IN THE SUPREME COURT
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., JACK B. PACKAR, P.A. and PACKAR AND PLATT,

Petitioners,

v.

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

Respondent.

INITIAL BRIEF OF PETITIONERS COWAN LIEBOWITZ & LATMAN, P.C., FRANZINO & ROSENBERG, P.C., MARSHALL PLATT, MARSHALL DOUGLAS PLATT, P.A., JACK B. PACKAR P.A. AND PACKAR AND PLATT

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

Caryn Bellus, Esq.
Florida Bar No. 60445
Kubicki Draper
City National Bank Bldg.
25 West Flagler Street
Miami, Florida 33130
305-982-6634
305-375-7846 Fax

Counsel for Petitioner
Franzino & Rosenberg, P.C.

Laura Besvinick, Esq.
Florida Bar No. 391158
Hogan & Hartson L.L.P.
1111 Brickell Avenue
Suite 1900
Miami, Florida 33131
305-459-6500
305-459-6550 Fax

Counsel for Petitioner
Cowan Liebowitz & Latman, P.C.

Deborah Poore Knight, Esq.
Florida Bar No. 289949
Walton Lantaff Schroeder, et al.
Blackstone Building
Third Floor
707 S.E. 3rd Avenue
Ft. Lauderdale, FL 33316
954-463-8456
954-763-6294 Fax
Counsel for Petitioners Marshall Platt, Marshall Douglas Platt, P.A., Jack B. Packar, P.A. and Packar and Platt

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STATEMENT OF THE CASE AND FACTS

Nature of the Case

This is an appeal from a decision of the Third District Court of Appeal reversing the trial court's dismissal with prejudice of legal malpractice claims against the former attorneys for Medical Research Industries, Inc. ("MRI"), brought not by MRI, but by Donald Kaplan ("Kaplan") in his capacity as the assignee of MRI, pursuant to § 727.104, Fla.Stat.[1] The trial court granted the Attorneys' motions to dismiss on standing grounds; the Third District reversed; and this Court accepted jurisdiction to resolve the conflict between the decision of the Third District and this Court's decisions in KPMG Peat Marwick v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 765 So.2d 36 (Fla. 2000); Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997); Espinosa v. Sparber, Shevin, Shapiro Rosen & Heilbronner, 612 So.2d 1378 (Fla. 1993); and Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987).

[1] The former attorneys named as defendants in the Complaint were 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 (collectively, the "Attorneys").

Statement of Facts[2]

a. **The Assignment to Kaplan.**

On or about November 12, 1999, MRI executed an "Assignment for the Benefit of Creditors," pursuant to which it assigned to Kaplan (and "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, . . . claims and demands belonging to" MRI. See Complaint, Exhibit A (Vol. V; R.1574-1612.) It is based on this assignment that Kaplan asserts that he "has sole and complete authority to bring this action" against MRI's former attorneys. Id. at ¶ 4.

b. **Kaplan's Claims Against the Attorneys.**

According to Kaplan, William Tishman formed MRI in 1995 to develop and market homeopathic medical products. Id. at ¶¶ 15, 16. "Soon after forming MRI," however, "Tishman sought to raise capital for MRI through private placement memoranda." Id. at ¶ 17. Shares in MRI were to be offered only to physicians on MRI's "Medical Advisory Board" and were not registered for that reason. Id. at ¶ 29. The Complaint alleges that, according to the private placement memoranda, the funds raised by the sale of share were to be used "to operate and expand the business of MRI." Id. at ¶ 33. In all, Kaplan alleges, four private placement memoranda (and one "supplement") were issued between 1996 and 1998, raising in excess of $50

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2 **Because the trial court granted the Attorneys' motions to dismiss with prejudice, this statement of facts is derived entirely from the Complaint.**

million from approximately 2000 shareholders. Id. at ¶¶ 25, 28.

According to the Complaint, however, "[t]he proceeds of the private placements were not used for the expansion or operation of MRI." Id. at ¶ 35. Instead, the funds raised were used "in large part to make unsecured loans for the benefit of Tishman," pursuant to a "loan program." Id. at ¶¶ 35, 37. Thus, of the more than $50 million raised by MRI, "Tishman borrowed approximately $18 million." Id. at ¶ 38.

Kaplan alleges that the Attorneys "prepared and reviewed most of the documentation relating to the private placement memoranda" for MRI and that "MRI primarily relied [on the Attorneys for advice] on matters of securities and corporate law." Id. at ¶ 23. According to Kaplan, the Attorneys advised MRI, incorrectly, that the shares sold through the private placement memoranda were "exempt from registration by virtue of Regulation D of the Securities Act of 1933." Id. at ¶ 29. Kaplan also complains that the Attorneys "drafted, reviewed and/or approved" the private placement memoranda for MRI and that they "knew or should have known" that the private placement memoranda "did not accurately state the manner" in which the funds raised were to be used, and were therefore "false and misleading" (although they did "recite that MRI had loaned money to Tishman") Id. at ¶¶ 33, 34, 37.

Based on these allegations, Kaplan asserted five claims against the Attorneys – for negligence (Count I), breach of fiduciary duty (Count II), indemnity (Count III) and negligent supervision (Counts IV and V) – all premised on the Attorneys' alleged failure to properly represent and advise

their client, MRI.[3]

Course of Proceedings

a. The Trial Court.

The Attorneys moved to dismiss the Complaint on multiple grounds. Among other things, the Attorneys argued that Kaplan, as the assignee of MRI, could not bring the legal malpractice claims of the company because, as a matter of black-letter Florida law, legal malpractice claims were not assignable. The Attorneys also argued that the statute upon which Kaplan premised his standing to sue, § 727.104, Fla.Stat., expressly excepted such claims from assignment for the benefit of creditors.[4] (See, e.g., Vol. V; R.1437-43; Vol. VI; R.1720-35).

After briefing and oral argument, the trial court granted the Attorneys' motions to dismiss with prejudice, on the grounds that Kaplan, as the assignee for the benefit of creditors of MRI, could not assert the legal malpractice claims of MRI. The trial court's reasoning was two-fold. First, the trial court noted that this Court had not recognized (or even suggested that there might be) any exceptions to the general rule of nonassignability of legal malpractice claims. June 15, 2001 Transcript at 19, 25-26 (Vol. V; R.1526-72). Second, the trial court held that the language of § 727.104, Fla.Stat., was clear and that it expressly excepted from assignment for the benefit of

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3 **In proceedings subsequent to the issuance of the mandate by the Third District and prior to this Court's acceptance of jurisdiction, the trial court dismissed the negligent supervision claims (Counts IV and V) and Kaplan elected not to replead them as independent counts.**

4 **The Attorneys also argued that the claim for indemnity should be dismissed as premature and that the negligent supervision claim was circular and failed to state a claim for relief. The trial court did not find it necessary to reach these arguments.**

creditors those assets which, like the legal malpractice claims at issue, were exempt by law from levy or sale under an execution. June 15, 2001 Transcript at 17, 18, 26-27 (Vol. V; R.1526-72).

Accordingly, on or about June 26, 2001, the trial court entered an Order dismissing the action with prejudice:

> The Motions to Dismiss are GRANTED. The Court holds that plaintiff Donald Kaplan, as the assignee for the benefit of creditors of Medical Research Industries, Inc. ("MRI"), pursuant to Chapter 727, Florida Statutes, lacks standing to sue defendants for legal malpractice alleged in connection with defendants' representation of MRI. Such claims are not assignable as a matter of Florida law, see, e.g., KPMG Peat Marwick v. Nat'l Union Fire Ins. Co., 765 So.2d 36 (Fla. 2000); Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997). In addition, such claims are "exempt by law from levy and sale under an execution" and are therefore excepted from assignment pursuant to Section 727.104, Florida Statutes. See §727.104, Fla. Stat.; Craft v. Craft, 757 So.2d 571 (Fla. 4th DCA 2000); Mickler v. Aaron, 490 So.2d 1343 (Fla. 4th DCA 1986).

June 26, 2001 Order at ¶1 (Vol. VI; R.1751-53).

b. MRI's Claims Against the Attorneys.

After the June 15, 2001 hearing on the Attorneys' motions to dismiss and before the Order memorializing the trial court's holdings had been entered, MRI filed legal malpractice actions against the Attorneys in its own name in New York and Broward County asserting the very claims that Kaplan had purported to assert in his capacity as the assignee of MRI in this action.[5] See Medical Research Industries, Inc.,

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[5] **Notably, at the June 15, 2001 hearing, the trial court raised this very possibility:**

> **The Court: Assuming that's correct, couldn't MRI bring this in its own name?**

et al. v. Cowan Liebowitz & Latman, P.C., et al., Index No. 112545/01 (the "New York action"); Medical Research Industries, Inc., et al. v. Cowan Liebowitz & Latman, P.C., et al., Case No. 01-011323 (the "Broward County action"). As of this writing, MRI's Broward County action remains pending.[6]

Disposition in the Lower Tribunal

On or about July 26, 2001, Kaplan filed his notice of appeal in this action. (Vol. VI; R.1742-47.) Following briefing and oral argument, in an opinion filed October 23, 2002, the Third District Court of Appeal reversed the June 26, 2001 Order of the trial court dismissing Kaplan's claims. October 23, 2002 Opinion (Vol. VI; R.1754-58.)

According to the Third District, the "issue before [the court was] whether an assignee (actually transferee) acting as a fiduciary for a corporation has standing to bring a legal malpractice action on behalf of the now-defunct corporation." Appendix, slip op. at 3. The court acknowledged the holding of Forgione, in which this Court "recognize[d] the general prohibition in Florida of the ordinary assignment of legal malpractice claims," but then held that this Court had "modified" the holding of Forgione in KPMG. Id. The Third District described the holding in KPMG in this way:

> The KPMG court concluded that the public policies discussed in Forgione (requiring attorney malpractice claims to be non-transferable as personal torts) do not apply where

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Ms. Besvinick: Yes. I think that's right.

June 15, 2001 Transcript at 7 (Vol.V; R.1526-72).

[6] **MRI voluntarily dismissed the redundant New York action on or about April 5, 2002.**

> the claims involve reliance on the allegedly confidential information by interests other than the entity for whom the information was prepared. KPMG at 38-39. The 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 investing public." KPMG at 38.

Appendix, slip op. at 3-4.

The court then analogized the role of the auditors in KPMG to the role of the Attorneys here: "Because the legal services at issue here are not personal in nature but involved the publication of corporate information to third parties, i.e., the investors, the policies underlying the prohibition of bare assignment of legal malpractice claims are inapplicable under these circumstances." Appendix, slip op. at 5. The court also held, without citation, that Kaplan was "no different from a trustee in bankruptcy who has full standing to bring a debtor's legal malpractice claim." Id. The court therefore concluded that Kaplan "ha[d] standing to bring the claims for malpractice against the Attorneys." Id.

"For the same reasons," the Third District also held that the trial court had "incorrectly determined that [the claims against the Attorneys were] exempt by law from levy and sale under an execution of assignment, pursuant to section 727.104." Id.

A timely motion for rehearing or, in the alternative, for certification was denied by the Third District on December 11, 2002, whereupon the Attorneys timely filed a notice to invoke the discretionary jurisdiction of this Court. By Order dated May 8, 2003, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

This Court has repeatedly and in multiple contexts recognized the unique and personal character of the attorney-client relationship. Thus, in Forgione and KPMG, this Court expressly recognized that 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 all militated against allowing the assignment of legal malpractice claims. For much the same reasons, this Court has consistently limited attorneys' liability in negligence to clients with whom they share privity of contract. See Espinosa; Angel. Moreover, the decisions of the district courts of appeal have been uniformly in accord.

The decision of the Third District marks a dramatic departure from this unbroken line of Florida law and it should be reversed. There are three reasons.

First, this Court has consistently held that legal malpractice claims are not assignable and, prior to the decision of the Third District in this case, no Florida court has ever recognized an exception to that rule. As this Court has previously recognized, there are strong public policies supporting the rule of nonassignability and, contrary to the decision of the Third District, those policies apply with equal force in this case. Moreover, the substantial majority of states to have considered the question have likewise concluded that legal malpractice claims cannot be assigned.

Second, this Court has consistently held that only clients may sue their attorneys for legal malpractice. Moreover, where, as here, the client is a corporation, Florida law is equally clear that the "client" is the corporation itself, and not the creditors or shareholders of the corporation. Contrary to this well-established law, the

Third District reasoned that the policies underlying the rule of nonassignability (and therefore the rule itself) did not apply in this case because the Attorneys were alleged to have provided legal advice to a corporation in connection with its issuance of private placement memoranda to "prospective shareholders." The court therefore analogized the Attorneys' role and duty to the role and duty of the auditors of financial statements. The Court should reverse the decision of the Third District and reaffirm the longstanding principle that an attorney representing a corporation owes "ultimate allegiance" to the corporation, not to its "creditors and stockholders," and that only the corporation, as the attorney's client, has standing to assert a legal malpractice claim against its attorney.

Third, the statute upon which Kaplan premised his standing to sue – Chapter 727, Fla.Stat., the assignment for the benefit of creditors statute – expressly excepts from assignment those assets exempt by law from forced sale. Legal malpractice claims, precisely because they are considered personal, are exempt and therefore do not pass by assignment under Chapter 727. Moreover, the legislative history of Chapter 727 confirms that such assets were intended to remain the property of the debtor-assignor. In this regard, a state law assignment for the benefit of creditors is entirely different from federal bankruptcy (contrary to the Third District's unsupported conclusion that an assignee is "no different from a trustee in bankruptcy").

This Court has consistently recognized that only clients may sue their attorneys for professional malpractice and that third parties, including assignees, cannot. There is no reason to change that rule or to depart from it in this case.

Accordingly, the decision of the Third District should be reversed with instructions that this action be dismissed with prejudice.[7]

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[7] **The trial granted the Attorneys' motions to dismiss with prejudice. The Order of the trial court is therefore "subject to de novo review." Siegle v. Progressive Consumers Ins. Co., 819 So.2d 732, 734 (Fla. 2002).**

ARGUMENT

I. The Court Should Reaffirm the General Rule That Legal Malpractice Claims Are Not Assignable as a Matter of Florida Law.

This Court has repeatedly held that legal malpractice claims are not assignable in Florida. The Court first considered the issue in Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557, 559 (Fla. 1997). The question presented in Forgione was whether a claim for negligence by an insured against an insurance agent for failure to procure appropriate insurance could be assigned to a third party. Id. at 558. The Court held that such a claim could be assigned because the relationship between an insured and his insurance agent, unlike the relationship between a client and his attorney, was not personal. Id. at 559-60.

The starting point of the Court's analysis was the Florida law holding that legal malpractice claims are not assignable:

> Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships.'

Id. (quoting Washington v. Fireman's Fund Ins. Co., 459 So.2d 1148, 1149 (Fla. 4th DCA 1984)) (emphasis added). The Court then went on to contrast the attorney-client relationship and the insurance agent-insured relationship. The Court noted that attorneys and clients have "a confidential relationship, which includes constraints upon information that can be disclosed to others," whereas the law imposes no "similar constraints on communications between an insurance agent and an insured." Id. at 560. The Court also noted that "[t]he relationship between an attorney and client is a fiduciary relation of the very highest character, and the attorney owes a duty of

undivided loyalty to the client." Id. An insurance agent, in contrast, although "required to use reasonable skill and diligence in obtaining coverage for an insured," "also owes the insurance company . . . an obligation of high fidelity." Id. Lastly, the Court noted that the relationship between attorney and client is "a personal one" and that an attorney "may not substitute another attorney" without the client's permission, whereas insurance agents are routinely "substituted without prior notification." Id. Based upon these "substantial differences," the Court concluded that the public policy considerations that supported the rule of nonassignability of legal malpractice claims did not apply and that an insured's negligence claim against his insurance agent could be assigned.

The Court next considered the rule of nonassignability of legal malpractice claims in KPMG Peat Marwick v. Nat'l Union Fire Ins. Co., 765 So.2d 36 (Fla. 2000). The question presented in KPMG was whether a claim for professional malpractice against an independent auditor could be assigned. Id. at 36. Just as in Forgione, the starting point of the Court's analysis was the Florida law holding that legal malpractice claims are not assignable. Describing its earlier holding in Forgione, the Court stated:

> This Court noted 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 owed to the client.

KPMG, 765 So.2d at 38.

The Court then went on, just as it did in Forgione, to contrast the attorney-client relationship and the auditor-client relationship. The Court noted that

"an accountant's duty of confidentiality is similar to that of an attorney," but distinguished "the type of accountant-client relationship in which the accountant is an independent auditor hired to give an opinion on financial statements." Id. at 38. The Court then stressed the very different roles and duties assumed by attorneys, who owe an "undivided to duty of loyalty" to their clients, and "independent auditors," who assume "a public responsibility transcending any [client] relationship." Id. Thus, the Court held:

> Unlike an attorney who is required to zealously represent a client's position in an adversarial setting, an independent auditor who is hired to give an opinion on a client's financial statements must do so with an independent impartiality which contemplates reliance upon the audit by interests other than the entity upon which the audit is performed.

Id. (emphasis added)[8]

In its decision, the Third District acknowledged this Court's clear statement in Forgione that legal malpractice claims are not assignable in Florida. However, the court then went on, incorrectly, to state that KPMG had "modified" Forgione to permit assignment "where the claims involve reliance on the allegedly confidential information by interests other than the entity for whom the information was prepared." Appendix, slip op. at 3.

As our review of Forgione and KPMG makes clear, however, KPMG did

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[8] **The KPMG Court "[left] for another day the issue of the assignability of accountant malpractice claims based in situations other than those involving audits." 765 So.2d at 38-39. Notably, this Court has never suggested that the nonassignability of a legal malpractice claim may depend on the situation in which the legal advice is rendered.**

not in any way modify the general rule against the assignability of legal malpractice claims set forth in Forgione. To the contrary, KPMG (like Forgione) explicitly recognized "the personal nature of legal services" and expressly distinguished the services provided by attorneys from the services provided (and duties undertaken) by independent auditors. KPMG, 765 So.2d at 38. Indeed, the KPMG Court allowed the assignment of professional malpractice claims against independent auditors precisely because the auditor-client relationship did not approximate the close, personal, fiduciary relationship between attorney and client.

In effect, the Third District held that "the policies underlying the prohibition of [the] bare assignment of legal malpractice claims" did not apply in this case for two reasons. First, the Court extended the rationale of KPMG to the Attorneys on the grounds that "the legal services at issue here [were] not personal in nature but involved the publication of corporate information to third parties, i.e., the investors." Appendix, slip op. at 5. This was plainly error. Although the Attorneys are alleged to have participated in the preparation of MRI's private placement memoranda for publication to "prospective shareholders," it remains the case that the Attorneys' only client, and the only entity to whom they owed an "undivided duty of loyalty" was MRI. The fact that the private placement memoranda were intended for publication to third parties does not make the legal services provided by the Attorneys to MRI any less "personal," or the privileged communications between the Attorneys and MRI any less confidential. In effect, the contours of the Attorneys' fiduciary duty to their only client, MRI, remain unchanged. There is thus no basis to extend the rationale of KPMG to the Attorneys here.

Second, the Third District held that Kaplan as the assignee for the benefit of creditors of MRI was "acting as a fiduciary for" MRI, and thus "stepped into the shoes" of MRI for purposes of the assertion of MRI's putative legal malpractice claims against the Attorneys. This holding was also in error. The duties of the assignee are defined by statute and no statutory provision imposes a fiduciary obligation on the assignee to the debtor-assignor. See Chapter 727, Fla.Stat. To the contrary, as the Complaint plainly states, Kaplan is the "assignee for the benefit of creditors," not for the benefit of MRI. Complaint, ¶ 3 (Vol. V; R.1574-1612.) It is thus to creditors, and not to MRI, that Kaplan owes his primary obligation. See, e.g., Mason Tenders Dist. Council Welfare Fund v. Logic Const. Corp., 7 F.Supp. 2d 351, 355 (S.D.N.Y. 1998) ("The assignee thus is acting in the interest of Logic's creditors, not Logic."); In re Colony Press, Inc., 83 B.R. 862 (D. Mass. Bankr. 1988) (recognizing "inherent conflict of interest" between attorney's role as assignee for the benefit of creditors and counsel to the debtor-assignor); Linton v. Schmidt, 88 Wis.2d 183, 198, 277 N.W. 2d 136, 143 (Wis. 1979) (holding "the assignee is therefore bound to look primarily to the interests of the creditors"). Because Kaplan's duties run primarily to the creditors of MRI, and not to MRI itself, he is just as much a "stranger" to the attorney-client relationship between the Attorneys and MRI as any third-party assignee. As a consequence, the public policy considerations that underlie the general rule of nonassignability of legal malpractice claims apply with equal force to Kaplan as an assignee for the benefit of creditors.

The strong public policies supporting the rule of nonassignability of legal malpractice claims have led the substantial majority of states to have considered the

question to likewise conclude that legal malpractice claims are personal to the client and cannot be assigned. Nineteen states – Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Tennessee, Texas, Virginia and Washington – currently hold that legal malpractice claims are not, as a rule, assignable.[9] In contrast, only seven jurisdictions – District of Columbia, Maine, Massachusetts, New York, Oregon, Pennsylvania and Rhode Island – hold that, either generally or under the specific circumstances at issue, legal malpractice claims may be assigned.[10]

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9 **Arizona:** Schroeder v. Hudgins, 142 Ariz. 395, 690 P.2d 114 (Ariz. App. Div. 1 1984); Botma v. Huser, 39 P.3d 538 (Ariz. Ct. App. 2002); **California:** Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (Cal.App. 2 Dist. 1976); **Colorado:** Roberts v. Holland & Hart, 857 P.2d 492 (Colo.App. 1993); **Connecticut:** Continental Ins. Co. v. Pullman, Comley, Bradley & Reeves, 709 F.Supp. 44 (D.Conn. 1989); **Florida:** KPMG Peat Marwick v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., 765 So.2d 36 (Fla. 2000); Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997); **Illinois:** Brocato v. Prairie State Farmers Ins. Ass'n, 166 Ill.App.3d 986, 520 N.E.2d 1200, 117 Ill.Dec. 849 (Ill.App. 4 Dist. 1988); **Indiana:** Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991); **Kansas:** Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson, 250 Kan. 490, 827 P.2d 758 (Kan. 1992); **Kentucky:** Coffey By and Through Collins v. Jefferson County Bd. of Educ., 756 S.W.2d 155 (Ky.App. 1988); **Michigan:** Joos v. Drillock, 127 Mich.App. 99, 338 N.W.2d 736 (Mich.App. 1983); **Minnesota:** Wagener v. McDonald, 509 N.W.2d 188 (Minn. App. 1993); **Missouri:** Scarlett v. Barnes, 121 B.R. 578 (W.D. Mo. 1990); **Nebraska:** Earth Science Laboratories, Inc. v. Adkins & Wondra, P.C., 246 Neb. 798, 523 N.W.2d 254 (Neb. 1994); **Nevada:** Chaffee v. Smith, 98 Nev. 222, 645 P.2d 966 (Nev. 1982); **New Jersey:** Alcman Services Corp. v. Samuel H. Bullock, P.C., 925 F.Supp. 252 (D.N.J. 1996), aff'd, 124 F.3d 185 (3rd Cir. 1997); **Tennessee:** Can Do, Inc. Pension and Profit Sharing Plan and Successor Plans v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865 (Tenn. 1996), cert. denied, 117 S.Ct. 298 (1996); **Texas:** Britton v. Seale, 81 F.3d 602 (5th Cir. 1996); Mallios v. Baker, 11 S.W.3d 157, 43 Tex. Sup. Ct. J. 254 (Tex. 2000); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.-San Antonio 1994); **Virginia:** MNC Credit Corp. v. Sickels, 255 Va. 314, 497 S.E.2d 331 (Va. 1998); **Washington:** Kommavongsa v. Haskell, 67 P.3d 1068 (Wash. 2003).

10 **District of Columbia:** Richter v. Analex Corp., 940 F.Supp. 353 (D.D.C. 1996); **Maine:** Thurston v. Continental Cas. Co., 567 A.2d 922, 58 USLW 2446 (Me. 1989); **Massachusetts:** New Hampshire Ins. Co., Inc. v. McCann, 429 Mass. 202,

For all of these reasons, the Court should reaffirm the rule that legal malpractice claims are not assignable as a matter of Florida law and also hold that the rule applies to the Attorneys here.

II. The Third District's Rationale for the Creation of an Exception to the General Rule of Nonassignability in This Case Violates The Strict Rule of Privity.

In Angel, Cohen and Rogovin v. Oberon, Investment, N.V., 512 So.2d 192 (Fla. 1987) and Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378 (Fla. 1993), this Court clearly held that attorneys' liability for negligence in the performance of their professional duties is limited to "clients with whom they share privity of contract." Angel, 512 So.2d at 194; accord Espinosa, 612 So.2d at 1379. The only instance in which the strict rule of privity is relaxed is where the plaintiff has been shown to be an intended third-party beneficiary of the contract. Angel, 512 So.2d at 194; Espinosa, 612 So.2d at 1380.

The strict rule of privity, which applies to attorneys, stands in contrast to the rule applied to auditors by this Court in First Florida Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990). In Max Mitchell, the Court held that "[b]ecause of the heavy reliance upon audited financial statements in the contemporary financial world, . . . permitting recovery only from those [auditors] in privity or near privity

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707 N.E.2d 332 (Mass. 1999); **New York:** Vitale v. City of New York, 183 A.D.2d 502, 583 N.Y.S.2d 445 (N.Y.A.D. 1 Dept. 1992); **Oregon:** Gregory v. Lovlien, 174 Or.App. 483, 26 P.3d 180 (Or. App. 2001); Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (Or. 1977), disavowed on other grounds, Lancaster v. Royal Ins. Co. of America, 302 Or. 62, 726 P.2d 371 (Or. 1986); **Pennsylvania:** Hedlund Mfg. Co., Inc. v. Weiser, Stapler & Spivak, 517 Pa. 522, 539 A.2d 357 (Pa. 1988); **Rhode Island:** Cerberus Partners, L.P. v. Gadsby & Hannah, 728 A.2d 1057 (R.I. 1999).

[with clients] is unduly restrictive." 558 So.2d at 15. In Espinosa, in contrast, the Court expressly refused to expand an attorney's liability for negligence beyond "clients with whom the attorney shares privity of contract." 612 So.2d at 1379.

This distinction is critical. As this Court recognized in both KPMG and Forgione, "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." KPMG, 765 So.2d at 38; Forgione, 701 So.2d at 559. Audit services, in contrast, are not "personal" in nature: the auditor is expected to be independent and to render an opinion on his client's financial statements on which others will rely; the attorney is expected to give confidential legal advice to his client alone. That is why both the rule of privity and the rule of nonassignability apply to attorneys, but not to auditors.

The decision of the Third District, in effect, expands the strict rule of privity that this Court has repeatedly held governs the scope of attorney liability, by allowing Kaplan, who is not in privity with the Attorneys, to assert negligence claims against them. Notably, the court cited no authority for this unprecedented expansion of attorney liability. Rather, the Third District incorrectly relied upon language in this Court's decision in KPMG describing the role of auditors, not attorneys, to whom the strict rule of privity does not apply precisely because of the very different role they serve. See Appendix, slip op. at 3-4; see supra at 14-16.

Allowing Kaplan to pursue the putative legal malpractice claims of MRI under these circumstances would plainly violate the strict rule of privity. The Attorneys, as counsel to MRI in connection with the preparation of the private

placement memoranda at issue, represented and owed a duty to MRI, and only MRI, not its creditors or shareholders. "An attorney who represents a corporation is 'not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholders individually.'" Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So.2d 381, 389 (Fla. 4th DCA 1999). "The duty of an attorney for [a] corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders." Brennan v. Rueffner, 640 So.2d 143, 146 (Fla. 4th DCA 1994). Accord Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane, 763 So.2d 1274, 1276-77 (Fla. 1st DCA 2000) (holding that unit owners were not intended third-party beneficiaries of legal services contract between condominium association and attorneys and that attorneys therefore owed no duty to unit owners). Thus, MRI, and only MRI, has standing to assert any putative legal malpractice claims against the Attorneys. Kaplan, as the assignee of MRI and as the putative representative of the creditors and shareholders of MRI, does not.

III. The Court Should Not Create An Exception to The General Rule of Nonassignability for Kaplan Simply Because He is an Assignee For the Benefit of Creditors.

In the lower courts, Kaplan argued that the general rule of nonassignability ought not to preclude him from pursuing the putative legal malpractice claims of MRI against the Attorneys because of his unique status as an assignee for the benefit of creditors, pursuant to § 727.104, Fla.Stat. According to Kaplan, the policies underlying the general rule do not apply to him and so the rule ought not to apply to

him either. Instead, he argued, and the Third District agreed, he was "no different from a trustee in bankruptcy who has full standing to bring a debtor's malpractice claim." Appendix, slip op. at 5.

For the reasons set forth below, the Court should reject Kaplan's invitation to create an exception to the general rule of nonassignability for assignees for the benefit of creditors pursuant to § 727.104, Fla.Stat.

A. Because Legal Malpractice Claims Are "Exempt By Law From Levy and Sale Under An Execution," They Are Expressly Excepted From Assignment Under Section 727.104, Fla.Stat.

There is no reason for the Court to create an exception to the general rule of nonassignability to permit Kaplan to sue in this case because, based on the clear and unambiguous language of § 727.104, Fla.Stat., on which Kaplan premises his standing to sue, the putative legal malpractice claims of MRI were never assigned to him.

Section 727.104(1)(b), Fla.Stat., sets forth the form of assignment and provides that the assignor shall assign "all of its assets, except such assets as are exempt by law from levy or sale under an execution." (emphasis added). In addition, § 727.103(1), Fla.Stat., defines "asset" to mean "a legal or equitable interest in property . . . except property exempt by law from forced sale." (emphasis added). Notably, the assigment for the benefit of creditors appended to the Complaint in this action and on which Kaplan expressly premises his standing to sue contains the identical language. See Complaint, Exhibit A (Vol. V; R.1574-1612). Thus, Kaplan, as the assignee for MRI does not succeed to all of the assets of MRI; rather he

succeeds only to those assets which are not exempt by law from levy or sale.

This limitation on the scope of the statutory assignment proves fatal to Kaplan's claim. Although "[o]rdinarily, a judgment debtor's choses in action may be reached by supplementary proceedings," "narrow exceptions" do exist. Craft v. Craft, 757 So.2d 571, 571 (Fla. 4th DCA 2000). These "exceptions" include personal suits which "have been held not to be assignable," specifically "suits for legal malpractice." Id. Accord Mickler v. Aaron, 490 So.2d 1343 (Fla. 4th DCA 1986) (holding that legal malpractice claim, although a chose in action, was not subject to execution because not assignable).

Section 727.104, Fla.Stat., is clear and unambiguous. Only those assets not exempt by law from forced sale are actually assigned to the assignee for the benefit of creditors; assets that are exempt remain the property of the debtor-assignor. Florida common law is equally clear. Legal malpractice claims are personal and not assignable; see supra at 11-14, and they are therefore exempt from forced sale. The inescapable conclusion is that the putative legal malpractice claims at issue were never assigned to Kaplan.

The legislative history of Chapter 727, Fla.Stat., is in accord. "The practice of assignment for the benefit of creditors existed at common law. . . but has been codified since Roman times." Moecker v. Antoine, 2003 WL 1086514, *4 (Fla. 1st DCA March 13, 2003) (internal citations omitted). Florida first codified the assignment for the benefit of creditor practice in 1889. Then, as now, the law required that a debtor-assignor assign all of his "real and personal property, except such as is exempted by law from forced sale." § 727.01, Fla.Stat. (1889) (emphasis added).

The law stood unchanged until 1987 when it was amended to "establish uniform procedures to govern the actions of the assignor, the assignee, the creditors and the courts." Senate Staff Analysis and Economic Impact Statement, Bill SB808 (April 30, 1987). As the Senate Staff Analysis makes clear, however, it was not the intent of the Legislature to change the law governing assignments when the amended statute was adopted in 1987. Id. ("The economic impact upon the public should be insignificant since the bill primarily clarifies and updates existing Florida law as it relates to assignments.") (emphasis added). Thus, the amended statute, like the 1889 statute, continues to exempt from assignment "such assets as are exempt by law from levy and sale under an execution." § 727.104, Fla.Stat.

In short, it is and has always been the case in Florida that an assignee for the benefit of creditors is assigned only those assets which are not exempt from forced sale, and the assignor retains the remainder, which in this case includes the assignor's putative legal malpractice claims. Cf. Kirkland v. Lowe, 1857 WL 2643 (Miss. Err. & App. 1857) (holding that where the account sued upon was not assignable, the assignee could not maintain an action in his own name but "the suit could be maintained in the name of the insolvent").

Indeed, not only does MRI retain its putative legal malpractice claims under § 727.104, Fla.Stat., it has actually asserted such claims in its own name and those claims remain pending as of this writing. See supra at 7.

B. Contrary to the Decision of the Third District, An Assignee for the Benefit of Creditors is "Different" from a Trustee in Bankruptcy in Important Respects.

Kaplan argued, and the Third District agreed, that there was no meaningful distinction between a federal bankruptcy proceeding and a state law assignment for the benefit of creditors. In fact, there are substantial differences.

First, under federal bankruptcy law, the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property." Camp v. St. Paul Fire & Marine Ins. Co., 616 So.2d 12, 15 (Fla. 1993), citing 11 U.S.C. § 541(a)(1) (emphasis added). "[T]he determination of what constitutes section 541 property is a federal question." Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1343 (7th Cir. 1987), cert. denied, 485 U.S. 906 (1988). Thus, "[r]egardless of whether a personal injury claim is transferable or assignable under state law, such claims become part of the bankruptcy estate under section 541." Sundae v. Scot, 529 N.W. 2d 362, 363 (Minn. App. 1995). The debtor may then seek to exempt property from the estate under 11 U.S.C. § 522. Florida does not recognize the exemptions set forth in 11 U.S.C. § 522(d); however, residents of the state are allowed to claim those exemptions "given . . . by the State Constitution and the Florida Statutes." See § 222.20, Fla.Stat.

In bankruptcy, all property, including nonassignable claims, automatically becomes property of the estate and it is up to the debtor to claim a constitutional or statutory exemption. If the debtor does not claim an exemption, or if there is none, the claim – notwithstanding the fact that it may be nonassignable as a matter of state law – remains the property of the bankruptcy estate as a matter of federal law.[11] In a

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[11] **Federal Deposit Ins. Corp. v. Martin, 770 F.Supp. 623, 626-27 (M.D. Fla. 1991), is analogous. In Martin, the FDIC as receiver purported to assert the legal malpractice claims of a failed bank. The court recognized that legal**

state law assignment proceeding, in contrast, only those assets that are not "exempt by law from forced sale" become property of the assignment estate. The debtor-assignor is not required to claim an exemption; he simply retains property that has not been assigned. Moreover, unlike the debtor in bankruptcy, who is expressly limited to constitutional and statutory exemptions, the assignor retains all property that is "exempt by law from forced sale," which includes those nonassignable causes of action, like the putative legal malpractice claims Kaplan has purported to assert here, that are exempt by case law. Cf. In re Mills, 46 B.R. 525, 526 (S.D. Fla. Bankr. 1985) (holding that personal injury claim was property of bankruptcy estate and denying exemption because "[i]n Florida, there is no statutory exemption for causes of action").

These differences between federal bankruptcy and state assignment practice explain why bankruptcy trustees are authorized to pursue the putative legal malpractice claims of debtors, but assignees for the benefit of creditors are not. Legal malpractice claims, although nonassignable as a matter of state law, are non-exempt property of the bankruptcy estate as a matter of federal law. Assignment practice, in contrast, is governed exclusively by state law, which recognizes the nonassignability of legal malpractice claims and therefore excepts such claims from the assignment estate.

Second, in bankruptcy, (subject to limited exceptions) the debtor obtains

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malpractice claims were nonassignable as a matter of Florida law, but held that federal statutory law preempted contrary state law. So here, legal malpractice claims, although nonassignable as a matter of state law, became property of the bankruptcy estate as a matter of federal law.

a discharge of his debts See, e.g., 11 U.S.C. § 523. In contrast, "no discharge from [an] assignor's debts is obtainable in an assignment for the benefit of creditors." See Freeman v. Marine Midland Bank New York, 419 F.Supp. 440, 447 (E.D.N.Y. 1976). "After a claim is allowed, the debtor-assignor continues to remain liable for the unpaid balance of the debt" and his creditors may pursue whatever remedies may be available to them. Id.

The lack of a discharge fundamentally distinguishes state law assignment practice from bankruptcy. Because the debtor-assignor's debts are not discharged, the debtor-assignor remains obligated to his creditors following assignment to the extent such creditors have not been paid. Thus, if MRI successfully pursues its putative legal malpractice claims against the Attorneys, any moneys it recovers will be subject to any claims of creditors and shareholders that remain after assignment.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Third District Court of Appeal with instructions to dismiss this action with prejudice.

Respectfully submitted,

Caryn Bellus, Esq.
Florida Bar No. 60445
Kubicki Draper
City National Bank Building
25 West Flagler Street
Miami,Florida 33130
Counsel for Petitioner
Franzino & Rosenberg, P.C.

Laura Besvinick, Esq.
Florida Bar No. 391158
Hogan & Hartson L.L.P.
1111 Brickell Avenue
Suite 1900
Miami, Florida 33131
Counsel for Petitioner
Cowan Liebowitz & Latman, P.C.

By______________________________
Laura Besvinick

Deborah Poore Knight, Esq.
Florida Bar No. 289949
Walton, Lantaff, Schroeder, et al.
Blackstone Building, Third Floor
707 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
Counsel for Petitioners Marshall Platt, Marshall Douglas Platt, P.A., Jack B. Packar, P.A. and Packar and Platt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail on this ______ day of June, 2003, on Steven E. Stark, Esq. and David A. Friedman, Esq., Fowler White Burnett, Bank of America Tower, 17th Floor, 100 S.E. Second Street, Miami, Florida 33131 and Robert M. Klein, Esq., and Marlene Reiss, Esq. Stephens, Lynn, Klein, 9130 South Dadeland Boulevard,

Penthouse II - Two Datran Center, Miami, Florida 33156.

____
Laura Besvinick

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210 (a)(2).

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APPENDIX

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