration" except the Garcias?

4. Were the Garcias subjected to any cross-examination about the nature or extent of their injuries?

5. Did the Star offer any defense, such as suggesting comparative negligence on the part of the Garcias?

Because Associated did not attend the arbitration, it does not know the answer to these questions. However, it has seen no evidence that the Garcias' claims were tested by cross-examination nor that they were supported by independent medical evidence such as would normally be offered at a trial. The danger of collusion is enormous.

extend to the assignment here. Courts have long upheld such assignments of claims against an insurer on the grounds that when an insurer refuses to provide a defense, it runs the risk of incurring whatever judgment results in the underlying litigation, even if such a judgment results from a potentially collusive settlement between the insured and its adversary. *See Ayers v. C&D General Contractors*, 269 F.Supp.2d 911, 915-916 (W.D. Ky. 2003) (surveying the law in this area). The insurer's remedy is a collateral attack on the amount of the judgment or settlement as collusive or fraudulent. *Id.* Courts allow these potentially collusive assignments only because insurers make the conscious choice to accept the risk of an undesirable judgment. *Id.*

The policy behind such assignments does not apply here in any way. Associated is not an insurer. It was a stranger to the personal injury lawsuit. Unlike insurers in cases such as *O'Bannon*, *Medical Protective*, and *Ayers*, agents such as Associated make no conscious decision comparable to that of an insurer denying coverage. Unlike an insurer, an agent such as Associated takes no action that could be characterized as assuming the risk of being held to an undesirable judgment. Thus, the policy reason that supports upholding assignments against insurers in cases such as *O'Bannon* simply cannot be extended to the present case.

C. The Court of Appeals Erred by Invalidating a Portion of the Agreement Without Invalidating the Whole.

Although the Court of Appeals recognized the assignment of a professional negligence claim, it did not uphold the Garcias' collusive Agreement with the Star in its entirety. Rather, the Court of Appeals held that the portion of the Agreement that resulted in the arbitration award is unenforceable. Because that portion of the

Agreement cannot be severed from the remainder of the Agreement, the entire Agreement – including the assignment of claims – is void.

The shadowy purpose of the Agreement is to provide a mechanism under which the Star and the Garcias would submit the issue of the Garcias' "damages" to arbitration and then enforce the results of the arbitration against non-parties. (TR 436.) The assignment itself is only one component of that Agreement. The Agreement provides for the Star to stipulate its liability and for the parties to submit the issue of the Garcias' damages to arbitration. The Garcias agreed not to sue the Star, and the Star agreed to assign to the Garcias its purported claims against Associated, AON, and HIH, including the amount of any arbitration award, so that the Garcias could sue them instead. (*Id.*) After the arbitration, the Garcias filed suit to collect a judgment from Associated "in the amount of $742,193.10" – precisely the amount of the arbitration award. (Complaint, TR 4.)

The Court of Appeals upheld the assignment but invalidated the arbitration component of the Agreement. The Court of Appeals noted that, in other jurisdictions that have upheld similar assignment agreements, such agreements are ***only*** valid "to the extent that they provide for the assignment of the insured's claims while insulating the insured from execution." (Court of Appeals Opinion, p.10). Where the parties not only agree to an assignment but also agree to fix the amount of the non-party's liability, the latter portion of the agreement is invalid. Thus, in the Court's words, "with all due respect to the arbitration in this case," the arbitration award is not enforceable. (*Id.*)

Having found that the arbitration component of the Agreement is invalid, the Court should have voided the Agreement between the Star and the Garcias -- including

the assignment -- as a whole. The arbitration component cannot be severed from the remainder of the Agreement. Under Kentucky law, "in determining whether a contract is severable, the intention of the parties is a controlling factor." *Knight v. Hamilton*, 233 S.W.2d 969, 971 (Ky. 1950). Here, the intention of the parties is crystal clear. The Garcias and the Star did not include a severability clause in their Agreement. In fact, they did quite the opposite. They expressly agreed that "violation of any portion of this Agreement, absent good cause shown, ***voids this entire agreement***." (TR 438, Agreement, Apx. Ex. 5) (emphasis supplied).

The Star and the Garcias clearly expressed their intention that if one clause in their Agreement fails, the whole Agreement must fail. Because the Court of Appeals found the arbitration component of the Agreement invalid, it was required to void the entire Agreement, including the assignment of claims. Thus, this Court should reverse the Court of Appeals and affirm the trial court's order granting summary judgment to Associated and AON, because the assignment Agreement between the Star and the Garcias was void.

CONCLUSION

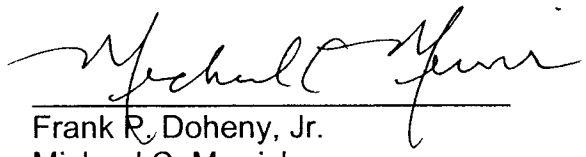
As has been clearly demonstrated herein:

1. The Court of Appeals overruled precedent of the Supreme Court of Kentucky by abandoning the distinction between assignable *contract* claims and non-assignable *tort* claims;

2. The Court of Appeals also erroneously ignored its own precedent, set forth in *Coffey v. Jefferson County Board of Education*, where it had held that an assignment such as the one in this case was legally ineffective, and;

3. Having found that the agreement between the Garcias and the Star was only partially enforceable, the Court of Appeals was required to invalidate the entire agreement, and could not enforce part of the agreement and rewrite the rest.

This Court should reverse the Court of Appeals and affirm the trial court's order granting summary judgment to Associated and to AON.



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