SUPREME COURT OF FLORIDA

CASE NO. SC 03-59
THIRD DISTRICT CASE NO. 3D01-3081
L.T. CASE NO. 99-26596 CA(04)
SUPPLEMENTAL PROCEEDING CASE NO. 01-1431 CA04

IN RE: Assignment for the Benefit of Creditors of
MEDICAL RESEARCH INDUSTRIES, INC.,
Assignor TO: DONALD KAPLAN, Assignee,

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, Appellees/Petitioners,

v.

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

ON DISCRETIONARY REVIEW OF A DECISION OF
THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Without reiterating the Petitioners' Statement of the Case and Facts, Respondents submit that it is appropriate to focus on the issue presented below and the essential holding of the Third District's Opinion. The issue, as stated by the court, was:

> The issue before us is 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.

The resolution of this issue, as stated by the court, was:

> 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. 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. Kaplan has standing to bring the claims for malpractice against the Attorneys.
>
> For the same reasons as set forth above, we further hold that the trial court incorrectly determined that such claims are exempt by law from levy and sale under an execution of assignment, pursuant to section 727.104, Florida Statutes (2000), the Assignment for Benefit of Creditors statute.

Opinion at 5. It is this holding that confers standing on the Assignee for the Benefit of Creditors and it is this holding that the Petitioners erroneously contend is in conflict with other decisions of this Court.

SUMMARY OF ARGUMENT

This Court should deny review because no conflict exists to justify this Court's exercise of conflict jurisdiction. The Opinion does not announce a rule of law that is contrary to another district court decision or to this Court's decisions, or otherwise make a different determination of law on the same or similar facts.

KPMG and *Forgione* are an accountant malpractice and an insurer liability case, respectively, that merely compare prior legal malpractice holdings to the facts in each of those cases. They do not expand those legal malpractice holdings to apply to the unique statutory relationship of an Assignee for the Benefit of Creditors to the estate under his care and do not conflict with the decision below.

The other cases that the Attorneys discuss are all cases that involve incidental third party beneficiaries who lack privity with the lawyers they are seeking to sue. In those cases the plaintiffs had interests that were disparate from the

person or entity to whom the lawyers owed their foremost duty. In the instant case, Kaplan's interest is one and the same with that of MRI -- he stands in its shoes. There is no conflict. This Court should deny review.

ARGUMENT

I. THE OPINION DOES NOT CONFLICT WITH *FORGIONE* OR *KPMG*

The Third District's Opinion does not conflict with any decision of this Court or another district court. This Court has previously refused "to exercise its discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." *The Florida Star v. B.J.F.*, 530 So. 2d 286, 289 (Fla. 1988). Contrary to the Attorneys' contention, the Opinion does not conflict with either *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997) or *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co.*, 765 So. 2d 36 (Fla. 2000). The Attorneys urge that *Forgione* constitutes a "bright-line" absolute "rule of nonassignability for legal malpractice claims" and that the Opinion, by permitting the Assignee for the Benefit of Creditors to proceed with this action violates that absolute rule. *Brief of Petitioners on Jurisdiction* at 7. Nevertheless, *Forgione*, which was not a legal malpractice case but rather an insurance coverage case, does not cite a single case that recognizes a "bright-line" absolute prohibition of the assignment of legal malpractice claims in every and any instance including instances such as bankruptcy and assignments for the benefit of creditors when the "assignment" is actually a transfer by operation of law, as the District

Court found. In addition, there is no holding, either in *Forgione* or in any other Florida case that considers the right of an assignee for the benefit of creditors to pursue a legal malpractice claim. As the District Court recognized, the rights of the assignee for the benefit of creditors derive from statute -- Florida Statutes, Section 727.101 *et seq*. -- and are comprehensive. The assignee for the benefit of creditors is a fiduciary and attorney-in-fact for the debtor. *Id*. § 727.104. An ordinary assignee has no such relationship with his assignor. The assignee for the benefit of creditors is *statutorily obligated* to bring actions as necessary on behalf of the estate. *Id*. §§ 727.108, 727.110. An arm's length assignee has no such obligation. Therefore, the situation at bar is distinguishable from the cases that Florida courts have considered in the past. Furthermore, bankruptcy trustees, receivers, and personal representatives *do* have standing to bring legal malpractice actions on behalf of the estates they represent and existing case law refutes the overstated application that the Attorneys would accord it. Finally, the Third District reconciles its holding with *Forgione* and its opinion does not "expressly and directly" conflict with that decision. To the contrary, it states that *Forgione* "recognizes the *general* prohibition in Florida of the *ordinary assignment* of legal malpractice claims because of the highly personal nature of legal representation and confidentiality." Opinion at 3 (emphasis added). The Opinion

correctly recognizes, however, that the instant case involves "an assignee (*actually transferee*) acting as a fiduciary for a corporation" who "has the legal charge of gathering and liquidating the assets of the corporation." Opinion at 3, 5 (emphasis added). The cases are not conflicting; they are expressly and directly harmonized.

Similarly, the Opinion does not conflict with *KPMG*, an accounting malpractice action. Although the Court, similar to *Forgione*, employed legal malpractice situations as a means of comparing and contrasting the nature of the accountant's obligations before it, that decision does not mandate the dismissal of the claim herein. The Third District did not and should not have interpreted *KPMG* to render an exhaustive unconditional prohibition on receivers, trustees, statutory assignees for the benefit of creditors, or personal representatives from pursuing legal malpractice claims. Rather, *KPMG* contrasted the role of an attorney "who is required to zealously represent a client's position *in an adversarial setting*" *id.* at 38 (emphasis added), to the "public watchdog" function of an accountant that creates a "public responsibility transcending any employment relationship with the client." *Id*. Although the Third District opinion recognizes that the Attorneys, when writing the private placement memoranda, owed their "ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public," Opinion at 3-4, quoting *KPMG* at 38 -- a duty

that is well recognized in securities actions -- even that aspect of the Opinion is secondary to the conclusion that Kaplan, in his capacity as the statutory assignee for the benefit of creditors stands in the shoes of the client, MRI. The Third District recognized Kaplan's standing as "no different from a trustee in bankruptcy," Opinion at 5, and flows directly from his statutory charge. Any other conclusion would lead to an absurd and unworkable application of the statute and the District Court's decision correctly interprets existing law to facilitate the statutory intent.

II. THE OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OR WITH THIS COURT ON THE PRIVITY ISSUE

The issue that was before the Third District was whether an assignee for the benefit of creditors has standing to bring a legal malpractice claim. In their Brief on Jurisdiction, the Attorneys cite a number of additional cases, all of which discuss whether and when an attorney owes a duty to third parties with whom he is *not* in privity. *See Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane*, 763 So. 2d 1274 (Fla. 4th DCA 2000); *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th DCA 1994); *Angel, Cohen & Rogouin v. Obrein Investments, N.V.*, 512 So. 2d 192 (Fla. 1987). In the circumstances before this Court, however, there is no such disparity between client and shareholder that

is at issue. The Attorneys' breaches of their duties harmed the corporation and Kaplan, by virtue of the statute, stands in the shoes of that corporation. *See* Florida Statutes, Section 727.104(1)(b) in which the Assignee for the Benefit of Creditors is charged with the duty to demand, recover, and if necessary retain counsel to sue the recovery of all corporate assets. *Cf. Camp v. St. Paul Fire & Marine Ins. Co.*, 616 So. 2d 12, 15 (Fla. 1993) (allowing a bankruptcy trustee to pursue a bad faith claim against the debtor's insurer since the "bankruptcy estate stood in the shoes of the debtor"). There is no conflict with those cases because in this case the Assignee for the Benefit of Creditors is in privity with the Attorneys. As the Third District correctly recognized, he is a statutory transferee acting as a fiduciary for MRI for the purposes of marshaling assets, paying claims, and liquidating the estate. He steps into the shoes of MRI for these purposes. He is not a stranger to the relationship between MRI and its Attorneys; he is simply the person charged by statute to act for MRI. "In that regard Kaplan is no different from a trustee in bankruptcy who has full standing to bring a debtor's legal malpractice claim." This statutorily created legal role of the Assignee for the Benefit of Creditors is more than sufficient to confer standing.

Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 612 So. 2d 1378 (Fla. 1993) recognizes that a probate estate of a decedent "stands in the shoes of the testator and clearly satisfies the privity requirement," *id.* at 1380,[1] and confirms that a statutorily appointed representative of a client standing in the shoes of the client is entitled to maintain a professional liability action against the Attorneys because the privity between attorney and client is not lost under those circumstances. The relationship of the decedent's estate to the decedent is analogous to the relationship of the assignee for the benefit of creditors to MRI. Kaplan's rights to pursue this action derive not through a third party beneficiary analysis, but through the clear legal position he occupies in the shoes of MRI.

Although the Attorneys recognize that *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990) finds it reasonable to hold accountants liable to the public and to shareholders "[b]ecause of the heavy reliance upon audited financial statements in the contemporary financial world," Attorneys' Brief on Jurisdiction at 8, quoting *Max Mitchell*, 558 So. 2d at 15, they simultaneously suggest that when they prepare private placement memoranda similar reasoning should not apply. In *Max Mitchell*, this Court adopted the rationale of section 552, *Restatement (Second)*

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[1] It 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.

of Torts (1976), which sensibly extends a defendant's liability responsibility to those whom the defendant intends to benefit or knows will benefit from or will reply upon his disclosures. The opinion below establishes that the Attorneys here undertook a representation for purposes of preparing and disseminating information to a limited class of foreseeable persons. Those services resulted in harm to the corporation. Although the reasoning of Section 552 would support an expansion of their legal obligations to reasonably foreseeable users of the information, no such extension is necessary here. Rather, the decision is premised on the statutory relationship between the corporation and Kaplan, which is more than sufficient to confirm standing.

The cases that the Attorneys cite as being in conflict do not deal with the situation the Third District correctly resolved, the power and authority of Kaplan, as a legal transferee of MRI's rights and obligations, to sue MRI's counsel for the alleged acts of malpractice that resulted in the outstanding claims against the corporation in the initial instance. Although the Petition asserts that the Third District Opinion conflicts with Florida law, it actually questions the nature of the statutory relationship of the Assignee for the Benefit of Creditors to the corporation whose assets and claims he is charged with administering. The Third District correctly decided that question contrary to the presumption that the

Attorneys seek to interject in a manner that is consistent with, not in conflict with, existing law. No further review is required.

CONCLUSION

WHEREFORE, Kaplan respectfully requests that this Court deny the Petition on Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of February, 2003, to Robert Michael Klein, Esq., Marlene Reiss, Esq., *Counsel for Petitioners Stephen M. Rosenberg and James J. D'Esposito*, STEPHENS LYNN KLEIN, *et al*, 9130 South Dadeland Boulevard, Penthouse II, Miami, Florida 33156; Deborah Poore Knight, Esq., *Counsel for Petitioners Marshall Platt, Marshall Douglas Platt, P.A., Jack B. Packar, P.A., and Packar and Platt*, WALTON LANTAFF SCHROEDER, *et al*, Blackstone Building, Third Floor, 707 S.E. Third Avenue, Ft. Lauderdale, FL 33316; Laura Besvinick, Esq., *Counsel for Petitioners Cowan Liebowiz & Latman, P.C.*, HOGAN & HARTSON LLP, 1111 Brickell Avenue, Suite 1900, Miami, Florida 33131; and Caryn Bellus, Esq., *Counsel for Petitioners Franzino & Rosenberg, P.C.*, KUBICKI DRAPER, City National Bank Building, 25 West Flagler Street, Miami, FL 33130.

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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.

Steven E. Stark

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