SUPREME COURT OF FLORIDA

KPMG PEAT MARWICK, etc.,

Petitioner,

CASE NO. 96,413

vs.

District Court of Appeal,
3rd District - No. 98-3051

NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PENNSYLVANIA,
etc.,

Respondent.
_________________________________/

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The plaintiff below, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA ("National Union"), through its Fourth Amended Complaint, sued KPMG PEAT MARWICK ("KPMG") for accounting malpractice. In Count I of the Fourth Amended Complaint, National Union asserted a claim as the assignee of BankAtlantic. (R. 629-630). In Count II, National Union asserted a claim as the contractual subrogee of BankAtlantic. (R. 630-632). In Count V, National Union asserted a claim as the equitable subrogee of BankAtlantic. (R. 637-638).[1]

In its Fourth Amended Complaint, National Union alleged that it was the fidelity bond insurer of BankAtlantic from May of 1989 through May of 1992. (R. 617, ¶ 10). National Union further alleged that BankAtlantic made a claim against National Union on the surety bond relating to a portfolio of loans purchased by BankAtlantic from Sterling Resources, Ltd. ("Sterling Portfolio"), and that National Union agreed to pay BankAtlantic approximately $18,000,000 for losses sustained in the Sterling Portfolio. (R. 617, ¶¶ 11-12). National Union alleged that KPMG, as the independent auditor of BankAtlantic, was negligent in the performance of certain of the independent audits of BankAtlantic in not discovering the activities leading to the losses, and that such

[1] The Fourth Amended Complaint also asserted certain direct claims by National Union against KPMG in Counts III and IV, but such claims were voluntarily dismissed by agreed order dated October 14, 1998, and were not at issue in the appeal below. (R. 1268).

negligence caused all or some of the loss for which National Union paid BankAtlantic. (R. 616-638). National Union also alleged that BankAtlantic assigned to National Union any and all claims against KPMG for negligence in the performance of the subject audits, and attached a copy of the purported assignment as an exhibit. (R. 617, Ex. C).

KPMG answered the Fourth Amended Complaint denying the material allegations thereof, and asserted various affirmative defenses. (R. 734-750). On February 16, 1996, KPMG filed a Motion for Judgment on the Pleadings. (R. 806-815). The basis for this motion was that, inter alia, National Union could not sustain a claim for accounting malpractice as either the assignee or subrogee of BankAtlantic because Florida law prohibits the transfer of such professional malpractice claims.

On October 14, 1998, the trial court entered an order granting KPMG's Motion for Judgment on the Pleadings and entered Final Judgment in favor of KPMG. (R. 1280-1281). National Union appealed this judgment to the Third District Court of Appeal. (R. 1274-1279). By Opinion filed July 28, 1999, the Third District Court of Appeal reversed the Final Judgment and remanded the case back to the trial court. (App. 1). However, the Third District certified to this Court the issue presented as one of great public importance. (App. 1, pp. 3, 7).

SUMMARY OF THE ARGUMENT

This appeal involves an issue of great public importance, that is, whether the same public policy considerations recognized by Florida courts which prohibit the transfer of claims for legal malpractice by assignment or subrogation also preclude the transfer of claims for accounting malpractice. The Third District recognized the significance of its decision by certifying the issue of whether this Court's recent decision in Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997), created an inherent conflict with its 1934 decision in Danzler Lumber & Export Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116 (1934).

In Forgione, the issue presented was whether a claim by an insured against an insurance agent was transferable. This Court reviewed the long line of Florida cases which found legal malpractice claims non-assignable based on public policy grounds. This Court then analyzed a number of factors which led to its conclusion that the same public policy grounds which preclude the transfer of legal malpractice claims, including the confidential relationship between an attorney and his client, the duty owed by an attorney to his client, and the personal relationship between an attorney and his client, did not apply to claims by an insured against an insurance agent. However, the public policy considerations applied by this Court in Forgione plainly preclude the transfer of claims for accounting malpractice.

Under Florida law, a claim for legal malpractice may not be transferred by assignment or subrogation. Florida law provides that the principles governing legal malpractice apply to claims against all professionals, including accountants. Peat Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990). For this reason, accounting malpractice claims may not be transferred.

Further, the factors considered by this Court in Forgione require that a claim for accounting malpractice be non-transferable. As to the first factor enunciated in Forgione, the confidential relationship between the attorney and client, this same confidentiality exists between an accountant and its client. The accountant-client privilege contained in Florida's Evidence Code is identical to the attorney-client privilege, and these privileges establish a clear intent by the legislature that communications between an accountant and its client are just as confidential as those between an attorney and his client. Further, this confidentiality requirement also appears in Chapter 473 governing Public Accountancy, so that it is a substantive right as well. The Third District's reliance on federal law is misplaced where federal courts do not recognize an accountant-client privilege in federal question cases, in clear contrast to Florida courts and federal courts in diversity cases which apply state law privileges.

The second factor in Forgione, which is the duty owed by an attorney to his client, equally compels the conclusion that accounting malpractice claims are not assignable. Clearly, under the law established by this Court in First Florida Bank v. Max Mitchell, 558 So.2d 9 (Fla. 1990), an accountant owes a duty to its client, and not to the public absent either strict privity of contract or actual knowledge of reliance by a third party. The Third District's characterization of an accountant as a "public watchdog" places an unwarranted emphasis on the performance of a singular task by an accountant - the audit of a public company - when in fact the vast majority of accountants practicing in Florida do not even perform this function. Rather, most accountants are not practicing in large accounting firms, and perform services with no public attributes, such as tax advice, pension plan audits, management consulting, and other similar activities. Moreover, in an assignment or subrogation setting such as this one, public interests are never involved. Rather, the transfer is of a claim possessed by the client against the accountant.

As to the third factor considered by this Court in Forgione, the personal nature of the relationship, the type of activities described above are indicative of the close relationship between an accountant and its client that have no impact on the public. Thus, all of the factors considered by this Court in Forgione compel a conclusion that accounting malpractice claims are not transferable.

The Third District Court of Appeal in this case misplaces its reliance on this Court's 1934 decision in Danzler. Although Danzler permitted the transfer by subrogation of an accounting malpractice claim, that decision analyzed only the issue of equitable subrogation in general, and did not contain any analysis of the factors enunciated by this Court in Forgione 63 years later.

The Third District recognized the inherent conflict between the decisions in Forgione and Danzler, and certified to this Court a question of great public importance, which is whether Danzler still represents Florida law in light of Forgione. (App. 1, pp. 3, 7). For the reasons set forth in this brief, Forgione is the controlling law of this state. The Third District erred in holding that claims for accounting malpractice may be transferred by assignment or subrogation and this Court should reverse that decision.

CERTIFICATE OF TYPE SIZE AND STYLE

It is hereby certified that this brief is typed in 14 point Times New Roman.

ARGUMENT

A CLAIM FOR ACCOUNTING MALPRACTICE MAY NOT BE TRANSFERRED BY ASSIGNMENT OR SUBROGATION

A. Florida law Prohibits the Assignment or Subrogation of a Claim for Professional Malpractice

It is without question that under Florida law, a claim for legal malpractice may not be assigned to a third party. Kozich v. Shahady, 702 So.2d 1289 (Fla. 4th DCA 1997); Mickler v. Aaron, 490 So. 2d 1343 (Fla. 4th DCA 1997); Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148 (Fla. 4th DCA 1984). In considering this issue of first impression in Florida, the court in Washington observed that a majority of jurisdictions prohibit the assignment of such actions because of the personal nature of legal services which involve highly confidential relationships.

The same public policy considerations that prohibit transfers by assignment of legal malpractice claims also preclude their transfer by subrogation. In National Union Fire Ins. Co. v. Salter, 717 So.2d 141 (Fla. 5th DCA 1998), the same plaintiff as involved in this action, sought to bring a legal malpractice action as a subrogee of the attorney's client. The court first reiterated that under Florida law, legal malpractice claims are personal torts which cannot be assigned because of the personal nature of the legal services which involve highly confidential relationships. (Citing Forgione; Kozich). The court concluded that the policy reasons for prohibiting assignments are equally applicable to a subrogation action.[2]

As this Court has held, the same principles which govern legal malpractice actions govern all professional malpractice actions. In Peat Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990), this Court considered the issue of the commencement of the statute of limitations in an accounting malpractice action. This Court found that while the Florida courts had not expressly addressed that question in an accounting malpractice case, they had addressed a similar issue in legal malpractice actions. In determining to follow such precedent, this Court stated: *"**We find that the basic principles for all professional malpractice actions should be the same**"*, absent a clear legislative intent to distinguish certain professions in the application of the limitations period." Id. at 1325. (Emphasis added).

This Court in Peat Marwick further looked to the definition of "profession" set forth in Pierce v. AALL Insurance, Inc., 531 So. 2d 84 (Fla. 1988). In Pierce, this Court found that an insurance agent was not a professional for purposes of the statute of limitations. This Court defined a profession as a vocation requiring, as a minimum

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[2] Although National Union was a party in the Salter case, National Union did not cite to that decision in its Initial Brief filed in the Third District, nor did the Third District even mention this case, notwithstanding that the Fifth District's holding that legal malpractice claims may not be transferred by subrogation is plainly relevant to the issue presented in this appeal.

standard, a college degree in the specific field in order to be licenced under the laws and administrative rules of this state. The Pierce court used a certified public accountant as an example of such a profession. See also Garden v. Frier, 602 So.2d 1273 (Fla. 1992) (reaffirming Pierce but clarifying its earlier holding).

Similarly, in Coopers & Lybrand v. Trustees of the Archdiocese of Miami/Diocese of St. Petersburg Health & Welfare Plan, 536 So.2d 278 (Fla. 3d DCA 1988), the Third District considered a case of first impression involving the measure of damages in a claim for accounting malpractice. Finding no direct guidance, the court observed that "the same analyses of foreseeability and causation undertaken when assessing damages in other professional malpractice actions should apply when calculating the measure of damages in an accountant malpractice action." Id. at 281.[3]

In its Opinion in this case, the Third District Court of Appeal completely ignored this Court's decisions in Peat Marwick and Pierce, and even failed to consider its own decision in the Coopers & Lybrand case, all of which hold that the principles applying to legal malpractice cases should apply to all professional malpractice actions, including accountant malpractice suits. Because Florida law holds that legal malpractice claims may not be transferred by assignment or subrogation, and also holds that claims for

[3] The Third District observed that accountants, like attorneys, are professionals, citing to the Pierce decision which held that an insurance agent is not a professional. Id. at n. 6.

professional malpractice should be governed by the same principles, under Florida law a claim for accounting malpractice may not be transferred by assignment or subrogation, and the Third District erred in reaching a contrary conclusion.

B. The Public Policy Rationale Set Forth in this Court's Decision in Forgione Mandates Against the Assignability of Accounting Malpractice Claims

The Third District also failed to properly apply the factors set forth by this Court in Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997), to determine whether an accounting malpractice claim is assignable. In Forgione, this Court held that a negligence claim against an insurance agent was assignable, and contrasted the assignability of this claim with the non-assignability of a legal malpractice claim. This Court carefully enunciated several factors to be used in determining which claims are assignable and which are not assignable for public policy reasons. The factors set forth by this Court in Forgione plainly support the conclusion that a claim for accounting malpractice may not be assigned.

The Forgione decision reiterated the general rule that parties can assign causes of action derived from a contract or statute. See, e.g., McNulty v. Nationwide Mut. Ins. Co., 221 So.2d 208 (Fla. 3d DCA 1969) (upholding assignment of contract based claim). In contrast, purely personal tort claims are not assignable under Florida law. See, e.g., Notarian v. Plantation AMC Jeep, Inc., 567 So. 1034 (Fla. 4th DCA 1990) (claim for intentional infliction of emotional distress is a personal injury claim that is not assignable).

This Court further noted that the majority of jurisdictions prohibit assignment of legal malpractice claims based on public policy considerations.[4] The Court then discussed the various factors supporting these public policy considerations. The considerations addressed by this Court in Forgione apply equally to accounting malpractice claims.

1. The First Factor in Forgione: A Confidential Relationship

First, this Court noted that attorneys and clients have a confidential relationship, which includes constraints upon information that can be disclosed to others, citing Section 90.502, Florida Statutes (1995) (explaining parameters of the lawyer-client privilege recognized by Florida's Evidence Code), and Rules Regulating The Florida Bar 4-1.6 (imposing obligation that lawyer not reveal information relating to representation of

[4] See, e.g., Schroeder v. Hudgins, 142 Ariz. 395, 690 P.2d 114 (App. 1984); Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 389 133 Cal. Rptr. 83 (1976); Roberts v. Holland & Hart, 857 P.2d 492 (Colo. App. 1993); Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991); Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson, 250 Kan. 490, 827 P.2d 758 (1992); Coffey v. Jefferson County Bd. of Educ., 756 S.W. 2d 155 (Ky. App. 1988); Joos v. Drillock, 127 Mich. App. 99, 338 N.W. 2d 736 (1983); Earth Science Laboratories, Inc. v. Adkins & Wondra, P.C., 246 Neb. 798, 523 N.W. 2d 254 (1994); Chaffee v. Smith, 98 Nev. 222, 645 P.2d 966 (1982); Can Do, Inc. Pension and Profit Sharing Plan and Successor Plans v. Manier, Herod, Hollabaught & Smith, 922 S.W. 2d 865 (Tenn. 1996); City of Garland v. Booth, 895 S.W. 2d 766 (Tex. App. 1995).

client). This Court observed that the law does not impose similar constraints on communications between an insurance agent and an insured.

The same confidential relationship exists between an accountant and its client under Florida law. In fact, the accountant-client privilege codified in Section 90.5055 of the Florida Statutes is ***identical*** to the attorney-client privilege set forth in Section 90.502. This evidentiary privilege extending to communications between an accountant and its client provides that a communication between an accountant and its client is confidential if it is not intended to be disclosed to third persons other than in furtherance of the rendition of the accounting services to the client or those reasonably necessary for the transmission of the communication. The client is the holder of the accountant-client privilege, and the client has the privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant. The accountant may claim the privilege only on behalf of the client.

In its decision, the Third District failed to recognize the significance of this statutory privilege. The Third District correctly noted that the accountant-client privilege, unlike the attorney-client privilege, is not recognized at common law. (App. 1, p. 3). However, the Florida Legislature chose to enact this privilege in recognition of the confidential nature of the relationship between an accountant and its client. Further, the Florida Legislature in 1931 enacted the predecessor statute to Chapter 473, which governs

Public Accountancy. Section 473.16 of the present statute contains the same exact language as Section 90.5055 and thus the confidentiality between an accountant and its client is more than simply an evidentiary privilege as the Third District implies; it is also a substantive statutory right.

Florida's appellate courts have recognized that the relationship between an accountant and its client is a confidential one much like the relationship between an attorney and his client. In Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2d DCA 1981), the court, in holding that a confidential memorandum prepared by an accountant concerning the viability of a contract is privileged, noted that the purpose of such a privilege is to carry out the public policy of being able to consult with an accountant without fear that the resultant communications may become public. Similarly, in Green v. Harry Savin, P.A., 455 So.2d 494 (Fla. 3d DCA 1984), the Third District found that a complaint properly stated a cause of action for unauthorized disclosure of confidential information where it alleged that the accountants of a medical doctor and his professional association improperly released confidential financial data to the doctor's wife, which data was used by the wife and her attorney in the subsequent trial of a dissolution of marriage between the doctor and his wife. See also Deloitte, Haskins & Sells v. So. Finance Holding Corp., 566 So.2d 906 (Fla. 4th DCA 1990) (quashing circuit court order requiring discovery of financial records and workpapers in accountant's possession).

Although the Third District cited to federal cases which hold that no accountant-client privilege exists under federal law, such as United States v. Arthur Young & Co., 465 U.S. 805 (1984) and Falsone v. United States, 205 F.2d 734 (5^{th} Cir. 1953), the court failed to cite any one of the above Florida cases recognizing and protecting the accountant-client privilege. The Third District's reliance on federal law is misplaced given the clear statutory privilege in Florida and the Florida court's consistent application of this privilege.[5]

Further, just as the Rules Regulating The Florida Bar impose an obligation on a lawyer not to reveal information relating to the representation of his client, the American Institute of Certified Public Accountants ("AICPA") imposes a like obligation on its member accountants. As recognized by the Code of Professional Conduct promulgated

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[5] In fact, federal courts in diversity cases apply state accountant-client privileges. As held by the Seventh Circuit in Palmer v. Fisher, 228 F.2d 603 (7^{th} Cir. 1955), federal courts have held that state laws creating a privilege are substantive, and they have followed them in diversity cases. In that case, the court held that because the state legislature of Illinois had declared it to be public policy that public accountants shall not be required to testify about information obtained in their confidential capacity as accountants, this policy would be defeated if any federal court in Illinois should require an accountant to testify as to such information). See also Comm'l Union Ins. Co. v. Talisman, Inc., 69 F.R.D. 490 (E.D. Mo. 1975) (state created accountant client privilege may be asserted in diversity actions); Lukee Ent., Inc. v. New York Life Ins. Co., 52 F.R.D. 21 (D.N.M. 1971) (same); Federal Rule of Evidence 501 ("in civil actions and proceedings, . . . the privilege of a witness . . . shall be determined in accordance with State law.").

by the AICPA: "A member in public practice shall not disclose any confidential information without the specific consent of the client." 2 AICPA Professional Standards, ET § 301.01.[6] For all of these reasons, a confidential relationship exists between an accountant and its client, supporting the conclusion that a claim for accounting malpractice is not assignable on public policy grounds.

2. The Second Factor in Forgione: Duty Owed to the Client

As a second factor, this Court in Forgione observed that unlike an attorney who owes his duty to the client, an insurance agent, while required to use reasonable skill and diligence in obtaining coverage for an insured, owes the insurance company, which is his or her principal, the highest obligation. An accountant, like an attorney, also owes a duty of care and loyalty to its client, and not to third parties. Coopers & Lybrand v. Trustees of the Archdiocese of Miami/Diocese of St. Petersburg Health & Welfare Plan, 536 So.2d 278 (Fla. 3d DCA 1988) (auditor owes a duty of care to its client to conduct audit in accordance with generally accepted auditing standards).

A cornerstone of the Third District's opinion is its reliance on federal cases which hold that an independent auditor owes a duty to the public, and not the client. The Third District quoted language in United States v. Arthur Young & Co., 485 U.S. 805 (1984),

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[6] For the convenience of the Court, the AICPA Professional Standards cited herein are included in the Appendix to this Initial Brief as App. 2 and App. 3.

stating that "by certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client." However, the Third District overlooks that under the law of Florida, there is no such duty owed by an accountant to the public under these circumstances.

As this Court held in the seminal decision of First Florida Bank v. Max Mitchell, 558 So.2d 9 (Fla. 1990), an accountant may be liable to a third party absent privity only under highly limited circumstances described in Restatement (Second) of Torts § 552 (1976). Max Mitchell first observed that under the law existing at the time of the decision, the lack of strict privity between an accountant and a third party absolutely precluded liability for negligence or gross negligence, citing to Justice Cardozo's renowned opinion in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). This Court observed that since the Ultramares decision, other state courts had begun to recede from the strict privity requirement, applying different tests.

In Max Mitchell, this Court reviewed the different tests and adopted that of the Restatement (Second) of Torts § 552 (1976), which applies an "actual knowledge" standard, and rejected the "foreseeability" standard used by other states. Under Section 552, the liability of a professional is limited to those persons whom the professional intends or knows will rely on the advice given.

Under this test, an accountant in Florida does not owe a duty to the public such as that described by the federal decision of United States v. Arthur Young & Co. In fact, that liability is specifically proscribed in Illustration 10 to Section 552. Although the court in Arthur Young states that an independent auditor assumes a public responsibility by certifying a ***public*** corporation's financial reports, Florida law absolutely proscribes a member of the public from bringing an action against an accountant for any negligence in that situation. As Illustration 10 states, an accountant who renders an opinion on a corporation's financial statements is not liable to those relying on those statements unless the auditor knows or is informed of any specific intended use of the financial statements, notwithstanding that an auditor knows that financial statements, accompanied by an auditor's opinion, are customarily used in a wide variety of financial transactions by the corporation and may be relied on by lenders, investors, shareholders, creditors, purchasers, and the like. An accountant is liable only to those classes of persons whom he "knows" will rely on his opinion rather than those he "should have known" would do so.

This rule established in Section 552 is applicable to all professionals, and would clearly govern the liability of an attorney as well. Cf. Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987) (in decision pre-dating Max Mitchell, court similarly limited attorney's liability to third party only under narrowlydefined third-party beneficiary exception).[7]

Significantly, although an auditor issues an opinion on the financial statements which may be disseminated to the public, any communications between the accountant and its client remain privileged under Sections 90.5055 and 473.316, Florida Statutes. Similarly, although an attorney may issue an opinion or "comfort letter" in connection with an SEC filing, securities offering or otherwise, which is intended to be relied upon by the public, the attorney-client privilege remains undisturbed.

The Third District's reliance on the accountant's "public responsibility" as a characteristic distinguishing accountants from lawyers also ignores the fact that the federal cases cited by the Court address the small percentage of audits that are performed for companies with publicly-traded securities. By far the vast majority of audits report on the financial statements of private companies; indeed, most accountants other than those

[7] The requirement of "independence" on the part of an auditor, which was also a factor considered in the Third District's opinion, has several parallels in the requirements imposed on attorneys by the Rules Regulating The Florida Bar. See, e.g., Rule 4-1.7 ("A lawyer shall not represent a client if the lawyer's exercise of ***independent professional judgment*** in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyers' own interest . . .") (emphasis supplied). Moreover, just as an accountant's independence may be compromised by an ownership interest in, or debtor-creditor relationship with an accountant, 2 AICPA Professional Standards, ET § 101.02, an attorney is subject to significant limitations on similar transactions with a client under Rule 4-1.8. These restrictions are imposed on both accountants and attorneys in order to avoid any conflict of interest, and do not affect the duty owed by such professionals to their clients.

employed with the national firms do virtually no public company audits. In addition, there are many other services performed by accountants that could give rise to claims against them by their clients - claims that would be transferable under the Third District's decision - which have no public attributes: reviews, compilations, "agreed upon procedures", bookkeeping, tax advice and preparation of returns, pension plan audits, and a myriad of consulting activities, to name but a few. Indeed, KPMG's fees for public company audits make up less than 20 percent of its total revenues. [1998 Annual Report of KPMG Peat Marwick LLP to the American Institute of Certified Public Accountants Division for CPA Firms]. The Third District's focus on a tiny portion of the work performed by Florida's accountants to determine the nature of their professional responsibilities clearly was error.

In this case, as in most other cases involving claims for professional malpractice, or any other claim transferred by subrogation, the reality is that the injury suffered is to the client, and not the public. Thus, the argument that such claims should be transferable because of a purported duty owed by a professional to the public has no merit. The duty owed by an accountant to its client is substantially similar to that owed by an attorney to his client, and is unlike the relationship between an insurance agent and the insured. Under the second factor established in Forgione, claims for accounting malpractice are not subject to transfer.

3. The Third Factor in Forgione: Personal Nature of the Relationship

The third factor considered by this Court in Forgione is the personal nature of the relationship between an attorney and a client. This Court found that while an attorney may not substitute another attorney in his or her place without the client's permission, in contrast insurance agents are often substituted without notification to the insured. In this respect as well, the accountant-client relationship is similar to that of the attorney-client relationship. While an attorney in a law firm may send another attorney to a hearing, deposition, or similar matter, it may not substitute another law firm in its place without the client's consent. Likewise, while an accounting firm may assign different accountants to a client's audit, it cannot substitute another accounting firm without consent from its client. The accountant-client relationship is also one that is considered "personal" to the client.

This Court in Forgione, upon an examination of these factors, found that there were substantial differences between the attorney-client relationship and the insurance agent-insured relationship, so that public policy considerations do not preclude the assignment of an insured's claim for negligence against the insurance agent. To the contrary, the accountant-client relationship is substantially similar to the attorney-client relationship. Based on the factors enumerated in Forgione, an accounting malpractice action simply may not be assigned under Florida law.

C. Danzler is Not Controlling and Other State Court Decisions Citing to Danzler are Distinguishable

The Third District based its decision that accounting malpractice claims may be transferred by assignment or subrogation primarily on this Court's 1934 decision in Danzler Lumber & Export Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116 (1934). It is correct that in Danzler, this Court permitted the subrogation of an accounting malpractice claim to an insurer. However, the Danzler decision did not address any of the public policy considerations that this Court carefully considered 63 years later in Forgione. This Court in Danzler devoted its discussion to the law of subrogation, generally citing the principles behind that doctrine and its development. That case did not examine the confidential relationship between an accountant and its client, or the duty owed by an accountant to its client, as this Court's later decision of Forgione requires.

In fact, it was not until 1984 when the appellate court in Washington first determined that legal malpractice claims were not assignable, that any court had ever examined the public policy reasons which preclude the transfer of professional malpractice claims. This Court in Forgione not only approved of these policy concerns, but expanded on them, whereas Danzler did not address them at all.

It is significant that Section 90.5055 was not enacted by the legislature until 1978, over 40 years after the Danzler decision, thus, no evidentiary accountant-client privilege existed in the Evidence Code at the time of that decision. This Court also should note that there is only a select group of privileged relationships chosen by the legislature for inclusion in the Evidence Code, including lawyer-client, psychotherapist-patient, sexual assault counselor-victim, domestic violence advocate-victim, accountant-client, and clergy. KPMG submits that under Forgione none of these claims would be transferable in light of the personal, confidential nature of these relationships, unlike that of an insurance agent.

In its opinion in this case, the Third District recognized the potential for this Court to recede from its holding in Danzler because the Danzler decision did not address the factors considered to be of the utmost import in Forgione, a later decision of this Court. For this reason, the Third District certified that question, stating that: "This reliance on Danzler for both our conclusion on the issue of assignment and subrogation and appellee's insistence that Danzler no longer represents Florida law in light of Forgione, prompts us to certify the question of whether Danzler is still good law." (App. 1, p. 7). For the reasons set forth earlier in this brief, an analysis of the factors enunciated by this Court in Forgione compels a holding that a claim for accounting malpractice, like a claim for legal malpractice, may not be transferred by assignment or subrogation. Without question, there are substantial similarities between an attorney and an accountant which distinguish these professions from the position of an insurance agent.

The Third District also relied heavily in its opinion on a decision by an Indiana appellate court for the proposition that accounting malpractice claims may be assigned. However, that case is readily distinguishable, as are cases from other jurisdictions dealing with this issue. In First Community Bank and Trust v. Kelley, Hardesty, Smith and Co., Inc., 663 N.E.2d 218 (Ct. App. Ind. 1996), the directors of a failed bank purchased the bank's assets consisting of its non-performing loans, and thereafter filed an accounting malpractice action against the bank's auditors. The Indiana court allowed the assignment of the accounting malpractice claim only under the limited circumstances presented there, holding that: "When an accountant who is serving as an external auditor issues an opinion regarding financial statements, and accounts are audited to produce the financial statement, any malpractice claim associated with the production of the financial statement and opinion of the accountant ***may be assigned with the purchase of the business or the assets included in the audit.***" Id. at 220.[8]

As the concurring opinion in that case points out, the majority's decision is based upon the unique facts of that case, where a plaintiff stands in the shoes of or succeeds to the rights of the client of the accountant. Cases from other jurisdictions also permit a third party to bring an accounting malpractice claim on behalf of another entity only under the same or similar circumstances. See, e.g., Comeau v. Rupp, 810 F. Supp. 1127 (D.

[8] The Indiana court is mistaken in its statement that "accounts are audited to produce" financial statements; rather, financial statements are prepared by management, and the task of the accountant is to audit the financial statements taken as a whole.

Kan. 1992) (FDIC may bring accounting malpractice action in its corporate capacity as the successor-in-interest to the failed lending institution); Axel Johnson, Inc. v. Arthur Andersen & Co., 738 F. Supp. 772 (S.D.N.Y. 1990) (assignment of accounting malpractice claim in connection with acquisition of company); cf. Federal Deposit Ins. Corp. v. Nathan, 804 F. Supp. 888 (S.D. Tex. 1992) (under ***federal law***, insolvent thrift's ***legal*** malpractice action could be assigned to FDIC as thrift's receiver, even if malpractice actions were not assignable under state law).

In contrast, a number of other state court decisions, while not directly addressing the issue of the transferability of an accounting malpractice claim, have recognized and emphasized the confidential relationship between an accountant and its client, and the duty of an accountant to protect its client's confidences. See Roberts v. Chaple, 369 S.E.2d 482 (Ga. Ct. App. 1988) (purpose of accountant-client privilege is to insure an atmosphere in which the client will transmit all relevant information to his accountant without fear of any future disclosure, since without an atmosphere of confidentiality, the client might withhold facts he considers unfavorable to this situation rendering the accountant powerless to adequately perform the services he renders); Dixon v. Bennett, 72 Md. App. 620, 531 A.3d 1318 (1987) (recognition of accountant-client privilege creating exception to the general rule of testimonial compulsion evidences a strong public policy in support of accountant-client confidential communications); Wagenheim v.

Alexander Grant & Co., 482 N.E.2d 955 (Ohio Ct. App. 1983) (legal obligation exists in every accountant-client relationship that information communicated to the accountant by his client in confidence should not be disclosed without the client's prior consent); Mailman, Ross Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 444 A.2d 75 (1982) (accountants, like doctors and lawyers, are engaged in profession which necessarily requires clients to reveal personal and confidential information to them in the course of professional relationship, and the right of the client to repose confidence in the accountant of his or her choice should not readily be circumscribed by restrictive covenants).

D. This Case Illustrates Clearly the Public Policy Reasons Prohibiting the Transferability of Accounting Malpractice Cases

Public policy requires that an accounting malpractice claim may not be transferred by assignment or subrogation in order to maintain the atmosphere of confidentiality and relationship of trust and confidence reposed in an accountant by its client. As set forth earlier, the court in National Union v. Salter correctly noted the dangers of allowing equitable subrogation of attorney malpractice claims, including that (1) the plaintiff would of necessity invade the confidential relationship between the client and its attorneys; (2) the attorneys might have to reveal work product or the confidences of their client to defend themselves; and (3) the client may not even be interested or believe that it has a legal malpractice action against its attorneys. All three of these concerns have been borne out in this litigation.

The rationale behind the public policy prohibiting an assignment of an accounting malpractice claim begins with an analysis of Section 90.5055, Florida Statutes. Under subsections (2) and (3), the accountant-client privilege belongs to the client. Further, under subsection (4)(b), there is no accountant-client privilege when: "A communication is relevant to an issue of breach of duty by the accountant to his client or by the client to his accountant." Thus, when a client chooses to sue its accountant for malpractice, it chooses to forfeit any accountant-client privilege which it would otherwise hold concerning that subject matter.

However, were the transfer of an accounting malpractice claim permitted, the client would no longer have control over the privilege. Instead, the assignee or subrogee by bringing an accounting malpractice suit triggers subsection (4)(b), and no accountant-client privilege exists as to any communications which are relevant to an issue of the accountant's alleged breach of duty. The client no longer has a right to assert the privilege. Indeed, particularly where the client and the accountant have an ongoing relationship in which the accountant continues to provide services, litigation between the accountant and a third party has significant implications affecting the client's ability to candidly provide information to the accountant, given that not only past, but ***future*** communications may be subject to disclosure if relevant to the issue of breach of duty.

Such an outcome has a chilling effect on the two factors deemed most important by this Court in Forgione, the confidential relationship between the accountant and its client, and the duty owed by an accountant to its client.

Such potential for conflict is borne out by this particular case. To this day, KPMG continues to act as BankAtlantic's accountants, and continues to have access to its books and records. (R. 1175-1188). As reflected by the proceedings below, BankAtlantic never believed KPMG was liable for malpractice, never wanted to sue KPMG, and never wished to waive the accountant-client privilege. However, through this lawsuit, National Union has placed KPMG and BankAtlantic in a position which threatens to compromise the confidential relationship between these entities.

Prior to the institution of this lawsuit, National Union refused coverage on the bond and BankAtlantic brought a federal action seeking a declaration of coverage. (R. 958-1042; 1043-1174, Tab C). In settling that action, National Union and BankAtlantic entered into a Covenant Not to Execute, in which BankAtlantic agreed to undertake collection activities against various third parties, including former BankAtlantic employees, Sterling employees, and contractors. (R. 1043-1174, Tab F, ¶¶ 7, 9; App. 4). However, BankAtlantic did not agree to bring an action against its accountant, KPMG. (R. 1043-1174, Tab F, ¶ 9).

Instead, the Covenant Not to Execute states that National Union believes that

BankAtlantic may have a claim against KPMG, and that National Union will undertake an investigation of this potential claim. (R. 1043-1174, Tab F, ¶ 11). National Union required the full cooperation of BankAtlantic in connection with its investigation of this possible claim. (R.1043-1174, Tab F, ¶ 11). National Union further required that BankAtlantic agree to assign its rights against KPMG to National Union in the event it determined to pursue the claim. It is this subsequent assignment on which National Union relies in bringing this action. (R. 614-702, Exhibit C).

Indeed, BankAtlantic did not agree to bring suit against its own accountants and continued to retain KPMG to provide auditing services while National Union maintained a lawsuit accusing KPMG of causing BankAtlantic to incur a substantial loss. This strongly suggests that BankAtlantic was compelled under the bond to execute the assignment as a condition of repayment. This "economic coercion" is the type of evil that the court in National Union v. Salter recognized as a concern, where it observed that the client in that case might have no interest in, or believe it had any claim against, its attorneys.

By bringing this lawsuit, National Union has implicated Section 90.5055 (4)(b), and there is no longer any accountant-client privilege as to any communications between BankAtlantic and KPMG regarding the Sterling loan portfolio. Yet, in this case, BankAtlantic has attempted to assert a privilege, placing KPMG, the bank's current auditors, at odds with its own client. In fact, when National Union initially sought KPMG's workpapers in this case, BankAtlantic informally intervened to assert the accountant-client privilege, leading to the execution of a Stipulation for Confidentiality by counsel for KPMG, National Union, and BankAtlantic. In the Stipulation, National Union agreed to the production of only some of the documents it requested. However, given that KPMG believed that no accountant-client privilege existed under Section 90.5055 (4)(b), it required that the Stipulation be "without prejudice to the positions of the parties hereto concerning the accountant-client privilege." (App. 5).

Further, in an effort to avoid serving a subpoena for documents on its current client BankAtlantic, KPMG in its written discovery sought to require National Union to produce documents in the possession of BankAtlantic that it needed to defend itself in this action. National Union fought these requests and KPMG's subsequent efforts to compel production of these documents. These efforts resulted in the entry of discovery orders by the General Master and the Court, in which National Union was ordered to request the documents from BankAtlantic, but left unresolved the procedure in the event BankAtlantic resisted these requests, which it ultimately did. (R. 1233-1236; 1253-1255).

KPMG, as defendant in this lawsuit and as continuing auditor for BankAtlantic, is in the very situation that the Courts in Forgione, Washington, Salter, and other cases recognized as the basis for the public policy requiring that legal malpractice claims be non-transferable. In order to defend the action brought by National Union, KPMG must take steps which may be antagonistic to its own client. KPMG has asserted the affirmative defense of comparative negligence, and must take depositions of its client to prove BankAtlantic's negligence while it remains its auditor. (R. 734-750). KPMG also maintains that it has the right to use otherwise privileged accountant-client communications in its defense because once National Union has brought this action, such communications are not privileged. BankAtlantic has not agreed to the disclosure of such information, once again creating the potential for conflict between an accountant and its on-going client.

The proceedings in this case are illustrative of the public policy concerns recognized by Florida and other courts. In order to maintain the integrity of the accountant-client privilege, and the relationship between an accountant and its client, this Court must hold that claims for accounting malpractice may not be transferred by assignment or subrogation.

CONCLUSION

Based on this Court's mandate that all professional malpractice actions should be governed by similar principles, and in light of the significant public policy considerations announced by this Court in Forgione, this Court should find that Florida law prohibits the assignment of accounting malpractice claims. Because the transfer of such a claim by equitable or conventional subrogation implicates the same public policy concerns, this Court should also hold that accounting malpractice claims may not be transferred by equitable or conventional subrogation. This Court should answer the certified question in the negative by holding that Danzler is no longer controlling on this issue, and should reverse the decision of the Third District Court of Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this **8th** day of October, 1999 to James F. Crowder, Jr., Esquire, Russell Yagel, Esquire, KIMBRELL & HAMANN, P.A. Suite 900, Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131-2805.

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