IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 88,908
U. S. 11TH CIR. CASE NO: 95-5516
DC DKT.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.

APPELLEE's, STATE FARM's, ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts included in the initial brief filed by Appellant, DAVID FORGIONE ("FORGIONE"), as assignee of Harry Tofel and Lena Tofel (the "Tofels"), is essentially correct. However, Appellee, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("STATE FARM"), supplements it with the following to provide the Court with a more complete statement of the proceedings that took place below.

In his Second Amended Complaint, FORGIONE alleged that the Tofels had liability insurance with STATE FARM and an umbrella policy with FIREMAN'S FUND INSURANCE COMPANY. (R l-32-4)' He contends that one or both of the insurance agents who procured the insurance for the Tofels was negligent in allowing a gap in coverage to exist and that the insurance companies were vicariously liable for the agents' negligence. (R l-32-5, 8) The Tofels allegedly assigned their rights to sue the agents and the insurance companies to FORGIONE. (R 1-32-1, 2)

After FORGIONE had twice amended his complaint, the cause came before the United States District Court on STATE FARM's motion to dismiss. In its motion to dismiss, STATE FARM contended that FORGIONE's claim against STATE FARM, which was based upon

[1] Record references are made in accordance with the United States Eleventh Circuit Court of Appeals' procedure. The references are to volume number, document number and page number.

STATE FARM's alleged vicarious liability for the negligence of Defendant, DENNIS PIRTLE AGENCY, INC., ("DENNIS PIRTLE") had not been validly assigned under Florida law because it was not bottomed upon either a contract or a statute but, instead, constituted a pure tort action. (R l-l O-2) (FORGIONE had voluntarily dismissed PIRTLE, STATE FARM's alleged agent, before the appealed order was rendered to maintain complete diversity.)

In its Order Granting Defendant's Motion to Dismiss, the federal district court agreed with STATE FARM that the assignment was invalid under Florida law. The 14-page order includes a comprehensive discussion of the law of assignment of causes of action in Florida. The district court, while acknowledging that language in some of the Florida decisions suggests that no tort actions may be assigned, proceeded, instead, under the assumption that some tort claims may be assigned if they are not of a personal nature. (R l-30-13) In analogizing the present case to a legal malpractice case, the court held that FORGIONE's claims of insurance agency negligence were "personal" and, therefore, were not assignable. In particular, the district court reasoned:

> We believe that a similar personal relationship is created when a prospective insured consults an insurance agent, provides that agent with specific information about his unique circumstances and relies on the agent to obtain appropriate coverage tailored to these circumstances. Florida courts have recognized that the relationship between a prospective insured and an insurance agent (like the relationship of attorney and client) is that of principal and agent, for the purpose of negotiating a policy suitable to the client's needs, , . . As an agent for the insured, a broker owes his client a duty to exercise reasonable skill, care and diligence in effecting

> insurance. . . . Moreover, an insurance agent owes the prospective insured a duty of unwavering loyalty similar to that owed by an attorney to a client. . . . It is the special fiduciary nature of the relationship between a prospective insured and an insurer that lends the relationship a "personal" character similar in scope to the lawyer-client relationship. For this reason, we believe that alleged acts of negligence on the part of an insurance agent who has been consulted for the express purpose of meeting a client's unique needs create a non-assignable "personal tort" similar to that identified in Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148 (Fla. 4th DCA 1984) (holding legal malpractice claims to be non-assignable)].

(R l-37-9) (citations omitted).

FORGIONE appealed the dismissal order to the United States Eleventh Circuit Court of Appeals, which, in turn, certified the following question to this Court: "Can a claim for negligence by an insured against an insurance agent for failure to obtain proper insurance coverage be assigned to a third party?"

SUMMARY OF THE ARGUMENT

The United States District Court correctly concluded that a negligence action against an insurance agent is not an assignable claim in Florida. Florida, like several other jurisdictions, follows the common law rule that "pure" torts are not assignable. This has been specifically announced by this Court, and no Florida appellate court has ever permitted a pure tort claim -- a claim not founded upon a contract or statute -- to be assigned.

To the extent that certain decisions in Florida can be read to distinguish "personal" torts from "impersonal" torts, the dicta in such cases departs from the common law approach that otherwise prevails in the state. Moreover, as the district court found below, the agency negligence claims brought by FORGIONE have the same personal nature as that found in legal malpractice claims, which the Florida courts have held to be non-assignable. No legitimate reason exists for distinguishing among professionals in determining whether assignments of malpractice claims should be allowed. In each case, the relationship of trust and confidence that necessarily obtains is inevitably eroded or threatened by the prospect of strangers stepping in after the relationship has terminated to seek economic gain.

No good policy reason exists for extending tort rights to persons not injured by the alleged negligence of the defendant professional. To the contrary, such an extension of rights runs directly contrary to public policy as reflected in Florida's efforts at tort reform and should,

therefore, be rejected.

The second issue addressed by FORGIONE -- whether the Second Amended Complaint should have been dismissed with prejudice -- is not before this Court. This issue was not certified and is not dependent upon Florida law.

ARGUMENT AND CITATIONS OF AUTHORITY

A CLAIM FOR NEGLIGENCE BY AN INSURED AGAINST AN INSURANCE AGENT IS NOT ASSIGNABLE IN FLORIDA

Florida Decisions

Florida follows the common law rule prohibiting the assignment of pure tort causes of action. This rule was recognized in State Road Dep't v. Bender, 2 So. 2d 298 (Fla. 1941). In that case, this Court was addressing the assignability of a claim made in a condemnation action brought in equity. The assignment was from the previous owner of the subject realty to the new owner. This Court stated:

> A cause of action arising from pure tort like personal injury cannot be assigned, but it is well settled that a cause of action growing out of injury to property may be assigned especially when the assignee, as in this case, has acquired title to the property.

Id. at 300 (emphasis added). Bender was followed in Florida Power Corn. v. McNeely, 125 So, 2d 311 (Fla. 2d DCA 1960), cert denied, 138 So. 2d 341 (Fla. 1961), which was an eminent domain proceeding. In neither of those two cases did the courts describe the assigned claims as "torts."

Florida's adherence to the common law rule was recognized in In re Sav-A-Stop, Inc., 98 B.R. 83, 85 (M.D. Fla. 1989). In that case, the officers, directors and legal counsel of the debtor corporation had been sued for return of an escrow deposit held by the corporation. After that suit

was dismissed for lack of personal jurisdiction, the individual defendants assigned their claims of abuse of process and malicious prosecution to the corporation which brought a counterclaim for such causes of action against the plaintiff in an adversary proceeding. In holding that the claims of abuse of process and malicious prosecution could not be assigned, the bankruptcy court stated:

> 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. . . . Claims for malicious prosecution and abuse of process are tort claims and fall within the ambit of this rule.

Id. at 85. The court did not distinguish between so-called personal torts and other torts (those that, presumably, would be considered impersonal), and nothing from the decision reflects that the claims assigned in that case were, in any meaningful way, "personal."

Since Bender, no Florida appellate court has ever approved the assignment of a pure tort claim. In this regard, the cases have distinguished between ordinary tort claims and those actions which are based on contract or statute. In all of the cases in which ordinary tort actions have been assigned, the courts have held the assignments to be invalid. See Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490 (Fla. 3d DCA 1994) (claims of waste and conversion not assignable); Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148 (Fla. 4th DCA 1984) (legal malpractice action not assignable); McNulty v. Nationwide Mutual Ins. Co., 221 So. 2d 208 (Fla.

3d DCA 1969) (claims for personal injuries, slander or assault not assignable); Florida Patient's Compensation Fund v. St. Paul Fire & Marine Ins. Co., 535 So. 2d 335 (Fla. 4th DCA 1988) (personal injury and malpractice claims not assignable), approved on other grounds, 559 So. 2d 195 (Fla. 1990); Notarian v. Plantation AMC Jeep, Inc., 567 So. 2d 1034 (Fla. 4th DCA 1990) (intentional infliction of emotional distress claims not assignable). On the other hand, in the cases involving contractually or statutorily based causes of action, the assignments have been upheld. See Carpenter v. Bachman Enterprises, Inc., 657 So. 2d 42 (Fla. 3d DCA 1995) (right of contribution under section 768.3 1, Florida Statutes, is assignable); Notarian (employee's wrongful discharge claim based upon section 440.205, Florida Statutes, and contract claim that employer gave insufficient notice of termination assignable); Aaron v. Allstate Ins. Co., 559 So. 2d 275 (Fla. 4th DCA), rev. denied., 569 So. 2d 1278 (Fla. 1990) (action against insurer for failure to provided adequate defense, which duty arose out of insurance contract, assignable); Selfridge v. Allstate Ins. Co., 219 So. 2d 127 (Fla. 4th DCA. 1969) (insured's cause of action against insurer for alleged negligent failure to settle within policy limits assignable). In this regard, as the district court recognized below, both Aaron and Selfridge, which included claims of negligence, nonetheless, constituted contractually based actions. The Fourth District Court of Appeal simply declined in those cases to categorize the claims involved there as either tort or contract actions. The Third District Court of Appeal in McNulty, which was also a bad faith case

involving the identical issue found in Selfridge, explained the significance of this distinction as follows:

> The contractual duty of the insured to defend justifies an implication that the insurer will exercise ordinary care and good faith in so proceeding. Accordingly, when an insurer under such a policy contract undertakes to defend an action against the insured and becomes involved in negotiations for settlement, the law imposes the duty that it act therein in good faith. It follows that the cause of action for an "excess," where one arises from bad faith, is bottomed on the contract, and that the nature of an action thereon is [in contract] rather in tort. The fact that the proofs offered to establish an insurer's bad faith in this connection may include or consist of showing an act of negligence will not take the cause of action out of the contract category.

Id. at 210.

The Third District Court of Appeal has been consistent in following the rule, recognized in In re Sav-A-Stop, Inc., that tort claims can not be assigned in Florida. In the recent case of Carpenter, the district court, in concluding that a right to contribution is assignable because "it [is] a creature of statute, not of tort," stated: "While Florida does not recognize the assignability of tort claims, 'rights to contribution are generally recognized as being assignable."' Carpenter, 657 So. 2d at 43 (quoting Robarts v. Diaco, 581 So. 2d 911 (Fla. 2d DCA), rev. denied, 591 So, 2d 183 (Fla. 1991)). In Ginsberg, the Third District court held that the plaintiffs counts of conversion and waste failed to state claims upon which relief could be granted because, while sounding in tort, the causes of action arose out of a contractual relationship. In doing so, the

court noted that, even if independent torts of conversion and waste had been stated, the claims could not have been brought pursuant to an alleged assignment because "those torts could only have been committed against the [assignor] and thus were personal to the [assignor]." Ginsberg, 645 So. 2d at 496 n.4.

A distinction between "personal" torts and "impersonal" torts has never been made by this Court. At most, the Court has recognized a difference between "property" claims, at least those relating to real property, and all other torts, i.e., those which involve "personal" damages. See Bender. The "personal"/"impersonal" tort dichotomy was created by the Fourth District Court of Appeal, in dicta, in the Selfridge case, In that case, heavy reliance was placed upon section 45.11 (now 46.021), Florida Statutes, which provides, generally, for the survivability of causes of action. Selfridge, 219 So. 2d at 129. More recently, however, the Fourth District receded from that reliance in Notarian, where it stated, "The assignability of a tort claim . . . is not controlled by its survivability." Notarian, 567 So. 2d at 1035. The court recognized that Florida follows the common law of assignability but limited its statement in that case to the prohibition against assigning personal injury claims. Id. Because Notarian involved a claim of infliction of emotional distress, it was not required to address the issue presented here. The Fourth District has not had to decide whether other pure torts, outside of legal malpractice claims, are assignable.

Under the law as stated in Bender and in the decisions of the Third District Court of

Appeal, the Tofels' malpractice claim against their insurance agent was not assignable because it constituted a pure tort. However, even if it were decided that a "personal" tort test should be applied, for the reasons expressed by the federal district court below, FORGIONE's complaint was, nonetheless, properly dismissed. There is simply no valid reason for distinguishing, in this context, a lawyer-client relationship from other professional agency relationships, and no public policy reason exists for departing from the common law recognized in Bendery e r s a r e n o t the only persons entitled to protection from the buying and selling of tort actions,

The relationship between a lawyer and client is that of principal and agent. Beaslev v. Girten, 61 So. 2d 179 (Fla. 1952); Johnson v. Estate of Fraedrich, 472 So. 2d 1266 (Fla. 1st DCA 1985). This is the same basic relationship alleged to have existed between the defendants and the Tofels. (See appealed order (R 1-37-9), quoted above in Statement of Case) "The very relation [between principal and agent] implies that the principal has imposed some trust or confidence in the agent." Fisher v. Grady, 178 So. 852, 860 (Fla. 1937). Moreover, insurance agents, like attorneys, are licensed professionals who are subjected to examination, continuing legal education requirements and strict rules of conduct. See generally ch. 626, Fla. Stat. (1995).

In Washington, the Fourth District Court of Appeal provided lawyers with protection "because of the personal nature of legal services which involve highly confidential relationships." Washington, 459 So. 2d at 1149. Underlying the Fourth District's rather cryptic opinion is the

principle that professionals who engage in personal services for others should not be subjected to the prospect of being sued by strangers to that relationship. The confidentiality aspect of the relationship only highlights the personal nature or character of the services.

The concern of maintaining client confidences as a basis for distinguishing legal malpractice claims is not well placed. Such confidences will necessarily be disclosed regardless of whom brings the malpractice action. In this regard, a client cannot complain of confidences being disclosed where he or she has assigned the legal claim to a third party. Any such confidences must be considered waived. It is the bringing of such an action, and not by whom, that will result in disclosure.

The Washington court relied upon decisions from other states in holding legal malpractice claims to be non-assignable. These include Clement v. Prestwich, 448 N.E.2d 1039 (Ill. App. Ct. 1983), and Joos v. Drillock, 338 N.E.2d 736 (Mich. App. Ct. 1982), both of which were quoted in the district court's order below (R. 1-37-8, 9), as well as Christison v. Jones, 405 N.E.2d 8 (Ill. App. Ct. 1980), relied upon in both of those cases. In Christison, the Illinois court explained the nature of a malpractice claim as follows:

> [T]he injuries resulting from legal malpractice are not personal injuries, in the strict sense of injuries to the body, feelings or character of the client. Rather, they are pecuniary injuries to intangible property interests. While focus on these aspects of the malpractice 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. Similarly, here, it is the personal nature of the services that should control -- not whether the Tofels suffered bodily injury. The fact that the duties allegedly breached were those of an insurance agent and not of an attorney should not change the result.

Law of Other Jurisdictions

The common law rule of the non-assignability of tort claims is followed in several jurisdictions. In addition to Oklahoma, which was addressed in In re Sav-A-Stop, Inc., 98 B.R. at 85, see Dippel v. Hunt, 517 P.2d 444 (Okl. Ct. App. 1973) (common-law prohibition against assignment of tort action obtains unless otherwise provided by statute), Kansas, New Jersey, Arizona, Georgia, and Arkansas appear to follow this rule. See Glenn v. Fleming, 799 P.2d 79 (Kan. 1990); Conopco, Inc. v. McCreadie, 826 F. Supp. 855 (D.N.J. 1993); Sabon Invs., Inc. v. Braniff Airways, Inc., 534 F. Supp. 683 (D. Ariz. 1982); Southern Railway Co. v. Malone Freight Lines, Inc., 330 S.E.2d 371 (Ga. Ct. App. 1985); Midwest Mut. Ins. Co. v. Arkansas Nat'1 Co., 538 S.W.2d 574 (Ark. 1976).

In Conopco, Inc., for example, the United States District Court for the District of New Jersey was called upon to apply the New Jersey law of assignments to a claim for professional malpractice and negligence brought against a computer consulting partnership for the design and

implementation of a computer system, The district court first determined that the sole New Jersey statute addressing assignments of actions provided only for the assignability of contractual causes of action. Id. at 866. It then turned to the state's common law for guidance and, finding that the New Jersey courts had consistently held that tort claims could not be assigned prior to judgment, held that the claims in that case were not validly assigned. In doing so, the court relied upon Costanzo v. Costanzo, 590 A.2d 268 (N.J. Super, 1991), in which the state court stated:

> A tort claim is a chose in action and at first blush it would appear to be assignable. But in New Jersey, as a matter of public policy, a tort claim cannot be assigned.
>
> Tt has always been held that the right to bring an action in the courts of this state is possessed by the injured person, alone, unless the injured person assigns his right to someone else which cannot be done before [sic] judgement when the action sounds in tort. [United States Cas. Co. v. Hyrne, 117 N.J.L. 547, 552, 189 A. 645 (E. & A. 1936)].

Id. at 271. Even more on point is Midwest Mut. Ins. Co., in which the Supreme Court of Arkansas addressed whether a negligence action against an insurance agency and one of its agents for failing to reinstate insurance coverage on a vehicle could be assigned. The assignment was made from the owner of the vehicle, which had been involved in a collision with a motorcycle, to the uninsured motor vehicle carrier after a judgment was entered against the owner in favor

of the motorcycle operator. In addressing the assignability of the action, the Arkansas court stated:

> It must be remembered that the assignor . . . did not assign a judgment . . , to the [assignee] in this case. [The assignor] did not own the judgment; [the assignor] owed the judgment to . , . complete strangers to the transactions between [the assignor] and its insurance agency . . . . [The strangers'] claims against [the assignor] were liquidated by judgments . . . but the subject of the assignment in this case was [the assignor's] separate tort damage claim against its insurance agent.

Id. at 579. The court thereupon concluded that, under Arkansas' law of non-assignability, the action against the agents amounted to an unliquidated tort claim that was not assignable. Id. As was true in Midwest Mut. Ins. Co., the assignment here is not of a judgment -- the judgment against the Tofels was already owned by FORGIONE -- but of a chose of action in tort based upon the owing of the judgment.

The law in Florida is remarkably similar to that found in Kansas. In Heinson v. Porter, 772 P.2d 778 (Kan. 1989), overruled in part, Glenn v. Fleming, 799 P.2d 79 (Kan. 1990), the Supreme Court of Kansas stated:

> We agree that tort claims remain unassignable in Kansas. There are sound continuing policy reasons for this common-law rule. Tort claims are personal in nature and third parties should not be permitted to buy claims for personal injuries and losses.
>
> Inasmuch as tort claims are not assignable, plaintiff acquired no rights thereto from the invalid assignment. Further, we do not

recognize bad faith as an independent tort in Kansas.

Id. at 785. In Glenn, the Kansas supreme court confirmed the statements of the law quoted above, but overruled Heinson to the extent it had held that bad faith and negligent refusal of an insurer to settle are non-assignable tort claims, Instead, the court held that such claims are based upon a breach of a contractual obligation and, for that reason, can be assigned. Glenn, 799 P.2d at 90. This is the same distinction made in Florida. See. e.g., McNulty; Aaron.[2]

The Minnesota case relied upon by FORGIONE, Peterson v. Brown, 457 N.W.2d 745 (Minn. Ct. App. 1990), provides no relevant guidance because it applies a body of state law significantly unlike that found in Florida. In Minnesota, "[a] cause of action is assignable if it meets the statute's survival test." Id, at 748 (referring to Minn. Stat. § 573.01 (1990), which governs survival of causes of action). In this regard, assignments of causes of action for fraud and misrepresentation have been upheld in Minnesota as early as 1896. See cases cited at id. The court specifically rejected the foreign cases relied upon by the defendants based upon Minnesota's well-established law, stating: "The cases cited by [the defendants] are inapposite,

[2] Another approach that has been followed in at least one jurisdiction is distinguishing between personal torts and property torts. Under Tennessee law, ex delicto actions for injury to persons, as distinguished from ex delicto actions for injury to property, are not assignable. Smith v. State Farm Mut. Auto. Ins. Co., 278 F. Supp. 405, 407 (E.D. Term 1967). In that case, the court relied upon a new statute specifically authorizing the assignment of bad faith claims against insurers, which it found applied retroactively, in upholding an assignment, thereby implying, at least, that the action would have otherwise been considered non-assignable. This distinction may be the same one referred to in Bender.

as the body of law that has developed in Minnesota is significantly different from that developed in these other states." Id. at 749. As stated above, in Florida, assignability is not likewise governed by survivability.

The law in Florida has developed much differently than that in Minnesota or in any of the other states which might permit assignment in this case. The Florida decisions are consistent with those of such states as New Jersey, Arkansas, and Kansas, and require the certified question to be answered in the negative.

Public Policy

The trend in Florida, as it is across the nation, is to control the spread of tort litigation which is clogging judicial systems and causing insurance to become unaffordable. The public policy in Florida in restricting such actions is reflected in the adoption of a no-fault system, workers' compensation laws, and other tort reform acts. FORGIONE has not provided any good reason why this clear statement of policy and the common law should be ignored by permitting malpractice claims against professionals (other than attorneys) to be traded like commodities, The public policy considerations that were articulated by the California Court of Appeals in Goodlev v. Wank & Wank, Inc., 62 Cal. App. 3d 392,397, 133 Cal. Rptr. 83, 87 (1976), and adopted by the Illinois court in Christison, apply equally to this case:

> The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be

> exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage -unjustified lawsuits, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers.

It is not too much to require the person who has been allegedly injured by professional malpractice to bring his or her own claim. By allowing all other potential buyers to do so, the courts, necessarily, will increase the chances that frivolous and unjustified lawsuits will be brought. The professional should be able to face his client "party-to-party" and not be subjected to claims of a stranger who could not know the full picture and, even more significantly, would be motivated solely by the prospect of economic gain.

Dismissal with Prejudice

Whether the trial court should have dismissed FORGIONE's complaint with prejudice is not an issue before this Court. This issue does not implicate Florida law and was not certified for resolution along with the assignability question. Accordingly, the issue is not addressed in this brief. (The issue was fully addressed with the briefs submitted to the United States Eleventh Circuit Court of Appeals.)

CONCLUSION

Wherefore, for the foregoing reasons, STATE FARM requests that the Court answer the certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Joseph R. Dawson, Esquire, LAW OFFICES OF JOSEPH R. DAWSON, P. A., 320 Davie Boulevard, Fort Lauderdale, Florida 333 15, R. Scott McNary, McNARY & BEFERA, 2937 Southwest 27th Avenue, Suite 203, Miami, Florida 33133 and Hayes G. Wood, Esquire, WOOD & QUINTAIROS, 7990 Red Road, Miami, Florida 33 143 this 22nd of November, 1996.

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