

IN THE SUPREME COURT OF TEXAS

=====
No. 98-0408
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JOHN C. MALLIOS D/B/A MALLIOS & ASSOCIATES, MALLIOS & ASSOCIATES, P.C.,
AND JAMES D. BLUME, PETITIONERS

v.

MARK W. BAKER, RESPONDENT

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS
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Argued on December 8, 1998

JUSTICE ENOCH, joined by CHIEF JUSTICE PHILLIPS, concurring.

I join the Court's opinion. I write separately because I do not share Justice Hecht's view that so-called "commercial" legal malpractice claim assignments are against public policy.

As the Court correctly states, the arrangement between Baker and Herron does not implicate the concerns about collusion and position-shifting we expressed in *State Farm Fire and Casualty Co. v. Gandy*¹ and *Zuniga v. Groce, Locke & Hebdon*.² On remand, just as before, Baker's position, that Mallios committed legal malpractice by suing the wrong defendant, will be the same as if he had no agreement with Herron.

¹ 925 S.W.2d 696 (Tex. 1996).

² 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd).

Moreover, I can think of no good reason why "commercial" assignments of legal malpractice claims should be declared void as against public policy. Texas law favors free assignment of claims. Indeed, for over 100 years the Texas Legislature has expressly recognized that the *sale* of claims in Texas is permissible. Section 12.014 of the Texas Property Code, which has existed in roughly the same form since 1889, provides that "an interest in a cause of action on which suit has been filed *may be sold*, regardless of whether the . . . cause of action is assignable in law or equity, if the transfer is in writing."³

Justice Hecht dismisses this Property Code section as a "simpl[e] . . . notice [provision]" and declares it "irrelevant."⁴ True, section 12.014(a) is a notice provision. But it is far from irrelevant. Why would the Legislature pass a notice provision for an act — selling a claim — that violates public policy? That the Legislature passed a provision governing how notice of a claim's sale is to be given, rather than barring the sale altogether, may mean a number of things. But it must mean, at least, that the act of selling a claim is not, in itself, against Texas public policy.⁵

Nonetheless, Justice Hecht articulates the view that sale of legal malpractice claims is bad. While I agree with the Court that disposition of this case does not turn on that issue, I feel constrained to point out, given Justice Hecht's writing, that I share the Massachusetts Supreme

³T EX. PROP. CODE § 12.014(a) (emphasis added) (first passed in 1889 as article 6833 of the Texas Revised Civil Statutes).

⁴ ___ S.W.3d at ___ (Hecht, J., concurring).

⁵ See *McCloskey v. San Antonio Traction Co.*, 192 S.W. 1116, 1119-20 (Tex. Civ. App.— San Antonio 1917, writ ref'd).

Judicial Court's suspicion that "fear of 'open trading' is based in part on outmoded concepts and protectionism."⁶

Finally, I disagree with Justice Hecht asking a question to which, he insists, Herron is "entitled to an answer."⁷ For one, Herron isn't here, and never asked us to pass on whether his agreement with Baker is enforceable.

Moreover, Justice Hecht's speculation about whether Baker would choose to continue to pursue his claim if we were to declare, despite Herron's absence from this proceeding, that Herron cannot finance the claim, is just that — speculation. It seems at least as likely to me, though I am careful to note the record is silent on this point, that in such an event Baker still might want to pursue his claim.

The summary judgment evidence is that Baker originally went to Herron not to secure financing for a claim, but because Herron advertised that he buys judgments and Baker had a judgment in his pocket that Mallios was not collecting for him. Arguably, that's when Baker first learned he had a claim against Mallios. Why guess that, under Justice Hecht's scenario, he would abandon it? In any event, it is fortunate that the Court has chosen to decide this case not on "what-ifs," but on the record as presented.

⁶ *New Hampshire Ins. Co. v. McCann*, 707 N.E.2d 332, 337 (Mass. 1999).

⁷ ___ S.W.3d at ___ (Hecht, J., concurring).

With these remarks, I join fully the Court's opinion.

Craig T. Enoch
Justice

Opinion Delivered: January 6, 2000