IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC03-59
L.T. Case No. 3D01-2081

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

Petitioners,

v.

In re: Assignment for the Benefit of Creditors Of MEDICAL RESEARCH INDUSTRIES, INC., Assignor to DONALD KAPLAN, Assignee,

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

Respondents,

PETITIONERS STEPHEN M. ROSENBERG'S and JAMES J. D'ESPOSITO'S BRIEF ON THE MERITS

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

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STATEMENT OF AUTHORITIES

Other Authorities:

STATEMENT OF THE CASE AND FACTS

These Petitioners join in the Statement of the Case and Facts as set forth within the Brief filed by Petitioner Cowan, Liebowitz & Latman, P.C.

SUMMARY OF THE ARGUMENT

To the extent that these Petitioners have joined in the arguments set forth in the Initial Brief on the Merits filed by Petitioner Cowan, Liebowitz & Latman, P.C., we also join in the Summary of the Argument as set forth within Cowan, Liebowitz's Initial Brief.

In addition, these Petitioners have advanced additional public policy arguments, which emphasize the policy arguments set forth by this Court in *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557 (Fla. 1997) and *KPMG Peat Marwick v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, 765 So.2d 36 (Fla. 2000) and which are particularly applicable in this case.

The stark differences between a trustee in bankruptcy and an assignee for the benefit of creditors - - as the Plaintiff/Appellee is in this case - - demonstrate the applicability of *Forgione* and *KPMG* and highlight the error in the Third District Court of Appeal's opinion, which glosses over those distinctions and, in fact, attempts to incorrectly liken those two distinctly different roles in terms of their duties and obligations.

Of paramount importance is the need to protect the sanctity of the attorney-client privilege vis-a-vis the corporate entity and its counsel.

ARGUMENT

In addition to the legal bases set forth in the Brief filed by Petitioner Cowan, Liebowitz & Latman, P.C., in which we join, these Petitioners submit that public policy considerations dictate that the Court disapprove the Third District Court of Appeal's opinion.

The public policy considerations that are set forth within *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557 (Fla. 1997) and *KPMG Peat Marwick v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, 765 So.2d 36 (Fla. 2000), the cases that directly and expressly conflict with the Third District Court of Appeal's opinion in this case, are precisely on point in this case. The same public policy considerations apply in this case, and mandate that the Court disapprove the Third District's decision.

Legal malpractice claims repeatedly have been recognized as personal torts that cannot be assigned because of "the personal nature of legal services which involve highly confidential relationships." *Forgione, supra* at 559, *quoting Washington v. Fireman's Fund Insurance Company*, 459 So.2d 1148, 1149 (Fla. 4th DCA 1984). In *Forgione*, the Court recognized that the "real basis and substance of the malpractice suit" is a breach of duties within the personal relationship between the attorney and client. *Forgione, supra* at 559, *quoting*

Christison v. Jones, 405 N.E.2d 8, 10 (Ill. 1980). 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 have led to the conclusion that legal malpractice claims are not subject to assignment.

At the core of this analysis is the fiduciary and confidential relationship shared by the client with his or her attorney. The law does not impose similar constraints on communications within the context of most other relationships. The fiduciary relationship between client and attorney is of the highest character, and the attorney owes a duty of undivided loyalty to the client. *See* Rule 4-1.7, Rules Regulation the Florida Bar (general rule regarding conflict of interest); 4-1.8 (prohibiting certain transactions which involve conflict of interest); 4-1.9 (explaining conflict of interest as to former client). *See also Forgione, supra,* at 560*; Peat, Marwick, supra* at 38.

The Court, in *Forgione* and *Peat, Marwick* ultimately held that these public policy considerations *did not* preclude the assignment of an insured's claim for negligence against an insurance agent or the assignment of an accounting malpractice claim within the very limited context of an audit, respectively.

In contrast, in this case, the relationship between the *assignee*, Donald Kaplan, and the Defendants is unquestionably distinguishable from the relationship

between *MRI* (the corporate entity) and the Defendants, such that the policy considerations behind the non-assignability of malpractice claims results in the inescapable conclusion that MRI's purported malpractice claims are *not* assignable to Kaplan.

MRI's claims should not be transferrable to Kaplan because Kaplan does not "stand in the shoes" of MRI, such that the Defendants owe the same fiduciary duty to Kaplan as that which they owe to MRI. Rather, if Kaplan stands in anyone's shoes, it is those of the creditors. Indeed, as an assignee for the benefit of creditors, Kaplan's fiduciary duty actually is to the creditors whose interests he has been appointed to represent, not to MRI. *See European American Bank v. Prime Leasing, Inc.*, 2001 WL 563783, *3 (N.D. Ill. 2001). On the other hand, the Defendants' duty of loyalty has always been - - and still is - - to MRI, not its creditors. *See In re Colony Press, Inc.*, 83 B.R. 862 (D. Mass. 1988)(debtor's counsel cannot also serve as assignee for benefit of creditors because of inherent conflict of interest); *Block v. Schragenheim*, 433 N.Y.S.2d 979 (N.Y. Civ. Ct. 1980).

In that regard, communications between MRI and the Defendants remain confidential. Indeed, MRI - - the corporate client - - was still a viable entity at the time this lawsuit was filed in January of 2001 and did not go into inactive status until

October of 2002, almost two years after Kaplan filed suit on behalf of MRI's creditors. In fact, in June of 2001, MRI filed a separate lawsuit against the Defendants on its own behalf in Broward County, Florida.[1] As such, no one but MRI may waive the confidentiality that MRI enjoys with its counsel. Certainly, Kaplan may not. The attorney-client privilege that exists in this case may only run on a single course, i.e., between MRI and its counsel, the Defendants. There is no basis in law for the position that MRI must share the privilege with an assignee for the benefit of creditors. That factor, in and of itself, demonstrates that Kaplan, as assignee for the benefit of creditors, has not "stepped into the shoes" of MRI as is the general effect of a true assignment. To suggest otherwise would allow Kaplan to circumvent MRI's confidentiality privilege and, in fact, allow for the divulgence of protected communications to an adversary, a result that is completely contrary to the public policy considerations advanced in *Forgione* and *Peat, Marwick*.

As was noted in the brief has that been submitted on behalf of Petitioner Cowan, Liebowitz and Latman, P.C., the Third District Court of Appeal analogized between the assignee, Kaplan, and a trustee in bankruptcy. In fact, when one compares the obligations and duties of individuals who hold such positions, it should be clear as to precisely why the roles are eminently distinguishable; those

[1] The Broward County lawsuit is presently stayed.

distinctions further clarify precisely why a trustee in bankruptcy may in fact pursue a claim for legal malpractice, while an assignee for the benefit of creditors may not. First, however, it is important to review the statutory basis for the trustee's authority.

As is noted in Cowan, Leibowitz's brief, Section 727.104(1)(b), Fla. Stats., specifically excepts from the operation of that statute "such assets as are exempt by law from levy or sale under execution." Fla.Stats. §727.104(1)(b). The bankruptcy statutes contain no such exception. To the contrary, the Bankruptcy Code was amended in 1978 to eliminate an exemption which was virtually identical to the exceptions that are set forth in §727.104, *i.e.*, claims that are exempt by law from levy or sale pursuant to execution.

> "[T]he Bankruptcy Reform Act of 1978 fundamentally changed the bankruptcy treatment of exempt property. Prior to the Bankruptcy Reform Act, the bankruptcy estate did not include property which was subject to exemption from attachment or execution under state law."

Edwards v. Francini, 965 P.2d 318 (N. Mex. App. 1998). As a result of that amendment, personal injury claims and other personal torts became a part of the bankruptcy estate, to be administered by the bankruptcy trustee. *See also Sierra Switchboard Company v. Westinghouse Electric Company*, 789 F.2d 705, 707-709 (9th Cir. 1986). Thus, in light of Federal court findings to the effect that federal

bankruptcy court procedures "trumped" state law, it is clear why a bankruptcy court trustee maintains a unique position with regard to the pursuit of these types of claims.

The bankruptcy court trustee represents all parties to the proceedings, and has a fiduciary relationship with virtually all potential claimants, including the corporation "as debtor in possession," creditors and shareholders of the corporation. In essence, the trustee is empowered to speak for all of those potential claimants to the estate of the bankrupt entity; while there may be a priority of claims within the bankruptcy proceedings, all claims are adjudicated and liquidated by and through the trustee, who has the ultimate responsibility for resolving those issues, including determining whether and if to bring a claim for legal malpractice, how to resolve it and the manner in which the proceeds therefrom will be distributed. In addition, all potential claimants participate in the process.

The role and authority of a bankruptcy trustee stands in stark contrast to that of an assignee for the benefit of creditors - - including the corporation. The assignee for the benefit of creditors in empowered to act solely for the benefit of the creditors; the assignee has no fiduciary relationship with the corporation itself, or its shareholders. Thus, an assignee for the benefit of creditors cannot speak for the corporation in matters involving the waiver of corporate privileges. For this

simple reason alone, an assignment of legal malpractice claim "for the benefit of creditors" should not be permitted.

Hypothetically speaking, at any time, matters of privilege will arise in discovery involving a legal malpractice action; the scope of discovery that may be allowed in such instances - - and the extent of the waiver of the attorney/client privilege - - has been narrowly circumscribed by the Courts of this state. *See, e.g.*, *Ferraro v. Vining*, 744 So.2d 480, 482 (Fla. 3d DCA 1999), which notes that a defendant attorney may only reveal information "to the extent necessary to defend himself," once sued for legal malpractice; *see also, Coyne v. Schwartz, Gold, Cohen, Zackarann & Kotler*, 715 So.2d 1021 (Fla. 4th DCA 1998).

Among other things, these cases highlight the problem of determining when and how the client's privilege may be waived, *i.e.*, where there are multiple attorneys who are alleged to have represented the corporation, or successor counsel, who may have taken over the case. *Volpe v. Conroy, Simberg & Ganon, P.A.*, 720 So.2d 537 (Fla. 4th DCA 1998). In this case, that situation already exists, *i.e.*, multiple attorneys have been sued pursuant to the assignment, and there is no question that issues of privilege may arise, particularly if any of those attorneys are ultimately dropped from the case. In this posture, however, no one is in any position to determine will assert that privilege, or how it will be resolved.

There is one public policy issue which bears repetition, although it was discussed at length in the Cowan, Liebowitz's brief. Nevertheless, given the unique nature of audit services, and the public policy underlying this Court's determination that these types of claims can in fact be assigned, a final review of the distinctions between an auditor and an attorney representing a client bears additional emphasis.

As this Court noted in Peat, Marwick, an auditor does not represent the corporation. To the contrary, by definition, an auditor must remain completely independent of the client, to the extent that the auditor must pass on the propriety of financial information provided by the corporation, and then opine as to the financial status of the company. The engagement contemplates the reliance by third parties upon the auditor's independence. *KPMG.*, 765 So.2d at 38.

Thus, the auditor occupies a unique role in the realm of professionals, in that an auditor is retained by a corporation to perform an assessment that is completely independent of the corporation itself; it is the very nature of that independence that may also give rise to potential claims by third parties, in which simultaneously permits the assignability of such a claim.

In contrast, attorneys maintain a close fiduciary relationships with the client. That relationship may not be subject to attack by third parties, other than in extremely limited circumstances, *i.e.*, where the express intent of a testator is

frustrated by the negligence of the decedent's attorney, *Espinosa v. Sparver, Shevin, Shapiro, Rosen & Halburner*, 612 So.2d 1376 (Fla. 1993), absent some kind of direct fraud by the attorney, along with the client. *Angel, Cohen & Rogaven v. Oberon Investments, N.V.*, 512 So.2d 192 (Fla. 1987).

Neither situation inheres in the facts of this case, which involve rather common themes of negligence which would and could arguably have been asserted (and were in fact asserted) by MRI itself based upon the alleged negligence of the various Defendants in the preparation of the private placement memoranda for MRI. Those claims should simply not be assignable.

Given that fact, who is going to determine when and how to exercise objections that may be leveled to a potential breach of the attorney client privilege? Certainly, the assignee has no authority to waive claims of privilege, and it is questionable as to whether or not the assignee would have the standing to challenge a claimed waiver of privilege that may arguably be too broad. Yet, how are these issues to be resolved in the context of this type of proceeding, where the entity holding the privilege is not even a party to the lawsuit - - as it is in a bankruptcy proceeding? These Petitioners submit that these types of policy implications are inherent in the assignment of any claim for legal malpractice. The results do not change simply because the assignment in this instance was ostensibly pursuant to

statute, for the benefit of creditors. Under the circumstances, the Third District's decision should be reversed and the trial court's determination to dismiss this claim with prejudice should be reinstated.

CONCLUSION

In addition to the legal bases set forth within the Cowan, Leibowitz's Brief, the public policy considerations that support this Court's decisions in *Forgione v. Dennis Pirtle Agency, Inc.*, *supra*, and *KPMG Peat Marwick v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, supra*, are applicable in this case and require that the Court disapprove the decision of the Third District Court of Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a correct copy of the foregoing was sent by U.S. Mail on this 16th day of June, 2003, to:

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