

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA  
CIVIL DIVISION**

In re:

Laser Spine Institute, LLC	Case No. 2019-CA-2762
CLM Aviation, LLC	Case No. 2019-CA-2764
LSI HoldCo, LLC	Case No. 2019-CA-2765
LSI Management Company, LLC	Case No. 2019-CA-2766
Laser Spine Surgery Center of Arizona, LLC	Case No. 2019-CA-2767
Laser Spine Surgery Center of Cincinnati, LLC	Case No. 2019-CA-2768
Laser Spine Surgery Center of Cleveland, LLC	Case No. 2019-CA-2769
Laser Spine Surgical Center, LLC	Case No. 2019-CA-2770
Laser Spine Surgery Center of Pennsylvania, LLC	Case No. 2019-CA-2771
Laser Spine Surgery Center of St. Louis, LLC	Case No. 2019-CA-2772
Laser Spine Surgery Center of Warwick, LLC	Case No. 2019-CA-2773
Medical Care Management Services, LLC	Case No. 2019-CA-2774
Spine DME Solutions, LLC	Case No. 2019-CA-2775
Total Spine Care, LLC	Case No. 2019-CA-2776
Laser Spine Institute Consulting, LLC	Case No. 2019-CA-2777
Laser Spine Surgery Center of Oklahoma, LLC	Case No. 2019-CA-2780

Assignors,

Division L

To:

Soneet Kapila,

Assignee,

**SHIRLEY AND JOHN LANGSTON'S OPPOSITION TO ASSIGNEE'S  
MOTION FOR ENTRY OF ORDER PURSUANT TO FLA. STAT. §  
727.109.15: (I) AUTHORIZING THE USE OF CASH COLLATERAL (II)  
PROVIDING ADEQUATE PROTECTION TO LENDERS; (III)  
ESTABLISHING A LIEN CHALLENGE DEADLINE AND (IV) GRANTING  
RELATED RELIEF**

Shirley and John Langston, by and through undersigned counsel, now oppose Assignee's Motion For Entry Of Order Pursuant To Fla. Stat. § 727.109.15: (I) Authorizing The Use Of Cash Collateral (II) Providing Adequate Protection To Lenders; (III) Establishing A Lien Challenge Deadline And (IV) Granting Related Relief ("Motion") and state:

1. **Summary.** The Assignee, Sonett Kapila, seeks to shift his statutory burden to examine and challenge perfected liens to unsecured creditors, and proposes a 40-day window for unsecured creditors to raise any such challenges or any lien defenses to be forever barred. The proof of claim bar date is not until July 12, 2019. The Assignee, not the unsecured creditors, has the statutory obligation to examine the validity and priority of claims, including secured claims, and report those findings to all creditors. This has not yet occurred. The Motion also seeks to sweep all tort and contract claim recoveries, which are not currently part of the collateral of the perfected liens, into the collateral pool of the perfected liens. Essentially, the Assignee is proposing to waive all defenses to perfected lien claims without investigation, and grant lenders additional collateral. Unsecured creditors have no right, or responsibility, to take any action with respect to the validity of perfected liens. Until such time as the Assignee has fully reported on the extent and scope of tort and contract claims, and until such time as Assignee has fully investigated and reported on any defenses to lien claims and/or affirmative tort or contract claims against the lenders, the relief sought by the Motion is premature.

### **Background**

2. Pursuant to § 727.102, this Court has jurisdiction over all matters arising under Chapter 727 Assignments.

3. Shirley and John Langston (“the Langstons”) are Plaintiffs in a medical malpractice case pending in the Circuit Court of Hillsborough County, Florida, against Laser Spine Institute, LLC (“LSI”) and one of the former physician employees of LSI, Dr. Thomas Francavilla, titled, Shirley and John

Langston v. Laser Spine Institute, LLC, and Dr. Thomas Franavilla, Case No. 17-CA-10423, Circuit Court of Hillsborough County, Florida (the “Langston Malpractice Case”), in the Defendants claim to be self-insured for the first one million dollars of claims.

4. Beginning March 1, 2019, culminating on March 14, 2019, LSI along with a series of what the Motion describes as “15 affiliates,” ceased operations and filed these state court proceedings under Chapter 727 of the Florida Code as assignments for the benefit of creditors.

5. LSI is a common Florida LLC, not a professional association, which employed physician employees and in the case of the Langstons, rendered medical care through its physician employees. LSI entered contracts to provide medical services to the Langstons, paid the physician employees, hired and paid other health care workers, and engaged in a nationally advertised business of providing “laser” spine surgery. LSI apparently contracted with one of its “affiliates,” which held a Florida ambulatory surgical center license, but the physician employees were only employees of the unlicensed common LLC, LSI. The Langstons allege that LSI and its physician employee were negligent in the treatment and care of Shirley Langston, causing damage.

6. July 12, 2019, is the current proof of claim deadline for all unsecured claims.

### **Analysis**

7. Pursuant to § 727.101:

The intent of this chapter is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors

and equal distribution of assets according to priorities as established under this chapter.

Also see *Pro Finish, Inc. v. Estate of Estate of All Am. Trailer Mfrs.*, 204 So. 3d 505, 507 (Fla. 4th DCA 2016) (“The intent of chapter 727 is to provide a uniform procedure, ensure full reporting to creditors, and ensure equal distribution per priority.”)

8. § 727.108 describes the “duties of assignee,” which includes the following subsections:

- a. In subsection 1, prosecuting, or selling and assigning the right to prosecute, tort claims and causes of action, and remedies are not limited by a claim that the assignor acquiesced or participated in the wrongful act;
- b. In subsection 2, examining the assignor under oath, which the Assignee noticed for April 16, 2019;
- c. Subsection 3 requires notice to all creditors of matters concerning the administration of the estate;
- d. Subsection 9 requires an “interim report of receipts and disbursements within 6 months after the filing date,” with certain exceptions;
- e. Subsection 10 requires the Assignee to “[e]xamine the validity and priority of all claims against the estate,”; and
- f. Subsection 11 provides for the abandonment of assets to perfected lien creditors where Assignor determines that there is no equity or the assets are burdensome.

9. § 727.109, in subsection 8, grants this Court the power to determine the validity, priority, and extent of liens, and subsection 15 grants a general power to exercise any other powers necessary to enforce or carry out the provisions of Chapter 727.

10. The Assignee has the authority to bring the Assignor's legal malpractice claims under the direct wording of the statute, which was amended after the Florida Supreme Court determined that issue in *Cowan Lebowitz & Latman, PC v. Kaplan*, 902 So. 2d 755 (Fla. 2005).

11. In the Motion, the Assignee, Soneet Kapila ("Assignee") contends that this Court has jurisdiction to authorize the Assignee to use Cash Collateral, adopting the definition from the federal bankruptcy code, to "fund the wind-down," Motion, Page 4, to grant to the lenders "a lien on all claims and causes of action of each Assignor . . . including all commercial tort claims of every kind and description . . .," Motion, Page 6, to pay professional fees, and seeks the "[e]stablishment of a lien challenge deadline" for the purpose of barring any challenges to the security interests of the Lenders. The Assignee's stated purpose is that the Lender will not fund wind-down expenses unless it has uncontested liens and obtains additional collateral.

12. Laser Spine Institute LLC and Dr. Francavilla claim to have been "self-insured," as to medical malpractice claims, in part, and pursuant to Florida law, Dr. Francavilla was required to post either an irrevocable letter of credit or an escrow account in the amount of \$250,000/\$750,000 in accordance with Chapter 675 for the letter of credit and § 625.53, Fla. Stat., for the escrow account. It appears that the employee physicians were operating with the

understanding that LSI's employment contract included the responsibility to comply with the Florida self-insurance requirements.

13. The Langstons filed a motion in these proceedings to determine the self-insurance compliance with the foregoing, and Assignee's counsel has indicated that there was no compliance. This raises the specter of claims for fraud, breach of fiduciary duty, negligent misrepresentation, legal malpractice, and similar claims, against the controlling persons and attorneys, both in-house and outside counsel, who designed this business platform and induced physicians to provide medical care in Florida without complying with the statutorily mandated self-insurance requirements. Some of these claims may be derivative claims, and derivative claims may solely be brought by the Assignee, *Moffatt & Nichol, Inc. v. B.E.A. International Corp.*, 48 So. 3d 896, 899 (Fla. 3d DCA 2010).

14. There has been no reporting by the Assignee of the following facts and circumstances:

- a. The identity of the owners of all of the "affiliates" under the Court's jurisdiction with an explanation of whether there are any insurance policies covering errors and omissions of the owners and controlling persons;
- b. The identify of the persons who were responsible for complying with the Florida statutory self-insurance requirements, including controlling persons and in-house attorneys, why LSI operated in violation of those statutes, and whether there are any claims Assignee can bring related to that non-compliance;

- c. Whether assets of LSI were used to pay debts of other affiliates and whether any Lenders received payments from LSI for debts that LSI was not obligated to pay;
- d. Whether there is any basis to claim that any perfected liens should be equitably subordinated to the unsecured claims, and whether the owners of the Assignors contend that any of the Lenders participated in conduct that could result in the subordination of the liens. Florida recognizes the doctrine of equitable subordination of liens, *Carlton Fields, P.A. v. LoCascio*, 59 So. 3d 246 (Fla. 3d DCA 2011), which allows Courts to subordinate liens to claims of junior creditors for a lender's misconduct, *Pepper v. Litton*, 308 U.S. 295, 304, 84 L. Ed. 281, 60 S. Ct. 238 (1939). The general areas of inquiry should minimally concern:
  - i. Whether the lenders allegedly breached any loan agreements;
  - ii. Whether the lenders received payments from entities, such as LSI, that are not liable on the debt;
  - iii. Whether the lenders engaged in any conduct that could create defenses to payment;
  - iv. Whether the lenders engaged in any conduct that constituted undue control over the business activities of the Lenders;
  - v. Whether the lenders knew that LSI was operating in

violation of the Florida law on self-insurance;

- vi. Whether the lenders were involved in decisions relating to the defense of any claims that could give rise to legal malpractice claims, including without limitation, possible legal malpractice claims related to *Baily v. St. Louis*, 2018 Fla. App. LEXIS 18768 \*; 44 Fla. L. Weekly D 128; 2018 WL 6816180 (Fla. 2d DCA Dec. 28, 2018, *Bailey v. St. Louis*, 196 So. 3d 375, 2016 Fla. App. LEXIS 1375 (Fla. Dist. Ct. App. 2d Dist., Feb. 3, 2016);
- vii. How the Motion's requested relief will impact fraud and negligent representation claims against the individual controlling persons of the assigned entities relating to the failure of LSI to comply with the Florida medical malpractice self insurance statutes;
- viii. Whether the unsecured creditors will be better off seeking the abandonment of any claims so unsecured creditors may pursue their own causes of action. Only the Assignee may pursue certain claims, including fraudulent transfer claims, unless the Assignee abandons the claims:

In sum, in the context of a Chapter 727 assignment for the benefit of creditors, only the assignee may bring a Chapter 726 fraudulent transfer claim. This conclusion is consistent with the underlying



rationale of both statutes, which seek to protect the rights of creditors. To allow creditors to bring their own fraudulent transfer claims, without the consent of the assignee, would undermine Chapter 727 by depleting assets of the estate and disregarding the priorities established under that statute.

This is not to say that a judgment creditor may never bring its own fraudulent transfer claim after the filing of a Chapter 727 assignment. The duties of an assignee include the decision whether to pursue or abandon a fraudulent transfer claim or "sell and assign, in whole or in part, such claims or causes of action to another person or entity on the terms that the assignee determines are in the best interest of the estate." § 727.108(1)(a), Fla. Stat. (2010). If the assignee has determined that it is in the best interest of the estate to abandon or to sell and assign a fraudulent transfer claim, a judgment creditor may then prosecute the claim outside of the Chapter 727 assignment. An assignee's decision to abandon or to sell and assign a claim is a condition precedent to a judgment creditor's ability to bring a separate lawsuit. *Smith v. Effective Teleservices, Inc.*, 133 So. 3d 1048, 1052 (Fla. 4th DCA 2014)

15. Unless and until the Assignee fully investigates and reports on whether or not there is any defense to the liens, and further, provides a reasonably comprehensive report on the structure of the affiliates, the interlocking ownership, the identity of all controlling persons and attorneys, the possibility of claims and insurance coverage, it is premature to bar defenses against perfected liens and grant the Lenders a perfected lien on all contract and tort claims that are not currently part of the collateral.

16. The Movants understand the dilemma facing the Assignee; the Assignee requires money to administer the estate, the only source of the funding is the secured lender, and the secured lender is refusing to fund the money unless all claims against its liens are barred and the lender also receives

additional collateral. However, that additional collateral may be the only source of recovery for the unsecured creditors, and before the Court sweeps all assets in the form of tort and contract recoveries into the perfected lien collateral, and bars all defenses to those liens, the Assignee must be required to conduct a thorough investigation of all defenses to those liens and the total impact of the Assignee's proposal on the unsecured claimants.

17. The alternative is to dismiss these proceedings. If these assignment cases are being administered solely for the benefit of the secured creditors, and if the net effect of these assignment cases is to eliminate without investigation all defenses to perfected liens and to apply all proceeds of litigation to pay secured lenders while barring all defenses to the perfected liens without investigation, these assignment cases do not comply with the intent of the statute to ensure full reporting to creditors, and ensure equal distribution per priority, *Pro Finish, Inc. v. Estate of Estate of All Am. Trailer Mfrs.*, 204 So. 3d 505, 507 (Fla. 4th DCA 2016), and:

However, "the provisions of an assignment which are inconsistent with the applicable statute are void, and the assignment as a whole is void where it fails to comply with such a statute, or is against public policy." 21 C.J.S. Creditor and Debtor § 9 (footnotes omitted). *Id.*, at 507.

18. Instead of granting the Motion, the Court has the authority to evaluate the assignment and determine whether or not this entire proceeding is void as against the public policy of ensuring full reporting to creditors and equal distribution per priority, and if so, declaring the assignments to be void and dismissing all of these cases.

## **Conclusion**

The Assignee's motion is premature. Before abandoning all defenses to perfected lien claims and before adding all tort and contract claims as additional collateral to those incontestable liens, the Assignee must first comply with the overall intent of Chapter 727 to ensure full reporting to creditors and to ensure distribution per priority. This has not yet occurred, and likely cannot occur within 40 days. The Motion is, at best, premature, and the Assignee should first be required to provide a full and complete report as stated above, together with other information as sought by other unsecured creditors, and provide the Court and all creditors with a full explanation of why LSI and its affiliates collapsed in this spectacular fashion, whether there are parties liable for the collapse, and how to best approach these cases. Accordingly, the Assignee should be compelled to fully comply with all reporting requirements of Chapter 727 and, pending that compliance, the motion should be denied and/or held in abeyance.

**Wherefore;** the Langstons oppose the Motion and request that the same be denied or held in abeyance, and request the Court to order the Assignee to fully report on the status of all tort and contract claims and the status of the estate as above stated, and such other relief as the Court deems appropriate.

Certificate of Service: I hereby certify that a copy of the foregoing has been filed and service will be made through the Court's efilng service this 28 day of May, 2019.

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