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 AMENDED REPLY BRIEF

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REPLY

The Court properly accepted conflict jurisdiction. Security National does not have standing to maintain an action for legal malpractice against Stern. Further, legal malpractice claims are generally not assignable in Florida; therefore, any purported assignment to Security National is void as a matter of law. A contrary result was not mandated by this Court's decision in *Kaplan*.

SECURITY NATIONAL HAS NO STANDING : IT WAS NOT STERN'S CLIENT AT TIME OF STERN'S NEGLIGENCE

Security National continues to argue that it has standing to sue Stern for legal malpractice, even in the absence of an assignment. Specifically, Security National suggests that its standing to sue Stern for legal malpractice arises from its "attorney-client relationship with Stern with respect to the acts or omissions upon which the malpractice claim is based." (Answer Brief at 17). That is simply incorrect. It is of absolutely no consequence that Security National had an attorney-client relationship with Stern at some point during the pendency of the appeal that was pursued before the Second District Court of Appeal, or that Stern had served as foreclosure counsel to each of the prior assignees. (Answer Brief at 17-18).

To the contrary, unless Security National can demonstrate that there was an attorney-client relationship between itself and Stern "at the time of the alleged acts

or omissions," Security National does not have standing to sue Stern for legal malpractice. *See Kates v. Robinson*, 786 So.2d 61, 64 (Fla. 4th DCA 2001**).** In this instance, EMC was Stern's client and the only one to whom Stern owed a duty, when Stern negligently dismissed the timely foreclosure action, leaving only the untimely action intact. *See also Weiss v. Leatherberry*, 863 So. 2d 368 (Fla. 1st DCA 2003) (injury resulting from an attorney's negligence is *personal* to the client; consequently, cause of action arising from the breach of the lawyer's duty to the client can only be asserted by that client).

Stern does not take issue with the proposition that an assignor of a note and mortgage generally may not bring an action to enforce those agreements. However, that general proposition of law does not lead inexorably to Respondent's conclusion that "if the [legal malpractice] claim does not travel with the Note and Mortgage, it disappears." (Answer Brief at 24). This is because any claim for malpractice against Stern arose from Stern's negligent dismissal of the timely filed action during the course of his attorney-client relationship with EMC, even though that claim may have not technically matured until some later date. Nevertheless, even under the best of circumstances, it is clear that this claim would have become ripe -- that is, it would have accrued and could have been pursued -- no later than November of 2000, when the trial court granted summary judgment on the foreclosure action adverse to NAMC.

Certainly, Security National cannot realistically contend that NAMC could not have pursued a claim for negligence at that juncture, even using Respondent's own theory of liability, i.e., that the claim for malpractice automatically followed the assignment of the Note and Mortgage. The mere fact that NAMC chose to seek appellate review of the adverse summary judgment is not adequate to explain how Security National somehow inherited a legal malpractice action when it took an assignment of the Note and Mortgage after the appeal was filed.

The circumstances in which a client's subsequent actions may be deemed as an abandonment of a legal malpractice claim are very narrow. *See Segall v. Segall*, 632 So.2d 76 (Fla. 3d DCA 1993); *Pennsylvania Ins. Guar. Ass'n v. Sikes*, 590 So.2d 1051, 1053 (Fla. 3d DCA 1991). Thus, while the pursuit of an appeal may prolong the formal accrual of the claim, the cause of action may still be pursued without final appellate review of the underlying claim, unless the client's damages were actually occasioned by some form of judicial error, as opposed to legal malpractice. *(See Segall supra; Pennsylvania Ins. Guar. Ass'n v. Sikes)*. As the Third District Court of Appeal has noted in the distinguishing *Sikes*, a claimant clearly has the prerogative of attempting to compromise a claim -- or in this instance, pursue a claim for legal malpractice -- "rather than risk an all-or-nothing ruling in the appellate court." *Gwynn v. Daly Agency, Inc., 759 So.2d 20, 23 (Fla. 3rd DCA 2000).*

In *Lenahan v. Russell L. Forkey, P.A.*, 705 So. 2d 610, 612 (Fla. 4th DCA 1997) (citing to *Segall v. Segall,* 632 So.2d 76 (Fla. 3d DCA 1993), the 4th District Court of Appeal specifically cautioned that:

> Our cases should not be read to require every party who suffers a loss and attributes that loss to legal malpractice to obtain a final appellate determination of the underlying case before asserting a claim for legal malpractice. The test for determining when a cause of action for attorney malpractice [accrues] remains when 'the existence of redressable harm has been established.'

It therefore follows that, when NAMC decided to sell the Note and Mortgage to Security National, NAMC could certainly have established that it had suffered demonstrable harm as a direct result of Stern's negligence.[1] *See Lenahan,* 705 So. 2d at 611. "The principle of *Peat, Marwick* does not mean that in every case

[1] NAMC'S collateral - and thus its ability to collect on the note - was impaired, the moment that the trial court determined that the foreclosure action was untimely. For that reason alone, a claim could have been filed against Stern, e.g., to demonstrate that it would have been difficult to collect upon the Note, or that the loan was sold at a discount, to an entity which would be willing to pursue a potentially worthless claim. The reasons underlying NAMC'S decision not to pursue a malpractice claim are irrelevant. The fact remains that, even following Respondent's logic, if the right to pursue the Note and Mortgage followed the assignment, the claim for malpractice was certainly viable once the ability to foreclose on the Mortgage was negated as a result of Stern's malpractice. The fact remains that Security National was not Petitioner's client either at the time of the alleged malfeasance, or when the actual claim became ripe, assuming that it followed the assignment, i.e., once a judgment was entered adverse to NAMC. (It is difficult to believe that Security National failed to recognize that it was going to have a problem pursuing a collection action on the Note, given that summary judgment that had already been entered in the foreclosure action.)

involving attorney malpractice, the dismissal or settlement of a related case, or the failure to take an appeal of the underlying lawsuit, will automatically translate into an inability to establish redressable harm." *Lenahan*, 705 So. 2d 611, citing to *Peat Marwick, Mitchell and Company v. Lane*, 565 So.2d 1323 (Fla. 1990).

Security National argues that it has standing to sue even in the absence of an assignment simply because it owned the loan at the time that the appeal was completed, and the cause of action arguably accrued. However, as was noted above, it does not therefore logically follow that Security National is the only entity which could demonstrate that it had been damaged as a result of the attorney's negligence. To the contrary, as was noted above, Petitioner believes that a cause of action existed prior to the prosecution of the appeal for impairment of the collateral on the Note. In addition, however, in advancing its argument, Security National blurs the critical distinction between the occurrence of the negligence which gave rise to a claim against Petitioner and the actual accrual of a potential cause of action.

In a legal malpractice action, it is generally true that a cause of action may not formally accrue -- and thus the statue of limitation does not begin to run -- until the termination of the underlying litigation. *Peat Marwick Mitchell and Company v. Lane, supra;; Silverstone v. Adell, 721 So.2d at 1173 (Fla. 1998)*; *See, also Fremont Indemnity Company v. Carey, Dwyer, Eckhart et al.*, 796 So.2d 504, 507

(Fla. 2001) (Chief Justice Wells's dissenting opinion). Nevertheless, Florida law does not suggest that a client must necessarily pursue an appeal where it is clear that the client has been damaged as a result of an attorney's misconduct. [2] Thus -- and again assuming that the right to pursue the foreclosure followed the assignment of the note and mortgage as a matter of law -- NAMC could certainly have filed an immediate action against Stern for the impairment of its collateral upon the entry of the adverse judgment in the underlying claim, before Security National ever became a party to these proceedings.

While the record may not contain adequate evidence as to the evolution of the underlying transactions, this does not (as Security National suggests), therefore make it reasonable for this Court to simply infer that the Note and Mortgage were sold to successive purchasers without any discount off of the original $108,000 value.[3] (Answer Brief at 20). This is because a note is generally valid and

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[2] In some cases, a cause of action for legal malpractice does not *accrue* until the conclusion of the appellate process. In other cases, the legal malpractice claim may accrue at the time of the *negligence occurs*. The distinction depends upon whether or not the client's damages are contingent upon the final outcome of the underlying litigation. See *Fremont Indemnity, supra.*

[3] It goes without saying that it is highly unlikely that NAMC in particular would have been able to sell the note and mortgage at face value once the trial court had dismissed the foreclosure action. It is equally reasonable -- if not more reasonable -- to conclude that Security National would not have paid "face value" given record evidence of the adverse judgment and the increased risk of recovery on the Note.

enforceable even absent a right of foreclosure because the mortgagee can theoretically pursue other assets that may belong to the borrower. However, where the mortgagee loses its right to foreclose on the mortgage as a result of its attorney's negligence, the mortgagee certainly has an immediate right of action against that attorney for any impairment of its collateral.[4] This result should not change simply because Security National chose to continue pursuing the appeal of the dismissal of the foreclosure action.

The Fourth District's decision in *Coble v. Aronson*, 647 So.2d 968 (Fla. 4th DCA1994), supports this conclusion. In *Coble,* the court explained that the client's legal malpractice action accrued even though the client had settled the underlying case, where the existence of redressable harm did not depend upon the outcome of the litigation. *Id*. at 970-71; See also, *Segall*, supra (noting that a party is not required to pursue final appellate determination where a claim has been lost as a result of the negligence of the litigation attorney).

[4] When Stern negligently dismissed the timely filed 1997 foreclosure action, leaving only the untimely action intact, the Borrower was bankrupt, a fact noted by Respondent in its Answer Brief. (Answer Brief at 25, fn.9). Again, therefore, it is entirely reasonable for the Court to infer that Note and Mortgage were ultimately sold to Security National at a considerable discount, given the impairment of that collateral. Nevertheless, the record does not contain adequate information on this issue, beyond the obvious implication to be derived from the adverse summary judgment.

As with any other negligence action, a plaintiff in a legal malpractice action must prove that the attorney's negligence was the legal cause of the client's loss. *See DWL, Inc. v. Foster*, 396 So. 2d 726 (Fla. 5th DCA 1991) (intervening cause). Here, the fact remains that Security National was not Stern's client either at the time of Stern's alleged negligence, or at the time that it was determined that the foreclosure action was time barred. See *Weiss*, supra. Thus, Security National has no standing to pursue a claim at this juncture, where both the negligence and the actual damage had been realized on the record prior to its purchase of the Note and Mortgage. Accordingly, Security National should not be permitted to sue Stern as a result of some form of "disappointed economic expectation," which was both unreasonable and unprecedented under Florida law.

FLORIDA LAW AND PUBLIC POLICY DO NOT SUPPORT THE FOURTH DISTRICT'S OPINION BELOW

Security National argues that the Fourth District properly expanded this Court's decision in *Kaplan* because Florida no longer aligns itself with the majority of jurisdictions that generally prohibit the assignment of a legal malpractice claim. (Answer Brief at 13). This is simply incorrect. This Court's decisions in *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557 (Fla. 1997); *KPMG Peat Marwick v. National Union Fire Ins. Co. of Pittsburgh, Pa*., 765 So. 2d 36 (Fla. 2000), continue to represent the law in this State. Security National's assertions to the contrary must therefore be rejected. (Answer Brief at 22).

Security National cites to *Shuster v. Blue Cross Blue Shield of Florida, Inc.*, 843 So. 2d 909, 912 (Fla. 4th DCA 2003), *Foster v. Foster*, 703 So. 2d 1107, 1109 (Fla. 2d DCA 1997) and *Laing v. Gainey Buiders, Inc.*, 184 So. 2d 897, 900 (Fla. 1s DCA 1966), in support of its argument that its purchase of the Note and Mortgage put it in the position of the previous mortgagees, and sanction its pursuit of this legal malpractice claim against Stern. (Answer Brief at 23-25). However, these cases are not instructive, and have no application to the unique issue presented in this appeal. These cases discuss only the general rights vested in the assignee of a mortgage, and do not contemplate the automatic assignment of a legal malpractice claim in conjunction with the transfer of a note and mortgage.

Security National also cites to *Lawyers Title Ins. Co., Inc. v. Novastar Mortgage.*, Inc., 862 So. 2d 793, 798 (Fla. 4th DCA 2003) and *Rose v. Teitler*, 736 So. 2d 122 (Fla. 4th DCA 1999), for the proposition that the assignee of a note and mortgage gains all of the interests and rights of the assignor, including any potential claims held by the assignor at the time of the assignment. (Answer Brief at 23-24). These cases only support the proposition that "an assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned." *See Lawyers Title Ins. Co, Inc.*, supra (emphasis added). Accordingly, the only interests and rights that Security National received, by assignment, were those interests and rights that the previous mortgagee had in that Note and

Mortgage -- namely, the right to enforce the note against the borrower. Here the right to recover on the mortgage as a result of the mortgagor's failure to tender a timely balloon payment had already been foreclosed by the time of the assignment.

What Security National's argument ignores -- and the Fourth District has completely failed to recognize -- is that EMC's right to bring the malpractice action against Stern did not arise from EMC's ownership of the Note and Mortgage. Simply put, EMC's right to sue Stern for legal malpractice was not a right "in" that Note and Mortgage. Rather, EMC's right to sue Stern for legal malpractice arose from Stern's breach of a duty to EMC during course of their attorney-client relationship. This was a right that was personal to EMC and, therefore, could only be asserted by EMC. See *Weiss v. Leatherberry*, supra. (injury resulting from an attorney's negligence in the representation of a client is *personal* to the client; thus, a cause of action arising from the breach of the lawyer's duty to the client can only be asserted by that client). Thus, Security National did not acquire EMC's right to bring a legal malpractice claim against Stern when it purchased the subject Note and Mortgage.

Security National's reliance on *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A. 2d 1057 (R.I. 1999), *Hedlund Manufacturing Company, Inc. v. Weiser, Stapler & Spivak*, 357 (Pa. 1988) and *Richter v. Analex Corp.*, 940 F.Supp.

353 (D.D.C.1996), is entirely misplaced.[5] Although these cases may involve similar factual circumstances, they are completely uninstructive because they do not follow the law which has been adopted in Florida.

Florida continues to follow the rule adopted by the majority of jurisdictions, i.e., that legal malpractice actions are generally not assignable. *See Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755, 759 n. 3 (Fla.2005) (counting eighteen states adhering to the majority view). In fact, this Court specifically noted in *Cowan* that it was not retreating from its prior decisions. Instead, the Court created a limited exception to the general rule of non-assignability, given the special duty owed by the securities lawyers in that case, i.e., to provide accurate information to potential third party investors. *See Cowan,* supra. Given that circumstance, the Court reasoned that the attorney's representation did not involve "personal services," and in fact contemplated reliance by those third parties, given the preparation of corporate documents for publication to shareholders and the investing public. *See Cowan,* supra. The attorney's conduct in *Cowan* stands in stark contrast to the uniquely personal representation of a client in litigation.

Validation of Security National's claim would run afoul of the public policy considerations articulated in the seminal case of *Goodley v. Wank & Wank, Inc.*,

[5] *Cerebus, Hedlund,* and *Richter* emanate from states that follow the case-by-case approach when determining the assignability of a legal malpractice claim, which is only recognized by a minority of jurisdictions.

133 Cal. Rptr. 83 (Cal. 2d DCA 1976), which was adopted in *Forgione* and *KPMG*, namely, i.e., the commercialization of legal malpractice claims and the prospect of subjecting attorneys to negligence actions brought by third parties, to whom the attorney did not owe a duty at the time of the allegedly negligent acts or omissions. *See Cowan*, 902 So. 2d at 760 (citing to *Goodley, supra)*; *See also*, *Forgione supra; KPMG Peat Marwick.*

Security National argues that Stern's attorney-client relationship with EMC did not involve "personal services," since Stern represented EMC in litigation involving a commercial real estate transaction which was "unlikely to involve the sharing of privileged information…." For that reason, Security National concludes that the policy concerns underlying Florida's general prohibition against the assignment of a legal malpractice claim are not implicated here. (Answer Brief at 27). This conclusion is simply not reasonable, and is wholly unsupported by any kind of meaningful case citation. Nor can mortgage foreclosure litigation be readily compared to the preparation of limited partnership statements for dissemination to prospective investors.[6]

[6] It is simply not realistic to presume that Stern's attorney-client relationship with EMC did not involve "personal services." Respondent provides no explanation for its determination that it was 'unlikely' that EMC shared confidential information with Stern during the course of its attorney-client relationship. Petitioner would submit that litigation on behalf of a client is uniquely personal. The Court should protect the sanctity of the attorney-client relationship if there is even a slight possibility that confidential communications may be implicated.

One must necessarily pose the following query, at this juncture. Suppose EMC had determined to file suit against Stern after the dismissal of the timely foreclosure action, had it been advised that it would no longer be able to pursue an action on the mortgage. Could it have not pursued that claim against Stern? The answer is obvious; a claim could have been pursued, and EMC would have had the right to seek damages for the impairment of its ability to collect on the outstanding Note. Conversely, if one accepts Respondent's suggestion that the right to pursue a claim followed the Note and Mortgage, than NAMC could have pursued that right immediately upon the entry of the adverse final judgment, assuming that it was not otherwise on notice of the impairment of its ability to pursue the borrower on the Note prior to the time that it purchased the Note and Mortgage. In either event, those claims could have been pursued before the Note and Mortgage were ultimately assigned to Security National. It therefore does not logically follow that only Security National can pursue this claim.

There are fundamental flaws to Security National's public policy position - positions which have also been adopted in some of the minority jurisdictions which have affirmed the broad assignability of potential claims for legal malpractice. The problem stems from the failure to distinguish between the occurrence of malpractice and the accrual of a potential claim, which merely determines when a client must prosecute a lawsuit, assuming that the client has been damaged. In this

instance, the fact remains that EMC -- Stern's client at that time of his negligence -- in all likelihood suffered no harm as a result of that negligence, since EMC assigned the Note and Mortgage prior to the time that trial court determined that the untimely foreclosure action could not be pursued. Conversely, and assuming for the sake of argument that EMC could have demonstrated that it sold the Note and Mortgage at a discount, e.g., because it was advised by some other attorney that the foreclosure would ultimately have been unsuccessful due to the dismissal of the timely action, EMC's claim would have vested immediately. Under either scenario, EMC either did not have a claim, because it had no damage, or it had the right to bring an immediate claim, assuming that it was determined by some other means that its collateral had been impaired.

Conversely, if the cause of action necessarily followed the Note and Mortgage, NAMC could have immediately pursued a claim for malpractice once the mortgage foreclosure action was dismissed. Based upon the authorities cited earlier in this brief, the right to pursue that action, would not have required NAMC to prosecute an appeal. Thus, Security National is essentially arguing that it purchased a "right" to pursue a claim for malpractice in conjunction with the assignment of the Note and Mortgage, where the party whom Stern was representing at the time of the dismissal of the timely foreclosure action, EMC, probably did not sustain any damage, and the party who was arguably damaged at

the time that the cause of action accrued, NAMC, chose not to pursue a claim. The public policy implications cannot be overstated.

CONCLUSION

Security National suggests that *Cowan* must be read expansively, as a signal that Florida should now follow the case-by-case approach, in determining whether or not to permit a legal malpractice claim arising by assignment. (Answer Brief at 23). This argument completely disregards this Court's concerted effort to craft an opinion in *Cowan* which would ensure the limited application of that decision, negating the Court's attempt to fashion a workable framework for determining whether the *Cowan* exception may be applicable to other claims.

Petitioner respectfully submits that this Court should recognize that the Fourth District's decision in this matter has unduly expanded *Cowan*, opening the door for a virtual panoply of claims for legal malpractice by assignment – a result which Petitioner does not believe was ever intended by this Court's decision in *Cowan*. The Court should issue an opinion confirming the limited scope of its decision in *Cowan*, and affirm the summary judgment that was entered by the trial court.

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 _____ day of August, 2006.

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