IN THE SUPREME COURT
STATE OF FLORIDA

Case No.

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.

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,

BRIEF OF PETITIONERS ON JURISDICTION

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

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INTRODUCTION AND JURISDICTIONAL STATEMENT

This jurisdictional brief seeks discretionary review of a decision of the Third District Court of Appeal, rendered December 11, 2002, pursuant to Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., on grounds that the decision (i) expressly and directly conflicts with this Court's decisions in Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557 (Fla. 1997), and KPMG Peat Marwick v. Nat'l Union Fire Ins. Co., 765 So.2d 36 (Fla. 2000), by recognizing for the first time in Florida an exception to the rule against the nonassignability of legal malpractice claims and (ii) expressly and directly conflicts with this Court's decisions in Angel, Cohen & Rogovin v. Oberon Investments, N.V., 512 So.2d 192 (Fla. 1987), and Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378 (Fla. 1993), by expanding an attorney's liability for negligence beyond clients with whom the attorney shares privity of contract. For the reasons discussed below, the Court should grant discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

This is an appeal of an Order dismissing with prejudice an action for legal malpractice against the former attorneys for Medical Research Industries, Inc. ("MRI") brought not by MRI, but by Donald Kaplan ("Kaplan") as the assignee of MRI, pursuant to §727.104, Fla. Stat.

In the Complaint, Kaplan alleged that MRI issued certain private placement memoranda to sell shares in the company, that the shares should have been, but were not, registered with the SEC, and that the private placement memoranda were false and misleading in that they did not accurately disclose the intended use of the funds raised through the sale of the shares. Appendix, slip op. at 2. Based on these allegations, Kaplan purported to assert claims against the Attorneys for negligence, breach of fiduciary duty, indemnity and negligent supervision.

The trial court dismissed the claims asserted by Kaplan on two grounds. First, relying on Forgione, and KPMG, the trial court held that the claims that Kaplan purported to assert in his capacity as the assignee of MRI were not assignable as a matter of law. Second, the trial court held that the claims were expressly excepted from assignment under §727.104, Fla. Stat., the statute upon which Kaplan purported to base his standing to sue. Appendix, slip op. at 2-3.

Following the trial court's dismissal of the claims asserted by Kaplan, MRI sued the Attorneys in its own name, asserting the same claims that had previously been asserted by Kaplan. See Medical Research Industries, Inc. v. Cowan Liebowitz & Latman, P.C., et al., Case No. 01-011323 CACE 14, pending in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. The MRI action against the Attorneys remains pending.

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. 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," Appendix, slip op. at 3, 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 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 [were] not personal 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 [were] inapplicable under these circumstances." Appendix, slip

op. at 5. The court therefore concluded that Kaplan "ha[d] standing to bring the claims for malpractice against the Attorneys." Id.

A timely motion for rehearing or, in the alternative, for certification was denied by the Third District on December 11, 2002. See Appendix. This appeal follows.

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 KMPG, 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, prior to the decision of the Third District in this case, have been uniformly in accord.

The decision of the Third District is in express and direct conflict with this uninterrupted line of Florida law in two fundamental respects. First, the court held that a legal malpractice claim was assignable to an assignee for the benefit of creditors pursuant to §727.104, Fla. Stat., notwithstanding the bright line rule of

nonassignability recognized by this Court in Forgione and KPMG. Second, the court held that an assignee for the benefit of creditors, who was not in privity with the attorneys for the assignor-corporation, could sue the corporation's former attorneys for legal malpractice, notwithstanding the privity requirement recognized by this Court in Angel and Espinosa.

ARGUMENT

I. The Decision of the Third District is in Express and Direct Conflict With This Court's Decisions in KPMG and Forgione.

In KPMG and Forgione, this Court clearly stated that legal malpractice claims are not assignable in Florida. In Forgione, the Court contrasted negligence claims against attorneys (which are not assignable) with claims against insurance agents (which are). Similarly, in KPMG, the Court contrasted the attorney-client relationship with the auditor-client relationship and concluded that negligence claims against auditors, unlike attorneys, were assignable. Describing its earlier holding in Forgione, the KPMG 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. *Id.* at 559.

KPMG, 765 So.2d at 38.

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 "modified" Forgione. See Appendix, slip op. at 3. In fact, KPMG did not in any way modify the general rule against the assignability of legal malpractice claims set forth in Forgione. To the contrary, KPMG expressly distinguished the role served by attorneys from the role served by auditors. Thus, in KPMG, this Court stated:

> 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.

KPMG, 765 So.2d at 38 (emphasis added). Claims against auditors could be assigned, the Court held, precisely because the auditor-client relationship (like the insurance agent-client relationship addressed in Forgione) did not approximate the close personal, fiduciary relationship between attorney and client.

In the case at bar, MRI purportedly[1] assigned its putative legal malpractice claims against the Attorneys to Kaplan (pursuant to § 727.104, Fla.

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[1] The Attorneys also argued, and the trial court agreed, that the legal malpractice claim asserted by Kaplan had never been assigned by MRI under the terms of §727.104, Fla.Stat., because claims "exempt by law from levy or sale under an execution" are expressly excepted from assignment by the statute. Appendix, slip

Stat.), who then filed suit against the Attorneys based on the assignment. Appendix, slip op. at 2. The Third District then re-characterized Kaplan as a "transferee," id. at 3, and held that Kaplan could assert the assigned legal malpractice claims.

The decision of the Third District is utterly at odds with this Court's analysis. In Forgione and KPMG, this Court recognized and reiterated a bright line rule of nonassignability for legal malpractice claims premised on what the Court considered to be the unique attributes of the attorney-client relationship. In express and direct conflict with these decisions, the Third District created a first-ever exception to this rule premised on its (precisely contrary) view that the attorney-client relationship was comparable to the auditor-client relationship.

II. The Decision of the Third District Directly and Expressly Conflicts With This Court's Decisions in Angel and Espinosa and Decisions of the Fourth District.

In Angel and Espinosa, 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

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op. at 3; 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).

has been 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 [with clients] is unduly restrictive." 558 So.2d at 15. In Espinosa, in contrast, the Florida Supreme 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 served by auditors, not by attorneys, to whom the strict rule of privity does not apply precisely because of the very different role that auditors play. See Appendix, slip op. at 3-4. The decision of the Third District is thus in express and direct conflict with Angel and Espinosa because it applies the less restrictive rule of liability applicable to auditors to attorneys to whom the strict rule of privity applies.

For much the same reason, the decision of the Third District is in express and direct conflict with decisions of the Fourth District which, consistent with Angel and Espinosa, hold that an attorney for a corporation is in privity with – and thus owes a duty of care solely to – the corporation and not, as the Third District effectively held below, to the corporation's creditors and shareholders. See Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane, 763 So.2d 1274, 1276-77 (Fla. 4th DCA 2000) ("we hold that where an attorney represents a closely

held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder"); Brennan v. Ruffner, 640 So.2d 143 (Fla. 4th DCA 1994) (same).[2]

CONCLUSION

By improperly analogizing the role served by attorneys to the role served by auditors, the Third District has, in express and direct conflict with this Court's decisions in Forgione and KPMG (regarding assignability) and Angel and Espinosa (regarding privity), expanded the scope of attorney liability in Florida. The Court should accept discretionary review to resolve this important conflict.

Respectfully submitted,

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[2] The same cases hold that the shareholders should not to be viewed as intended third-party beneficiaries of the corporation's contract with its attorneys. Id.; accord Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So.2d 381, 389 (Fla. 4th DCA 1999) (same).

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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 January, 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

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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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