IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC06-361
Fourth District Court of Appeal Case No. 4D04-776

LAW OFFICE OF DAVID J. STERN, P.A.,

Petitioner,

v.

SECURITY NATIONAL SERVICING CORP.,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

BRIEF ON THE MERITS OF RESPONDENT SECURITY NATIONAL SERVICING CORP.

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PREFACE

This petition for discretionary review based on a purported conflict in decisions is from an Opinion of the Fourth District Court of Appeal reversing a trial court's dismissal of Respondent's legal malpractice lawsuit against Petitioner.

Petitioner Law Offices of David J. Stern, P.A. will be referred to as "Stern."

Respondent Security National Servicing Corp. will be referred to as "Security National."

Stern's Initial Brief on the Merits will be cited as "IB___."

Stern's Appendix will be cited as "A___."

STATEMENT OF THE CASE AND OF THE FACTS

A. Introduction

The order appealed to the Fourth District is a November 19, 2003 Final Judgment on Defendant's Motion for Summary Judgment ("Summary Judgment"), which entered summary judgment in favor of Stern on Security National's claim for legal malpractice arising from a "botched mortgage foreclosure" (Opinion p. 1). The grounds for the Summary Judgment were that there was "no attorney client privilege" between Security National and Stern "at the time the cause of action accrued" and that the legal malpractice claim against Stern was not assignable.

The Fourth District reversed the Summary Judgment, holding that because the record before it showed that the legal malpractice claim was transferred incident to the transfer of a Note and Mortgage to Security National, as opposed to the transfer of a legal malpractice claim in a vacuum, there was no impermissible "assignment."

Stern seeks this Court's discretionary review, contending that the Opinion conflicts with *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005), *KPMG Peat Marwick v.*

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, 765 So. 2d 36 (Fla. 2000), and *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997).

Security National disagrees. *Kaplan*, 902 So. 2d at 757, specifically recedes from the "broad dicta" in *KPMG* and *Forgione* "purporting to prohibit the assignment of *all* legal malpractice claims." With *KPMG* and *Forgione* expressing only anti-assignment dicta, and *Kaplan* receding from that dicta, Security National does not believe that there is any conflict over which the Court may exercise jurisdiction. Even if such a conflict exists, however, the conflict should be resolved in Security National's favor on the narrow commercial facts of cases such as this, because they are consistent with the exceptional circumstances of which the Court spoke in *Kaplan*.

Finally, Security National cannot agree with Stern's Statement of the Facts and Case because it fails to state the facts in the light most favorable to Security National, against which the Summary Judgment was entered and in whose favor the Opinion issued, and because it similarly fails to accept the facts as stated by the Fourth District. For these reasons, Security National

repeats here the facts it provided to the Fourth District and on which the Fourth District relied in reaching its decision.

B. The Foreclosure Actions

In 2002, when it filed this case against Stern, Security National held a 1987 Promissory Note ("Note") and Mortgage Deed ("Mortgage") on a piece of property on Sanibel Island, in Lee County, Florida. Over 10 years before, the original obligor on the Note and Mortgage quit-claimed the property to a wholly-owned corporation, Islands International Realty, Inc. ("Islands").

At around the same time, the original mortgagee, American Pioneer Savings Bank, was put into receivership with the Resolution Trust Company. Between 1991 and 2002, the Note and Mortgage were assigned seven times in the following sequence:

DATE	ASSIGNOR	ASSIGNEE
June 28, 1995	RTC	Summatyme Corp.
August 28, 1996	Summatyme Corp.	UMLIC-SIX Corp.
March 8, 1997	UMLIC-SIX Corp.	Wilshire Funding Corp.

DATE	ASSIGNOR	ASSIGNEE
June 30, 1998	Wilshire Funding Corp.	EMC Mortgage Corp.
August 27, 1999	EMC Mortgage Corp.	Univ. Portfolio Buyers
October 15, 1999	Univ. Portfolio Buyers	N. Amer. Mortgage Co.
March 30, 2001	N. Amer. Mortgage Co.	Security National

During the course of the assignments two foreclosure actions were filed, both naming Islands as a defendant. The first, in January 1997, was filed by UMLIC-SIX Corp. as mortgagee ("1997 Foreclosure"). The second, in December 1998, was by EMC Mortgage Corp. as mortgagee ("1998 Foreclosure"). Stern filed the 1998 Foreclosure.

The two foreclosure actions were never consolidated, and both remained pending until February 1999, when Stern substituted as UMLIC-SIX Corp.'s counsel in the 1997 Foreclosure and filed a Voluntary Dismissal. Just over a year later, in July 2000, Islands filed a Motion for Summary Judgment

in the 1998 Foreclosure, arguing that the applicable statute of limitations expired before the case was filed.

In September 2000, with Island's Motion for Summary Judgment pending, Universal Portfolio Buyers, as successor in interest to EMC and while represented by Stern, filed a Motion to Vacate Notice of Voluntary Dismissal, or to Consolidate Foreclosure Actions ("Motion to Vacate") in the 1998 Foreclosure. Stern admitted in the Motion to Vacate that "the first foreclosure action was erroneously dismissed, as it should have been the second action which was dismissed, or, alternatively, the cases should have been consolidated."

In October 2000, Universal Portfolio Buyers' Motion to Vacate and Islands' Motion for Summary Judgment were argued in the 1998 Foreclosure. The following month the court entered two orders: an Order on Motion for Summary Judgment, which made findings of fact and granted Island's Motion for Summary Judgment but did not enter judgment in its favor; and an Order on Motion to Vacate Notice of Voluntary Dismissal or to Consolidate Foreclosure Actions, which denied Universal's Motion to Vacate.

C. The Appeal in the 1998 Foreclosure

In December 2000, North American Mortgage Company, as successor to Universal Portfolio Buyers and still represented by Stern, prematurely appealed the two November 2000 Orders,[1] but on March 15, 2001 the trial court entered an appealable Final Judgment on Defendant's Motion for Summary Judgment ("Final Judgment"), and the appeal proceeded. On March 30, 2001, before any briefs were filed, the Note and Mortgage were assigned to Security National.

And, while Stern contends that the assignment to Security National was "unbeknownst" to it (IB4), Stern continued to represent Security National throughout the appeal – filing the briefs, billing Security National for its legal services, receiving payments from Security National, and remaining Security National's counsel through issuance of the Second District's

[1] Stern's repeated contentions that the Note and Mortgage were "worthless" or "virtually worthless" or "virtually unenforceable" at the time of the assignment to Security National (IB3, 6, 10, 13-14 n3, 27) are fundamentally irreconcilable with its argument to the Second District that the Note and Mortgage were valuable assets that would be lost unless the court reversed. As the Fourth District explained in its Opinion, to accept Stern's

opinion. Stern's purported lack of knowledge of its representation of Security National (IB4) was therefore correctly rejected by both the trial court and the Fourth District.

On the other hand, but as the Fourth District found on undisputed facts, there is no evidence that Security National was aware of Stern's malpractice, or its effect on the Note and Mortgage, at the time Security National purchased the Note and Mortgage. In fact, from this point forward until the end of the appeal, while Stern collected legal fees from Security National for an appeal necessitated solely by Stern's own negligence, nothing in the record shows that Stern disclosed its malpractice to any of the mortgagees from 1999 forward before their purchase of the Note and Mortgage. Nor is there any record evidence that any of the mortgagees, including Security National, were aware of the malpractice. Stern's "constructive knowledge" argument (IB6) was, therefore, correctly rejected by the Fourth District.

On December 7, 2001 – long after Stern undertook the representation of Security National for compensation – the Second District affirmed the Final Judgment and the cause of

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"worthless" argument now renders its argument to the Second District frivolous.

action against Stern for legal malpractice accrued. *See Universal Portfolio Buyers, Inc., II v. Islands Intern. Realty, Inc.*, 806 So. 2d 479 (Fla. 2d DCA 2001).

D. Security National's Legal Malpractice Action against Stern

After issuance of the Second District's opinion upholding the Final Judgment in favor of Islands, Security National filed this case, alleging that Stern committed legal malpractice in: (1) dismissing the timely filed 1997 Foreclosure; (2) failing to consolidate the 1997 and 1998 Foreclosures; and (3) failing to reinstate the 1997 Foreclosure. Security National requested that the court take judicial notice of the 1997 and 1998 Foreclosures, and the court did so.

Thereafter, Security National moved for entry of partial summary judgment in its favor on the issue of Stern's liability, explaining: (1) Security National possessed all the rights to the assigned Note and Mortgage and had an attorney-client relationship with Stern when the malpractice claim accrued; and (2) Security National was damaged by Stern's admitted negligence

in erroneously dismissing the 1997 Foreclosure and failing to consolidate the 1997 and 1998 Foreclosures.

Stern responded with Defendant Law Offices of David J. Stern, P.A.'s Motion for Summary Judgment with Memorandum and Affidavit in Support Thereof and in Opposition to Plaintiff's Motion for Partial Summary Judgment, arguing, as it does here (IB4-5): (1) its negligent acts did not occur during its attorney-client relationship with Security National; (2) only EMC had the right to bring a legal malpractice action against it because only EMC was its client when it committed the negligent act; (3) legal malpractice claims are personal in nature and may not be assigned; and (4) Security National caused its own damages by purchasing the Note and Mortgage with knowledge of the March 2001 Final Judgment.[2]

Security National replied that the public policy reasons for prohibiting assignments of legal malpractice actions were not present in this case and that Stern waived the argument in any event because it acknowledged its own negligence and agreed to

[2] Stern presented no proof of this allegation, and the Fourth District explicitly rejected it.

represent Security National in the Second District after learning that Security National had purchased the Note and Mortgage. Security National's Supplement to Plaintiff's Opposition Memorandum to Defendant's Motion for Summary Judgment clarified that its right to sue Stern stemmed from its acquisition of the Note and Mortgage, at which time no legal malpractice action had yet accrued, rather than from a pure assignment of a matured malpractice claim.

At the November 19, 2003 hearing on the Motions, Security National explained:

- it had standing to bring the legal malpractice claim based on the existence of its attorney-client relationship with Stern when the claim accrued;
- this was not an assignment of a cause of action but, rather, an assignment of a Note and Mortgage, with all attendant rights and obligations; and
- no legal malpractice cause of action had accrued at the time of the assignment so no earlier mortgagee could have brought such an action.

In response, Stern reiterated that a claim for legal malpractice requires the existence of an attorney-client relationship when the negligent acts or omissions occur, which Security National did not have because EMC owned the Note and Mortgage when Stern

erroneously dismissed the 1997 Foreclosure. Stern admitted, however, that EMC could not have sued it for legal malpractice until the Second District appeal was concluded and that Security National owned the Note and Mortgage by that time.

E. The Appealed Summary Judgment

On November 19, 2002, the trial court denied Security National's Partial Summary Judgment Motion, granted Stern's Summary Judgment Motion, and entered the Summary Judgment in Stern's favor, specifically noting:

> While the Court may take issue with the fairness of such ruling, it feels bound by the authority of Forgione v. Dennis Pirtle Agency, Inc., 701 So. 2d 557 (Fla. 1997). There was no attorney client privilege between the [plaintiff and defendant] at the time the cause of action accrued.

Security National moved for rehearing, arguing: (a) this case is distinguishable from *Forgione* because, rather than an assignment of a legal malpractice claim, this was an assignment of a Note and Mortgage that later became unenforceable because of Stern's negligence; and (b) under the theory of *Kaplan v. Cowan, Liebowitz & Latman, P.C.*, 832 So. 2d 138 (Fla. 3d DCA 2002), *approved*, 902 So. 2d 755 (Fla. 2005), which gives standing to an

assignee for the benefit of creditors to maintain a legal malpractice action, Security National should be given standing here.

The trial court denied Security National's Motion for Rehearing, and it appealed the Summary Judgment to the Fourth District.

F. The Fourth District's Opinion

The Opinion accepts the following as undisputed:

- Stern admitted its malpractice, thus eliminating the need for any discovery in a legal malpractice case brought by any mortgagee;
- the face amount of the Note and Mortgage is $108,000, and there is no record proof that the amount was ever discounted on assignment to any mortgagee, including Security National;[3]
- the appeal to the Second District was pending when the Note and Mortgage were assigned to Security National; and

[3] Once again laying to rest Stern's "worthless" argument (IB13-14 n3). Unlike an obviously damaged vehicle that is sold at a discount, there is no proof in this record that the Note and Mortgage were discounted — as the Fourth District found.

- no legal malpractice claim had yet accrued at the time that Security National took assignment of the Note and Mortgage.

On the first legal issue, whether Security National had standing to assert a claim for legal malpractice in the absence of an assignment, the Opinion recognizes that a legal malpractice cause of action "does not accrue until the underlying adverse judgment becomes final, including exhaustion of appellate rights" (Opinion p. 2). Despite acknowledging that Security National owned the Note and Mortgage when the legal malpractice action accrued, the Opinion cites *Kates v. Robinson*, 786 So. 2d 61, 64 (Fla. 4th DCA 2001), to hold that Security National did not have standing to assert a claim against Stern because it had no attorney-client relationship with Stern at the time the malpractice occurred. Stern contends that this is a correct result (IB7). Security National disagrees, as it argues below, and believes that this is a second basis on which the Court should rule in its favor.

Concluding that Security National could obtain standing only by assignment, the Opinion analyzes *Kaplan*, 902 So. 2d at 755, and authority from other jurisdictions, including *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999),

to hold that the unique commercial facts of this case allowed assignment through the vehicle of the Note and Mortgage.

The Fourth District reached its conclusion based on the following reasoning: (1) as in *Kaplan*, the policy concerns regarding the attorney-client privilege did not exist, a valid conclusion given Stern's representation of all of the mortgagees; (2) as in *Kaplan*, the policy concerns regarding the personal nature of legal services did not exist, also a valid conclusion given Stern's multiple representations; and (3) as in *Kaplan* and *Cerebrus*, the core concern of creating "a market for legal malpractice claims" did not exist, as the assignment was of commercial paper, which simply carried with it the not-yet-accrued right to bring the malpractice action, not of a mature legal malpractice action in a vacuum within the scope of the anti-assignment doctrine (Opinion pp. 4-6).

As the Fourth District understood, but Stern apparently does not (IB7-9, 14), after *Kaplan*, Florida no longer "aligns itself with the majority of jurisdictions" that prohibit <u>all</u> assignments of legal

malpractice claims.[4] To the contrary, in *Kaplan*, 902 So. 2d at 756-757, 759 n.3, the Court expressly receded from the "broad dicta" in *Forgione* and *KPMG* "purporting to prohibit the assignment of *all* legal malpractice claims." While emphasizing that the vast majority of legal malpractice claims are still unassignable in Florida, the *Kaplan* Court moved Florida to a more commercially reasonable view of assignments like that in this case and specifically established the Florida's willingness to examine whether the public policy concerns behind the anti-assignment dogma exist in a particular case.[5]

[4] Yet in its Summary of Argument (IB9-11) and Argument (IB14-18), Stern appears to admit that *Kaplan* receded from Florida's strict anti-assignment stance.

[5] Chief Justice Lewis's dissent also supports Security National's position. In *Kaplan*, 902 So. 2d at 763 (Lewis, J., dissenting), "Kaplan acquired his interest in the legal malpractice claim along with all of MRI's other assets by operation of law." Here, likewise, Security National acquired its interest in the legal malpractice claim, along with all other attributes of the Note and Mortgage, by operation of law.

SUMMARY OF ARGUMENT

The Court does not have conflict jurisdiction. In *Kaplan*, 902 So. 2d at 755, the Court receded from the broad anti-assignment dicta in both *Forgione*, 701 So. 2d at 557, and *KPMG*, 765 So. 2d at 36. Therefore, the Court's conflict jurisdiction cannot be based on either of those cases. Furthermore, in *Kaplan*, 902 So. 2d at 755, the Court held that there were exceptions, albeit rare, to the anti-assignment doctrine where the public policy concerns regarding assignment were not present. Because the Court left open the question whether a particular case fits within the exception, this case cannot conflict with *Kaplan*. For these reasons, the Court should find that it improvidently accepted jurisdiction and dismiss Stern's request for review.

However, if the Court finds that it has conflict jurisdiction, the Fourth District's decision should be approved on either of two grounds.

First, while the Fourth District rejected this argument, Security National was entitled to pursue Stern for its admitted malpractice because all three elements necessary to maintain a

legal malpractice claim existed without any assignment. Security National was Stern's client at the time the legal malpractice claim accrued. Stern admitted that it was negligent in dismissing the 1997 Foreclosure, which resulted – upon the Second District's decision – in the worthlessness of the $108,000 Note and Mortgage. Stern's negligence resulted in harm to Security National, which owned the Note and Mortgage at the time that the legal malpractice cause of action accrued. No other earlier mortgagee could maintain an action against Stern, because no other mortgagee could prove that it was damaged by Stern's negligence.

Second, as the Fourth District correctly concluded, this commercial transaction is precisely the type of case comprehended by *Kaplan*, 902 So. 2d at 755. Stern represented a series of mortgagees, including Stern, to which the Note and Mortgage were repeatedly assigned. There is no apparent danger of disclosure of any attorney-client confidence, particularly given the repeated assignments. The case involves a commercial transaction in which the rights attendant to the Note and Mortgage followed from assignee to assignee. There is therefore no risk of

creating a marketplace for legal malpractice claims. In the absence of any of the public policy concerns giving rise to the anti-assignment doctrine, the Opinion should be approved.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION IS CORRECT UNDER EITHER THEORY ARGUED BY SECURITY NATIONAL BELOW.

A. The standard of review is *de novo.*

A trial court's entry of summary judgment is reviewed *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

B. Security National has standing to maintain its legal malpractice claim against Stern in the absence of an assignment.

As Stern recognizes (IB12-13), Security National made two arguments to the Fourth District. First, Security National argued that it had standing to maintain a legal malpractice claim against Stern without any assignment because the three requirements for maintaining a claim for legal malpractice existed: the attorney's employment; the attorney's neglect of a reasonable duty to the client; and damages resulting from the neglect. *See Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999). Alternatively, Security National argued that it obtained standing by assignment of the

Note and Mortgage, which carried with them the right to assert the then-immature legal malpractice claim should it later mature.

On the first issue, the Fourth District agreed with Stern that Security National did not have standing because the three legal malpractice elements did not exist. Security National believes that the case on which Stern and the Fourth District relied, *Kates*, 786 So. 2d at 64, does not dictate that result or, if it does, it is inconsistent with this Court's authority. Thus, if the Court's conflict jurisdiction has been triggered by the assignment issue, it also has jurisdiction over this issue and should approve the Fourth District's result on this alternative basis. *See Caufield v. Cantele*, 837 So. 2d 371, 377 n.5 (Fla. 2002).

First, there was unquestionably an attorney-client relationship between Security National and Stern throughout the Second District appeal, thus eliminating any concerns regarding the "personal relationship between the attorney and client," the "unique nature of legal services," and the "confidentiality of the attorney-client relationship." *See Forgione*, 701 So. 2d at 559. An "attorney need not be in privity with the client throughout the entire course of the underlying action" to satisfy the privity

requirement. *Dadic v. Schneider*, 722 So. 2d 921, 923 (Fla. 4th DCA 1998).

Furthermore, the attorney-client relationship between Stern and Security National was unquestionably "with respect to the acts or omissions upon which the malpractice claim is based." *Kates*, 786 So. 2d at 64. Stern was foreclosure counsel for all mortgagees from 1999 forward, including Security National. The act or omission giving rise to the legal malpractice claim was Stern's February 1999 dismissal of the 1997 Foreclosure in its capacity as foreclosure counsel. By the time that act or omission became final, and the legal malpractice claim thus ripened, Security National owned the Note and Mortgage and was the entity harmed by the act or omission. The first legal malpractice element was thus established.

In contrast, Stern contends that Security National was not a party to the appeal and was not Stern's client – despite the assignment to Security National of the Note and Mortgage before any briefs were filed and Stern's acceptance of Security National's representation for compensation (IB19-20). Stern also takes the position that the appeal to the Second District was

unnecessary and that the legal malpractice suit could have been filed against it without the appeal by some earlier mortgagee (IB20 n4). Since Stern filed the appeal, accepted Security National's representation, and argued vehemently that the trial court erred in entering the Final Judgment, its current position borders on the "frivolous," as the Fourth District noted. Its inconsistent positions are also barred by the doctrine of judicial estoppel. *See Blumberg v. USAA Cas. Ins.* Co., 790 So. 2d 1061, 1066 (Fla. 2001).[6]

Second, Stern admitted that its voluntarily dismissal of the 1997 Foreclosure without recognizing that the 1998 Foreclosure was barred by the applicable statute of limitations was the neglect of a legal duty. The second legal malpractice element was thus established. *See Steele*, 747 So. 2d at 933.

[6] Security National also disagrees with Stern's understanding of the law of legal malpractice. As the Fourth District explained in *Bradley v. Davis*, 777 So. 2d 1189, 1190 (Fla. 4th DCA 2001), a "client cannot pursue a legal malpractice case if the mistake in the original law suit would 'in all likelihood' have been corrected on appeal." Here, Stern obviously believed in the merit of the appeal and should not now be allowed to do an about face. *See Blumberg*, 790 So. 2d at 1066.

Third, contrary to Stern's argument (IB6), its negligence resulted in and was the proximate cause of Security National's loss (IB6). Security National owned a negotiable instrument with a face value of $108,000, and Stern's negligence deprived it of its right of recovery. As the Fourth District held, there is no evidence supporting Stern's multiple insinuations that the Note and Mortgage were worthless before the appeal was completed or that Security National knew or should have known of the purported worthlessness at the time it purchased the Note and Mortgage (IB3, 6, 13-14 n3, 26). Furthermore, those insinuations are fundamentally inconsistent with Stern's arguments to the Second District and therefore barred by the doctrine of judicial estoppel. *See Blumberg*, 790 So. 2d at 1066. The third legal malpractice element was thus established.

The logic and fairness of allowing Security National to maintain its legal malpractice claim against Stern is also apparent. As the Fourth District recognized, no cause of action for legal malpractice existed until December 2001, when the Second District issued its decision in *Universal Portfolio Buyers*, 806 So. 2d at 479, and "redressable harm" was established. *See Peat,*

Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323, 1325 (Fla. 1990) (quoting *Lane v. Peat, Marwick, Mitchell & Co.*, 540 So. 2d 922, 924 (Fla. 3d DCA 1989)); *see also Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998) ("To be specific, we hold that the statute of limitations does not commence to run until the final judgment becomes final."). Before December 2001, no mortgagee or assignee of the Note and Mortgage could maintain a claim against Stern for its negligent dismissal of the 1997 Foreclosure. *See Clemente v. Freshman*, 760 So. 2d 1059, 1061 (Fla. 3d DCA 2000) ("This is because, until that time, it cannot be determined whether there was any actionable error by the attorney.").

By the time the cause of action accrued, Security National owned the Note and Mortgage and it, not any earlier mortgagee or assignee, was the only entity that fulfilled all the requirements to maintain the claim.[7] Had EMC, owner of the Note and Mortgage

[7] Stern misinterprets the language in Security National's Reply Brief in the Fourth District proceedings (IB13-14 n3). Security National has never taken the position that there was no assignment, only that "the assignment itself was of much more than a legal malpractice claim at the conclusion of a commercial transaction gone bad. Here, the assignment was of the Note and Mortgage — and the legal malpractice claim arose after the assignment."

at the time that Stern negligently dismissed the 1997 Foreclosure, attempted to bring the legal malpractice claim, Stern would undoubtedly have argued, and probably successfully, that EMC could not maintain the claim because it suffered no damage as a result of the negligence, because there is no evidence that the Note and Mortgage were discounted from their $108,000 face value. Similarly, no other mortgagee or assignee could demonstrate "that there is an amount of damages which [it] would have recovered but for the attorney's negligence." *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 328 (Fla. 4th DCA 1998).

Stern's primary argument against Security National's position, which the trial court accepted in entering the Summary Judgment even while finding it unjust, and which the Fourth District also accepted in rejecting Security National's argument, was that the attorney-client relationship between Security National and Stern had to exist at the time the negligent act was committed (IB12-13). That distinction is not valid in the context of this case.

As the trial court recognized, if Security National could not maintain the claim against Stern, no one could. While the law does not provide a remedy for every wrong, once a particular act is recognized as tortious, a remedy exists. *See Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 585 n.8 (Fla. 2000) (quoting PROSSER AND KEETON ON THE LAW OF TORTS 2 (W. Page Keeton, general ed., 5th ed. 1984) ("Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.")).

Here, the long-recognized tort is legal malpractice, and the long-recognized remedy is a claim for damages. Security National was in an attorney-client relationship with Stern with respect to the Note and Mortgage foreclosure; Stern neglected a legal duty within the scope of that relationship; and Security National incurred damages as a result of Stern's neglect. Security National owned the claim against Stern because it owned the Note and Mortgage at the time the cause of action for legal malpractice accrued. Because Security National met all conditions precedent to maintaining a claim for legal malpractice against Stern, it had

standing even without an assignment. On this alternative basis, without more, the Court should approve the Fourth District's decision reversing the Summary Judgment.

C. Current Florida case law authority and public policy support the Opinion.

As the Fourth District correctly concluded, Security National's position below is consistent with current authority from this Court and with the law of assignments in general. Contrary to Stern's position (IB14-19), neither *Forgione* nor *KPMG* are good law for Florida's current position on legal malpractice claims. Rather, as the Court explained in *Kaplan*, 902 So. 2d at 757, Florida no longer follows a strict anti-assignment policy.[8] While the "vast majority of legal malpractice

[8] Security National disagrees that *Kaplan* requires a third party beneficiary relationship, and whether or not Security National conceded below that it was not a third party beneficiary of the relationship between Stern and the earlier mortgagees (IB12 n2, 15, 17, 21) is immaterial, because that legal concession is not binding on Security National or a court. *See, e.g., Cilento v. State*, 377 So. 2d 663, 668 (Fla. 1979). Furthermore, factually Security National could well have qualified as a third party beneficiary under the various assignments – but never had an opportunity to develop those facts because of the Summary Judgment.

claims remain unassignable because in most cases the lawyer's duty is to the client," Florida now allows exceptions to the former rule in the absence of the public policy considerations prohibiting assignment. *Id*.

In the Opinion, the Fourth District did nothing more than apply *Kaplan*'s guidelines in this commercial context. The court did not expressly and directly recognize a conflict with any valid Florida authority, nor does one exist. There is, thus, no "*rule of law* which conflicts with a rule previously announced" or "application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

Analysis of the Opinion in the light of other relevant Florida law also supports the Court's lack of conflict jurisdiction. While Stern focuses on the "assignability of a legal malpractice action" (P15-19), the accurate focus is on the assignment of the Note and Mortgage. Under Florida law, notes and mortgages are assignable, even after default, unless the instruments specifically

provide to the contrary. *See, e.g., Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863, 865 (Fla. 4th DCA 2000).

Generally, a party taking assignment of a note and mortgage takes all the interest and rights of the assignor, including any potential claims held by the assignor at the time of the assignment. *See, e.g., Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2003); *Rose v. Teitler*, 736 So. 2d 122, 122 (Fla. 4th DCA 1999) (citing *State v. Family Bank of Hallandale*, 667 So. 2d 257, 259 (Fla. 1st DCA 1995)). "[A]n assignee of a mortgage has the same status and rights as if he or she had been named in the mortgage." *Foster v. Foster*, 703 So. 2d 1107, 1109 (Fla. 2d DCA 1997). "Under Florida law, parties can assign causes of action derived from a contract or a statute." *National Union Fire Ins. Co. v. Salter*, 717 So. 2d 141, 142 (Fla. 5th DCA 1998).

The effect of an unconditional assignment is to place all claims, including contingent claims, in the hands of the assignee, and the assignor no longer has any right to sue for damages connected to the assigned instrument. *See, e.g., Schuster v. Blue Cross and Blue Shield of Florida, Inc.*, 843 So. 2d 909, 912 (Fla.

4th DCA 2003) (citing *Oglesby v. State Farm Mut. Auto. Ins. Co.*, 781 So. 2d 469, 470 (Fla. 5th DCA 2001)); *Laing v. Gainey Builders, Inc.*, 184 So. 2d 897, 900 (Fla. 1st DCA 1966) (explaining the assignor's lack of standing and the assignee's standing to sue for foreclosure).

In this case, application of the general law of assignment to vest Security National with the right to maintain a legal malpractice claim against Stern is even more justified and important than in the above cases, because if the claim does not travel with the Note and Mortgage, it disappears and Security National is left without a remedy for Stern's legal malpractice.[9] No Florida case, and no case from any other jurisdiction, supports that outcome.

Several out-of-state cases addressing the problem before the Court here have also recognized the injustice of application of the rigid "anti-assignment" rule in scenarios similar to this. For example, in *Hedlund Manufacturing Company, Inc. v. Weiser, Stapler & Spivak*, 539 A.2d 357, 358-59 (Pa. 1988), the

Pennsylvania Supreme Court refused to prohibit a party from maintaining a legal malpractice claim where the claim arose out of an attorney's failure to timely file a patent application, the patent application and product were later assigned, and the claim involved only commercial monetary damage and not personal injury. The court said:

> 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. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected.

Id. at 359.

Similarly, in *Richter v. Analex Corporation*, 940 F. Supp. 353, 355-56, 358 (D.D.C. 1996), the court rejected the type of argument made by Stern in this case, explaining that the legal malpractice claim there was not simply "bartered or sold to an unrelated third party," but was acquired by the assignee along with other rights and liabilities attendant to a corporate purchase and sale. Emphasizing that the assignment before it did not

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[9] Security National cannot recover on the Note because the maker sought and received bankruptcy protection and cannot recover on

involve personal injury or a "confidential attorney-client relationship" that had to be preserved, the court concluded that there was no public policy prohibition to assignment of the legal malpractice claim to the party that acquired the other corporate rights and liabilities. *See id*. at 358.

Last, in *Cerberus*, 728 A.2d at 1058-59, the case on which the Fourth District relied, the Rhode Island Supreme Court held in a case virtually identical to the one before this Court that the legal malpractice claim was assignable as part of the package of rights traveling with the mortgage documents. There, the plaintiffs filed a claim for legal malpractice, arguing that they were successors in interest to the original lenders. *See id.* at 1058. The lower court granted summary judgment in favor of the defendant attorneys, stating that there was no attorney-client relationship between the plaintiffs and the attorneys and Rhode Island's public policy prohibited assignment of legal malpractice claims. *See id.* at 1059.

The Rhode Island Supreme Court reversed, stating:

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the Mortgage because of Stern's malpractice.

> We conclude that . . . the assignment of legal malpractice claims as part of a larger commercial transaction, such as the one in this case, are permitted under Rhode Island law.

Id. In support of its decision, the court explained:

> The plaintiffs did not merely purchase the legal malpractice claim, but were instead the assignees of the Lenders' original agreements with respect to the loans to [the borrowers], and the plaintiffs acquired, along with those loans, all of the attendant obligations and rights that went along with those loans, including but not limited to the Lenders' legal malpractice action against the defendants. Thus, 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.

Id. (emphasis supplied).

The court's final comment was in specific rejection of the defendants' reliance upon *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. 1976), and its unyielding anti-assignment doctrine. *See also* Kevin Pennell, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481, 482-86

(2003) (discussing and rejecting the various rationales for the anti-assignment doctrine).

As the above authorities recognize, in cases such as this there is no justifiable reason for depriving an assignee of any of the rights it obtains through assignment of a note, mortgage, or other contractual right. And as the Fourth District explained – not "summarily" (IB23) but at length – in the Opinion, the reasons highlighted in cases such as *Forgione* and *KPMG* just do not apply. A commercial mortgage foreclosure does not involve the type of "personal services" inherent in a tort action and is unlikely to involve the sharing of privileged information.

Moreover, as the Fourth District also recognized, to the extent there was privileged information between Stern and a former mortgagee, the privilege was waived when the Note and Mortgage were transferred. It is inconceivable to assume, as Stern argues (IB24, 30), that a mortgagee could transfer the Note and Mortgage but attempt to protect information necessary to the foreclosure action.

Last, to the extent Stern raises a series of "ominous" horribles and unanswered questions regarding the risk of runaway

legal malpractice claims (IB25-33), those concerns are either not present in this case or highlight the correctness of the Fourth District's reversal of the Summary Judgment because of all the unresolved factual issues.[10] For example, Stern continues to argue that the Note had lost value (IB25-26) — yet there is nothing in the record supporting the argument. Furthermore, if there were any argument to be made in that regard, it would depend on factual findings that were precluded by the Summary Judgment and mandate its reversal. The Opinion is thus correct on this alternative basis. *See Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 45 (Fla. 1999) (explaining the operation of the "tipsy coachman" rule).

As the Fourth District also explained, there is no risk of the creation of a "market for legal malpractice claims" in cases such as this, as Stern contends (IB26-30). It is inconceivable that an investor would buy a Note and Mortgage with knowledge of its defects simply to take the risk of recovering exactly the face

[10] The same is true regarding Stern's "question" whether Security National received an assignment. If there was such a question, it is one of material fact, and the Summary Judgment was error. As

amount after protracted litigation such as this. The Fourth District rejected the argument, and so should this Court. If Security National had actual knowledge of the condition of the Note and Mortgage, as Stern insists, it would have been foolhardy indeed to "purchase [the] virtually unenforceable debt" to "replace a defaulted mortgagor with a solvent defendant," as Stern also insists (IB27-28). How much simpler merely to not purchase the Note and Mortgage in the first place. Stern's argument collapses under the weight of its own inconsistencies.

The Opinion correctly interprets *Kaplan*, particularly in the context of this unique commercial transaction. To prohibit Security National from pursuing Stern immunizes Stern from any accountability for its admitted negligence. As *Kaplan* and the Opinion recognize, Florida law should not condone such a result.

Stern admits, "[a]ll of these questions must be answered" (IB32), thus precluding summary judgment.

CONCLUSION

For the foregoing reasons, the Court should find that it improvidently accepted review. Alternatively, as it did in *Kaplan*, the Court should approve the decision of the Fourth District as a commercially reasonable and narrow exception to the anti-assignment doctrine.

CERTIFICATE OF SERVICE

We certify that a true and correct copy of the above and foregoing was furnished by U.S. Mail to the persons on the attached Service List, this _____ day of July, 2006.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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