IN THE SUPREME COURT OF FLORIDA

CASE NO: SC06-361
4th DCA CASE NO.: 4D04-776

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

Defendant/Petitioner,

v.

SECURITY NATIONAL SERVICING CORP.,

Plaintiff/Respondent.

_____/

PETITIONER LAW OFFICE OF DAVID J. STERN, P.A.'s INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Nature of the Case

This is an appeal from a decision of the Fourth District Court of Appeal reversing the trial court's order entering final summary judgment against Security National Servicing Corp. ("Security National") on its legal malpractice action against the Law Offices of David J. Stern, P.A. ("Stern"). The trial court granted Stern's motion for summary judgment, ruling: (1) that an attorney-client relationship did not exist between Security National and Stern at the time of the alleged malpractice; and (2) that the claim for legal malpractice was not assignable under Florida law.

Statement of Facts

a. The "Assignment" to Security National

This legal malpractice action arises out of Stern's handling of a note and mortgage foreclosure action on a piece of real property located in Lee County, Florida, which was assigned seven (7) times over ten (10) years.

In 1997, the note and mortgage went into default. At that time, USMLIC – SIX was the holder of the note and mortgage. USMLIC – SIX, through its counsel, timely filed a mortgage foreclosure action upon the defaulted loan under Lee County Circuit Case No. 97-93-CA-LG ("the 1997 action"). *See* Complaint ¶ 11.

While the 1997 action was pending, USMLIC - SIX assigned the loan to EMC Mortgage ("EMC"). EMC then hired Stern to prosecute the mortgage foreclosure. *See* Complaint ¶ 12. On December 15, 1998, Stern filed a foreclosure action on the behalf of EMC under Lee County Circuit Case No. 98-9431-CA-LG ("the 1998 action"). However, the statute of limitations had already expired. Thus, the filing of this second foreclosure action in 1998 was untimely.

On February 19, 1999, Stern substituted as Plaintiff's counsel in the timely-filed 1997 foreclosure action against the Property, which had originally been filed by USMLIC – SIX, the holder of the subject mortgage prior to EMC. *See* Complaint ¶ 14. Then, on February 24, 1999, Stern voluntarily dismissed the timely 1997 action, without prejudice, while continuing to prosecute the untimely 1998 action on the behalf of EMC. *See* Complaint ¶ 14. These actions form the basis of Security National's claim for legal malpractice against Stern.

On August 27, 1999, EMC assigned the subject mortgage loan to Universal Portfolio Buyers, Inc. ("Universal") and Stern continued to prosecute the 1998 action for the new Plaintiff, Universal. *See* Complaint ¶ 10.

On October 15, 1999, Universal assigned the subject mortgage loan to North American Mortgage Company ("NAMC") and Stern continued to

prosecute the 1998 action as counsel for the new Plaintiff, NAMC. *See* Complaint ¶ 10.

On July 24, 2000, Islands International ("Islands"), the mortgagor of the subject property, moved for summary judgment in the 1998 action, alleging the foreclosure action was barred by the statute of limitations. *See* Complaint ¶ 15.

On September 18, 2000, Stern moved to vacate the earlier voluntary dismissal, or alternatively to consolidate the timely 1997 action with the untimely 1998 action. *See* Complaint ¶ 17. However, on November 5, 2000, the trial court granted Island's Motion for Summary Judgment, determining that the 1998 action was time barred. The trial court also denied Stern's Motion to Vacate Notice of Dismissal, and denied the alternative Motion to Consolidate. *See* Complaint ¶ 16.

On December 1, 2000, NAMC instructed Stern to appeal the summary judgment entered against it. *See* Complaint ¶¶ 18.

On March 15, 2001, upon the Second District's temporary relinquishment of jurisdiction to allow entry of a "final appealable order," the trial court entered a final judgment against NAMC's right to foreclose. *See* Complaint ¶ 16. Thus, the Note and Mortgage held by NAMC were deemed worthless.

Then, on March 30, 2001 - - unbeknownst to Stern - - NAMC assigned the subject note and mortgage to Security National Servicing Corporation ("Security National"), the Plaintiff in this legal malpractice action. Consequently, Stern (unknowingly at first) continued to prosecute the appeal of the 1998 action for the new Plaintiff, Security National, albeit after all acts of alleged malpractice had occurred. *See* Complaint ¶ 10**.**

On December 7, 2001, the Second District per curiam affirmed the Final Summary Judgment entered against NAMC's right to foreclose. *See* Complaint ¶ 18; *See also Universal Portfolio Buyers, Inc. II v. Islands Intern. Realty, Inc.,* 806 So. 2d 479 (Fla. 2d DCA 2001).

b. **Security National's Claims against Stern**

Security National sued Stern in Broward County, alleging four acts/omissions constituting legal malpractice. The following chart demonstrates the allegations of malpractice, along with the corresponding dates on which the alleged malpractice occurred and Stern's client(s) at the time:

Alleged Malpractice	Date	Client/Dates of Representation
Filing the 1998 foreclosure (Complaint ¶ 19a)	December 15, 1998 (the date Stern filed the 1998 action)	EMC (from September 22, 1998 until August 27, 1999)
Dismissing the 1997 foreclosure (Complaint ¶ 19b)	February 24, 1999 (the date of dismissal of the 1997 action)	EMC
Failing to consolidate the 1997 and 1998 foreclosures(Complaint ¶ 19c)	February 24, 1999 (the date of dismissal of the 1997 action)	EMC Universal (from August 27, 1999 until October 15, 1999)
Failing to timely reinstate the 1997 action (Complaint ¶ 19d)	February 24, 1999 thru September 18, 2000 (the dates when Stern filed its Motion to Vacate the Voluntary Dismissal of the 1997 action)	EMC Universal NAMC (from October 15, 1999 until March 30, 2001)

The acts or omissions on which Security National bases its claims all occurred well before Stern had undertaken any duties or representation on Security National's behalf. Indeed, the alleged negligence only occurred during the time that Stern was engaged as counsel for EMC, Universal, and NAMC - - *not* Security National.

Course of Proceedings

a. The Trial Court

Security National moved for partial summary judgment on the issue of Stern's liability, arguing that it: (1) possessed the right to bring this action by virtue of the assignment of the Note and Mortgage; (2) had an attorney-

client relationship with Stern at the time the malpractice claim accrued for statute of limitations purposes; and (3) suffered damages as a direct result of Stern's negligence in dismissing the timely 1997 action and in failing to consolidate the 1997 and 1998 actions.

In response, Stern filed a cross-motion for summary judgment and opposition to Security National's motion, arguing that: (1) all of Stern's alleged negligent acts occurred before Security National purchased this 'bad debt'; (2) no attorney-client relationship existed between Stern and Security National at the time of the acts and omissions upon which this legal malpractice action is based; (3) legal malpractice actions are not assignable under Florida law; and (4) Stern did not proximately cause Security National's alleged damages, if any, as Security National purchased the bad debt on or about March 30, 2001, with constructive (if not actual) knowledge of the entry of the November 5, 2000, Order granting summary judgment to the title owner and against NAMC, which determined that any foreclosure action upon the subject note and mortgage was time barred.

On November 19, 2003, the trial court denied Security National's motion and granted summary judgment in Stern's favor. The trial court determined that *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997), governed, since no attorney-client relationship existed between Stern and Security National "at the time the cause of action accrued," i.e. when the

negligent acts or omissions occurred. *See Security National Servicing Corp. v. Law Offices of David Stern*, 916 So. 2d 934 (Fla. 4th DCA 2005).

The trial court denied rehearing, and Security National appealed to the Fourth District.

b. Disposition in the Lower Tribunal

The Fourth District dispensed with oral argument and issued its November 30, 2005, Opinion, reversing the trial court's final summary judgment in favor of Stern and against Security National. *See id.*.

The district court first noted that "the time of the negligent act or omission is the critical point for testing the scope and existence of the attorney-client relationship." *See Stern*, 916 So. 2d at 937. Since Security National did not have an attorney-client relationship with Stern at this critical point in time, the district court explained that Security National's legal malpractice claim against Stern arose only by assignment of the not and mortgage and, thus, it was necessary to review and apply the law on assignment of legal malpractice actions. *Id*.

The court also properly noted that Florida aligns itself with the majority of jurisdictions, which hold that legal malpractice claims are not assignable. *Id*. However, it added that, in the minority of jurisdictions, legal malpractice claims are assignable on a case-by-case basis, in light of relevant policy concerns. *Id.* Then, the district court apparently interpreted

this Court's decision in *Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 759 (Fla. 2005), as an adoption of a case-by-case approach only followed by a minority of jurisdictions, notwithstanding the limited scope of this Court's decision in *Kaplan*.

The district court reversed the trial court summary judgment, based in part upon its interpretation of *Kaplan*. However, the Fourth District also cited with approval to the decision by the Rhode Island Supreme Court in *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A. 2d 1057, 1061 (R.I. 1999). In doing so, the district court aligned itself with the *minority* view, which essentially allows for a case-by-case review concerning the assignability of any particular legal malpractice claim.

Thus, the Fourth District misinterpreted the basis for this Court's creation of the limited exception in *Kaplan* as evidenced its conclusion that:

> the significance of Kaplan is *not a narrow point* pertaining to the attorney-client relationship, but rather the more *broad* view that the door is now *open* to assignment of legal malpractice actions which do not fully implicate the core policy concerns underlying the general rule.

Stern, 916 So. 2d at 938-39

The district court further reasoned that the assignment in this case was permissible under *Kaplan*, due to "the absence of the main policy concerns

underlying the general rule, [which] distinguishes this case from those involving 'most' assignments." *Id*.

The district court denied Stern's Motion for Rehearing and Rehearing *En Banc*. Stern invoked this Court's discretionary jurisdiction, which the Court accepted on May 5, 2006.

SUMMARY OF ARGUMENT

The Fourth District impermissibly allowed Security National to pursue this legal malpractice claim, despite (1) the lack of an attorney-client relationship at the time of the alleged negligence; (2) the lack of any intended third party reliance; and, (3) the lack of a valid assignment. This results in a clear violation of the main public policy concerns underlying Florida's general prohibition against the assignment of legal malpractice claims.

For the first time in *Kaplan*, this Court created a narrow exception to Florida's longstanding general prohibition against the assignment of a legal malpractice claim, while simultaneously reaffirming the notion that legal malpractice claims are generally not assignable in Florida. Apparently ignoring what appeared to be a clear intent on the part of this Court to effectively limit its holding to the facts that had been presented in *Kaplan*, the Fourth District has expanded the assignability of legal malpractice claims to third parties to whom the attorney owed no duty at the time of the

alleged malpractice. Petitioner believes that the Fourth District misconstrued the basis for this Court's decision in *Kaplan*, resulting in an unauthorized and unsupported expansion of attorney liability to non-client third parties who had no relationship with the defendant attorney, and where there is absolutely no suggestion of intended third party reliance.

The assignment of the previous loan holder's legal malpractice claim against Stern to Security National is completely contrary to Florida public policy. Allowing this type of broad assignment is incompatible with the notion that claims should only be brought against an attorney by a client, to whom the attorney owed a duty of loyalty, and is otherwise incompatible with the attorney's duty to maintain the confidentiality of the attorney's client, in an action that is brought by a virtual stranger to the attorney-client relationship. Moreover, allowing Respondent to proceed on a claim against Stern by way of the assignment of a virtually worthless note promotes the commercialization of legal malpractice claims, by effectively allowing a client to transpose a potential legal malpractice claim into a valuable commodity, which is subject to exploitation and sale to the highest bidder.

This Court should quash the district court's decision, as it conflicts with a long line of cases emanating from this Court - - as well as cases from the majority of other jurisdictions throughout the United States - - which have either prohibited the assignability of a legal malpractice claim, or

limited the assignability to a very narrow set of circumstances. The Fourth District's decision is also contrary to the longstanding public policy concerns which underlie Florida's general rule of non-assignability. This decision has resulted in an unsupported and unwarranted expansion of attorney liability to a non-client third party to whom the attorney owed *no duty* whatsoever.

ARGUMENT

The district court's decision should be quashed because: (1) no attorney-client relationship existed between Stern and Security National when the alleged acts and omissions upon which this purported legal malpractice action is based occurred; (2) as a general rule, Florida prohibits the assignment of legal malpractice claims; (3) the very narrow exception allowed by this court in *Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 759 (Fla. 2005), is inapplicable, as this claim does not involve any 'intended third-party reliance;' and (4) this assignment is contrary to Florida public policy, as it demonstrates the inevitable creation of a marketplace for legal malpractice claims.

I. THE DISTRICT COURT'S OPINION CONFLICTS WITH ESTABLISHED PRECEDENT, WHICH FOLLOWS THE MAJORITY OF JURISDICTIONS, GENERALLY PROHIBITING THE ASSIGNMENT OF LEGAL MALPRACTICE CLAIMS ABSENT VERY LIMITED FACTUAL CIRCUMSTANCES THAT DO NOT EXIST IN THIS CASE.

A critical element of any legal malpractice claim is the existence of the attorney-client relationship.[1] The employment prong of the tort requires that the attorney and the client share privity of contract with one another.[2] *See Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, et. al.,* 612 So.2d 1378 (Fla. 1993); *See also Angel, Cohen, and Rogovin v. Oberon Investment, N.V.*, 512 So.2d 192 (Fla. 1987). The attorney-client relationship must be in existence *at the time* of the alleged acts or omissions upon which malpractice claim is based. *See Kates v. Robinson*, 786 So.2d 61, 64 (Fla. 4th DCA 2001).

Here, as the district court correctly recognized, no attorney-client relationship existed between Stern and Security National at the time of the alleged negligent acts or omissions upon which this legal malpractice action

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[1] To establish a legal malpractice claim a client must prove: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty to the client during the course of this employment; and (3) that such negligence was the proximate cause of loss to the client. *See Kates v. Robinson*, 786 So.2d 61, 64 (Fla. 4th DCA 2001); *see also Maillard v. Dowdell*, 528 So.2d 512 (Fla. 3d DCA 1988).

[2] As discussed below, a limited exception to this strict privity requirement has been created where a plaintiff can demonstrate that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party. *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, et. al.,* 612 So.2d 1378 (Fla. 1993);); *Angel, Cohen, and Rogovin v. Oberon Investment, N.V.*, 512 So.2d 192, 194 (Fla. 1987). Security National conceded in the trial court that it was not an intended third party beneficiary.

is based. In fact, Security National did not even come into the picture until March 31, 2001 - - some six months after the trial court had granted summary judgment in the underlying action, determining that it was time-barred, and some five months after Stern initiated an appeal from that ruling on behalf of NAMC. Accordingly, every alleged act of malpractice preceded Security National's ownership of the note and mortgage.

Thus, the district court correctly concluded that Security National's "standing" in this action is wholly dependent upon whether it received a valid assignment of a legal malpractice claim, as opposed to having standing pursuant to its after-the-fact status as a client or as an intended third party beneficiary. *See Stern*, 916 So.2d at 937.[3]

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[3] It is questionable whether Security National even ever received an "assignment" of a legal malpractice claim. The only support for an "assignment" is an allegation in the Complaint, in which Security National alleges that NAMC "assigned its rights under the mortgage loan" to Security National on or about March 30, 2001. *See Complaint* ¶ 10. Moreover, Security National itself denied that its right to bring this lawsuit was under an "assignment:"

> Security National's rights to bring this suit are not based on an assignment of a malpractice claim. Rather, it was Security National's acquisition of the Note and Mortgage and the subsequent representation by Stern which gave rise to a claim for malpractice. . .

(Security National's Reply Brief filed in the Fourth District, at page 6).

In this instance, the transfer of the note and mortgage were analogous to the sale of any other chattel, which carry no rights unto themselves, where the transferred property has no real intrinsic value. Security National is

Florida follows the majority of jurisdictions, which generally prohibit the assignment of legal malpractice claims. *See Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 559 (Fla. 1997); *See also KPMG Peat Marwich v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 765 So. 2d 36 (Fla. 2000). This Court has traditionally applied a blanket prohibition against the assignment of legal malpractice claims, allowing only clients to sue for malpractice. *See Kaplan*, 902 So.2d at 757-58. The rule is premised on the well established principle that an attorney's duty is only to his client -- and not to third parties. *Id.* At 758.

Most recently, in *Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 759 (Fla. 2005), this Court created a narrow exception to the general prohibition against the assignment of legal malpractice claims by permitting third party creditors of an insolvent corporation to sue the lawyers who had prepared private placement memoranda for the corporation. *Id*. at

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suing upon a note which had already been rendered worthless at the time that the note and mortgage were assigned. This situation may be analogized to the purchaser of a damaged vehicle suing the party responsible for that damage, where the automobile was bought at a deep discount in light of its poor condition. The claim for the damage which had been done to the vehicle does not transfer with the sale of the vehicle, absent a specific assignment; rather, the claim belongs to the original owner, who was presumably forced to sell the vehicle at a discount because of the negligence of the party that caused the damage. Similar reasoning should apply here, i.e., a claim for legal malpractice should not transfer automatically upon the sale of a worthless note and mortgage, where it is the negligence of the attorney which resulted in the diminished value of those instruments.

757. Kaplan brought the action as an "assignee for the benefit of creditors," alleging that the lawyers had failed to disclose material information in the private placement memoranda for the sale of shares in the soon-to-be-insolvent corporation, Medical Research Industries Inc. (MRI). *Id.* at 755.

None of the facts on which *Kaplan* is premised, however, exists in this case. The decision in *Kaplan* was specifically based upon this Court's comparison to independent auditors, who "owe a duty to those who rely on statements contained in their published documents." *Kaplan*, 902 So.2d at 756. Yet, the Fourth District Court of Appeal failed to reconcile *Kaplan's* intended third party reliance rationale with the facts in this case. *See Security National Servicing Corp. v. Law Offices of David J. Stern, P.A.*, 916 So.2 d 934 (Fla. 2005). Based upon the limiting language in *Kaplan* it appears that it was never intended to support the proposition that Florida courts must evaluate the validity of assignments on a case-by-case basis, in light of relevant policy concerns. That approach has been historically rejected in Florida, and is only followed by a limited number of jurisdictions throughout the United States.

As was noted above, in *Kaplan*, this Court addressed an extremely narrow issue, i.e., whether a potential plaintiff may "assign" a legal malpractice claim involving the preparation of private placement

memoranda. Indeed, the carefully crafted introduction to Justice Quintero's opinion appears to address the limited factual basis for the Court's decision to allow the claim for legal malpractice to proceed in that action, in an apparent attempt to avoid a more expansive interpretation concerning the assignability of a legal malpractice claim, as has occurred in this case:

> In this case, we decide whether a potential plaintiff may assign a legal malpractice claim involving the preparation of private placement memoranda. In two prior cases, we allowed the assignment of other types of claims, contrasting them to claims for legal malpractice, which we stated were *not* assignable.

See Kaplan, 902 So. 2d at 756. (Emphasis added.)

In *Kaplan*, the Court determined that the attorneys produced corporate statements with full knowledge that inaccurate information contained therein would be disclosed to the public and that the statements were produced with the *intent to induce the reliance* of potential investors. Thus, the Court found that the potential investors were *intentional third party beneficiaries* of the attorney-client relationship between the Kaplan attorneys and the corporation.

Specifically, the Court found that a narrow exception to the general rule of non-assignment was warranted because the attorneys were acting:

> not just for the corporation's benefit, but *for the*

> *benefit of all those who rely* on the representations in their documents--in this case, potential shareholders.

Kaplan, 902 So.2d at 758. (emphasis added.)

In fact, as the Court later noted, the legal services that were at issue in K*aplan* "were not personal but involved publication of corporate information." *Kaplan*, 902 So.2d at 758.

Thus, this Court held that the legal malpractice claim was assignable, since the *Kaplan* attorneys owed a *duty* to those third parties who had *relied* upon the published (but inaccurate) information. Nevertheless, this Court stressed "that the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client." *Id*. at 757.

Kaplan discusses this Court's previous treatment of cases addressing the assignability of professional malpractice claims, beginning with *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557 (Fla. 1997), in which this Court allowed the assignment of a claim against an insurance agent, because unlike claims against attorneys, the agent-insured relationship does not implicate the same fiduciary and confidentiality obligations. *See Forgione*, 701 So.2d at 560.

Then, in *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co.*, 765 So.2d

36 (Fla. 2000), the Court determined that a malpractice claim against an independent auditor could be assigned to a third party, expressly recognizing - - as in *Forgione* - - that "legal malpractice claims are not assignable because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided loyalty to the client." *See KPMG*, 765 So.2d at 38.

The Court further explained that negligence claims against independent public auditors are assignable because:

> ...the independent auditor assumes a public responsibility transcending any employment relationship with the client.... [T]his special function owes *ultimate allegiance to the corporation's creditors and stockholders, as well as the investing public*. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and *requires complete fidelity to the public trust*.

See KPMG, 765 So.2d at 38. (Emphasis added.)

In contrast, most legal malpractice actions involve "a breach of the duties within the personal relationship between the attorney and client." *Forgione*, 701 So.2d at 559 (*citing to Christison v. Jones*, 405 N.E. 2d 8 (Ill. 1980). Consequently, a cause of action arising from the breach of a lawyer's duties to a client can only be asserted by the client. *See Forgione*, 701 So.2d at 557.

Finally, in *Kaplan*, the Court explained the basis for its decision in

KPMG, which continued to note that legal malpractice claims are not assignable because:

> *unlike an attorney who must zealously represent a client in an adversarial setting*, 'an independent auditor who is hired to give an opinion on a client's financial statements must do so with an independent impartiality which *contemplates reliance* upon the audit by interests *other than* the entity upon which the audit is performed.'

See Kaplan, 902 So.2d at 758 (citing *KPMG*, 765 So.2d at 38 (emphasis added).

Yet, in its decision in this matter, the Fourth District failed to recognize this unique distinction, or to even acknowledge that the claims against Stern arose out actions taken "in an adversarial setting" on behalf of a client who is not a party to this lawsuit.

Kaplan and *KPMG* represent a very limited right to pursue a cause of action against a professional by individuals who have specifically relied upon the services of that professional, where that reliance was clearly contemplated by the very nature of the services performed. *See Kaplan*, 902 So.2d at 759-61; *See also KPMG*, 765 So.2d at 38-39. Yet both decisions make it clear that the prohibition against the assignability of a legal malpractice action remains in tact in Florida, absent the existence of the limited factual scenario which triggered this Court's decision to allow an exception to the general rule in *Kaplan*.

In this case, Security National's legal malpractice claim arose from negligent acts or omissions occurring during the course of an adversarial proceeding when Stern was representing its clients, EMC, Universal, and NAMC - - *not* Security National. Moreover, Security National itself denies any intended third party reliance. Nevertheless, the district court ignored this Court's earlier rationale by expansively interpreting *Kaplan,* to allow the assignment of a legal malpractice claim by a third-party, to whom the attorney owed *no duty* at the time of the alleged negligent acts or omissions.

According to the Fourth District, the decision in *Kaplan* effectively expanded attorney liability non-clients in cases where a court determines that the legal malpractice claim does not arise from "personal services" or does "not fully implicate the core policy concerns." *See Stern*, 916 So. 2d at 938. Yet, the Court does not explain its summary conclusion to the effect

[4] In its arguments to the Fourth District, Security National suggested that it was allowed to proceed with this claim "because it owned the loan by the time the appeal was completed and the cause of action accrued." *Security National*, 916 So.2d at 937. While it is generally true that a cause of action for legal malpractice may not be deemed to have formally accrued for the purposes of determining when a statute of limitations begins to run against an attorney on a claim involving some form of underlying litigation, see *Fremont Indemnity Company v. Carey, Dwyer, Eckhart, et al.*, 796 So.2d 504 (Fla. 2001), there is no question about the fact that a claim for malpractice could have been immediately pursued once the trial court determined that the second action that had been filed by Stern was untimely, thus foreclosing any further action on the note and mortgage. See *Segall v. Segall*, 632 So.2d 76, 78 (Fla. 3d DCA 1993), which noted that a party must not pursue final appellate determination where a claim has been lost as a result of the arguable negligence of the litigation attorney, before a claim may be asserted for legal malpractice.

that Stern's conduct in this matter did not involve "personal services," which is particularly troubling in light of the distinction which was drawn in *Kaplan* between the obligations of an independent auditor and the attorney "who must zealously represent a client in an adversarial setting." *Kaplan*, 902 So.2d at 758 (citing *KPMG*, 765 So.2d at 38).

As opposed to the Fourth District's conclusion that the *Kaplan* decision opened the Florida courts to a wide ranging variety of potential claims for malpractice against attorneys by way of assignment, Petitioner believes that this Court's opinion in *Kaplan* stands for the limited proposition that a non-client may maintain a malpractice action against an attorney in cases where the claim is based upon an attorney's *fraudulent or negligent communications* made by the attorney in the course of representing the attorney's client, but *only if:* (1) the attorneys *intended* the communication *to influence* the third parties' actions, (2) the third parties' *reliance* thereon was fully *justified*, and (3) *harm* to the third party resulted.

The facts of this case do not bring it within the ambit of the limited scope of *Kaplan.* Security National was <u>never</u> an intended beneficiary of the attorney-client relationship between Stern and EMC since the scope of Stern's representation of EMC was to pursue a foreclosure action for EMC (not Security National) to recover upon a 'bad debt,' which was likely purchased by Security National for an amount that was significantly less

than face value. The purported malpractice committed by Stern did not involve the negligent preparation of any private placement memoranda - - or any other communications for that matter - - with the *intention of inducing reliance thereon by third parties.* Nor can Security National reasonably attempt to claim any justifiable reliance upon any such communications.

Thus, the district court's decision conflicts with this Court's decision in *Kaplan* and should be quashed.

II. THE FOURTH DISTRICT'S OPINION DIRECTLY CONTRAVENES FLORIDA PUBLIC POLICY CONCERNS.

Initially, the Fourth District noted in its opinion that Florida follows the majority view, i.e., that legal malpractice claims are generally not assignable. However, the court then cited to a few decisions from jurisdictions which had adopted the minority approach, allowing assignments on a case-by-case basis, ostensibly when the main policy concerns underlying the general rule of non-assignment are not fully implicated. *See e.g., Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A. 2d 1057, 1061 (R.I. 1999).

The Court suggested that *Cerberus* was the perfect model for allowing the assignment of the legal malpractice claim in this matter, given the factual similarities between the two cases. This was based upon the Court's determination that the assignment to Security National did not involve the

transfer of a malpractice claim alone, but rather as part of the underlying commercial transaction; thus, the transfer was "not like most assignments." *Stern*, 916 So.2d at 937.

The district court also demonstrated its inaccurate assessment of the rationale underlying this Court's decision in *Kaplan*, to the extent that the court of appeal did not view *Kaplan* as having created a narrow exception to the general rule against the assignability of a legal malpractice action, but rather an exception which is far more expansive than the exception that had been carefully crafted by this Court in its decision in *Kaplan*:

> The significance of *Kaplan* is *not a narrow point* pertaining to the attorney-client privilege, but rather the more *broad* view that the *door is now open* to assignment of legal malpractice actions in exceptional cases which do not fully implicate the core policy concerns underlying the general rule.

See Stern, 916 So.2d at 938-39. (Emphasis added.)

The Fourth District then concluded, albeit all too summarily and incorrectly, that the public policy concerns which have been expressed by this Court in *Kaplan* and *Forgione* were not implicated in this matter, since the claim presented by Security National is "not a claim involving personal services" and, thus, "it seemed highly unlikely that the [the previous holders of the note and mortgage] shared privileged information with" Stern. *Id.* at 937-38.

The Fourth District fails to explain this conclusion. The decision fails to address the possibility that privileged communications may ultimately be involved with regard to the prosecution of the underlying claims on behalf of EMC, Universal or NAMC. Further, discovery may be implicated with regard to the value of the note at the time that it was deemed to be essentially worthless. Nor does the Fourth District's decision explain how the prosecution of a mortgage foreclosure action fails to involve "personal services."

The foregoing proposition is squarely incompatible with this Court's decision in *Kaplan* which allowed an extremely narrow exception to Florida's general rule of non-assignability. *See Kaplan*, 902 So.2d at 756-759. Not only has the district court completely misconstrued the essential basis for the exception which was created in *Kaplan*, but it also ignores what appears to have been a purposeful effort by this Court to limit the scope of its decision in *Kaplan* to the facts that are set forth in that opinion, while simultaneously protecting the sanctity of the attorney-client relationship and preventing any potential commercialization of legal malpractice claims.

In determining that *Kaplan* should be read as a signal of this Court's approval of a case-by-case assessment of the viability of assignments of legal malpractice actions, the Fourth District effectively adopted the minority approach to any determination concerning whether or not to

recognize the assignment of a legal malpractice claim. *See Stern*, 916 So. 2d at 939. Yet, Petitioner does not believe that this Court's decision in Kaplan intended to signal any approval of this type of case-by-case approach. In fact, this Court specifically noted in *Kaplan* that the case-by-case approach has only been recognized in the *minority* of jurisdictions - - and never in Florida. *See e.g., Kaplan*, 902 So. 2d at 759, n. 3.

Equally problematic, however, is the fact that the Fourth District's decision provides absolutely no guidance as to precisely what circumstances would allow a trial court to assess the viability of an assignment, "in a commercial setting." The implications are ominous. As phrased, the Fourth District's opinion could give rise to innumerable potential claims for malpractice by non-clients, involving virtually any form of commercial transaction, where that transaction goes awry.

The District Court's attempts to alleviate those concerns do not, in fact, address legitimate policy implications. In rejecting Stern's argument, that the loans that Security National bought were "almost worthless when purchased," the District Court suggested that the loans "clearly…did have *some* value" while the underlying matter was pending before the Second District Court of Appeal. *Security National*, 916 So.2d at 939. This argument ignores the fact that the note had lost significant value - - if it indeed had any value at all - - once the trial court determined the action to

enforce the note was untimely, an event which occurred before Security National purchased the note and mortgage. Thus, Security National effectively bought the right to file a malpractice action on a note that had otherwise been rendered worthless prior to that purchase. This appears to be the precise public policy concern which was identified by this Court in *Kaplan* and numerous other cases which have refused to accept the assignability of a legal malpractice action in the majority of jurisdictions in this country.[5]

The main policy concern underlying Florida's general anti-assignment rule is to protect attorneys from "the creation of a market for legal malpractice claims." *See Kaplan*, 902 So. 2d at 760. For example, in *Kaplan*, citing to the seminal decision of *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. 2d DCA 1976), which persuasively sets out the potential perils of allowing the assignment of legal malpractice claims, this Court expressly recognized that:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The

[5] *See Delaware CWC Liquidation Corp. v. Martin*, 584 SE2d 473 (Del. 2003), and cases cited therein; *see also General Security Insurance Company v. Jordan, Coyne & Savits, LLP*, 357 F.Supp. 2d 957 (E.D. Va. 2005).

> assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty…The commercial aspect of assignability of … legal malpractice [actions] is rife with probabilities that could only debase the legal profession.
>
> The almost certain end result of merchandizing [sic] such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

See id.

Accepting the validity of the assignment of a potential malpractice claim to Security National in the instant case is directly contrary to Florida public policy. Although characterized as nothing more than a component of a broader commercial transaction, Security National's purchase of this virtually unenforceable debt reflects a transparent attempt by Security National to replace a defaulted mortgagor with a solvent defendant, thus

making Stern a virtual guarantor of the bad debt solely by virtue of the assignment of the note. *See e.g.*, *Forgione*, 701 So. 2d at 559-560; *See also Kaplan*, 902 So. 2d at 760.

The Fourth District's decision completely ignores the true nature of this transaction and the attendant public policy concerns - - acknowledged in Florida - - by relying upon the *Cerberus* decision to summarily conclude that no such public policy concerns are presented here, given the "commercial nature" of the instant transfer. *See Stern*, 916 So.2d at 937-39. Yet, unlike the wholesale transfer of the assets and liabilities of a corporation, which have occasionally supported claims of malpractice against the predecessor corporation's attorney, this case involves the limited sale of a "bad note and mortgage" to Security National, at a point in time when a court had already ruled that a predecessor entity could not foreclose the mortgage.

Thus, at the time that Security National purchased the note and mortgage the only potential value turned upon whether or not an appellate court would reverse the trial court's dismissal of the untimely foreclosure action or otherwise accept the viability of a malpractice claim brought against Stern by a third-party assignee of the note. *See Stern*, 916 So. 2d at 934-35. Given that analysis, it is clear that Security National purchased this loan with either actual or constructive knowledge that it would in all likelihood have no ability to recover upon the defaulted debt. Thus, it is

unquestionably evident that this loan had little value to Security National, absent its ability to pursue the prior note holders' claim(s) for legal malpractice against Stern. Permitting a legal malpractice claim to go forward will directly promote the commercialization of similar malpractice claims by effectively converting potential claims into a commodity, which can be exploited and transferred to the highest bidder. *See Forgione*, 701 So. 2d at 559-560; *See also Kaplan*, 902 So. 2d at 760.

As was noted earlier, the assignment of a legal malpractice claim is also prohibited because "Florida law views legal malpractice as a personal tort […] involv[ing] a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client." *See Forgione*, 701 So. 2d at 559. A client's claim against its attorney for legal malpractice arises from a uniquely personal relationship, where the attorney has breached a personal duty owed to the client, and where the client has been injured as a result of that breach. *See Kaplan*, 902 So. 2d at 756. It therefore naturally follows that this relationship is a privileged and confidential one, which must be honored by the attorney. The attorney must also protect the confidences reposed in the attorney by his client, which are of a highly personal nature. Those confidences may not be summarily ignored; nor may the attorney unilaterally determine when and to what

extent a former client has waived any attendant privilege. *See Forgione*, 701 So. 2d at 559.

In an apparent effort to distinguish *Kaplan*, the Fourth District dismissed any concerns over the personal nature of the underlying litigation, by concluding:

> This case likewise does not involve personal services. It also seems highly unlikely that the EMC or North American shared privileged information with Stern.
>
> *Stern*, supra at 938.

Inexplicably, however, the Fourth District fails to note how it was able to reach that conclusion, i.e., how it could determine, based on the record before it, that Stern would not have to violate any attorney-client privilege in defending itself in a legal malpractice action.

In any case arising out of some form of underlying litigation, an attorney necessarily has the right to defend against the claims of malpractice. In some instances, those defenses will necessarily implicate the client's own conduct, or require the attorney to disclose client confidences. For example, in some mortgage foreclosure actions, the actions taken by the attorney may be governed by inaccurate information that has been received from the client. In those circumstances, who is to make the determination concerning the potential waiver of the attorney-client privilege, where the actual client is not a party to the litigation?

In this instance, the note and mortgage had been assigned on three separate occasions following the dismissal of the 1997 foreclosure action. What was the value of the note to EMC at that juncture? Did Stern discuss the dismissal of the 1997 action with EMC and, more particularly, was there a reason that had been explored with the client - - EMC - - as to why the 1997 action should be dismissed? Perhaps it was filed in the wrong jurisdiction. Other factual issues may arise involving EMC or the subsequent assignees, Universal and NAMC. How is Stern to defend itself, if decisions were made in the litigation - - preceding the assignment of the worthless note to Security National - - which bore directly upon Stern's conduct of the underlying litigation?

In some instances, the attorney=s defense may be based upon the fact that the client has not sustained an actual loss - - a defense which would certainly be applicable here. For example, Stern may be able to demonstrate that EMC assigned the note to NAMC at a point in time when NAMC recognized that the note was virtually worthless, or not subject to enforcement. Is Stern now in a position where it must necessarily breach that privilege with regard to each in a series of note holders, to demonstrate that there was no real damage - - or limited damage - - sustained as these notes were bundled and sold? How are decisions going to be made as to the scope of any potential waiver, particularly where the prior assignees may

have little or no knowledge of the pending legal malpractice action? Who is in a position to defend whatever privileges may be asserted by each of these entities?

All of these questions must be answered before a court can blithely conclude that concerns over a waiver of the attorney-client privilege do not pose any impediment to the successful prosecution of a malpractice action, so long as the assignment occurred in some kind of commercial setting.

Those concerns are not alleviated by the simple conclusion that "a malpractice action necessarily works a limited waiver of the attorney-client privilege to allow defending the claim, an assignment of the malpractice claim causes the client to lose control over that waiver." *Stern*, 916 So. 2d at 938. To the contrary, where it is distinctly possible that prior assignees never even contemplated the prospect that Security National would pursue a malpractice action against Stern, and particularly where the lawyer may have a continuing relationship with the original assignor, questions of privilege become paramount. *See Schetter v. Schetter*, 239 So. 2d 51 (Fla. 4th DCA 1970) (attorney-client privilege can only be waived by the client); *Procacci v. Seitlin*, 497 So. 2d 969 (Fla. 3d DCA 1986).

Accordingly, Florida public policy concerns should prohibit the assignment of the instant claim which is being asserted by Security National against Stern on the foregoing grounds, since Security National was not a

client at the time of the alleged malpractice. Security National was a complete stranger to the attorney-client relationship which Stern enjoyed with EMC, Universal and NAMC; Security National was owed no duty by Stern at the time of the acts and omissions upon which this claim is based, particularly where Security National cannot reasonably argue that it suffered any injury whatsoever as a result of the actions of its counsel. *See Kaplan*, 902 So. 2d at 756-60.

The District Court's decision should be reversed; it represents little more than an improper and unwarranted expansion of an attorney's liability to a third party, to whom the attorney owed *no duty*, for actions which occurred before the note and mortgage were purchased. This potential claim is incompatible with the attorney's duty to act with unfettered loyalty to the attorney's own client, and to maintain client confidentiality. The decision by the Fourth District Court of Appeal will open the door to virtually unlimited commercialization of legal malpractice claims, through the creation of a market place which will prompt clients to convert a potential legal malpractice claim into a valuable commodity which can be thereafter exploited through the sale and transfer to subsequent bidders, with whom the attorney had no relationship and to the attorney owed no legal duty whatsoever.

CONCLUSION

The District Court's decision represents an unsupported and unwarranted expansion of an attorney's liability to a non-client, to whom the attorney owed *no duty*, in a case which did not involve any *intended third party reliance*. It is equally incompatible with the attorney's duty of loyalty toward existing clients, and the mandatory preservation of client confidentiality. Equally important, the decision by the District Court of Appeal opens the door to the unlimited commercialization of legal malpractice claims, simply because they may arise in a "commercial setting," leading to the inevitable market place for claims of this nature, where potential claims can be bartered to the highest bidder, as some form of viable commercial transaction. Clearly, this was not a result which had been contemplated by this Court when it crafted its carefully worded opinion in *Kaplan*.

Petitioner Law Offices of David J. Stern respectfully requests that based upon the foregoing law, arguments and Florida public policy considerations set forth in the above brief, this Honorable Court reverse the Fourth District's decision in this matter, as inconsistent with Florida's general prohibition against assignment of legal malpractice claims announced in *Forgione, KPMG*, and to further define the full extent of the

limitations placed upon the exception to this general rule of non-assignment created by this Honorable Court in *Kaplan*.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief has been computer generated in Times New Roman, 14-point font, in compliance with Fla.R.App.P. 9.210(a).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail to: **NANCY W. GREGORIE, ESQ**., Bunnell, Woulfe, Kirschbaum, Keller, McIntyne & Gregoire, P.A., 100 S.E. 3rd Avenue, Suite 900, Fort Lauderdale, Florida 33394, **FORREST G. McSURDY, ESQ.**, Stern & McSurdy, 801 South University Drive, Suite 500, Plantation, Florida 33324, and **CHRISTOPHER BOPST, ESQ**., 1401 Brickell Avenue, Suite 700, Miami, Florida 33131, this 9th day of June, 2006.

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APPENDIX