3-28-2012

St. Luke's Medical Center v. Luciani Appellant's Reply Brief Dckt. 39315

IN THE SUPREME COURT OF THE STATE OF IDAHO

ST. LUKE'S MAGIC VALLEY REGIONAL MEDICAL CENTER (formerly MAGIC VALLEY REGIONAL MEDICAL CENTER),

Plaintiff/Appellant,

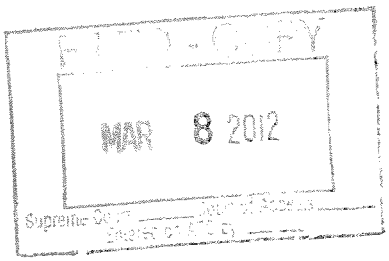
v.

THOMAS R. LUCIANI; STAMPER, RUBENS, STOCKER & SMITH, P.S.,

Defendants/Respondents.

Supreme Court Docket No. 39315-2011

United States District Court No. 8-30-S-EJL



APPELLANT'S REPLY BRIEF

On Order Certifying Question of Law
from the U.S. District Court for the District of Idaho
Honorable Edward J. Lodge, U.S. District Judge

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I. INTRODUCTION AND SUMMARY

In their Respondents' Brief ("RB"), Defendants Thomas R. Luciani and Stamper, Rubens, Stocker & Smith, P.S. ("Defendants" or "Luciani") misstate a critical threshold fact in this legal malpractice action: the identity of their former client. As the federal district court expressly found in its order certifying the question of assignability to this Court, Defendants' client in the underlying litigation was Magic Valley Regional Medical Center ("Magic Valley" or the "Hospital"), the predecessor-in-interest of St. Luke's Magic Valley Regional Medical Center ("St. Luke's"), Plaintiff and Appellant here. Yet in their brief to this Court, more than four years after this legal malpractice action was filed in 2008, Defendants now assert for the first time that their client was Twin Falls County, not the Hospital. RB at 2-3. That newly-found contention cannot be squared with the district court's order certifying the question to this Court or with the record before that court, including Defendants' own pleadings and sworn testimony. *See* Part II(A), *infra*. Likewise, Defendants' denial that St. Luke's is Magic Valley's successor is inconsistent with the district court's contrary finding and with the undisputed record evidence that St. Luke's acquired substantially all of the Hospital's assets, real property, personnel, management, and business. *See* Part II(B), *infra*. Finally, and most remarkably, Defendants never even address the broad assignment language of the Sales and Lease Agreement by which Magic Valley's claims against Luciani were assigned to St. Luke's. *See* Part II(C), *infra*.

Defendants' key factual misstatements, in turn, cause them to misconceive the only substantive issue presented here: "whether St. Luke's (as Luciani's client's successor) can step into the shoes of Magic Valley for Magic Valley's legal malpractice claim against Luciani in light of the broad assignment language used in the Sale and Lease Agreement or are legal malpractice actions not assignable in Idaho as a matter of law." Order Certifying Question to

Idaho Supreme Court (D. Idaho Oct. 27, 2011) ("Order") at 4.[1] As St. Luke's emphasized in its opening brief (AOB at 16-20), the majority of courts to have addressed that question have held that a predecessor entity may assign a legal malpractice claim to its successor. *See* Part IV(A), *infra*. Rather than squarely address that body of authority, Defendants rely heavily on cases that involved very different facts. As St. Luke's pointed out in its opening brief, those states that have endorsed a blanket rule barring the assignment of legal malpractice claims nearly always have done so in cases where the purported assignment is to a stranger to the attorney-client relationship, such as the client's litigation adversary. *See* AOB at 27-29, 31-32. But the public policy considerations in that context are entirely distinct from those presented in the very different context presented here, that of an assignment to a successor entity, and the blanket rule therefore should not apply. *See id.* at 32-35. Defendants' emphasis on those public policy concerns (*see* RB at 20-31) is divorced from the undisputed facts of this case and glosses over that critical distinction. *See* Part IV(B), *infra*. Defendants' remaining technical arguments lack merit. *See* Part IV(C), *infra*.

The blanket no-assignment rule advocated by Defendants, if accepted by this Court, would have the inequitable result of permitting negligent attorneys to escape liability due to the fortuity of a change in ownership of their client. *See* AOB at 21-22. Defendants' mistaken assertion as to the identity of their former client leads them to dismiss that concern by asserting that Twin Falls County "survives and, if it were damaged, would have been the proper party to assert a claim against Luciani." RB at 39. However, Luciani's actual former client, Magic

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[1] Defendants also ask this Court to decide a number of additional issues. However, that request is improper because those issues are beyond the scope of the certified question, they raise questions of fact, and Defendants have waived them by failing to cite supporting authority. This Court's role is limited to answering the certified question. *See* Part III, *infra*.

Valley, did *not* survive the transaction by which all of its claims against third parties were assigned to St. Luke's, and therefore can no longer assert any claim against Luciani. The sole question posed here is whether the assignment of those claims to St. Luke's, its successor, was effective under Idaho law. In answering *that* question, rather than the very different one posed by Defendants, this Court should follow the majority of courts that enforce such assignments to successor entities. *See* Part IV(D), *infra*.

II. DEFENDANTS HAVE MISSTATED THE FACTS FOUND BY THE FEDERAL DISTRICT COURT IN CERTIFYING THE QUESTION TO THIS COURT.

At the outset, Defendants misstate key facts that bear directly on the question this Court agreed to decide. Defendants' characterization of the record is inconsistent with the facts found by the federal district court in its order certifying the question to this Court, and indeed with Defendants' own position in the underlying litigation. Defendants' attempt to rewrite the undisputed facts is improper and should be disregarded.

A. Defendants' Client Was Magic Valley, Not Twin Falls County.

This legal malpractice action arises out of Defendants' representation of Magic Valley Regional Medical Center, the predecessor-in-interest of St. Luke's Magic Valley Regional Medical Center. Remarkably, however, Defendants now deny—for the first time since this litigation was filed in 2008—that they had an attorney-client relationship with Magic Valley. Instead, they assert that Luciani's client was Twin Falls County, the Hospital's owner. RB at 2-3 (asserting that "Twin Falls County was Luciani's client" and that "while St. Luke's took over ownership of certain buildings and the Hospital's business, it did not succeed to the ownership of Luciani's client, Twin Falls County"); *id.* at 40 ("Luciani's relationship only existed with Twin Falls County"). Based on this contention, Defendants assert that because Twin Falls County

(unlike Magic Valley) still exists, it would be the only proper party to assert a claim against them. RB at 39. Defendants' contentions are inconsistent with the district court's order and with the record.

First and foremost, Defendants' newly-found position contradicts the district court's findings in its order certifying the question to this Court. At the very beginning of that order, after observing that the facts related to the issue "are not disputed by the parties," the district court expressly found that Luciani "represented Magic Valley Regional Medical Center ('Magic Valley') to defend a wrongful termination and False Claims Act action alleging fraudulent Medicare billing by Magic Valley ('the Suter litigation')." Order at 1-2 (footnote omitted); *see also id.* at 2 (after his termination as "counsel for Magic Valley," Luciani "was no longer the attorney representing Magic Valley in the Suter litigation"). That finding is binding here.

As noted in our opening brief (AOB at 15-16), in deciding questions of law certified to it by another court, this Court relies upon the facts as stated by the certifying court. *See Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 792 P.2d 926, 927 & n.1 (1990) (considering "only those facts contained in the [Ninth Circuit's certification] order"). Here, the district court expressly found that Luciani's client was the Hospital, not Twin Falls County. That Twin Falls County was "the Hospital's owner during the time period of Luciani's representation of the Hospital" (RB at 2) does not render it Defendants' "client," any more than an attorney representing a subsidiary of a corporation has a direct attorney-client relationship with the client's parent company. *Cf. JUB Engineers, Inc. v. Security Ins. Co.*, 146 Idaho 311, 193 P.3d 858, 864 n.4 (2008) (in legal malpractice action, attorney had an attorney-client relationship with a subsidiary of plaintiff parent company, which filed a motion to substitute subsidiary as the real party in interest after defendants challenged whether parent was the appropriate party-plaintiff); *see generally Tucker v. Union Oil Co. of California*, 100 Idaho 590, 603 P.2d 156, 160-61 (1979)

("Ownership of capital stock in one corporation by another does not, itself, create an identity of interest between the two companies") (citations and internal quotations omitted).[2]

Second, the district court's finding is fully supported by the record before that court, including Luciani's own sworn testimony. Magic Valley Regional Medical Center, not Twin Falls County, was named as a defendant by the parties to the *Suter* litigation. *See Suter* Litigation Compls. [Tompkins Dec., Exs. 9, 12 and 13].[3] As Luciani himself admitted in his deposition, he and his firm were retained to represent Magic Valley, not the County, in that litigation. Luciani Dep. 24:17-25:16, 29:10-14 [Call Dec., Ex. 8] (Luciani's testimony that he was asked by Truck Insurance Exchange "to represent the Hospital" and that he understood he was "defending the hospital"); RB at 8 ("Luciani and his law firm were retained by the Hospital"); *see* Notice of Withdrawal and Substitution of Counsel (July 15, 2003) [Tompkins Dec., Ex. 3] (substitution of Defendants "as attorneys of record for Defendant Magic Valley Regional Medical Center"). Likewise, it was "Hospital executives," not County officials, to whom Luciani reported regarding his representation of Magic Valley. RB at 8 (discussing

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[2] For this reason, Defendants' contention that Twin Falls County "would have been the proper party to assert a claim against Luciani" (RB at 39) is erroneous: as a general rule, an attorney's duty runs to his or her client, not to third parties who may have an ownership or other interest in the client. *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884, 887 (2004).

[3] It is hardly unusual that the plaintiffs in the *Suter* litigation named Magic Valley rather than Twin Falls County as a party defendant. Over the years, parties to numerous cases involving a wide variety of subjects ranging from slip-and-fall cases to medical malpractice actions followed the same practice. *See, e.g., Magic Valley Newspapers, Inc. v. Magic Valley Regional Medical Center*, 138 Idaho 143, 59 P.3d 314 (2002); *Robertson v. Magic Valley Medical Center*, 117 Idaho 979, 793 P.2d 211 (1990). In contrast, where Twin Falls County is the proper party defendant, litigants have separately named it as such. *See, e.g., Chisholm v. Twin Falls County*, 139 Idaho 131, 75 P.3d 185 (2003); *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990).

Luciani's "telephone calls with Hospital executives and with the Hospital's general counsel"). And it was Magic Valley, not the County, that was forced to replace Defendants as counsel after their malpractice threatened it with multi-million dollar exposure. *See* Notice of Substitution of Counsel (Mar. 14, 2006) [Tompkins Dec., Ex. 4] (substitution out of Luciani as "local counsel for Defendant Magic Valley Regional Medical Center").

Third, if all of this were not enough, Defendants' contention that their client was Twin Falls County, not Magic Valley Regional Medical Center, is flatly inconsistent with the position that Defendants themselves repeatedly took before the district court. As noted in our opening brief (AOB at 4), in their original answer to the complaint in the district court, Defendants admitted that they had an attorney-client relationship with St. Luke's. Later, however, Defendants sought to withdraw that admission by filing a motion to amend their Answer, which the district court granted. In the very first sentence of that motion, Defendants stated, "Defendants represented Magic Valley Regional Medical Center ('MVRMC') in underlying litigation from July, 2003 to March 14, 2006." Memo. in Support of Defs.' Motion for Leave to Amend Answer (Dec. 15, 2010) at 1; *see also id.* at 3 ("Defendants represented Magic Valley Regional Medical Center, a unit of Twin Falls County, Idaho ('MVRMC'), in the underlying lawsuit"). That motion discussed in detail Defendants' representation of Magic Valley, and argued that Defendants' admission that they had an attorney-client relationship with St. Luke's was inadvertent. *Id.* at 3-7. Nowhere in that motion—the precise focus of which was the identity of their client—did Defendants ever suggest that their client had been Twin Falls County rather than Magic Valley. Thus, even if this Court were not bound by the district court's findings and the record, Defendants would be estopped from taking positions inconsistent with their own prior representations to the district court. *See Heinze v. Bauer*, 178 P.3d 597, 600 (Idaho 2008) ("Judicial estoppel is intended to prevent a litigant from playing fast and loose with

the courts") (citation omitted).[4]

B. St. Luke's Is Magic Valley's Successor In Interest.

Defendants take a similarly revisionist approach to the transaction by which St. Luke's succeeded to Magic Valley's claims. Defendants contend that St. Luke's did not succeed to the ownership of Luciani's purported "client," Twin Falls County, but merely acquired sufficient assets from the County to enable it "to continue some discrete portion of the seller's business." RB at 3-4, 32. Defendants expressly deny that the Hospital merely changed its name and that St. Luke's is Magic Valley's "successor," arguing that label does not apply here and that the public policy reasons for allowing a successor entity to assert claims it received by assignment from a predecessor therefore should not apply here. *Id.* at 3, 32. Again, however, Defendants' contentions are belied by the district court's findings and the undisputed record.

As discussed at length in our opening brief (AOB at 5-8), and as the district court expressly found, the 2006 transaction by which St. Luke's acquired its claims against Defendants from Magic Valley involved "the transfer or sale of the assets and liabilities associated with the operation of Magic Valley." Order at 3. The leased or transferred assets included, among other things, the real property containing the land and buildings comprising the campus of Magic Valley, as well as certain out-patient facilities, physician office buildings, physician offices and sites of health care delivery and ancillary medical services; all tangible personal property owned, used, maintained or operated by the Hospital; and "[a]ll of the Hospital's contracts, agreements

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[4] Notably, in their brief to this Court, Defendants admit that they were retained to represent Magic Valley, not the County. *See, e.g.,* RB at 7 ("Luciani Defended the Hospital in the Suter Litigation"); *id.* at 8 ("Luciani and his law firm were retained by the Hospital"); *see also id.* at 15 ("St. Luke's has brought this legal malpractice action against Luciani for his representation of the Hospital").

and leases." Sale and Lease Agreement §§ 2.1(a),(b), 2.2(b) at 5 [Tompkins Dec., Ex. 7]. Thus, as Defendants acknowledge, St. Luke's was formed to own and operate the Hospital after the asset purchase, in which it took over ownership of the Hospital's buildings and business. RB at 3. While that transaction technically took the form of an asset and liability transfer rather than a merger, the net result was closely similar: after the transaction closed, "Magic Valley ceased to exist and the operation and management of the regional medical center was taken over by St. Luke's. The Magic Valley management team became the St. Luke's management team with some minor modifications." Order at 3.[5]

Thus, as the district court found, St. Luke's is "Luciani's former client's successor." Order at 4. The question presented here arises and should be decided in that context, not in an entirely dissimilar context such as the assignment of a legal malpractice claim to a client's litigation adversary in settlement of that litigation. *Cf.* RB at 27, 31.

C. Defendants Fail To Mention The Key Contractual Language By Which St. Luke's Was Assigned "Any . . . Claims Against Third Parties By The Hospital."

As the district court expressly noted, the Sale and Lease Agreement contained unusually "broad assignment language" (Order at 4):

> [I]t is the intent of the Parties that all property and interests of the Hospital whether real or personal, tangible or intangible, be leased, sold assigned, licensed or transferred by [the] County and the [Magic Valley] subsidiaries . . . to [St. Luke's] (*including any* rights of first refusal, options or *claims against third parties by the Hospital* and settlements received thereto, *whether or not reflected*

[5] As St. Luke's showed in its opening brief, an assignment of a legal malpractice claim to a successor may be effective regardless of the technical form of the transaction by which the claim is transferred. AOB at 19-21. Defendants do not contest the point or respond to any of the cases cited for that proposition.

on the Hospital's Balance Sheet and whether known or unknown, contingent or otherwise.

Order at 3 (emphasis added), quoting Sale and Lease Agreement § 2.5 at 6 [Tompkins Dec., Ex. 7]. Although Defendants quote a short excerpt from this key provision (*see* RB at 4), they omit anywhere in their lengthy brief to address the broad assignment language (italicized above) that forms the basis for the certification order. That broad language ("any . . . claims against third parties by the Hospital . . ., whether known or unknown, contingent or otherwise") easily encompasses any claims for legal malpractice against Luciani, as the district court impliedly found in certifying the assignability issue to this Court.

III. DEFENDANTS IMPROPERLY ASK THIS COURT TO DECIDE ISSUES BEYOND THE SCOPE OF THE CERTIFIED QUESTION.

Toward the end of their lengthy brief, Defendants raise a number of issues that are beyond the scope of the certified question in this case. Thus, Defendants contend that any assignment of Magic Valley's claims against them to St. Luke's was ineffective because the language of the Asset Purchase Agreement broadly assigned any "claims against third parties by the Hospital" without explicitly referring to a legal malpractice claim and without a separate assignment agreement. *Id.* at 37-38.[6] Defendants also assert that "Twin Falls County had no legal malpractice action to assign" (RB at 2) because no cause of action had accrued against

[6] Defendants make the unsupported assertion that "[t]he parties' failure to reference legal malpractice claims in the Agreement, and to execute transactional documents as with other assigned rights and liabilities, renders the alleged assignment insufficiently specific to be given any effect." RB at 37-38. Even if that issue were within the scope of the certified question, by failing to cite any authority in support of that argument, Defendants have waived it. A party waives an issue cited on appeal if either authority or argument is lacking. I.A.R. 35(a)(6); *State v. Zichko*, 129 Idaho 259, 923 P.2d 966, 970 (1996).

Luciani before the closing of the Asset Purchase Agreement and because Twin Falls County purportedly "sustained no damage due to any purported negligence by Luciani." *Id.* at 38-41.[7] Finally, Defendants ask this Court to decide that claims for punitive damages are not assignable. *Id.* at 41. None of these issues is properly presented here, as each is beyond the scope of the question certified to this Court by the district court, and some raise questions of fact not suitable for resolution by this Court. Indeed, the district court expressly so noted. *See* Order at 4 ("Whether the alleged legal malpractice claim occurred or caused harm is disputed by the parties, but those disputed facts do not appear to impact the legal question of assignability of a legal malpractice claim").

In *Peone v. Regulus Stud Mills, Inc.*, 113 Idaho 374, 744 P.2d 102 (1987), the U.S. Court of Appeals for the Ninth Circuit certified to this Court the question whether certain sections of the Restatement (Second) of Torts are consistent with Idaho law and create a duty of care on the part of a party to a contract to the employees of the other contracting party. The Court, observing that the question presented "is a narrow one," declined to decide whether such a duty could be created by any other provision of law. The Court stated that "[o]ur role is limited to answering the certified question," and that "[f]or us to now decide the matter would result in an advisory opinion on a question not certified." *Id.* at 103. Precisely the same reasoning and conclusion follow here. This Court should decide the question certified to it by the district court, not the additional factual questions that Defendants now raise in their brief.

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[7] Defendants make the related assertion that St. Luke's would have paid more in cash for the Hospital's assets if it had not assumed liability for the pending *Suter* litigation. RB at 4-5, 28. Defendants do not cite any evidence in the record to support that factual assertion. Nor do they point to any evidence that the transaction could have been successfully negotiated or closed without such an assumption of liability.

IV. MAGIC VALLEY'S ASSIGNMENT OF ITS LEGAL MALPRACTICE CLAIMS TO ST. LUKE'S, ITS SUCCESSOR, WAS EFFECTIVE UNDER IDAHO LAW.

As St. Luke's showed in its opening brief, the majority of courts to have addressed the specific question presented here—whether an entity may assign a legal malpractice claim to its successor—have answered that question in the affirmative. AOB at 16-21. Defendants do not address those cases until nearly the end of their brief. RB at 35-39. Rather, they rely principally on cases which involved a very different issue: whether a party may assign a legal malpractice claim to a litigation adversary or other unrelated third party. But those cases not only arose on different facts, they presented public policy considerations that do not apply in the context of assignment to a successor entity. This Court should follow the majority rule and hold that an entity may assign a legal malpractice claim to its successor.

A. The Majority Of Courts Hold That An Entity May Assign A Legal Malpractice Claim To Its Successor.

The majority of courts to have addressed the issue before this Court hold that an entity may assign a legal malpractice claim to its successor as part of an overall transaction, such as the St. Luke's Transaction in which Magic Valley transferred assets and liabilities to St. Luke's. *See generally* Annot., *Assignability of Claim for Legal Malpractice*, 64 A.L.R.6th 473 § 2 (2011) ("Legal malpractice claims, transferred along with other assets and obligations to an assignee in a commercial transaction, may be assignable"); 4 Mallen & Smith, *Legal Malpractice* § 26.10 at 1018 (2011 ed.) ("The reported decisions have tended to treat a 'successor' entity as able to assert the legal rights of the predecessor, including a pre-existing malpractice claim . . . .") (footnote omitted); AOB at 16-21. The courts that follow that rule include the high courts of Pennsylvania and Rhode Island. *See Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999) (holding as a matter of first impression that "legal malpractice claims, transferred along with other assets and obligations to an assignee in a commercial transaction,

are assignable"); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1987) (assignment by client patentee of "all rights and causes of action" against attorney arising out of mishandling of patent application was effective under Pennsylvania law).

Still other courts, including courts in Oregon, Maine, and Massachusetts, allow voluntary assignment on a case-by-case basis, refusing to adopt the blanket rule against assignability that Defendants advocate here. *See* AOB at 31-35; *see also Villanueva v. First American Title Ins. Co.*, 313 Ga. App. 164, 721 S.E.2d 150 (2011) (holding as a matter of first impression under Georgia law that mortgage lender's legal malpractice claim was assignable to title insurer, while acknowledging that "there may be cases where the special nature of the attorney-client relationship precludes assignment").

Defendants do not deny that courts generally uphold assignment of legal malpractice claims to a successor corporation as part of a larger commercial transaction such as the St. Luke's Transaction. Indeed, one of Defendants' own cases explicitly acknowledged that the general rule barring the assignment of legal malpractice claims "did not bar a legal malpractice claim that was assigned to a successor corporation, which was a direct continuation of its predecessor." *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 667 (Ind. Ct. App. 2003), citing *Summit Account and Computer Service, Inc. v. RJH of Florida, Inc.*, 690 N.E.2d 723 (Ind. Ct. App. 1998). *Defendants do not cite a single case in which a court squarely refused to enforce such an assignment.*[8] Instead, Defendants urge this Court to adopt a blanket

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[8] Defendants' other cases (RB at 33-37) involved purported assignments to litigation adversaries or other strangers to the attorney-client relationship, rather than to a true successor entity such as St. Luke's. *See Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003) (clients assigned legal malpractice claims to their adversaries in settlement of underlying litigation); *Earth Science Labs., Inc. v. Adkins & Wondra, P.C.*, 523 N.W.2d 254 (Neb. 1994) (plaintiff assignee acquired debtor's assets from debtor in bankruptcy); *MNC Credit* (Continued...)

rule banning *any* assignment of legal malpractice claims. However, as shown in the next section, none of the policy considerations offered by courts for such a rule applies in the context of assignment to a successor entity.

B. None Of The Public Policy Considerations On Which Defendants Rely Applies In The Context Of Assignment To A Successor Entity.

The issue of first impression posed here does not turn principally on provisions of the Idaho Code or existing case authority. Rather, as Defendants acknowledge, "[t]he basis for finding a survivable cause of action non-assignable is public policy." RB at 21. Defendants argue at length that for a variety of policy reasons, this Court should conclude that a legal malpractice claim is not assignable. *Id.* at 24-31. But as we have shown, even if these considerations were persuasive in the abstract,[9] none applies in the specific context involved here: the assignment of a legal malpractice claim by a predecessor entity to its successor. *See* AOB at 32-35. Accordingly, this Court should not reflexively apply a blanket rule of non-assignability, as Defendants urge. The considerations underlying that general rule simply do not apply in the circumstances of this case. *Cerberus Partners*, 728 A. 2d at 1060 (concluding that

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Corp. v. Sickels, 497 S.E.2d 331 (Va. 1998) (client assigned rights to sister subsidiary corporation); *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661 (Ind. Ct. App. 2003) (debtor corporation in bankruptcy assigned rights to creditor in settlement agreement); *New Falls Corp. v. Lerner*, 579 F. Supp. 2d 282 (D. Conn. 2008), *aff'd,* 352 Fed. Appx. 596 (2d Cir. 2009) (client lender under loan and equipment leasing agreements assigned assets including legal malpractice action to third party, which later re-assigned them to plaintiff New Falls) (applying California law); *Law Office of Stern v. Security Nat. Corp.*, 969 So.2d 962, 964 (Fla. 2007) (underlying mortgage and note on which attorney filed untimely foreclosure action were "assigned several times before Security National finally acquired them during the appeal in the foreclosure action").

[9] As St. Luke's has shown, the blanket rule barring assignment of legal malpractice claims—alone among all other types of claims—has been the subject of considerable criticism. *See* AOB at 29 n.9.

such public policy reasons do not mandate "blind adherence to a general rule of prohibition in all cases of assignment"); *Gurski v. Rosenblum and Filan, LLC*, 885 A.2d 163, 171 (Conn. 2005) ("In examining all of the aforementioned considerations, we are not persuaded that every voluntary assignment of a legal malpractice action should be barred as a matter of law") (footnote omitted). "An assignment of a malpractice claim by one corporation to another as part of a merger or acquisition does not present these concerns." *Gregory v. Lolien*, 26 P.3d 180, 184 (Or. App. 2001), citing *Richter v. Analex Corp.*, 940 F. Supp. 353, 357-58 (D.D.C. 1996); *see also* cases cited, AOB at 29. As this Court long ago recognized, even if the reasoning underlying a general rule is sound, "it does not follow that the rule of the common law must forever remain fixed and unyielding in all cases and under all circumstances." *Good v. Good*, 311 P.2d 756, 758-599 (Idaho 1957) (discussing the common law maxim that "where the reason of a rule ceased the rule also ceased"); *see also Matter of Contempt of Wright*, 700 P.2d 40, 47 (Idaho 1985) (common law is "judge-made law based upon reason and common sense," is flexible, and adapts itself to varying conditions) (Bistline, J., concurring).

1. The "Unique Character of Legal Services" Does Not Justify Barring An Entity From Assigning A Claim To Its Successor.

Defendants argue first that assignment should not be allowed because of "the unique character of legal services," including the personal nature of the attorney's duty and the confidentiality of the attorney-client relationship. RB at 24-25. But that consideration simply does not apply where, as here, the only material change was in the corporate ownership of the client. The Hospital's assets, facilities, and business remained the same before and after the closing of the St. Luke's Transaction, as did its employees and management. *See* AOB at 5-6; Order at 3 ("The Magic Valley management team became the St. Luke's management team with some minor modifications"). Thus, the "Hospital executives" and employees (RB at 8) whom

Luciani had previously defended, and to whom he reported, remained in the same positions.[10] Nothing about the formal change in ownership of the Hospital from Twin Falls County to St. Luke's, or the County's assignment of its claims against third parties to St. Luke's as part of the overall transaction, in any way interfered with the fiduciary or confidential nature of the attorney-client relationship. Nor could it have, because Magic Valley ceased to exist following the closing of the St. Luke's Transaction. *See* AOB at 13. Moreover, as Defendants emphasize, Luciani was discharged as counsel to Magic Valley before the execution of the Sale and Lease Agreement. RB at 12.

Thus, on the undisputed facts involved here, there was no ongoing attorney-client relationship between Luciani and Magic Valley with which the assignment of Magic Valley's claims against Luciani could have interfered. To the contrary, St. Luke's simply stepped into Magic Valley's shoes in the pending litigation, in which Defendants themselves treated St. Luke's as Magic Valley's successor. In nearly every one of the cases on which Defendants rely, in contrast, the individual or corporate client continued to exist following the attempted assignment, and the assignment of the client's claims against its attorneys to its litigation adversary or other unrelated third party therefore threatened directly to jeopardize the attorney-client relationship.

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[10] Of course, "[a]s fictitious entities, corporations can seek and receive legal advice and communicate with counsel only through individuals empowered to act on behalf of the corporation." *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1492 (9th Cir. 1989). Those individuals remained the same after the closing of the St. Luke's Transaction.

2. Assignment To A Successor Does Not "Undermine The Attorney-Client Relationship."

For similar reasons, Defendants' closely-related argument that assignment would "undermine the attorney-client relationship" (RB at 26-28) is unpersuasive. Specifically, Defendants contend that assignment would eliminate the client's control over the attorney's disclosure of confidential information or inhibit a client's transfer of such information to the attorney, and would create conflicts of interest between the attorney and the client in the context of settlement negotiations. *Id.* Again, however, neither concern has any application in the undisputed context of this case, which involves assignment to a successor entity as part of a larger commercial transaction.

First, Defendants argue that because an attorney may utilize confidential information revealed by the client to defend against a claim of legal malpractice, assignment of the claim deprives the client of the ability to prevent the release of such information by dismissing the malpractice litigation. RB at 26. Defendants contend that for that reason, the potential for assignment may cause a client to restrict an attorney's access to valuable information to prevent such disclosure in the event of a future assignment. *Id.* Putting aside the speculative nature of this argument, these considerations are inapposite in the situation involved here, that of an assignment to a corporate successor. As the district court noted, after the St. Luke's Transaction closed, "Magic Valley ceased to exist and the operation and the operation and management of the regional medical center was taken over by St. Luke's." Order at 3. Under well-established case authority, control of the Hospital's attorney-client privilege passed to St. Luke's, which succeeded to the Hospital's management. *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985) ("when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive

the attorney-client privilege with respect to communications made by former officers and directors"). Under the circumstances, St. Luke's did not lose the ability to control disclosure of its confidential information, and its predecessor Magic Valley would have had no reason to restrict Luciani's access to confidential information.

Second, Defendants raise the specter that if assignment is allowed, a litigation adversary may agree to a settlement in exchange for assignment of any legal malpractice claims the client may have against his attorney, thereby placing the attorney in a conflict of interest and influencing the attorney's duty of loyalty. RB at 28-29, citing *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1966) and *State Farm Mut. Auto Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007). In numerous cases cited by Defendants, clients assigned legal malpractice claims to their litigation adversaries in settlement of the underlying litigation.[11] While that prospect undoubtedly raises troubling issues, such as the risk of collusion between the client and its adversary, those concerns are entirely absent where, as here, an entity assigns claims against third parties as part of an overall transfer of assets and liabilities to a successor, and the successor continues the underlying litigation. The two situations could not be more different.

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[11] *E.g., Gurski*, 885 A.2d 163 (judgment debtor assigned to judgment creditor bankruptcy estate's interest in legal malpractice action); *id.* at 173 (noting that "two jurisdictions, Texas and Washington, preclude assignment of legal malpractice actions when, as here, the assignment is to an adverse party in the underlying action") (footnote omitted); AOB at 31-32. A number of those courts narrowly limited their holdings to that situation. *E.g., Gurski*, 885 A.2d at 164 ("We conclude that an assignment of a legal malpractice claim or the proceeds from such a claim to an adversary in the same litigation that gave rise to the alleged malpractice is against public policy and thereby unenforceable"); *cf. id.* at 171 ("we are not persuaded that every voluntary assignment of a legal malpractice action should be barred as a matter of law") (footnote omitted); *see* AOB at 29.

3. Assignment To A Successor Will Not "Increase Litigation."

Defendants' further contention that the assignment of legal malpractice claims "increases litigation" (RB at 28-30) is entirely unsupported on the record of this case. The concern that assignments may "create a marketplace for legal malpractice claims" (*id.* at 29) simply has no application to a larger transaction in which, as here, an entity transfers substantially all of its assets and liabilities to a new corporate owner, including claims against third parties. Certainly, Defendants do not suggest, nor could they, that Magic Valley's claim against Luciani was a substantial motivating factor in St. Luke's overall acquisition of the Hospital's assets and business. Moreover, as Defendants themselves emphasize (RB at 12), the parties did not execute the Sale and Lease Agreement until after Magic Valley had discharged Luciani and substituted in new counsel. In short, "we are not dealing here with a situation where a legal malpractice claim was transferred to a person without any other rights or obligations being transferred along with it." *Cerebrus Partners, L.P.*, 728 A.2d at 1059; *accord, Richter*, 940 F. Supp. at 358 (legal malpractice claim "was not bartered or sold to an unrelated third party").[12]

4. Assignment To A Successor Does Not "Impact Negatively On The Public's Perception of the Legal Profession."

Finally, Defendants contend that the assignment of legal malpractice claims "reinforces negative public perception of the legal profession" because it can require attorneys to "advocate patently contradictory positions in successive proceedings." RB at 30-31. Again, however, no

[12] Defendants misplace their reliance on *InLiner Americas, Inc. v. Macomb Funding Group, LLC*, 348 S.W.3d 1 (Tex. Ct. App. 2010), which they describe as involving "transfer of assets in a commercial setting." RB at 29-30. In that case, after debtors defaulted on a secured loan and their creditor began proceedings to foreclose on the collateral, the debtors assigned the collateral to the creditor, including all assignable causes of action the debtors owned or later acquired. The Texas Court of Appeals held that the debtors' legal malpractice claims were not assignable. Thus, *InLiner Americas*, like many of Defendants' cases, involved an attempted assignment to a litigation adversary, not to a successor entity.

such risk is posed by assignment of a legal malpractice to a successor entity that, like St. Luke's, simply steps into the shoes of its predecessor. St. Luke's was not forced, by virtue of that assignment, to take any position inconsistent with Magic Valley's prior position in the same litigation. Magic Valley was not judgment-proof, nor did it collude with an opponent to assign any claims against its counsel to its litigation adversary. None of those concerns is remotely posed by an entity's assignment of legal malpractice claims as part of an overall commercial transaction such as the St. Luke's Transaction.

C. Defendants' Other Arguments Lack Merit.

Defendants briefly make two other technical arguments: that a legal malpractice cause of action should not be assignable because it sounds in tort rather than contract (RB at 17-18) and because at the time of the assignment, legal malpractice claims did not survive under Idaho law. RB at 19-20. Neither argument is persuasive.

As to the first argument, labeling a legal malpractice claim as a "tort" or "contract" cause of action is not determinative. This Court has explicitly recognized that legal malpractice actions are "an amalgam of tort and contract theories." *Bishop v. Owens*, 2012 WL 90411 at *3, --- P.3d ---- (Jan. 12, 2012), quoting *Johnson v. Jones*, 103 Idaho 72, 652 P.2d 650, 652 (1982); *accord, Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 248 P.3d 1256, 1261 (2011) ("A legal malpractice action is based on a combination of tort and contract theories"); *see* AOB at 25 & n.6. As the Connecticut Supreme Court observed persuasively, because an action for legal malpractice can be pleaded either in contract or in tort, "rather than strain to fit each legal malpractice claim into a category often determined by counsel based on concerns not relevant to the inquiry at hand, we think the better approach is to resolve the issue uniformly on the basis of

public policy." *Gurski*, 885 A.2d at 162.[13]

As to the second, as Defendants acknowledge, "[w]here there is legislation on survivability, survivability and assignment in most jurisdictions have now been disconnected for purposes of determining the assignability of a legal malpractice claim." RB at 20. Indeed, in its recent decision in *Bishop v. Owens*, which held that a legal malpractice cause of action abated upon the death of the individual plaintiff, this Court expressly declined to address the argument that "the personal nature of the attorney-client relationship suggests that legal malpractice claims are not assignable." 2012 WL 90411 at *4 ("This Court need not specifically address this issue because Shelton's legal malpractice claim abated"). *Bishop* thus strongly suggests that the two issues are no longer logically linked under Idaho law.[14] As Defendants also concede, as a result of the enactment of Idaho Code § 5-327(2), a legal malpractice claim in this State now survives the death of an individual plaintiff. *See* AOB at 26 n.7; RB at 20. Thus, neither point resolves the issue here, which turns almost entirely on public policy considerations.

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[13] Defendants argue that in *Bishop*, this Court "necessarily" concluded a legal malpractice cause of action is not a "thing in action" under Idaho Code § 55-402. RB at 23. Not so: *Bishop* did not mention § 55-402, nor did it address the assignability issue presented here.

[14] In light of *Bishop*, which was decided after St. Luke's filed its opening brief, the analogy we drew to survivability of individuals' claims (AOB at 24-26) is not accurate. As noted, however, *Bishop* expressly declined to decide the issue before the Court here, but instead limited its holding to the application of the abatement rule. *See* 2012 WL 90411 at *3 ("under the abatement rule, breach of duty is an action in tort, not contract"). *Bishop* did not involve assignment to a successor entity in the context of a larger commercial transaction, but instead arose when the plaintiff's personal representative sought to assert her legal malpractice claims after the plaintiff passed away during the pendency of the litigation.

D. Defendants' Blanket No-Assignment Rule Would Permit Attorneys To Escape Liability For Negligence Due to the Fortuity of a Change In Corporate Ownership.

For the foregoing reasons, the public policy considerations cited by courts to bar assignment of legal malpractice claims in some circumstances do not apply in the context of an assignment to a successor as part of a larger merger or other transaction. Moreover, if the Court were to accept Defendants' blanket rule in this context, it would lead to inequitable results, because it would permit attorneys entirely to escape liability for the consequences of their legal malpractice merely because of an unrelated change in ownership of the client. *See* AOB at 21-22. As Defendants observe, an invalid assignment generally has no effect on the validity of the underlying cause of action; thus, in those jurisdictions that follow a no-assignment rule, the assignor may still pursue the legal malpractice claim as the real party in interest. RB at 39 (citing *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 634 (Tex. Ct. App. 2000); *see also Davis v. Scott*, 320 S.W.3d 87, 91-92 (Ky. 2010) (collecting authorities). However, where, as here, the assignor ceases to exist as a result of the very transaction by which the assignment was to have been effected, the result of adopting Defendants' inflexible rule would be that *nobody* could pursue the claim. That result would allow an attorney to escape the consequences of his legal malpractice by the happenstance of a change in ownership of his corporate client. As the Pennsylvania Supreme Court has observed, that result would be inequitable. *Hedlund*, 539 A.2d at 359 ("We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice").

Defendants' response (RB at 38-39) is unpersuasive. They rely on a Minnesota decision which rejected the Pennsylvania court's reasoning that refusing to allow assignment of legal malpractice claims would improperly shield an attorney from the consequences of legal

malpractice, reasoning that "[t]he client would still be able to bring any and all legal malpractice claims against his or her attorney." *Wagener v. McDonald*, 509 N.W.2d 188, 192 (Minn. Ct. App. 1993).[15] But as shown above, the argument is based on a false factual premise: Magic Valley ceased to exist following the closing of the Sale and Lease Agreement, and therefore cannot assert any claims against Luciani. Moreover, it was St. Luke's, rather than Magic Valley, that suffered the lion's share of the damages caused by Luciani's malpractice when it was forced to incur uninsured attorneys' fees and ultimately to pay millions of dollars to settle the *Suter* Litigation. *See* AOB at 12-13. If this Court were to accept Defendants' position and adopt a blanket no-assignment rule, therefore, the consequence would be that the merits of St. Luke's claim against Luciani would never be determined, since there is no existing party that could assert that claim. That result would be inequitable, and would be inconsistent with Idaho courts' strong policy in favor of deciding claims on their merits. *Cf. Bunn v. Bunn*, 587 P.2d 1245, 1246 (Idaho 1978) ("It has long been judicial policy in Idaho that controversies be determined and disposed of each on its own particular facts and as substantial justice may require. The exercise of judicial discretion should tend to bring about a judgment on the merits").

[15] In *Wagener*, client sellers, against whom judgment was entered in an action arising out of the sale of real property, assigned all their rights in any claims against their attorney to a co-defendant in settlement of the co-defendant's claims against them. 509 N.W.2d at 189. As in many of Defendants' cited cases, the assignee thus was the client's litigation adversary, not its successor in interest.

V. CONCLUSION

For the foregoing reasons, this Court should answer the question certified to it by the U.S. District Court for the District of Idaho as follows:

On the undisputed facts here, which involve "an asset and liability transfer from Magic Valley to St. Luke's" that included an assignment of "all claims against third parties by the Hospital," Magic Valley's assignment to St. Luke's of its legal malpractice claims against Luciani was effective under Idaho law.

Dated: March 28, 2012

ANDERSON, JULIAN & HULL, LLP

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2012, I filed the foregoing Plaintiff's Initial Disclosures Under Rule 26 electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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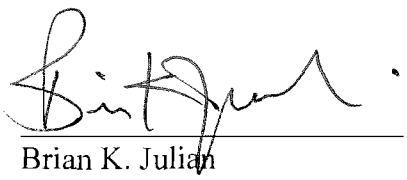

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