IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC03-59

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.

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

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

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I. Kaplan's Concession That Legal Malpractice Claims Are Nonassignable As A Matter of Florida Law Mandates Reversal

In his Answer Brief, Kaplan concedes that

> This Court has previously recognized that an aggrieved client may not assign a legal malpractice claim to a third party because the claim is a personal tort that involves the unique quality of legal services and confidentiality concerns with respect to the attorney-client relationship….The Respondent does not dispute this principle. It does not seek to change the law.

Ans. Br. at 26 (citations omitted) (emphasis added).

This concession is contrary to the decision of the Third District and fatal to Kaplan's claims against the attorneys here. Because, as Kaplan concedes, "an aggrieved client may not assign a legal malpractice claim to a third party because the claim is a personal tort," it necessarily follows that a legal malpractice claim is also "exempt from levy," which Kaplan also concedes. See Ans. Br. at 12 ("the extent to which [the legal malpractice claim at issue in Mickler] was exempt from levy was because it was unassignable…if the claim were assignable in the first place, it would not have been exempt from levy"). Moreover, because legal malpractice claims are "exempt from levy," they are also excepted from assignment under Florida's assignment for the benefit of creditors statute, which Kaplan also concedes. See Ans. Br. at 25 ("The Assignment for the Benefit of Creditors statute excludes assets exempt from forced sale.").

Remarkably, Kaplan fails to understand the necessary consequence of these

concessions. Because legal malpractice claims are nonassignable, they are exempt from levy, and because they are exempt from levy, they are expressly excepted from assignment by the literal language of Chapter 727. Thus, Kaplan's concessions require that the decision of the Third District be reversed.

Rather than recognize this simple logic, Kaplan accuses the attorneys of making a "'bootstrap' argument." Ans. Br. at 13. But Kaplan is wrong. The argument made by the attorneys in this Court and below is not a "bootstrap." As Kaplan concedes, this Court has held that legal malpractice claims are not assignable – a common law principle which Kaplan purports not to dispute. That principle has consequences, and one of them is that the claims, because they are nonassignable, are exempt from levy. The legislature, in enacting Chapter 727, expressly excepted such exempt claims from assignment pursuant to statute. Kaplan suggests that this argument is circular, but it is not. It begins with the fundamental premise – what this case is about and what Kaplan now claims not to dispute – that legal malpractice claims are nonassignable. Chapter 727 is simply consistent with this principle. (If the legislature had not excepted exempt assets from assignment by statute, the issue confronting this Court might be more difficult, raising the question whether the statute or the common law should prevail. Instead, the legislature enacted a statute consistent with the common law, expressly providing that exempt assets – including those assets which are exempt because they are nonassignable personal claims – are excepted from assignment under the statute.)

For this reason alone, the Court should reverse the decision of the Third District.

II. Chapter 727 Clearly And Unambiguously Excepts Legal Malpractice Claims From Assignment For The Benefit Of Creditors Consistent With Florida Common Law

In an apparent recognition of the fact that Chapter 727 plainly says exactly what the attorneys have argued that it says – namely, that exempt assets (including legal malpractice claims) are expressly excepted from assignment – both Kaplan and the Business Law Section argue that "the literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion." Ans. Br. at 10-11; Amicus Br. at 14-15. The Court should reject this argument. The statute plainly and unambiguously says exactly what it says and requires no "rules of statutory construction" to aid in its interpretation. Nor is there anything "unreasonable or ridiculous" in giving effect to the statute precisely as enacted by the legislature.

As this Court has long held,

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931).

Moreover, "[s]tatutory language is not to be assumed superfluous and all words and phrases within a statute are to be given meaning." General Electric v. DeCubas, 504 So.2d 1276, 1278 (Fla. 1st DCA 1986) (citations omitted).

Here, Kaplan and the Business Law Section urge the Court to ignore the "clear and unambiguous" language of Chapter 727. In a patent effort to manufacture a non-existent ambiguity, both Kaplan and the Business Law Section point to the fact that § 727.104(1)(b) "includes among the assets of the estate 'claims and demands belonging to the assignor.'" Ans. Br. at 6 (emphasis in original); accord Amicus Br. at 3, 15, 16-17. Yet, both pointedly ignore the fact that the same sentence of the statute expressly "except[s] such assets as are exempt by law from levy and sale under an execution." § 727.104(1)(b), Fla. Stat. (emphasis added). Thus, § 727.104(1)(b), which sets forth the form of the assignment is completely consistent with § 727.103, which defines an "asset" as "a legal or equitable interest of the assignor in property . . . except property exempt by law from forced sale." (emphasis added).

To argue, as both Kaplan and the Business Law Section do, that § 727.104(1)(b) "specifically includes among the assets of an assignor's estate 'claims and demands belonging to the assignor'" while omitting citation to the exclusionary language in the very same sentence of the statutory section is nothing short of bad faith. The fact is that Chapter 727 is clear, unambiguous and consistent: "claims and demands" are part of the assignment estate, except to the extent such "claims and demands" are exempt from levy, in which case they are expressly excepted from assignment by statute.

What Kaplan and the Business Law Section are really asking this Court to do is to treat Chapter 727 as if it were identical to federal bankruptcy when, by its plain

terms, it is not. Thus, Kaplan argues that "the relevant provisions of the Assignment statute and the Bankruptcy Code are similar" and that, because "bankruptcy law permits a trustee to maintain malpractice actions, an assignee for the benefit of creditors in state court should be permitted to do so as well." Ans. Br. at 14 (citing case law for the proposition that, "where a statute may be borrowed from or patterned on identical or similar provisions in a . . . federal statute, it is appropriate for the court to resort to the judicial constructions placed on the statute by . . . the federal courts"). The Business Law Section makes the same argument, extensively citing Moecker v. Antoine, 845 So.2d 904, 911 n.10 (Fla. 1st DCA 2003), for the proposition that "State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceeding[s] involving assignments for the benefits of creditors." Amicus Br. at 2, 5.

In fact, as the First District expressly recognized in Moecker, significant differences between Florida's assignment for the benefit of creditors statute and federal bankruptcy may compel a different result in a proceeding under the Florida statute. In Moecker, the assignee urged the court to accord priority to rescission claims consistent with § 510(b) of the Bankruptcy Code, notwithstanding the lack of comparable language in Florida's assignment for the benefit of creditors statute. Citing McRainey, the Court refused, holding:

> Thus, even though the public policy underlying section 510(b) seems sound, we decline the invitation to interpret the unambiguous provisions of chapter 727 as if it included a provision subordinating the appellees' rescission claims to those of all creditors.

Moecker, 845 So.2d at 913.

In this regard, this case is no different from Moecker. Florida's assignment for the benefit of creditors statute may be similar to federal bankruptcy in some respects, but in the only ways that matter here, it is critically different.

First, Florida's statute excepts from assignment all assets exempt by law from levy or sale. These assets never become part of the assignment estate. In bankruptcy, in contrast, all assets become property of the bankruptcy estate, without exception, as a matter of federal law. Although a debtor may then assert exemptions to remove property from the estate, those exemptions are limited. As a consequence, legal malpractice claims in bankruptcy automatically become property of the bankruptcy estate and, in the absence of a federally cognizable exemption, remain the property of the bankruptcy estate for the trustee to pursue. Section 222.20, Fla. Stat., allows Florida residents to assert exemptions "given . . . by the State Constitution and the Florida Statutes," but not common law exemptions, like the exemption based on the rule of nonassignability at issue here. Florida's assignment for the benefit of creditors statute, in contrast, is not so limited, but excepts from assignment "such assets as are exempt by law from levy or sale," which includes the common law.

The interpretation of Chapter 727 offered by Kaplan and the Business Law Section would have the improper effect of reading this language out of the statute and importing instead the limitations of the federal bankruptcy law, which are not otherwise present. Kaplan's displeasure with Florida's assignment statute as written is evident

in the Answer Brief. In an effort to explain why legal malpractice claims, although nonassignable and therefore exempt by law from levy or sale, should nonetheless not be excepted from assignment under Chapter 727, Kaplan notes that legal malpractice claims are not "exempt from execution as a specially protected asset in the manner that veteran's benefits or disability benefits are exempt. There is no statutory exemption for malpractice claims." Ans. Br. at 13. What Kaplan fails to recognize, of course, is that Florida's assignment for the benefit of creditors statute, in contrast to federal bankruptcy law, is not limited to "statutory exemptions" and there is no legislative history to suggest that it is.

Second, a debtor invoking Florida's assignment for the benefit of creditors statute, in contrast to federal bankruptcy law, receives no discharge. After the assignment is concluded, the debtor continues to owe the creditors any moneys not paid to them by the assignment estate. Kaplan and the Business Law Section attempt to gloss over this difference, but it is fundamental. It means that if, as Florida law provides, MRI (as opposed to Kaplan) is permitted to pursue MRI's putative legal malpractice claims against the attorneys, creditors of MRI stand to benefit to the extent that MRI is successful. It simply is not true, as Kaplan repeatedly suggests, that if this Court adheres to the rule of nonassignability in this context that "potential wrongdoers [will be insulated] based upon a technicality." Ans. Br. at 4. Moreover, not only can MRI sue, it has – a fact that Kaplan simply chooses to ignore.

Finally, and the importance of this obvious distinction should not be

underestimated just because it is so obvious, Florida's assignment for the benefit of creditors statute is a creature of state law, whereas bankruptcy is governed by federal law. Federal law preempts contrary state law, in bankruptcy and in the federal receivership proceedings on which Kaplan relies. FDIC v. Martin, 770 F. Supp. 623 (M.D. Fla. 1991), is a case in point. The Martin court recognized that legal malpractice claims were nonassignable as a matter of Florida law but held that federal statutory law applicable to the FDIC preempted contrary state law. Id. at 627. Here, there is no federal law to preempt the Florida rule of nonassignability and so that rule applies with full force and effect to bar Kaplan from asserting his "assigned" legal malpractice claims against the attorneys.

The theme that runs through both the Answer Brief and the Amicus Brief of the Business Law Section is that if MRI had elected to proceed in bankruptcy court, the trustee there could have asserted MRI's legal malpractice claim against its former attorneys and that simply because that is true, Kaplan must also be allowed to assert MRI's claim as its assignee in the state court. Yet there is absolutely no support in the plain language of Chapter 727 or in the decisions of this Court to support such a conclusion. Nor is there any reason why Florida's assignment for the benefit of creditors statute should simply duplicate federal bankruptcy law. Would-be debtors have a choice to proceed under state law or federal law and each choice has attendant consequences. This is one.

III. Requiring that MRI Pursue Its Putative Legal Malpractice Claims Against Its Former Attorneys,

Rather Than Allowing Kaplan To Do So, Will Not "Insulate Potential Wrongdoers From Any Liability."

Kaplan repeatedly asserts, without basis, that if the Court were to apply the rule of nonassignability under these circumstances, it would "insulate potential wrongdoers from any liability." Ans. Br. 7; id. at 10, 23. Kaplan is wrong for two fundamental reasons.

First, as set forth in the Initial Brief of the attorneys and above, MRI is not "the useless hollow shell of a defunct corporation" that Kaplan claims it is. MRI has retained counsel (in fact, the same lawyers who are representing Kaplan here) and these lawyers have filed a lawsuit against the attorneys on MRI's behalf. That action is presently stayed, but that fact is of no moment. MRI has the ability to activate the lawsuit at any time. Moreover, because MRI will not receive a discharge at the conclusion of the assignment proceeding, in the event it is successful in its lawsuit against the attorneys, any recovery it makes will be subject to the claims of the very creditors and shareholders Kaplan purportedly seeks to benefit here.

Second, Kaplan's argument is premised on a fundamental mistake. Kaplan claims that the assignee should have the right to sue the attorneys because "the incurring of damages . . . statutorily rests with the Assignee for the Benefit of Creditors." Ans. Br. at 10. But that is clearly wrong. To the extent Kaplan purports to bring the legal malpractice claims of MRI against its former attorneys, the only damages that he (or more properly, MRI) can seek to recover are the damages allegedly incurred by MRI. Following the rule of nonassignability and requiring that

MRI pursue its own putative legal malpractice claims therefore results in no disjunction.

IV. The Court Should Decline Kaplan's Invitation To Create An Exception To The Rule Of Nonassignability

In the Answer Brief, Kaplan states he "does not dispute" the rule of nonassignability, only its application under these circumstances, in effect, asking that the Court create an exception to the rule for assignees for the benefit of creditors under Chapter 727. The Court should decline Kaplan's invitation for a variety of reasons.

First, when the Florida Legislature enacted Chapter 727, it did not purport to abrogate the common law rule of nonassignability. See, e.g., Ady v. American Honda Finance Corp., 675 So.2d 577, 581 (Fla. 1996)("statute in derogation of the common law must be strictly construed"). To the contrary, as we have seen, the legislature expressly incorporated an exception to the statutory assignment for assets "exempt by law from forced sale," including not only statutorily-exempt assets, but also nonassignable claims like the legal malpractice claims at issue here.

Second, the same policies that underlie the rule of nonassignability apply here. Although Kaplan continues to assert, without basis, that he is "a fiduciary for the corporation," he is not. The statute does not so provide and the case law construing comparable statutes in other states is directly to the contrary. See Initial Brief at 16-17. Notably, Kaplan offers no response to this case law.

The fact is Kaplan and MRI are not one and the same. Kaplan's primary duties

are not to MRI, but to MRI's creditors. Moreover, although Kaplan now claims to "stand in the shoes" of MRI, it is safe to assume that if permitted to pursue the legal malpractice claims of MRI, he will assert that, as MRI's innocent assignee, he is not subject to the same imputation-based defenses as MRI. See, e.g., Welt v. Sirmans, 3 F. Supp. 2d 1396 (S.D. Fla. 1997) (rejecting imputation defense to bar legal malpractice claim by bankruptcy trustee).

Third, although Kaplan attempts to distinguish the assignment at issue from what he describes as a "bare assignment," there is no meaningful distinction between the two. One of the chief public policy reasons supporting the rule of nonassignability is that a client in financial straits may well offer to trade (assign) his putative legal malpractice claim against his solvent (insured) attorney to a putative plaintiff in order to escape his own liability. Yet that is precisely what has occurred here. MRI, presumably to avoid the fraud claims of disgruntled shareholders, has assigned its putative legal malpractice claims against its attorneys to Kaplan, who now seeks to pursue the claims for the benefit of MRI's creditors (who consist almost exclusively of MRI's disgruntled shareholders). Plainly, the same public policies that support the rule of nonassignability generally apply with equal force here.

Fourth, Kaplan's contention that it "simply defies reason to conclude that administrators, receivers, substitute trustees and bankruptcy trustees all have the right to pursue legal malpractice claims, but Assignees for the Benefit of Creditors do not have that right" is based on a misreading of the cases on which he relies. Ans. Br. at

23-24. As noted above, in FDIC v. Martin, the Court declined to apply the rule of nonassignability on preemption grounds, holding that "Florida law [was] an unacceptable obstacle to the operation of the FDIC." Id. at 627. There is no such federal interest at stake in this case. In FDIC v. Brodie, 602 So.2d 1358 (Fla. 3d DCA 1992), the court entered summary judgment in favor of the attorney on the legal malpractice claim on unspecified grounds, making to mention of whether the claim was, or was not, assignable. Id. at 1360. Lastly, Kaplan completely misstates the holding in Datwani v. Netsch, 562 So.2d 721 (Fla. 4th DCA 1990). Datwani recognized the right of the original beneficiaries of a trust to bring the legal malpractice claims of the trust, not the right of a substituted trustee to do so. Id. at 723.

Finally, although Kaplan has attempted to characterize the result he seeks as consistent with the rule of nonassignability generally, it really is not. If we are honest, Kaplan's exception would swallow the rule. Every assignee, regardless of the basis for the assignment, would claim, as Kaplan does here, that he stands in the shoes of the assignor-client. Indeed, that is true, by definition, of every assignment. Moreover, every assignee's interest in prosecuting an assigned legal malpractice claim is exactly the same as Kaplan's here – to collect damages against the assignor-client's attorneys. For Kaplan to suggest that he is somehow different from other assignees is simply disingenuous. In effect, Kaplan's argument would require the court to analyze the motive and purpose underlying every assignment and to review the relationship between every assignor-client and assignee. Such a case-by-case analysis is not only

unworkable, it would defeat the very public policies underlying the rule of nonassignability.

V. Kaplan's Contention That The Attorneys Owed A "Public Responsibility" To Persons Other Than Their Client, MRI, Is Contrary To Florida Law

As set forth in the Initial Brief, this Court has consistently held that attorneys, in contrast to public accountants, owe a duty exclusively to their clients and not to other, third parties. Initial Br. at 19-22. Moreover, where, as here, the client is a corporation, Florida courts have held that the attorney's duty extends only to the corporation and not to its shareholders or creditors. Id. The decision of the Third District, which purports to recognize a broader duty where the attorney renders advice to a corporation in connection with a securities offering stands in sharp conflict with this settled law.

Kaplan urges this Court to follow the lead of the Third District, relying primarily on authorities interpreting the federal securities laws. Ans. Brief at 34-38. Kaplan's reliance on these authorities is misplaced, however. In the securities fraud cases (and the commentary thereon) on which Kaplan relies, the plaintiffs were investors – not the corporation that issued the allegedly misleading offering documents – and the claims were for securities fraud – not legal malpractice. Thus, none of the federal securities law authorities on which Kaplan relies even purport to touch upon the question before this Court.

Kaplan's reliance on First Florida Bank, N.A. v. Max Mitchell & Co., 558

So.2d 9 (Fla. 1990) and the Restatement (Second) of Torts § 552 is similarly misplaced. No Florida court has ever extended Section 552 to attorneys and there is no reason or basis for the Court to do so here, since Kaplan is unable to meet the standard of liability set forth in Section 552 in any event.

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,

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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 September, 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 Paul Steven Singerman, Ilyse M. Homer and Paul A. Avron, Berger Singerman, P.A., 200 S. Biscayne Boulevard, Suite 1000, 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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