IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO:
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's JURISDICTIONAL BRIEF

Respectfully Submitted,

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INTRODUCTION

This jurisdictional brief seeks discretionary review of a decision of the Fourth District Court of Appeal, rendered on November 20, 2005, pursuant to Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., on grounds that the decision expressly and directly conflicts with this Court's decisions in *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co.*, 765 So.2d 36 (Fla. 2000), and *Forgione v. Dennis Pirtle Agency, Inc*., 701 So.2d 557 (Fla. 1997), and this Court's opinion in the case of *Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 759 (Fla. 2005), by improperly expanding the purposefully limited scope of that decision. For the reasons discussed below, the Court should grant discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

This was an appeal of a trial court 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 ("Stern"). The trial court ruled that an attorney-client relationship did not exist between Security National and Stern at the time of the alleged malpractice and that Florida law prohibited the assignment of the legal malpractice claim, under these circumstances.

This case arises out of a "botched mortgage foreclosure" on a note and mortgage on real property in Lee County,

Florida, which was assigned multiple times over the course of 10 years. In 1997, the note and mortgage went into default. USMLIC - SIX, the holder of the note and mortgage at that time timely filed a mortgage foreclosure action upon the defaulted loan. (*See* Appendix, Opinion at 1).

While that action was pending, USMLIC - SIX assigned the loan to EMC Mortgage ("EMC"). EMC then hired Stern to act as its attorney and to bring a second foreclosure action on the same note and mortgage. On December 15, 1998, Stern filed a foreclosure action on the behalf of EMC; 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 counsel in the timely 1997 foreclosure suit. Five days later, Stern voluntarily dismissed that timely action, leaving only the untimely action. This is the basis for Security National's case against Stern.

The loan was assigned twice more while the underlying foreclosure action was pending. Ultimately, the defendant/owner of the encumbered property obtained a summary judgment on statute of limitations grounds. At that time, the note and loan were owned by North American Mortgage Company, which appealed the final judgment. On April 30, 2001, while the appeal was pending, North American assigned the loan to

Security National. Several months later, the Second District Court of Appeal affirmed the judgment for the owner of the encumbered property. Security

National then brought this legal malpractice action against Stern.

Security National's Complaint for legal malpractice is based solely on the dismissal of the timely 1997 action and the failure to move to reinstate the 1997 action after the motion for summary judgment was filed in the later action. At that time, Stern's client was EMC and EMC owned the loan.

The trial court determined that it was bound by *Forgione* to enter summary judgment on Stern's behalf, because there was no attorney-client relationship with Security National "at the time the cause of action accrued," i.e. when the negligent acts or omissions occurred. (*See* Appendix, Opinion at 2)

The Fourth District Court of Appeal reversed the summary judgment against Security National. The court explained that because Security National's legal malpractice claim against Stern arose "only by assignment of the immature claim," it was necessary to review and apply the law on assignment of legal malpractice actions.(*See* Appendix, Opinion at 3)

The Fourth District acknowledged that "the majority rule in this country is that legal malpractice claims are not assignable....[whereas] the minority jurisdictions generally look at the validity of malpractice assignments on a case by case basis in light of the relevant policy considerations."

(*See* Appendix, Opinion at 3) (Internal citations omitted.) Nevertheless, the court ignored the expressly limited scope of this Court's recent decision in *Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 759 (Fla. 2005). Instead, citing precedent from other jurisdictions, the Fourth District aligned itself with the minority of jurisdictions in this country, and held that, given "the absence of the main policy concern underlying the general rule [which thereby] distinguishes this case from those involving 'most' assignments... this assignment was permissible under *Kaplan*." (*See* Appendix, Opinion at 7)

A motion for rehearing or rehearing *en banc*, was denied by the Fourth District Court of Appeal on January 20, 2006. (*See* Appendix)

SUMMARY OF THE ARGUMENT

Last year, in *Cowan, Liebowitz & Latman v. Kaplan*, 902 So.2d 755 (Fla. 2005), this Court receded from the prevailing prohibition against the assignment of legal malpractice claims, acknowledging a *limited* exception to the rule of nonassignability, while simultaneously recognizing and reiterating the general rule that only clients can sue for legal malpractice in Florida. Apparently ignoring this

Court's clear intent to effectively limit its holding, the Fourth District has issued a decision-- citing *Kaplan* as authority-- that not only misconstrues the essential basis for this Court's decision in *Kaplan,* but also expressly and directly conflicts with the limitations on assignability expressed in *Kaplan* and its predecessors, which continue to stand for the proposition that legal malpractice claims are generally not assignable in Florida.

The Fourth District reinstated a legal malpractice claim asserted by a virtual stranger, to whom Stern owed no duty at the time of the alleged misconduct, expressly and directly conflicting with this Court's decisions in *Kaplan*, *Forgione,* and *KPMG*.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *KAPLAN*, *KPMG* AND *FORGIONE*.

Until last year, Florida prohibited the assignment of claims for legal malpractice. However, in *Kaplan*, 902 So.2d at 755, this Court carved out a limited exception to that blanket prohibition. Although this Court specifically stated that the assignment of legal malpractice claims is still generally prohibited under Florida law, the Fourth District's decision ignores the implication of legitimate policy concerns

underlying that prohibition, dramatically expanding the scope of an attorney's potential liability to non-clients.

In *Kaplan*, this Court held that a legal malpractice claim was assignable where the defendant attorneys prepared private placement memoranda, knowing that the information contained therein would be disclosed to the public and that potential investors would rely on that information. *See Kaplan*, 902 So.2d at 759. This Court reasoned that this limited exception to the general rule was warranted, given the unique factual circumstances presented, since 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. *Id.* at 758.(Emphasis added.)

The Court therefore receded from the blanket prohibition expressed in *KPMG* and *Forgione*. The Court nevertheless 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.

The Fourth District's decision expressly and directly conflicts with this Court's decisions in *Kaplan, Forgione* and *KPMG* by virtue of its overly expansive interpretation of *Kaplan*, to validate the assignment of a legal malpractice claim asserted by a third party, to whom the attorney owed *no*

duty at the time of his alleged negligence. Instead, the District Court's decision ignores the deliberately limited scope of the *Kaplan* opinion. Indeed, the decision completely misconstrues the essential bases underlying the *Kaplan* decision.

In *Forgione* and *KPMG*, this Court confirmed that legal malpractice claims are not assignable. *See Forgione*, 701 So.2d at 558; *See also KPMG*, 765 So.2d at 36. In *Forgione*, this Court distinguished negligence claims against attorneys, which are not assignable, from negligence claims against insurance agents, by comparing the relationship between a prospective insured and an insurance agent to the attorney-client relationship. The Court ruled that negligence claims against insurance agents are assignable, *unlike those against attorneys*, because the agent-insured relationship does not implicate the same fiduciary and confidentiality obligations. *See Forgione*, 701 So.2d at 560.

Then, in *KPMG,* this Court determined that a malpractice claim against an independent auditor could be assigned to a third party. Nevertheless, as in *Forgione*, the Court expressly recognized 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.

In *Kaplan*, this 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.' *Kaplan*, 902 So.2d at 758, citing to *KPMG*, 765 So.2d at 38 (Emphasis added.)

Yet in this instance, the claim against Stern occurred during the

course of an adversarial proceeding in which Stern was representing its former client.

Citing to *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), in *KPMG*, the Court explained that negligence claims against independent public accountants are assignable, *unlike those against attorneys*, 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*. *KPMG*, 765 So.2d at 38.

In contrast, most legal malpractice actions involve "a breach of the duties within the personal relationship between the attorney and client." *Id*. 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.

In *Kaplan*, this Court analogized the actions of the attorneys in that matter to the circumstances involved in *KPMG*, because the *Kaplan* attorneys who prepared the private placement memoranda had intentionally shared client information with third parties, i.e., shareholders and the investing public. *Id.* at 757-61. Because these lawyers intended that third parties would rely on the representations made in their published documents, just like the independent auditors, this Court determined that the defendant attorneys *owed a duty* to those who relied on their published documents. *Id.* at 757-59.

Essentially, when read together, *Kaplan* and *KPMG* represent a limited right to pursue a cause of action against a professional brought by individuals who 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. Absent the existence of these limited factual circumstances, none of which exists here, the rule announced by this Court in *KPMG* and *Forgione,* ie., that legal malpractice actions are generally not assignable, continues to be controlling law in Florida.

The Fourth District's decision expressly notes that the significance of *Kaplan* "is not a narrow point, 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." (*See* Appendix, Opinion at 5) Essentially, the district court's opinion mistakenly directs Florida courts to now evaluate the validity of all legal malpractice assignments on a *case by case basis,* in light of the "relevant policy considerations," or to determine whether any particular claim involves "personal services." This approach has been taken by only a minority of jurisdictions and never in Florida. *See Kaplan*, 902 So.2d 755, n.3.

Not only does the Fourth District's decision improperly validate the assignment of a legal malpractice claim asserted

by a party to whom the attorney owed *no duty* at the time of his alleged negligence, but the District Court's expansive interpretation of *Kaplan* also seemingly stands for the proposition that virtually *any* legal malpractice claim arising in a commercial context may be assigned, expressly and directly conflicting with *Forgione* and *KPMG*.

The District Court's opinion will likely open the door to a flood of legal malpractice claims, expanding the purposefully limited scope of this Court's holding in *Kaplan* and completely disregarding the general rule against the assignment of legal malpractice claims announced by this Court in *KPMG* and *Forgione*. The opinion will inevitably create the "market for legal malpractice claims" which this Court sought to avoid in *Kaplan*.

CONCLUSION

For the foregoing reasons, Petitioner Law Office of David J. Stern, P.A. respectfully requests this Court to accept jurisdiction in this cause to resolve the conflict that has been generated by the decision of the Fourth District Court of Appeal in this matter.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief has been computer generated in Courier New 12-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 mail and hand delivered 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 27th day of February, 2006

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