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IN THE SUPREME COURT,
STATE OF FLORIDA

CASE NO.: 88,908

U.S. COURT OF APPEALS,
ELEVENTH CIRCUIT CASE NO.: 95-5516

DISTRICT COURT CASE NO.: 94-07254 CIV-SM

DAVID FORGIONE, AS ASSIGNEE OF
HARRY TOFEL AND LENA TOFEL,
Appellant

vs.

DENNIS PIRTLE AGENCY INC., STATE
FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, an ILLINOIS CORPORATION,
HERMAN B. FINE, CERRATO-FINE AGENCY INC.,
and FIREMAN'S FUND INSURANCE COMPANY,
a CALIFORNIA CORPORATION,
Appellees.

/

AMICUS CURIAE BRIEF ON BEHALF OF APPELLEES

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Appearing as Amicus Curiae on behalf of
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SUMMARY OF THE CASE AND FACTS

The Florida Defense Lawyers Association, as Arnicus Curiae, hereby adopts and incorporates herein by reference the Summary of the Case and Facts set forth in the Answer Brief of Appellee, **FIREMAN'S FUND INSURANCE COMPANY.** The Florida Defense Lawyers Association, as Amicus Curiae, also agrees with the Summary of the Case and Facts set forth by Appelle, **STATE FARM MUTUAL AUTOMOBILE INSURANCE.**

SUMMARY OF THE ARGUMENT

The District Court of the United States, Southern District of Florida correctly concluded that the assignment of a claim for negligence against an insurance agent is not valid under Florida law. This Court announced fifty-five years ago that "pure" tort claims could not be assigned, and no Florida authority, or federal authority interpreting Florida law, has ever allowed the assignment of a tort claim since then, unless it was specifically authorized by statute. In this respect, Florida follows both the prevailing view of other jurisdictions and sound public policy.

Authorities which have validated the assignments of claims against insurance agents are distinguishable in that such claims have been based on contract, and not tort law. The claim assigned in the instant case should properly be characterized as a tort, arising before the creation of a contract of insurance. It is most analogous to a claim of legal malpractice, in that it involves a breach of the relationship of trust between a client and a licensed professional acting as his agent.

Claims for legal malpractice are one of the kinds of tort claims specifically declared unassignable by Florida caselaw, as well as by the caselaw of other jurisdictions. The public policy reasons for disallowing assignments of claims for legal malpractice are legion. These include concerns for an increase in litigation, a desire to encourage the availability of legal services, and a hesitation to cheapen the attorney-client relationship by allowing malpractice claims to be brought by strangers to the relationship.

The same concerns apply to the assignment of negligence claims against insurance agents. The issue of insurance lurks in the shadows of every personal injury case. If assignments such as that sought by the Appellant were valid, every Plaintiff having difficulty collecting a judgment from an uninsured/underinsured Defendant would be tempted to bring suit against the Defendant's insurance agent. As well, the cost of insurance and the amount of insurance litigation would be directly affected by the resulting spawn of impersonal lawsuits brought by the assignees against the insurance agent, who was previously completely unknown and adversarial to them. In turn, insurance agents would be much less willing to make insurance available to the public out of

concerns of having to defend lawsuits brought by strangers. This Court should therefore answer the Certified question from the Eleventh Circuit Court of Appeal in the negative.

ARGUMENT

This Court must decide whether an assignment of a claim against an insurance agent for negligence in the procuring of an insurance policy is valid under Florida law. This type of claim is characterized as a personal tort, the assignment of which is invalid under current law. Sound public policy further dictates that the law should not be expanded to allow assignments such as that sought by the Appellant.

Florida has followed the long-standing common law rule that tort claims are not assignable. In ***State Road Dep'f v. Bender,*** 2 So. 2d 298 (Fla. 1941), this Court stated that "a cause of action arising from pure tort like personal injury cannot be assigned . . . " Id at 300. Accordingly, each time a Florida Court has been presented with an assignment of a claim characterized as a tort, where the assignment was not specifically authorized by statute, the assignment has been found void. ***See, e.g.***, ***Ginsberg v. Lennar Fla. Holdings, 645 So.*** 2d 490 (Fla. 3d DCA 1994) (holding that claims for waste and conversion were not assignable); ***McNulty v. Nationwide Mutual Ins. Co.,*** 221 So. 2d 208 (Fla. 3d DCA 1969) (stating that claims for personal injuries, slander or assault were not assignable); ***Loft*** v. ***Fuller,*** 408 So. 2d 619 (Fla. 4th DCA 1977) (stating that claim for invasion of privacy was too personal to be assigned); ***Notarian v. Plantation AMC Jeep, Inc.,*** 567 So. 2d 1034 (Fla. 4th DCA 1990) (holding that claim for intentional infliction of emotional distress was not assignable); ***Florida Patient's Compensation Fund v. St. Paul Fire & Marine Ins.*** Co., 535 So. 2d **335** (Fla. **4th** DCA **1988)** (holding that personal injury and medical malpractice claims were not assignable); ***Washington v. Fireman's Fund Ins. Co.,*** 459 So. 2d 1148 (holding that legal malpractice action was not assignable).

Although tort claims are not assignable, a right to contribution in a tort judgment can be. In ***Carpenter v. Rachman Enterprises, Inc., 657 So.*** 2d 42, 43 (Fla. 3d DCA 1995), an assignment of a right to contribution from a joint-tortfeasor, where the underlying claim was for negligence, was upheld. The Court's rationale, based on ***Robarts v. Diaco***, 581 So. 2d 911 (Fla. 2d DCA 1991), is instructive. A right to contribution from a joint-tortfeasor is assignable, but only because it is a right; 1. separate and apart from the tort; 2. arising after the issue of liability

has been settled; and 3. created by statute. ***Id*** at 915. The implication is that there cannot be an assignment for an unsettled tort claim where the assignment has not been created by statute.

This was the conclusion reached by a federal Court applying Florida law in ***In re Sav-A-Stop, Inc.,*** 98 B.R. 83 (M.D. Fla. 1989). The United States Bankruptcy Court stated that "both Florida and Oklahoma subscribe to the common law rule that, absent statutory authority, claims for injury which do not arise out of contract are non-assignable . . ." ***Id.*** at 85.

By contrast, claims based on rights under a contract are generally assignable. ***Selfridge v. Allstate Ins. Co.,*** 219 So. 2d 127, 128 (Fla. 4th DCA 1969); ***Notarian, 567*** So. 2d (holding that contract claim that employer gave insufficient notice of termination was assignable). The controlling factor was that contractual rights are a form of property, and an infringement of those rights is an injury against personal property, whereas a tort is an injury against the person. See ***Bender,*** 2 So. 2d at 300. Significantly, though, not even contractual rights are assignable if they deal with an obligation which is personal in nature. ***L. V. McClendon Kennels, Inc. v. Investment Corp. of South Florida,*** 409 So. 2d 1374, 1375 (Fla. 3d DCA 1986) (holding that kennel had a limited right to assign contract whereby it furnished track with greyhounds).

The theme that personal obligations are not assignable can also be seen in the law of guaranties. General guaranties are assignable, whereas special guaranties are not assignable because they name a specific individual promisee and imply personal trust placed by the guarantor in that promisee. ***Brunswick Corp. v. Creel,*** 471 So. 2d 617, 618 (Fla. 5th DCA 1985).

In the instant case, the Appellant brought suit as the assignee of a claim for negligence in the procuring of an insurance policy by an insurance agent. The involved assignment is not authorized by statute, and does not arise out of contract. Therefore, this Court should find it invalid.

The Appellant seeks to support his contention that the assignment in the instant case is valid with the authority of ***Selfridge.*** In ***Selfridge***, the Fourth District upheld an assignment by an insured of a claim against his insurer for negligent failure to settle a lawsuit within the policy limits. That Court faced a very similar issue in ***Aaron v. Allstate Ins. Co.,*** 559 So. 2d 275 (Fla.

4th DCA 1990), in which it held that an insured's cause of action against an automobile insurer for breach of contract, bad faith, negligence and fraud in causing entry ofjudgment in excess of policy limits was assignable. In deeming these actions assignable, the Court never characterized the claims as either based in tort or ex contractu, but a careful analysis of these cases shows the claims to be contractually based. In each case, the claim arose because the insurer failed to do what it was obligated to do by the insurance contract, which distinguishes those from the subject claim, which arose before an insurance contract existed.

Such a deduction is bolstered by ***McNulty***, in which the Third District did not back away from characterizing almost identical claims as those in ***Selfridge*** and ***Aaron*** as ex contractu. In ***McNulty***, the insurer negligently failed to settle for an amount within the policy limits. The insured assigned the claim to the judgment creditor, who successfully brought suit against the insurer, based on the assignment, for the excess of the judgment over the coverage limits. In deciding the issue of assignability, the Court stated that the question turned on "whether the action is ex contractu or is one for a personal tort." 221 So. 2d at 210. In holding that the claim was assignable, the Court reasoned that the cause of action arose from the contract of insurance. ***Id.*** "The contractual duty of the insurer to defend justifies an implication that the insurer will exercise ordinary care and good faith in so proceeding." Id Thus, although claims such as in ***Selfridge***, ***Aaron*** and ***McNulty*** involve much of the language of a negligence claim, they are assignable because, and only because, they are bottomed in contract.

Selfridge goes further than any other Florida authority in the direction of allowing assignments in general. It states that "assignability of a cause of action is the rule rather than the exception," and links assignability to survivability. 219 So. 2d at 128. It then observes in a footnote that, as per Florida Statutes, section 46.021, "[n]o cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law." Id at 129. The Appellant contends that ***Selfridge*** indicates that all causes of action, save a few narrow exceptions for the most "personal" torts, are assignable.

However, the Fourth District backed off from this extreme stance in ***Notariun,*** stating that "the assignability of a tort claim, however, is not controlled by its survivability. Florida's Courts adhere to the common-law prohibition barring the assignment of personal injury claims." 567 So. 2d at 1035.

The Appellants point to ***Peterson v. Brown,*** 457 N.W. 2d 745 (Minn. App. 1990), as perhaps the only case precisely on point, and would have this Court follow ***Peterson's*** persuasive authority in allowing the assignment in the instant case. In ***Peterson,*** an insurance agent negligently failed to obtain the requested full insurance coverage for the insured's newly opened motel. When two motel employees died of burns received in the motel, the trustees for their estates brought suit against the insured, who then discovered that he did not have workers' compensation coverage. The insured assigned his claims against the insurance agent for failing to obtain the requested insurance to the trustees. The ***Peterson*** court upheld the assignment. ***Id*** at 749.

Interestingly, the ***Peterson*** Court reached its conclusion by means of an even stricter link between assignability and survivability than in ***Selfridge***. "A cause of action is assignable if it meets [Minnesota's statutory] survival test." ***457*** N.W. at ***748. Peterson*** admits to no exception to this rule. But what is most striking about ***Peterson*** is that the Court actually analogized the cause of action to that of a legal malpractice claim, precisely as the District Court did in the instant case. However, the ***Peterson*** Court found the claim assignable on the grounds that Minnesota provides for the survivability of legal malpractice claims. ***Id.*** at 749. This Court should indeed see legal malpractice as the closest analogy to this cause of action, and should therefore hold that it is unassignable, for the same sound public policy reasons that legal malpractice claims are unassignable in Florida. ***See Washington v. Fireman's Fund Ins. Co.,*** 459 So. 2d 1148 (Fla. 4th DCA 1984).

The District Court rightly found a more persuasive authority in ***Joos v. Drillock***, ***338*** N.W. 2d 736 (Mich. App. 1983). In ***Joos,*** the insured's attorney allegedly negligently failed to settle a lawsuit within the insured's automobile insurance policy limits, and the insured assigned

her claim for legal malpractice to the injured party. The Court held such an assignment to be invalid. ***Id.*** at 739. It first noted that survivability was not the sole test to determine assignability; "[r]ather, assignability of a cause of action must be based upon an analysis of the claim sought to be assigned as well as upon the public policy considerations involved." ***Id.*** It then elaborated on public policy reasons against the assignment of legal malpractice claims; stating that such claims involve a relationship of trust between a client and a licensed professional and allowing the assignments of which such claims would increase litigation. Further, such assignments would cause attorneys to be more selective of their clients, thus decreasing the availability of competent legal services to the public. ***Id.*** at 738-39.

The Appellant discounts the similarity between the attorney-client relationship and that between an insurance agent and the prospective insured, mainly on the basis that an insurance agent is not bound to confidentiality as the attorney is. The insurance agent-insured relationship is nonetheless one in which the client places his trust in a trained professional to handle a matter competently, because of that matter's attendant complexities. For this reason insurance agents are licensed by the state, and are subject to examination, continuing education requirements, and strict rules of conduct. ***See generally*** ch. 626, Fla. Stat. (1995).

An Illinois Court has offered perhaps the best characterization of a legal malpractice claim in ***Christison*** v. ***Jones,*** 405 N.E. 8 (Ill. App. 3d 1980):

> ". the injuries resulting from legal malpractice are not personal injuries, in the sense of injuries to the body, feelings or character of the client Rather, they are pecuniary injuries to intangible property interests. While . . . these aspects of the . . . cause of action might indicate placement of it under the class of tort actions for injury to personal property, such placement overlooks the personal nature of the relationship, with attendant duties, that exists between an attorney and client. It is a breach of those duties within the relationship which forms the real basis and substance of the malpractice suit. "

Id. at 10. Though the resulting injuries may be to personal property, in the case of both a legal malpractice claim and one such as in the instant case, the cause of action is really for a breach of the trust placed in the relationship by the client. It should therefore be considered personal to the client and unassignable.

The societal costs of allowing assignments of legal malpractice claims are discussed in *Goodley* v. *Wank & Wank, Inc.,* 62 Cal. App. 3d 389 (Cal. 2d DCA 1976). One cost would be the increase of legal malpractice litigation, including an increase in unjustified lawsuits, as malpractice claims become "a commodity to be exploited and transferred to economic bidders . . ." *Id.* at 397. Another cost would be that attorneys would be more selective in accepting clients for fear of malpractice claims eventually brought by strangers. *Id.* at 398.

There is no reason to presume that assignments such as that advanced by the Appellant would not have the same results. Each time an injured party had difficulty collecting a judgment from an underinsured defendant, the temptation would be to launch a second suit against the defendant's insurance agent, possibly as a "deep pocket" defendant, in hopes of recovering the otherwise uncollected judgment from the first suit. There is also reason to fear that insurance would become less available to the public or unaffordable in such an environment, as insurance agents feared suit from strangers and the burdens of nuisance lawsuits filed against "deep pocket" Defendants.

By affirming the decision below, this Court would keep Florida with the prevailing view among other jurisdictions namely, that professional malpractice claims and pure negligence claims against insurance agents specifically, are not assignable. *See, e.g., Conopco, Inc. v. McCreadie,* 826 F. Supp. 855 (D.N.J. 1993) (holding under New Jersey law that claim for professional malpractice and negligence against computer consulting partnership arising from its faulty implementation of computer system could not be assigned); *Midwest Mut. Ins. Co. v. Arkansas Nat'l Co.,* 538 S.W. 2d 574 (Ark. 1976) (holding under Arkansas law that claim against insurance agency for negligently failing to reinstate automobile insurance was not assignable); See *also Glenn* v. *Fleming,* 799 P. 2d 79 (Kan. 1990) (holding under Kansas law that claims against

insurer for bad faith and negligent refusal to settle are only assignable because they are based upon a breach of contract, tort claims remaining unassignable).

Since the instant case assignment is not ex **contractu**, the claim having arisen before the creation of the insurer's contract obligations, and since the assignment was not authorized by statute, it is not valid under Florida law. The assignment sought is most analogous to an assignment of a legal malpractice claim, of which there can be no doubt that such claims are unassignable. There is sound public policy reasons for treating an assignment such as that sought by the Appellant in the same way as the assignment of a claim for legal malpractice. To do otherwise would encourage unfounded lawsuits, force agents to defend themselves against strangers to the relationship of trust they had with their clients, and cause a chilling effect on the availability of insurance to the public.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should answer the certified question in the negative.

CERTIFTCATEOFSERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief was served by U.S. mail this **24th** day of December, 1996 to: Joseph R. Dawson, Esquire, JOSEPH R. DAWSON, P.A., 320 Davie Blvd., Ft. Lauderdale, FL 33315, Counsel **for Appellant (Forgione),** Thomas A. Conrad, Esquire, HELLER & CONRAD, P.A., 2500 Hollywood Blvd., Suite 401, Hollywood, Florida **33020, Counsel for Appellee - State Farm,** Scott R. McNary, Esquire, David Peterson, Esquire, MCNARY & BEFERA, P.A., 2937 S.W. 27th Ave., Grove Forest Plaza, Suite 203, Miami, Florida 33 133-3772, **Counsel for Appellee - Fireman's Fund.**

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