

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

In re:

Laser Spine Institute, LLC. ¹	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,

Consolidated Case No.
2019-CA-2762

to

Soneet Kapila,

Division L

Assignee.

**ASSIGNEE'S MOTION FOR ENTRY OF ORDER
AUTHORIZING AND DIRECTING HOLLAND AND
KNIGHT LLP TO TURN OVER ASSIGNOR CLIENT FILES**

Soneet Kapila, as assignee (“Assignee”) for the benefit of the creditors of the Assignors
(defined below), by and through his undersigned attorneys, hereby files this motion seeking entry

¹ On April 8, 2019, the Court entered an order administratively consolidating this case with the assignment cases of the following entities: LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC.

of an order authorizing and directing Holland and Knight LLC (“**H & K**”) to turn over client files of the Assignors (defined below). In support of this motion (the “**Motion**”), the Assignee states as follows:

Summary of Relief Requested

The Assignee seeks turnover of H&K’s files related to its representation of certain Assignor entities in pre-assignment litigation. Certain former co-defendants of the Assignors have raised objections. There does not, however, appear to be any basis for these parties to object to H&K’s turnover of these files to the Assignee.

First, turnover of the client files is consistent with the Assignors’ duties under Florida law to turn over all papers, records, and other documents in their possession, custody, or control to the Assignee. Second, the Assignee, as the Assignors’ successor-in-interest, has the right to obtain the client files and is now the holder of the Assignors’ attorney-client privilege. Third, the former co-clients, who are the objecting parties, cannot use the attorney-client privilege to shield communications with H&K from the Assignee, as there is typically no expectation of privacy among co-clients.

Accordingly, the Assignee asks the Court to enter an order authorizing and directing H&K to turn over the Bailey Client Files (as defined below) to the Assignee.

Background

1. On March 14, 2019, Laser Spine Institute, LLC (“**LSI**”) executed and delivered an assignment for the benefit of creditors to the Assignee. The Assignee filed a Petition with the Court on March 14, 2019, commencing an assignment for the benefit of creditors proceeding pursuant to Section 727 of the Florida Statutes (the “**LSI Assignment Case**”).

2. Simultaneous with the filing of the LSI Assignment Case, the Assignee filed fifteen other Petitions (collectively, the “**Assignments**”) commencing assignment for the benefit of creditors proceedings for 15 affiliates of LSI (the “**Assignment Cases**”): LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC (collectively, together with LSI, the “**Assignors**”).

3. Prior to the filing of the Assignment Cases, H&K represented LSI, and certain other Assignors as counsel in various legal matters, including the lawsuit styled *Bailey, et al., v. St. Louis, et al.*, Case No. 06-08498, which proceeded to trial and resulted in prolonged appellate proceedings (collectively, the “**Bailey Lawsuit**”).

4. In the Bailey Lawsuit, H&K represented all of the defendants, which included Assignors LSI and Laser Spine Surgical Center, LLC (the “**Assignor Clients**”), as well as the following co-defendants: Dr. James St. Louis; Dr. Michael W. Perry; EFO Holdings, L.P.; EFO Genpar, Inc.; EFO Laser Spine Institute, Ltd.; Laser Spine Medical Clinic, LLC; and Laser Spine Physical Therapy, LLC.

5. H&K is in possession of various files and documents arising from its representation of the Assignor Clients and other parties in the Bailey Lawsuit (the “**Bailey Client Files**”).²

² H&K also is in possession of client files of the Assignors related to the representation of the Assignors in the other matters. H&K will also be turning over those files to the Assignee. Since no third parties have raised objections as to H&K’s turnover of those files, these files are not the subject of this Motion and will be turned over by H&K.

6. On January 16, 2020, the Assignees sent a demand letter to H&K requesting turnover of the Bailey Client Files.³ H&K sent notice to the other co-defendants in the Bailey Lawsuit providing an opportunity to object to H&K's production of the Bailey Client Files.

7. Two groups of co-defendants in the Bailey Lawsuit objected to H&K's provision of the Bailey Client Files to the Assignee. Dr. James St. Louis and Dr. Michael W. Perry ("**St. Louis & Perry**") objected, primarily asserting that the Assignee has no greater right to the Bailey Client Files than St. Louis and Perry. Separately, a group comprising Dr. Michael W. Perry,⁴ EFO Holdings, L.P., EFO Genpar, Inc., and EFO Laser Spine Institute (collectively, the "**EFO Parties**") objected.

Relief Requested and Basis for Relief

8. The Assignee seeks entry of an order authorizing and directing H&K to turn over the Bailey Client Files. St. Louis & Perry and the EFO Parties have objected to H&K's turnover of the Bailey Client Files to the Assignee⁵. These parties, however, have no basis to object to the Assignee's right of access to the Bailey Client Files.

9. First, the Assignee has an unqualified right to obtain the Bailey Client Files because the Assignors' rights to the Bailey Client Files were assigned to the Assignee. In these Assignment Cases, nearly identical Assignments were filed in each case, which followed the statutory form prescribed by Section 727.104(1)(b) of the Florida Statutes. In addition to the assets assigned, the Assignment also transferred all related "books, records, and electronic data." One of the statutorily prescribed duties of an assignor is to "deliver to the assignee all of the assets of the estate in the

³ The Assignee also sent similar demand letters to other law firms that represented the Assignors. To the extent issues arise with respect to such demands, the Assignee will seek relief in separate motions.

⁴ It appears that Dr. Perry is represented by two different attorneys, each of whom objected to H&K's production of the Client Files.

⁵ The Assignee does not object to St. Louis & Perry also obtaining a copy of the Bailey Client Files from H&K but object to any assertion by St. Louis & Perry that they have greater rights of possession of the Bailey Client Files.

assignor's possession, custody, or control, **including, but not limited to, all accounts, books, papers, records, and other documents.**" Fla. Stat. § 727.107(2) (emphasis added). The Bailey Client Files held by H&K were within the Assignor Clients' control and are subject to turnover.

10. Second, the Assignee succeeded to the Assignor Clients' rights as clients of the H&K and the Assignor Clients' attorney-client privilege. Generally, a former client of an attorney is "presumptively accorded full access to the entire attorney's file with narrow exceptions." *In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801, 809 (2010); *See also* Restatement (Third) of the Law Governing Lawyers § 46 (2000) (discussing client's right to retrieve, inspect, and copy documents). As successor-in-interest, the Assignee succeeded to the Assignor Clients' rights to the Bailey Client Files.

11. Third, as the Assignor Clients' successor-in-interest, the Assignee holds the attorney-client privilege of the Assignor Clients. The United States Supreme Court, in *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985), held that a bankruptcy trustee over a corporate entity becomes the party entitled to assert (or waive) the corporate entity's attorney-client privilege. All of the factors considered by the Court in *Weintraub* apply with equal force to an assignee in an assignment for the benefit of creditors case. *See id.* at 351–56 (reasoning that "the actor whose duties most closely resemble those of management should control the privilege in bankruptcy")⁶.

12. Although there is no Florida case law directly applying *Weintraub* to an assignee, Florida Statutes expressly provide that an assignee or successor of an entity is entitled to assert the attorney-client privilege. *See* Fla. Stat. § 90.502(1)(d) (stating that the privilege may be claimed by "[a] successor, assignee, trustee in dissolution, or any similar representative of an organization,

⁶ "State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceedings involving assignments for the benefit of creditors." *Moecker v. Antoine*, 845 So. 2d 904, 912 n.10 (Fla. 1st DCA 2003).

corporation, or association or other entity, either public or private, whether or not in existence”). Moreover, at least one other court has held that an assignee in an assignment for the benefit of creditors proceeding holds the attorney-client privilege of the assignor. *MFS & Company, LLC v. Caterpillar, Inc.*, 2010 WL 11549935 (E.D. Mich. Sept. 20, 2010) (stating that the assignee’s possession of the attorney-client privilege “is consistent with the general law of privilege, which holds that receivers, liquidators, and subrogees have the authority to waive or assert the privilege”).

13. Further, courts have consistently held that analogous fiduciaries, such as receivers in receivership cases, hold the receivership entity’s privilege. *See, e.g., Federal Deposit Ins. Corp. v. Cherry, Bekaert & Holland*, 129 F.R.D. 188 (M.D. Fla. 1989) (holding FDIC could assert bank’s attorney-client privilege in FDIC receivership); *S.E.C. v. Ryan*, 747 F. Supp. 2d 355, 362 (N.D.N.Y. 2010) (holding that receiver in S.E.C. receivership, after succeeding to all management of the entity, effectively became the client with respect to pre-receivership law firm and was entitled to assert or waive privileges).

14. Fourth, under the co-client exception to the attorney client privilege, the Assignee is entitled to all communications in possession of H&K in connection with the Bailey Litigation, regardless of with whom H&K was communicating. The Assignor Clients, St. Louis & Perry, and the EFO Parties were all co-defendants in the Bailey Litigation. H&K provided legal defense and appellate services for all co-defendants. The Assignee is entitled to obtain all communications and documents in H&K’s possession related to the defense of the Bailey Litigation. In Florida, this exception to the attorney-client privilege is codified. Section 90.502(4)(e) of the Florida Statutes exempts from the attorney-client privilege communications among co-clients “if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.” There is no expectation

of confidentiality among co-clients. *See Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So. 2d 1112, 1117 (Fla. 1st DCA 1994).

15. In bankruptcy, courts have applied the co-client exception to allow trustees to obtain communications and documents from law firms representing the debtor and other clients in the same matter before the bankruptcy case, even if those parties were adverse in the bankruptcy case. *See In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (Bankr. M.D. Fla. 2013) (holding that bankruptcy trustee could invoke the co-client exception to obtain all communications and work product in connection with joint pre-bankruptcy litigation defense); *In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801 (Bankr. S.D. Fla. 2010) (holding attorney-client privilege prevent law firms' production of documents in connection with joint transaction, despite the terms of the joint defense agreement). The doctrine has also been applied in the insurance context to allow an insurer to obtain production of documents exchanged between an insured and its counsel. *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, 2015 WL 1860826 (S.D. Fla. Apr. 22, 2015).

16. In summary, there does not appear to be any basis for St. Louis & Perry or the EFO Parties to object to H&K's turnover of the Bailey Client Files to the Assignee. Turnover of the Bailey Client Files is consistent with the Assignors' duty to turn over all papers, records, and other documents in their possession, custody, or control. Additionally, the Assignee, as the successor-in-interest of the Assignor Clients, is entitled to obtain the Bailey Client Files and has succeeded to the Assignor Clients' attorney-client privilege with respect to the Bailey Litigation. Accordingly, the Assignee asks the Court to enter an order authorizing and directing H&K to turn over the Bailey Client Files to the Assignee.

WHEREFORE, the Assignee respectfully requests that this Court enter an order (i) granting this Motion, (ii) authorizing and directing H&K to turn over the Bailey Client Files to the Assignee, (iii), providing for such other and further relief as is just and proper.

CERTIFICATE REGARDING CONFERENCE OF COUNSEL

On February 25, 2020, counsel for the Assignee and counsel for the EFO Parties participated in a telephone call in a good faith effort to resolve the issues in this motion, but were unable to reach an agreement. The parties agreed to try to reach a resolution prior to a hearing on this Motion. In addition, counsel for St. Louis & Perry and counsel for the Assignee participated in a telephone call in a good faith effort to resolve the issues in this motion, but were unable to reach an agreement.

DATED: March 3, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Assignee's Motion for Entry of Order Authorizing and Directing Holland and Knight LLP to Turn Over Assignor Client Files* has been furnished on this 3rd day of March, 2020 by the Court's electronic system to all parties receiving electronic service, and by either U.S. mail or electronic mail to the parties listed on the attached Limited Notice Parties list and to:

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January 14, 2020

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