IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No.: CS03-59
Lower Tribunal Case No.: 3D01-2081

COWAN, LIEBOWITZ & LATMAN, P.C.,
STEPHEN M. ROSENBERG, FRANZINO &
ROSENBERG, P.C., JAMES J. D'ESPOSITO,
MARSHALL PLATT, MARSHALL DOUGLAS
PLATT, P.A., JAMES B. PACKAR, P.A. and
PACKAR AND PLATT,

Petitioners,

v.

DONALD KAPLAN, ASSIGNEE FOR THE
BENEFIT OF CREDITORS OF MEDICAL
RESEARCH INDUSTRIES, INC.,

Respondent.

CONSENTED AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS' ASSOCIATION (Supporting Petitioners)

On Discretionary Review From a Decision of the
Third District Court of Appeal

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STATEMENT OF INTEREST

______Amicus Curiae, Florida Defense Lawyers' Association ("FDLA") hereby submits this brief supporting Petitioners, Cowan Liebowitz & Latman, P.C., Stephen M. Rosenberg, Franzino & Rosenberg, P.C., James J. D'Esposito, Marshall Platt, Marshall Douglas Platt, P.A., James B. Packar, P.A. and Packar and Platt ("Petitioners"). FDLA respectfully submits this brief in its capacity as a Florida-wide organization of defense attorneys consisting of over 1,000 members. FDLA is frequently involved in cases of great importance that impact Florida law.

This case features important issues of first impression in Florida involving the very special and unique nature of the attorney/client relationship. This Honorable Court has an opportunity to uphold its prior opinions in *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 765 So.2d 36 (Fla. 2000) **and *Forgoine v.* Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997), solidifying Florida's rule precluding assignment of legal malpractice claims to assignees for the benefit of creditors. Since such a rule will solidify Florida law on this issue, and rightfully keep legal malpractice claims between attorneys and their clients, FDLA supports and joins the Petitioners.**

STATEMENT OF THE FACTS AND CASE

Amicus Curiae hereby adopts Petitioners' statement of the facts and case as its own for the purpose of its brief.

SUMMARY OF THE ARGUMENT

This Honorable Court should affirm and follow its earlier precedent and preclude Kaplan from bringing a legal malpractice action against the Petitioners for the following reasons. First, a plain reading of Fla. Stat. § 727.104, the statute setting forth the authority under which Kaplan brought suit against the Petitioners, and Florida case law dealing with assignment of legal malpractice actions shows that an assignee for the benefit of creditors is precluded from being assigned a legal malpractice action. Despite Respondent's assertions that an assignee for the benefit of creditors is the same or similar to a trustee for purposes of bankruptcy, Florida law has yet to recognize such a similarity. Quite the opposite of what Respondents assert, *Forgoine* and *KPMG* make it unquestioned that in Florida, a cause of action for legal malpractice does not assign under Fla. Stat. § 727.104.

Second, Respondent's position, and that of the Third District Court of Appeal, is in conflict with the majority of jurisdictions that has ruled on this issue. A great many public policies require legal malpractice suits to be kept between the parties to the actual attorney/client relationship at issue. Failing to do so would significantly upset the delicate balance that the many confidences between attorney and client create. It would also insert a heretofore unrecognized third party (the assignee) into the relationship as an enforcer of rights for yet another group, the stockholders.

Accordingly, it is only fitting and proper that any action brought for legal malpractice is brought by the corporation against the attorneys at issue.

For these reasons, this Honorable Court should stand by its earlier rulings that a chose in action for legal malpractice does not assign to an assignor and reverse the Third District Court of Appeal's ruling and order dismissal of the Respondent's suit with prejudice.

ARGUMENT

THE STATUTE UNDER WHICH THE RESPONDENT ALLEGES AUTHORITY TO BRING THIS ACTION DOES NOT PERMIT ASSIGNMENT OF A LEGAL MALPRACTICE CHOSE IN ACTION.

Because the statute under which Kaplan claims authority precludes assignment of a corporation's assets that are exempt from levy or sale by law, and Florida case law precludes assignment of legal malpractice actions, Kaplan's role as an assignee for the benefit of creditors does not include the authority to pursue a legal malpractice action that MRI may have. To hold otherwise would splinter and confuse clear and existing precedent from this Honorable Court.

Kaplan's entire authority as assignee for the benefit of creditors derives from Fla. Stat. § 727.104, which expressly states that

> the assignor . . . grants, assigns, conveys, transfers, and sets over, unto the assignee, her or his successors and assigns, all of its assets, except such assets as are exempt by law from levy and sale under an execution . . . .

Similarly, Fla. Stat. § 727.103 defines an asset as "a legal or equitable interest . . . , which shall include anything that may be the subject of ownership, . . . except property exempt by law from forced sale."

The primary issue in this case is whether an assignee for the benefit of creditors, assigned non-exempt assets of a corporation under this statute, takes as part of his or her assignment a debtor/assignor corporation's chose in action for legal malpractice. This Honorable Court has already spoken twice on the issue of whether a cause of action for legal malpractice assigns, and has ruled that it does not as a matter of law. While the aforementioned statute was not at issue in either prior case, a logical and

consistent extension of the two cases would prevent the cause of action from being assigned.

The aforementioned language in the statute implies that there are certain assets that the law specifically prevents from assignment. In the interest of protecting existing and consistent precedent, it is necessary to pay particular attention to the cases upon which the Third District relied in making its ruling. The first is *Forgione*, which involved a certified question from the Court of Appeals for the Eleventh Circuit that asked whether "a claim for negligence by an insured against an insurance agent for failure to obtain proper insurance coverage [can] be assigned to a third party." *Forgione*, 701 So.2d at 558. In that case, Forgione had been the victim of an automobile accident. *See id.* As the tortfeasors involved in the accident had a gap in their automobile coverage, they were unable to satisfy the judgment he obtained. *See id.* The tortfeasors then assigned to Forgione the claims that they had against their insurance agent and company. *See id.* Forgione tried filing a complaint against the agent and company in federal court, which was dismissed because the lower court found an action for negligent and insufficient issuance of insurance to be analogous to a non-assignable legal malpractice action. *See id.*

This Court, in answering the certified question in the affirmative, noted that "purely personal tort claims cannot be assigned under Florida law." *Id.* at 559. It went on to include legal malpractice claims in this category of claims, along with medical malpractice and intentional infliction of emotional distress claims. *See id.* (citing *Florida Patient's Compensation Fund v. St. Paul Fire & Marine Ins. Co.*,

535 So.2d 335 (Fla. 4th DCA 1988); *approved*, 559 So.2d 195 (Fla. 1990) and *Notarian v. Plantation AMC Jeep, Inc.*, 567 So.2d 1034 (Fla. 4th DCA 1990)). The justification for this inclusion was the "personal nature of legal services which involve highly confidential relationships." *Id.* (citing *Washington v. Fireman's Fund Ins. Co.*, 459 So.2d 1148, 1149 (Fla. 4th DCA 1984). Accordingly, this Court held that a non-assignable legal malpractice chose in action was distinguishable from an assignable negligent sale of insufficient insurance chose in action. *See id.*

KPMG Peat Marwick v. National Union Fire Ins. Co. of Pittsburgh, Pa., 765 So.2d 36 (Fla. 2000) was decided less than three years later. In *KPMG*, the Court considered a certified question of great public importance,

> [W]hether *Dantzler Lumber & Export Co. v. Columbia Cas. Co.*, 115 Fla. 541, 156 So. 116 (Fla. 1934), permits a claim of an independent auditor's professional malpractice to be asserted by an insurer/assignee and/or insurer/subrogee.

Id. at 36. *KPMG* involved a claim against KPMG, an independent auditing firm, for alleged negligently performed audits. *See id.* It was alleged that the KPMG failed to detect losses during 3 separate audits that led the claimant (National Union) to pay amounts to its insured to cover the losses. *See id*. This Court again compared the relationship at issue (independent auditor/audited corporation) to a claim for legal malpractice. *See id.* at 37. KPMG unsuccessfully argued that its relationship with the insured was akin to an attorney/client relationship. *See id.* This Court pointed out that an attorney/client relationship required representation of a client's position in an adversarial setting as opposed to an independent auditor's "impartiality." *Id.* This Court pointed to R. Regulating Fla. Bar 4-1.3 and 1.7 to show that representation of

the specific client's position is required in every attorney/client relationship. *See id.* The lack of such a requirement in the auditor/audited corporation relationship proved fatal to KPMG's argument.

Similarly, this distinction should prove fatal to Kaplan's claim against MRI. This Court was absolutely correct in holding that attorneys and clients share a relationship that no other individual or entity can claim a right to recover damages from through an assignment. Kaplan alleges exactly what this Court has twice held cannot be done legally—assert a claim for legal malpractice by virtue of an assignment allegedly made to him. Fla. Stat. §§ 727.104 and 727.103 specifically prevent assignment of any assets that are exempt from law from assignment. If this Court allows Kaplan's assignment to give him a right to pursue this legal malpractice claim, *Forgoine* and *KPMG* will be rendered legally ineffective. The high regard in which the attorney/client relationship is held will fall by the wayside merely because Kaplan alleges misconduct that affects third parties.

The Third District Court of Appeal held that *KPMG* allowed Kaplan's claim since "[t]he *KPMG* court determined that where an entity 'assumes a *public* responsibility transcending any employment relationship with the client . . .' that entity 'owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.'" *Kaplan v. Cowan Liebowitz & Latman, P.C., et al.*, 832 So.2d 138 at 140 (Fla. 3d DCA 2002). The specific portion of *KPMG* from which the Third District took that language, however, dealt with this Court's analysis of an independent certified public accountant. This Court expressly distinguished the role

of an attorney and a certified public accountant. It said that "[a]n independent certified public accountant performs a different role [than that of an attorney]." *KPMG*, 765 So.2d at 38. This Court pointed out that an independent auditor performs a "special function," and stressed the independence and impartiality with which he or she does it. *Id.* Nowhere did this Court impose such a status or duty on an attorney/client relationship. As a result, *KPMG* certainly did not create an exception to the rule against assignability of legal malpractice claims, and it was error for the Third District to hold otherwise.

II. A MAJORITY OF JURISDICTIONS HAS HELD THAT LEGAL MALPRACTICE CHOSES IN ACTION ARE NOT ASSIGNABLE AS A MATTER OF LAW.

An analysis of the policies giving rise to the rule against assignability of legal malpractice choses in action necessarily requires an inquiry into decisions of other states' decisions. As the Supreme Court of Tennessee stated, "a majority of jurisdictions have concluded that public policy considerations militate against allowing assignment of legal malpractice actions." *Can Do, Inc. Pension and Profit Sharing Plan and Successor Plans v. Manier Herod, Hollabaugh & Smith*, 922 S.W.2d 865 at 868 (Tenn. 1996) (citing *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758 (Kan. 1992); *Earth Science Laboratories, Inc. v. Adkins & Wondra*, P.C., 523 N.W.2d 254 (Neb. 1994); *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982); *Schroeder v. Hudgins*, 690 P.2d 114 (Ariz.App. 1984); *Goodley v. Wank & Wank, Inc.*, 133 Cal.Rptr. 83 (Cal.App. 2d Dist. 1976); *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo.App. 1993); *Washington v. Fireman's Fund Ins. Co.*, 459 So.2d 1148 (Fla. 4th DCA 1984); *Christison v. Jones*, 405 N.E.2d 8 (Ill. App. Ct. 3d Dist. 1980), *superceded by statute as recognized in Hoth v. Stogsdill*, 569 N.E.2d 34 (Ill. App. Ct. 2d Dist.); *Coffey v. Jefferson Cty. Bd. of Educ.*, 756 S.W.2d 155 (Ky.App. 1988); *Joos v. Drillock*, 338 N.W.2d 736 (Mich.App. 1983); *Wagener v. McDonald*, 509 N.W.2d 188 (Minn.App. 1993); *City of Garland v. Booth*, 895 S.W.2d 766 (Tex.App. 1995); *Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 709 F.Supp. 44 (D.Conn. 1989), *aff'd* 929 F.2d 103 (2d Cir. 1999); *Scarlett v. Barnes*, 121 B.R.

578 (W.D.Mo. 1990)).

The various states' decisions set forth many important policy reasons for the majority rule. For example, the California Court of Appeal, Second District in *Goodley* dealt with a legal malpractice claim allegedly assigned to Goodley against Wank & Wank, Inc. for the provision of legal services in a dissolution of marriage proceeding. *See Goodley*, 133 Cal.Rptr. at 83. In affirming summary judgment for the defendant corporation on standing grounds, the *Goodley* court stated that "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to the most conscientious fidelity . . . ." (quoting *Cox v. Delmas*, 33 P. 836, 839; *Neel v. Magana, Olney, Levy, Cathcart and Gelfand*, 491 P.2d 421). The *Goodley* court then held that the attorney/client relationship was "jealously guarded and restricted to *only* the parties involved." *Id.* (emphasis added). Moreover, Goodley pointed out that assignment of legal malpractice claims "could relegate the legal malpractice action to the marketplace 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 whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights." *Id.* at 88. This, the court reasoned, would give rise to lawsuits in which lawyers have no choice but to defend against individuals the lawyers do not know. *See id.* Such lawsuits would put an unreasonable and undeserved strain on both the legal profession and judicial system. *See id.* In addition, lawyers would certainly become far more selective in their choice of clients, "rendering a disservice to the

public and the profession." *Id.*

The *Goodley* court also addressed the effect that fraud would have on the issue of assignability. *Goodley* held that allowing allegations of fraud to be asserted in assigned actions would allow assignees to purchase such claims for their litigation value without actually having been defrauded. *See id.* at 88. *Goodley*, in quoting *Dickinson v. Seaver*, 7 N.W. 182 (Mich. 1880), held that "[i]t would be against every rule of equity to allow a party to buy up stale claims, and then seek to establish fraud committed against his assignors. A right to complain of fraud is not assignable." *Id.*

The *Can Do, Inc.* court agreed with the *Goodley* court's policy considerations, adding that the duties of both loyalty and confidentiality would be affected, deteriorating the very fabric of the attorney/client relationship. *See Can Do, Inc.*, 922 S.W.2d at 869.

These precise policy concerns affect the instant action. As *Goodley* indicates, the Petitioners' relationship with MRI was of the highest character and the Petitioners owed MRI, not Kaplan, the "highest conscientious fidelity." Upsetting longstanding Florida precedent preventing the assignment of legal malpractice claims would only serve to create new and marketable causes of action for willing assignees-to-be, so long as they allege some element of fraud in the relationship between the attorneys and assignors. The aforementioned chilling effect on the provision of legal services would surely result, hampering the flow of legal services to the public and deteriorating attorneys' duties of loyalty and confidentiality. Permitting Kaplan's action to proceed would expose the attorney/client relationship to the influences of third parties

heretofore not part of the relationship, tainting a previously untainted relationship between attorney and client.

This Court has mirrored the notions set forth in *Goodley*, indicating that "legal malpractice claims are not assignable because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owned to the client." *KPMG*, 765 So.2d at 38 (citing *Forgione*, 701 So.2d at 558). Moreover, this Court stated that "attorneys and clients have a confidential relationship, which includes constraints upon information that can be disclosed to others." *Forgione*, 701 So.2d at 558. It should be without question that this Court and the State of Florida join the majority rule against the assignability of legal malpractice actions.

CONCLUSION

For the aforementioned reasons, and the reasons very capably set forth in Petitioners' briefs, Amicus Curiae respectfully submits that Kaplan's action, if permitted to go forward, will substantially disrupt this Honorable Court's existing precedent on this issue. Moreover, it will stray from the holdings of the majority of jurisdictions ruling on this issue, and deteriorate the very nature of the attorney/client relationship. FDLA respectfully requests this Honorable Court to reverse the Third District Court of Appeal's holding below.

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WE HEREBY CERTIFY that this Amicus Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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