IN THE SUPREME COURT OF FLORIDA

Case No. SC03-59
District Case No.: 3D01-2081
Circuit Case No. 99-26596-CA(04)

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

Petitioners,

v.

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

Respondent.

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

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ANSWER BRIEF OF RESPONDENT DONALD KAPLAN, ASSIGNEE FOR THE BENEFIT OF MEDICAL RESEARCH INDUSTRIES, INC.

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STATEMENT OF THE CASE AND FACTS

The Respondent generally accepts the Petitioner's recitations of the Statement of Facts and the Course of Proceedings, but supplements them as follows:

A. Statement of Facts

The complete language of the Assignment for the Benefit of Creditors creating the rights in the Assignee for the Benefit of Creditors reads:

> [the] Assignor, in consideration of the Assignee's acceptance of this Assignment, and for other good and valuable consideration, hereby grants, assigns, conveys, transfers, and sets over, unto the Assignee, his successors and assigns, all of its assets, except such assets as are exempt by law from levy and sale under an execution, including, but not limited to, all real property, fixtures, goods, stock, inventory, equipment, furniture, furnishings, accounts receivable, bank deposits, case, promissory notes, cash value and proceeds of insurance policies, claim and demands

> belonging to the Assignor, wherever such assets may be located, hereinafter the "Estate", as which assets are to the best knowledge and belief of the Assignor, set forth on Schedule "B" annexed hereto.

See Assignment, (R.VI: 1617, 1629). This list of inclusions clearly details the assets that are included in the Estate, not the property excepted from it.

The debtor corporation — Medical Research Industries, Inc. ("MRI") made this statutory assignment in consideration of the acceptance by Donald Kaplan, as Assignee for the Benefit of Creditors ("Kaplan"), of that Assignment, which entails an obligation to pay the debts so far as it is possible "by an assignment of all of its assets for that purpose."

The Assignment further provides that

> The Assignee shall take possession and administer the Estate in accordance with the provisions of Chapter 727, Florida Statutes, and shall liquidate the assets of the Estate with reasonable dispatch and convert the Estate into money, collect all claims and demands hereby assigned as may be collectible, and pay and discharge all reasonable expenses, costs and disbursements in connection with the execution and administration of this Assignment from the proceeds of such liquidations and collections.
>
> . . .

> In the event that all debts and liabilities are paid in full, any funds of the Estate remaining shall be returned to the Assignor.

The Assignment specifies in its Schedules that there are no exemptions claimed. *See Assignment*, (R.VI: 1617, 1629, Schedule B. II.) (specifying "none" for exemptions or exclusions from the assignment).

B. Course of Proceedings

When the trial court dismissed the action, MRI filed an action against the Petitioners in Broward County, Florida in order to prevent the statute of limitations from running while the instant action was on appeal. The Broward County action was immediately stayed and remains stayed,[1] a point that the Petitioners neglect to mention in their Brief. When MRI filed and stayed that action, the Petitioners moved to dismiss the then pending appeal in the Third District as moot, claiming that MRI had accepted the "benefit" of the judgment of dismissal. The Third District properly denied the Petitioners' motions to dismiss the appeal.

SUMMARY OF ARGUMENT

[1] Neither MRI nor Kaplan intend to lift the stay of that action so long as there is any chance that Kaplan may pursue the claim in the assignment proceeding.

The Third District Court of Appeal correctly concluded that an Assignee for the Benefit of Creditors under Chapter 727, Florida Statutes, has standing to pursue an assignor debtor's malpractice claim and that the general prohibition against assignment of legal malpractice claims does not apply in this special context. An assignment for the benefit of creditors has little in common with an ordinary assignment. MRI has no quarrel with and seeks no revision of Florida law prohibiting the bare assignment of malpractice claims to third parties that are strangers to the attorney-client relationship. But this case of first impression in the State of Florida relates to a statutory proceeding in which the assignee is a fiduciary for the corporation and in that capacity is legally charged with marshaling and liquidating the assets of that corporation. The assignee for the benefit of creditors occupies a position no different than that of a bankruptcy trustee who does have the legal authority and capacity to pursue malpractice claims on behalf of the estate.

Fundamental principles of statutory construction, as applied to the Assignment for the Benefit of Creditors Statute, establish that an Assignee has standing to prosecute an assignor debtor's legal malpractice claim. The plain language expressly includes among the assets of the estate "claims and demands belonging to the assignee" and such claims do

not constitute property that is "exempt from forced sale," such as homestead property, pensions, etc. The Legislative history of the statute also confirms that it is supposed to function as a simpler alternative to bankruptcy.

The Petitioners' interepretation of the statute is absurd in that is severs the assignor debtor's remedy for malpractice from the Assignee's right to recover damages therefor, thus insulating potential wrongdoers from any liability based upon a technicality. Indeed, the Federal Bankruptcy Code and other analogous authority supports the conclusion that an Assignee for the Benefit of Creditors has authority to pursue an assignor debtor's malpractice claim. It would simply defy reason to conclude that administrators, bankruptcy trustees, and receivers all have the right to pursue legal malpractice claims, but Assignees for the Benefit of Creditors do not.

In addition, the general prohibition against assigning legal malpractice actions does not apply to a statutory assignment for the benefit of creditors. The policy concerns that arise with respect to the assignment of legal malpractice claims to a third party in the ordinary assignment setting have no relevance in this liquidation proceeding where the assignee stands in the shoes of the assignor debtor and the assignment is a transfer by operation of law. Also, the Third District correctly recognized the Petitoners' "public responsibility" obligations. In particular, an attorney who

occupies a special relationship to investors making use of the information has a duty to them. Furthermore, the assignee stands in the shoes of the assignor and thus is in privity with the Petitioners and can bring this action.

Under thee foregoing circumstances, this Court should affirm the Third District's decision that properly concluded that an Assignee for the Benefit of Creditors has standing to pursue an assignor debtor's claim for legal malpractice.

ARGUMENT

I. AN ASSIGNEE FOR THE BENEFIT OF CREDITORS HAS STANDING TO PURSUE THE ASSIGNOR DEBTOR'S MALPRACTICE CLAIM

A. The plain language, purpose and intent of the Assignment for the Benefit of Creditors Statute permits an Assignee for the Benefit of Creditors to pursue an assignor debtor's legal malpractice action

Whether Florida Statutes, Chapter 727 precludes or exempts legal malpractice claims from the estate that an assignee for the benefit of creditors administers is a question of statutory construction. As the Third District properly recognized, fundamental principles of statutory construction as applied to the Assignment for the Benefit of Creditors Statute dictate that an Assignee has standing to prosecute a debtor's legal malpractice claim.

Contrary to the Petitioners' argument, the plain language of Florida's Assignment for the Benefit of Creditors statute expressly *includes* among the assets of the estate "claims and demands belonging to the assignor." Fla. Stat. § 727.104(1)(b). The statutory list of assets that the debtor must complete in commencing a proceeding, includes a section that expressly includes "claims and choses in action." *Id.* § 727.104(1)(d) (2003). The Assignee for the Benefit of Creditors has the duty to "[c]ollect and reduce to money the assets of the estate, whether by suit in any court of

competent jurisdiction or by public or private sale." *Id.* § 727.108(1) (2003); *see also id.*, § 727.110(1)(a) (2003). Nowhere does the Assignment for the Benefit of Creditors statute (or any other language in Florida statutory or case law) provide that the prosecution of a malpractice action by an Assignee for the Benefit of Creditors is prohibited or that any recovery from such a suit is exempt from forced sale.

In this case, the Petitioners urge that the "exempt[ion] from forced sale" language in the statute's definition of "assets" (*id.*, § 727.103(1) (2003)) precludes Kaplan from asserting a legal malpractice claim against them. The statutory language relevant to this controversy appears in the statute's definition provision:

> "Asset" means a legal or equitable interest of the assignor in property, which shall include anything that may be the subject of ownership, whether real or personal, tangible or intangible, wherever located and by whomever held at the date of the assignment, *except property exempt by law from forced sale.*

Fla. Stat. § 727.103(1) (2003) (emphasis added). In considering whether that section can be interpreted to bar Kaplan's claim, the Court must examine the purpose of the statute, *i.e.*, to fairly distribute assets to creditors. This purpose contradicts the Petitioners' position — a position that would frustrate any distribution and insulate potential wrongdoers

from any liability if a corporation elected to file an Assignment for the Benefit of Creditors to reorganize or liquidate assets.

It is well established that whenever possible, a court must glean the meaning of a statute from its plain language. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); *Levine v. Levine*, 734 So. 2d 1191 (Fla. 2d DCA 1999). Where there is any doubt as to the meaning of a statute, the purpose for which it was enacted is of primary importance in its interpretation. *Florida Indus. Commission v. Manpower, Inc. of Miami*, 91 So. 2d 197 (Fla. 1956); *Weiss v. Leonardy*, 160 Fla. 570, 36 So. 2d 184 (1948); *Sunshine State News Co. v. State*, 121 So. 2d 705 (Fla. 3d DCA 1960). It is also a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the provision under construction and every part of the statute as a whole. *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977); *T.R. v. State*, 677 So. 2d 270 (Fla. 1996). Statutory phrases are not to be read in isolation, but rather within the context of the entire section. *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996); *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912 (Fla. 2001). This Court must therefore construe the statutory language excluding from the estate assets property exempt from levy — the language, upon which

the Appellees rest their entire argument — within the context of the Assignment for the benefit of creditors statute as a whole.

To effect its purpose, the Assignment for the Benefit of Creditors statute establishes methods and procedures for the Assignee for the Benefit of Creditors to marshal the assets and claims of the debtor, to review and to prioritize those claims, and to pay the proper claims in proper proportions with the assets available to do so. It confers upon the Assignee for the Benefit of Creditors the duty to conduct the business of the Assignee, when appropriate. Fla. Stat. § 727.108(4) (2003). It requires the Assignor to appoint the Assignee for the Benefit of Creditors as its attorney in fact and to accept the "trust created by the assignment." Fla. Stat. § 727.104(1)(b) (2003). It requires the Assignee for the Benefit of Creditors to execute and file a bond. *Id.*, § 727.104(2). In short, the statute protects against the very concerns that would ordinarily render the assignment of a legal malpractice claim undesirable.

B. The Petitioners' interpretation of the statute leads to an absurd result that severs the Assignor Debtor's remedy for malpractice from the Assignee's right to recover damages

This Court should reject, as the Third District did, the Petitioners' suggested interpretation of the statute because it results in an absurdity. They argue that liability for claims rests with Kaplan while any right to sue for those damages remains with MRI. The Petitioners are seriously contending that the correct interpretation of the statute strips the remedy from the right or ability to recover; the remedy stays in the useless hollow shell of the defunct corporation, while the right to recover (*i.e.*, the incurring of damages) statutorily rests with the Assignee for the Benefit of Creditors. The creditors lose, the debtor loses, and the Assignee loses, while the responsible party benefits in direct proportion to the damage it has caused (and from which it will effectively be exculpated). And this result is especially likely to occur when the defendants themselves advise the debtor to elect an Assignment for the Benefit of Creditors, instead of bankruptcy or receivership, where the trustee or receiver may lawfully pursue the malpractice claim.

This Court should also decline to accept the Petitioners' construction of the Assignment statute because such a result also clashes with the statutory purpose of the assignment statute, with justice, and with common sense. A literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous

conclusion, or would result in a manifest incongruity. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); *Las Olas Tower Co. v. City of Fort Lauderdale*, 733 So. 2d 1034 (Fla. 4th DCA 1999), *superseded on other grounds in part*, 742 So. 2d 308 (Fla. 4th DCA 1999).

Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932)(constructions should be avoided that would operate to impair, pervert, nullify, or defeat the object of the statute).

The claim against the Petitioners is not an asset exempt from forced sale or levy and Kaplan acquired it with the rest of the MRI estate. The Petitioners' argument that the Assignee has no standing to pursue a legal malpractice claim because the claim is exempt by law from forced sale is a circular argument. They contend that because the definition of "assets" in the Assignment for the Benefit of Creditors statute excludes from the estate any "property exempt by law from forced sale," Fla. Stat., § 727.103(1), and because a legal malpractice action is exempt by law from forced sale, MRI could not assign to Kaplan its legal malpractice action. To support their contention that a legal malpractice action is exempt by law from forced sale, the Petitioners cite *Craft v. Craft*, 757 So. 2d 571 (Fla. 4th DCA 2000) and *Mickler v. Aaron*, 490 So. 2d 1343 (Fla. 4th DCA 1986). *Craft* and *Mickler*, however, do not stand for the proposition

that a legal malpractice claim is exempt from forced sale. In *Mickler*, after a plaintiff obtained a judgment, the plaintiff attempted in proceedings supplementary[2] to pursue an action against the defendant's attorney. *Mickler* is nothing more than a recognition of the *Forgione* general unassignability principle. *See Forgione v. Dennis Pirtle Agency*, 701 So.2d 557, 559 (Fla. 1997). *Craft* recognized this principle as well[3]. The *Craft* court specifically cited to *Forgione* in its discussion. *Craft*, 757 So. 2d at 572. Consequently the *Craft* and *Mickler* decisions do nothing more than beg the question in this case — whether an assignee for the benefit of creditors, to whom the *Forgione* factors do not pertain, can bring a claim that ordinary assignees, or *de facto* assignees, such as Mr. Mickler, cannot bring. The claim in *Mickler* was not unassignable because it was exempt from levy; the extent to which it was exempt from levy was because it was unassignable. Therefore, if the claim *were* assignable in the first place, it would not have been exempt

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[2] The case at bar is not a post-judgment "proceeding supplementary" Fla. Stat. § 56.29, *et. seq.* as were *Craft* and *Mickler;* it is a "Supplemental Proceeding" as that term is explained in Florida Statutes, Section 727.110; it is supplemental to the principal assignment for the benefit of creditors proceeding, which means, under that statute, that it is brought as a sub-action to that proceeding before the same judge, to implead the defendant's attorneys, claiming malpractice in their representation of the assignor.

[3] Despite that recognition, however, the *Craft* court declined to "broaden the exception for non-assignable 'personal torts'" in that instance. *Id*. at 572.

from levy. In sum, if *Forgione* does not apply, the claim is assignable and there is no exemption issue. The Petitioners confuse cause with effect. *Mickler* can not serve as authority for rendering the claim against the Petitioners exempt under the Fla. Stat. § 727.103(1) (2003). It is a "bootstrap" argument that concludes that malpractice claims in assignments for the benefit of creditors are unassignable because they are exempt from levy. But to determine if they are exempt from levy, one first seek to conclude they are unassignable.

To the extent *Mickler* holds that one cannot execute upon legal malpractice claims, there remains a critical difference between recognizing that prohibition and recognizing an exemption to an assignment to a designated fiduciary as part of an overall liquidation plan. Neither *Craft* nor *Mickler* even remotely suggest that the malpractice claims in those cases were exempt from execution as a specially protected asset in the manner that veteran's benefits or disability benefits are exempt. There is no statutory exemption for malpractice claims.

In any ordinary case, a defendant can seek recovery against the third parties it claims are responsible for the damages that the plaintiff(s) seek(s). In this case, because MRI, Kaplan and the creditors of MRI did in fact implement the Assignment for the Benefit of Creditors statute, all of the claims against MRI were by necessity filed with the

Assignee for the Benefit of Creditors. Section 727.112(2), Florida Statutes, specifically requires that "[c]laims shall be filed by delivering the claim to the assignee." Logically then, having the right to conduct the debtor's business, to marshal and to liquidate its assets, and to receive all of its claims, the Assignee for the Benefit of Creditors should also have right to seek recovery against any third parties that may be responsible for those claims.

C. The Federal Bankruptcy Code and other analogous authority supports the conclusion that an Assignee for the Benefit of Creditors has authority to pursue an assignor debtor's malpractice claim

Florida's Assignment for the Benefit of Creditors statute is unquestionably a state level alternative to federal bankruptcy, which the Florida legislature was presumed to know when it enacted the Assignment statute. *Collins Inv. Co. v. Metropolitan Dade County*, 164 So. 2d 806 (Fla. 1964); *Parker v. State*, 406 So. 2d 1089 (Fla. 1981); *Akins v. Bethea*, 160 Fla. 99, 33 So. 2d 638 (1948). Given that the relevant provisions of the Assignment statute and the Bankruptcy Code are similar, and that bankruptcy law permits a trustee to maintain malpractice actions, an assignee for the benefit of creditors in state court should be permitted to do so as well. *Green v. Burger King Corp.*, 728 So. 2d 369 (Fla. 3d DCA 1999)(in circumstances where a statute may be borrowed from or patterned on identical or similar

provisions in a statute of another state or a federal statute, it is appropriate for the court to resort to the judicial constructions placed on the statute by the courts of those states or the federal courts in construing the subject statute); *see also State ex rel. Feldman v. Kelly*, 76 So. 2d 798 (Fla. 1954); *Gay v. Inter-County Tel. & Tel. Co.*, 60 So. 2d 22 (Fla. 1952); *Tilton v. Horton*, 103 Fla. 497, 137 So. 801 (1931), *reh'g denied*, 103 Fla. 497, 139 So. 142 (1932); *Venice East, Inc. v. Manno*, 186 So. 2d 71 (Fla. 2d DCA 1966).

The relevant provision in the Assignment statute is comparable to the federal bankruptcy statute. The Assignment statute provides that an

> "Asset" means a legal or equitable interest of the assignor in property, which shall include anything that may be the subject of ownership, whether real or personal, tangible or intangible, wherever located and by whomever held at the date of the assignment, *except property exempt by law from forced sale.*

Fla. Stat. § 727.103(1) (2003) (emphasis added). The comparable language in the bankruptcy statute describes the property that a debtor may withhold from the estate and his creditors as:

> *any property that is exempt under Federal law*, other than subsection (d) of this section, *or State or local law* that is applicable on the date of the filing of the petition.

11 U.S.C. § 522(b)(2)(A) (emphasis added).

The language in the two statutes, as well as their purpose and effect, is similar. The legislature is presumed to know this law. The purposes of the bankruptcy and assignment for the benefit of creditors statutes are similar, the language of the statutes relating to exemptions is similar, and the "spirit and policy" of the statutes are similar. Bankruptcy law is therefore appropriate and persuasive authority to examine in determining whether the assets that a debtor assigns to an assignee for the benefit of creditors includes the debtor's legal malpractice claim(s).

Several cases recognize the right of a bankruptcy trustee to maintain malpractice actions, even in jurisdictions where legal malpractice actions are otherwise unassignable. In bankruptcy, debtors are entitled to exclude from the bankrupt estate the same legal exemptions as one can in assignments for the benefit of creditors, including, notably, the exemptions allowed by state or local law. Because bankruptcy law permits the trustee to maintain malpractice actions, it follows that an assignee for the benefit of creditors in state court should be permitted to do so as well. An assignee for the benefit of creditors is not simply analogous to a bankruptcy trustee; for all purposes relevant to the standing question, an assignee is identical. In a bankruptcy context, the criterion for determining whether a person has standing

to pursue a claim is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly the debtor's unsecured creditors. *In re Sweetwater*, 884 F.2d 1323 (10th Cir. 1989); *Temex Energy v. Hoste and Kirschner*, 96 B.R. 330 (Bankr. W.D. Okla. 1989); *DuVoisin v. East Tennessee Equity, Ltd.*, 59 B.R. 688 (Bankr. E.D. Tenn. 1986); *see also Lloyd as Trustee and Liquidator of First Assurance and Cas. Co., Ltd. v. Paine Webber, Inc., et al.*, 208 F.3d 755 (9th Cir. 2000); *In re Richman*, 1997 U.S. App. Lexis 16159 (4th Cir. 1997); and *In re Haaland*, 89 B.R. 845 (S.D. Cal. 1988). These cases all hold that a trustee in bankruptcy has standing to bring a malpractice action against the debtor's attorney. The same reasoning should control in an assignment for the benefit of creditors proceeding, which is essentially a state court bankruptcy procedure.

Even one of the authors of Florida's Assignment statute, which the legislature completely revised in 1987, likens assignments for the benefit of creditors to a Chapter 7 bankruptcy proceeding in that they are both vehicles for the liquidation of insolvent debtors, with the primary difference being the assignment's relative simplicity and the absence of any debtor discharge at the close of the assignment proceeding. *See W.L. Courshon, "Florida's New Law on Assignments for the Benefit of Creditors: An Alternative to Bankruptcy," Fla. Bar Journal*, Oct. 1987, page 39. In

the Senate Staff Analysis and Economic Impact Statement to S.B. 808, the 1987 Senate Bill that became the Assignment for the Benefit of Creditors statute, the Staff Analyst explained:

> It should be noted that SB 808 provides the judiciary with a wide range of discretion in implementing assignments for the benefit of creditors. From this standpoint, the judicial discretion allowed in this area would be akin to that allowed courts in bankruptcy proceedings. Jones, *Senate Staff Analysis and Economic Impact Statement*, S.B. 87-808, Apr. 29, 1987.

In *Appletree Square I Limited Partnership and Business Consultants, Inc. v. O'Connor & Hannan*, 575 N.W.2d 102 (S. Ct. Minn. 1998), the court distinguished a malpractice claim of the debtor that a liquidating agent in a bankruptcy was pursuing from an ordinary impermissible assignment of a malpractice claim:

> The method by which BCI [the liquidating agent] acquired authority over the malpractice claim was more akin to transfer by the operation of law, rather than by an outright assignment. . . . Acquisitions of this nature, where the entity bringing the action merely is representing the original holder, do not come within the traditional definition of an assignment (citing *In re Sweetwater*, 884 F.2d 1323 (10th Cir. 1989).

In the case before this Court, the only difference from the foregoing bankruptcy cases is that it is a state statute as opposed to a federal statute that confers the exact same rights to the assignee. There is no logical basis to suggest that

assignments of legal malpractice claims are any less appropriate under Florida's Assignment statute than they were, and are, under an analogous federal assignment statute.

The Florida statute, of course, is not identical in every detail to federal bankruptcy law. The Petitioners identify one or two differences. But any differences between assignment proceedings and bankruptcy proceedings do not justify treating them differently in terms of the standing of the trustee or assignee to bring professional liability claims. In bankruptcy, the United States Trustee appoints the trustee of the debtor's estate or the creditors can elect the trustee. 11 U.S.C. §§ 701-703. In an assignment for the benefit of creditors, the debtor determines the assignee in the course of signing the documents that initiate the proceeding. Fla. Stat. § 727.104 (2003). If the issue is, as *Forgione* urges, the special confidential relationship between attorney and client, it would seem that in bankruptcy, where the debtor has little or no say in who the trustee will be, it is less appropriate to permit a malpractice proceeding by that trustee than in an Assignment, where the role of the debtor in determining the assignee is more substantial.

One difference that does not exist between bankruptcy and statutory assignments is one that Petitioners suggest in their Brief. The Petitioners contend (as a new argument) that unlike bankruptcy, exemptions in an assignment for the

benefit of creditors proceeding are mandatory; they claim the debtor automatically retains all property that has not been assigned, which they contend must include all property exempt by law from forced sale. There are, at a minimum, three fallacies in this argument. First, it confounds cause and effect, concluding that a legal malpractice claim is unassignable because it is exempt from levy, when in actuality malpractice actions in the usual circumstance are only exempt from levy because they are unassignable. *See Mickler v. Aaron*, 490 So. 2d 1343 (Fla. 4th DCA 1986) and discussion at Part III, below. Second, it ignores the express instrument between MRI and Kaplan that requires any exemptions to be specified in a schedule that happens to list no exemptions whatsoever. Third, it ignores Fla. Stat. § 222.061 (2003), which explains:

> When a levy is made by writ of execution, writ of attachment, or writ of garnishment upon personal property which is allowed by law or by the State Constitution to be exempt from levy and sale, *the debtor **may** claim such personal property to be exempt* from sale by making, within 15 days after the date of the levy, an inventory of his or her personal property . . .

(emphasis added).

Asserting exemptions in an assignment for the benefit of creditors, therefore, is a logical event. It is the right of the debtor, not the debtor's adversary, to determine the extent to which the debtor chooses to claim exemptions. It is

optional. If the debtor declines to exercise the right, then there will be no exemptions. A debtor can waive its exemptions from forced sales. *State Farm Life Ins. Co. v. Florida Asset Fin. Corp.*, 786 So. 2d 1 (Fla. 4th DCA 2000); *Windsor-Thomas Group, Inc. v. Parker*, 782 So. 2d 488 (2d DCA 2001) (holding that an annuity issuer had standing to assert exemptions as well, but still recognizing that exemption is subject to waiver). The corporate debtor in the case at bar has intended to waive and has waived that exemption with respect to claims brought by the Assignee against the Petitioners. *See Assignment* (R.VI: 1617, 1629, Schedule B. II) (specifying "none" for exemptions or exclusions from the assignment). And the corporation, MRI, has in no way, shape or form asserted any objection to the Assignee bringing this action or claiming the right or entitlement to do so.

The only person or entities asserting the purported exemption, are, not surprisingly, the Petitioners herein. Rather ironically, they argue the Assignee lacks standing, when it is they who lack standing to raise this objection. *See State Farm, supra*; *Windsor-Thomas Group, supra*. The right to assert an exemption to a forced sale belongs to the debtor and (in situations where the exemption is an annuity or retirement plan) to the issuer of the asset. No authority supports the proposition that a defendant can exculpate itself from its own negligence by asserting a right of the plaintiff that the

plaintiff has knowingly and voluntarily waived. The Petitioners' premise, therefore, that exempt property automatically remains with the debtor, thereby distinguishing it from bankruptcy, is unsupportable.

The Bankruptcy Code also includes among its exemptions, property exempt under state law. 11 U.S.C. § 522(b)(2). Therefore, if the Petitioners were correct, legal malpractice claims should also not be included in bankruptcy estates because such claims are immune from execution under state law. And yet, as the cases discussed above recognize, a trustee in bankruptcy may assert legal malpractice claims on behalf of the debtor's estate. Once again, there is no reason to draw a distinction in an assignment for the benefit of creditors.

The Petitioners complain that Kaplan's pursuit of this claim would lead to the Assignee improperly holding the attorney client privilege, but fail to present a genuine issue. As the Third District appropriately recognized in its opinion in this case:

> The Attorneys' conduct was governed by the Rules Regulating the Florida Bar 4-1.13, which states that a lawyer "shall proceed as is reasonably necessary in the best interest of the [corporation]." R. Regulating Fla. Bar 4.1.13(b). Kaplan alleges that the Attorneys participated in a fraud on the public in connection with the sale of securities and aided a director in actions relating to their representation of the corporation in violation of the director's legal fiduciary obligation, which violation could reasonably be imputed to the corporation. Here, the controlling

> shareholder/director was the corporate constituent whose conduct would eventually cause the harm. *See* Comment to R. Regulating Fla. Bar 4-1.13 (corporate constituents are not the client; and "discussions between the lawyer for the corporation and the constituent may not be privileged."). The rules of evidence and professional conduct make clear that the communications concerning the private placements were neither privileged, confidential, nor of such a personal nature as to warrant non- disclosure. *See Kneale v. Williams*, 158 Fla. 811, 30 So. 2d 284 (Fla. 1947) ("It is well settled that the perpetration of fraud is outside the scope of the professional duty of an attorney and no privilege attaches to a communication and transaction between an attorney and client with respect to transactions constituting the making of a false claim or the perpetration of a fraud."). The Attorneys may disclose information to the extent necessary to defend against the malpractice claim. R. Regulating Fla. Bar 4-1.6(c). There is thus no concern for privilege or confidentiality regarding the Attorney-Corporation communications that involved the private placement memoranda.

The Petitioners' argument that the Assignee for the Benefit of Creditors cannot speak for the corporation with respect to matters involving the waiver of corporate privileges is simply erroneous. The Assignee *does* have a fiduciary relationship with the corporation itself. It cannot be a creditor or have any interest adverse to the estate and in accepting his duties undertakes a "trust" on the corporation's behalf. Fla. Stat. §§ 727.103, 727.104 (2003). The Assignee becomes the lawful attorney-in-fact for the corporation, irrevocably, with full power and authority to do all acts and things which may be necessary to execute the assignment. *Id*. Conversely, the creditors may elect the trustee in

bankruptcy and the trustee in bankruptcy is the fiduciary for the *creditors*. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986, 85 L.Ed.2d 372 (1985); 11 U.S.C. § 704. It is absurd to suggest that the trustee in bankruptcy has the right to assert attorney client privileges of the debtor in a malpractice claim, while the Assignee in a state court liquidation proceeding does not.

Essentially the Petitioners in this case seek to hide from liability for their acts and omissions behind the cloak of a privilege that neither the debtor nor the Assignee for the Benefit of Creditors has any intent to assert. As the Third District correctly concluded the privilege does not present any reason why this case cannot proceed.

There also is no material distinction between an Assignee for the Benefit of Creditors and a receiver, who has been held to possesses the authority to pursue legal malpractice claims. In *Federal Deposit Insurance Corp. v. Martin*, 770 F. Supp. 623 (M.D. Fla. 1991), the FDIC, as receiver of a failed bank, sued a law firm for malpractice. The defendants argued that legal malpractice claims are not assignable, just as the Defendants do in the case before this Court. The *Martin* Court cited the federal statutes authorizing the FDIC "to purchase any such assets" of a failed bank. The court held that the statute created a power in the FDIC to purchase any assets, including assets otherwise nontransferable in

order to facilitate the FDIC's purposes. *Id.* at 626. The court further emphasized the regulation that identified "chose in action" among the assets included in this authorization. *Id.* (citing 12 C.F.R. § 569a.6(c)(1)). There is no meaningful distinction between the role of the receiver in that case and the role of the Assignee for the Benefit of Creditors in this case, except to the extent that the Assignee, with its fiduciary, attorney in fact status, may be even more closely aligned with the debtor than the receiver. *See also Federal Deposit Ins. Corp. v. Brodie,* 602 So. 2d 1358 (Fla. 3d DCA 1992)(a receiver for a failed bank was able to bring a malpractice claim against the bank's attorneys); *see also In re Vernon,* 609 So. 2d 128 (Fla. 4th DCA 1992), (permitting an *administrator ad litem* to pursue the legal malpractice claim on behalf of the *estate* of a decedent); *Datwani v. Netsch*, 562 So. 2d 721 (Fla. 4th DCA 1990) (recognizing the right of a substituted trustee of a land trust to bring the malpractice claim).

It simply defies reason to conclude that administrators, receivers, substitute trustees and bankruptcy trustees all have the right to pursue legal malpractice claims, but Assignees for the Benefit of Creditors do not have that right.

The Florida Legislature is also presumed to know the law pertaining to exemptions. Chapter 222, Florida Statutes, describes the exemptions that are generally available to individuals — not corporations — under Florida law (*e.g.*

homestead, head of household wages, life insurance policies, etc.). The assets described in that Chapter constitute assets exempt from forced sale.

The Legislature has recognized in other statutes the distinction between an unassignable asset being and an exempt asset. The two terms are not synonymous. For example, Section § 185.25, Fla. Stat., which relates to municipal police pensions, provides that the funds "shall not be subject to execution or attachment or to any legal process whatsoever, and shall be unassignable" (emphasis added). *See also* Fla. Stat. § 238.15 (2003) (using *identical* language with respect to teacher's pensions). If the asset's unassignability rendered it exempt from attachment or legal process, the Legislature would not have needed to state that it was both exempt from attachment *and* unassignable. The two concepts are therefore distinct, and the Legislature obviously has recognized a distinction between exemption from forced sale and unassignability. The Assignment for the Benefit of Creditors statute excludes assets exempt from forced sale. But it

says nothing about excluding assets that might ordinarily be unassignable. Had the Florida Legislature intended to include the term "unassignable" in the Assignment statute it would have done so, just as it did in other instances.

II. THE GENERAL PROHIBITION AGAINST ASSIGNING LEGAL MALPRACTICE ACTIONS DOES NOT APPLY TO A STATUTORY ASSIGNMENT FOR THE BENEFIT OF CREDITORS

A. The policy behind the prohibition is not relevant in an Assignment for the Benefit of Creditors

This Court has previously recognized that an aggrieved client may not assign a legal malpractice claim to a third party because the claim is a personal tort that involves the unique quality of legal services and confidentiality concerns with respect to the attorney-client relationship. *Forgione v. Dennis Pirtle Agency*, 701 So. 2d 557, 559 (Fla. 1997); *see also Washington v. Fireman's Fund Ins. Co.*, 459 So. 2d 1148 (Fla. 4th DCA 1984). The Respondent does not dispute this principle. It does not seek to change the law. It does not seek to reclassify Florida as a "minority" state, allowing the general assignment of legal malpractice claims. Rather, an assignee for the benefit of creditors acquires his interest by operation of law and stands in the shoes of the assignor debtor, thus the *Forgione* concerns simply do not apply. The entire focus of the Florida Defense Lawyers' Association *Amicus Curiae* brief is the preservation of

the *Forgione* rule in Florida. However, this particular case neither requires nor necessitates disturbing this *Forgione* principle, thus the case does not threaten any stake of that organization. At issue is not an isolated, garden-variety assignment of the client's claim; at issue is a special statutory relationship. In this circumstance the policy concerns of *Forgione* do not arise.

In *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996), the District of Columbia court pointed out that courts that have barred the assignment of legal malpractice claims rely on the concern that parties would exploit such a right to sell claims to opponents or unrelated third parties and that such assignments could "jeopardize the personal nature of legal services." *Richter*, 940 F. Supp. at 357. The Florida case of *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997) echoes these concerns as the reason why Florida courts have precluded assignments of personal torts. *See also Washington v. Firemans Fund Insurance Co.*, 459 So. 2d 1148, 1149 (Fla. 4th DCA 1984). This Court in *Forgione* explained that it is "the unique quality of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship" that have led other courts to conclude that legal

malpractice claims are not subject to assignment. *Forgione*, 701 So. 2d at 559, *quoting Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal Rptr. 83, 87 (1976).

The explicit intent of the Assignment for the Benefit of Creditors statute is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter. Fla. Stat. § 727.101 (2003). The act contemplates the liquidation and fair distribution of the estate. In an assignment for the benefit of creditors, the debtor itself determines who the fiduciary — the assignee for the benefit of creditors — will be, subject to the approval of the court. *Id.*, Fla. Stat. § 727.104 (2003). The Assignee cannot be a creditor or have any interest adverse to the estate. *Id.*, § 727.103(2). As does the Bankruptcy Code, the Assignment statute employs the term "estate" to describe the assets of the insolvent corporation. *Id.*, Fla. Stat. § 727.103(7) (2003). The insolvent corporation initiates an assignment proceeding with a voluntary document in which it *appoints the assignee its true and lawful attorney*, irrevocably, with full power and authority to do all acts and things which may be necessary to execute the assignment; to demand and recover from all persons all assets of the estate; *to sue for the recovery of such assets*; to execute, acknowledge, and deliver all necessary deeds,

instruments, and conveyances; and to appoint one or more attorneys under her or him to assist the assignee in carrying out her or his duties. *Id*., Fla. Stat. § 727.104 (2003) (emphasis added). An attorney-in-fact is "a private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, not of a legal character." *Black's Law Dictionary* (West 6th ed. 1990). The resulting relationship between the debtor and the assignee for the benefit of creditors, therefore, is not simply a single asset arm's length assignment. In fact, the statute requires that the "assignment" contain the following additional language:

> The assignor hereby authorizes the assignee to sign the name of the assignor to any check, draft, promissory note, or other instrument in writing which is payable to the order of the assignor, or to sign the name of the assignor to any instrument in writing, whenever it shall be necessary to do so, to carry out the purpose of this assignment. The assignee hereby accepts the *trust created by the assignment*, and agrees with the assignor that the assignee will faithfully and without delay carry out her or his duties under the assignment.

Id. Fla. Stat. § 727.104 (2003) (emphasis added).

Like a trustee in bankruptcy, then, the assignee in an assignment for the benefit of creditors is a fiduciary charged with the effective administration of the estate. This fiduciary duty to administer the estate is plenary and includes the right to bring actions to recover estate assets. *Id*. Fla. Stat. §§ 727.108, 110 (2003).

In connection with those duties, the Assignee receives all assets for the purpose of liquidating the estate. *Id*. Fla. Stat. §§ 727.106, 107(2) (2003). The entire proceeding is subject to the review and approval of the court. *Id*. Fla. Stat. §§ 727.108 (8) (12); Fla. Stat. 727.109, 727.112, 727.116 (2003). The procedure even requires the assignee to post a bond to assure his faithful discharge of his duties. *Id*. Fla. Stat. § 727.104(2)(b) (2003).

Consequently, the assignee for the benefit of creditors *becomes* the corporate debtor for all intents and purposes relating to the accumulation of assets and payments of claims and liabilities. The assignee can even continue the operation of the entity under appropriate circumstances. *Id*. Fla. Stat. § 727.108(4) (2003).

These factors are significantly material to the issue of standing. An assignee for the benefit of creditors is acting entirely in the interest of the corporation in the effort to marshal assets; it is managing all of the corporation's assets; he has possession of, or access to, to the greatest extent possible, the communications, files and documents of the

corporation; and it essentially serves as the managing agent for the same corporation that would otherwise have the right to bring the malpractice action. Because the corporation only exists at that point for the purpose of satisfying the just claims of the creditors, the interests of the corporation and the collective interest of the creditors become co-extensive.

An assignment for the benefit of creditors is not a commonplace, isolated, incidental transaction, like a sale of a single asset, that a corporation might effectuate in order to raise capital. To the contrary, an assignment for the benefit of creditors is typically the corporation's final act of liquidation. With an assignment for the benefit of creditors, there is no danger of malpractice claims being sold off to the highest bidder to be pursued by strangers to the lawyer or entities totally unfamiliar with the business and makeup of the original client. With an assignment for the benefit of creditors, there is no concern with the widespread or uncontrolled dissemination and dissipation of confidential aspects of the attorney-client relationship. With an assignment for the benefit of creditors, there is no concern with a sterile, disaffected disregard for the personal nature of the attorney's duty to the client.

Accordingly, when an assignee for the benefit of creditors pursues a professional liability action, there is no danger of compromising the quality of legal services, the personal nature of the attorney's duty to the client, confidentiality, or

any other factor that underlies *Forgione* or any other decision that prohibits an assignment of a malpractice claim. Despite the use of the term "assignment," an assignment for the benefit of creditors is an entirely different creature than an ordinary assignment. Accordingly, this Court should reject the Petitioners' position and avoid applying law involving ordinary assignments to statutory assignments for the benefit of creditors simply and only because the two concepts share the term "assignment" in their labels.

B. An Assignment for the Benefit of Creditors is a transfer by operation of law, and as such, general assignment proscriptions do not apply

The United States Supreme Court recognized the distinction between ordinary assignments and assignments for the benefit of creditors as long ago at 1880. In that year, the Supreme Court considered whether a prohibition against assignments of claims against the government included statutory assignments for the benefit of creditors. It did not. *Goodman v. Niblack,* 102 U.S. 556, 560-61, 26 L.Ed. 229 (1880). The Court explained:

> The language of the statute, "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," is broad enough (if such were the purpose of Congress) to include transfers by operation of law, or by will. Yet we held [in *Erwin v. United States*, 97 U.S. 392 (1878)] it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose

> in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. **In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy?** There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the act of 1853.

Id. (emphasis added). Similarly, in *Patterson v. United States*, 354 F.2d 327, 329-30 (U.S. Ct. Cl. 1965), the Court of Claims listed a number of different circumstances in which claims no longer in the hands of the original claimant were valid nonetheless as assignments or transfers "by operation of law." While Florida's assignment for the benefit of creditors statute is relatively new, the reasoning of *Goodman* and *Patterson* is persuasive and the fact that the question now relates to claims against attorneys rather than claims against the United States in not material. Because an assignment for the benefit of creditors is a transfer by operation of law, the concerns that warrant barring ordinary assignments of legal malpractice actions are simply not implicated.

III. THE THIRD DISTRICT CORRECTLY RECOGNIZED THE PETITIONERS' "PUBLIC RESPONSIBILITY" OBLIGATIONS

This case is not an action of a third party. The corporation itself was injured and its proper representative, Kaplan, who followed all statutory requirements in taking on this representative capacity is bringing the case on its behalf. Therefore questions of third party beneficiary standing and privity issues do not control the outcome of the case.

The issue in this case is whether an Assignee for the Benefit of Creditors has standing to pursue a legal malpractice action against the attorneys who had represented the debtor. This Court does not actually need to consider the specific function that the attorneys were performing on behalf of the debtor at the time of the malpractice. This is not a case where the Assignee for the Benefit of Creditors seeks to pursue the claims of the public or of someone who the Petitioners were not directly representing[4]. This Court, to decide this matter, need only interpret the Assignment for the Benefit of Creditors statute. Still the Third District's conclusions about the Petitioners' public responsibilities are, as a general point of law, correct.

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[4] Although the Respondent is seeking indemnification for the claims that third parties have brought against it.

A. An attorney who occupies a special relationship to investors making use of the information has a duty to them

The Third District in its decision explained that the Petitioners, in writing private placement memoranda that they knew would be disclosed to and relied upon by public investors, took upon themselves a public responsibility much like the accountants in *KPMG Peat Marwick v. National Union Fire Ins. Co.*, 765 So. 2d 36 (Fla. 2000). Whether *KPMG* "modified" *Forgione*, as the Third District interpreted, or whether the Petitioners, as attorneys writing and disseminating a public disclosure, exercised a function more similar to the *KPMG* accountants than the *Forgione* litigators, the result remains the same – the Petitioners must defend these claims

In *Kline v. First Western Government Securities, Inc.*, 24 F.3d 480 (3d Cir. 1994), an attorney was responsible for misrepresentations made in an opinion letter, even though he prefaced the opinion by expressing that he was assuming the stated underlying information he had been given was accurate. The court held:

> When a representation is made by professionals or 'those with greater access to information or having a special relationship to investors making use of the information,' there is an obligation to disclose data indicating that the opinion or forecast may be doubtful. [citation omitted]. When the opinion or forecast is based on underlying materials which on their face or under the circumstances suggest that they cannot be relied on without further inquiry, then the failure to investigate further

> may 'support an inference that when the defendant expressed the opinion it had no genuine belief that it had the information on which it could predicate that opinion.

Id. at 486 (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 776 (3d Cir. 1985)). That attorneys would owe a duty to the public, shareholders and investors in a 10b-5 context, but not in a state court negligence context, defies all logic. The duty of the attorneys lies in their acts and the nature of their representation, not in the particular cause of action the plaintiff chooses to bring.

In *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d 9 (Fla. 1990), this Court adopts the rationale of section 552, *Restatement (Second) of Torts* (1976). That section of the *Restatement* is entitled "Information Negligently Supplied for the Guidance of Others.[5]" It does not limit its applicability to accountants and it obviously reflects that

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[5] The section reads, in its entirety, as follows:

> B. One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> 1. Except as stated in Subsection the liability stated in Subsection is limited to loss suffered:

a different analysis pertains to professionals providing such information than the analysis afforded to professionals acting in some other capacity.

The *Restatement*, which the Florida Supreme Court adopted in *Max Mitchell*, sensibly hinges a defendant's liability to those whom the defendant intends to benefit or knows will benefit from or rely upon his disclosures. The *Restatement* does not issue a magic pass to attorneys. The distinction lies not in the differences between accountants and attorneys, but rather in the differences between a professional serving a restrictive, private function and a professional service with a public function. The Third District correctly recognized that the Petitioners supplied information for the guidance of others and that they *did* have a duty to creditors, investors and shareholders.

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a. by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

b. through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

c. The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created in any of the transactions in which it is intended to protect them.

It is well established that lawyers can be liable under circumstances such as those alleged in the Complaint in this case. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A*, 511 U.S. 164 (1994), the Supreme Court of the United States held that lawyers participating in securities offerings may be *primarily* liable under Section 10(b) of the Securities and Exchange Act of 1934. A cogent explanation of the law and its rationale appears in a law review article entitled, "The Primary Liability of Securities Lawyers."[6]

Its author, Manning Warren, describes the *Central Bank*'s decision on lawyers' liability as "perhaps the least controversial aspect" of the opinion. He then explains:

> Any analysis of the securities lawyer's role as an integral and essential participant in the securities offering must necessarily begin with the question of why that lawyer is involved and what he or she actually does. Given the complexity of state and federal securities regulation and the attendant liability risks under a wide array of state and federal antifraud provisions, the retention of experienced securities counsel is critical. Consequently, any party who decides to raise capital through the issuance of securities must retain an experienced securities lawyer in order to ensure compliance with state and federal securities law. . . These laws also generally require preparation of a disclosure document *for the intended benefit of prospective investors*, those third parties who the transactional participants, including the securities lawyer, fully expect to utilize the information

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[6] M. Warren III, "The Primary Liability of Securities Lawyers," 50 *S.M.U. L. Rev.* 383 (Sept./Oct. 1996).

> disclosed to make investment decisions. The securities lawyer has first-line and last-line responsibility for the production of this disclosure document – responsibility which includes not only gathering, verifying, and presenting the information to be disclosed, but also making literally thousands of intricate and complex determinations of what information is legally "material" and thus necessary for actual disclosure to prospective investors.

Id. at 387-88 (emphasis added). Professor Warren then states:

> If a misrepresentation or omission is so made or furnished to investors by means of the disclosure document the lawyer has prepared, then it is the lawyer, and not the client issuer alone, who has made the misrepresentations or omissions in connection with the investors' purchase of securities.

Id. at 402. Accordingly, the law is clear that Kaplan has stated valid causes of action against the attorneys.

B. Kaplan, as an assignee for the benefit of creditors is in privity, with the Petitioners and can bring this action

The Petitioners cite several authorities to support their contention that a person *not* in privity with an attorney is barred from bringing a malpractice action against that attorney. *See, e.g.*, *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378 (Fla. 1993). That the Petitioners cite *Espinosa* in *support* of their argument is rather surprising. That case recognizes that a probate estate of a decedent "stands in the shoes of the testator and clearly

satisfies the privity requirement." *Id*. at 1380[7]. The Petitioners do not explain why a personal representative should have standing to bring the decedent's legal malpractice claim while the statutory assignee should not. The assignee for the benefit of creditors *is* in privity. The assignee *is* MRI for the purposes of marshaling assets, paying claims and liquidating the estate. He steps into the shoes of MRI for these purposes. It is not a stranger to the relationship between MRI and its attorneys; the assignee is simply the person charged by statute to act for MRI.

As the Third District properly determined:

> Kaplan, as assignee for benefit of creditors, has the legal charge of gathering and liquidating the assets of the corporation. In that regard Kaplan is no different from a trustee in bankruptcy who has full standing to bring a debtor's legal malpractice claim.

Even in *Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane*, 763 So.2d 1274 (Fla. 1st DCA 2000), where the shareholders of the close corporation were *not* deemed to be intended third party beneficiaries, the court made clear that the duty of the attorney is "first and foremost to the corporation." *Id*. at 1277. In *Silver Dunes* and

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[7] *Espinosa* also recognizes that a plaintiff who is an intended third-party beneficiary to an attorney-client relationship also has the right to bring a legal malpractice action. As the previous section of this brief details, the creditors are certainly intended third-party beneficiaries with respect to the Petitioners' relationship with MRI.

in *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th DCA 1994), where the interests of the shareholders were *different* than those of the close corporations that the defendant lawyers represented, the courts logically concluded that the duties of the attorneys were to the corporation. In the circumstances before this Court, there is no such disparity; the Petitioners' breach of their duties detrimentally affected the corporation, shareholders, investors and creditors alike. Even without considering the Petitioners' public role in this case, the Third District properly concluded that the statutorily created legal role of the Assignee for the Benefit of Creditors is more than sufficient to confer standing to maintain a legal malpractice claim. This Court should affirm that correct result.

CONCLUSION

For the foregoing reasons, this Court should affirm the Third District's Order that determined that an Assignee for the Benefit of Creditors under Chapter 727, Florida Statutes, may properly assert a legal malpractice claim on behalf of the assignor debtor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of July, 2003 to **Laura Besvinick, Esq.**, Hogan & Hartson, LLP, Barclays Financial Center, 1111 Brickell Avenue, Suite 1900, Miami, Florida 33131, **Marlene S. Reiss, Esq. and Robert Michael Klein**, Esq., Stephens, Lynn, Klein & McNicholas, P.A., 9130 South Dadeland Boulevard, Penthouse II, Miami, Florida 33156, **Deborah Poore Knight, Esq.**, Jonathan J. Davis, Esq., Walton Lantaff Schroeder & Carson, P.A., 110 East Broward Blvd., Corporate Center -Suite 2000, Ft

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that the typeface of this brief is 14 point Times New Roman and complies with the font standards prescribed by Fla.R.App.P. 9.210.

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