

SUPREME COURT OF FLORIDA

CASE NUMBER: SC13-1215

Lower Tribunal Case No. 11-15145

**MDS (CANADA), INC., BEST THERATRONICS, LTD. and
BEST MEDICAL INTERNATIONAL, INC.,**

Appellants,

v.

RAD SOURCE TECHNOLOGIES, INC.,

Appellee.

**APPELLANTS' REPLY BRIEF ON CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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CONSTITUTIONAL PROVISION

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STATUTORY PROVISION

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SUMMARY OF REPLY ARGUMENT

The Appellants, MDS (Canada) Inc. (now known as Nordion (Canada) Inc. and referred to as “Nordion”), Best Theratronics, Ltd. (“Best Theratronics”) and Best Medical International, Inc. (“Best Medical”) (Best Theratronics and Best Medical are sometimes collectively referred to as “Best”) (all appellants are collectively referred to as “Appellants”), respectfully submit this Reply Brief in response to the Brief of Appellee, Rad Source Technologies, Inc. (“Rad Source”). Rad Source’s Brief makes two primary assertions. First, it asserts a jurisdictional argument that the Court should decline to answer the question certified by the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) because federal law, not Florida law, purportedly should be applied to determine whether the Sublicense Agreement between Nordion and Best constitutes a license agreement or an assignment. Second, in the alternative, Rad Source asserts that the certified question should be restated and then, based on its restatement, the Court should hold that the Sublicense Agreement is an assignment under Florida law.

Appellants submit that both of Rad Source’s assertions should be rejected. First, the Eleventh Circuit has ruled that Florida law will be applied to the license agreement that underlies the certified question. Indeed, the Eleventh Circuit confirmed its ruling after it submitted the certified question to the Court. Several weeks after submission of the certified question, the Eleventh Circuit issued an

order that summarily denied Rad Source's motion for reconsideration in which Rad Source made the identical assertion that federal law, not Florida law, controlled.

The Eleventh Circuit's summary rejection is dispositive as well as appropriate. It is well settled that merely because an agreement involves the licensing of a patent does not mean that federal law supplants state law for purposes of construing the agreement. Otherwise, state courts could never decide disputes involving patent license agreements. In fact, however, state courts regularly decide such disputes by applying state law. In effect, Rad Source requests the Court to overrule the Eleventh Circuit and, incongruously, instruct the federal court on federal law. Such a request is not proper and should be denied.

Second, Rad Source's Brief does not offer any support for its assertion that the Court should restate the question certified by the Eleventh Circuit. Rather, Rad Source merely proposes its own restated question without justifying why such a restatement is truly necessary. But even assuming for the sake of argument that there could be a valid reason to adopt Rad Source's restatement of the certified question, the Sublicense Agreement should still be deemed to be a license and not an assignment under Florida law because it is indisputable that Nordion did not transfer all of its interests to Best. Accordingly, the Court should answer the Eleventh Circuit's certified question and state that the Sublicense Agreement is not an assignment under Florida law.

ARGUMENT

A. THE CERTIFIED QUESTION IS CONTROLLED BY FLORIDA LAW

Rad Source's assertion that federal law controls the certified question is incorrect and should be rejected. This breach of contract matter is before the Court because the Eleventh Circuit has determined – repeatedly – that Florida law controls and will be applied. Absent that determination by the Eleventh Circuit, the Court could not have taken this matter for consideration. Rad Source cannot avoid the application of Florida law by asking the Court in this proceeding to, in effect, overrule the Eleventh Circuit and declare that federal law applies.

Pursuant to Art. V, § 3(b)(6), Fla. Const., the Court's jurisdiction includes the discretion to review a question certified by a federal court of appeals "which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." Florida law further provides that:

The Supreme Court of this state may, by rule of court, provide that, when it shall appear ... to any circuit court of appeals of the United States ... that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.

§ 25.031, Fla. Stat. (emphasis added). *See also*, Fla. App. P. 9.150.

As the foregoing make clear, the Court considers a certified question only after the federal appellate court determines that Florida law is determinative. Although divided over other issues, the Eleventh Circuit panel was unanimous in holding that Florida law, not federal law, controlled. *MDS (Canada), Inc. v. Rad Source*, 720 F.3d 833, 854-57 (11th Cir. 2013); Appendix (“App.”) at 39-45.

Indeed, the Eleventh Circuit explained at length why Florida law controlled. *Id.*, 720 F.3d at 841-43, 854-56; App. at 12-16, 39-43. It determined that the jurisdiction of the lower court, the United States District Court for the Southern District of Florida, was based on diversity, not federal patent law, and rejected Rad Source’s argument to the contrary. *Id.* at 841-43; App. at 10-16. Furthermore, the Eleventh Circuit found that this case involved “a breach of contract” that did not arise under federal patent law and noted that:

... the Supreme Court has explained that state law claims “based on underlying patent matters will rarely, if ever, arise under federal patent law ...”

Id., quoting, *Gunn v. Minton*, ___ U.S. ___, 133 S.Ct. 1059, 1065 (2013); App. at 15. The Eleventh Circuit further noted that, if it treated this dispute as arising under federal patent law, it “would upset the ‘congressionally approved balance of federal and state judicial responsibilities.’” *Id.*, 720 F.3d at 843, quoting, *Grable & Sons Metal Prods., Inc., v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005); App. at 15.

On July 11, 2013, the Court issued an Acknowledgement of New Case which stated that it had received the certified question from the Eleventh Circuit. Subsequently, on July 22, 2013, Rad Source filed a Motion for Reconsideration with the Eleventh Circuit.

In its Motion for Reconsideration to the Eleventh Circuit, as in its Brief to the Court, Rad Source asserted that federal law, not Florida law, controlled. *See* Rad Source's Motion for Reconsideration at 11-16.¹ On August 21, 2013, the Eleventh Circuit summarily denied Rad Source's Motion for Reconsideration.² The Eleventh Circuit's summary denial of reconsideration accorded with the decisions of other courts that have considered the enforcement of a patent licensing agreement and held that "[a] suit to enforce a patent licensing agreement does not arise under federal patent law." *Scheiber v. Dolby Lab., Inc.*, 293 F.3d 1014, 1016 (7th Cir. 2002), *citing*, *Jim Arnold Corp. v. Hydrotech Sys., Inc.*, 109 F.3d 1567, 1575 (Fed. Cir. 1997). *See also*, *Power Lift, Inc. v. Weatherford Nipp.-Up Systems*, 871 F.2d 1082, 1085 (Fed. Cir. 1989) ("The district court correctly determined that the present license contract is governed by Oklahoma law.").

¹ On July 24, 2013, Rad Source filed a copy of its Motion for Reconsideration with the Court as Exhibit "A" to its Motion to Stay.

² On August 22, 2013, Rad Source filed a Notice with the Court regarding the Eleventh Circuit's order that summarily denied the Motion for Reconsideration. Rad Source included a copy of the Eleventh Circuit's order as Exhibit "A" to its Notice.

Similarly, the Court has recognized that “state courts may decide certain cases even though they involve federal patent law.” *Jacobs Wind Elec. Co., Inc. v. Department of Transportation*, 626 So.2d 1333, 1335 (Fla. 1993). Thus, “[i]t is well settled that if the patentee pleads a cause of action based on rights created by a contract, ... the case is not one ‘arising under’ the patent laws.” *Jim Arnold Corp.*, 109 F.3d at 1572. This principle recognizes that such actions are based in state contract law, not federal patent law. *Luckett v. Delpark, Inc.*, 270 U.S. 496, 510-11, 46 S.Ct. 397, 402 (1926) (suit for breach of license agreement “did not give the District Court jurisdiction of the cause as one arising under the patent laws.”).

On July 24, 2013, Rad Source filed a Motion to Stay with the Court which asked that the proceedings on the certified question be stayed until the Eleventh Circuit ruled on Rad Source’s Motion for Reconsideration. On August 21, 2013, the Court granted Rad Source’s Motion to Stay pending the Eleventh Circuit’s ruling. The next day, August 22, 2013, the Eleventh Circuit summarily denied Rad Source’s Motion for Reconsideration.

Because the Eleventh Circuit has already decided that Florida law, not federal law, is determinative, the Court should reject Rad Source’s assertion and proceed to answer the certified question. Appellants do note, however, that Rad Source’s Brief mistakenly relies on the same caselaw that it presented in its Motion

for Reconsideration to the Eleventh Circuit. These cases serve only to underscore that state law, not federal law, applies.

For example, Rad Source cites *Cincom Systems, Inc. v. Novelis Corp.*, 581 F.3d 431 (6th Cir. 2009), for the proposition that federal law governs. See Rad Source’s Brief at 17-18. In that case, however, the court noted “that in the context of intellectual property, a license is presumed to be non-assignable and nontransferable in the absence of ‘express provisions to the contrary.’” *Cincom*, 581 F.3d at 436 (emphasis added), quoting, *PPG Industries, Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1095 (6th Cir. 1979). Although the court noted that Ohio state law could not override that federal law presumption, it held that Ohio state law controlled because the license agreement in question expressly addressed the issue of transfer of patent rights. *Id.*, 581 F.3d at 440, n. 4. The court succinctly concluded that “state contract law will govern the interpretation of a license because a license is merely a type of contract.” *Id.* at 437.

The other cases upon which Rad Source relied stand for the same proposition. Thus, in *In re CFLC, Inc.*, 89 F.3d 673 (9th Cir. 1996), the court noted that “[t]he construction of a patent license is generally a matter of state contract law,” but held that a California statute that allowed the free assignability of contracts would have to yield to the federal law presumption against transfer of

patent rights in the absence of an express contract provision. *Id.*, 89 F.3d at 677, 679.

Likewise, in *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 284 F.3d 1323, 1327-28 (Fed. Cir. 2002), the court stated that “the interpretation of patent license contracts is generally governed by state law.” It found, however, that it was confronted with “a unique situation” involving application of the bona fide purchaser defense to a patent infringement claim that necessitated application of federal law. *Id.* at 1328. In *Devlin v. Ingram*, 928 F.2d 1084, 1090-97 (11th Cir. 1991), the court looked to Alabama state law to resolve the underlying contract issues of whether the parties entered into an enforceable contract and to resolve conflicting contract terms.³

Unlike the matter presently before the Court, the cases cited by Rad Source typically did not involve agreements that expressly addressed assignment. Thus, there was a potential conflict between state laws that allowed for free assignability of contracts and federal patent law that does not allow patent rights to be transferred absent express contractual language. Here, no such conflict can arise because the contract between Nordion and Rad Source (the “License Agreement”)

³ Rad Source also cites to the Court’s decision in *Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995), for the proposition that Florida law must yield to federal law. But in *Chandris*, the Court applied Florida law to answer the certified questions and found that there was “no merit” to the contention that federal law created an exception to Florida’s bar admission requirements. *Id.*, 668 So.2d at 184-86.

expressly allowed for sublicensing and assignment. [Record (“R.”) 286-1; App. at 72-73, 91].

Thus, ironically, the cases that Rad Source relies upon are consistent with Eleventh Circuit’s determination that Florida law controls the certified question. Notably, Rad Source also fails to acknowledge that, in the Counterclaim it filed against Nordion, Rad Source expressly stated “[t]hat the parties have chosen Florida law to govern their agreement (see [License] Agreement, 13.13).” [R. 80, ¶ 5.] Rad Source, therefore, chose to have Florida law applied when it entered into the License Agreement and should not be heard to complain anymore about its application.

B. THE CERTIFIED QUESTION DOES NOT HAVE TO BE RESTATED

Rad Source asserts that the question certified by the Eleventh Circuit “is too general to address the circumstances of this case and should be restated “as necessary.” *See* Rad Source’s Brief at 24. Rad Source is incorrect because the certified question is germane to the facts in dispute. The Eleventh Circuit certified the following question:

When a licensee enters into a contract to transfer all of its interests in a license agreement for an entire term of a license agreement, save one day, but remains liable to the licensor under the license agreement, is the contract an assignment of the license agreement, or is the contract a sublicense?

MDS (Canada), Inc., 720 F.3d at 856; App. at 43. This accurately recites the facts that are relevant to the Sublicense Agreement. [R. 290-C; App. at 62-69.]

Rad Source does not explain the basis for its assertion that the Eleventh Circuit's certified question is purportedly too general. Rad Source cites the Court's decision in *Fisher v. Shenandoah General Constr. Co.*, 498 So.2d 882, 883 (Fla. 1986), as support for the proposition that the Court may restate a certified question. In that case, however, the Court restated the certified question from the Fourth District because the question that was originally certified was not "germane to the facts alleged in the pleadings." *Id.*, 498 So.2d at 883.

Significantly, Rad Source does not contend that the question certified by the Eleventh Circuit is not germane. Rather, Rad Source simply wants to restate the question in way that it finds more favorable to its assertions.⁴ The Court should not allow Rad Source to rely on nothing but its mere self-interest as the basis for restating a federal appellate court's certified question.⁵

The question certified by the Eleventh Circuit is relevant to the facts in dispute and the Court should proceed to answer that question. Because no

⁴ It should be noted that Rad Source's Brief purports to answer only Rad Source's restatement of the question and not the question actually certified by the Eleventh Circuit.

⁵ Rad Source also cites to the Court's decision in *Iglehart v. Phillips*, 383 So.2d 610, 613 (Fla. 1980), as support for restating certified questions. In that case, however, it appears that the Court restated questions *sua sponte* for purposes of clarity and not because a party proffered the restated questions.

restatement is necessary, Rad Source's self-serving restatement of the question should not be accepted.

C. THE SUBLICENSE AGREEMENT IS NOT AN ASSIGNMENT UNDER FLORIDA LAW

In their initial Brief, Appellants cited decisions by Florida courts that involved a determination whether or not an agreement constituted an assignment. *See generally*, Appellants' Brief at 13-17. Some of the cases involved landlord-tenant disputes. *See, e.g., C.N.H.F., Inc. v. Eagle Crest Dev. Co.*, 128 So. 844, 845 (Fla. 1930); *Estate of Basile v. Famest, Inc.*, 718 So.2d 892 (Fla. 4th DCA 1998). Some of the cases, however, did not involve landlord-tenant disputes. *See, e.g., Price v. RLI Ins. Co.*, 914 So.2d 1010, 1013 (Fla. 5th DCA 2005) (assignment of an installment sales contract); *Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp.*, 864 So.2d 55, 58 (Fla. 5th DCA 2004) (real estate contract for sale of lots); *Dep't of Rev. v. Bank of Am., N.A.*, 972 So.2d 637, 642 (Fla. 1st DCA 2000) (assignment of automobile financing contracts). Bizarrely, Rad Source ridicules Appellants for purportedly presenting this matter as a landlord-tenant case. *See* Rad Source's Brief at 13. Appellants clearly did no such thing.

Instead, the cases Appellants cited demonstrate that the criteria for determining whether an agreement constitutes an assignment are applicable to contracts involving all subject matters. Rad Source, on the other hand, mistakenly urges the creation of separate criteria for agreements that involve patent licenses.

Rad Source's position is unfounded because, as courts have repeatedly recognized, patent license agreements are simply contracts that are subject to the same state law rules of contract construction as any other contract. *See, e.g., Cincom*, 581 F.3d at 437 (“[S]tate contract law will govern the interpretation of a license because a license is merely a type of contract.”); and *Power Lift*, 871 F.2d at 1085 (“A license agreement is a contract governed by ordinary principles of state contract law.”).

Thus, despite Rad Source's protestations to the contrary, the Sublicense Agreement should be interpreted in accordance with Florida's ordinary principles of contract law. Under the ordinary principles of Florida contract law, the Sublicense Agreement is not an assignment because “it is well established that an ‘assignment transfers to the assignee all of the interests and rights of the assignor in and to the thing assigned.’” *Rose v. Teitler*, 736 So.2d 122 (Fla. 4th DCA 1999) (emphasis added), *quoting, State v. Family Bank of Hallandale*, 667 So.2d 257, 259 (Fla. 1st DCA 1995).

It is indisputable that Nordion did not transfer all of its interests to Best. The term of the Sublicense Agreement was one day less⁶ than the term of the License Agreement, Nordion kept the right to enforce the License Agreement against Rad

⁶ Rad Source's Brief asserts that Nordion testified that the one day remainder “has *no* business purpose whatsoever.” *See* Rad Source's Brief at 12 (emphasis in original). That is utterly untrue. Even a cursory reading of the record cited by Rad Source shows that Nordion never said that. [R. 335 at 37:12-16].

Source, and Nordion retained the right to use the technology after the License Agreement concluded without any further obligation to Rad Source. [R. 290-C; App. at 62-69.]

Rad Source asserts that, under Section 2.7 of the Sublicense Agreement, Nordion had no right to enforce the License Agreement against Rad Source. That is patently incorrect. Section 2.7 of the Agreement does not preclude Nordion from taking any action against Rad Source under the License Agreement. Rather, Section 2.7 simply states that if Best requested Nordion to take such action, Best would have to bear the cost. [R. 290-C; App. at 65.]

Equally misguided is Rad Source's assertion that the one day difference between the Sublicense Agreement and the License Agreement is insufficient. Courts have regularly held that an agreement giving rights to a party does not constitute an assignment if it has a term of one day less than the underlying main agreement. *See, e.g., American Community Stores Corp. v. Newman*, 441 N.W. 154, 159 (Neb. 1989) ("Agreements calling for the surrender of possession only 1 day prior to the expiration of the term of the main lease have been held to be subleases rather than assignments.") (citations omitted); *Joseph Brothers Co. v. F.W. Woolworth Co.*, 844 F.2d 369, 372-73 (6th Cir. 1988) (holding that sublease did not constitute an assignment because it was for one day less than the principal lease); *Walgreen Arizona Drug Co. v. Plaza Center Corp.*, 647 P.2d 643, 645, 648-

49 (Ariz. Ct. App. 1982) (rejecting arguments that sublease that had a term of one day less than the main lease was a “sham” and really an assignment).

These cases are in accord with the decisions of Florida courts which hold that an assignment does not occur unless all rights are transferred. *See, e.g., Lauren Kyle Holdings, Inc.*, 864 So.2d 55 at 58. Because Best did not acquire all of Nordion’s rights, the Sublicense Agreement is not an assignment under Florida law.

Moreover, the Sublicense Agreement did not terminate Nordion’s contractual obligations to Rad Source under the License Agreement. Rather, Nordion’s contractual obligations to Rad Source remained – and remain – unaffected by the Sublicense Agreement. Rad Source contends that it refused to consent to an assignment to Best because it did not know Best and it wanted to deal with Nordion. [R.335-22:24-23:23.] Because Nordion remains contractually obligated to Rad Source, the Sublicense Agreement preserves that connection between Rad Source and Nordion.

Rad Source also asserts, however, that via the Sublicense Agreement, Nordion left the blood irradiation business. Article 13.9 of the License Agreement expressly states that Rad Source’s consent is not required if Nordion assigns its rights to an entity that acquires its business. [R. 286-1; App. at 91.] If, as Rad Source asserts, the Sublicense Agreement is really a complete assignment to Best

and by which Nordion got out of the blood irradiation business, then Nordion could not have breached the License Agreement by entering into the Sublicense Agreement to Best, because Rad Source's consent to an assignment was not required. The bottom line, of course, is that the Sublicense Agreement did not result in Best acquiring all of Nordion's rights and obligations under the License Agreement. Therefore, as a matter of Florida, the Sublicense Agreement is not an assignment.

CONCLUSION

For the foregoing reasons, this Court should answer the question certified by the Eleventh Circuit and state that the Sublicense Agreement is not an assignment under Florida law.

Respectfully submitted,

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I hereby certify that on the 18th day of October, 2013, I caused a copy of the foregoing Appellants' Reply Brief to be served via email (PDF format) and first-class mail, postage prepaid, on the following attorneys for the Appellee:

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Undersigned counsel hereby certifies that the foregoing Appellants' Initial Brief has been prepared in Times New Roman 14-point font and complies with the requirements of Rule 9.210.

s/ Charlie C.H. Lee

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