IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC06-361
4th DCA 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 FOURTH DISTRICT

AMENDED BRIEF ON JURISDICTION OF RESPONDENT SECURITY NATIONAL SERVICING CORP.

Nancy W. Gregoire, Esq.
BUNNELL WOULFE KIRSCHBAUM KELLER
McINTYRE GREGOIRE & KLEIN, P.A.

Attorneys for Respondent
One Financial Plaza
9th Floor
100 S.E. Third Avenue
Fort Lauderdale, Florida 33394
Telephone: 954.761.8600
Facsimile: 954.525.2134

TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

Petitioner requests discretionary review of a November 20, 2005 decision of the Fourth District pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

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 Jurisdictional Brief will be cited as "IB__."

STATEMENT OF THE CASE AND OF THE FACTS

A. Facts Before the Fourth District

Security National adopts the Opinion's recitation of the facts:

"This case concerns a note and mortgage in a face amount of $108,000. In 1997, the holder of the note and mortgage, UMLIC-SIX CORP., timely filed a mortgage foreclosure action. While that action was pending, UMLIC-SIX assigned the loan to EMC Mortgage. EMC hired Stern to foreclose the loan. Stern filed a second foreclosure action on the same note and mortgage on December 15, 1998. By this time, the statute of limitations had already expired, so that this 1998 foreclosure action was untimely.

"On February 19, 1999, Stern substituted as counsel in the timely 1997 foreclosure suit, then five days later voluntarily dismissed that timely action, leaving only the untimely action intact. Stern essentially admits that this was malpractice.

"On August 27, 1999, EMC assigned the loan to Universal Portfolio Buyers, Inc. (Universal). Stern continued on as Universal's counsel in the untimely 1998 action. On October 15, 1999, Universal assigned the loan to North American Mortgage Co. (North American). Stern remained as North America's counsel in the 1998 action.

"On July 24, 2000, the owner of the encumbered property moved for summary judgment on statute of limitations grounds. On November 5, 2000, the trial court entered summary judgment for the defendant. North American appealed [to the second district]. "On April 30, 2001, while the appeal was pending, North American assigned the loan to Security National. The record does not reflect whether there was consideration for this transfer or whether Security National had knowledge of the status of the foreclosure at the time. Thereafter, Stern remained as counsel representing Security National, but only for a month or two.

"On December 7, 2001, the second district affirmed the final judgment." *Universal Portfolio Buyers, Inc., II v. Islands Intern. Realty, Inc.*, 806 So. 2d 479 (Fla. 2d DCA 2001). Security National then brought this legal malpractice action against Stern. The complaint alleges negligence in dismissing the timely 1997 action (at the time EMC owned the loan) and in failing to timely move to reinstate the 1997 action until after the motion for summary judgment was filed (potentially spanning the ownership of EMC, Universal, and North American).

"Although the trial court stated in her order that she 'may take issue with the fairness of such ruling,' she felt bound to

enter summary judgment on Stern's behalf because there was no attorney-client relationship between Stern and Security National 'at the time the cause of action accrued.'"

B. The Fourth District's Opinion

Citing *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 n. 2 (Fla. 1998), the Fourth District explained that for statute of limitations purposes a cause of action for legal malpractice does not accrue until the "underlying judgment becomes final, including exhaustion of appellate rights." The court then noted Security National's position that since it had an attorney-client relationship with Stern, Stern had represented it in the mortgage case, and it owned the loan when the cause of action against Stern for legal malpractice accrued, there was no improper "assignment" of a legal malpractice claim.

The Fourth District agreed with Stern, however, that "the time of the alleged negligent act or omission is the critical point for testing the scope and existence of the attorney-client relationship." Because Security National was not Stern's client at the time of the legal malpractice, the Fourth District concluded that Security National's rights could arise "only by assignment of the immature claim."

The court then analyzed whether, under the unique facts of

this case, assignment was available. It quoted from *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So. 2d 755, 759 n. 3 (Fla. 2005), to discuss the primary policy reasons for the majority rule and note the exceptions to the rule when the underlying policy concerns, in particular personal services and confidentiality issues, were absent. The court noted that here, as in *Kaplan,* because of the commercial setting and loan transfers, there were neither personal services nor privileged information to prohibit assignment of the cause of action along with the loan.

Then the Fourth District looked at the relevant out-of-state cases, including the nearly indistinguishable *Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057, 1060 (R.I. 1999), and *New Hampshire Insurance Co., Inc. v. McCann,* 707 N.E.2d 332, 337 (Mass. 1999), to explain that the Supreme Courts of both Rhode Island and Massachusetts have held that, on the type of commercial facts present here, assignments of commercial rights waived the attorney-client privilege and thus eliminated at least that reason for the anti-assignment rule.

And last, the Fourth District analyzed the main policy concern underlying the general anti-assignment rule – the creation of a market for legal malpractice claims – and found it absent in the exceptional facts of this case. As the court explained, here, in

contrast to "most" legal malpractice claims, the cause of action merely followed the rights and obligations that accompanied the loan. That scenario does not create a "marketplace" or implicate any other main policy concern underlying the general rule. On that basis, the Fourth District reversed the trial court's summary judgment against Security National and remanded with instructions to reinstate the claim. The court later denied Stern's request for rehearing and rehearing en banc, and Stern is now before this Court.

SUMMARY OF ARGUMENT

The Opinion does not conflict with any decision of this Court. The Court is, therefore, without conflict jurisdiction.

Even if the Court were to determine that it has conflict jurisdiction, it should decline review in this case. As the Fourth District noted, the exceptional facts here are unlikely to create any "marketplace" for legal malpractice claims or even be duplicated with any frequency.

Finally, from a policy perspective, the result that Stern advocates, to prohibit Security National from asserting a cause of action, leaves Stern immune from any claim for its admitted legal malpractice. That is not, and should not be, Florida law.

ARGUMENT

I. THE OPINION DOES NOT CONFLICT WITH

ANY DECISION OF THIS COURT.

A. An "express and direct conflict" is required for conflict jurisdiction.

The Court's jurisdiction is governed by section 3(b)(3) of article V of the Florida Constitution, which provides that the Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The term "expressly" is defined as "in an express manner," and "express" is defined as "to represent in words" or "to give expression to." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). A "conflict" is the "announcement of a *rule of law* which conflicts with a rule previously announced" or the "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). Under the first conflict test the facts are immaterial, but under the second the facts are vital. *Id.*

Contrary to Stern's argument, the Opinion does not establish an express and direct conflict with any decision of this Court under either test.

B. The Opinion does not conflict with *Kaplan*.

Stern admits that *Kaplan*, 902 So. 2d at 755, carves out a

limited exception to the anti-assignment rule (IB5). The exception created by the Court in *Kaplan* is that "lawyers preparing private placement memoranda, like independent auditors, owe a duty to those who rely on statements contained in their published documents, parties may assign claims for legal malpractice committed in preparing them." *Id.* at 758. Based on the Court's recognition of the exception, it receded from dicta to the contrary in *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997) (permitting the assignment of claims against an insurance agent), and *KPMG Peat Marwick v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 765 So. 2d 36 (Fla. 2000) (permitting the assignment of claims against an accountant conducting an independent audit).

While the Court stressed that the "vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client," nothing in *Kaplan* prohibits a claim such as that in this case. To the contrary, the "legitimate public policy" expressed in *Kaplan* (IB5) fully supports the Fourth District's Opinion. Here, as in *Kaplan*, 902 So. 2d at 758, all of the lenders relied on Stern's performance as the loan was assigned.

Furthermore, Stern points to nothing in *Kaplan* with which the Opinion conflicts to give the Court conflict jurisdiction (IB6). Rather, the Opinion expressly and directly recognizes its harmony

with the public policy underpinnings of *Kaplan*. As the Opinion tacitly and narrowly recognizes, here, as in *Kaplan*, Stern owed a duty to every lender in the commercial assignment stream that was both an assignee of the defaulted loan and a client of Stern. Security National was among those lenders and was, additionally, the lender holding the mortgage at the time the legal malpractice claim matured.

C. The Opinion does not conflict with *Forgione*.

The second case on which Stern relies is *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997) (IB1, 6-7). There, the Court stated that legal malpractice claims are not assignable because "[a]ttorneys and clients have a confidential relationship, which includes constraints upon information that can be disclosed to others," the "relationship between an attorney and client is a fiduciary relation of the very highest character," the "attorney owes a duty of undivided loyalty to the client," and the "relationship between an attorney and a client is also a personal one." *Id.* at 560.

Stern argues that the Opinion conflicts with the statement in *Forgione* that legal malpractice claims cannot be assigned because of the fiduciary and confidentiality obligations involved (IB7). Security National disagrees for two reasons. First, the Opinion recognizes each of these concerns, analyzes them under the facts of this case, and finds as a matter of fact and law that they do not

exist here. Second, this language from *Forgione* is exactly the overly broad language from which the Court receded in *Kaplan*, 902 So. 2d at 757. It cannot, therefore, create the necessary express and direct conflict to give the Court jurisdiction under rule 9.030(a)(2)(A)(iv).

Furthermore, once again Stern points to no language in the Opinion that expressly and directly conflicts with any holding of *Forgione*, as modified by *Kaplan*. Instead, as the Opinion recognizes, it addresses a scenario completely unique in Florida law but analyzed correctly by both the Rhode Island and Massachusetts Supreme Courts as an exception to the anti-assignment rule.

D. The Opinion does not conflict with *KPMG*.

The last case on which Stern relies is *KPMG Peat Marwick v. National Union Fire Insurance Company*, 765 So. 2d 36 (Fla. 2000) (IB1, 7-8). There, the Court explained that the "public policy reasons discussed in *Forgione* that require attorney malpractice claims to be nontransferable do not require the same result in an independent auditor malpractice claim." *Id.* at 38. But, again, in *Kaplan*, 902 So. 2d at 757, the Court receded from the "broad dicta" in *KPMG* "purporting to prohibit the assignment of all legal malpractice claims."

While the *KPMG* Court stressed that the "vast majority" of

legal malpractice claims are unassignable because of the lawyer's duty to the client, in this case the Opinion specifically recognized that Stern's duty here was broader than that to a single, particular client. Here, in perfect harmony with *KPMG* and *Kaplan*, the Fourth District recognized that the particular and unique facts before established an attorney-client relationship with Security National, a breach of the duty inherent in that relationship, and Security National's damages. There is no conflict between the Opinion and *KPMG*.

E. Public policy supports the Opinion.

In *Kaplan*, 902 So. 2d at 757-58, the Court recognized that "public policy concerns with permitting the assignment of legal malpractice claims are substantially attenuated" in certain circumstances. There, the issue was private or public placement memoranda, where attorneys act for a broad spectrum of private interests. Here, as in *Kaplan*, Stern represented a broad spectrum of clients, the lenders, through all the stages of foreclosure.

To suggest, and Stern urges, that it can avoid the implications of its legal malpractice because the end lender, which Stern represented, was not the lender at the time of the malpractice, effectively immunizes Stern from the negative impact of its legal malpractice. No case, and certainly not *Kaplan*,

Forgione, or *KPMG*, requires such a conclusion. The Fourth District's Opinion harmonizes all existing Florida law to do justice. This Court should either decline the exercise of its jurisdiction or approve the Opinion.

CONCLUSION

For the foregoing reasons, the Court should find that it is without conflict jurisdiction and reject Stern's claim. Alternatively, if the Court determines that it has conflict jurisdiction, it should either decline to exercise its jurisdiction because of the narrow scope of the Opinion or hold that the Opinion correctly construes the Court's decisions in *Kaplan*, *Forgione*, and *KPMG*.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Gregory S. Glasser, Esq., Robert M. Klein, Esq., Stephems, Lynn, Klein, et al., Two Datran Center, PH2, 9130 South Dadeland Boulevard, Miami, Florida 33156, and to Forrest G. McSurdy, Esq., Stern & McSurdy, 801 South University Drive, Suite 500, Plantation, Florida 33324, and to Christopher Bopst, Esq., 1401 Brickell Avenue, Suite 700, Miami, Florida 33131, this ___ day of March, 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,

BUNNELL WOULFE KIRSCHBAUM

KELLER

McINTYRE GREGOIRE & KLEIN,

P.A.

Attorneys for Respondent
One Financial Plaza, 9th Floor

100 S.E. Third Avenue
Fort Lauderdale, Florida 33394
Telephone: 954.761.8600; Facsimile:
954.525.2134

By:
Nancy W. Gregoire
Florida Bar No. 475688