IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BEAVOR, AN INDIVIDUAL, Appellant, vs. JOSHUA L. TOMSHECK, AN INDIVIDUAL, Respondent.	Supreme Court Case No. 81964 District Court No. A-19-793405-C

APPELLANT'S APPENDIX – VOLUME I OF III

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Attorney for Appellant Christopher Beavor

CHRONOLOGICAL TABLE OF CONTENTS TO APPELLANT'S APPENDIX

ALPHABETICAL TABLE OF CONTENTS TO APPELLANT'S APPENDIX

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Attorneys for Plaintiff

CASE NO: A-19-793405-C
Department 8

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual; Plaintiff, vs. JOSHUA TOMSHECK, an individual; DOES I-X; ROE ENTITIES, I-X; Defendants.	Case No.: Dept. No.: **(Exempt from Arbitration: Damages in Excess of $50,00)**

COMPLAINT

Plaintiff Christopher Beavor ("Beavor"), by and through his counsel, hereby complains and alleges against defendant Joshua Tomsheck ("Tomsheck") as follows:

I.

THE PARTIES, JURISDICTION AND VENUE

1. At all material times herein, Defendant Tomsheck was and remains an individual

residing in the County of Clark in the State of Nevada doing business as a local attorney.

2. At all material times herein, Plaintiff Beavor was and remains an individual residing in the County of Clark in the State of Nevada.

3. Plaintiff does not know the true names of the individuals, corporations, partnerships and entities sued and identified in fictitious names as DOES I through X and ROE CORPORATIONS I through X, inclusive. Plaintiff allege that such Defendants are responsible for damages suffered by Plaintiff as more fully discussed under the claims set forth below. Plaintiff will request leave of this Honorable Court to amend this Complaint to show the true names and capacities of each such fictitious Defendants at such time Plaintiff discovers such information.

4. Jurisdiction and venue of this Court is proper because the injuries, events, harm and damages incurred occurred in Clark County, Nevada and Tomsheck resides in Clark County, Nevada.

II.

PERTINENT FACTS AND ALLEGATIONS

5. On July 21, 2011, Yacov Hefetz ("Hefetz") commenced an action against Beavor by filing a complaint with a single claim for breach of guaranty.

6. Hefetz's claim was tried to a jury from February 25, 2013 through March 1, 2013.

7. Ultimately, Hefetz's breach of guaranty claim was submitted to the jury and the jury returned a verdict in favor of Beavor.

8. On May 21, 2013, the District Court entered a judgment on the jury verdict.

9. On June 10, 2013, Hefetz filed a Motion for New Trial (the "New Trial Motion").

10. The New Trial Motion was based on two grounds: (1) *Lioce* challenges based on alleged remarks concerning Hefetz; and (2) that the jury misunderstood the issues in Bankruptcy Court and therefore ignored the Jury Instructions.

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11. On or about June 19, 2013, Beavor retained Tomsheck for the purposes of defending him as his attorney in the Hefetz claim (the "Agreement").

12. On June 20, 2013, Tomsheck filed an opposition to the New Trial Motion (the "Opposition"). In the Opposition, Tomsheck failed to substantively oppose the request for a new trial. Tomsheck did not respond to either of the two substantive arguments, that reasonably appeared to have merit, presented by Hefetz in the New Trial Motion.

13. Instead, Tomsheck's Opposition solely argued that Hefetz failed to timely file the New Trial Motion.

14. In his Reply, Hefetz clearly explained why his New Trial Motion was timely and sought to have his New Trial Motion granted pursuant to EDCR 2.20 because Tomsheck failed to file a substantive opposition to the New Trial Motion.

15. On August 7, 2013, the District Court heard arguments on the New Trial Motion.

16. During argument on the New Trial Motion, the trial court stated that it would not have granted the New Trial Motion if Tomsheck had filed a substantive written opposition on the merits of the New Trial Motion.

17. The Court noted that Tomsheck only filed an opposition regarding the timeliness of the New Trial Motion and that Tomsheck was incorrect regarding his calculation of timeliness. Without Tomsheck having filed any substantive opposition to the New Trial Motion, the Court granted the New Trial Motion as unopposed, as permitted by the Judge's discretion and local rules of practice (commonly known and enforced).

18. Tomsheck then compounded his error by filing a Petition for Writ of Mandamus (the "Petition") on or about May 13, 2014, rather than taking a direct appeal from the Court's order on the New Trial Motion.

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19. On or about September 16, 2014, the Nevada Supreme Court entered an order denying Tomsheck' s Petition, noting that writ relief was unavailable because a direct appeal was the proper course of action to challenge the trial court's ruling on the New Trial Motion.

20. However, by that time the Petition was filed more than thirty days after entry of the District Court order granting the New Trial Motion, the Petition could not be converted into an appeal.

21. Additionally, Tomsheck made no attempt to convert the Petition into an appeal or to concurrently file an appeal contesting the Court's order granting the New Trial Motion .

22. As a result of Tomsheck' s errors, the judgment on the jury verdict in Beavor's favor was vacated and Hefetz's action against Beavor continued.

23. Tomsheck withdrew as counsel for Beavor on November 5, 2014.

24. On January 21, 2015, Gordon Silver filed a Notice of Appearance on behalf of Beavor, which representation was later continued by Dickinson Wright..

25. Over the following several years, Beavor incurred legal fees in defending against Hefetz's breach of guaranty claim.

26. In the meantime, on or about September 16, 2015, Tomsheck was expressly placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the parties further agreed to toll the statute of limitations for the claims of malpractice until the expiration of 180 days following an appeal or final resolution.

27. Hefetz's claim against Beavor was recently resolved on or about March 13, 2019 with the filing of a stipulation to dismiss with prejudice being filed.

28. Beavor now brings these claims against Tomsheck, which is timely per the written agreement of Beavor and Tomsheck to toll the applicable statute of limitations.

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III.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Professional Negligence)

29. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

30. Beavor and Tonsheck entered into an attorney-client relationship.

31. As part of that relationship, Tomsheck owed a duty to Beavor to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake.

32. Tomsheck breached his duty to Beavor, at least in part, by failing to substantively oppose the New Trial Motion, but instead relying solely on a clearly erroneous procedural argument, by failing to file a direct appeal of the Court's order on the New Trial Motion, by instead filing the Petition, by filing the Petition outside the thirty day appeal window such that it could not be converted to an appeal, and/or by failing to even attempt to convert the Petition into an appeal.

33. The District Court has expressly stated that, but for Tomsheck' s failure to substantively oppose the New Trial Motion, the New Trial Motion would have been denied.

34. Rather, despite a jury finding in favor of Beavor initially and the dismissal of the action being achieved, Beavor was compelled to defend the action for several years, which was eventually resolved in March 2019.

35. The legal fees, efforts, costs and other damages would not have been incurred but for the actions of Tomsheck.

36. As a result of Tomsheck' s breach of his duty to Beavor, Beavor has had to incur additional legal fees and damages in excess of $50,000 in defending against Hefetz's claim.

37. It has been necessary for Beavor to retain counsel, and Beavor is entitled to an award of attorney's fees and costs incurred in the litigation of this claim.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

38. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

39. Beavor's attorney, Tomsheck, attorney, owed a continuing fiduciary duty and duty of loyalty to him.

40. A fiduciary relationship exists when one has a right to expect trust and confidence in the integrity and fidelity of another.

41. Attorneys owe a fiduciary duty to their clients and a duty of loyalty

42. As Beavor's attorney, Tomsheck breached these duties as described herein.

43. That these breaches of duties caused Beavor significant damages in excess of $50,000.

WHEREFORE, Beavor prays for relief as follows:

1. For an award against Tomsheck, in favor of Beavor, in an amount in excess of $50,000.00;

2. For pre-judgment interest at the applicable legal rate;

3. For an award to Beavor of his costs;

4. For an award to Beavor of his reasonable attorneys' fees; and

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5. For such other and further relief that the Court deems just and proper.

Dated this 23rd day of April 2019.

THE BARNABI LAW FIRM, PLLC

By: /s/ CJ Barnabi
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Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual; Plaintiff, vs. JOSHUA TOMSHECK, an individual; DOES I-X; ROE ENTITIES, I-X; Defendants.	Case No.: A-19-793405-C Dept. No.: VIII

ACCEPTANCE OF SERVICE

I, Max Corrick, Esq. of Olson Cannon Gormley Angulo & Stoberski, Counsel for Defendant Joshua Tomsheck, hereby accept service of Summons and Complaint on behalf of the

///

///

Defendant.

Dated this 25 day of April 2019.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

By: _____

Max Corrick, Esq.
Nevada Bar No. 6609
9950 West Cheyenne Avenue
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Attorneys for Defendant, Joshua Tomsheck

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ANS
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Attorneys for JOSHUA TOMSHECK

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual, Plaintiff, v. JOSHUA TOMSHECK, an individual; DOES I-X, inclusive, Defendants.	CASE NO. A-19-793405-C DEPT. NO. VIII **JOSHUA TOMSHECK'S ANSWER AND THIRD-PARTY COMPLAINT**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

COMES NOW Defendant JOSHUA TOMSHECK, (hereinafter referred to as "Defendant"), by and through their attorneys of record, OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and hereby answer Plaintiff's Complaint and admits, denies and alleges as follows:

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI
Law Offices of
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

Law Offices of
OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
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(702) 384-4012 Telecopier (702) 383-0701

I.

THE PARTIES, JURISDICTION AND VENUE

1. Answering Paragraph 1, this answering Defendant admits the allegations contained therein.

2. Answering Paragraphs 2, 3, and 4, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

II.

PERTINENT FACTS AND ALLEGATIONS

3. Answering Paragraphs 12, 13, 14, 26, and 28, this answering Defendant denies the allegations contained therein.

4. Answering Paragraphs 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 27, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

III.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Professional Negligence)

5. Answering Paragraph 29 of Plaintiff's Complaint, this answering Defendant repeats and realleges each and every answer in above as if fully set forth at length herein.

6. Answering Paragraphs 30, 31, 32, 34, 35, 36, and 37, this answering Defendant denies the allegations contained therein.

7. Answering Paragraph 33, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

8. Answering Paragraph 38 of Plaintiff's Complaint, this answering Defendant repeats and realleges each and every answer in above as if fully set forth at length herein.

9. Answering Paragraphs 40 and 41, this answering Defendant admits the allegations contained therein.

10. Answering Paragraphs 39, 42 and 43, this answering Defendant denies the allegations contained

therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against this answering Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred by application of the relevant statute of limitations.

THIRD AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not caused by any negligence or want of care on the part of this answering Defendant, but rather through the design, negligence or want of care, or failure of an unknown third person or persons over whom this answering Defendant had no control or responsibility in law or fact.

FOURTH AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not directly and proximately caused and/or contributed to by the negligence, carelessness or fault of other parties, and therefore this answering Defendant is entitled to contribution in proportion to the percentage of fault attributed to other parties.

FIFTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *in pari delicto*.

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SIXTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *laches*.

SEVENTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *unclean hands*.

EIGHTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any injuries, economic or otherwise, said injuries were proximately caused by his failure to mitigate his damages, if any, and/or take corrective action. Accordingly, any and all recovery is barred or should be limited to the extent or degree of Plaintiff's failure to mitigate his damages, if any.

NINTH AFFIRMATIVE DEFENSE

All services provided by this answering Defendant during the relevant times were provided within the standard of care for similar attorneys providing similar services in the community at the time and place the legal services were provided.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against this answering Defendant are barred because the Plaintiff's alleged damages were the result of the intervening, superseding conduct of others.

ELEVENTH AFFIRMATIVE DEFENSE

No attorney-client relationship existed between Plaintiff and this answering Defendant which obligated this answering Defendant to provide the services described in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

Each and all of Plaintiff's rights, claims, and obligations as set forth in the Complaint, has, or have, by conduct, agreement or otherwise been waived.

THIRTEENTH AFFIRMATIVE DEFENSE

The loss, injuries and damages which Plaintiff alleges, if any, were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of Plaintiff, which is greater

than the alleged negligence, carelessness or fault, if any, of this answering Defendant, and therefore Plaintiff's claims against this answering Defendant is barred.

FOURTEENTH AFFIRMATIVE DEFENSE

The loss, injuries and damages, if any, which Plaintiff alleges in the Complaint were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of Plaintiff, and therefore this answering Defendant are entitled to contribution in proportion to the percentage of negligence attributed to the Plaintiff.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claim is barred for failure to name an indispensable party as a defendant to this litigation.

SIXTEENTH AFFIRMATIVE DEFENSE

That pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of these Defendant's Answer. This answering Defendant reserves the right to amend his Answer to allege additional affirmative defenses if subsequent investigation warrants.

WHEREFORE, this answering Defendant prays as follows:

1. That Plaintiff take nothing by reason of the Complaint on file herein:

2. For reasonable attorney's fees;

3. For costs of suit incurred and to be incurred herein; and

4. For such other and further relief as to the Court may deem just and proper in the premises.

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DATED this _____ day of May, 2019.

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

_____
MAX E. CORRICK, II
Nevada Bar No. 6609
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for JOSHUA TOMSHECK

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THIRD-PARTY COMPLAINT

COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck"), by and through his attorneys of record, OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and for its Third-Party Complaint against MARC SAGGESE, ESQ., complains, alleges and states as follows:

1. Tomsheck was and is a resident of Clark County, Nevada for all relevant times stated herein.

2. MARC SAGGESE, ESQ. was and is a resident of Clark County, Nevada for all relevant times stated herein, and provided legal services to Plaintiff Christopher Beavor.

3. On or about April 23, 2019, Plaintiff Christopher Beavor filed his Complaint naming Tomsheck as a defendant. That Complaint alleges, *inter alia*, professional negligence and breach of fiduciary duty against Tomsheck.

4. Tomsheck has denied such allegations and alleged in his Answer pertinent Affirmative Defenses.

FIRST CAUSE OF ACTION

Contribution (against MARC SAGGESE, ESQ.)

5. Tomsheck repeats and realleges each and every allegation contained in Paragraphs 1 through 4, inclusive, as though fully set forth herein.

6. Tomsheck alleges that in the event he is found to be liable to Plaintiff or to any party for damages or payment is made to Plaintiff or to any other party as a result of the

incidents or occurrences described in the Complaint, then Tomsheck's liability or payment is based on the acts and/or omissions including, without limitation, the negligence and/or fault of MARC SAGGESE, ESQ., individually, and therefore Tomsheck is entitled to Contribution from MARC SAGGESE, ESQ. for his proportionate share of all such loss or damage pursuant to NRS 17.225.

7. Tomsheck has been forced to retain an attorney to bring this Third-Party Complaint, and therefore Tomsheck is entitled to recover his reasonable attorney's fees and costs for the necessity of instituting this action.

WHEREFORE, Tomsheck prays for relief as follows:

1. For Contribution from MARC SAGGESE, ESQ.;

2. For an award of reasonable attorneys fees and costs; and

3. For all other such relief as the Court deems just and proper.

DATED this 16 day of May, 2019.

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

MAX E. CORRICK, II
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Attorneys for JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2019, I sent via e-mail a true and correct copy of the above and foregoing **ANSWER AND THIRD-PARTY COMPLAINT** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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Las Vegas, NV 89119
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702-823-3400 fax
sjohnson@cohenjohnson.com

and

Charles ("CJ") E. Barnabi, Jr., Esq.
The Barnabi Law Firm, PLLC
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Attorneys for Plaintiff

Jane Hollingsworth
An Employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

JCCR
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Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

vs.

JOSHUA TOMSHECK, an individual; DOES I-X; ROE ENTITIES I-X,

Defendants.

JOSHUA TOMSHECK, an individual,

Third-Party Plaintiff,

vs.

MARC SAGGESE, ESQ., an individual,

Third-Party Defendant.

Case No.: A-19-793405-C
Dept. No.: 8

JOINT CASE CONFERENCE REPORT

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Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

DISPUTE RESOLUTION
CONFERENCE REQUIRED:

YES_____ NO__X

SETTLEMENT CONFERENCE
REQUESTED:

YES_____ NO__X____

I.

PROCEEDINGS PRIOR TO CASE CONFERENCE REPORT

A. DATE OF FILING OF COMPLAINT: April 23, 2019.

B. DATE OF FILING OF ANSWER BY EACH DEFENDANT: May 16, 2019. Defendant also asserted a Third-Party Complaint against Marc Saggese, Esq. and is in the process of serving the Summons and Third-Party Complaint.

C. DATE THAT EARLY CASE CONFERENCE WAS HELD AND WHO ATTENDED: July 23, 2019, H. Stan Johnson, Esq. appearing for Plaintiff and Max Corrick, Esq. appearing for Defendant.

II.

A BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND EACH CLAIM FOR RELIEF OR DEFENSE: [16.1(c)(2)(A)]

A. Description of the action: Plaintiff's Complaint alleges the following facts:

1. Plaintiff is an individual residing in Clark County, Nevada. Defendant is an individual residing in Clark County, Nevada and is doing business as an attorney at law.

2. On July 21, 2011, Yacov Hefetz ("Hefetz") commenced an action against Beavor by filing a complaint with a single claim for breach of guaranty.

3. Hefetz's claim was tried to a jury from February 25, 2013 through March 1, 2013.

4. Ultimately, Hefetz's breach of guaranty claim was submitted to the jury and the jury returned a verdict in favor of Beavor.

5. On May 21, 2013, the District Court entered a judgment on the jury verdict.

6. On June 10, 2013, Hefetz filed a Motion for New Trial (the "New Trial Motion")./

///

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7. The New Trial Motion was based on two grounds: (1) *Lioce* challenges based on alleged remarks concerning Hefetz; and (2) that the jury misunderstood the issues in Bankruptcy Court and therefore ignored the Jury Instructions.

8. On or about June 19, 2013, Beavor retained Tomsheck for the purposes of defending him as his attorney in the Hefetz claim (the "Agreement").

9. On June 20, 2013, Tomsheck filed an opposition to the New Trial Motion (the "Opposition"). In the Opposition, Tomsheck failed to substantively oppose the request for a new trial. Tomsheck did not respond to either of the two substantive arguments, that reasonably appeared to have merit, presented by Hefetz in the New Trial Motion.

10. Instead, Tomsheck's Opposition solely argued that Hefetz failed to timely file the New Trial Motion.

11. In his Reply, Hefetz clearly explained why his New Trial Motion was timely and sought to have his New Trial Motion granted pursuant to EDCR 2.20 because Tomsheck failed to file a substantive opposition to the New Trial Motion.

12. On August 7, 2013, the District Court heard arguments on the New Trial Motion.

13. During argument on the New Trial Motion, the trial court stated that it would not have granted the New Trial Motion if Tomsheck had filed a substantive written opposition on the merits of the New Trial Motion.

14. The Court noted that Tomsheck only filed an opposition regarding the timeliness of the New Trial Motion and that Tomsheck was incorrect regarding his calculation of timeliness. Without Tomsheck having filed any substantive opposition to the New Trial Motion, the Court granted the New Trial Motion as unopposed, as permitted by the Judge's discretion and local rules of practice (commonly known and enforced).

15. Tomsheck then compounded his error by filing a Petition for Writ of Mandamus (the "Petition") on or about May 13, 2014, rather than taking a direct appeal from the Court's order on the New Trial Motion.

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16. On or about September 16, 2014, the Nevada Supreme Court entered an order denying Tomsheck' s Petition, noting that writ relief was unavailable because a direct appeal was the proper course of action to challenge the trial court's ruling on the New Trial Motion.

17. However, by that time the Petition was filed more than thirty days after entry of the District Court order granting the New Trial Motion, the Petition could not be converted into an appeal.

18. Additionally, Tomsheck made no attempt to convert the Petition into an appeal or to concurrently file an appeal contesting the Court's order granting the New Trial Motion.

19. As a result of Tomsheck' s errors, the judgment on the jury verdict in Beavor's favor was vacated and Hefetz's action against Beavor continued.

20. Tomsheck withdrew as counsel for Beavor on November 5, 2014.

21. On January 21, 2015, Gordon Silver filed a Notice of Appearance on behalf of Beavor, which representation was later continued by Dickinson Wright.

22. Over the following several years, Beavor incurred legal fees in defending against Hefetz's breach of guaranty claim.

23. In the meantime, on or about September 16, 2015, Tomsheck was expressly placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the parties further agreed to toll the statute of limitations for the claims of malpractice until the expiration of 180 days following an appeal or final resolution.

24. Hefetz's claim against Beavor was recently resolved on or about March 13, 2019 with the filing of a stipulation to dismiss with prejudice being filed.

25. Beavor now brings these claims against Tomsheck, which is timely per the written agreement of Beavor and Tomsheck to toll the applicable statute of limitations.

B. Claims for relief: First Claim for Relief: Professional Negligence; Second Claim for Relief: Breach of Fiduciary Duty / Breach of Duty of Loyalty.

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C. Defenses: Defendant's Answer alleges the following Affirmative Defenses:

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against this answering Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred by application of the relevant statute of limitations.

THIRD AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not caused by any negligence or want of care on the part of this answering Defendant, but rather through the design, negligence or want of care, or failure of an unknown third person or persons over whom this answering Defendant had no control or responsibility in law or fact.

FOURTH AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not directly and proximately caused and/or contributed to by the negligence, carelessness or fault of other parties, and therefore this answering Defendant is entitled to contribution in proportion to the percentage of fault attributed to other parties.

FIFTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *in pari delicto.*

SIXTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *laches.*

SEVENTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *unclean hands.*

EIGHTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any injuries, economic or otherwise, said injuries were proximately caused by his failure to mitigate his damages, if any, and/or take corrective action. Accordingly,

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any and all recovery is barred or should be limited to the extent or degree of Plaintiff's failure to mitigate his damages, if any.

NINTH AFFIRMATIVE DEFENSE

All services provided by this answering Defendant during the relevant times were provided within the standard of care for similar attorneys providing similar services in the community at the time and place the legal services were provided.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against this answering Defendant are barred because the Plaintiff's alleged damages were the result of the intervening, superseding conduct of others.

ELEVENTH AFFIRMATIVE DEFENSE

No attorney-client relationship existed between Plaintiff and this answering Defendant which obligated this answering Defendant to provide the services described in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

Each and all of Plaintiff's rights, claims, and obligations as set forth in the Complaint, has, or have, by conduct, agreement or otherwise been waived.

THIRTEENTH AFFIRMATIVE DEFENSE

The loss, injuries and damages which Plaintiff alleges, if any, were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of Plaintiff, which is greater than the alleged negligence, carelessness or fault, if any, of this answering Defendant, and therefore Plaintiff's claims against this answering Defendant is barred.

FOURTEENTH AFFIRMATIVE DEFENSE

The loss, injuries and damages, if any, which Plaintiff alleges in the Complaint were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of Plaintiff, and therefore this answering Defendant are entitled to contribution in proportion to the percentage of negligence attributed to the Plaintiff.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claim is barred for failure to name an indispensable party as a defendant to this litigation.

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SIXTEENTH AFFIRMATIVE DEFENSE

That pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of these Defendant's Answer. This answering Defendant reserves the right to amend his Answer to allege additional affirmative defenses if subsequent investigation warrants.

III.

A BRIEF STATEMENT OF WHETHER THE PARTIES DID OR DID NOT CONSIDER SETTLEMENT AND WHETHER SETTLEMENT OF THE CASE MAY BE POSSIBLE: [16.1(c)(2)(B)]

Counsel for the parties briefly discussed settlement at the ECC. Settlement of the case may be possible.

IV.

LIST OF ALL DOCUMENTS, DATA COMPILATIONS, DAMAGES COMPUTATIONS, INSURANCE AGREEMENTS, TANGIBLE THINGS AND OTHER REQUIRED INFORMATION IN THE POSSESSION, CUSTODY OR CONTROL OF EACH PARTY WHICH WERE IDENTIFIED OR PROVIDED AT THE EARLY CASE CONFERENCE OR AS A RESULT THEREOF: [16.1(c)(2)(E), (G), (H)]

A. Plaintiff: Plaintiff served his NRCP 16.1 Initial List of Witnesses and Documents on August 14, 2019.

B. Defendant: Defendant served his NRCP Rule 16.1 Initial List of Witnesses and Documents on July 23, 2019.

V.

LIST OF PERSONS IDENTIFIED BY EACH PARTY AS LIKELY TO HAVE INFORMATION DISCOVERABLE UNDER RULE 26(b), INCLUDING IMPEACHMENT OR REBUTTAL WITNESSES, MEDICAL PROVIDERS AND EXPERTS : [16.1(a)(1)(A) and 16.1(c)(2)(D), (F), (I)]

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A. Plaintiff: Plaintiff listed the following persons in his NRCP 16.1 Initial List of Witnesses and Documents served on August 23, 2019: Christopher Beavor, Joshua Tomsheck, Esq., and Marc Saggese, Esq.

B. Defendant: Defendant listed the following persons in his NRC 16.1 Initial List of Witnesses and Documents served on July 23, 2019: Christopher Beavor, Joshua Tomsheck, Esq., and Marc Saggese, Esq.

VI.

DISCOVERY PLAN [16.1(b)(4)(C) and 16.1(c)(2)]

A. What changes, if any, should be made in the timing, form or requirements for disclosures under 16.1(a):

1. Plaintiff's view: None.

2. Defendant's view: None.

B. When disclosures under 16.1(a)(1) were made or will be made:

1. Plaintiff's disclosures: August 13, 2019.

2. Defendant's disclosures: July 23, 2019.

C. Subjects on which discovery may be needed:

1. Plaintiff's view: Plaintiff's Claims for Relief, Defendant's Affirmative Defenses, and Claims for Relief and Affirmative Defenses related to the Third-Party Complaint.

2. Defendant's view: Plaintiff's Claims for Relief, Defendant's Affirmative Defenses, and Claims for Relief and Affirmative Defenses related to the Third-Party Complaint.

D. A statement identifying any issues about preserving discoverable information [16.1(c)(2)(J)]:

1. Plaintiff's view: None at this time.

2. Defendant's view: None at this time.

E. Should discovery be conducted in phases or limited to or focused upon particular issues?

1. Plaintiff's view: No.

2. Defendant's view: No.

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F. What changes, if any, should be made in limitations on discovery imposed under these rules and what, if any, other limitations should be imposed?

1. Plaintiff's view: None at this time.

2. Defendant's view: None at this time.

G. A statement identifying any issues about trade secrets or other confidential information, and whether the parties have agreed upon a confidentiality order or whether a Rule 26(c) motion for protective order will be made [16.1(c)(2)(K)]:

1. Plaintiff's view: Not applicable at this time.

2. Defendant's view: Not applicable at this time.

H. What, if any, other orders should be entered by court under Rule 26(c) or Rule 16(b) and (c):

1. Plaintiff's view: None at this time.

2. Defendant's view: None at this time.

I. Estimated time for trial:

1. Plaintiff's view: 5 days.

2. Defendant's view: 5 days.

VII.

DISCOVERY AND MOTION DATES [16.1(c)(2)(L)-(O)]

A. Dates agreed by the parties:

1. Close of discovery: April 13, 2020.

2. Final date to file motions to amend pleadings or add parties (without a further court order): January 13, 2020.

3. Final dates for expert disclosures:

i. initial disclosure: January 13, 2020.

ii. rebuttal disclosures: February 13, 2020.

4. Final date to file dispositive motions: May 11, 2020.

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VIII.

JURY DEMAND [16.1(c)(2)(Q)]

A jury demand has been filed: Yes, by Defendant.

IX.

INITIAL DISCLOSURES/OBJECTIONS [16.1(a)(1)]

If a party objects during the Early Case Conference that initial disclosures are not appropriate in the circumstances of this case, those objections must be stated herein. The Court shall determine what disclosures, if any, are to be made and shall set the time for such disclosure.

This report is signed in accordance with rule 26(g)(1) of the Nevada Rules of Civil Procedure. Each signature constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosures made by the signer are complete and correct as of this time.

Dated this 19th day of August, 2019.

COHEN JOHNSON PARKER EDWARDS

By: _____

H. STAN JOHNSON, ESQ.
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sjohnson@cohenjohnson.com
375 East Warm Springs Road, Suite104
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THE BARNABI LAW FIRM, PLLC
CHARLES ("CJ") E. BARNABI JR., ESQ.
Nevada Bar No. 14477
375 East Warm Springs Road, Suite104
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Attorneys for Christopher Beavor

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Dated this 14 day of August, 2019.

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

By: _____

MAX E. CORRICK, II, ESQ.
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mcorrick@ocgas.com
9950 West Cheyenne Avenue
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Telephone: (702) 384-4012
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Attorneys for Joshua Tomsheck

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and complete copy of the foregoing **JOINT CASE CONFERENCE REPORT** to be filed and served upon all persons registered to receive same via the Court's Odyssey E-file and E- Serve System, as follows:

Christopher Beavor - Plaintiff

Charles ("CJ") E. Barnabi Jr.	cj@barnabilaw.com
Sarah Gondek	sgondek@cohenjohnson.com
H S Johnson	calendar@cohenjohnson.com
H Stan Johnson	sjohnson@cohenjohnson.com
Michael B. Morrison	mbm@cohenjohnson.com

Joshua Tomsheck - Defendant

Julie Brown	jbrown@ocgas.com
Max E. Corrick	mcorrick@ocgas.com
Jane Hollingsworth	jhollingsworth@ocgas.com

Dated this 19th day of August, 2018.

/s/ Michael B. Morrison
Michael B. Morrison
An employee of Cohen Johnson Parker Edwards

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DISTRICT COURT
CLARK COUNTY, NEVADA

Legal Malpractice	**COURT MINUTES**	**September 12, 2019**

A-19-793405-C Christopher Beavor, Plaintiff(s)
vs.
Joshua Tomsheck, Defendant(s)

September 12, 2019 9:00 AM Mandatory Rule 16 Conference

HEARD BY: Silva, Cristina D. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

PARTIES PRESENT:

Corrick, Max E	Attorney
Johnson, Harold Stanley	Attorney

JOURNAL ENTRIES

- This is the time set for the Mandatory Rule 16 Conference. Court addressed the requirements of Rule 16. Counsel anticipate the trial will take five (5) days; this is a legal malpractice case; no settlement conference has been requested.

Court noted that the Complaint was filed on November 9, 2018. Colloquy regarding the scope of the discovery. Mr. Johnson advised that this a fairly straight forward legal malpractice case; he anticipates depositions of the pertinent parties as well as experts to establish the various duties associated with malpractice, the written discovery will be minimal.

Mr. Corrick advised that he does not believe this is a straight forward legal malpractice case due to its long history; however, the discovery will be minimal. At the Rule 16.1 conference, counsel discussed the computation of damages and documentation supporting those damages. Part of the damages emanate from a settlement agreement in the underlying matter and Mr. Corrick believes that the Defendant is entitled to know what is in that settlement agreement; he is willing to enter into a Protective Order. Additionally, the Third-Party Defendant was recently served and his answer was due yesterday (September 11) but it has not been filed yet. Therefore, Mr. Corrick believes that the dates set out in the Joint Case Conference Report (JCCR) are appropriate.

The Court believes the dates in the JCCR are realistic and, therefore, will make no changes at this time. Upon Court's inquiry, Mr. Johnson advised that he believes counsel can work together regarding the Protective Order. COURT ORDERED, matter set for a status check. If the Protective Order is resolved prior to the status check date, it will be VACATED.

10/22/19 8:30 AM STATUS CHECK: PROTECTIVE ORDER

DISTRICT COURT
CLARK COUNTY, NEVADA

Legal Malpractice	**COURT MINUTES**	**October 10, 2019**

A-19-793405-C Christopher Beavor, Plaintiff(s)
vs.
Joshua Tomsheck, Defendant(s)

October 10, 2019 **Chambers** **Minute Order** **Minute Order Re: Dept. 28 Recusal**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

PARTIES
PRESENT: None

JOURNAL ENTRIES

- Judge Israel presided over the underlying case, Hefetz v. Beavor, A-11-645353-C and therefore it is appropriate in the instant Legal Malpractice case, to avoid the appearance of impropriety and implied bias, this Court hereby disqualifies itself and ORDERS, this case be REASSIGNED at random. Master Calendar to RESET any pending motions before the new Department and notify the parties of same.

CLERK'S NOTE: A copy of this minute order was e-served to counsel. Kt 10/10/19

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Attorneys for JOSHUA TOMSHECK

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual, Plaintiff, v. JOSHUA TOMSHECK, an individual; DOES I-X, inclusive, Defendants. --- JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	CASE NO. A-19-793405-C DEPT. NO. XXIV **JOSHUA TOMSHECK'S MOTION FOR SUMMARY JUDGMENT** ***HEARING DATE REQUESTED***

COMES NOW Defendant JOSHUA TOMSHECK, by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and hereby submits his Motion for Summary Judgment.

This Motion is made and based upon all the papers, pleadings and records on file herein, the attached Points and Authorities, and such oral argument, testimony and evidence which may

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be presented upon the hearing of this Motion.

DATED this 9th day of March, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Max E. Corrick, II
MAX E. CORRICK, II
Nevada Bar No. 6609
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Defendant
JOSHUA TOMSHECK

DECLARATION OF ATTORNEY MAX E. CORRICK, II

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

MAX E. CORRICK, II declares and states as follows:

1. That I am a Shareholder with the law firm of Olson Cannon Gormley & Stoberski, and am duly licensed to practice law before all of the Courts in the State of Nevada.

2. I am an attorney retained to represent the Defendant in this matter and have personal knowledge of the contents of this Declaration.

3. The documents attached as Exhibits A through K to Defendant's Motion for Summary Judgment are true and accurate copies of those documents.

MAX E. CORRICK, II

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POINTS AND AUTHORITIES

I.

SUMMARY OF THE ARGUMENT

This is a legal malpractice case. Mr. Tomsheck is entitled to summary judgment based upon two independent arguments. First, Plaintiff impermissibly assigned his legal malpractice claim to his adversary in the underlying litigation, Yacov Hefetz ("Hefetz"). In Nevada, legal malpractice claims are absolutely unassignable and subject to summary judgment if they are assigned. *See Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).[1] "As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment...[t]he decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982). In this case the evidence shows Hefetz – not Plaintiff – was assigned the Plaintiff's legal malpractice claim and Hefetz maintains complete control over this litigation. For example, Plaintiff is represented by Hefetz's attorney in the underlying matter, Hefetz stands to receive 100% of any proceeds recovered in this legal malpractice case, and Hefetz has agreed to pay any attorneys fees and costs incurred. These, among other powers held by Hefetz, are hallmarks of an assigned legal malpractice claim which violates public policy and requires summary judgment pursuant to clear Nevada precedent.[2]

Second, Plaintiff filed his assigned legal malpractice claim after the statute of limitation

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[1] The settlement agreement between Hefetz and the Plaintiff, which bears out this impermissible assignment, is subject to a protective order. *See* Exhibit A (filed under seal). Therefore, it is being submitted to the court for *in camera* review.

[2] As noted below, the assignment evidences significant position shifting by the Plaintiff and his counsel. It converts the Plaintiff's legal malpractice claim against Mr. Tomsheck to a commodity to be exploited, and is rife with the possibilities that could only debase the legal profession. It performs an end run around Nevada public policy and achieves indirectly what it could not achieve directly. *See Schwende v. Sheriff, Washoe County*, 86 Nev. 143, 144, 466 P.2d 658, 659 (1970) (rejecting a litigant's attempt to indirectly obtain relief that he could not obtain directly); *Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261, 265 (Wash. Ct. App. 2013) (disallowing an assigned legal malpractice claim and stating "[w]e cannot allow th[e] rule to be obfuscated by clever lawyers and legal subtleties.").

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ran. In particular, Plaintiff failed to file this lawsuit (for Hefetz's benefit) after the specific time frame required by NRS 11.207 and the written agreement Plaintiff and Mr. Tomsheck negotiated at arms-length. The evidence shows Plaintiff entered into a binding contract by which he and Mr. Tomsheck agreed that the statute of limitation applicable to Plaintiff's prospective legal malpractice claim against Mr. Tomsheck was to be stayed until two years after the resolution of Supreme Court Appeal No. 68438 (c/w 68843). By the terms of their written agreement, that date ran on May 10, 2018. However, Plaintiff delayed filing his legal malpractice action against Mr. Tomsheck until April 23, 2019. This action is therefore untimely and subject to summary judgment.

II.

STANDARD OF REVIEW

NRCP 56, *Summary Judgment*, states in pertinent part:

> (b) *For defending party*. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Nevada Rules of Civil Procedure, Rule 56. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions and affidavits on file, show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Villescas v. CNA Ins. Cos.*, 109 Nev. 1075, 864 P.2d 288 (1993). In determining whether summary judgment is proper, the non-moving party is entitled to have the evidence and all reasonable inferences accepted as true. *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989).

However, the non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983), *quoting Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Indeed, an opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must be able to point out to the court something indicating the existence of a triable issue of fact

and is required to set forth specific facts showing that there is a genuine issue for trial. *Hickman v. Meadow Wood Reno*, 96 Nev. 782, 617 P.2d 871 (1980); *and see Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965), *overruled on other grounds*, *Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1996) ("The word 'genuine' has moral overtones; it does not mean a fabricated issue.").

Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubt exists, the availability of summary proceedings promotes judicial economy and reduces litigation expenses associated with actions clearly lacking in merit. Therefore, it is readily understood why the party opposing summary judgment may not simply rest on the allegations of the pleadings. To the contrary, the non-moving party must, by competent evidence, produce specific facts that demonstrate the presence of a genuine issue for trial. *Elizabeth E. v. ADT Sec. Sys. W.*, 108 Nev. 889, 839 P.2d 1308 (1992).

As the Nevada Supreme Court announced in *Wood v. Safeway, Inc.*, 121 Nev 724, 121 P.3d 1026 (2005), the "slightest doubt" standard has been abrogated. Instead, the *Wood* Court adopted the standard enunciated by the United States Supreme Court in *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), stating:

> [w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor.

Wood, 121 Nev. at 731, 121 P.3d at 1030-1031, *citing Matsushita Electrical Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). Indeed, the substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Id.* at 731, 121 P.3d at 1031, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248.[3]

Subsequently, the Nevada Supreme Court in *Cuzze v. University And Community College System Of Nevada*, 172 P.3d 131 (Nev. 2007), explained the appropriate framework for assessing a summary judgment motion:

> "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a

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[3] A factual dispute is genuine only when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id.*

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showing is made, then the party opposing summary judgment assumes the burden of production to show the existence of a genuine issue of material fact."

Id. at 134. The *Cuzze* Court continued: "If the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out...that there is an absence of evidence to support the nonmoving party's case." *Id.*

III.

STATEMENT OF UNDISPUTED FACTS PURSUANT TO NRCP 56(c)

Pursuant to NRCP 56(c), the following facts may be taken as true and relevant to Mr. Tomsheck's Motion for Summary Judgment:

1. Plaintiff retained Mr. Tomsheck on or about June 19, 2013 to provide legal services related to a civil trial between Plaintiff and Hefetz in Case No. 645353. *See* Exhibit B, *Plaintiff's Complaint*, ¶ 11. Marc Saggese, Esq. was Plaintiff's trial counsel. Mr. Tomsheck was not hired until after the conclusion of the trial. He represented Plaintiff for the purpose of filing and responding to post-trial motions.

2. On August 7, 2013, the district court ruled that Mr. Tomsheck, in his representation of Plaintiff, failed to file a "substantive written opposition" to Hefetz's motion for new trial. *Id.* at ¶ 16.[4]

3. Mr. Tomsheck filed a motion for reconsideration on August 28, 2013. *See* Exhibit C, *Motion for Reconsideration.* That motion was denied on November 14, 2013 by the lower court. *See* Exhibit D, *Findings of Fact and Conclusions of Law*; *and see* Exhibit B, ¶ 17.

4. Thereafter, Mr. Tomsheck filed a Petition for Writ of Mandamus on May 13, 2014 – Nevada Supreme Court Case Number 65656. That Petition was denied on September 16, 2014. *Id.* at ¶ 19. The Nevada Supreme Court issued a Notice of Remittitur for that Petition on October 13, 2014. *See* Exhibit E, *Notice of Remittitur.* As a result, the underlying jury verdict in Plaintiff's favor was vacated. *See* Exhibit B, ¶ 22.

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[4] Mr. Tomsheck disputes this conclusion, however for the purposes of this motion this court can take the trial court's conclusion as correct.

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5. Mr. Tomsheck withdrew as counsel for Plaintiff on November 5, 2014. *Id.* at ¶ 23.

6. Nearly a year later, on September 16, 2015, Plaintiff alleges he placed Mr. Tomsheck on notice that he intended to pursue a legal malpractice claim against Mr. Tomsheck. This was memorialized in an attorney letter drafted by Plaintiff's then-counsel, Joel Schwarz, Esq. *Id.* at ¶ 26. Plaintiff alleged that by that time he had "incurred – and continues to incur – legal fees". *See* Exhibit F, *Letter dated September 16, 2015.* Accordingly, as of that date, Plaintiff was aware of material facts which would constitute a cause of action for legal malpractice by Mr. Tomsheck.[5]

7. On March 28, 2016, Plaintiff and Mr. Tomsheck, each represented by counsel, voluntarily chose to enter into a tolling agreement in place and stead of any statutory or common law tolling rule, such as the litigation malpractice tolling rule. *See* Exhibit G, *Tolling Agreement.* By its terms, the Effective Date of the tolling agreement was March 28, 2016. *Id.* The tolling agreement specified the parties agreed to only toll the running of any statute of limitations for purposes of bringing a legal malpractice claim against Mr. Tomsheck "during the pendency of the appellate matter styled *Yacov Hefetz v. Beavor (Supreme Court No. 68438 c/w 68843) ("Appeal").* *Id.*[6] In their tolling agreement, the parties explicitly defined the term "*Appeal*" as being Supreme Court Case No. 68438 c/w 68843.

8. The "Termination Date" of the tolling agreement was specified as being "at the end

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[5] The fact that Plaintiff had incurred at least some damages by that date is provided as mere context because Plaintiff later agreed to supersede the litigation malpractice tolling rule by virtue of the negotiated written tolling agreement.

[6] At the time the tolling agreement was entered Plaintiff's claims against Mr. Tomsheck were already tolled pursuant to the common law litigation malpractice tolling rule. *See Branch Banking & Tr. Co. v. Gerrard*, 134 Nev. Adv. Op. 106, 432 P.3d 736, 738-40 (2018) (noting that, generally, the litigation malpractice tolling rule applies to the two-year discovery rule and serves to toll a malpractice claim's statute of limitations until the underlying litigation is resolved and damages are certain). However, Plaintiff and Mr. Tomsheck thereafter chose to enter into a contract, the written tolling agreement, which necessarily superceded any common law tolling. Indeed, such is the only fair construction of the agreement which does not render its terms completely meaningless and superfluous. A basic rule of contract interpretation is that "[e]very word must be given effect if at all possible." *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1986). A court "should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978).

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of the 180th day after the Effective Date, or the final resolution of the *Appeal*, whichever occurs later." Therefore, once the later of those two events occurred, the statute of limitation for any legal malpractice claim Plaintiff may have held against Mr. Tomsheck would begin to run.

9. The final resolution of the *Appeal* occurred on May 10, 2016 when the Nevada Supreme Court issued a Remittitur in Nevada Supreme Court Case No. 68438 c/w 68843. *See* Exhibit H, *Notice of Remittitur*. This May 10, 2016 date was more than 180 days from the Effective Date. Therefore, the statute of limitation for Plaintiff's legal malpractice claim against Mr. Tomsheck began to run on May 10, 2016.

10. Pursuant to NRS 11.207 and their written agreement, Plaintiff had until May 10, 2018 in which to file a legal malpractice claim against Mr. Tomsheck.

11. Plaintiff filed his legal malpractice claim against Mr. Tomsheck on April 23, 2019, nearly one full year after the statute of limitation expired.

12. In the course of discovery in this case, Plaintiff disclosed that he and Yacov Hefetz entered into a settlement agreement on or about February 15, 2019. The terms of that settlement agreement identify an agreed upon sum Plaintiff – and Hefetz – determined would constitute Plaintiff's damages he would be able to seek in any legal malpractice action against Mr. Tomsheck.[7] In this respect, Plaintiff was obligated by Hefetz to prosecute a legal malpractice claim against Mr. Tomsheck for Hefetz's sole benefit and thereafter turn over any funds recovered in that lawsuit to Hefetz.

13. Pursuant to the terms of their settlement agreement, Hefetz retains exclusive control of the Plaintiff's litigation against Mr. Tomsheck. Plaintiff must use Hefetz's attorney, H. Stan Johnson, Esq., as his own attorney for this case despite the fact Mr. Johnson was opposing counsel in the underlying matter. Hefetz is responsible for all invoices for attorneys fees and costs incurred in this lawsuit. Hefetz agrees to indemnify Plaintiff for any such fees and costs. Hefetz is entitled to 100% of the proceeds from this lawsuit. Hefetz even requires Plaintiff to "represent[] and warrant[]

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[7] As noted above, the Hefetz settlement agreement (PLTF001-006) is being submitted under seal and provided to this court for *in camera* review rather than be attached as an exhibit to this filing.

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that he will fully pursue and cooperate in the prosecution" of a legal malpractice claim against Defendant for Hefetz's sole benefit. Hefetz requires that Plaintiff "do nothing intentional to limit or harm the value of any recovery related to" this legal malpractice claim. Further, Hefetz requires Plaintiff to "provide Hefetz, through his counsel, copies of any documents or correspondence that [Plaintiff] believes relate to" the legal malpractice claim against Mr. Tomsheck, and Hefetz requires Plaintiff to "fully cooperate with Hefetz and his counsel regarding any claims initiated on behalf of [Plaintiff]" for the legal malpractice claim.

14. Plaintiff did not disclose the impermissible assignment agreement until December 23, 2019 even though it serves as the basis for his alleged damages against Mr. Tomsheck.

15. No additional discovery is needed for this court to decide whether the settlement agreement between Plaintiff and Hefetz, or the tolling agreement between Plaintiff and Mr. Tomsheck, as a matter of law, compel summary judgment in Mr. Tomsheck's favor.

IV.

ARGUMENT

A. Plaintiff is prosecuting an impermissible, assigned legal malpractice claim which violates public policy and is subject to summary judgment

Nevada law prohibits the assignment of legal malpractice claims. *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 634, 377 P.3d 118, 122 (2016).[8] Nevada follows the overwhelming majority rule in this regard, especially when a legal malpractice claim has been assigned to an adversary in the underlying litigation. *See Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976)[9]; *Tate v. Goins, Underkoffer, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Kommavongsa v. Haskell*, 149 Wash.2d 288 (2003); *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F.Supp.2d (D.D.C. 2009); *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 744 S.E.2d 130 (2013); *Trinity Mortgage Companies, Inc. v. Dreyer*, 2011 WL 61680 (N.D. Okla. 2011); *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998);

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[8] A copy of the *Tower Homes* decision is attached hereto as Exhibit I.

[9] A copy of the *Goodley* decision is attached hereto as Exhibit J.

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Freeman v. Basso, 128 S.W.3d 138 (Mo. Ct. App. 2004); *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010); *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F.Supp. 252 (D.N.J. 1996); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *Schroeder v. Hudgins*, 142 Ariz. 395, 690 P.2d 114 (Ariz. Ct. App. 1984); *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); *Christison v. Jones*, 83 Ill.App.3d 334, 405 N.E.2d 8 (1980); *Delaware CWC Liquidation Corp. v. Martin*, 213 W.Va. 617, 584 S.E.2d 473 (2003); *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. App. 1993); *cf. Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005) (collecting cases as of that date and concluding a legal malpractice claim which is assigned to an adversary in the underlying matter is impermissible and subject to judgment as a matter of law).[10]

In fact, while assignment of proceeds from a *personal injury* case may be permissible under Nevada law, they are prohibited when those proceeds arise out of a legal malpractice claim. *Id.* at 635, 377 P.3d at 122-23. This is especially true where the hallmarks of control of the legal malpractice litigation, as well as who ultimately is entitled to the proceeds of that legal malpractice litigation, are held by someone other than the original client – Hefetz, who was not Mr. Tomsheck's client. In this case, Plaintiff impermissibly assigned his legal malpractice claim to his former adversary, Hefetz, which obligates this court to enter summary judgment against Plaintiff as

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[10] The *Gurski* decision, which examines many of the reasons against (and for) allowing the assignment of legal malpractice claims – before joining Nevada's majority position – is attached hereto as Exhibit K. Since *Gurski*, Utah has rejected the *Goodley* rationale and joined the small "pro-assignment" camp. *See Eagle Mountain City v. Parsons Kinghorn & Harris*, 408 P.3d 322 (Utah 2017). Nevada, however, has adopted *Goodley* and its progeny and therefore holds contrary to Utah. *See Tower Homes*, *supra.* Another stray case, *Mallios v. Baker*, 11 S.W.3d 157 (Tex. 2000), has noted that although Texas law does not permit the assignment of legal malpractice claims, under certain circumstances a partial assignment "[does] not vitiate the plaintiff's right to pursue his own malpractice claim." Once again, the overwhelming majority of jurisdictions – Nevada included – have reached a contrary conclusion: once you assign a legal malpractice claim you do not get to call it back and proceed as if the assignment never occurred. *See, e.g. Gurski, supra*; *and see Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition) (rejecting the dissent's suggestion that *Tower Homes* is unfair to the assignor of a legal malpractice claim by subjecting the entire cause of action to dismissal). So, to the extent Plaintiff may try to argue that even if this court could "blue-pencil" the settlement agreement to excise the impermissible assignment, Nevada law and public policy do not allow Plaintiff to salvage for himself what he has already assigned away, namely the ability to enforce a legal malpractice action. *See Chaffee*, *supra.*

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a matter of law.[11]

1. *Tower Homes* is controlling precedent which compels summary judgment in Mr. Tomsheck's favor

In *Tower Homes*, the Nevada Supreme Court was asked to determine whether the lower court has correctly granted summary judgment in favor of an attorney in a legal malpractice case on the basis that the plaintiff (a group of purchasers of condominiums which were never built) had been impermissibly assigned a legal malpractice claim against a developer debtor's (Tower Homes, LLC) attorney in Chapter 11 bankruptcy proceedings against the developer. Even though the bankruptcy court ordered (pursuant to a stipulation) that the plaintiff could proceed against the debtor's attorney – with all proceeds recovered to be for their benefit – the defendant attorney, Heaton, moved for summary judgment on the basis that the stipulation and order "constituted an impermissible assignment of a legal malpractice claim to the purchasers." *Id.* at 632, 377 P.3d at 121.

The district court granted the motion for summary judgment in favor of Heaton. The purchasers appealed and argued two points – the second of which is particularly relevant to this case. The first point argued was that the bankruptcy stipulation and order was not an impermissible assignment because "under federal law a Chapter 11 bankruptcy plan may permit [named] representatives to bring a legal malpractice claim on behalf of the estate without an assignment..." *Id.* at 633, 377 P.3d at 121. That is, they were arguing they were properly acting on behalf of the estate pursuant to Chapter 11.

The second argument the purchasers made was that "there was no assignment of the legal malpractice claim, only an assignment of proceeds." *Id.* Therefore, they claimed, this was not a true assignment of a legal malpractice claim at all; it merely involved the recovery of funds.

With respect to the purchasers' bankruptcy court-related argument, the Court quickly disposed of it by focusing upon the elements of control over the litigation. The Court stated, "the

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[11] A "settlement agreement is a contract [and] its construction and enforcement are governed by principles of contract law." *See May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005).

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bankruptcy court's order transferred control and proceeds of the claim to the purchasers. We therefore conclude that the purchasers are not pursuing a legal malpractice action on behalf of Tower Homes' estate as provided by [Chapter 11]." *Id.* at 634, 377 P.3d at 121.

Moving to the purchasers' second argument, the Court continued: "When the [Chapter 11] conditions are not satisfied, Nevada law prohibits the assignment of legal malpractice claims from a bankruptcy estate to creditors...To overcome these concerns, the purchasers contend that they were only assigned proceeds, not the entire malpractice claim against Heaton. In *Edward J. Achrem, Chartered v. Expressway Plaza, Ltd. Partnership*, this court determined that the assignment of personal injury claims was prohibited, but the assignment of personal injury claim proceeds was allowed. 112 Nev. 737, 741, 917 P.2d 447, 449 (1996). " *Id.* at 634-35, 377 P.3d at 122. The Court, however, rejected the purchasers' arguments on multiple grounds.

First, the Court noted "[w]e are not convinced that *Achrem*'s reasoning applies to legal malpractice claims...in *Achrem*, this court determined that the difference between an assignment of an entire case and an assignment of proceeds was the retention of *control*. *Id.* When only the proceeds are assigned, the original party maintains control over the case. *Id.* at 740-41, 917 P.2d at 448-49. When an entire claim is assigned, a new party gains control over the case. *Id.* Here, the bankruptcy court gave the purchasers the right to "pursue any and all claims on behalf of...[d]ebtor...which shall specifically include...pursuing the action currently filed in the Clark County District Court styled as *Tower Homes, LLC v[.] William H. Heaton, et al.*" No limit was placed on the purchasers' control of the case, and the purchasers were entitled to any recovery." *Tower Homes,* 132 Nev. at 635, 377 P.3d 122-23 (emphasis in original). Thus, in ascertaining whether there has been an impermissible assignment of a legal malpractice claim, the *Tower Homes* decision directs district courts to consider the named plaintiff, and terms of the agreement, as well as focus upon whether some third party is exercising a significant degree of control over the litigation. District courts are also directed to determine where any recovery from the legal malpractice litigation will ultimately go.[12]

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[12] This is noteworthy because the settlement agreement between Plaintiff and Hefetz explicitly says that Plaintiff "irrevocably assigns any recovery or proceeds to Hefetz." So, not

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Next, in striking down the impermissible assignment found in *Tower Homes*, the Court extensively quoted and adopted the longstanding approach taken by the California Court of Appeals in *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976), which detailed the policy considerations underlying the nonassignability of legal malpractice claims. The Court noted: "As the court in *Goodley* stated, '[i]t 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.' 133 Cal.Rptr. at 87. Allowing such assignments would 'embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.' *Id.*" *Tower Homes,* 132 Nev. at 635, 377 P.3d at 123.

Finally, in upholding the district court's decision to grant summary judgment to Heaton on the basis that an impermissible assignment of a legal malpractice claim had occurred, the *Tower Homes* Court concluded: "While the 2013 bankruptcy stipulation and order here do not explicitly use "assigned," such formalistic language is not required for a valid assignment... the 2013 bankruptcy stipulation and court order express the bankruptcy court's and the bankruptcy trustees present intention to allow the purchasers to control the legal malpractice case. As a result, we conclude that the district court properly determined that the legal malpractice claim was assigned to the purchasers." *Id.* at 636, 377 P.3d at 123. (Internal citation omitted).[13] Once again, the district

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only does the settlement agreement explicitly give Hefetz full control over the litigation, it explicitly assigns the proceeds of the lawsuit to Hefetz as well. Whether characterized as an explicit or *de facto* assignment, at bottom it remains an impermissible assignment.

[13] That is, the Court recognized *de facto* assignments of legal malpractice claims are as impermissible as explicit ones. Just as a point of interest, this conclusion was recently reemphasized by the Nevada Court of Appeals in *Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742 *2-6 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition). In citing to *Tower Homes*, *Goodley*, and several other jurisdictions which have held *de facto* assignments of legal malpractice claims as unenforceable as explicit ones, the *Oceania Insurance* Court – in the context of a unique fact pattern – highlighted the same general concerns found in the present case, *e.g.*: (1) counsel for the prior adversary is now representing his client's former adversary and confidentiality has been destroyed; (2) the potential for "abrupt and shameless" position shifting by the parties and their counsel "that would give prominence (and substance) to the

court must look at the end result, in addition to the verbiage used, in reaching its conclusion as to whether an impermissible assignment of a legal malpractice claim has occurred. Here, there is no doubt such impermissible assignment exists.

2. Hefetz's overwhelming degree of control over this lawsuit is undeniable proof Plaintiff has impermissibly assigned his legal malpractice claim to his former adversary in this case

Tower Homes focused upon the concerns of control over the litigation and who stood to profit in order to strike down an impermissible legal malpractice claim assignment. Those two guideposts loom large over the impermissible assignment here. Plaintiff's former adversary (Yacov Hefetz) has total, unfettered control over this litigation and Plaintiff must to prosecute the legal malpractice claim against Mr. Tomsheck, under Hefetz's control, and turn over any and all funds recovered to Hefetz. It is squarely an impermissible assignment.

Laid bare, the extent of Hefetz's control over this legal malpractice claim should be shocking to this court. Pursuant to the terms of their settlement agreement, Plaintiff has to use Hefetz's attorney, H. Stan Johnson, Esq., to represent him against Mr. Tomsheck here – even though Johnson represented Plaintiff's adversary (Hefetz) in the underlying lawsuit. In other words, Hefetz hand-selected Plaintiff's attorney for him, giving Plaintiff no choice in the matter, in order to help Hefetz exert control over this litigation.

Next, Hefetz requires Plaintiff to "represent[] and warrant[] that he will fully pursue and cooperate in the prosecution of" this legal malpractice claim. Hefetz requires that Plaintiff "will take any and all reasonable actions as reasonably requested by [Hefetz's] counsel to prosecute" this case. Even if Plaintiff wants to abandon the case, for whatever reason, Hefetz has forbidden him from doing so.

It does not end there. Hefetz compels Plaintiff to "do nothing intentional to limit or harm the value of any recovery related to" this legal malpractice case. Plaintiff must even share with

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perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession"; (3) the potential conversion of a legal malpractice claim into a commodity, thereby debasing the legal profession; and (4) the mere opportunity for potential collusion.

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Hefetz "copies of any documents or correspondence that [Plaintiff] believes relate to" this malpractice action – even if those communications might be privileged. To that end, Plaintiff must also "fully cooperate with Hefetz and his counsel regarding any claims initiated on behalf of [Plaintiff] for" this lawsuit.

And there is still more. Per the assignment, Plaintiff "irrevocably assigns any recovery or proceeds to Hefetz from" this lawsuit and "agrees to take any actions necessary to ensure that any recovery or damages are paid to Hefetz." In return, "Hefetz agrees to indemnify and hold harmless [Plaintiff] from any attorneys fees or costs that may be incurred in pursuing" this lawsuit "and any and all invoices shall be issued directly to Hefetz with Hefetz bearing sole responsibility for payment thereof." Finally, confirming his complete control of this litigation, Hefetz agrees that any fees or costs incurred in Plaintiff's lawsuit "are to be paid by Hefetz and are Hefetz's sole responsibility."

Simply put, Plaintiff commoditized and sold his legal malpractice claim to Hefetz, giving Hefetz all authority over the case while Plaintiff stands to gain (and lose) absolutely nothing by continuing to prosecute the claim as Hefetz's figurehead. It is difficult to conceive of a more obvious assignment of a legal malpractice claim – explicit or *de facto* – than the one before this court. It must be condemned and summary judgment should be granted in Mr. Tomsheck's favor.

3. The *Tower Homes/Goodley* factors strongly favor the conclusion that Plaintiff has impermissibly assigned his legal malpractice claim to his former adversary in this case

The degree of Hefetz's control over this legal malpractice lawsuit is sufficient for this court to grant Mr. Tomsheck summary judgment. The clear rationale prohibiting both *de facto* and explicit assignments of legal malpractice claims, described by the courts in *Tower Homes* and *Goodley*, cement this conclusion even further.

For example, the *Goodley* Court first noted the general rule – echoed in and relied upon by *Tower Homes* – that "[o]ur view that a chose in action for legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based

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thereon." *Goodley*, 62 Cal.App.3d at 395, 133 Cal.Rptr. at 86. It then continued: "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 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, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing 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." *Id.* at 397, 133 Cal.Rptr. at 87.

Goodley next summarized its rationale for prohibiting the assignment of legal malpractice claims by acknowledging that "the ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession. That assignability of the legal malpractice chose in action would be contrary to sound public policy is supported by many considerations based upon the nature of the services rendered by the legal profession." *Id.* at 397-98, 133 Cal.Rptr. at 87.

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The *Goodley* rationale is compelling and was adopted and expanded by the Nevada Supreme Court in *Tower Homes*. There, the *Tower Homes* Court remarked: Allowing such assignments would "embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." [] Here, issues regarding the personal nature of the attorney-client privilege are implicated. Also, a number of confidentiality problems arise if the purchasers are allowed to bring this claim. For example, the record reflects that plaintiff's counsel attempted to discover confidential files regarding Heaton's representation of Tower Homes. Because the bankruptcy court's order demonstrates that the purchasers are actually pursuing the claim, any disclosure potentially breaches Heaton's duty of confidentiality to Tower Homes. Additionally, Tower Homes can no longer control what confidential information is released, because it cannot decide whether to dismiss the claim in order to avoid disclosure of confidential information. *Tower Homes*, 132 Nev. at 635-36, 377 P.3d at 123 (internal citation omitted).

The sound rationale utilized in both *Goodley* and *Tower Homes*, when applied to this case, leads to the same conclusion: dismissal of an impermissibly assigned legal malpractice claim. To reiterate, there can be no reasonable argument Hefetz maintains total control of the litigation and that he has pried open the fiduciary relationship between Plaintiff and Mr. Tomsheck by purchasing Plaintiff's claim from him. He forced Plaintiff to forego any rights to claim attorney-client privilege by requiring Plaintiff to turn over all documents and correspondence which Hefetz might deem relevant to the case. He prevents Plaintiff from making any decisions about whether to dismiss the claim for whatever reason – including avoiding potential disclosure of confidential information. And Hefetz, alone, stands to benefit. This is patently against public policy and Nevada law.

In summary, Plaintiff and Hefetz's machinations, if left unchecked, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client. Their conduct and their assignment cannot stand. This court must enter summary judgment against the Plaintiff at this time.

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B. Plaintiff's Complaint is also barred by the applicable statute of limitation and the written tolling agreement entered between Plaintiff and Mr. Tomsheck supersedes any common law litigation malpractice tolling

The Nevada Supreme Court illuminated the role which statutes of limitation play in *Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990). In *Petersen*, a case involving child sexual abuse, the Court expounded upon the utility of statutes of limitation, noting that "it is necessary to consider the purposes served by statutes of limitation. Justice Holmes succinctly stated that the primary purpose of such statutes is to "[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-349 (1944). Although statutes of limitation are generally adopted for the benefit of individuals rather than public policy concerns, *Kyle v. Green Acres at Verona, Inc.*, 207 A.2d 513, 519 (N.J. 1965), it has been stated that:

> Viewed broadly. . .statutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Thus, statutes of limitation rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses. 51 Am.Jur.2d Limitations of Actions §18 (1970) (footnotes and citations omitted).

Petersen, 106 Nev. at 273-274, 792 P.2d at 19-20.

As noted above, this case concerns a claim of legal malpractice which allegedly occurred when Mr. Tomsheck arguably did not file a written opposition which addressed all the arguments in a motion for new trial, and thereafter filed a Petition for Writ rather than a Notice of Appeal. *See Plaintiff's Complaint*, paragraphs 11-22. The Nevada Supreme Court issued its first Remittitur on those issues on October 13, 2014, then its second Remittitur on May 10, 2016. Therefore, this case does not fall under any of the exceptions to the two-year rule and is not subject to the "delayed discovery rule." *See e.g., Prescott v. United States*, 523 F.Supp. 918 (D. Nev. 1981), *aff'd Prescott v. United States*, 731 F.2d 1388 (Ninth Cir. 1984), *citing State Farm Mutual Auto Insurance Co. v. Wharton*, 88 Nev. 183, 495 P.2d 359 (1972) (NRS § 11.190(4)(e) starts to run from the date the

injuries were incurred).

Instead, this case is governed by NRS 11.207, which provides as follows:

> 1. An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.
>
> . . .

Nevada Revised Statutes, Section 11.207.

The elements of a claim for legal malpractice include 1) an attorney-client relationship, 2) a duty owed to the client by the attorney, 3) a breach of that duty by the attorney, and 4) that the breach was the proximate cause of the client's damages. *Warmbrodt v. Blanchard*, 100 Nev. 703, 692 P. 2d 1282 (1984). At common law, an action for legal malpractice generally does not accrue until the plaintiff knows, or should know, all facts relevant to the foregoing elements and damage has been sustained. *Jewett v. Patt*, 95 Nev. 246, 591 P. 2d 1151 (1979).[14] Nevertheless, as parties are free to contract for anything which is not illegal or against public policy, parties are free to reduce (or enlarge) statutes of limitations if they so choose – tolling agreements are commonplace, enforceable, and there is no statute which prohibits them. *See e.g. Miller v. A&R Joint Venture,* 97 Nev. 580, 636 P.2d 277 (1981) (noting that Nevada's longstanding principle to allow the freedom of contract is a more important policy than any "public policy" concerning the enforceability of exculpatory clauses).

As applied to this matter, Plaintiff and Mr. Tomsheck entered into an arms-length negotiation, each side represented by counsel at the time, wherein they agreed to a particularized tolling agreement which set the parameters between them concerning when Plaintiff would be permitted to file a legal malpractice claim against Mr. Tomsheck. That written agreement sets forth that the statute of limitation would be tolled for the pendency and resolution of the *Appeal.* Thereafter, the statute of limitations would begin to run. The tolling agreement is quite

---

[14] Whether Plaintiff's damages were complete at any point of time is irrelevant because, again, Plaintiff and Mr. Tomsheck entered into a separate agreement which superseded any common law tolling afforded by, *inter alia*, the litigation malpractice tolling rule. *See e.g., Kim v. Dickinson Wright, PLLC, et al,* 135 Nev. Adv. Op. 20 (June 13, 2019).

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unambiguous in that respect.

There is no dispute the *Appeal* was ultimately resolved on May 10, 2016. So, pursuant to their written agreement, Plaintiff's statute of limitation to file his prospective legal malpractice claim against Mr. Tomsheck ran on or about May 10, 2018. As noted above, it is undisputed Plaintiff filed his Complaint on April 23, 2019, nearly a full year after the parties' agreed upon statute of limitation had expired. Thus, Plaintiff's Complaint was untimely pursuant to NRS 11.207. This court should therefore grant summary in Mr. Tomsheck's favor accordingly.

V.

CONCLUSION

Plaintiff sold his potential legal malpractice claim against Mr. Tomsheck to Plaintiff's former adversary, Yacov Hefetz. That bargain forced Plaintiff to file this lawsuit for Hefetz's benefit and gave Hefetz complete control over this legal malpractice lawsuit even though Mr. Tomsheck has never held any legal relationship with Hefetz. Plaintiff's bargain also awarded Hefetz all potential proceeds from this lawsuit, with Plaintiff carrying no risk from an adverse verdict or judgment. Plaintiff impermissibly assigned his legal malpractice claim and summary judgment, pursuant to *Chaffee* and *Tower Homes*, must be entered against him.

Alternatively, Plaintiff and Mr. Tomsheck entered into a written tolling agreement which superseded any common law tolling of Plaintiff's legal malpractice claim against Mr. Tomsheck. Plaintiff agreed he would have until May 10, 2018 in which to file a legal malpractice action against Mr. Tomsheck, but he waited until April 23, 2019 to file that legal malpractice action. In summary, Plaintiff entered into a written agreement, violated that agreement, and is now attempting to profit from that violation. This is unfair, improper, and actionable. Consequently, summary judgment should be entered in Mr. Tomsheck's favor pursuant to the running of the statute of limitation as well.

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WHEREFORE, JOSHUA TOMSHECK respectfully requests that this court enter an Order granting summary judgment against the Plaintiff.

DATED this 9th day of March, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Max E. Corrick, II
MAX E. CORRICK, II
Nevada Bar No. 6609
9950 West Cheyenne Avenue
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Attorneys for Defendant
JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2020, I sent via e-mail a true and correct copy of the above and foregoing **MOTION FOR SUMMARY JUDGMENT** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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375 East Warm Springs Road, Suite 104
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An Employee of OLSON CANNON GORMLEY & STOBERSKI

EXHIBIT A
FILED UNDER SEAL

EXHIBIT B

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Attorneys for Plaintiff

CASE NO: A-19-793405-C
Department 8

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual; Plaintiff, vs. JOSHUA TOMSHECK, an individual; DOES I-X; ROE ENTITIES, I-X; Defendants.	Case No.: Dept. No.: **(Exempt from Arbitration: Damages in Excess of $50,00)**

COMPLAINT

Plaintiff Christopher Beavor ("Beavor"), by and through his counsel, hereby complains and alleges against defendant Joshua Tomsheck ("Tomsheck") as follows:

I.

THE PARTIES, JURISDICTION AND VENUE

1. At all material times herein, Defendant Tomsheck was and remains an individual

residing in the County of Clark in the State of Nevada doing business as a local attorney.

2. At all material times herein, Plaintiff Beavor was and remains an individual residing in the County of Clark in the State of Nevada.

3. Plaintiff does not know the true names of the individuals, corporations, partnerships and entities sued and identified in fictitious names as DOES I through X and ROE CORPORATIONS I through X, inclusive. Plaintiff allege that such Defendants are responsible for damages suffered by Plaintiff as more fully discussed under the claims set forth below. Plaintiff will request leave of this Honorable Court to amend this Complaint to show the true names and capacities of each such fictitious Defendants at such time Plaintiff discovers such information.

4. Jurisdiction and venue of this Court is proper because the injuries, events, harm and damages incurred occurred in Clark County, Nevada and Tomsheck resides in Clark County, Nevada.

II.

PERTINENT FACTS AND ALLEGATIONS

5. On July 21, 2011, Yacov Hefetz ("Hefetz") commenced an action against Beavor by filing a complaint with a single claim for breach of guaranty.

6. Hefetz's claim was tried to a jury from February 25, 2013 through March 1, 2013.

7. Ultimately, Hefetz's breach of guaranty claim was submitted to the jury and the jury returned a verdict in favor of Beavor.

8. On May 21, 2013, the District Court entered a judgment on the jury verdict.

9. On June 10, 2013, Hefetz filed a Motion for New Trial (the "New Trial Motion").

10. The New Trial Motion was based on two grounds: (1) *Lioce* challenges based on alleged remarks concerning Hefetz; and (2) that the jury misunderstood the issues in Bankruptcy Court and therefore ignored the Jury Instructions.

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11. On or about June 19, 2013, Beavor retained Tomsheck for the purposes of defending him as his attorney in the Hefetz claim (the "Agreement").

12. On June 20, 2013, Tomsheck filed an opposition to the New Trial Motion (the "Opposition"). In the Opposition, Tomsheck failed to substantively oppose the request for a new trial. Tomsheck did not respond to either of the two substantive arguments, that reasonably appeared to have merit, presented by Hefetz in the New Trial Motion.

13. Instead, Tomsheck's Opposition solely argued that Hefetz failed to timely file the New Trial Motion.

14. In his Reply, Hefetz clearly explained why his New Trial Motion was timely and sought to have his New Trial Motion granted pursuant to EDCR 2.20 because Tomsheck failed to file a substantive opposition to the New Trial Motion.

15. On August 7, 2013, the District Court heard arguments on the New Trial Motion.

16. During argument on the New Trial Motion, the trial court stated that it would not have granted the New Trial Motion if Tomsheck had filed a substantive written opposition on the merits of the New Trial Motion.

17. The Court noted that Tomsheck only filed an opposition regarding the timeliness of the New Trial Motion and that Tomsheck was incorrect regarding his calculation of timeliness. Without Tomsheck having filed any substantive opposition to the New Trial Motion, the Court granted the New Trial Motion as unopposed, as permitted by the Judge's discretion and local rules of practice (commonly known and enforced).

18. Tomsheck then compounded his error by filing a Petition for Writ of Mandamus (the "Petition") on or about May 13, 2014, rather than taking a direct appeal from the Court's order on the New Trial Motion.

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19. On or about September 16, 2014, the Nevada Supreme Court entered an order denying Tomsheck' s Petition, noting that writ relief was unavailable because a direct appeal was the proper course of action to challenge the trial court's ruling on the New Trial Motion.

20. However, by that time the Petition was filed more than thirty days after entry of the District Court order granting the New Trial Motion, the Petition could not be converted into an appeal.

21. Additionally, Tomsheck made no attempt to convert the Petition into an appeal or to concurrently file an appeal contesting the Court's order granting the New Trial Motion .

22. As a result of Tomsheck' s errors, the judgment on the jury verdict in Beavor's favor was vacated and Hefetz's action against Beavor continued.

23. Tomsheck withdrew as counsel for Beavor on November 5, 2014.

24. On January 21, 2015, Gordon Silver filed a Notice of Appearance on behalf of Beavor, which representation was later continued by Dickinson Wright..

25. Over the following several years, Beavor incurred legal fees in defending against Hefetz's breach of guaranty claim.

26. In the meantime, on or about September 16, 2015, Tomsheck was expressly placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the parties further agreed to toll the statute of limitations for the claims of malpractice until the expiration of 180 days following an appeal or final resolution.

27. Hefetz's claim against Beavor was recently resolved on or about March 13, 2019 with the filing of a stipulation to dismiss with prejudice being filed.

28. Beavor now brings these claims against Tomsheck, which is timely per the written agreement of Beavor and Tomsheck to toll the applicable statute of limitations.

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III.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Professional Negligence)

29. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

30. Beavor and Tonsheck entered into an attorney-client relationship.

31. As part of that relationship, Tomsheck owed a duty to Beavor to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake.

32. Tomsheck breached his duty to Beavor, at least in part, by failing to substantively oppose the New Trial Motion, but instead relying solely on a clearly erroneous procedural argument, by failing to file a direct appeal of the Court's order on the New Trial Motion, by instead filing the Petition, by filing the Petition outside the thirty day appeal window such that it could not be converted to an appeal, and/or by failing to even attempt to convert the Petition into an appeal.

33. The District Court has expressly stated that, but for Tomsheck' s failure to substantively oppose the New Trial Motion, the New Trial Motion would have been denied.

34. Rather, despite a jury finding in favor of Beavor initially and the dismissal of the action being achieved, Beavor was compelled to defend the action for several years, which was eventually resolved in March 2019.

35. The legal fees, efforts, costs and other damages would not have been incurred but for the actions of Tomsheck.

36. As a result of Tomsheck' s breach of his duty to Beavor, Beavor has had to incur additional legal fees and damages in excess of $50,000 in defending against Hefetz's claim.

37. It has been necessary for Beavor to retain counsel, and Beavor is entitled to an award of attorney's fees and costs incurred in the litigation of this claim.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

38. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

39. Beavor's attorney, Tomsheck, attorney, owed a continuing fiduciary duty and duty of loyalty to him.

40. A fiduciary relationship exists when one has a right to expect trust and confidence in the integrity and fidelity of another.

41. Attorneys owe a fiduciary duty to their clients and a duty of loyalty

42. As Beavor's attorney, Tomsheck breached these duties as described herein.

43. That these breaches of duties caused Beavor significant damages in excess of $50,000.

WHEREFORE, Beavor prays for relief as follows:

1. For an award against Tomsheck, in favor of Beavor, in an amount in excess of $50,000.00;

2. For pre-judgment interest at the applicable legal rate;

3. For an award to Beavor of his costs;

4. For an award to Beavor of his reasonable attorneys' fees; and

///

///

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5. For such other and further relief that the Court deems just and proper.

Dated this 23rd day of April 2019.

THE BARNABI LAW FIRM, PLLC

By: /s/ CJ Barnabi

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EXHIBIT C

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CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

YACOV JACK HEFETZ,

Plaintiff,

vs.

CHRISTOPHER BEAVOR, an individual

Defendant,

Case Number: A645353

Dept No: XXVIII

DEFENDANT CHRISTOPHER BEAVOR'S MOTION FOR RECONSIDERATION

DATE OF HEARING:

TIME OF HEARING:

COMES NOW, Defendant CHRISTOPHER BEAVOR, through his attorney of record, JOSHUA TOMSHECK of the Law Firm of Hofland & Tomsheck, and hereby submits the MOTION TO RECONSIDER.

This MOTION is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

NOTICE OF MOTION

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that DEFENDANT CHRISTOPHER BEAVOR, will bring the foregoing MOTION TO RECONSIDER on for hearing on the 9 day of Oct. In Chambers, 2013, at _:_ a.m./p.m., before Department XXVIII or as soon thereafter as counsel may be heard.

DATED THIS 27th DAY OF AUGUST, 2013

HOFLAND & TOMSHECK

By: _____

Joshua Tomsheck, Esq.
Nevada Bar No. 9210
228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101
(702) 895-6760
Attorney for Christopher Beavor

POINTS AND AUTHORITIES
FACTS RELEVANT TO THE INSTANT MOTION PREVIOUSLY RAISED BEFORE THIS COURT

This case went to jury trial before this honorable court. On March 1, 2013, the jury in this matter entered a defense verdict. On May 17, 2013, this Court signed the Judgment in this case, entering the defense verdict. On May 21, 2013, notice of entry of Judgment was served on the Plaintiff. Plaintiff's counsel concedes in their Motion for New Trial that they were served with the notice of entry of judgment on May 21, 2013. (*See* Motion, pg. 4, lns 7-8).

FACTS RELEVANT TO THE INSTANT MOTION FOR RECONSIDERATION

This case was tried to a Jury before this Honorable Court in February of 2013, commencing February 25, 2013 and concluding with the jury's Verdict for the Defense on March 1, 2013.

After this matter proceeded to Trial, Defendant's former counsel (and Trial Counsel in this matter), Marc Saggese, Esq. formally withdrew as attorney of record on March 25, 2013. (*See* Exhibit "A").

On May 21, 2013, Judgment and Notice of Entry of Judgment was entered by this Court and served on Plaintiff. (*See* Exhibit "B").

On June 10, 2013, Plaintiff's counsel filed their Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV).

On June 19, 2013, Defendant Christopher Beavor retained the undersigned to defend against Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV).

On June 20, 2013, the undersigned counsel contacted Plaintiff's counsel, Brian Morris, Esq., whose name was attached to the aforementioned Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV). During that contact, the undersigned counsel inquired of Mr. Morris as to how Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV) was not untimely filed and thus, time barred. During that same conversation, Mr. Morris conceded that Plaintiff's Motion appeared to be time barred and indicated Plaintiff's counsel may be forced to withdraw the Motion given its untimeliness. At the conclusion of that telephone conversation, Plaintiff's counsel, Mr. Morris, indicated he did not see how Plaintiff's Motion was not filed late, but if he found otherwise, he would contact Defense Counsel.

Thereafter, on June 20, 2013, the undersigned counsel filed, on behalf of Defendant Beavor, Defendant's Opposition to Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV). In the Opposition, the Defense stated "[a]s Plaintiff's Motion is untimely filed, and thus procedurally time barred, Defendant need not address Plaintiff's motion on the merits" but that "should this honorable Court desire additional briefing on the

merits, Defense counsel can provide same." (*See* Opposition at page 3).

After the undersigned had contacted Plaintiff's counsel and received the above referenced information, and after filing their opposition, Plaintiff's counsel, Mr. Morris, contacted Defense counsel and stated that after reviewing the calendar, he now believed that his Motion had been timely filed. The undersigned counsel informed Plaintiff's counsel that he had already filed his opposition based on their earlier conversation, but that he had included reference to the Court that should the Court requires or require additional briefing, it would be provided. Plaintiff's counsel indicated he would have no objection to same. Thereafter, Plaintiff's counsel, Mr. Johnson, filed their Reply, leaving out all of the pertinent procedural facts relayed above.[1]

This matter, having to do with a substantive issue which sought to invalidate the Jury's determination of the facts, law and evidence, was never heard for argument, but was heard on a "chambers calendar." The Matter was continued until a second chambers calendar on August 7, 2013, at which time this Court ruled.

It is important for this Court to note that the Minute Order from the Chambers decision was ***never served*** on the undersigned, even though he is listed as "Lead Attorney" for Defendant Christopher Beavor on the Courts Odyssey system.

---

[1] It should be noted that the signing attorney on the document was Mr. Johnson and not Mr. Morris, whom had conferred with Defense counsel regarding the matter. It should also be noted that this filing is not intended to convey to the Court any attempt at intended unethical conduct on behalf of Mr. Morris, who is known to the undersigned as being an extremely ethical and forthright litigator, simply that the Court made its decision without the necessary requisite facts to be fully informed on the issues.

(*See* Exhibit "C"). Instead, as the minutes from the August 7, 2013 hearing clearly state, "CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: H. Stan Johnson, Esq. (Cohen- Johnson) and Marc Saggese, Esq. (Saggese & Associates)" even though Mr. Saggese withdrew as counsel of record on March 25, 2013. The undersigned only discovered the Court's decision by happenstance when checking the online Court minutes after realizing he had never received a decision. This Motion for Reconsideration now follows.

LEGAL ARGUMENT

Pursuant to E.D.C.R 2.24:

(a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

1. (b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment.

(c) If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

To date, the only Order related to the reconsideration sought by Defense

Counsel is the Minute Order referred to above, which, of the date of this filing was has never been served on the undersigned. It is only by happenstance that the undersigned learned of the entry of the minute order from this Court. There is no written order, nor has any Notice of Entry of Order been received. As such, this Motion for Reconsideration is ripe and timely filed.

1) Plaintiff's Motion Must Be Heard on its Merits:

Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. Costello v. Casler, 127, Nev. Adv. Op. 36, 254 P. 3d 631 (2011), *See also* Schmidt v. Sadri, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) ("The Legislature envisioned that [the Nevada Rules of Civil Procedure] would serve to simplify existing judicial procedures and promote the speedy determination of litigation upon its merits.").

Plaintiff claims in their reply that Defendant's failure to oppose the Motion on its Merits constitutes a waiver pursuant to EDCR 2.20. The record at this juncture states otherwise however. As outlined above, the undersigned defense counsel contacted Plaintiff's counsel and inquired about the Motion for New Trial, and had in depth discussions about the timeliness of same. After that first conversation, defense counsel was left with the notion that Plaintiff's counsel had, in fact, conceded the lateness of their motion. Plaintiff then filed their opposition on that basis. However, in that Motion, defense counsel expressly reserved the right to file additional points and authorities should the Court so desire, by stating "should this honorable Court

desire additional briefing on the merits, Defense counsel can provide same." (*See* Opposition at page 3). Following the filing of that Opposition, Plaintiff's counsel *then* contacted defense counsel and indicated that he no longer though the Motion for New Trial was time barred. In that conversation, Plaintiff's counsel conceded that he would have no objection to defense counsel filing points and authorities on the merits should the Court agree with Plaintiff's counsel as to the timeliness of the Motion for New Trial.

Moreover, as this Court is aware, there is nothing within EDCR 2.20, or any other rule of law, which ***requires*** the Court to find in Plaintiff's favor under these circumstances. EDCR 2.20 simply states that "[f]ailure of the opposing party to serve and file written opposition ***may*** be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." ***Emphasis added.*** This "may" language, as opposed to a directive such as "shall," indicates that this Court has discretion and can make a decision based on the totality of the circumstances. Here, it is crystal clear that the Defendant ***did not*** admit that the Plaintiff's motion had merit or consent to its granting. Conversely, defense counsel provided in its opposition that despite its position that "Plaintiff's Motion is untimely filed, and thus procedurally time barred, Defendant need not address Plaintiff's motion on the merits" – something that had been conceded by the Plaintiff at the time Defendant filed his opposition – but affirmatively stated that "should this honorable Court desire additional briefing on the merits, Defense counsel can provide same." The

"may" provision within EDCR 2.20 is designed to address a situation where a non-moving party simply "fails to serve and file written opposition." That didn't happen here. The non-moving party (the Defendant) ***did*** serve and file written opposition, addressing the issue of timeliness and offering to provide additional briefing, an allowance discussed, and agreed to, by Plaintiff's counsel.

Given this procedural history and the consistent mandate of the Nevada Supreme Court, this matter must be decided on its merits.

2) Plaintiff's Motion was Not Timely Filed:

Despite Plaintiff's clever attempt to draw out the time period to file the Motion for New Trial pursuant to NRCP 59, their application of NRCP 6 to include the date in which they filed their Motion is in error. In their analysis, they neglect the clear application of the rules and incorrectly conclude that the three (3) day addition for mailing is exclusive or weekends and non-judicial days. This is not the case.

As this Court is aware, Motions for New Trial after the 2004 Amendment to NRCP 6, must be filed within ten days from the date when notice of the final judgment's entry is served. NRCP 59(b). Under NRCP 6(a), this ten-day period does not include weekends and nonjudicial days, including holidays. Further, under NRCP 6(e), three days are added to the ten-day period when the notice of entry is served by mail or electronic means, as done in this case by former counsel, Mr.

Saggese. (*See* Exhibit "B"). To calculate the due date, the ten-day period is determined and then the three (3) days are added to that date. However, unlike the ten-day filing period, the three-day mailing period ***includes*** weekends and nonjudicial days. Winston Products Co. v. DeBoer, 122 Nev. 517, 134 P.3d 726 (2006); *see also* Nalty v. Nalty Tree Farm, 654 F. Supp. 1315, 1318 (S.D. Ala. 1987) (recognizing that the final day of the three-day mailing period could land on a weekend or nonjudicial day). *See also* Comments on 2005 Amendments to FRCP 6(e), as adopted in NRCP 6(e), noting that "[i]ntermediate Saturdays, Sundays, and legal holidays are included in counting these added three days." This distinction is one that Plaintiff fails to recognize in their Reply.

Here, the ten-day period commenced the day after notice of the final judgment's entry was served, May 22, 2013 and ended on Wednesday, June 5, 2013. Thereafter, the three (3) days are added onto that date for mailing. Unfortunately for the Plaintiff, they, in their reply, clearly apply the standard that is true in NRCP 6(a), namely that the ten (10) day period for filing under that subsection does not include weekends and non-judicial days, including holidays, **and** Plaintiff further applies that rule to the three (3) day mailing provision under Rule 6 (e). However, the Nevada Supreme Court has clearly held that the three (3) day mailing period under NRCP 6(e) ***does*** include both weekends and holidays. As such, their Motion was due ***before*** they filed it on June 10, 2013. As the Nevada Supreme Court has repeatedly held, "[u]ntimely motions for new trial . . . must be denied." Ross v.

Giacomo, 97 Nev. 550, 553, 635 P.2d 298, 300 (1981) overruled on other grounds by Winston Products Co. v. DeBoer, 122 Nev. 517, 134 P.3d 726.

As Plaintiff's Motion for a New Trial was untimely filed, a fact that was acquiesced to at the time Defendant filed their opposition in this matter, this Court should reconsider its previous ruling and deny Plaintiff's Motion. In the event this Court agrees with Plaintiff that their NRCP 59 Motion was timely filed, this Court should deny Plaintiff's Motion for the reasons set forth below.

3) NRCP 59 does not warrant a new trial or a judgment notwithstanding the verdict

As this court is well aware, NRCP 59 controls the relief Plaintiff is seeking in their Motion, by stating:

> RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed no later than 10 days after service of written notice of the entry of the judgment. (emphasis added).

As outlined below, none of the provisions of NRCP 59 warrant a granting of Plaintiff's Motion under the facts of this case.

I. ***There was no irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which the Plaintiff was prevented from having a fair trial, and any argument to the contrary is belied by the record;***

Plaintiff argues that defense counsel "intentionally violated" Nevada law in making the closing arguments submitted to the jury. Specifically, Plaintiff's counsel refers to arguments made at page 63 of the day 5 trial transcript. A thorough reading of the record however, reveals the opposite to be true. In reviewing the record from Trial, it is clear that defense counsel 1) made no objectionable argument that wasn't supported by the evidence; and 2) that the arguments raised by Plaintiff's counsel in their Motion for New Trial ***were not objected to at Trial.*** It is unfathomable how Plaintiff's counsel can raise, in the venue of their instant Motion for a New Trial, that these arguments were so inappropriate that a Motion for New Trial was warranted, yet Trial counsel for the Plaintiff, who was present at each phase of the Trial before the jury, didn't even see fit to lodge an objection. Despite Plaintiff's contention that now, at this juncture, the "prejudice was so egregious that no objection was necessary to preserve the issue for reconsideration either in a motion for new trial or

on appeal," the clear holdings of the Nevada Supreme court say otherwise. It is a well settled rule of law that "[t]he failure to object to allegedly prejudicial remarks at the time an argument is made, and for a considerable time afterwards, strongly indicates that the party moving for a new trial did not consider the arguments objectionable at the time they were delivered, but made that claim as an afterthought." Beccard v. Nevada Nat'l Bank, 99 Nev. 63, 657 P.2d 1154 (1983), *citing* Curtis Publishing Company v. Butts, 351 F.2d 702, 714 (5th Cir.1965), aff'd, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In the case of Beccard, *supra*, the District Court granted a Motion for a New Trial for Respondent Nevada National Bank based on the claim that counsel for Appellant had made no less than eight (8) "highly prejudicial and inflammatory statements" allegedly made during closing argument. However, there, as here, no objection was made at the time of Trial. The Nevada Supreme Court reversed the District Court's granting of a new Trial as they were not objected to at the time of Trial. In so finding, the Court stated that "[s]pecific objections must be made to allegedly improper closing arguments in order to preserve the contention for appellate review. Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1235-36 (1978). The Court concluded that the District Court committed error in granting a new trial under NRCP 59 based on the allegations of improper arguments because the moving party failed to object to the allegedly improper closing arguments at trial and raised the allegation for the first time in a Motion for a New Trial. Beccard, *supra* at 1156, *citing* Curtis Publishing,

supra. The same holds true in this matter. There was no objection raised at the time of Trial. The fact that there are dynamic changes of a case during Trial, something that happens in ***every*** case, does not lessen the burden on the parties to raise contemporaneous objections. Here, there was none and raising the issue now, on a Motion for New Trial, is not sufficient. As such Plaintiff's Motion must be denied.

II. There was no misconduct of the jury or prevailing party warranting a new trial

As this Court is also aware, when a party is given the opportunity for a mistrial during litigation, or a curative instruction related to the admission of Trial evidence, and therein waives the opportunity to ask for same at Trial, they are thereafter barred from raising the same circumstances as a basis for a Motion for New Trial following an adverse verdict. This is precisely the circumstances that present themselves to the Court in this matter.

The Plaintiff has argued that defense Trial counsel "engaged in repeated acts of misconduct which while objected to and to which objections were sustained no admonishment was given to the jury." (Motion at page 6). A reading of the Trial transcripts however reveals a different story. While it is true that defense Trial counsel was admonished by this Court to refrain from making further reference to the Plaintiff as an "Israeli Businessman," and that the Court went as far as to caution defense counsel that any further such comment could result in a Mistrial, the record reveals that the first broach of the subject was elicited by ***Plaintiff's Counsel*** during

the direct examination of Plaintiff by Mr. Iglody.

Q: I see you hesitating. What's – what's is your mother tongue?

A: Hebrew

Trial Transcript, Day 2, Page 4 line 23-25.

This discussion continued onto the next page:

Q: How long have you been in the United States?

A: I've been in and off. I came here as a young man and I left the country and then I came back. Since I came back was 15 years.

Trial Transcript, Day 2, Page 4 line 23-25.

During cross examination, the Plaintiff volunteered that "English is my second language. And I never went – I never went to school in America."

Trial Transcript, Day 2, Page 24 lines 11-12.

It was during further cross examination of Plaintiff that defense counsel asked the following question:

Q: You knew as a businessman, a successful, very wealthy Israeli businessman, that the fact that this project - -

Trial Transcript, Day 2, Page 31 line 9-11.

The Court then immediately asked counsel to approach and sent the jury to lunch. Thereafter, there was a lengthy conversation between the Court and counsel regarding the use of the word "Israeli" by defense counsel. The Court admonished defense Trial counsel not to do it again and indicated that if it happened again, the

Court would declare a mistrial.

Trial Transcript, Day 2, Page 34

Thereafter defense Trial counsel apologized, indicated his intent was not to offend of inflame the jury, and promised the Court it wouldn't happen again.

Following the lunch break, the Court again admonished defense Trial counsel. Trial Transcript, Day 2, Page 37.

From that point on, the record indicates that it was ***plaintiff's counsel themselves*** that asked that no curative instruction be given and never moved the Court to grant a mistrial. Specifically; the following exchange took place:

Q: (by the Court): So, my question to the plaintiff's counsel is do you want a curative instruction?

A: The problem with a –

Q: (by the Court): Or do you just want to move on?

A: The problem with a curative instruction, and this is difficult for us, is, of course, when you give a curative instruction, you just draw attention to it.

Q: (by the Court): Highlights it, yes.

A: And that – that creates the problem. If it would please the Court I think perhaps you can reserve on that issue for now, depending on how the rest of the examination goes. And if necessary, that can be addressed perhaps before we issue the jury instructions, depending on whether it's necessary. At some point I have to rely on the jury's good discretion to see past these inflammatory statements.

Q: (by the Court): Okay. Then we'll continue.

Trial Transcript, Day 2, Page 37.

Thereafter, there was no mention of the word "Israeli" by either party and the issue did not present itself again. Moreover, and more importantly, the Plaintiff ***never*** again made an objection, Motion (for mistrial or otherwise) or request for curative instruction related to the issue. The record reveals a thorough discussion about all areas of the jury instructions and forms of verdict, in which the issue is neither raised or mentioned by ***any*** party or the Court. Trial Transcript, Day 5, Pages 23-38.

The Nevada Supreme Court has consistently held that one of this court's "primary objectives" is to promote the "efficient administration of justice." Eberhard Mfg. Co. v. Baldwin, 97 Nev. 271, 273, 628 P.2d 681, 682 (1981). The efficient administration of justice requires that any doubts concerning a verdict's consistency with Nevada law be addressed before the court dismisses the jury. Carlson v. Locatelli, 109 Nev. 257, 262-63, 849 P.2d 313, 316 (1993). The Court has also held that wherever possible, the verdict should be salvaged so that no new trial is required." Id. at 263, 849 P.2d at 316-17. In furtherance of that goal, the Court has repeatedly held true the policy that "failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury" constitutes a waiver of the issue of an inconsistent verdict. Eberhard, 97 Nev. at 273, 628 P.2d at 682. *See also* Brascia v. Johnson, 105 Nev. 592, 596, 781 P.2d 765, 768 (1989); Carlson, 109 Nev. at 262-63, 849

P.2d at 316-17.

Accordingly, in the instant case, the Plaintiff's clear decision to pass on the Court's offered consideration of either a curative jury instruction or Motion for Mistrial, would have allowed the issue to be addressed while the jury was still in the box and in doing so, would have allowed for the Court to make a determination at that time in the efficient administration of justice. When given this option, the Plaintiff unequivocally decided against making a motion for same. The Plaintiff even asked the Court to reserve the issue, and even given the flexibility to make the same motion later, never did. The Plaintiff was given the opportunity to object, move the Court for a Mistrial or ask for a curative instruction. The Plaintiff chose not to do so. As such, the Plaintiff has waived his ability to argue for same at this juncture following an adverse verdict. This Court should not consider this argument now, after the jury has returned their verdict and should deny Plaintiff's Motion on this issue.

III. There was no "manifest disregard by the jury of the instructions of the court"

In determining the propriety of the granting of a new trial under NRCP 59(a)(5), the question is not whether the jurors correctly applied the instructions of the court in their entirety, but whether one can "declare that, had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached." Weaver Bros. v. Misskelley, 98 Nev. 232 (1982),

citing Fox v. Cusick, 91 Nev. 218, 533 P.2d 466 (1975); *see also* Groomes v. Fox, 96 Nev. 457, 611 P.2d 208 (1980); Eikelberger v. Tolotti, 94 Nev. 58, 574 P.2d 277 (1978); Price v. Sinnott, 85 Nev. 600, 460 P.2d 837 (1969).

In the instant case, while the Plaintiff makes naked allegation that "the only possible explanation for this verdict must lie in the Defendant's improper conduct during the trial" - - Plaintiff cannot point to a single shred of evidence in the record that in any way intimates either the seeking of a nullified verdict or a verdict that is based on nullification. The only explanation that Plaintiff makes to this end is that the verdict was a dissatisfactory one and thus, must have been based on jury nullification. Clearly, this tenuous argument cannot be stretched to meet the Plaintiff's burden to show that "it would have been impossible for them to reach the verdict they reached." *See* Weaver Bros. v. Misskelley, *supra.*

In this matter, the jury clearly, through polling, indicated their reasoned decision in this case. On page 78-80 of the day 5 Trial Transcript, this honorable Court polled the entire jury, member by member, and inquired of their responses and verdict. There was no objection to the polling and there was no objection to the ultimate verdict made contemporaneous with this process. As such, the Plaintiff must now be precluded from raising this issue on a Motion for New Trial pursuant to NRCP 59. Our Supreme Court has held that "[f]ailure to object to asserted errors at trial will bar review of an issue on appeal." McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983); see also Allum v. Valley Bank of Nevada, 970 P. 2d 1062

(1998), *citing* Commonwealth v. Jackson, 457 Pa. 237, 324 A.2d 350, 353 (Pa. 1974) (one cannot be heard to challenge unanimity of verdict where he fails to question the jurors' answers or requests that jurors be further interrogated); *See also* Scott v. Chapman, 71 Nev. 329, 331, 291 P.2d 422, 423 (1955).

CONCLUSION

Based upon the foregoing, Defendant's Motion for Reconsideration should be GRANTED and Plaintiff's previously filed Motion for New Trial should be DENIED in its entirety.

DATED this 27th day of August, 2013.

HOFLAND & TOMSHECK

By: _____

Joshua Tomsheck, Esq.
Nevada Bar No. 9210
228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101
(702) 895-6760
Attorney for Christopher Beavor

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I hereby certify that I am an employee of HOFLAND & TOMSHECK and that on the 28th day of August, 2013, service of a true and correct copy of the foregoing MOTION FOR RECONSIDERATION was made as indicated below:

__X___ By First Class Mail, postage prepaid from Las Vegas, Nevada; or

__X___ By Facsimile to the numbers indicated on this certificate of service; or

_____ By Personal Service as indicated.

to : H. STAN JOHNSON, and
BRIAN A. MORRIS
c/o COHEN-JOHNSON, LLC
6923 Dean Martin Drive, Suite G
Las Vegas, Nevada, 89118

And that a copy of same was sent via facsimile transmission to:

(702) 823-3400

Additionally, the undersigned verifies that a courtesy copy of same was delivered via facsimile transmission to Department 28 of the Eighth Judicial District Court to:

(702) 366-1407

An Employee of Hofland & Tomsheck

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

JOB NO.	1332
DESTINATION ADDRESS	3661407
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	08/28 12:19
USAGE T	12'07
PGS.	34
RESULT	OK

Hofland &
Tomsheck

ATTORNEYS AND COUNSELORS AT LAW

BRADLEY J. HOFLAND*
JOSH TOMSHECK
MATTHEW D. MANNING (1970 – 2005)

FACSIMILE TRANSMITTAL COVER LETTER

DATE: **August 28, 2013**

TO: **Department 28**

FROM: Joshua Tomsheck, Esq.

FAX NO.: (702) 366-1407

Re: *Hefetz vs. Beavor*

If there are any problems with this transmission, please contact our office at 702-895-6760

MESSAGE:

Please see the attached.

Hofland &
Tomsheck

ATTORNEYS AND COUNSELORS AT LAW

BRADLEY J. HOFLAND*
JOSH TOMSHECK
MATTHEW D. MANNING (1970 – 2005)

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If there are any problems with this transmission, please contact our office at 702-895-6760

MESSAGE:

Please see the attached.

228 S. 4TH STREET, 1ST FLOOR, LAS VEGAS, NEVADA 89101 • TELEPHONE (702) 895-6760 • FACSIMILE (702) 731-6910

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

JOB NO.	1329
DESTINATION ADDRESS	8233400
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	08/28 12:02
USAGE T	05'01
PGS.	32
RESULT	OK

Hofland & Tomsheck

ATTORNEYS AND COUNSELORS AT LAW

BRADLEY J. HOFLAND*
JOSH TOMSHECK
MATTHEW D. MANNING (1970 – 2005)

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DATE: August 28, 2013

TO: H. Stan Johnson, Esq. and Brian Morris, Esq.

FROM: Joshua Tomsheck, Esq.

FAX NO.: (702) 823-3400

Re: *Hefetz vs. Beavor*

If there are any problems with this transmission, please contact our office at 702-895-6760

MESSAGE:

Please see the attached.

Hofland &
Tomsheck

ATTORNEYS AND COUNSELORS AT LAW

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Please see the attached.

228 S. 4TH STREET, 1ST FLOOR, LAS VEGAS, NEVADA 89101 • TELEPHONE (702) 895-6760 • FACSIMILE (702) 731-6910

EXHIBIT A

Electronically Filed
03/25/2013 04:36:41 PM

CLERK OF THE COURT

WOA
MARC A. SAGGESE, ESQ.
Nevada Bar No. 7166
SAGGESE & ASSOCIATES, LTD.
732 S. Sixth Street, Suite 201
Las Vegas, Nevada 89101
Telephone 702.778.8883
Facsimile 702.778.8884
Marc@MaxLawNV.com
Attorney for Defendant Christopher Beavor

DISTRICT COURT

CLARK COUNTY, NEVADA

YACOV JACK HEFETZ, an individual,

Plaintiff,

vs.

CHRISTOPHER BEAVOR, an individual; SAMANTHA BEAVOR, an individual; DOES I through X and ROE ENTITIES I through X, inclusive,

Defendants.

Case No.: A-11-645353-C
Dept. No.: XXVIII

NOTICE OF WITHDRAWAL OF ATTORNEY

Pursuant to Supreme Court Rule 46, MARC A. SAGGESE, ESQ., hereby gives notice of his withdrawal as attorney of record for Defendant, CHRISTOPHER BEAVOR, a final determination having being entered in this matter.

DATED this 25th day of March, 2013.

/s/ MARC A. SAGGESE, ESQ.

MARC A. SAGGESE, ESQ.
Nevada Bar No. 7166
SAGGESE & ASSOCIATES, LTD.
732 S. Sixth Street, Suite 201
Las Vegas, Nevada 89101
Telephone 702.778.8883
Facsimile 702.778.8884
Marc@MaxLawNV.com

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 25th day of March, 2013, a copy of the foregoing **NOTICE OF WITHDRAWAL OF ATTORNEY** was sent via facsimile and in a sealed envelope via US Mail, with postage fully pre-paid thereon, to the following counsel of record,

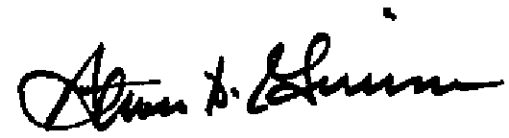
H. Stan Johnson; Esq.
Brian A. Morris, Esq.
Cohen-Johnson, LLC
255 E. Warm Springs Road, Ste. 100
Las Vegas, NV 89119
702.823.3400

and that there is regular communication between the place(s) of mailing and the place(s) so addressed.

/s/ Alexis Vardoulis

An Employee of Saggese & Associates, Ltd.

EXHIBIT B



JUDG
MARC A. SAGGESE, ESQ.
Nevada Bar No. 7166
SAGGESE & ASSOCIATES, LTD.
732 S. Sixth Street, Suite 201
Las Vegas, Nevada 89101
Telephone 702.778.8883
Facsimile 702.778.8884
Marc@MaxLawNV.com
Attorney for Defendants/Counterclaimants

DISTRICT COURT

CLARK COUNTY, NEVADA

YACOV JACK HEFETZ, an individual, Plaintiff, vs. CHRISTOPHER BEAVOR, an individual; SAMANTHA BEAVOR, an individual; DOES I through X and ROE ENTITIES I through X, inclusive, Defendants.	Case No.: A-11-645353-C Dept. No.: XXVIII **JUDGMENT**
CHRISTOPHER BEAVOR, an individual; SAMANTHA BEAVOR, an individual, Counterclaimants, vs. YACOV JACK HEFETZ, an individual; DOES I through X; and ROE CORPORATIONS 1 through 10, inclusive, Counter-Defendant.	

...

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...

☐ Voluntary Dis ☐ Involuntary (stat) Dis ☐ Jdgmt on Arb Award ☐ Mtn to Dis (by deft)	☐ Stip Dis ☐ Stip Jdgmt ☐ Default Jdgmt ☐ Transferred	☐ Sum Jdgmt ☐ Non-Jury Trial ☒ Jury Trial	FINAL DISPOSITIONS ☐ Time Limit Expired ☐ Dismissed (with or without prejudice) ☐ Judgment Satisfied/Paid in full

5/16/13 (28)

I. JUDGMENT ON JURY VERDICT

This action came on for trial before the Court, Honorable Ronald J. Israel, District Judge, presiding and a jury on February 25, 26, 27, 28, and March 1, 2013, the issues having been duly tried and the jury having duly rendered its verdict on March 1, 2013, the Court enters this Judgment pursuant to N.R.C.P. 54.

IT IS ORDERED AND ADJUDGED that Judgment on the jury verdict is entered in favor of Defendant Christopher Beavor.

II. NOTICE OF ENTRY OF JUDGMENT

Within ten (10) days after entry of this Judgment, Defendant shall serve written notice of such entry, together with a copy of this Judgment, upon Plaintiff and shall file notice of entry with the clerk of the court.

IT IS SO ORDERED.

DATED this 17 day of May, 2013.

Ronald J. Israel
DISTRICT COURT JUDGE

Respectfully Submitted,

Marc A. Saggese
MARC A. SAGGESE, ESQ.
Nevada Bar No. 7166
SAGGESE & ASSOCIATES, LTD.
732 S. Sixth Street, Suite 201
Las Vegas, Nevada 89101
Telephone 702.778.8883
Facsimile 702.778.8884
Marc@MaxLawNV.com
Attorney for Defendants/Counterclaimants

EXHIBIT 1

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 01 2013 4:23pm
BY KATHY KLEIN, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

YACOV JACK HEFETZ, an individual, Plaintiff, vs. CHRISTOPHER BEAVOR, an individual, Defendant.	CASE NO: A-11-645353-C DEPT NO.: XXVIII

VERDICT FORM

We, the jury in the above-entitled action find:

For Plaintiff _____,

For Defendant O.

If you find in favor of Plaintiff: $_____.

DATED this 1 day of March, 2013.

Holly Howard
FOREPERSON

RECEIVED
MAR 04 2013
CLERK OF THE COURT

A-11-645353-C
VER
Verdict
2270479

05/15/2013 09:39 7023661407 DEPT 28 PAGE 01/01

EXHIBIT C

REGISTER OF ACTIONS

CASE NO. A-11-645353-C

Yacov Hefetz, Plaintiff(s) vs. Christopher Beavor, Defendant(s)

Case Type: **Breach of Contract**
Subtype: **Guarantee**
Date Filed: **07/21/2011**
Location: **Department 28**
Conversion Case Number: **A645353**

PARTY INFORMATION

Counter Claimant	**Beavor, Christopher**	**Lead Attorneys** **Joshua L. Tomsheck** *Retained* 702-671-2640(W)
Counter Claimant	**Beavor, Samantha**	**Marc A. Saggese** *Retained* 702-788-8883(W)
Counter Defendant	**Hefetz, Yacov Jack**	**H. Stanley Johnson** *Retained* 702-823-3500(W)
Defendant	**Beavor, Christopher**	**Joshua L. Tomsheck** *Retained* 702-671-2640(W)
Defendant	**Beavor, Samantha**	**Marc A. Saggese** *Retained* 702-788-8883(W)
Plaintiff	**Hefetz, Yacov Jack**	**H. Stanley Johnson** *Retained* 702-823-3500(W)

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

06/26/2012 **Order of Dismissal** (Judicial Officer: Israel, Ronald J.)
Debtors: Christopher Beavor (Defendant), Samantha Beavor (Defendant)
Creditors: Alis Cohen (Plaintiff)
Judgment: 06/26/2012, Docketed: 07/05/2012

03/01/2013 **Verdict** (Judicial Officer: Israel, Ronald J.)
Debtors: Yacov Jack Hefetz (Plaintiff)
Creditors: Christopher Beavor (Defendant)
Judgment: 03/01/2013, Docketed: 03/05/2013

05/21/2013 **Judgment Upon the Verdict** (Judicial Officer: Israel, Ronald J.)
Debtors: Yacov Jack Hefetz (Plaintiff)
Creditors: Christopher Beavor (Defendant)
Judgment: 05/21/2013, Docketed: 05/29/2013

OTHER EVENTS AND HEARINGS

07/21/2011 **Case Opened**
07/21/2011 Document Filed
Verified Complaint
07/22/2011 Initial Appearance Fee Disclosure
Initial Appearance Fee Disclosure
09/21/2011 Affidavit of Service
Affidavit of Service of Christopher Beavor
09/27/2011 Affidavit of Service
Affidavit of Service of Samantha Beavor
10/21/2011 Answer and Counterclaim
Defendants' Answer to Complaint and Counterclaim
10/21/2011 Initial Appearance Fee Disclosure
Initial Appearance Fee Disclosure
11/01/2011 Reply to Counterclaim
Reply to Counterclaim
11/28/2011 Demand for Jury Trial

EXHIBIT D

ORDR
COHEN-JOHNSON, LLC
H. STAN JOHNSON
Nevada Bar No. 00265
sjohnson@cohenjohnson,com
BRIAN A, MORRIS, ESQ.
Nevada Bar No. 11217
bam@cohenjohnson.com
255 W. Warm Springs Rd., Ste. 100
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

YACOV JACK HEFETZ, an individual, Plaintiff, vs. CHRISTOPHER BEAVOR, an individual; SAMANTHA BEAVOR, an individual; DOES I through X and ROES ENTITIES I through X, inclusive, Defendants.	Case No.: A645353 Dept. No.: XXVIII Hearing Date: September 26, 2013 Hearing Time: 9:00 am

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

THIS MATTER having come before this Court on September 26, 2013 on Defendant Christopher Beavor's Motion for Reconsideration, Plaintiff Yacov Hefetz, having been represented by H. Stan Johnson, Esq. of Cohen-Johnson, LLC; Defendant Christopher Beavor, having been represented by Joshua Tomsheck, Esq. of Hofland & Tomsheck; and Defendant Samantha Beavor having been represented by Marc A. Saggese, Esq. of Saggese and Associates, Ltd.; the Court having heard the representations and arguments set forth in open Court on the date of the hearing; the Court having carefully considered the pleadings and papers on file herein; being fully advised regarding the same; and good cause appearing:

FINDINGS OF FACT

The Court heard arguments by Counsel regarding Defendant's Motion for Reconsideration; the parties argued the timeliness of the Motion filed by Plaintiff for a New

11/5/13

Trial.

THE COURT FINDS that Plaintiff's Motion for New Trial was timely filed;

THE COURT FURTHER FINDS: there were no grounds for reconsideration of the Court's prior order.

COUCLUSION OF LAW

THE COURT CONCLUDES that pursuant to NRCP 6(a) and (e), that the underlying Motion for New Trial or in the Alternative Motion for Judgment notwithstanding the Verdict (JNOV) was timely filed.

THE COURT FURTHER CONCLUDES that pursuant to EDCR 2.24 there are no grounds for reconsideration of the Court's order granting Plaintiff's Motion for New Trial.

ORDER

IT IS HEREBY ORDERED that the Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED that Mr. Tomshek's Oral Motion for a Stay is DENIED.

Dated this 12 day of Nov, 2013.

DISTRICT COURT JUDGE

Submitted by:

COHEN-JOHNSON, LLC

H. Stan Johnson, Esq.
Nevada Bar No.: 00265
Brian A. Morris, Esq.
Nevada Bar No.: 11217
255 E. Warm Springs Road, Ste. 100
Las Vegas, NV 89119
Attorneys for Plaintiffs

COHEN-JOHNSON, LLC
6293 Dean Martin Drive, Suite G
Las Vegas, Nevada 89118
(702) 823-3500 FAX: (702) 823-3400

EXHIBIT E

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BEAVOR,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RONALD J. ISRAEL, DISTRICT JUDGE,
Respondents,
and
YACOV JACK HEFETZ,
Real Party in Interest.

Supreme Court No. 65656
District Court Case No. A645353

NOTICE IN LIEU OF REMITTITUR

TO THE ABOVE-NAMED PARTIES:

The decision and Order of the court in this matter having been entered on September 16th, 2014, and the period for the filing of a petition for rehearing having expired and no petition having been filed, notice is hereby given that the Order and decision entered herein has, pursuant to the rules of this court, become effective.

DATE: October 13, 2014

Tracie Lindeman, Clerk of Court

By: Amanda Ingersoll
Deputy Clerk

cc: Hon. Ronald J. Israel, District Judge
Hofland & Tomsheck
Cohen-Johnson LLC
Steven D. Grierson, Eighth District Court Clerk

EXHIBIT F

DICKINSON WRIGHT PLLC

8363 WEST SUNSET ROAD, SUITE 200
LAS VEGAS, NV 89113-2210
TELEPHONE: (702) 382-4002
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JOEL Z. SCHWARZ
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September 16, 2015

VIA E-MAIL AND U.S. MAIL

Joshua Tomsheck
Hofland & Tomsheck
228 South 4th Street, 1st Floor
Las Vegas, NV 89101
JoshT@hoflandlaw.com

Re: Yacov Hefetz v. Christopher Beavor, Case No. A-11-645353-C

Dear Mr. Tomsheck:

We are writing to put you on notice that our client, Christopher Beavor, has a professional malpractice claim against you. The claim arises out of your representation of Mr. Beavor in the above-referenced case between June 2013 and November 2014, wherein your failure to substantively oppose Plaintiff Yacov Hefetz's Motion for a New Trial, legally erroneous opposition to the Motion for New Trial, and subsequent failure to properly appeal the District Court's Order granting a new trial resulted in Mr. Beavor having to continue defending an action which the District Court has now made clear would have otherwise ended.

As indicated in the attached draft complaint, as a direct result of your errors, Mr. Beavor has incurred—and continues to incur—legal fees and still faces potential liability on a claim which was already defeated once at trial. Had you substantively opposed Mr. Hefetz's Motion for a New Trial, Mr. Beavor never would have had to incur additional fees because the Court would have denied Mr. Hefetz's request for a new trial and closed the case. There can be no doubt of this because the District Court stated as much in a July 23, 2015 Order, a copy of which is also attached hereto. See *id.* at 2:16-3:8.

Please be advised that Mr. Beavor will be participating in a settlement conference with Mr. Hefetz on October 1, 2015 at 9:00 a.m. at the law offices of Jimmerson Hansen. This provides an opportunity for your coverage carrier to minimize the damages resulting from the professional negligence. Demand is hereby made that: (1) you place your coverage carrier on notice of Mr. Beavor's claim and the upcoming settlement conference and (2) that your coverage carrier participates in the upcoming settlement conference.

Thank you for your immediate attention to this matter.

Sincerely,

Joel Z. Schwarz

JZS:bjd

Attachments (as noted)
LVEGAS 65530-3 34668v1

EXHIBIT G

TOLLING AGREEMENT

THIS TOLLING AGREEMENT ("Agreement") is made and effective as of the date of the latest signature of a Party to this Agreement (the "Effective Date") between Christopher Beavor ("Beavor") and Joshua Tomsheck ("Tomsheck") (collectively, the "Parties," and each singularly a "Party" to this Agreement).

RECITALS

WHEREAS, Beavor had prevailed in a jury trial against Yacov Hefetz in the matter styled *Hefetz v. Beavor*, Eighth Judicial District Court, Clark County, Nevada Case No. A-11-645353-C (the "Action") and Beavor retained Tomsheck to serve as his counsel and to advise him in connection with Hefetz's Motion for New Trial (the "New Trial Motion"); and

WHEREAS, Tomsheck performed legal services as an attorney on behalf of Beavor in connection with the New Trial Motion; and

WHEREAS, based upon Tomsheck's representation of Beavor in connection with the New Trial Motion, Beavor may wish to assert claims against Tomsheck; and

WHEREAS, Beavor and Tomsheck agree that it is in their mutual interests to evaluate fully all matters that might be in dispute between and among them during the pendency of the appellate matter styled *Yacov Hefetz v. Beavor (Supreme Court No. 68438 c/w 68843) ("Appeal")* prior to Beavor filing suit against Tomsheck at this time, without prejudice to Beavor's rights to pursue his claims at a later time; and

WHEREAS, due to the pendency of the Appeal, the Parties desire to toll any and all applicable statutes of limitations or similar defenses and to retain all legal and equitable actions or defenses the Parties may have, and to provide that no legal or equitable act out of the matters described in this Agreement may be instituted by or on behalf of the parties against each other or any one of them during the Term of this Agreement;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements contained herein, it is agreed as follows:

1. Term of Agreement. The term of this Agreement shall be from and including the Effective Date until and including the Termination Date as set forth in Paragraph 5 below (the "Term").

2. Covered Claims. The Claims covered by this Agreement include any claim, cause of action, legal theory, or other cause for recovery, whether brought by direct action, counterclaim, cross-claim or third party action, that Beavor or Tomsheck has or might have relating directly or indirectly to the Action, the New Trial Motion, the attorney-client relationship between Beavor and Tomsheck, and all other present or potential claims relating to the matters covered by this Agreement (the "Claims").

3. Tolling Agreement. During the Term of this Agreement, the Parties agree to toll and suspend the running of any and all statutes of limitations, repose, and all other legal and/or equitable defenses and arguments, including but not limited to the defenses of waiver, estoppel and laches, recognized in any forum or jurisdiction in the United States and elsewhere that may apply to the Claims. Any time period which elapses between the Effective Date and the

Termination Date of this Agreement (including both the Effective Date and the Termination Date) shall not be included in computing any statute of limitations periods, or considered in any defense of laches, waiver, or other time-based doctrine or defense, rule, law, or statute otherwise limiting any Party's right to preserve and prosecute any Claim, or used in determining the amount of time between the accrual of any Claim and the institution of any action. Nothing in this Agreement shall have the effect of reviving any claims that are expired or otherwise barred by any statute of limitations, repose or similar defense prior to the Effective Date.

4. Effective Date. The Effective Date of this Agreement is the date of the latest signature of a Party to this Agreement.

5. Termination Date. This Agreement shall terminate at the end of the 180th day after the Effective date, or the final resolution of the Appeal, whichever occurs later. This Agreement may be extended by agreement of the Parties as provided in this Agreement. Additionally, any Party may terminate this Agreement by providing 60 days' notice of termination to all other Parties. Termination by any Party terminates this Agreement as to all Parties.

6. Notice. Written notice of termination or of any other matter for which notice is required under this Agreement shall be given by facsimile or first class mail and email to:

For Tomsheck:

Max Corrick
OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Tel: 702-384-4012
mcorrick@ocgas.com

For Beavor:

Joel Z. Schwarz
DICKINSON WRIGHT PLLC
8363 W. Sunset Rd., Suite 200
Las Vegas, NV 89113
Tel: 702-550-4436
jschwarz@dickinsonwright.com

7. No Legal Action During the Term of this Agreement. The Parties, for themselves, their successors and assigns, each agree that no legal or equitable action related to the Claims will be initiated by any Party against another Party during the Term of this Agreement.

8. Remedies and Defenses upon Expiration of the Term of this Agreement. Upon the expiration of the Term of this Agreement, the Parties shall retain any and all legal and equitable claims, remedies, defenses, rights and duties to the fullest extent of law, which they have or may have as of the Effective Date of this Agreement.

9. No Admissions. This Agreement is not and shall not be construed as an admission of law or facts, wrongdoing, liability, or fault, a waiver of any right or defense, or an estoppel, either among the Parties or with respect to any person or entity not a Party to this Agreement. All Parties agree that this Agreement is protected by NRS 48.105and Rule 408 of the Federal Rules of Evidence.

10. Limited Use of Agreement. The signing of this Agreement, the negotiations leading to it, anything contained in this Agreement, and this Agreement, shall not be admissible for any purpose, or used against any Party, except to enforce its terms, to rebut a defense based on the passage of time or delay, or to defend against any claim, action, or other proceeding brought in breach of this Agreement. Nothing contained in this Agreement shall operate to create or expand any rights, remedies or liabilities of the Parties which existed prior to the execution of this Agreement.

11. Choice of Law. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF NEVADA, without regard to any choice of law rules that might apply the laws of any other jurisdiction.

12. Entire Agreement. This Agreement contains the entire agreement between the Parties with respect to its subject matter, supersedes and cancels any prior understanding or agreements with respect to the matters contained herein, and no statement, promise, or inducement made by any of the Parties or agents or counsel of any of the Parties that is not contained in this Agreement shall be valid or binding.

13. No Oral Modification. Any enlargement, modification, alteration or waiver of any provision of this Agreement, or any consent to any departure from the terms of this Agreement, shall not be binding unless expressed in writing and signed by all Parties or their respective representatives, successors, or assigns.

14. No Adverse Construction. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party, based upon the Agreement having been drafted by the mutual efforts of all Parties.

15. Binding Effect. This Agreement shall be binding upon and inure to the benefit of each Party and its respective successors and assigns, if any.

16. Full Authorization and Understanding. Each person signing this instrument represents that he or she is authorized to enter into on behalf of, and fully bind, the Party to this Agreement, to make and uphold the promises and warranties contained herein, and fully understands this Agreement.

17. Multiple Counterparts. The Parties to this Agreement agree that a facsimile signature shall be considered as if it were an original signature and that this Agreement may be executed in multiple counterparts.

18. No Disclosure. This Agreement is confidential and shall not be publicly disclosed

unless required by law, agreed to in writing by the Parties, or necessary for its enforcement.

19. Severability. Should any provision of this Agreement be held void or voidable, that finding shall not affect the enforceability or the validity of the remainder of this Agreement or the particular paragraph in which the void or voidable provision appears.

20. Voluntary Agreement. This Agreement was made voluntarily, without duress, fraud, or any other inducement, and no Party has relied upon any promises or representations as an inducement to this Agreement except as expressly set forth in this instrument.

DATED this 8 day of ~~February~~ March 2016.

CHRISTOPHER BEAVOR

By: _____

Its: _____

DATED this ___ day of February 2016.

JOSHUA TOMSHECK

By: _____

Its: _____

LVEGAS 65530-1 51620v1
LVEGAS 65530-1 56209v1

EXHIBIT H

IN THE SUPREME COURT OF THE STATE OF NEVADA

YACOV JACK HEFETZ,
Appellant,
vs.
CHRISTOPHER BEAVOR,
Respondent.

Supreme Court No. 68438/68843
District Court Case No. A645353

FILED

MAY 10 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

YACOV JACK HEFETZ,
Appellant,
vs.
CHRISTOPHER BEAVOR,
Respondent.

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 26, 2016

Tracie Lindeman, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

cc (without enclosures):
Hon. Ronald J. Israel, District Judge
Cohen-Johnson LLC
Dickinson Wright PLLC

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on APR 29 2016.

Deputy District Court Clerk

RECEIVED
APR 29 2016
CLERK OF THE COURT

RECEIVED
MAY 04 2016
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

YACOV JACK HEFETZ,
Appellant,
vs.
CHRISTOPHER BEAVOR,
Respondent.

YACOV JACK HEFETZ,
Appellant,
vs.
CHRISTOPHER BEAVOR,
Respondent.

Supreme Court No. 68438/68843
District Court Case No. A645353

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER these appeals DISMISSED."

Judgment, as quoted above, entered this 1st day of April, 2016.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this April 26, 2016.

Tracie Lindeman, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk

EXHIBIT I

132 Nev. 628
Supreme Court of Nevada.

TOWER HOMES, LLC, A Nevada Limited Liability Company, Appellant,
v.
William H. HEATON, Individually; and Nitz Walton & Heaton, Ltd., A Domestic Professional Corporation, Respondents.

No. 65755.
|
Aug. 12, 2016.

Synopsis
Background: Creditors, who were authorized by bankruptcy trustee to pursue Chapter 11 debtor's legal malpractice claim, brought legal malpractice action against attorney and law firm, asserting negligence and breach of fiduciary duty claims arising out of the loss of earnest money deposits that creditors gave to debtor to reserve condominium space in buildings that debtor planned to build. The Eighth Judicial District Court, Clark County, Gloria Sturman, J., 2014 WL 2892155, entered summary judgment in favor of attorney and law firm. Creditors appealed.

Holdings: The Supreme Court, Hardesty, J., held that:

[1] creditors did not pursue legal malpractice claim on behalf of debtor's estate, and thus, conditions set forth in bankruptcy statute, permitting estate's representative to pursue debtor's claims, were not satisfied, and

[2] bankruptcy trustee's stipulation and court's order permitting creditors to pursue debtor's legal malpractice claim constituted assignment of the claim in violation of public policy against assignments of legal malpractice claims.

Affirmed.

West Headnotes (14)

[1] **Appeal and Error**
De novo review

The Supreme Court reviews a summary judgment order de novo.

[2] **Judgment**
Absence of issue of fact

Summary judgment is appropriate only when the pleadings and record demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

[3] **Appeal and Error**
Summary Judgment

When reviewing a summary judgment motion on appeal, evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.

[4] **Bankruptcy**
In general; standing

A bankruptcy trustee can pursue a debtor's legal claims. 11 U.S.C.A. §§ 704(a), 1123(b)(3)(B).

[5] **Assignments**
For Tort

As a matter of public policy, the court cannot permit enforcement of a legal malpractice action which has been transferred by assignment, but

which was never pursued by the original client.

1 Cases that cite this headnote

[6] **Attorney and Client**
In general; limitations

The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client.

[7] **Bankruptcy**
Leave to sue
Bankruptcy
Construction, execution, and performance

Where a Chapter 11 bankruptcy plan of reorganization grants a creditor the right to pursue a claim belonging to the debtor's estate as a representative of the estate, and where the representative has no independent claim to any proceeds from a successful prosecution, there has been no assignment of the claim. 11 U.S.C.A. § 1123(b)(3)(B).

[8] **Bankruptcy**
Leave to sue
Bankruptcy
Requisites of Confirmable Plan

Although Nevada law prohibits the assignment of legal malpractice claims, a Chapter 11 bankruptcy plan may provide for an estate representative to pursue a legal malpractice claim belonging to the estate without an assignment so long as the representative is prosecuting the claim on behalf of the estate. 11 U.S.C.A. § 1123(b)(3)(B).

1 Cases that cite this headnote

[9] **Assignments**
For Tort
Bankruptcy
In general; standing

Pursuit of a legal malpractice claim by a Chapter 11 bankruptcy estate representative on behalf of the estate is not contrary to the rule prohibiting assignment of a legal malpractice claim because the representative does not own the claim and is entitled only to reimbursement for incurred expenses and a reasonable hourly fee for its services, as permitted by federal bankruptcy law. 11 U.S.C.A. § 1123(b)(3)(B).

[10] **Assignments**
By Assignee
Bankruptcy
In general; standing

If a party seeks to prosecute a legal malpractice action belonging to a Chapter 11 bankruptcy estate on its own behalf, it must do so as an assignee, not as a special representative. 11 U.S.C.A. § 1123(b)(3)(B).

[11] **Assignments**
By Assignee
Bankruptcy
In general; standing

Creditors did not pursue legal malpractice claim belonging to Chapter 11 bankruptcy estate on behalf of the estate, and thus, conditions set forth in bankruptcy statute, permitting estate's representative to pursue debtor's claims, were not satisfied, where bankruptcy court's order transferred control and proceeds of the claim to the creditors. 11 U.S.C.A. § 1123(b)(3)(B).

that malpractice claims should not be subject to assignment.

[12] **Assignments**
For Tort
Bankruptcy
Leave to sue

Bankruptcy trustee's stipulation and court's order permitting creditors to pursue Chapter 11 debtor's legal malpractice claim, arising out of the loss of earnest money deposits that creditors gave to debtor to reserve condominium space, constituted assignment of the claim in violation of public policy against assignment of legal malpractice claims; although order did not use the term "assigned," court gave creditors the right to pursue any and all claims on debtor's behalf, no limit was placed on creditors' control of the case, and creditors were entitled to any recovery. 11 U.S.C.A. § 1123(b)(3)(B).

[13] **Assignments**
For Tort
Bankruptcy
In general; standing

When the conditions set forth in bankruptcy statute, allowing representative of Chapter 11 bankruptcy estate to pursue debtor's claims, are not satisfied, Nevada law prohibits the assignment of legal malpractice claims from a bankruptcy estate to creditors. 11 U.S.C.A. § 1123(b)(3)(B).

1 Cases that cite this headnote

[14] **Assignments**
For Tort

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 supporting the conclusion

Attorneys and Law Firms

****119** Eglet Prince and Dennis M. Prince, Las Vegas; Keating Law Group and John T. Keating, Ian C. Estrada, and Eric N. Tran, Las Vegas, for Appellant.

Lewis Brisbois Bisgaard & Smith LLP and Jeffrey D. Olster and V. Andrew Cass, Las Vegas, for Respondents.

Before HARDESTY, SAITTA and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

***630** In this case, a bankruptcy court entered an order authorizing the bankruptcy trustee to permit a group of creditors to pursue a debtor's legal malpractice claim in the debtor's name. The order provided that the creditors were entitled to all financial benefit from the claim, and no limit was placed on the creditors' control of the lawsuit. The creditors ****120** then pursued that claim in Nevada district court. On the defendant attorney and law firm's motion, the district court entered summary judgment concluding that Nevada law prohibits the assignment of legal malpractice claims. To resolve this appeal, ***631** we are asked to consider whether the trustee's stipulation to permit the creditors to pursue the claim and the bankruptcy court's order authorizing the same resulted in an impermissible assignment of a legal malpractice claim. We conclude that the stipulation and order constituted an assignment, which is prohibited under Nevada law as a matter of public policy. Further, while we recognize that, when certain conditions are met, creditors may bring a debtor's legal malpractice claim pursuant to 11 U.S.C. § 1123(b)(3)(B) (2012), those conditions were not met in this case.

FACTS AND PROCEDURAL HISTORY

Appellant **Tower Homes**, LLC, and Rodney Yanke, its managing member, began developing a residential common ownership project called Spanish View **Towers** Project (hereinafter the project). **Tower Homes** planned to build three 18–story condominium **towers** as a part of the project. Attorney William Heaton and the law firm Nitz, Walton & Heaton, Ltd. (collectively Heaton), were retained by **Tower Homes** for legal guidance. A number of individual investors (hereinafter the purchasers) entered into contracts with **Tower Homes** and made earnest money deposits to reserve condominium space. The project failed, and **Tower Homes** entered Chapter 11 bankruptcy protection.

The purchasers were among the many creditors during the bankruptcy proceedings. A plan of reorganization was created by the bankruptcy trustee and a confirmation order was entered by the bankruptcy court in 2008. The plan and the confirmation order stated that the trustee and the bankruptcy estate retained all legal claims.

In 2010, the bankruptcy trustee entered into a stipulation with the purchasers recognizing that the trustee did not have sufficient funds to pursue any legal malpractice claims arising out of the loss of the purchasers' earnest money deposits and permitting the purchasers to pursue that claim in the **Tower Homes**' name. The bankruptcy court then entered an order authorizing the trustee to release to the purchasers all of **Tower Homes**' claims against any individual or entity that was liable for the loss of the earnest money deposits. Because there is a dispute as to whether the purchasers are pursing the claim individually, on behalf of the estate, or as **Tower Homes**, LLC, we will refer to the appellant party in this case as the purchasers.

Pursuant to the 2010 order, the purchasers filed a legal malpractice lawsuit in 2012 against Heaton, naming **Tower Homes** as plaintiff, alleging negligence and breach of fiduciary duty claims. The district court was not satisfied that the purchasers had standing under the 2010 order to pursue the claim, but it allowed the purchasers to ask the bankruptcy court for an amended order to remedy any potential concerns.

In 2013, the trustee and bankruptcy court again attempted to allow the purchasers to pursue the claims. The second stipulation ***632** agreed to by the trustee and the purchasers stated, in relevant part, as follows:

> 1) The Trustee has determined that he does not intend and, in any event, does not have sufficient funds in the Estate to pursue claims on behalf of the Debtor....
>
> ....
>
> 5) The Trustee hereby stipulates and *agrees to permit the **Tower Homes** Purchasers[ ] to pursue* ... the action currently filed in the Clark County District Court styled as ***Tower Homes**, LLC v. William H. Heaton, et al.* ...

(Emphasis added.)

The relevant portion of the bankruptcy court's corresponding order stated:

> [T]his Order authorizes the *Trustee to permit the **Tower Homes** Purchasers [ ] to pursue any and all claims on behalf of **Tower Homes**, LLC* (the "Debtor") ... which shall specifically include ... pursuing the action currently filed in the Clark County District Court styled as ***Tower Homes**, LLC v [.] William H. Heaton et al.* ...
>
> ****121** ... [T]his Court hereby authorizes the law firm of Marquis Aurbach Coffing, and/or Prince & Keating LLP ... to recover any and all earnest money deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and the **Tower Homes** Purchasers and that any such recoveries *shall be for the benefit of the **Tower Homes** Purchasers.*

(Emphases added.)

Heaton moved for summary judgment in the district court, arguing that the 2013 bankruptcy stipulation and order constituted an impermissible assignment of a legal malpractice claim to the purchasers. The district court agreed and granted summary judgment in favor of Heaton. This appeal follows.

DISCUSSION

[1] [2] [3] We review a summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate only when the pleadings and record demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When reviewing a summary judgment motion, "evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*

[4] When a bankruptcy petition is filed, all of the debtor's property, other than certain exceptions, becomes part of the bankruptcy estate. ***633** 11 U.S.C. § 541(a) (2012). A bankruptcy trustee is charged with administering the estate and recovering assets for the creditors' benefit. 11 U.S.C. § 704(a) (2012); 11 U.S.C. § 1123(b)(3)(B) (2012). The trustee can pursue a debtor's legal claims. *Office of Statewide Health Planning & Dev. v. Musick, Peeler & Garrett,* 76 Cal.App.4th 830, 90 Cal.Rptr.2d 705, 707–08 (1999); *see also In re J.E. Marion, Inc.*, 199 B.R. 635, 637 (Bankr.S.D.Tex.1996) (stating that potential legal claims belong to the estate). Therefore, when **Tower Homes** entered bankruptcy protection, the trustee was allowed to pursue a potential legal malpractice claim against Heaton. However, the issue presented in this case is whether the bankruptcy order impermissibly assigned a legal malpractice claim under Nevada law.

Under Nevada law, the assignment of legal malpractice claims is generally prohibited

[5] [6] "As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment ... but which was never pursued by the original client." *Chaffee v. Smith*, 98 Nev. 222, 223–24, 645 P.2d 966, 966 (1982). "The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Id.* at 224, 645 P.2d at 966.

Notwithstanding the rule set forth in *Chaffee*, the purchasers argue that they were named representatives of the estate and under federal law a Chapter 11 bankruptcy plan may permit such representatives to bring a legal malpractice claim on behalf of the estate without an assignment, or, alternatively, that there was no assignment of the legal malpractice claim, only an assignment of proceeds. Heaton argues that the 2013 bankruptcy stipulation and order did not appoint the purchasers to represent the bankruptcy estate in a legal malpractice claim on behalf of the estate as permitted under 11 U.S.C. § 1123(b)(3)(B) (2012), but instead purported to authorize the purchasers to prosecute a legal malpractice action on their own behalf and benefit in **Tower Homes**' name, thus constituting an unlawful assignment of a legal malpractice claim.

Bankruptcy statutes permit bankruptcy creditors to bring debtor malpractice claims under certain conditions

[7] Courts recognize that creditors can bring a debtor's legal malpractice claim under bankruptcy law when certain conditions are satisfied. *See Musick,* 90 Cal.Rptr.2d at 708. 11 U.S.C. § 1123(b)(3)(B) (2012) states that "a plan may ... provide for ... the retention and enforcement [of a claim of the estate] by the debtor, by the trustee, or *by a representative of the estate* appointed for such purpose, of any such claim or interest." (Emphasis added.) Where a ***634** Chapter 11 bankruptcy plan of reorganization grants a ****122** creditor the right to pursue a claim belonging to the debtor's estate pursuant to 11 U.S.C. § 1123(b)(3)(B) (2012) as a representative of the estate, and where the representative "has no independent claim to any proceeds from a successful prosecution, there has been no assignment" of the claim. *Appletree Square I Ltd. P'ship v. O'Connor & Hannan,* 575 N.W.2d 102, 106 (Minn.1998).

[8] [9] [10] Thus, although Nevada law prohibits the assignment of legal malpractice claims, a bankruptcy plan may provide for an estate representative to pursue a legal malpractice claim belonging to the estate without an assignment so long as the representative is prosecuting the claim "on behalf of the estate." *Musick,* 90 Cal.Rptr.2d at 708. Pursuit of such a claim by a bankruptcy estate representative is not contrary to the rule prohibiting assignment because the representative "does not own the claim and is entitled only to reimbursement for incurred expenses and a reasonable hourly fee for its services," as permitted by federal bankruptcy law. *Id.* "[I]f a party seeks to prosecute the action on its own behalf, it must do so as an assignee, not as a special representative." *Id.*

[11] Although the purchasers assert that the bankruptcy stipulation and order authorized them to bring the legal malpractice action in **Tower Homes**' name on behalf of the estate as set forth under section 11 U.S.C. § 1123(b)(3)(B) (2012), the bankruptcy court's order transferred control and proceeds of the claim to the purchasers. We therefore conclude that the purchasers are not pursuing a legal malpractice action on behalf of **Tower Homes**' estate as provided under 11 U.S.C. § 1123(b)(3)(B) (2012).

The legal malpractice claim against Heaton was improperly assigned to the purchasers

[12] [13] When the 11 U.S.C. § 1123(b)(3)(B) (2012) conditions are not satisfied, Nevada law prohibits the assignment of legal malpractice claims from a bankruptcy

estate to creditors. *See Chaffee*, 98 Nev. at 223–24, 645 P.2d at 966 (generally prohibiting the assignment of legal malpractice claims (citing *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976) (detailing policy considerations that underlie the nonassignability of legal malpractice claims))); *see also In re J.E. Marion, Inc.*, 199 B.R. at 639 ("[T]he costs to the legal system of assigning legal malpractice claims in the bankruptcy context outweighs the benefits")

To overcome these concerns, the purchasers contend that they were only assigned proceeds, not the entire malpractice claim ***635** against Heaton.[1] IN *EDWARD J. Achrem, CHARTERED v. exprEssway plaza Ltd. Partnership,* this court determined that the assignment of personal injury claims was prohibited, but the assignment of personal injury claim proceeds was allowed. 112 Nev. 737, 741, 917 P.2d 447, 449 (1996).

We are not convinced that *Achrem'* s reasoning applies to legal malpractice claims; however, even if an assignment of the claim is distinguished from a right to proceeds in the legal malpractice context, the 2013 bankruptcy stipulation and order constitute an assignment of the entire claim. In *Achrem,* this court determined that the difference between an assignment of an entire case and an assignment of proceeds was the retention of *control*. *Id.* When only the proceeds are assigned, the original party maintains control over the case. *Id.* at 740–41, 917 P.2d at 448–49. When an entire claim is assigned, a new party gains control over the case. *Id.* Here, the bankruptcy court gave the purchasers the right to "pursue any and all claims on behalf of ... [d]ebtor ... which ****123** shall specifically include ... pursuing the action currently filed in the Clark County District Court styled as ***Tower Homes**, LLC v[.] William H. Heaton, et al.*" No limit was placed on the purchasers' control of the case, and the purchasers were entitled to any recovery.[2]

[14] As the court in *Goodley* stated, "[i]t 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." 133 Cal.Rptr. at 87. Allowing such assignments would "embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* Here, issues regarding the personal nature of the attorney-client privilege are implicated. Also, a number of confidentiality problems ***636** arise if the purchasers are allowed to bring this claim. For example, the record reflects that plaintiff's counsel attempted to discover confidential files regarding Heaton's representation of **Tower Homes**. Because the bankruptcy court's order demonstrates that the purchasers are actually pursuing the claim, any disclosure potentially breaches Heaton's duty of confidentiality to **Tower Homes**. Additionally, **Tower Homes** can no longer control what confidential information is released, because it cannot decide whether to dismiss the claim in order to avoid disclosure of confidential information. In Nevada, the duty of confidentiality does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his or her client." NRS 49.115(3).

While the 2013 bankruptcy stipulation and order here do not explicitly use "assigned," such formalistic language is not required for a valid assignment. *See Easton Bus. Opportunities, Inc. v. Town Exec. Suites,* 126 Nev. 119, 127, 230 P.3d 827, 832 (2010) ("[T]here are no prescribed formalities that must be observed to make an effective assignment. The assignor must manifest a present intention to transfer its contract right to the assignee." (internal quotations and citations omitted)). The 2013 bankruptcy stipulation and court order express the bankruptcy court's and the bankruptcy trustee's present intention to allow the purchasers to control the legal malpractice case. As a result, we conclude that the district court properly determined that the legal malpractice claim was assigned to the purchasers.

Accordingly, for the reasons set forth above, we affirm the district court's summary judgment.

We concur: SAITTA, and PICKERING, JJ.

All Citations

132 Nev. 628, 377 P.3d 118, 132 Nev. Adv. Op. 62

Footnotes

1 The purchasers also argue that no assignment occurred because **Tower Homes**, not the purchasers, is the real party in interest as **Tower Homes** is the only entity with the requisite attorney-client privilege to bring a legal malpractice action. However, given the clear and express language in the 2013 bankruptcy stipulation and order providing the purchasers with a right to bring the claim and the exclusive interest in proceeds, we conclude that this contention is meritless. *Painter v. Anderson,* 96 Nev. 941, 943, 620 P.2d 1254, 1255–56 (1980) ("The concept 'real party in interest'

under NRCP 17(a) means that an action shall be brought by a party who possesses the right to enforce the claim and who has a significant interest in the litigation." (internal quotations omitted)).

2 The purchasers also contend that even if their claim was impermissibly assigned, the portion of the bankruptcy court order allowing the purchasers to retain any recovery should be ignored and the proceeds should revert back to the estate. However, the purchasers have cited no authority to support a remedy that would result in rewriting the bankruptcy court's order severing the purchasers' rights to proceeds, and we decline to do so.

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EXHIBIT J

62 Cal.App.3d 389
Court of Appeal, Second District, Division 1, California.

Harry I. GOODLEY, Plaintiff and Appellant,
v.
WANK AND WANK, INC., a corporation, et al., Defendants and Respondents.

Civ. 48001.
|
Sept. 28, 1976.

Synopsis

The assignee of a claim for damages for legal malpractice brought an action on the claim against a law firm. The Superior Court, Los Angeles County, August J. Goebel, J., entered judgment for defendants, and plaintiff appealed. The Court of Appeal, Lillie, J., held that the claim in suit was not assignable.

Affirmed.

West Headnotes (1)

[1] Assignments
For Tort

Claim for damages for legal malpractice was not assignable. West's Ann.Code Civ.Proc. § 437c; West's Ann.Civ. Code, §§ 953, 954.

143 Cases that cite this headnote

Attorneys and Law Firms

***391 **83** Harry I. Goodley, in pro per.

Roper & Folino and Craig N. Beardsley, Los Angeles, for defendants and respondents.

Opinion

LILLIE, Associate Justice.

The First Amended Complaint for Negligence alleges 'That plaintiff is the owner of the claim (legal malpractice) against defendants herein by virtue of a written assignment by Eleanor Rae Katz, dated August 7, 1972'; that defendants are attorneys at law and represented Eleanor Katz in a dissolution of marriage proceeding during the course of which they were negligent in advising her that they did not have to keep in their possession certain original insurance policies of which she was beneficiary and returned them to her, and in failing to secure a court order to restrain her husband from changing the status of said policies; that subsequently and during the pendency of the dissolution proceeding, her husband found the policies and, without her knowledge, cancelled the same and shortly thereafter died; that defendants' erroneous advice that she was protected in her property rights, was ***392** the proximate cause of her loss of the proceeds from the policies; and that as a result of defendants' negligence she has been damaged in the sum of $147,000. Subsequent to the filing of their answer and extensive discovery proceedings, defendants filed motion for summary judgment. Judgment was entered for defendants and against plaintiff on the order granting the motion. Plaintiff appeals therefrom.

The motion for summary judgment was made under section 437c, Code of Civil Procedure. It was supported by declaration of defendants' counsel which generally asserted that plaintiff's cause of action is based on a written assignment of a tort claim for negligent performance of personal legal services rendered to Eleanor Katz by defendants. In his opposing declaration plaintiff asserted the right to sue under the written assignment and relied heavily upon the facts of the underlying malpractice claim. The sole issue was whether by virtue ****84** of the assignment plaintiff has standing to bring this action for legal malpractice.[1]

On the state of the record it is clear that no factual issues were tendered by the declarations. The contention merely was that plaintiff has no standing to sue. Accordingly, we are not concerned with the sufficiency of the affidavits but with the sufficiency of the first amended complaint to state a cause of action in this plaintiff, the real issue being that the cause of action for tortious conduct by defendants, even if properly alleged and proved, cannot be asserted by him. 'That question may appropriately be

determined on a motion for summary judgment. (Goldstein v. Hoffman, 213 Cal.App.2d 803, 811, 29 Cal.Rptr. 334; Wilson v. Wilson, 54 Cal.2d 264, 269, 5 Cal.Rptr. 317, 352 P.2d 725.) We are persuaded, moreover, that the motion herein presented and submitted to the court, notwithstanding its nomenclature, was nothing more than a motion for judgment on the pleadings. (See Maxon v. Security Ins. Co., 214 Cal.App.2d 603, 610, 29 Cal.Rptr. 586.) Accordingly, the motion has the purpose and effect of a general demurrer. (Colberg, Inc. v. State of California ex rel. Dept. of Pub. Wks., 67 Cal.2d 408, 411—414, 62 Cal.Rptr. 401, 432 P.2d 3.) When a motion is made for a judgment on the pleadings, 'the only question, as on a general demurrer, is one of law, and that question is simply whether the complaint states a ***393** cause of action. (Citations.)' (Maxon v. Security Ins. Co., supra, 214 Cal.App.2d at p. 610, 29 Cal.Rptr. (586) at p. 589.)' (Franklin v. Municipal Court, 26 Cal.App.3d 884, 900, 103 Cal.Rptr. 354, 364.[2]) Thus we accept as true all allegations of the first amended complaint. (Franklin v. Municipal Court, 26 Cal.App.3d 884, 900, 103 Cal.Rptr. 354.)

If plaintiff has the right to maintain the within action said right can be based only on a written assignment. The crux of the issue is whether a cause of action for legal malpractice is assignable.[3]

In 1872 our Legislature effected a change in the common law rule of nonassignability of choses in action by enacting sections 953[4] and 954[5], Civil Code. Thus a thing in action arising out of either the violation of a right of property or an obligation or contract may be transferred (Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605; Stapp v. Madera Canal & Irr. Co., 34 Cal.App. 41, 46, 166 P. 823). The construction and application of the broad rule of assignability have developed a complex pattern of case law underlying which is the basic public policy that "(a)ssignability of things in action is now the rule; nonassignability, the exception" (Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98, 101; Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1; Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959; Everts v. Will S. Fawcett Co., 24 Cal.App.2d 213, 215, 74 P.2d 815). "(A)nd this exception is confined to ****85** wrongs done to the person, the reputation, of the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." (Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98, 101.) Thus, causes of action for personal injuries arising out of a tort are not assignable[6] nor are those founded upon wrongs of a purely ***394** personal nature such as to the reputation or the feelings of the one injured.[7] Assignable are choses in action arising out of an obligation or breach of contract[8] as are those arising out of the violation of a right of property (s 954, Civ.Code) or a wrong involving injury to personal or real property.[9]

'Legal malpractice consists of the failure of an attorney 'to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' (Lucas v. Hamm (1961) 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 825, 364 P.2d 685, 689.) When such failure proximately causes damage, it gives rise to an action in tort. Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. . . . ( ) Malpractice in the legal field usually causes damage to intangible property interests . . ..' (***395** Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 181, 98 Cal.Rptr. 837, 838, 491 P.2d 421, 422.) The elements of a cause of action for legal malpractice are set up in Budd v. Nixen, 6 Cal.3d 195 at page 200, 98 Cal.Rptr. 849, at page 852, 491 P.2d 433, at page 436: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence (citations).' Plaintiff's pleading sounds in tort. He has alleged negligence in the performance of legal services rendered to his assignor by defendants in their failure to secure a restraining order to prevent a third party from interfering with the status of certain insurance policies. He does not ****86** herein seek to recover the proceeds of the policies, indeed the amount thereof is not alleged, nor plead direct injury to personal or real property or sue for breach of contract. Although the relationship between plaintiff's assignor and defendants arose out of a contract for legal services, the underlying cause herein is clearly one for malpractice the gravamen of which is the negligent breach by defendants of a duty to plaintiff's assignor. The prayer is for money damages.

Appellant argues that the claim is 'for property damages arising out of the negligent performance of attorneys-at-law representing the assignor and it being a nonpersonal tort is freely assignable'. Respondents' position is that the duty owed to plaintiff's assignor and allegedly breached by them is a personal one thus the tort is of a 'purely personal nature,' and is none the less so because the damage alleged to have been suffered by plaintiff's assignor as a direct consequence of their alleged negligence is pleaded in terms of money.

Our view that a chose in action for legal malpractice is

not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon.

'The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity . . .' (Cox v. Delmas, 99 Cal. 104, 123, 33 P. 836, 839; Neel v. Magana, Olney, Levy, Cathcart and Gelfand, 6 Cal.3d 176, 189, 98 Cal.Rptr. 837, 491 P.2d 421). Thus, not only does the attorney owe the duty to use skill, prudence and diligence in the performance of the tasks he undertakes for his client (***396** Smith v. Lewis, 13 Cal.3d 349, 356, 118 Cal.Rptr. 621, 530 P.2d 589) but owes undivided loyalty to the interests professionally entrusted to him. Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved. For example, so personal and highly confidential is the relationship and so personal are the services performed by the attorney that his authority, in the absence of exceptional justifying circumstances, is not delegable to other counsel without the client's permission; thus, he cannot substitute another attorney in his place by assigning a contract with the client while services are still being rendered thereunder. (See Taylor v. Black Diamond Coal M. Co., 86 Cal. 589, 590, 25 P. 51.) Another example is the early denial in California of liability of an attorney in tort or contract to an intended beneficiary injured by a negligently drawn will (Buckley v. Gray, 110 Cal. 339, 42 P. 900).[10] Not until Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 and Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, was the scope of the liability of an attorney enlarged by recognition of a cause of action in tort for negligence or for breach of contract in those intended beneficiaries; the Supreme Court reasoned that such extension of liability 'does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.' (P. 589, 15 Cal.Rptr. p. 824, 364 P.2d p. 688.)

By retaining defendant-attorneys to represent her in connection with her status and personal and property rights arising out of dissolution of her marriage, there was created the professional relationship of attorney-client between defendants and plaintiff's assignor which defined the scope of reciprocal rights and duties of the parties. The attorneys' duty to their client arising out of their professional employment was a personal one running solely to her (****87** Norton v. Hines, 49 Cal.App.3d 917, 920, 123 Cal.Rptr. 237). An attorney has but one intended beneficiary, his client (see DeLuca v. Whatley, 42 Cal.App.3d 574, 576, 117 Cal.Rptr. 63 (duty to defend client accused of crime)), and no one other than plaintiff's assignor was intended to be benefitted by defendants' performance[11] (***397** Donald v. Garry, 19 Cal.App.3d 769, 771, 97 Cal.Rptr. 191). However, the personal nature of the duty owed to the client does not perforce convert the breach thereof to a 'tort of a purely personal nature' on a par with those wrongs done to the person of the injured party or his reputation or feelings which fall within the exception to the general rule of assignability; but neither does the damage alleged to be a direct consequence of defendants' negligent breach of duty convert it to a claim 'for property damages' arising out of a 'non-personal tort' that is freely assignable.

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 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, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing 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.

Public policy encourages those who believe they have claims to solve their problems in a court of law and secure a judicial adjustment of their differences. The California Supreme Court has emphatically rejected the concept of self help (i.e., Daluiso v. Boone, 71 Cal.2d 484, 492, 78 Cal.Rptr. 707, 455 P.2d 811 (policy against self help in land disputes)). However, the ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services

rendered and out of ***398** resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession.

That assignability of the legal malpractice chose in action would be contrary to sound public policy is supported by many considerations based upon the nature of the services rendered by the legal profession. An analogous situation is found in the court's early refusal to recognize a naked right of action for fraud and deceit as a marketable commodity, holding that assignment of a bare right to complain of fraud[12] ****88** is contrary to public policy (Whitney v. Kelly, 94 Cal. 146, 148, 29 P. 624). In Sanborn v. Doe, 92 Cal. 152, 28 P. 105, the court quoted from Dickinson v. Seaver, 44 Mich. 624, 7 N.W. 182: "The present complainant, according to his own proofs, has merely purchased claims for the purpose of this litigation, or of some litigation. He was never defrauded. It would be against every rule of equity to allow a party to buy up stale claims, and then seek to establish fraud committed against his assignors. A right to complain of fraud is not assignable . . .." (92 Cal. p. 154, 28 P. p. 106.)

The judgment is affirmed.

WOOD, P.J., and THOMPSON, J., concur.

All Citations

62 Cal.App.3d 389, 133 Cal.Rptr. 83

Footnotes

1 The minute order reads in part: 'A review of all papers filed herein establishes there are no triable issues of material fact existing as to these parties, and Moving party is entitled to judgment as a matter of law. The action is without merit in that the cause of action is predicated on a tort (i.e., malpractice) and plaintiff is the assignee of the person who allegedly was the victim of malpractice, and causes of action for tort cannot be assigned. (Pacific Gas & Electric v. Nakano, 12 Cal.2d 711, 713 (,87 P.2d 700).)'

2 We adhere to the foregoing even though demurrer to the first amended complaint was overruled.

3 The court in Fazio v. Hayhurst, 247 Cal.App.2d 200, at page 202, 55 Cal.Rptr. 370 at page 371 (overruled on other grounds in Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 190, 98 Cal.Rptr. 837, 491 P.2d 421) stated: 'It is established in this state that a cause (of action) for damages arising out of an attorney's malpractice survives his death (citation) . . ..' (See also 65 A.L.R.2d 211, 216.) No authority that such cause of action may be assigned by the client has been called to our attention.

4 'A thing in action is a right to recover money or other personal property by a judicial proceeding.'

5 'A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. . . .'

6 (Fifield Manor v. Finston, 54 Cal.2d 632, 639, 642, 7 Cal.Rptr. 377, 354 P.2d 1073; Washington v. Washington, 47 Cal.2d 249, 254, 302 P.2d 569; Pacific Gas & Elec. Co. v. Nakamo, 12 Cal.2d 711, 713, 87 P.2d 700; Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605; McCafferty v. Golbank, 249 Cal.App.2d 569, 574, 57 Cal.Rptr. 695; Franklin v. Franklin, 67 Cal.App.2d 717, 726, 155 P.2d 637; Auslen v. Thompson, 38 Cal.App.2d 204, 214, 101 P.2d 136; Cassetta v. Del Frate, 116 Cal.App. 255, 257.)

7 (Reichert v. General Ins. Co., 68 Cal.2d 822, 834, 69 Cal.Rptr. 321, 442 P.2d 377; Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1; Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 463, 274 P. 959; Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98; Los Angeles Fire & Police Protection League v. Rodgers, 7 Cal.App.3d 419, 425, 86 Cal.Rptr. 623; Franklin v. Franklin, 67 Cal.App.2d 717, 726, 155 P.2d 637; Everts v. Will S. Fawcett Co., 24 Cal.App.2d 213, 215, 74 P.2d 815.)

8 (Sec. 954, Civ.Code; Reichert v. General Ins. Co., 68 Cal.2d 822, 834, 69 Cal.Rptr. 321, 442 P.2d 377; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182.)

9 (Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1 (statutory right of administrator of insolvent estate to set aside fraudulent conveyance for benefit of creditors); Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643 (property (money) obtained by fraudulent representation); Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605

(property injury to employer); Lehmann v. Schmidt, 87 Cal. 15, 22, 25 P. 161 (conversion of personal property); Moore v. Massini, 32 Cal. 590, 594 (trespass); Smith v. Stuthman, 79 Cal.App.2d 708, 709, 181 P.2d 123 (slander of title); Michal v. Adair, 66 Cal.App.2d 382, 388, 152 P.2d 490 (creditors cause of action to set aside fraudulent conveyance); Miller v. Bank of America, 52 Cal.App.2d 512, 515, 126 P.2d 444 (conversion); Auslen v. Thompson, 38 Cal.App.2d 204, 214, 101 P.2d 136 (fraudulent sale of corporate stock); Staley v. McClurken, 35 Cal.App.2d 622, 625, 96 P.2d 805 (conversion of personal property); Stapp v. Madera Canal & Irr. Co., 34 Cal.App. 41, 46, 166 P. 823 (damages to realty).)

10 Said the court in Buckley v. Gray, 110 Cal. 339 at pages 342—343, 42 P. 900 at page 900: '. . . the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter.'

11 This is not a case of an attorney's liability to an intended beneficiary as in Heyer v. Flaig, 70 Cal.2d 223, 74 Cal.Rptr. 225, 449 P.2d 161 and Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685.

12 Where the form of assignment to plaintiff is sufficient to cover the property rights and claims of his assignors in and to the moneys or property so obtained by fraud and deceit, it constitutes a transfer of more than a mere naked right of action for fraud and deceit, since it includes also the right to recover the moneys or property so obtained. (Jackson v. Deauville Holding Co., 219 Cal. 498, 502—503, 27 P.2d 643.)

EXHIBIT K

276 Conn. 257
Supreme Court of Connecticut.

Walter GURSKI
v.
ROSENBLUM AND FILAN, LLC, et al.

No. 17426.
|
Argued Sept. 21, 2005.
|
Decided Nov. 22, 2005.

Synopsis
Background: Judgment debtor assigned to judgment creditor bankruptcy estate's interest in legal malpractice action. The debtor then brought legal malpractice action against attorney and law firm following entry of default judgment against debtor in creditor's medical malpractice action. Following judgment on jury verdict in favor of debtor, defendants sought remittitur and filed motions to set aside the verdict and obtain judgment notwithstanding the verdict (JNOV). The Superior Court, Judicial District of Stamford, Tobin, J., 48 Conn.Supp. 226, 838 A.2d 1090,denied motions, but reduced damages. Appeal and cross-appeal were taken, and case was transferred.

[Holding:] The Supreme Court, Katz, J., held as a matter of first impression that assignment of legal malpractice action or proceeds of it to judgment creditor in medical malpractice action violated public policy and was unenforceable.

Reversed and remanded.

West Headnotes (4)

[1] **Assignments**
For Tort

An assignment of a legal malpractice claim or the proceeds from such a claim to an adversary in the same litigation that gave rise to the alleged malpractice is against public policy and thereby unenforceable.

20 Cases that cite this headnote

[2] **Assignments**
For Tort

Neither a legal malpractice claim nor the proceeds from such a claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice.

16 Cases that cite this headnote

[3] **Appeal and Error**
Property in General

The question of whether an assignment is barred as a matter of public policy is an issue of law, and review is plenary.

4 Cases that cite this headnote

[4] **Assignments**
For Tort

Judgment debtor's assignment of legal malpractice action or proceeds of it to judgment creditor in medical malpractice action violated public policy and was unenforceable; an assignment of a legal malpractice action to the adverse party in the underlying litigation would create the opportunity and incentive for collusion in stipulating to damages in exchange for an agreement not to execute on the judgment in the underlying litigation, feature a public and disreputable role reversal, convert a legal malpractice action into a commodity, undermine the sanctity of the attorney-client relationship,

result in decreasing the availability of legal services to insolvent clients, and impact negatively on the duty of confidentiality and further the commercialization of malpractice claims.

34 Cases that cite this headnote

Attorneys and Law Firms

****163** Frederick L. Murolo, with whom were Karen T. Murolo and, on the brief, Nadine M. Pare and Richard A. Roberts, Cheshire, for the appellants-appellees (defendants).

A. Reynolds Gordon, with whom was Frank A. DeNicola, Jr., Stamford, for the appellee-appellant (plaintiff).

BORDEN, NORCOTT, KATZ, VERTEFEUILLE and ZARELLA, Js.

Opinion

****164** KATZ, J.

[1] ***259** The dispositive issue in this appeal is whether a client may assign a legal malpractice claim or the proceeds from such a claim to the client's adversary in the underlying litigation. The defendants, the law firm of Rosenblum and Filan, LLC, and one of its principals, James Rosenblum (law firm), appeal from the judgment of the trial court, rendered in accordance with a jury verdict in favor of the plaintiff, Walter Gurski.[1] WE CONCLUDE THAT An assignment of a legal malpractice claim or the proceeds from such a claim to an adversary in the same litigation that gave rise to the ***260** alleged malpractice is against public policy and thereby unenforceable. Accordingly, we reverse the judgment.

The record discloses the following facts and procedural history. On or about May 12, 1994, Gurski filed a voluntary petition for bankruptcy under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101 et seq. The United States Bankruptcy Court for the District of Connecticut issued an automatic stay of postpetition actions against Gurski's property pursuant to 11 U.S.C. § 362(a). Thereafter, in 1997, Susan Lee commenced an action against Gurski, a podiatrist, for malpractice, alleging that, as a result of Gurski's negligent and careless treatment of her feet in 1995 and 1996, she was permanently injured and required further treatment and corrective surgery.[2] Gurski notified his insurance carrier, AIG Insurance Company (AIG), which retained the law firm to represent Gurski. Subsequently, by letter dated December 15, 1997, AIG informed Gurski that the action filed by Lee was not covered under his policy and, accordingly, that it no longer would provide a defense or indemnification. The law firm thereafter informed Gurski in a letter dated December 17, 1997, and in subsequent oral communications that, because he had no coverage under the AIG policy, he would need to retain other counsel. In a letter dated July 6, 1998, the law firm notified Gurski that it had filed a motion to withdraw its appearance, that he should plan to attend a court hearing on that motion, and that he needed to retain new counsel. On July 9, 1998, the law firm notified Gurski that the court had scheduled a hearing for settlement discussions in Lee's action on July 22, 1998, and that he should appear at that time. ***261** The hearing went forward and, because neither Gurski nor the law firm appeared, the court entered a default judgment against Gurski. In a letter dated August 11, 1998, the law firm notified Gurski of the default judgment, advised him of another hearing scheduled for August 27, 1998, and counseled him to attend that hearing. The law firm repeated therein that it did not represent him and that the court likely would grant its motion to withdraw shortly. By letter dated October 16, 1998, the law firm informed Gurski that the motion to withdraw its appearance was scheduled for October 19, 1998. The trial court, *Holzberg, J.*, granted that motion on October 20, 1998. There is nothing in the record reflecting ****165** that Gurski was notified of that decision.[3]

On November 16, 1998, Gurski received a certificate of closed pleadings notifying him that, on November 12, 1998, Lee had claimed the malpractice case to a hearing in damages. Seeking advice, Gurski forwarded that document to another law firm, O'Donnell, McDonald and Cregeen, LLC (O'Donnell), which responded on December 8, 1998, notifying Gurski that the trial court had granted the law firm's motion to withdraw on October 20, 1998, and advising him to seek other counsel as soon as possible. Additionally, O'Donnell advised Gurski that, because the default judgment in favor of Lee had entered during the period before the Bankruptcy Court granted Lee's motion for relief from the stay; see footnote 2 of this opinion; the court would likely open the default judgment. Despite his efforts to retain counsel, Gurski was unsuccessful, and, because he had not entered a pro se appearance, he was not notified of the December 21, 1998 hearing in damages at which judgment entered against him for $152,000. In January, 1999, after judgment had been rendered for Lee, Gurski retained

counsel, who thereafter moved to ***262** open the judgment. The trial court denied the motion to open, concluding that "[Gurski] was fully advised of the entry of the default, the hearing in damages and the entry of judgment. Having failed to take reasonable steps to respond to the notice of these proceedings and having failed to demonstrate that he failed to appear because of mistake, accident or other reasonable [cause], the motion to [open] is denied."

Under bankruptcy law, the judgment in favor of Lee was considered an administrative claim and was not subject to being discharged in Gurski's pending bankruptcy proceedings. Gurski's assets were insufficient to pay both the amount of the judgment in favor of Lee and the payments required under the plan of reorganization that Gurski had filed in the Bankruptcy Court. As a consequence, on October 15, 1999, following lengthy settlement negotiations with Lee, Gurski filed a motion to compromise with the Bankruptcy Court regarding the judgment against him. In an attempt to move his chapter 11 case to confirmation, and because he did not have sufficient funds to liquidate Lee's claim, Gurski proposed a compromise predicated on a legal malpractice claim his bankruptcy estate held against the law firm. Lee agreed, dependent upon specific conditions, to compromise her claim against the estate.[4] On December ***263** 21, 1999, the Bankruptcy Court granted the motion to compromise, subject to the following orders: "(1) [Gurski] may compromise the claim against the [bankruptcy] estate held by [Lee] by assigning to her the estate's interest in a certain legal malpractice claim ****166** it holds against the [l]aw [f]irm ... (2) [Gurski] may also grant [Lee] a security interest in said malpractice claim up to the maximum amount of $152,000.00 ... (3) [Lee's] claim against [Gurski] is limited solely and exclusively to any recovery which may be obtained in the malpractice claim up to $152,000.00 and any other claim is hereby ordered expunged ... (4)[t]he estate is authorized to retain special counsel to prosecute the malpractice claim on a one-third contingency fee basis ... [and] (5) [Lee's] right to recovery is subject to special counsel's claim for attorney's fees and expenses, all of which shall be submitted to this [c]ourt on appropriate application, notice and hearing." These conditions, in conjunction with the terms set forth in Gurski's motion to compromise; see footnote 4 of this opinion; constitute the terms of the assignment at issue in this appeal.

In accordance with his obligation under the compromise, Gurski commenced the present action against the law firm, alleging that its negligence and breach of contract were a proximate cause of his injury—the $152,000 judgment, plus interest and costs expended in an effort to open the judgment. The law firm filed several special defenses, including a challenge to the assignment as violative of public policy. The law firm also filed a motion in limine seeking to exclude evidence of the assignment as irrelevant and prejudicial. The trial court, *Tobin, J.*, conditionally granted the motion. The legal malpractice action was tried to a jury. At the conclusion of Gurski's case, the law firm moved for a directed verdict, challenging, inter alia, the enforceability of the assignment. In denying the motion, the trial ***264** court noted that, up to that point in the trial, there had been no evidence of such an assignment. At the conclusion of the law firm's case, the parties agreed by stipulation that the issue of the assignment would be reserved for decision by the court. Accordingly, pursuant to that agreement, the jury was not told of the assignment.

The jury concluded that Gurski had not breached the standard of care when treating Lee and that the law firm had breached the standard of care when representing Gurski. Accordingly, it returned a verdict in favor of Gurski for $220,318, which included $136,800 in economic damages and $83,518 in interest. Although the only evidence of damages offered during the trial was a judgment against Gurski in the amount of $152,000, the jury determined that the gross economic damages were $177,000, which they reduced by $25,000 based on the estimated costs that Gurski, who was uninsured, would have incurred in defending the underlying medical malpractice action. The jury further reduced the award by 10 percent for Gurski's comparative negligence, resulting in the final award of economic damages of $136,800.

The law firm filed a motion to set aside the verdict and, thereafter, a motion for judgment notwithstanding the verdict, claiming, inter alia, that, as a matter of public policy, it is improper for a party to assign a legal malpractice claim to an adversarial party in the underlying litigation. Therefore, according to the law firm, the verdict on the malpractice claim should not be enforced. In a comprehensive opinion, the trial court recognized and followed the majority of jurisdictions holding that legal malpractice claims are considered personal torts that may not be assigned. The trial court then identified a distinction recognized by some jurisdictions between an assignment of the underlying claim and an assignment of the proceeds from that claim. ***265** Following that distinction, the trial court concluded that Connecticut's public policy does not prohibit the assignment of the proceeds, even when it would prohibit the assignment of the underlying ****167** action itself. Accordingly, the trial court denied both the motion to set aside the verdict and the motion for judgment notwithstanding the verdict.

The law firm also filed a motion for remittitur, which the trial court granted in part. Specifically, the court reduced the gross damages to $114,300 because the only evidence of damages was Lee's judgment in the amount of $152,000. The court also reduced the jury's award of interest to simple interest of $54,644.79. Gurski conditionally agreed to accept the remittitur subject to the law firm's agreement that if it were to appeal the verdict, he would be permitted to appeal the remittitur. This appeal and cross appeal followed.[5]

[2] The law firm claims, inter alia, that the trial court improperly denied its motion for a directed verdict and its motion for judgment notwithstanding the verdict because: (1) Gurski's action against the law firm had been an invalid assignment of a legal malpractice action and thus void as against public policy; (2) Gurski had failed to present expert testimony that the law firm's breach of the standard of care proximately caused his damages; and (3) Gurski had not sustained any damages as a result of the law firm's conduct in that he was not personally liable to Lee for the $152,000 judgment against him.[6] We conclude that neither a legal malpractice ***266** claim nor the proceeds from such a claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice, and we reverse the judgment accordingly.[7]

[3] We first note the standard of review we apply to this issue. The question of whether an assignment is barred as a matter of public policy is an issue of law. See *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997) (question of whether challenged discharge violates public policy is question of law). Accordingly, our review is plenary. *Prescott v. Meriden*, 273 Conn. 759, 764, 873 A.2d 175 (2005).

In deciding this question, we begin with certain general principles that typically guide our inquiry as to the issue of assignability. In *Rumbin v. Utica Mutual Ins. Co.*, 254 Conn. 259, 267–68, 757 A.2d 526 (2000), we recognized, with respect to assignment of contract claims, "the modern approach to contracts reject[ing] traditional common-law restrictions on the alienability of contract rights in favor of free assignability of contracts. See 3 Restatement (Second), Contracts § 317, p. 15 (1981) ([a] contractual right can be assigned); J. Murray, Jr., Contracts (3d Ed. 1990) (the modern view is that contract rights should be freely assignable); 3 E. Farnsworth, Contracts (2d Ed. 1998) § 11.2, p. 61 ([t]oday most contract rights are freely transferable). Common-law restrictions on assignment were abandoned when courts recognized the necessity of permitting the transfer of contract rights. ****168** The force[s] of human convenience and business practice [were] too strong for the common-law doctrine that [intangible contract rights] are not assignable.... J. Murray, Jr., supra, § 135, p. 791." (Internal quotation marks omitted.)

***267** We have taken a contrary position, however, with respect to whether a tort claim can be assigned, at least when the claim is based on personal injury. In *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 384, 698 A.2d 859 (1997), although we ultimately concluded that the action at issue was a contract action rather than a tort action, we acknowledged certain well settled principles as to such assignments: "Under common law a cause of action for personal injuries cannot be assigned, and in the absence of a statutory provision to the contrary a right of action for personal injuries resulting from negligence is not assignable before judgment.... It seems that few legal principles are as well settled, and as universally agreed upon, as the rule that the common law does not permit assignments of causes of action to recover for personal injuries.... The rule was early recognized in Connecticut. See *Whitaker v. Gavit*, 18 Conn. 522, 526 [1847]. The reasons underlying the rule have been variously stated: unscrupulous interlopers and litigious persons were to be discouraged from purchasing claims for pain and suffering and prosecuting them in court as assignees; actions for injuries that in the absence of statute did not survive the death of the victim were deemed too personal in nature to be assignable; a tort-feasor was not to be held liable to a party unharmed by him; and excessive litigation was thought to be reduced." (Citations omitted; internal quotation marks omitted.) *Dodd v. Middlesex Mutual Assurance Co.*, supra, at 382–83, 698 A.2d 859; accord *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362, 370, 672 A.2d 939 (1996) (noting "long-standing rule that personal injury actions may not be assigned").

Because an action for legal malpractice can be pleaded either in contract or in tort; *Krawczyk v. Stingle*, 208 Conn. 239, 245, 543 A.2d 733 (1988); neither *Dodd* nor *Rumbin*, nor their labels, are helpful in the ***268** present case.[8] Therefore, rather than strain to fit each legal malpractice claim into a category often determined by counsel based on concerns not relevant to the inquiry at hand, we think the better approach is to resolve the issue uniformly on the basis of public policy. See *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 341 (Ind.1991) (noting that several jurisdictions have recognized that legal malpractice could be characterized as either assignable contract actions or nonassignable personal injury actions and instead have determined issue on basis of public policy).

Although this appeal raises an issue of first impression in Connecticut, many other jurisdictions have considered whether a legal malpractice claim may be assigned. A majority of those jurisdictions have concluded that legal malpractice claims are not assignable based on several overlapping public policy considerations.[9] Many ****169** of those courts discuss the unique and ***269** personal nature of the relationship between attorney and client and the need to preserve the sanctity of that relationship as a reason for prohibiting the assignment. See, e.g., *Schroeder v. Hudgins*, 142 Ariz. 395, 399, 690 P.2d 114 (Ct.App.1984) (assignment of legal malpractice claims barred, citing "uniquely personal" relationship between attorney and client); *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 397, 133 Cal.Rptr. 83 (1976) (citing "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"); *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo.App.), cert. denied, 1993 Colo. Lexis 728 (1993) ("the assignment of legal malpractice claims involve matters of personal trust and personal service and do not lend themselves to assignability because permitting the transfer of such claims would undermine the important relationship between an attorney and client"); *Christison v. Jones*, 83 Ill.App.3d 334, 338, 39 Ill.Dec. 560, 405 N.E.2d 8 (1980) (prohibiting assignment due to "the personal nature of the [attorney-client] relationship and the duty imposed upon the attorney, coupled with public policy considerations surrounding that relationship"); *Joos v. Drillock*, 127 Mich.App. 99, 105, 338 N.W.2d 736 (1983) (citing "personal nature of the attorney-client relationship" and other public policy concerns), appeal denied, 419 Mich. 935 (1984); ***270** *Earth Science Laboratories v. Adkins & Wondra, P.C.*, 246 Neb. 798, 801–802, 523 N.W.2d 254 (1994) (refusing to permit assignment because of "personal nature and confidentiality involved in the attorney-client relationship"); *Delaware CWC Liquidation Corp. v. Martin*, 213 W.Va. 617, 621–23, 584 S.E.2d 473 (2003) ("[t]o permit the assignment of a claim that is firmly rooted in the highly personal attorney-client relationship would denigrate both the legal profession and the justice system").

In that same vein, courts also have pointed to the incompatibility of the assignment and the attorney's duty of loyalty and confidentiality in rejecting assignments of legal malpractice claims. See, e.g., *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 140, 927 P.2d 796 (Ct.App.1996) (such assignments would negate attorney's ****170** fiduciary and ethical duty to client because assignee is not client); *Goodley v. Wank & Wank, Inc.*, supra, 62 Cal.App.3d at 397 (to allow such assignments would "embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client"); *Picadilly, Inc. v. Raikos*, supra, 582 N.E.2d at 342 (same); *Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn.App.1993) (allowing such assignments "would be incompatible with the attorney's duty to act loyally towards the client ... [and] to maintain confidentiality" [citation omitted]).

Courts also have cautioned that permitting the assignment of legal malpractice claims would encourage the commercialization of such claims and in turn spawn increased and unwarranted malpractice actions. See, e.g., *Goodley v. Wank & Wank, Inc.*, supra, 62 Cal.App.3d at 397 ("The 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 ***271** the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing 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, [and] promote champerty ...."); *Wagener v. McDonald*, supra, 509 N.W.2d at 191–93 (quoting "commodity" concerns raised by California court in *Goodley*); *White v. Auto Club Inter–Ins. Exchange*, 984 S.W.2d 156, 160 (Mo.App.1998) (agreeing with this concern as articulated by California court in *Goodley*).

In rejecting the assignment of a legal malpractice claim as against public policy, courts also have expressed concern that allowing an assignment would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender. See, e.g., *Botma v. Huser*, 202 Ariz. 14, 17, 39 P.3d 538 (Ct.App.2002) ("[S]uch assignments would enable a plaintiff 'to drive a wedge between the defense attorney and his client by creating a conflict of interest' with the result that, 'in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant.' [*Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex.App.1994)].... Because '[a] plaintiff who is injured by an uninsured, insolvent defendant has every incentive to look elsewhere for a source of funding,' the plaintiff might well 'make a

deal [with the defendant] and focus on the defense lawyer' for monetary recovery if malpractice assignments were allowed."); *Goodley v. Wank & Wank, Inc.*, supra, 62 Cal.App.3d at 397 ("the ever present threat of assignment and the possibility ***272** that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession").

The final consideration cited by several jurisdictions barring assignment of legal malpractice claims pertains specifically to an assignment of such a claim to the adverse party in the underlying action and ****171** the potential for a reversal of roles that could undermine the legitimacy of the malpractice judgment. See, e.g., *Kracht v. Perrin, Gartland & Doyle*, 219 Cal.App.3d 1019, 1024–1025, 268 Cal.Rptr. 637 (1990) ("[A] malpractice suit filed by the former adversary is 'fraught with illogic' ... and unseemly arguments: In the former lawsuit [the plaintiff] judicially averred and proved she was entitled to recover against [judgment debtor]; but in the [subsequent] malpractice lawsuit [the plaintiff] must judicially aver that, but for [the] attorney's negligence, she was not entitled to have recovered against [the judgment debtor]. Reduced to its essence, [the plaintiff's] argument in the malpractice action is 'To the extent I was not entitled to recover, I am now entitled to recover.' " [Citation omitted.]); *Picadilly, Inc. v. Raikos*, supra, 582 N.E.2d at 344–45 ("Our decision to bar the assignment of these claims is also grounded on a highly practical consideration: the trial of this assigned malpractice claim would feature a public and disreputable role reversal. The mechanics of trying this case would magnify the least attractive aspects of the legal system.... In [the malpractice action], [the assignee] and his lawyer ... must necessarily bear the burden of proving a proposition directly contrary to the proposition they ***273** successfully proved in [the underlying personal injury action]. They now assert that it was [the assignor's] attorneys, and not [the assignor's conduct], that led the jury to award $150,000 in punitive damages. Because of the unique nature of the trial within a trial, [the assignee's] change in position would be obvious to all the jurors hearing the evidence in [the malpractice action]. They would rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered." [Citations omitted.]); *Freeman v. Basso*, 128 S.W.3d 138, 142 (Mo.App.2004) ("Here, we are faced with a situation in which the parties attempting to bring a claim for legal malpractice are the very parties who benefited from that malpractice [assuming that it occurred] during a previous stage of this litigation. The Missouri rule against assignment was created precisely so as to prevent this type of counterintuitive claim."); see also *Alcman Services Corp. v. Samuel H. Bullock, P.C.*, 925 F.Supp. 252, 256–58 (D.N.J.1996) (barring assignment on grounds of judicial estoppel and public policy, relying on court's reasoning in *Zuniga v. Groce, Locke & Hebdon*, supra, 878 S.W.2d at 318, discussed herein), aff'd, 124 F.3d 185 (3d Cir.1997). Several of these courts have noted that such assignments create an opportunity and incentive for collusion. See, e.g., *Coffey v. Jefferson County Board of Education*, 756 S.W.2d 155, 156–57 (Ky.App.1988) (principally rejecting assignment because facts suggested collusion between assignor and assignee); *Wagener v. McDonald*, supra, 509 N.W.2d at 191 (noting risk of collusion in assignment to adverse party in underlying action).

In examining all of the aforementioned considerations, we are not persuaded that every voluntary assignment of a legal malpractice action should be barred as a matter of law.[10] Indeed, there is a significant ****172** minority ***274** view that rejects a per se bar on assignments, questioning the rationale of some of the public policy considerations cited by the majority view and favoring instead a case-by-case determination when meritorious public policy concerns actually are implicated. See *Richter v. Analex Corp.*, 940 F.Supp. 353, 356–58 (D.D.C.1996) (concluding that assignment not barred under facts of case when successor company asserted malpractice as counterclaim against predecessor company's counsel; determining that no policy concerns implicated because claim sold to uninterested party and purely pecuniary harm at issue); *Thurston v. Continental Casualty Co.*, 567 A.2d 922, 923 (Me.1989) (An assignment was permitted under the specific facts of the case wherein the defendant in the underlying action assigned to the plaintiff a claim against the defendant's insurer and the insurer's attorney for failure to defend or settle; the court reasoned that the policy concern about creating a commercial market for claims was inapplicable because "this assignee has an intimate connection with the underlying lawsuit" and rejecting as unpersuasive other policy concerns: "A legal malpractice claim is not for personal injury, but for economic harm.... The argument that legal services are personal and involve confidential attorney-client relationships does not justify preventing a client ... from realizing the value of its malpractice claim in what may be the most efficient ***275** way possible, namely, its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit." [Citations omitted.]); *New Hampshire Ins.*

Co. v. McCann, 429 Mass. 202, 209–12, 707 N.E.2d 332 (1999) (stating that some concerns cited are "farfetched"; rejecting, inter alia, concern about disclosure of confidential information on ground that client assignor knowingly waives confidentiality by making assignment and concern about increased litigation on ground that there is no evidence of such increases); *Chaffee v. Smith*, 98 Nev. 222, 223–24, 645 P.2d 966 (1982) (assignment of previously unasserted claim barred because decision whether to bring such action is one "peculiarly vested" in client, but leaving open question of whether assignment is permitted if malpractice action already has been initiated); *Greevy v. Becker, Isserlis, Sullivan & Kurtz*, 240 App. Div.2d 539, 541, 658 N.Y.S.2d 693 (1997) (assignment to plaintiff in underlying personal injury action not barred as contrary to public policy); *Gregory v. Lovlien*, 174 Or.App. 483, 488, 26 P.3d 180 (noting that legal malpractice action is tort but typically is based on purely economic loss), rev. denied, 333 Or. 74, 36 P.3d 974 (2001); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 525–26, 539 A.2d 357 (1988) (The court concluded that legal malpractice action involves a pecuniary interest and, thus, was not barred under the rule precluding the assignment of a personal injury claim, and rejected the public policy argument that the attorney-client relationship must be protected: "We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected."); ****173** *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057, 1059–61 (R.I.1999) (questioning policy concerns ***276** generally and concluding that assignment not barred under specific facts of case, where commercial loan agreement was assigned and assignee brought malpractice action against attorney who represented original lender in commercial loan transaction; contrasting majority of cases barring assignment wherein legal malpractice claim is transferred to person without any other rights or obligations being transferred along with it); *Kommavongsa v. Haskell*, 149 Wash.2d 288, 291, 67 P.3d 1068 (2003) (questioning validity of policy arguments barring all assignments but finding persuasive policy arguments regarding assignment to party in underlying action); see also *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 633 (Tex.App.2000) (recognizing validity of some of policy arguments but allowing assignments in certain situations).

Notably, however, of those jurisdictions that permit the assignment of a legal malpractice claim on a case-by-case basis, two jurisdictions, Texas and Washington, preclude assignment of legal malpractice actions when, as here, the assignment is to an adverse party in the underlying action.[11] See *Tate v. Goins*, supra, 24 S.W.3d at 633 (noting "evils" of assignment to party in underlying proceedings); *Kommavongsa v. Haskell*, supra, 149 Wash.2d at 307, 67 P.3d 1068 (The court concluded that many policy concerns are overstated but determined "that permitting the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice claim ought to be prohibited because of the opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation .... [T]he 'trial ***277** within a trial' that necessarily characterizes most legal malpractice claims arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions that would give prominence [and substance] to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession ...."); see also *Weiss v. Leatherberry*, 863 So.2d 368, 371 (Fla.App.2003) (barring assignment to adversary in underlying litigation solely on ground that injury is personal to client and, thus, claim can be asserted only by client, but facts reflect that malpractice claim arose from settlement and no risk of inconsistent positions); *Otis v. Arbella Mutual Ins. Co.*, 443 Mass. 634, 824 N.E.2d 23 (2005) (barring assignment under doctrine of judicial estoppel where assignee was adverse party in underlying action and took inconsistent positions); *New Hampshire Ins. Co. v. McCann*, supra, 429 Mass. at 211, 707 N.E.2d 332 (not barring assignment but noting that risk of inconsistent position was not implicated in this case because merits of underlying action were immaterial to malpractice case).

[4] Thus, although not instituting a per se rule precluding a voluntary assignment, these courts have echoed the policy concerns cited by the majority jurisdictions that disapprove of an assignment to an adverse party in the underlying action because it would "necessitate a duplicitous change in the positions taken by the parties in [the] antecedent litigation." *Tate v.* ****174** *Goins, Underkofler, Crawford & Langdon*, supra, 24 S.W.3d at 633. Perhaps the best discussion of the problems associated with an assignment under these circumstances is in *Zuniga v. Groce, Locke & Hebdon*, supra, 878 S.W.2d at 318. In barring the assignment of the malpractice claim arising from litigation, the Texas Court of Appeals recognized therein that, "[t]he two litigants would have to ***278** take positions diametrically opposed to their positions during the underlying litigation because the legal malpractice case requires a 'suit within a suit.' ... For the law to countenance this abrupt and shameless shift

of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth.... It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching." (Citations omitted.) Id.; accord *Alcman Services Corp. v. Samuel H. Bullock, P.C.*, supra, 925 F.Supp. at 256–58; *Kracht v. Perrin, Gartland & Doyle*, supra, 219 Cal.App.3d at 1024–1025; *Picadilly, Inc. v. Raikos*, supra, 582 N.E.2d at 344–45.

This counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when she was the very party who benefited from that malpractice in the underlying litigation, would engender a perversion that would erode public confidence in the legal system. See *Freeman v. Basso*, supra, 128 S.W.3d 138. Permitting an assignment of a legal malpractice claim to the adversary in the underlying litigation that gave rise to the legal malpractice claim also creates the opportunity and incentive for collusion in stipulating to damages in exchange for an agreement not to execute on the judgment in the underlying litigation. Thus, the Texas and Washington courts, although adopting the minority position against a per se bar, nonetheless have agreed with the majority view that these policy considerations were compelling reasons to bar the assignment of a legal malpractice claim to ***279** an adversary in the underlying litigation that gave rise to the legal malpractice claim.

In the present case, Lee sued Gurski in the underlying action alleging that Gurski had been negligent in his treatment of her. In Gurski's legal malpractice action, in order to prevail, he would have had to prove that he had not been negligent and that he would have prevailed in Lee's medical malpractice action against him but for his law firm's negligence. Once Gurski assigned any or all of the interest in the malpractice action to Lee, however, the interests of these two former adversaries merged, and Lee had a vested interest in the jury's determination that Gurski had *not* been negligent.[12]

****175** Under these circumstances, we agree with the reasoning of the Texas and Washington courts; see *Tate v. Goins, Underkofler, Crawford & Langdon*, supra, 24 S.W.3d at 633; *Zuniga v. Groce, Locke & Hebdon*, supra, 878 S.W.2d at 318; *Kommavongsa v. Haskell*, supra, 149 Wash.2d 288, 67 P.3d 1068; that public policy considerations warrant the barring of an assignment of a legal malpractice ***280** action to an adversary in the underlying litigation. As the Indiana Supreme Court aptly expressed, such assignments "feature a public and disreputable role reversal" and "magnify the least attractive aspects of the legal system," such that jurors in the legal malpractice action witnessing such role reversals "would rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered." *Picadilly, Inc. v. Raikos*, supra, 582 N.E.2d at 344–45. Thus, independent of other public policy considerations—allowing assignments would: convert a legal malpractice action into a commodity; undermine the sanctity of the attorney-client relationship; result in decreasing the availability of legal services to insolvent clients; impact negatively on the duty of confidentiality and further the commercialization of malpractice claims that in turn would spawn an increase in unwarranted malpractice actions—we conclude that the assignment of a malpractice action to an adverse party in the underlying action creates a distortion that the profession cannot endure and thus should not tolerate.

The trial court in this case decided that the assignment of a malpractice action violated public policy. The trial court then, however, identified a distinction between an assignment of the underlying claim and an assignment of the proceeds from that claim. On the basis of that distinction, the court concluded that Connecticut's public policy does not prohibit the assignment of the proceeds, even when that policy would prohibit the assignment of the underlying action itself, and therefore the trial court concluded that Gurski's assignment of the proceeds to Lee was permissible.

In the present case, according to the compromise, Gurski agreed to assign to Lee the estate's interest in the malpractice claim. He further agreed to prosecute this action and to assign his recovery therein to Lee, up to the amount of the judgment she had obtained ***281** against him, in exchange for her not executing the judgment. See footnote 4 of this opinion. Therefore, as a result of the compromise, Gurski had no personal obligation to Lee on that judgment and no financial interest in the action against the law firm. Id. Even if we were to assume, arguendo, that this assignment can be characterized as simply an assignment of proceeds, we disagree with the trial court's conclusion.

In support of this alternative argument, Gurski relies on: (1) *Berlinski v. Ovellette*, 164 Conn. 482, 489, 325 A.2d 239 (1973), overruled, *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, supra, 236 Conn. 362, 672 A.2d 939, wherein this court recognized "a crucial distinction between an enforceable interest in the proceeds of an action and the right to maintain the action itself," and

suggested that the former would not be barred; and (2) case law from other jurisdictions that recognize such a distinction in ****176** the tort context generally. Neither is persuasive.

In *Berlinski*, this court concluded that an equitable subrogation agreement was equivalent to an impermissible assignment of a personal injury action. Accordingly, we concluded that the agreement was barred, noting: "There is, of course, a crucial distinction between an enforceable interest in the proceeds of an action and the right to maintain the action itself. Once the insured has litigated a claim, the policy prohibiting the assignment of personal injury claims does not necessarily interfere with equitable subrogation and an equitable disposition of the proceeds. On this basis a New York court has upheld an insurer's recovery from the insured of a portion of the proceeds of his judgment where it held a trust receipt for an equitable lien on them, because the control of the action or the consummation of any settlement ... [was] exclusively in the hands of the assignor.... We conclude that to the extent that the trust agreement in this case purports to transfer to [the assignee] the right to prosecute and ***282** control at its own expense and by its choice of counsel the plaintiff's cause of action against the defendants for his personal injuries it is contrary to public policy and void unless the common-law public policy of the state has been changed by the General Assembly." (Citations omitted; internal quotation marks omitted.) Id., at 489–90, 325 A.2d 239.

Gurski recognizes that the holding in *Berlinski* has been overruled by *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, supra, 236 Conn. at 374–75, 672 A.2d 939 ("equitable subrogation is not the equivalent of the assignment of a personal injury action, and ... in the absence of that starting point, there is no logical support for the decision in *Berlinski*"). He nonetheless argues that two aspects of the decision survive: (1) the distinction between an assignment of a claim and an assignment of proceeds; and (2) the factor of control of the litigation as dispositive as to the validity of such assignments. We disagree. First, both points can be disposed of as dicta. Second, although control over the assigned malpractice action appears to be a relevant factor in some jurisdictions; see *Weiss v. Leatherberry*, supra, 863 So.2d at 371; *Tate v. Goins, Underkofler, Crawford & Langdon*, supra, 24 S.W.3d at 633; it cannot be said that Gurski retained complete control. Here, Gurski was obligated to bring the malpractice action and, thus, did not have the right to withdraw the action. But see *Weston v. Dowty*, 163 Mich.App. 238, 241–43, 414 N.W.2d 165 (1987) (concluding that assignment of proceeds permissible when assignment required assignor to bring malpractice action within one year and conveyed to assignee all proceeds from action, less costs of bringing action).[13]

***283** Additionally, Gurski directs our attention to those jurisdictions that bar an assignment ****177** of a personal injury *tort* action but permit an assignment of the proceeds from such an action.[14] Those cases, however, are of minimal relevance here, however, because the rationale for the bar on assignments of tort actions generally does not implicate the policy concern specifically applicable to assignments to an adverse party in the underlying litigation. As we have underscored throughout this opinion, we have confined our decision in this case to the public policy concerns of an assignment solely in this specific context.

We note that only a handful of jurisdictions that bar assignment of a legal malpractice claim to the adverse party in the underlying litigation, either as a per se rule or under the particular facts of the case, have considered whether the proceeds of a legal malpractice ***284** can be assigned. Of those jurisdictions, two have barred the assignment, one has permitted the assignment and one has cases going both ways.[15] See *Botma v. Huser*, supra, 202 Ariz. at 18, 39 P.3d 538 (barring assignment of proceeds to party in underlying litigation as legal equivalent to impermissible assignment of claim if contract made prior to settlement or judgment); *Weiss v. Leatherberry*, supra, 863 So.2d at 371 (barring assignment to party in underlying litigation as tantamount to impermissible assignment of claim, but leaving open possibility that assignment of proceeds permissible if assignee retains control over litigation); *Weston v. Dowty*, supra, 163 Mich.App. at 241–43, 414 N.W.2d 165 (permitting assignment to party in underlying litigation, noting importance of fact that partial assignment was made and that assignor was real party in interest); *Tate v. Goins, Underkofler, Crawford & Langdon*, supra, 24 S.W.3d at 633 (barring assignment to former adversary on policy grounds when assignor retained 10 percent of any net recovery and assignee given absolute control over litigation); *Baker v. Mallios*, 971 S.W.2d 581 (Tex.App.1998) ****178** (permitting assignment because policy concerns court had cited in prior case not applicable when portion of proceeds was assigned to disinterested third party), aff'd, 11 S.W.3d 157 (Tex.2000).

The Texas cases are particularly instructive in that the court expressly focused on whether the assignment ***285** was made to the adversary in the underlying litigation giving rise to the malpractice claim as a principal rationale for its decisions. Compare *Tate v. Goins, Underkofler, Crawford & Langdon*, supra, 24 S.W.3d at

633 (barring assignment of proceeds to former adversary, noting that facts were closely analogous to *Zuniga v. Groce, Locke & Hebdon,* supra, 878 S.W.2d 313, wherein court previously had barred assignment of legal malpractice claim to adversary in underlying action) with *Baker v. Mallios,* supra, 971 S.W.2d at 585 (permitting assignment of proceeds to disinterested third party, noting that "most striking difference between this case and *Zuniga* is that there is not 'an illogical reversal of roles' ").

Finally, we agree with those courts that have identified the "meaningless distinction" between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments. *Town & Country Bank of Springfield v. Country Mutual Ins. Co.,* 121 Ill.App.3d 216, 218, 76 Ill.Dec. 724, 459 N.E.2d 639 (1984). We will not engage in such a nullity.

The judgment is reversed and the case is remanded with direction to render judgment for the law firm.

In this opinion the other justices concurred.

All Citations

276 Conn. 257, 885 A.2d 163

Footnotes

1 In his amended complaint, Gurski also named as a defendant Jennifer Hally, an attorney who had practiced with the law firm during the period relevant to Gurski's malpractice claim. Gurski subsequently withdrew his claims against Hally. References herein to the law firm are to the firm itself and Rosenblum.

2 On or about June 3, 1998, Lee filed a motion for relief from the stay, seeking an order permitting her to proceed with the malpractice action against Gurski. Over Gurski's objection, on August 25, 1998, the Bankruptcy Court ordered that Lee be permitted to proceed with the malpractice action, but not to execute on assets of the estate.

3 It appears that Gurski did not receive notice of court proceedings because he neither had filed an appearance nor had retained counsel.

4 The motion to compromise provided that Lee would agree "to compromise her claim against the estate in exchange for the following: (a) The estate will prosecute its legal malpractice claim against [the law firm]. (b) The estate will assign any recovery from this action to [Lee] and grant her a security interest therein, *up to* the amount of her judgment. (c) Special counsel hired to prosecute the malpractice action will be retained on a one-third contingency fee and [Lee's] interest in the recovery is subject to those fees and to any costs advanced in the prosecution of the case. (d) Any amount paid to [Lee] from the malpractice case, *up to* the amount of her judgment, shall be deemed to be in full and complete satisfaction of her claim against the estate, which is otherwise irrevocably released. (e) Any amounts recovered in the malpractice case in excess of attorney's fees, costs and the lien of [Lee] shall constitute estate property to be distributed in accordance with the Bankruptcy Code." (Emphasis in original.)

5 The law firm appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51–199(c). See Practice Book § 65–1.

6 The law firm also claims that the trial court improperly: (1) instructed the jury that it could consider claims of negligence in the complaint for which Gurski had failed to offer any expert testimony; (2) permitted Gurski to present evidence that the default that had entered against him was based on the law firm's intentional conduct; (3) refused to charge the jury on waiver and estoppel; and (4) instructed the jury that it could award interest pursuant to General Statutes § 37–3b.

7 Consequently, we need not address the law firm's remaining claims nor Gurski's cross appeal on the remittitur.

8 Indeed, it would make no sense to craft a rule, ostensibly based on public policy considerations, regarding the assignability of a legal malpractice action that the parties simply could avoid based on how they frame their pleadings.

9 The seminal case on this issue is *Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 395–96, 133 Cal.Rptr. 83 (1976), and the following jurisdictions have relied on some or all of the concerns cited in *Goodley* as a basis for concluding that assignments of legal malpractice actions are violative of public policy: *Alcman Services Corp. v. Samuel H. Bullock, P.C.,* 925 F.Supp. 252, 256–58 (D.N.J.1996) (applying New Jersey law), aff'd, 124 F.3d 185 (3d Cir.1997); *Botma v. Huser,* 202 Ariz. 14, 17, 39 P.3d 538 (Ct.App.2002); *Roberts v. Holland & Hart,* 857 P.2d 492, 495–96 (Colo.App.),

cert. denied, 1993 Colo. Lexis 728 (1993); *Wilson v. Coronet Ins. Co.,* 293 Ill.App.3d 992, 994, 228 Ill.Dec. 736, 689 N.E.2d 1157 (1997); *Rosby Corp. v. Townsend, Yosha, Cline & Price,* 800 N.E.2d 661, 664–67 (Ind.App.2003); *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson,* 250 Kan. 490, 498–99, 827 P.2d 758 (1992); *Coffey v. Jefferson County Board of Education,* 756 S.W.2d 155, 156–57 (Ky.App.1988); *Joos v. Drillock,* 127 Mich.App. 99, 105–106, 338 N.W.2d 736 (1983), appeal denied, 419 Mich. 935 (1984); *Wagener v. McDonald,* 509 N.W.2d 188, 191–93 (Minn.App.1993); *Freeman v. Basso,* 128 S.W.3d 138, 142 (Mo.App.2004); *Earth Science Laboratories v. Adkins & Wondra, P.C.,* 246 Neb. 798, 801–802, 523 N.W.2d 254 (1994); *Can Do, Inc., Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865, 868–69 (Tenn.), cert. denied, 519 U.S. 929, 117 S.Ct. 298, 136 L.Ed.2d 216 (1996); *MNC Credit Corp. v. Sickels,* 255 Va. 314, 317–18, 497 S.E.2d 331 (1998); *Delaware CWC Liquidation Corp. v. Martin,* 213 W.Va. 617, 621–23, 584 S.E.2d 473 (2003). Although Florida has permitted the assignment of a malpractice claim under limited circumstances, it does not permit assignment when the malpractice claim arises out of litigation. See *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755, 759–61 (Fla.2005) (noting that "vast majority" of assignments barred but permitting assignment of malpractice claim stemming from drafting of private placement memorandum because memorandum intended for publication to third parties and thus attorney owed duty of loyalty to public).

10 The Massachusetts Supreme Judicial Court noted that the courts imposing a per se bar on the assignment of legal malpractice claims on public policy grounds often have failed to distinguish between voluntary and involuntary assignments and further noted that public policy concerns do not effect the two types equally. See *New Hampshire Ins. Co. v. McCann,* 429 Mass. 202, 209–12, 707 N.E.2d 332 (1999); see also comment, T. Bell, "Limits on the Privity and Assignment of Legal Malpractice Claims," 59 U. Chi. L. Rev. 1533, 1540–46 (1992) (noting different treatment by courts of voluntary and involuntary assignments and arguing that policy concerns have different implications in each context); T. Bell, supra, 1543 (defining "voluntary assignment" as one "undertaken with the full consent of assignor and assignee" and "involuntary assignment" as one that "take[s] place by operation of law, and typically put[s] the legal malpractice claim in the hands of a deceased client's estate, a trustee or creditor in bankruptcy, or a subrogating insurer").

11 There are a few jurisdictions that have permitted the assignment of a legal malpractice claim to an adverse party, but those courts neither recognize nor provide any discussion of the policy concern regarding inconsistent positions. See *Thurston v. Continental Casualty Co.,* supra, 567 A.2d at 923; *Greevy v. Becker, Isserlis, Sullivan & Kurtz,* supra, 240 App.Div. 540–41, 270 N.Y.S. 630.

12 Gurski asserts the following arguments in support of his contention that, under the facts of this case, the role reversal problem is not implicated: (1) Lee did not testify at trial that Gurski had not been negligent; (2) that policy concern applies only to directly contradictory positions and not to hedging or downplaying a claim, as the law firm suggests Lee may have done here; and (3) the jury could evaluate Lee's credibility and, to the extent that the jury would not have considered the effect of the assignment on her testimony, the law firm assumed that consequence by seeking to exclude evidence of the assignment. We disagree with each of these contentions.
First and foremost, we reject Gurski's approach, which would require the courts to engage in a fact and record intensive inquiry in each case, and decide the better approach is to adopt a blanket prohibition on assignments on legal malpractice claims to adverse parties in the underlying action. We also are mindful of the fact that the risks from slight inconsistencies in positions arguably are greater than that from completely inconsistent positions, as the latter would be obvious to all. Finally, we are not inclined to force a litigant in the law firm's position to have to choose between putting the assignment before the jury, which could sway them to find in Gurski's favor to compensate Lee for her injury, and excluding the assignment, which could impair the law firm's ability to impeach Lee's motives.

13 The facts of *Weston v. Dowty,* supra, 163 Mich.App. 238, 414 N.W.2d 165, are similar to the present case. In *Weston,* a default judgment was entered against the plaintiff due to his attorney's failure to comply with discovery, the proceeds were assigned to the plaintiff's adversary in the underlying personal injury case, and the assignment both required the assignor to bring a malpractice action within one year and conveyed to the assignee all proceeds from the action, less costs. The Michigan Court of Appeals, in our view, applied a hypertechnical analysis that focused on the plaintiff's status as "the real party in interest" because he brought the suit in his own name without discussing the public policy implications: "Since [the] plaintiffs agreed to assign only a portion of their recovery, if any, from the malpractice suit, and since they did not specifically assign the claim or cause of action to [the assignee], we conclude that no assignment of a legal malpractice action occurred." Id., at 242, 414 N.W.2d 165. The court noted as significant that the assignor, not the assignee, brought the action and stated: "[The] [p]laintiffs were the real part[ies] in interest although, under the terms of the consent judgment, [the assignee] obtained a beneficial interest in the lawsuit." Id., at 243, 414 N.W.2d 165.

14 See *Alabama Farm Bureau Mutual Casualty Ins. Co. v. Anderson,* 48 Ala.App. 172, 263 So.2d 149 (Civ.App.), cert. denied, 288 Ala. 538, 263 So.2d 155 (1972); *Hernandez v. Suburban Hospital Assn.,* 319 Md. 226, 572 A.2d 144,

147–48 (1990); *Edward J. Achrem Chartered v. Expressway Plaza Ltd. Partnership,* 112 Nev. 737, 740–41, 917 P.2d 447 (1996); *Constanzo v. Costanzo,* 248 N.J.Super. 116, 120–22, 590 A.2d 268 (L.Div.1991); *Neilson Realty Corp. v. Motor Vehicle Accident Indemnification Corp.,* 47 Misc.2d 260, 263–64, 262 N.Y.S.2d 652 (1965); *Charlotte–Mecklenburg Hospital Authority v. First of Georgia Ins. Co.,* 340 N.C. 88, 91, 455 S.E.2d 655 (1995); *In re Webb,* 187 B.R. 221, 227 n. 8 (Bkrtcy.E.D.Tenn.1995); but see *Mallory v. Hartsfield, Almand & Grisham, LLP,* 350 Ark. 304, 308–309, 86 S.W.3d 863 (2002) (barring assignment of proceeds of tort action); *Town & Country Bank of Springfield v. Country Mutual Ins. Co.,* 121 Ill.App.3d 216, 218, 76 Ill.Dec. 724, 459 N.E.2d 639 (1984) (same); *Harvey v. Cleman,* 65 Wash.2d 853, 858, 400 P.2d 87 (1965) (same).

15 Two other jurisdictions have permitted an assignment of proceeds from a legal malpractice action, but apparently have not considered the broader, and indeed more fundamental, question of whether assignment of such claims are barred nor the public policy considerations relied on in numerous other jurisdictions. See *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin,* 828 P.2d 745, 757–58 (Alaska 1992); *First National Bank of Clovis v. Diane, Inc.,* 102 N.M. 548, 698 P.2d 5, 9–10 (Ct.App.1985). In neither of those jurisdictions, however, did the case involve an assignment to an adversary in the underlying litigation that would implicate a concern about inconsistent positions. Compare *Quality Chiropractic, P.C. v. Farmers Ins. Co. of Arizona,* 132 N.M. 518, 528–29, 51 P.3d 1172 (2002) (extensively discussing policy concerns in declining to recognize any distinction between assignment of personal injury claim and proceeds from such claims).

End of Document

CONFIDENTIAL SETTLEMENT AND MUTUAL RELEASE AGREEMENT

This Confidential Settlement and Mutual Release Agreement (the "Settlement Agreement,,) is entered into by and between Yacov Jack Hefetz ("Hefetz,,) and Christopher Beavor ("Beavor,,) (Hefetz and Beavor are sometimes referred to individually as a "Party,, and collectively as the "Parties,,).

1. Pending Case. The Parties are involved in Case No. A-11-645353-C in the Eight Judicial District Court, Clark County, Nevada (the "Pending Case,,). Hefetz filed a complaint against Beavor, and Beavor filed a counterclaim against Hefetz. Hefetz is represented in the Pending Case by the law firm of Cohen Johnson Parker Edwards. Beavor currently is represented in the Pending Case by the law firm of Dickinson Wright, PLLC. The Parties have reached a settlement of their claims against each other, the terms of which are stated below.

2. Settlement/Denial of Liability. By entering into this Settlement Agreement, no Party admits any liability to any other Party or to any third-party. The Parties, in order to avoid the cost, inconvenience, uncertainties and burdens associated with continued contested litigation, desire to compromise and settle all outstanding claims between them on the terms set forth herein. Therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in consideration of the promises and covenants contained herein, the Parties agree as follows:

    a. Release and Discharge-Hefetz. Hefetz agrees to release, discharge, and forever hold harmless: Beavor and his agents, heirs, assigns and legal representatives from any and all claims, demands, or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the Pending Case, from the beginning of time to the effective date of this Settlement Agreement, save and except for any obligation set forth in this Settlement Agreement.

    b. Release and Discharge-Beavor. Beavor agrees to release, discharge, and forever hold harmless: Hefetz and his agents, heirs, assigns, and legal representatives, of and from any and all claims, demands, or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the Pending Case, from the beginning of time to the effective date of this Settlement Agreement, save and except for any obligation set forth in this Settlement Agreement.

3. Settlement Payment. In consideration of the release provisions and other agreements provided for herein, Beavor agrees to pay Hefetz or his assigns the total sum of THREE HUNDRED THOUSAND AND 00/100 DOLLARS ($300,000.00) (the "Settlement Payment") as follows: (1) $100,000.00 within thirty days of the Effective Date of this Settlement Agreement; (2) $150,000.00 within one year of the Effective Date of this Settlement Agreement; and (3) $50,000.00 within two years of the Effective Date of this Settlement Agreement. Each Settlement Payment shall be made by certified check or wire. To protect Hefetz from Beavor's failure to timely make each Settlement Payment, at the time Beavor executes this Settlement Agreement he also shall execute a Confession of Judgment in favor of Hefetz in the amount of TWO MILLION AND 00/100 DOLLARS

($2,000,000.00) in the form attached hereto as **Exhibit 1**, which shall be approved as to form and content by Beavor's current counsel. Hefetz agrees not to record, file or execute upon the Confession of Judgment unless Beavor fails to satisfy his obligations under this Settlement Agreement. If all of the above Settlement Payments are timely paid and Beavor does not materially breach this agreement Hefetz shall not record the confession of Judgment and shall return the executed original to Beavor once the malpractice actions discussed herein have been settled or fully litigated. However, in the event Beavor fails to timely make any Settlement Payment, or materially breaches this Agreement, Hefetz shall provide Beavor and his counsel with written notice of the alleged breach or missed Settlement Payment. Said notice shall be in writing and personally delivered, sent by electronic mail, overnight delivery or certified U.S. Mail, return receipt requested. Notice shall be effective as follows: (a) If personally delivered, as soon as it is delivered; (b) If by electronic mail, on the date and time as indicated on such electronic correspondence; (c) If by overnight delivery, the day after delivery thereof to a reputable overnight courier service, delivery charges prepaid; or (d) If mailed by certified U.S. Mail, at midnight on the third (3rd) business day after deposit in the mail, postage prepaid. Notice to Beavor shall be made via email to chris@caicap.com or by mail or personal delivery at 60 Chapman Heights Street, Las Vegas, NV 89138. Notice to counsel shall be made to Joel Z. Schwarz, Esq. via email to JSchwarx@dickinsonwright.com or by mail or personal delivery at 8363 W. Sunset Road, Suite 200, Las Vegas, NV 89113. Beavor shall have seven (7) business days from receipt of any such written notice to cure any alleged breach or missed Settlement Payment. If Beavor fails to cure the alleged breach or make the required Settlement Payment within seven (7) business days after receiving the required written notice, Hefetz shall be entitled to immediately file the Confession of Judgment in the Eight Judicial District Court, Clark County, Nevada and thereafter record the Confession of Judgment and seek full satisfaction of said Judgment by all remedies allowed under Nevada law, less any payments made by Beavor to Hefetz pursuant to this Settlement Agreement. Hefetz shall also be entitled to an award of reasonable attorney's fees and costs incurred in the filing of the Confession of Judgment and collection of all amounts due thereunder.

4. Beavor's Malpractice Claims. Beavor agrees to prosecute any malpractice and/or any other claims he may have against his former counsel, but Beavor will not prosecute any malpractice and/or any other claims he may have against the law firm of Dickinson Wright PLLC or any attorneys at that firm who provided legal representation to him related to the Pending Case. H. Stan Johnson will serve as counsel for Beavor in his prosecution of said claims. In order to permit H. Stan Johnson to serve as counsel, Beavor and H. Stan Johnson will execute any required conflict waivers. Beavor represents and warrants that he will fully pursue and cooperate in the prosecution of the above referenced claims; that he will take any and all reasonable actions as reasonably requested by counsel to prosecute the above actions; and that he will do nothing intentional to limit or harm the value of any recovery related to the above referenced cases. Within thirty (30) days from the Effective Date of this Settlement Agreement, Beavor shall provide Hefetz, through his attorney H. Stan Johnson, copies of any documents or correspondence that Beavor believes relate to the above referenced malpractice actions. Beavor shall fully cooperate with Hefetz and his counsel regarding any claims initiated on behalf of Beavor for the above referenced actions. Hefetz agrees to indemnify and hold harmless Beavor from any attorney fees or costs that may be incurred in pursuing

the above referenced claims and any and all invoices for attorneys' fees or costs shall be issued directly to Hefetz with Hefetz bearing sole responsibility for payment thereof. Beavor further irrevocably assigns any recovery or proceeds to Hefetz from the above referenced actions and agrees to take any actions necessary to ensure that any recovery or damages are paid to Hefetz pursuant to the Agreement. Any and all costs of recovery or attempted recovery, including any attorneys' fees attributable thereto, are to be paid by Hefetz and are Hefetz's sole responsibility.

5. Other Actions. Hefetz further agrees that within thirty (30) days of the Effective Date of this Settlement Agreement he shall release any lien or encumbrance that he holds against the property located at 60 Chapman Heights Street, Las Vegas, NV 89138, bearing APN 137-26-318-9013 (the "Property,,). The reconveyance of the Deed of Trust to the Property is attached hereto as **Exhibit 2**. If Hefetz fails to release the lien or encumbrance from the Property within the required period, Beavor will be excused from making any payments identified in Section 3, *supra*, until said time as Hefetz releases the lien or encumbrance in accordance with this section.

6. Dismissal of the Pending Case With Prejudice. Within five business days from the Effective Date of this Settlement Agreement, Hefetz shall file a Stipulation and Order for Dismissal with Prejudice in the Pending Case in the form attached hereto as **Exhibit 3.**

7. Capacity to Execute Agreement/No Assignments. The Parties represent and warrant that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement, and that they have the sole right and exclusive authority to execute this Settlement Agreement, and they have not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Settlement Agreement.

8. Representations and Warranties. As a material inducement to the Parties' entry into this Settlement Agreement, each Party unconditionally represents and warrants at the signing of this Settlement Agreement and delivery of any documents hereunder:

   (a) that he has carefully read this Settlement Agreement, that he has had an opportunity to discuss its effect with counsel of his choice and that he fully understands its final and binding effect;

   (b) that he has the necessary authority to settle this matter fully on behalf of himself and all parties whose interests he purports to release in accordance with the terms of this Settlement Agreement, and that the individuals who execute this Settlement Agreement are fully authorized to execute the Settlement Agreement and to bind the respective Parties;

   (c) that he is the owner of the claims released herein and has the entire and exclusive authority to settle them on the terms herein set forth;

   (d) that he has executed this Settlement Agreement as his free and voluntary act, without any duress, coercion or undue influence exerted by or on behalf of any other Party; and

(e) that no promise, representation, conduct, or consideration by any other Party to this Settlement Agreement, his agents, servants, employees, attorneys or persons in privity with him has induced the execution of this Settlement Agreement, except for those representations and agreements specifically set forth herein.

9. General Terms and Conditions. The provisions of this Settlement Agreement comprise all of the terms, conditions, agreements, and representations of either Party respecting the settlement and compromise of this dispute, the matters relative thereto and the matters respecting this Settlement Agreement and supersedes any agreements, discussions, and/or negotiations, either orally or in writing, effectuated prior to or contemporaneously with the execution of this Settlement Agreement.

10. No Oral Modifications. This Settlement Agreement may not be amended, supplemented or otherwise modified except if in writing and signed by all Parties.

11. Successors In Interest. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, agents, representatives, associated entities and assigns.

12. Non-Disparagement. The Parties agree not to engage in conduct that disparages the other party.

13. Fax/Email Signatures/Counterparts. This Settlement Agreement may be executed in multiple counterparts and transmitted via facsimile or email, any and all of which shall be construed as valid and enforceable as the Settlement Agreement.

14. Effective Date. The effective date of this Settlement Agreement shall be the date of its execution by the last of the Parties.

15. Choice of Law/Forum Selection/Validity. This Settlement Agreement shall be construed in accordance with the laws of the State of Nevada and all parties submit to the jurisdiction of the courts of Nevada. The parties also agree to resolve any dispute arising out of or relating to this Settlement Agreement in Clark County, Nevada.

16. Severability. If any provision of this Settlement Agreement is held to be illegal, invalid or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable, and the remaining provisions thereof shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance therefrom.

17. Construction. The terms of this Settlement Agreement and each exhibit attached hereto shall not be construed against any Party as the drafting party.

18. Binding Effect. It is expressly understood and agreed that the terms hereof are contractual and not mere recitals, that the agreements herein contained and the consideration transferred

are to compromise disputed claims, avoid continued litigation, save legal fees and buy peace and that no payments made or releases or other consideration given shall be construed as an admission of liability.

19. Attorney Fees. Each Party acknowledges he will assume his own attorney's fees and costs associated with the Pending Case.

20. Confidentiality. The Parties acknowledge and agree that this Settlement Agreement (including its specific terms) were made and entered into in strict confidence and must remain confidential. The Parties on behalf of themselves, their employees, agents and attorneys, except as specifically permitted by this Settlement Agreement, will keep the terms of this Settlement Agreement (collectively, "Confidential Material,,) confidential and will not admit, discuss, announce, whether in writing or orally, to any other person or entity directly or indirectly, unless compelled to do so by law or except as necessary to effectuate the terms of this Settlement Agreement.

(a) Notwithstanding the foregoing, a Party, may disclose generally that they have entered into an agreement settling the Pending Case and, further, may disclose terms of this Settlement Agreement upon any of the following: (i) the express written consent of each Party to this Settlement Agreement; (ii) as required by an order of a court of competent jurisdiction; or (iii) to the extent disclosure is customary for the purposes of tax or regulatory reporting, for the purposes of obtaining or maintaining insurance coverage, or for the purpose of enforcing or remedying a breach of any term or provision of this Settlement Agreement. The representations and covenants in this paragraph are material to the Parties to this Settlement Agreement.

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SIGNATURE PAGE TO FOLLOW]

(b) If any Party is ever compelled, or is sought to be compelled, to disclose the terms of this Settlement Agreement to any third parties other than those excepted above, such party agrees to provide sufficient notice to the other Parties immediately by electronic mail and overnight delivery to all counsel of record for the Parties, in order to permit any party entitled to receive notice under this Settlement Agreement the opportunity to object and, if necessary, to seek Court protection to preserve the confidentiality of the Confidential Material.

J. H

Yacov Jack Hefetz
Plaintiff/Counterdefendant

STATE OF NEVADA)
)
CLARK COUNTY)

SUBSCRIBED AND SWORN TO before me this 8 day of January, 2019 by Yacov Jack Hefetz.

SARAH GONDEK
Notary Public-State of Nevada
APPT. NO. 16-3009-1
My Appt. Expires 06-27-2020

Notary Public

My Commission Expires: 6/27/2020

Christopher Beavor
Defendant/Counterclaimant

STATE OF NEVADA)
)
CLARK COUNTY)

SUBSCRIBED AND SWORN TO before me this 15 day of ~~January~~ February, 2019 by Christopher Beavor.

Alison Schwertfeger

Notary Public

My Commission Expires:
Jan. 10, 2021

ALISON SCHWERTFEGER
Notary Public State of Nevada
No. 13-9786-1
My Appt. Exp. January 10, 2021

ERR
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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual, Plaintiff, v. JOSHUA TOMSHECK, an individual; DOES I-X, inclusive, Defendants. JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	CASE NO. A-19-793405-C DEPT. NO. XXIV **ERRATA TO JOSHUA TOMSHECK'S MOTION FOR SUMMARY JUDGMENT** ***Hearing Date: May 7, 2020*** ***Hearing Time: 9:00 a.m.***

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COMES NOW Defendant JOSHUA TOMSHECK, by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and hereby submits his errata to the Motion for Summary Judgment which is currently set for hearing on May 7, 2020. The corrected versions of

those errata are provided in **BOLD**. These errata do not alter the legal and factual arguments in support of the Motion for Summary Judgment.

DATED this 11th day of March, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Max E. Corrick, II
MAX E. CORRICK, II
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JOSHUA TOMSHECK

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POINTS AND AUTHORITIES
I.
SUMMARY OF THE ARGUMENT

This is a legal malpractice case. Mr. Tomsheck is entitled to summary judgment based upon two independent arguments. First, Plaintiff impermissibly assigned his legal malpractice claim to his adversary in the underlying litigation, Yacov Hefetz ("Hefetz"). In Nevada, legal malpractice claims are absolutely unassignable and subject to summary judgment if they are assigned. *See Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).[1] "As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment...[t]he decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982). In this case the evidence shows Hefetz – not Plaintiff – was assigned the Plaintiff's legal malpractice claim and Hefetz maintains complete control over this litigation. For example, Plaintiff is represented by Hefetz's attorney in the underlying matter, Hefetz stands to receive 100% of any proceeds recovered in this legal malpractice case, and Hefetz has agreed to pay any attorneys fees and costs incurred. These, among other powers held by Hefetz, are hallmarks of an assigned legal

[1] The settlement agreement between Hefetz and the Plaintiff, which bears out this impermissible assignment, is subject to a protective order. *See* Exhibit A (filed under seal). Therefore, it is being submitted to the court for *in camera* review.

malpractice claim which violates public policy and requires summary judgment pursuant to clear Nevada precedent.[2]

Second, Plaintiff filed his assigned legal malpractice claim after the statute of limitation ran. In particular, Plaintiff failed to file this lawsuit (for Hefetz's benefit) after the specific time frame required by NRS 11.207 and the written agreement Plaintiff and Mr. Tomsheck negotiated at arms-length. The evidence shows Plaintiff entered into a binding contract by which he and Mr. Tomsheck agreed that the statute of limitation applicable to Plaintiff's prospective legal malpractice claim against Mr. Tomsheck was to be stayed for a specific period of time after the resolution of Supreme Court Appeal No. 68438 (c/w 68843). By the terms of their written agreement, that date ran on **September 26, 2018**. However, Plaintiff delayed filing his legal malpractice action against Mr. Tomsheck until April 23, 2019. This action is therefore untimely and subject to summary judgment.

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II.

STANDARD OF REVIEW

NRCP 56, *Summary Judgment*, states in pertinent part:

> (b) *For defending party*. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Nevada Rules of Civil Procedure, Rule 56. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions and affidavits on file, show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

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[2] As noted below, the assignment evidences significant position shifting by the Plaintiff and his counsel. It converts the Plaintiff's legal malpractice claim against Mr. Tomsheck to a commodity to be exploited, and is rife with the possibilities that could only debase the legal profession. It performs an end run around Nevada public policy and achieves indirectly what it could not achieve directly. *See Schwende v. Sheriff, Washoe County*, 86 Nev. 143, 144, 466 P.2d 658, 659 (1970) (rejecting a litigant's attempt to indirectly obtain relief that he could not obtain directly); *Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261, 265 (Wash. Ct. App. 2013) (disallowing an assigned legal malpractice claim and stating "[w]e cannot allow th[e] rule to be obfuscated by clever lawyers and legal subtleties.").

of law. *Villescas v. CNA Ins. Cos.*, 109 Nev. 1075, 864 P.2d 288 (1993). In determining whether summary judgment is proper, the non-moving party is entitled to have the evidence and all reasonable inferences accepted as true. *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989).

However, the non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)*, quoting Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Indeed, an opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must be able to point out to the court something indicating the existence of a triable issue of fact and is required to set forth specific facts showing that there is a genuine issue for trial. *Hickman v. Meadow Wood Reno*, 96 Nev. 782, 617 P.2d 871 (1980); *and see Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965), *overruled on other grounds*, *Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1996) ("The word 'genuine' has moral overtones; it does not mean a fabricated issue.").

Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubt exists, the availability of summary proceedings promotes judicial economy and reduces litigation expenses associated with actions clearly lacking in merit. Therefore, it is readily understood why the party opposing summary judgment may not simply rest on the allegations of the pleadings. To the contrary, the non-moving party must, by competent evidence, produce specific facts that demonstrate the presence of a genuine issue for trial. *Elizabeth E. v. ADT Sec. Sys. W.*, 108 Nev. 889, 839 P.2d 1308 (1992).

As the Nevada Supreme Court announced in *Wood v. Safeway, Inc.*, 121 Nev 724, 121 P.3d 1026 (2005), the "slightest doubt" standard has been abrogated. Instead, the *Wood* Court adopted the standard enunciated by the United States Supreme Court in *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), stating:

> [w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor.

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Wood, 121 Nev. at 731, 121 P.3d at 1030-1031, *citing Matsushita Electrical Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). Indeed, the substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Id*. at 731, 121 P.3d at 1031, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248.[3]

Subsequently, the Nevada Supreme Court in *Cuzze v. University And Community College System Of Nevada*, 172 P.3d 131 (Nev. 2007), explained the appropriate framework for assessing a summary judgment motion:

> "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes the burden of production to show the existence of a genuine issue of material fact."

Id. at 134. The *Cuzze* Court continued: "If the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out…that there is an absence of evidence to support the nonmoving party's case." *Id*.

III.

STATEMENT OF UNDISPUTED FACTS PURSUANT TO NRCP 56(c)

Pursuant to NRCP 56(c), the following facts may be taken as true and relevant to Mr. Tomsheck's Motion for Summary Judgment:

1. Plaintiff retained Mr. Tomsheck on or about June 19, 2013 to provide legal services related to a civil trial between Plaintiff and Hefetz in Case No. 645353. *See* Exhibit B, *Plaintiff's Complaint*, ¶ 11. Marc Saggese, Esq. was Plaintiff's trial counsel. Mr. Tomsheck was not hired until after the conclusion of the trial. He represented Plaintiff for the purpose of filing and responding to post-trial motions.

2. On August 7, 2013, the district court ruled that Mr. Tomsheck, in his representation of Plaintiff, failed to file a "substantive written opposition" to Hefetz's motion for new trial. *Id*. at

[3] A factual dispute is genuine only when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id*.

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¶ 16.[4]

3. Mr. Tomsheck filed a motion for reconsideration on August 28, 2013. *See* Exhibit C, *Motion for Reconsideration*. That motion was denied on November 14, 2013 by the lower court. *See* Exhibit D, *Findings of Fact and Conclusions of Law*; *and see* Exhibit B, ¶ 17.

4. Thereafter, Mr. Tomsheck filed a Petition for Writ of Mandamus on May 13, 2014 – Nevada Supreme Court Case Number 65656. That Petition was denied on September 16, 2014. *Id.* at ¶ 19. The Nevada Supreme Court issued a Notice of Remittitur for that Petition on October 13, 2014. *See* Exhibit E, *Notice of Remittitur*. As a result, the underlying jury verdict in Plaintiff's favor was vacated. *See* Exhibit B, ¶ 22.

5. Mr. Tomsheck withdrew as counsel for Plaintiff on November 5, 2014. *Id.* at ¶ 23.

6. Nearly a year later, on September 16, 2015, Plaintiff alleges he placed Mr. Tomsheck on notice that he intended to pursue a legal malpractice claim against Mr. Tomsheck. This was memorialized in an attorney letter drafted by Plaintiff's then-counsel, Joel Schwarz, Esq. *Id.* at ¶ 26. Plaintiff alleged that by that time he had "incurred – and continues to incur – legal fees". *See* Exhibit F, *Letter dated September 16, 2015.* Accordingly, as of that date, Plaintiff was aware of material facts which would constitute a cause of action for legal malpractice by Mr. Tomsheck.[5]

7. On March 28, 2016, Plaintiff and Mr. Tomsheck, each represented by counsel, voluntarily chose to enter into a tolling agreement in place and stead of any statutory or common law tolling rule, such as the litigation malpractice tolling rule. *See* Exhibit G, *Tolling Agreement*. By its terms, the Effective Date of the tolling agreement was March 28, 2016. *Id.* The tolling agreement specified the parties agreed to only toll the running of any statute of limitations for purposes of bringing a legal malpractice claim against Mr. Tomsheck "during the pendency of the appellate matter styled *Yacov Hefetz v. Beavor (Supreme Court No. 68438 c/w 68843) ("Appeal")*.

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[4] Mr. Tomsheck disputes this conclusion, however for the purposes of this motion this court can take the trial court's conclusion as correct.

[5] The fact that Plaintiff had incurred at least some damages by that date is provided as mere context because Plaintiff later agreed to supersede the litigation malpractice tolling rule by virtue of the negotiated written tolling agreement.

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Id.[6] In their tolling agreement, the parties explicitly defined the term "*Appeal"* as being Supreme Court Case No. 68438 c/w 68843.

8. The "Termination Date" of the tolling agreement was specified as being "at the end of the 180th day after the Effective Date, or the final resolution of the *Appeal*, whichever occurs later." Therefore, once the later of those two events occurred, the statute of limitation for any legal malpractice claim Plaintiff may have held against Mr. Tomsheck would begin to run.

9. The final resolution of the *Appeal* occurred on May 10, 2016 when the Nevada Supreme Court issued a Remittitur in Nevada Supreme Court Case No. 68438 c/w 68843. *See* Exhibit H, *Notice of Remittitur*. This May 10, 2016 date was **less** than 180 days from the Effective Date. Therefore, the statute of limitation for Plaintiff's legal malpractice claim against Mr. Tomsheck began to run on **September 26, 2016.**

10. Pursuant to NRS 11.207 and their written agreement, Plaintiff had until **September 26, 2018** in which to file a legal malpractice claim against Mr. Tomsheck.

11. Plaintiff filed his legal malpractice claim against Mr. Tomsheck on April 23, 2019, nearly **seven months** after the statute of limitation expired.

12. In the course of discovery in this case, Plaintiff disclosed that he and Yacov Hefetz entered into a settlement agreement on or about February 15, 2019. The terms of that settlement agreement identify an agreed upon sum Plaintiff – and Hefetz – determined would constitute Plaintiff's damages he would be able to seek in any legal malpractice action against Mr.

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[6] At the time the tolling agreement was entered Plaintiff's claims against Mr. Tomsheck were already tolled pursuant to the common law litigation malpractice tolling rule. *See Branch Banking & Tr. Co. v. Gerrard*, 134 Nev. Adv. Op. 106, 432 P.3d 736, 738-40 (2018) (noting that, generally, the litigation malpractice tolling rule applies to the two-year discovery rule and serves to toll a malpractice claim's statute of limitations until the underlying litigation is resolved and damages are certain). However, Plaintiff and Mr. Tomsheck thereafter chose to enter into a contract, the written tolling agreement, which necessarily superceded any common law tolling. Indeed, such is the only fair construction of the agreement which does not render its terms completely meaningless and superfluous. A basic rule of contract interpretation is that "[e]very word must be given effect if at all possible." *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1986). A court "should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978).

Tomsheck.[7] In this respect, Plaintiff was obligated by Hefetz to prosecute a legal malpractice claim against Mr. Tomsheck for Hefetz's sole benefit and thereafter turn over any funds recovered in that lawsuit to Hefetz.

13. Pursuant to the terms of their settlement agreement, Hefetz retains exclusive control of the Plaintiff's litigation against Mr. Tomsheck. Plaintiff must use Hefetz's attorney, H. Stan Johnson, Esq., as his own attorney for this case despite the fact Mr. Johnson was opposing counsel in the underlying matter. Hefetz is responsible for all invoices for attorneys fees and costs incurred in this lawsuit. Hefetz agrees to indemnify Plaintiff for any such fees and costs. Hefetz is entitled to 100% of the proceeds from this lawsuit. Hefetz even requires Plaintiff to "represent[] and warrant[] that he will fully pursue and cooperate in the prosecution" of a legal malpractice claim against Defendant for Hefetz's sole benefit. Hefetz requires that Plaintiff "do nothing intentional to limit or harm the value of any recovery related to" this legal malpractice claim. Further, Hefetz requires Plaintiff to "provide Hefetz, through his counsel, copies of any documents or correspondence that [Plaintiff] believes relate to" the legal malpractice claim against Mr. Tomsheck, and Hefetz requires Plaintiff to "fully cooperate with Hefetz and his counsel regarding any claims initiated on behalf of [Plaintiff]" for the legal malpractice claim.

14. Plaintiff did not disclose the impermissible assignment agreement until December 23, 2019 even though it serves as the basis for his alleged damages against Mr. Tomsheck.

15. No additional discovery is needed for this court to decide whether the settlement agreement between Plaintiff and Hefetz, or the tolling agreement between Plaintiff and Mr. Tomsheck, as a matter of law, compel summary judgment in Mr. Tomsheck's favor.

IV.

ARGUMENT

A. Plaintiff is prosecuting an impermissible, assigned legal malpractice claim which violates public policy and is subject to summary judgment

[7] As noted above, the Hefetz settlement agreement (PLTF001-006) is being submitted under seal and provided to this court for *in camera* review rather than be attached as an exhibit to this filing.

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Nevada law prohibits the assignment of legal malpractice claims. *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 634, 377 P.3d 118, 122 (2016).[8] Nevada follows the overwhelming majority rule in this regard, especially when a legal malpractice claim has been assigned to an adversary in the underlying litigation. *See Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976)[9]; *Tate v. Goins, Underkoffer, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Kommavongsa v. Haskell*, 149 Wash.2d 288 (2003); *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F.Supp.2d (D.D.C. 2009); *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 744 S.E.2d 130 (2013); *Trinity Mortgage Companies, Inc. v. Dreyer*, 2011 WL 61680 (N.D. Okla. 2011); *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998); *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. 2004); *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010); *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F.Supp. 252 (D.N.J. 1996); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *Schroeder v. Hudgins*, 142 Ariz. 395, 690 P.2d 114 (Ariz. Ct. App. 1984); *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); *Christison v. Jones*, 83 Ill.App.3d 334, 405 N.E.2d 8 (1980); *Delaware CWC Liquidation Corp. v. Martin*, 213 W.Va. 617, 584 S.E.2d 473 (2003); *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. App. 1993); *cf. Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005) (collecting cases as of that date and concluding a legal malpractice claim which is assigned to an adversary in the underlying matter is impermissible and subject to judgment as a matter of law).[10]

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[8] A copy of the *Tower Homes* decision is attached hereto as Exhibit I.

[9] A copy of the *Goodley* decision is attached hereto as Exhibit J.

[10] The *Gurski* decision, which examines many of the reasons against (and for) allowing the assignment of legal malpractice claims – before joining Nevada's majority position – is attached hereto as Exhibit K. Since *Gurski*, Utah has rejected the *Goodley* rationale and joined the small "pro-assignment" camp. *See Eagle Mountain City v. Parsons Kinghorn & Harris*, 408 P.3d 322 (Utah 2017). Nevada, however, has adopted *Goodley* and its progeny and therefore holds contrary to Utah. *See Tower Homes*, *supra.* Another stray case, *Mallios v. Baker*, 11 S.W.3d 157 (Tex. 2000), has noted that although Texas law does not permit the assignment of legal malpractice claims, under certain circumstances a partial assignment "[does] not vitiate the plaintiff's right to pursue his own malpractice claim." Once again, the overwhelming majority of jurisdictions – Nevada included – have reached a contrary conclusion: once you

In fact, while assignment of proceeds from a *personal injury* case may be permissible under Nevada law, they are prohibited when those proceeds arise out of a legal malpractice claim. *Id.* at 635, 377 P.3d at 122-23. This is especially true where the hallmarks of control of the legal malpractice litigation, as well as who ultimately is entitled to the proceeds of that legal malpractice litigation, are held by someone other than the original client – Hefetz, who was not Mr. Tomsheck's client. In this case, Plaintiff impermissibly assigned his legal malpractice claim to his former adversary, Hefetz, which obligates this court to enter summary judgment against Plaintiff as a matter of law.[11]

1. *Tower Homes* is controlling precedent which compels summary judgment in Mr. Tomsheck's favor

In *Tower Homes*, the Nevada Supreme Court was asked to determine whether the lower court has correctly granted summary judgment in favor of an attorney in a legal malpractice case on the basis that the plaintiff (a group of purchasers of condominiums which were never built) had been impermissibly assigned a legal malpractice claim against a developer debtor's (Tower Homes, LLC) attorney in Chapter 11 bankruptcy proceedings against the developer. Even though the bankruptcy court ordered (pursuant to a stipulation) that the plaintiff could proceed against the debtor's attorney – with all proceeds recovered to be for their benefit – the defendant attorney, Heaton, moved for summary judgment on the basis that the stipulation and order "constituted an impermissible assignment of a legal malpractice claim to the purchasers." *Id*. at 632, 377 P.3d at 121.

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assign a legal malpractice claim you do not get to call it back and proceed as if the assignment never occurred. *See, e.g. Gurski, supra*; *and see Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition) (rejecting the dissent's suggestion that *Tower Homes* is unfair to the assignor of a legal malpractice claim by subjecting the entire cause of action to dismissal). So, to the extent Plaintiff may try to argue that even if this court could "blue-pencil" the settlement agreement to excise the impermissible assignment, Nevada law and public policy do not allow Plaintiff to salvage for himself what he has already assigned away, namely the ability to enforce a legal malpractice action. *See Chaffee*, *supra.*

[11] A "settlement agreement is a contract [and] its construction and enforcement are governed by principles of contract law." *See May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005).

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The district court granted the motion for summary judgment in favor of Heaton. The purchasers appealed and argued two points – the second of which is particularly relevant to this case. The first point argued was that the bankruptcy stipulation and order was not an impermissible assignment because "under federal law a Chapter 11 bankruptcy plan may permit [named] representatives to bring a legal malpractice claim on behalf of the estate without an assignment..." *Id.* at 633, 377 P.3d at 121. That is, they were arguing they were properly acting on behalf of the estate pursuant to Chapter 11.

The second argument the purchasers made was that "there was no assignment of the legal malpractice claim, only an assignment of proceeds." *Id.* Therefore, they claimed, this was not a true assignment of a legal malpractice claim at all; it merely involved the recovery of funds.

With respect to the purchasers' bankruptcy court-related argument, the Court quickly disposed of it by focusing upon the elements of control over the litigation. The Court stated, "the bankruptcy court's order transferred control and proceeds of the claim to the purchasers. We therefore conclude that the purchasers are not pursuing a legal malpractice action on behalf of Tower Homes' estate as provided by [Chapter 11]." *Id*. at 634, 377 P.3d at 121.

Moving to the purchasers' second argument, the Court continued: "When the [Chapter 11] conditions are not satisfied, Nevada law prohibits the assignment of legal malpractice claims from a bankruptcy estate to creditors...To overcome these concerns, the purchasers contend that they were only assigned proceeds, not the entire malpractice claim against Heaton. In *Edward J. Achrem, Chartered v. Expressway Plaza, Ltd. Partnership*, this court determined that the assignment of personal injury claims was prohibited, but the assignment of personal injury claim proceeds was allowed. 112 Nev. 737, 741, 917 P.2d 447, 449 (1996). " *Id.* at 634-35, 377 P.3d at 122. The Court, however, rejected the purchasers' arguments on multiple grounds.

First, the Court noted "[w]e are not convinced that *Achrem*'s reasoning applies to legal malpractice claims...in *Achrem*, this court determined that the difference between an assignment of an entire case and an assignment of proceeds was the retention of <u>*control*</u>. *Id*. When only the proceeds are assigned, the original party maintains control over the case. *Id.* at 740-41, 917 P.2d at 448-49. When an entire claim is assigned, a new party gains control over the case. *Id*. Here, the

bankruptcy court gave the purchasers the right to "pursue any and all claims on behalf of...[d]ebtor...which shall specifically include...pursuing the action currently filed in the Clark County District Court styled as *Tower Homes, LLC v[.] William H. Heaton, et al.*" No limit was placed on the purchasers' control of the case, and the purchasers were entitled to any recovery." *Tower Homes,* 132 Nev. at 635, 377 P.3d 122-23 (emphasis in original). Thus, in ascertaining whether there has been an impermissible assignment of a legal malpractice claim, the *Tower Homes* decision directs district courts to consider the named plaintiff, and terms of the agreement, as well as focus upon whether some third party is exercising a significant degree of control over the litigation. District courts are also directed to determine where any recovery from the legal malpractice litigation will ultimately go.[12]

Next, in striking down the impermissible assignment found in *Tower Homes*, the Court extensively quoted and adopted the longstanding approach taken by the California Court of Appeals in *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976), which detailed the policy considerations underlying the nonassignability of legal malpractice claims. The Court noted: "As the court in *Goodley* stated, '[i]t 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.' 133 Cal.Rptr. at 87. Allowing such assignments would 'embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.' *Id*." *Tower Homes,* 132 Nev. at 635, 377 P.3d at 123.

Finally, in upholding the district court's decision to grant summary judgment to Heaton on the basis that an impermissible assignment of a legal malpractice claim had occurred, the *Tower Homes* Court concluded: "While the 2013 bankruptcy stipulation and order here do not explicitly

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[12] This is noteworthy because the settlement agreement between Plaintiff and Hefetz explicitly says that Plaintiff "irrevocably assigns any recovery or proceeds to Hefetz." So, not only does the settlement agreement explicitly give Hefetz full control over the litigation, it explicitly assigns the proceeds of the lawsuit to Hefetz as well. Whether characterized as an explicit or *de facto* assignment, at bottom it remains an impermissible assignment.

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use "assigned," such formalistic language is not required for a valid assignment... the 2013 bankruptcy stipulation and court order express the bankruptcy court's and the bankruptcy trustees present intention to allow the purchasers to control the legal malpractice case. As a result, we conclude that the district court properly determined that the legal malpractice claim was assigned to the purchasers." *Id.* at 636, 377 P.3d at 123. (Internal citation omitted).[13] Once again, the district court must look at the end result, in addition to the verbiage used, in reaching its conclusion as to whether an impermissible assignment of a legal malpractice claim has occurred. Here, there is no doubt such impermissible assignment exists.

2. Hefetz's overwhelming degree of control over this lawsuit is undeniable proof Plaintiff has impermissibly assigned his legal malpractice claim to his former adversary in this case

Tower Homes focused upon the concerns of control over the litigation and who stood to profit in order to strike down an impermissible legal malpractice claim assignment. Those two guideposts loom large over the impermissible assignment here. Plaintiff's former adversary (Yacov Hefetz) has total, unfettered control over this litigation and Plaintiff must to prosecute the legal malpractice claim against Mr. Tomsheck, under Hefetz's control, and turn over any and all funds recovered to Hefetz. It is squarely an impermissible assignment.

Laid bare, the extent of Hefetz's control over this legal malpractice claim should be shocking to this court. Pursuant to the terms of their settlement agreement, Plaintiff has to use

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[13] That is, the Court recognized *de facto* assignments of legal malpractice claims are as impermissible as explicit ones. Just as a point of interest, this conclusion was recently reemphasized by the Nevada Court of Appeals in *Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742 *2-6 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition). In citing to *Tower Homes*, *Goodley*, and several other jurisdictions which have held *de facto* assignments of legal malpractice claims as unenforceable as explicit ones, the *Oceania Insurance* Court – in the context of a unique fact pattern – highlighted the same general concerns found in the present case, *e.g.*: (1) counsel for the prior adversary is now representing his client's former adversary and confidentiality has been destroyed; (2) the potential for "abrupt and shameless" position shifting by the parties and their counsel "that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession"; (3) the potential conversion of a legal malpractice claim into a commodity, thereby debasing the legal profession; and (4) the mere opportunity for potential collusion.

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Hefetz's attorney, H. Stan Johnson, Esq., to represent him against Mr. Tomsheck here – even though Johnson represented Plaintiff's adversary (Hefetz) in the underlying lawsuit. In other words, Hefetz hand-selected Plaintiff's attorney for him, giving Plaintiff no choice in the matter, in order to help Hefetz exert control over this litigation.

Next, Hefetz requires Plaintiff to "represent[] and warrant[] that he will fully pursue and cooperate in the prosecution of" this legal malpractice claim. Hefetz requires that Plaintiff "will take any and all reasonable actions as reasonably requested by [Hefetz's] counsel to prosecute" this case. Even if Plaintiff wants to abandon the case, for whatever reason, Hefetz has forbidden him from doing so.

It does not end there. Hefetz compels Plaintiff to "do nothing intentional to limit or harm the value of any recovery related to" this legal malpractice case. Plaintiff must even share with Hefetz "copies of any documents or correspondence that [Plaintiff] believes relate to" this malpractice action – even if those communications might be privileged. To that end, Plaintiff must also "fully cooperate with Hefetz and his counsel regarding any claims initiated on behalf of [Plaintiff] for" this lawsuit.

And there is still more. Per the assignment, Plaintiff "irrevocably assigns any recovery or proceeds to Hefetz from" this lawsuit and "agrees to take any actions necessary to ensure that any recovery or damages are paid to Hefetz." In return, "Hefetz agrees to indemnify and hold harmless [Plaintiff] from any attorneys fees or costs that may be incurred in pursuing" this lawsuit "and any and all invoices shall be issued directly to Hefetz with Hefetz bearing sole responsibility for payment thereof." Finally, confirming his complete control of this litigation, Hefetz agrees that any fees or costs incurred in Plaintiff's lawsuit "are to be paid by Hefetz and are Hefetz's sole responsibility."

Simply put, Plaintiff commoditized and sold his legal malpractice claim to Hefetz, giving Hefetz all authority over the case while Plaintiff stands to gain (and lose) absolutely nothing by continuing to prosecute the claim as Hefetz's figurehead. It is difficult to conceive of a more obvious assignment of a legal malpractice claim – explicit or *de facto* – than the one before this court. It must be condemned and summary judgment should be granted in Mr. Tomsheck's favor.

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3. The *Tower Homes/Goodley* factors strongly favor the conclusion that Plaintiff has impermissibly assigned his legal malpractice claim to his former adversary in this case

The degree of Hefetz's control over this legal malpractice lawsuit is sufficient for this court to grant Mr. Tomsheck summary judgment. The clear rationale prohibiting both *de facto* and explicit assignments of legal malpractice claims, described by the courts in *Tower Homes* and *Goodley*, cement this conclusion even further.

For example, the *Goodley* Court first noted the general rule – echoed in and relied upon by *Tower Homes* – that "[o]ur view that a chose in action for legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon." *Goodley*, 62 Cal.App.3d at 395, 133 Cal.Rptr. at 86. It then continued: "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 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, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing 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

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between attorney and client." *Id.* at 397, 133 Cal.Rptr. at 87.

Goodley next summarized its rationale for prohibiting the assignment of legal malpractice claims by acknowledging that "the ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession. That assignability of the legal malpractice chose in action would be contrary to sound public policy is supported by many considerations based upon the nature of the services rendered by the legal profession." *Id*. at 397-98, 133 Cal.Rptr. at 87.

The *Goodley* rationale is compelling and was adopted and expanded by the Nevada Supreme Court in *Tower Homes*. There, the *Tower Homes* Court remarked: Allowing such assignments would "embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." [] Here, issues regarding the personal nature of the attorney-client privilege are implicated. Also, a number of confidentiality problems arise if the purchasers are allowed to bring this claim. For example, the record reflects that plaintiff's counsel attempted to discover confidential files regarding Heaton's representation of Tower Homes. Because the bankruptcy court's order demonstrates that the purchasers are actually pursuing the claim, any disclosure potentially breaches Heaton's duty of confidentiality to Tower Homes. Additionally, Tower Homes can no longer control what confidential information is released, because it cannot decide whether to dismiss the claim in order to avoid disclosure of confidential information. *Tower Homes*, 132 Nev. at 635-36, 377 P.3d at 123 (internal citation omitted).

The sound rationale utilized in both *Goodley* and *Tower Homes*, when applied to this case, leads to the same conclusion: dismissal of an impermissibly assigned legal malpractice claim. To reiterate, there can be no reasonable argument Hefetz maintains total control of the litigation and that he has pried open the fiduciary relationship between Plaintiff and Mr. Tomsheck by

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purchasing Plaintiff's claim from him. He forced Plaintiff to forego any rights to claim attorney-client privilege by requiring Plaintiff to turn over all documents and correspondence which Hefetz might deem relevant to the case. He prevents Plaintiff from making any decisions about whether to dismiss the claim for whatever reason – including avoiding potential disclosure of confidential information. And Hefetz, alone, stands to benefit. This is patently against public policy and Nevada law.

In summary, Plaintiff and Hefetz's machinations, if left unchecked, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client. Their conduct and their assignment cannot stand. This court must enter summary judgment against the Plaintiff at this time.

B. Plaintiff's Complaint is also barred by the applicable statute of limitation and the written tolling agreement entered between Plaintiff and Mr. Tomsheck supersedes any common law litigation malpractice tolling

The Nevada Supreme Court illuminated the role which statutes of limitation play in *Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990). In *Petersen*, a case involving child sexual abuse, the Court expounded upon the utility of statutes of limitation, noting that "it is necessary to consider the purposes served by statutes of limitation. Justice Holmes succinctly stated that the primary purpose of such statutes is to "[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-349 (1944). Although statutes of limitation are generally adopted for the benefit of individuals rather than public policy concerns, *Kyle v. Green Acres at Verona, Inc.*, 207 A.2d 513, 519 (N.J. 1965), it has been stated that:

> Viewed broadly. . .statutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Thus, statutes of limitation rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses. 51 Am.Jur.2d Limitations of Actions §18 (1970) (footnotes and citations omitted).

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Petersen, 106 Nev. at 273-274, 792 P.2d at 19-20.

As noted above, this case concerns a claim of legal malpractice which allegedly occurred when Mr. Tomsheck arguably did not file a written opposition which addressed all the arguments in a motion for new trial, and thereafter filed a Petition for Writ rather than a Notice of Appeal. *See Plaintiff's Complaint*, paragraphs 11-22. The Nevada Supreme Court issued its first Remittitur on those issues on October 13, 2014, then its second Remittitur on May 10, 2016. Therefore, this case does not fall under any of the exceptions to the two-year rule and is not subject to the "delayed discovery rule." *See e.g., Prescott v. United States*, 523 F.Supp. 918 (D. Nev. 1981), *aff'd Prescott v. United States*, 731 F.2d 1388 (Ninth Cir. 1984), *citing State Farm Mutual Auto Insurance Co. v. Wharton*, 88 Nev. 183, 495 P.2d 359 (1972) (NRS § 11.190(4)(e) starts to run from the date the injuries were incurred).

Instead, this case is governed by NRS 11.207, which provides as follows:

> 1. An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.
>
> . . .

Nevada Revised Statutes, Section 11.207.

The elements of a claim for legal malpractice include 1) an attorney-client relationship, 2) a duty owed to the client by the attorney, 3) a breach of that duty by the attorney, and 4) that the breach was the proximate cause of the client's damages. *Warmbrodt v. Blanchard*, 100 Nev. 703, 692 P. 2d 1282 (1984). At common law, an action for legal malpractice generally does not accrue until the plaintiff knows, or should know, all facts relevant to the foregoing elements and damage has been sustained. *Jewett v. Patt*, 95 Nev. 246, 591 P. 2d 1151 (1979).[14] Nevertheless, as parties are free to contract for anything which is not illegal or against public policy, parties are free to reduce (or enlarge) statutes of limitations if they so choose – tolling agreements are commonplace,

[14] Whether Plaintiff's damages were complete at any point of time is irrelevant because, again, Plaintiff and Mr. Tomsheck entered into a separate agreement which superseded any common law tolling afforded by, *inter alia*, the litigation malpractice tolling rule. *See e.g., Kim v. Dickinson Wright, PLLC, et al,* 135 Nev. Adv. Op. 20 (June 13, 2019).

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enforceable, and there is no statute which prohibits them. *See e.g. Miller v. A&R Joint Venture,* 97 Nev. 580, 636 P.2d 277 (1981) (noting that Nevada's longstanding principle to allow the freedom of contract is a more important policy than any "public policy" concerning the enforceability of exculpatory clauses).

As applied to this matter, Plaintiff and Mr. Tomsheck entered into an arms-length negotiation, each side represented by counsel at the time, wherein they agreed to a particularized tolling agreement which set the parameters between them concerning when Plaintiff would be permitted to file a legal malpractice claim against Mr. Tomsheck. That written agreement sets forth that the statute of limitation would be tolled for the pendency and resolution of the *Appeal.* Thereafter, the statute of limitations would begin to run. The tolling agreement is quite unambiguous in that respect.

There is no dispute the *Appeal* was ultimately resolved on May 10, 2016. So, pursuant to their written agreement, Plaintiff's statute of limitation to file his prospective legal malpractice claim against Mr. Tomsheck ran on or about **September 26, 2018**. As noted above, it is undisputed Plaintiff filed his Complaint on April 23, 2019, nearly **seven months** after the parties' agreed upon statute of limitation had expired. Thus, Plaintiff's Complaint was untimely pursuant to NRS 11.207. This court should therefore grant summary in Mr. Tomsheck's favor accordingly.

V.

CONCLUSION

Plaintiff sold his potential legal malpractice claim against Mr. Tomsheck to Plaintiff's former adversary, Yacov Hefetz. That bargain forced Plaintiff to file this lawsuit for Hefetz's benefit and gave Hefetz complete control over this legal malpractice lawsuit even though Mr. Tomsheck has never held any legal relationship with Hefetz. Plaintiff's bargain also awarded Hefetz all potential proceeds from this lawsuit, with Plaintiff carrying no risk from an adverse verdict or judgment. Plaintiff impermissibly assigned his legal malpractice claim and summary judgment, pursuant to *Chaffee* and *Tower Homes*, must be entered against him.

Alternatively, Plaintiff and Mr. Tomsheck entered into a written tolling agreement which superseded any common law tolling of Plaintiff's legal malpractice claim against Mr. Tomsheck.

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Plaintiff agreed he would have until **September 26, 2018** in which to file a legal malpractice action against Mr. Tomsheck, but he waited until April 23, 2019 to file that legal malpractice action. In summary, Plaintiff entered into a written agreement, violated that agreement, and is now attempting to profit from that violation. This is unfair, improper, and actionable. Consequently, summary judgment should be entered in Mr. Tomsheck's favor pursuant to the running of the statute of limitation as well.

WHEREFORE, JOSHUA TOMSHECK respectfully requests that this court enter an Order granting summary judgment against the Plaintiff.

DATED this 11th day of March, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2020, I sent via e-mail a true and correct copy of the above and foregoing **ERRATA TO MOTION FOR SUMMARY JUDGMENT** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual Plaintiffs, vs. JOSHUA TOMSHECK, an individual, Defendants.	Case No..: A-19-793405-C Dept.: VIII **HEARING REQUESTED** **THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ. Third-Party Defendant.	

Third-Party Defendant, MARC SAGGESE, ESQ., by and through his attorneys of record, LIPSON NEILSON P.C., hereby files a motion to dismiss Defendant/Third-Party Plaintiff JOSHUA TOMSHECK'S Third-Party Complaint ("Motion"). This Motion is made pursuant to NRCP 12(b)(4), 12(b)(5), and NRCP 56(b) and is based upon the following Memorandum of Points and Authorities, the paper and pleadings on file, and any oral argument this Court may entertain at a hearing on the motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter arises out of legal representation provided to Christopher Beavor ("Beavor") in a civil action alleging a claim against Beavor for breach of guaranty. Beavor retained Saggese to defend him and in March 2013, after a multiple day trial, the jury returned a verdict in Beavor's favor. Judgment was entered on the verdict and Saggese withdrew as counsel shortly thereafter. There were no motions or appeal deadlines pending at the time of his withdrawal.

Several months later, in June 2013, the Plaintiff in the action, Yacov Hefetz ("Hefetz") filed a Motion for New Trial. Beavor retained Tomsheck to oppose the motion and continue his defense in the action. Despite receiving the case in perfect condition and with a client already positioned as the prevailing party, Tomsheck made several critical errors in opposing the Motion for New Trial, which resulted in years of additional litigation. Specifically, Tomsheck opposed only the timeliness of the Motion for a New Trial, not the substantive arguments set forth therein. He then compounded this problem by filing a writ petition with the Nevada Supreme Court instead of taking a direct appeal, leaving Beavor with no procedural mechanism by which to challenge the district court order.

Tomsheck now asserts a third-party claim for contribution against Saggese, alleging (without any factual support) that his liability to Beavor is the direct result of Saggese's acts or omissions during litigation. Additionally, Tomsheck filed an Affidavit of Service of the Third-Party Complaint which, on its face, proves that service was woefully non-compliant with the express requirements of NRS 14.090. For all of these reasons, discussed further below, this Court must dismiss Tomsheck's third-party complaint or enter summary judgment on the contribution claim in Saggese's favor.

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II. STATEMENT OF RELEVANT FACTS

A. The First Trial and Waiver of the One Action Rule Defense

On July 21, 2011, Hefetz filed a complaint against Beavor alleging a single cause of action for breach of guaranty ("Underlying Matter") arising from a purported failure to meet guarantee obligations on a defaulted loan. *See* Complaint ₱ 5; see also *Affidavit of Christopher Beavor*, attached hereto as **Exhibit 1**. Beavor retained Saggese to defend him in the action. Ex. 1 ¶ 4; see also *Affidavit of Marc A. Saggese, Esq.* attached hereto as **Exhibit 2**.

Prior to filing an answer to the complaint, Saggese and Beavor spoke extensively regarding Hefetz's claim and Beavor's potential defenses. Ex. 1 ¶ 5; Ex. 2 ¶¶ 4 - 6. Saggese advised Beavor that Beavor could assert the one action rule in his defense. *Id.* Saggese specifically advised Beavor that despite the representations in the guaranty, NRS 40.495 prohibited waiver of the one action rule by a guarantor if the mortgage or lien was secured by real property which the owners maintained as their principal residence. *Id.*

Beavor understood that assertion of the one action rule defense in the Underlying Matter could potentially end litigation in his favor, but adamantly refused to place his personal property at risk of foreclosure, nor did he want to have any risk of displacing his children from their home or moving away from his elderly mother who lived next door. Ex. 1 ¶¶ 6 – 8. *Id.* He also advised Saggese that he wanted to resolve the conflict with Hefetz in front of a jury on the merits. *Id.* Therefore, even after Saggese explained the risks, Beavor demanded that they waive the one action rule defense in his answer and at all other stages of litigation. *Id.* He further demanded that Saggese take the case to jury trial. *Id.*

Ultimately, the decision to pursue the case on its merits resulted in great success for Beavor at the trial. Ex. 1 ¶¶ 8-9. The Underlying Matter went to jury trial between February 25, 2013 and March 1, 2013. *See* Complaint ₱ 6. On March 1, 2013, the jury returned a defense verdict in favor of Beavor. *Id.* ₱ 8; Ex. 2 ¶ 7, Att. 1. In light of this

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ruling and the district court's order to statistically close the case, Saggese filed a notice of withdrawal as attorney of record for Beavor. *Id.* On May 21, 2013, the district court entered a judgment on the verdict. *See* Complaint ⁋ 8.

B. The Motion for a New Trial and Tomsheck's Failure to Oppose the Same

On June 10, 2013 – over three months after Saggese filed his notice of withdrawal – Hefetz filed a Motion for New Trial. *Id.* ⁋ 9. The Motion for New Trial was based upon two grounds: (1) *Lioce* challenges pertaining to remarks made about Hefetz during the trial; and (2) assertions that the jury misunderstood the issues in bankruptcy court and therefore, ignored the Jury Instructions. *Id.* ⁋ 10.

On June 19, 2013, Beavor retained Tomsheck to oppose the Motion for New Trial and otherwise defend him against the Hefetz Claim. *Id.* ⁋ 11; Ex. 1 ¶ 10. On June 20, 2013, Tomsheck filed an opposition. *See* Complaint ⁋ 12. Tomsheck's opposition relied solely on Hefetz's alleged failure to timely file for Rule 59 relief. *Id.* ⁋ 12 -13; Ex. 1 ¶ 11. In his reply, Hefetz asserted that the motion was timely and requested that the motion be granted as unopposed pursuant to EDCR 2.20(e). *See* Complaint ¶ 14.

Saggese had no role in the drafting of the opposition to the Motion for New Trial, nor was he aware of the content of the opposition at the time of filing. Ex. 2 ¶ 9. Long after the opposition was filed, Saggese relayed to Tomsheck that Tomsheck was wrong to ignore the substantive issues raised in the motion. *Id.* ¶ 10.

On August 7, 2013, the district court issued an order holding that (1) Tomsheck was incorrect in his calculation of the time to file for Rule 59 relief; and (2) that the motion was granted in the absence of any opposition on the merits. See generally *id.* ¶ 15- 17. On August 28, 2013, Tomsheck filed a motion for reconsideration. Ex. 1 ¶ 10. On September 26, 2013, the motion for reconsideration was denied. *Id.* In an email to Beavor and Saggese reporting the denial of the motion for reconsideration, Tomsheck admitted that "[i]n hindsight, given the result, Marc [was] right that I should have opposed their motion differently..." Ex. 1 ¶ 10, Att. 1; Ex. 2 ¶ 11.

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On May 13, 2014, Tomsheck mistakenly filed a Petition for Writ of Mandamus rather than an appeal from the district court order granting the Motion for New Trial. *See* Complaint ¶ 18; Ex. 1 ¶ 11. On September 16, 2014, the Nevada Supreme Court denied the writ because a direct appeal is the proper relief from an order granting a motion for new trial. *See* Complaint ¶ 20. Beavor, however, was unable to file an appeal as the thirty-day deadline had long passed and there was no procedural mechanism by which to convert the writ petition into an appeal. *Id.* ¶¶ 20-22 and Ex. 1 ¶ 11. Tomsheck withdrew as counsel shortly thereafter. *See* Complaint ¶ 23.

C. Beavor's Motion to Dismiss, Hefetz's Appeal, and Settlement

Following the remand to district court, Tomsheck withdrew and Beavor retained Joel Schwartz of Dickinson Wright as his new counsel. *Id.* ¶ 24; Ex. 1 ¶ 12. In May 2015, Schwarz filed a motion to dismiss based upon the application of the one action rule defense. Ex. 1 ¶ 15. Schwartz also filed a motion to reopen the dispositive motion deadline in order to file a summary judgment motion based upon the one action rule defense. *Id.* Beavor informed Schwartz that he had previously demanded to waive the one action rule defense as part of the litigation strategy during the trial. *Id.* ¶ 14.

In June 2015, the district court granted Schwartz's motion to dismiss over Hefetz's objections that the one action rule defense had never been asserted in litigation and was therefore waived. Ex. 1 ¶ 16, Att. 2. *Notably, in the subsequent order denying Hefetz's motion for reconsideration of the order dismissing the complaint, the district court recognized that Tomsheck "**failed to oppose the motion for a new trial on the merits, and... it would not have been granted except for the lack of a timely and written opposition**."* *Id.* (emphasis added).

In July 2015, Hefetz filed a notice of appeal of the order granting the motion to dismiss. On July 6, 2017, the Supreme Court reversed the district court order and remanded the matter for further proceedings. On remand, the parties stipulated to reopen the dispositive motions and filed competing motions for summary judgment

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accordingly. The Hefetz Claim was fully and finally resolved via settlement in March 2019.

III. PROCEDURAL STATUS

On April 23, 2019, Beavor filed a complaint asserting claims for Professional Negligence and Breach of fiduciary/Breach of the Duty of Loyalty against Tomsheck. On May 16, 2019, Tomsheck filed his answer and affirmative defenses, as well as a Third-Party Complaint against Saggese, asserting a single cause of action for Contribution. On August 26, 2019, Tomsheck filed an Affidavit of Service of the Third-Party Complaint, attached hereto as **Exhibit 3** (*redacted*), claiming that Saggese was properly served at his residence pursuant to NRS 14.090 on August 21, 2019.

IV. STANDARDS OF REVIEW

A. NRCP 12(b)(4) and NRCP 4(e)

NRCP 12(b)(4) provides that a party may assert the defense of insufficient service of process by motion rather than in a responsive pleading. *See* Nev. R. Civ. P. 12(b)(4). The Nevada Supreme Court established in *Lacey v. Wen-Neva, Inc.*, 109 Nev. 341, 348-49, 849 P.2d 260, 264-65 (1993), *overruled in part on other grounds by Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 517, 998 P.2d 1190, 1196 (2000), that "a motion to dismiss is the proper method for challenging a complaint when service of process has not been effected within 120 days, as required by [Rule 4(e)]" and "the proper method for attacking improper service of process is a motion to quash service." *Id.* If a summons and complaint are not served within the 120-day period after a complaint or third-party complaint is filed, the court must dismiss the action accordingly. See Nev. R. Civ. P. 4(e)(2).

B. NRCP 12(b)(5)

NRCP 12(b)(5) provides that a party may move to dismiss a complaint where the complaint fails to state a claim upon which relief can be granted. Nev. R. Civ. Pr. 12(b)(5). Under Rule 8(a), a properly plead complaint must provide "s short and plain statement of the claim showing that the pleader is entitled to relief." Nev. R. Civ. P. 8(a).

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While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2009). Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted). If, however, matters are outside the pleadings are presented to the Court, the Rule 12(b)(5) motion to dismiss must be treated as a motion for summary judgment under Nevada Rule of Civil Procedure 56(b). Nev. R. Civ. Pr. 12(b)(5).

C. NRCP 56(b)

"The purpose of summary judgment is to pierce the pleading and to assess the proof in order to see whether there is a genuine need for trial." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits "show [] that there is no genuine disputes as to any material fact and the movant is entitled to judgment as a matter of law." Nev. R. Civ. P. 56(b); see also *Celotex v. Catrett*, 477 U.S. 317, 330 (1986); *Boland v. Nevada Rock & Sand Co.*, 111 Nev. 608, 610, 894 P.2d 988 (1995).

To survive a motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleadings," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), nor may it "simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586; see also *Boesiger v. Desert Appraisals, Ltd. Liab. Co.*, 444 P.3d 436, 440-41 (Nev. 2019) (implausible claims unsupported by evidence should be dispensed of under Rule 56). Rather it is the burden of the nonmoving party to "come forward with specific facts showing that there is

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a genuine issue for trial." *Id. at* 587; *Wood v. Safeway, Inc.,* 121 Nev. 724 (2005), citing *Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 713, 57 P.3d 82 (2002).

An issue is only genuine if there is a sufficient evidentiary basis for a reasonable jury to return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248 (1986). "The amount of evidence necessary to raise a genuine issue of material fact is enough to require a judge or jury to resolve the parties' differing versions of the truth at trial." *Id.* at 249. In evaluating a summary judgment motion, a court views all facts and draws all inferences in a light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 100, 1103 (9th Cir. 1986).

This does not mean, however, that implausible claims, lacking any support or evidence in the record, should survive to trial. *Boesiger*, 444 P.3d at 440-41. In fact, the Nevada Supreme Court recently opined that "trial courts should not be reluctant in dispensing with such claims, as they are instructive of the type of litigation that summary judgment is meant to obviate." *Id.*

V. LEGAL ARGUMENT

A. Dismissal is Proper Because Saggese Did Not Commit Legal Malpractice.

There are no facts plead in the Third-Party Complaint, nor is there any evidence to support a finding that Saggese was negligent in his handling of the Hefetz Claim, or that Saggese is the "direct and proximate cause" of Tomsheck's current predicament. See *Faulkner v. Ensz*, 109 F.3d 474, 476 (8th Cir. 1997) (internal citations omitted) (recognizing that the doctrine of intervening cause applies in attorney malpractice cases).

The facts in this matter are substantively similar to those of *Mirch v. Frank*, 295 F.Supp.2d 1180, 1181 (D.Nev.,2003). In *Mirch*, an attorney filed a third-party complaint for contribution against his client's successor counsel. *Id.* After providing a thoughtful analysis of the various policy issues implicated by the third-party claim, the District Court held that a former attorney may not seek contribution from a successor attorney in

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the same action. *Id.* at 1185, *citing* Restatement (Third) of the Law Governing Lawyers § 53(i)((2000).

The primary policy consideration behind this decision was simple: an attorney's duty runs to his client, not to prior or successor counsel. See generally *id.* at 1187. Therefore, an attorney is under no duty "to lessen the damages resulting from predecessor's counsel's negligence." *Id.*, citing *Waldman v. Levine*, 544 A.2d 683, 692–93 (D.C.,1988) ("Where there is a choice to be made, successor counsel has no duty to the client to take action which would lessen the damages resulting from predecessor counsel's negligence, and is not liable to predecessor counsel for contribution.")

Further, the attorney in *Mirch* failed to identify how the actions of subsequent counsel could possibly have contributed to the damages deriving from alleged malpractice. *Mirch*, 295 F.Supp.2d at 1187 ("Mirch has failed to state a cognizable claim that McDonald Carano has committed malpractice against its clients, and, therefore, his contribution or indemnity claim against McDonald Carano fails to state a claim under which relief can be granted.")

Here, Saggese so zealously represented Beavor during the First Trial that the jury returned a defense verdict in Beavor's favor. *See* Complaint ¶ 8. By the time Hefetz filed his Motion for New Trial, Saggese had withdrawn as counsel of record and Beavor had retained Tomsheck to continue defending his interests. It was thus Tomsheck - not Saggese – who opposed only the timeliness of the Motion for a New Trial. It was Tomsheck – not Saggese – who erroneously filed a writ petition instead of an appeal under NRAP 3(a). In fact, Tomsheck later admitted in writing that he should have opposed the motion differently. *See* Ex 2 ¶ 10, Att. 1 ("In hindsight, given the result, Marc is right that I should have opposed their motion differently …")

Tomsheck's negligence as successor counsel broke whatever hypothetical chain of causation could have arisen from Saggese's prior involvement. See generally *Faulker*, 109 F.3d at 476-477. But the importance of the word hypothetical cannot be understated, as there is no evidence establishing that the handling of the First Trial

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contributed to the damages derived from Tomsheck's alleged malpractice. In fact, even the "waiver" of the one action rule defense raised in motion work and on appeal by Joel Schwartz is a non-issue *because Saggese specifically advised Beavor of the one action rule defense and Beavor waived the defense in order to protect his property and pursue the case on its merits*.

Saggese is not successor counsel, however, the legal principles set forth in *Mirch* are equally applicable to the matter at hand. Beavor has never alleged that Saggese mishandled Beavor's defense. See *Mirch*, 295 F.Supp.2d at 1187. To the contrary, Beavor executed an affidavit in support of the instant motion, praising Saggese for his work prior to and during the First Trial and stating, under oath, that he demanded waiver of the one action rule defense in the First Trial in order to push the Hefetz Claim forward on its merits. The third-party complaint must be dismissed accordingly.

B. Service Must be Quashed and The Third-Party Complaint Dismissed Pursuant to NRPC 4(e).

As set forth above, Tomsheck's contribution claim is utterly without merit. However, in an abundance of caution, Saggese further seeks dismissal of Tomsheck's Third-Party Complaint on the grounds that service was not effected within 120 days as required by NRCP 4(e) *and* challenges any purported service of the Third-Party Complaint as defective.

Tomsheck filed his answer to Beavor's complaint and a third-party complaint against Saggese on May 16, 2019. When read in conjunction with NRCP 14(a)(1), which governs third-party practice, NRCP 4(e)(1) required Tomsheck to serve the third-party complaint on Saggese within 120 days. His failure to do so results in automatic dismissal pursuant to NRCP 4(e)(2) ("if service of the summons and complaint is not made upon a defendant before the 120-day service period ... the court must dismiss the action, without prejudice, as to that defendant upon motion or upon the court's own order to show cause.")

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NRS 14.090 permits service of process at residences accessible only through gate by one of two means: (1) by leaving the complaint with a guard posted at the gate after being denied entrance to the property; or (2) if there is no guard posted and entry through the gate is not reasonably available, obtaining permission from the court to mail a copy of the complaint to the defendant via certified or registered mail. Nev. R. Stat. § 14.090(1).

Saggese lives in a community that is accessible only by guard gate. Ex. 2. There are no reasonable (or legal) ways for visitors to enter the community without authorization from the guard or the resident. *Id.* Notwithstanding this fact, Tomsheck's process server trespassed in Saggese's community on multiple occasions in an attempt to personally serve Saggese at his residence. Ex. 3. The process server was unsuccessful. *Id.* On his final visit, on or around August 21, 2019, a neighbor noticed the process server lurking in front of the Saggese property and called a guard to remove him for trespass. *Id.* By his own admission, the process server then attempted service on the guard in front of Saggese's property. *Id.*

These facts alone establish that the Tomsheck process server did not comply with the express language of NRS 14.090, which required him to leave a copy of the third-party complaint with a guard *posted at the gate*, *after being denied entry to the property*. See Nev. Rev. Stat. 14.090(1)(a). But to make things worse, Tomsheck subsequently filed an Affidavit of Service stating that Saggese had been served "[b]y delivering and leaving a copy with John Doe Gate Guard who is a person of suitable age and discretion that *lives* with the above stated party at ...." *Id.* (emphasis added).

For all of these reasons, Tomsheck's third-party claims against Saggese should be dismissed pursuant to NRCP 4(e)(2) and any alleged service at Saggese's residence on August 21, 2019 should be quashed for failure to comply with the express requirements of NRS 14.090(a).

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VI. CONCLUSION

Based on the foregoing arguments, Third-Party Defendant Marc A. Saggese respectfully requests that this Court dismiss the Third-Party Complaint pursuant to NRCP 4(e)(2), or alternatively, quash the purported August 2019 service as deficient under NRS 14.090. Saggese further requests that this Court dismiss the Third-Party Complaint pursuant to NRCP 12(b)(5), or enter summary judgment on the contribution claim in Saggese's favor based upon the arguments set forth above.

DATED this 11th day of March, 2020.

LIPSON NEILSON P.C.

/s/ Megan H. Hummel

By: _____

Joseph P. Garin, Esq. (Bar No. 6653)
Megan H. Hummel, Esq. (Bar No. 12404)
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

Attorneys for Third-Party Defendant, Marc Saggese

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 11th day of March, 2020, I served a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** utilizing the Court's Odyssey eFileNV and Serve system for transmittal to the following Odyssey eFileNV and Serve registrants:

C.J. Barnabi Jr., Esq. THE BARNABI LAW FIRM, PLLC 375 E. Warm Springs Road, Ste. 104 Las Vegas, Nevada 89119 *Attorneys for Plaintiff, Christopher Beavor*	H. Stan Johnson, Esq. COHEN JOHNSON PARKER EDWARDS 375 E. Warm Springs Road, Ste. 104 Las Vegas, Nevada 89119 *Attorneys for Plaintiff, Christopher Beavor*
Max Corrick, Esq. OLSON CANNON GORMLEY & STOBERSKI 9950 West Cheyenne Avenue Las Vegas, NV 89129 *Attorneys for Defendant / Third-Party Plaintiff, Joshua Tomsheck*	

/s/ Brenda Correa

An Employee of LIPSON NEILSON P.C.

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EXHIBIT 1

EXHIBIT 1

AFFIDAVIT OF CHRISTOPHER BEAVOR

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Christopher Beavor, Esq., attest as follows:

1. I am an individual residing in Las Vegas, Clark County, Nevada and the named plaintiff in the action entitled *Christopher Beavor v. Joshua Tomsheck*, et al.; Case No. A-19-793405-C. I am also the named defendant in the now settled matter of *Yacov Jack Hefetz v. Christopher Beavor*, et al.; Case No. A-10-645353-C ("Underlying Matter").

2. This Affidavit is made upon my own personal knowledge except where stated on information and belief, and that as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto:

3. On July 21, 2011, I was sued by Hefetz in the Underlying Matter based upon my alleged failure to guarantee obligations on a defaulted loan.

4. In or around October 2011, I retained attorney Marc A. Saggese to defend me. I retained Mr. Saggese because I wanted an experienced, aggressive, and well-prepared attorney with extensive jury trial experience.

5. Prior to filing any response to the complaint, Mr. Saggese and I spoke extensively regarding Hefetz's claim against me and my potential defenses. Mr. Saggese advised me that one such defense was called the "one action rule." I understood the one action rule to be a legal defense premised on the idea that a creditor seeking to recover a debt secured by real property must first proceed against the security before pursuing the debtor personally.

6. I understood that assertion of the one action rule defense in the Underlying Matter could potentially end the current court litigation, but I did not want my home foreclosed on because my elderly mother lives next door, and I was (and still am) raising not only my own daughter, but also my deceased's sister's 3 children, whom I

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adopted. I also did not want any of the properties assigned to my ex-wife to be foreclosed on.

7. Moreover, I felt that the dispute between myself and plaintiff Hefetz needed to be heard by a jury. Therefore, even after Mr. Saggese explained the risks to me, I demanded that we waive the one action rule defense in my answer and at all other stages of litigation. I also demanded that Mr. Saggese take my case to trial. In fact, despite many options and strategies suggested by Mr. Saggese, including settlement on the first day of trial, I continually pushed to have my facts heard by the jury.

8. I made the right decision because in March 2013, the jury returned a defense verdict in my favor. I was extremely pleased, not only with the outcome, but with the quality of Mr. Saggese's legal representation throughout the proceedings.

9. By taking the case to trial, I had the opportunity to not only win on the merits, but also to keep my home, which I built, raised my kids in, and still live in today.

10. In June 2013, Hefetz filed a Motion for a New Trial in the Underlying Matter. By that time, Mr. Saggese had already withdrawn as my counsel of record. I strongly desired to retain Mr. Saggese to continue the fight, however, due to the nature of the allegations set forth in the Motion for a New Trial, Mr. Saggese and I decided it would be better to bring in new counsel. I retained Joshua Tomsheck accordingly.

11. The only argument that Mr. Tomsheck raised in opposition to the Motion for a New Trial was the purported untimeliness of the request. He did not address the substantive arguments raised.

12. The district court granted the Motion for a New Trial and denied Mr. Tomsheck's subsequent motion for reconsideration. In an email advising me that the motion for reconsideration had been denied, Mr. Tomsheck admitted to me and Mr. Saggese that he had made a mistake in failing to address the substantive arguments. A true and correct copy of this email is attached hereto as **Attachment 1**.

13. After losing the motion for reconsideration, Mr. Tomsheck filed the incorrect appellate document with the Nevada Supreme Court, which ultimately resulted

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in my inability to stop the new trial from moving forward.

14. I hired Joel Schwartz, Esq. of Dickinson Wright to represent me in the second trial. I advised Mr. Schwartz that I had intentionally waived the one action rule as part of my litigation strategy in the first trial.

15. In May 2015, Mr. Schwartz filed a motion to dismiss the Underlying Matter. Schwartz also filed a motion to reopen the dispositive motion deadline in order to file a summary judgment motion based upon the one action rule defense.

16. On July 23, 2015, Joel Schwartz emailed me a copy of an order Judge Israel had issued in the Underlying Matter, wherein Judge Israel stated that he would never have granted Hefetz's Motion for a New Trial, but for Mr. Tomsheck's failure to file a timely and written opposition. A true and correct copy of the Order is attached hereto as **Attachment 2.**

17. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 11th day of March, 2020.

CHRISTOPHER BEAVOR

SUBSCRIBED AND SWORN to before me
this 11th day of March 2020.

JENNIFER JUAREZ
Notary Public-State of Nevada
APPT. NO. 13-10788-1
My Appt. Expires 04-20-2021

NOTARY PUBLIC, in and for said County and State
JENNIFER JUAREZ

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ATTACHMENT 1

ATTACHMENT 1

Marc A. Saggese

From: Gmail <joshua.tomsheck@gmail.com>
Sent: Thursday, September 26, 2013 9:52 AM
To: Chris Beavor; Marc A. Saggese
Subject: Judge Israel

Follow Up Flag: Follow up
Flag Status: Flagged

Bad news and good news. He denied the motion for reconsideration, but then made a record that he tended to agree with our position on the issues. He stated that he couldn't hear a motion for reconsideration without new facts or law and then cited a rule that says no such thing. I verbally requested a stay, and informed him we are filing a writ on the issue to the Supreme Court, which I will take care of... His statements on the record today are good for the writ issue.

In hindsight, given the result, Marc is right that I should have opposed their motion differently... Although I sincerely believe I had a good basis to handle the matter in the way I did... And without the benefit of hindsight I likely wouldn't have handled it any differently. That being said, I intend to fully litigate this through until the right result is reached.

I just tried a jury trial in front of Judge Israel and from my perspective I can tell you one thing that I am sure of -- that Judge Israel is just simply not very smart -- and one thing I an quite certain of -- that Judge Israel does not like your case solely because of the "Jewish" issue and the references by Marc at trial to the plaintiff being "an Israeli businessman." I know Marc and know he 100% didn't intend anything in the form of prejudice when he asked those questions and Israel's hypersensitivity to it is exactly the thing we should not have from our Judges. His rulings are being made based on his own personal feelings and not based on the law.

Chris, I will call you later today or tomorrow to discuss. Talk to you soon.

Josh Tomsheck - Attorney at Law
Certified Specialist in Criminal Trial Advocacy by State Bar of Nevada
Board Certified in Criminal Trial Law by National Board of Trial Advocacy
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Hofland &
Tomsheck
ATTORNEYS AND COUNSELORS AT LAW

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ATTACHMENT 2

ATTACHMENT 2

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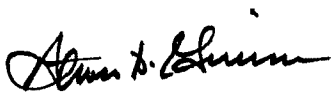

CLERK OF THE COURT

ORDR
Judge Ronald J. Israel
Eighth Judicial District Court
Department XXVIII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
(702)671-3631

DISTRICT COURT

CLARK COUNTY, NEVADA

YACOV JACK HEFETZ, Plaintiff, vs. CHRISTOPHER BEAVOR, Defendant.	Case No. A-11-645353-C Dept. No. XXVIII

ORDER

Plaintiff's Motion to Re-Open the Case and for Reconsideration of an Order of Dismissal Without Prejudice and Defendant's Motion for Leave to Strike Reply; or, in the Alternative, Motion to File Sur-Reply, having come before the Court in Chambers on July 22, 2015, the Court having reviewed the parties' motions, oppositions, and replies thereto, and good cause appearing therefor, the Court hereby finds as follows:

A party filing a motion must state with particularity the grounds therefor, the absence of which may be construed as an admission that the motion is not meritorious. NRCP 7(b); EDCR 2.20(c). Plaintiff's motion does not comply with court rules since it fails to state under what rule it is moving. Rather, it is not until Plaintiff's reply that Defendant and Court are apprised that Plaintiff is moving pursuant to NRCP 59(e), to alter or amend the judgment, despite the motion being titled as motion for reconsideration, which would ordinarily be made pursuant to EDCR 2.24.

Regardless, the Court has inherent authority to amend and/or clarify its orders and to ensure the proper administration of justice. Accordingly, in the absence of a clear standard to be used when determining whether to dismiss a case without prejudice pursuant to NRS 40.435(2)(a) or grant a continuance to allow the proceeding to be converted to an action which does not violate the One Action Rule pursuant to NRS 40.435(2)(b), the Court will clarify why it dismissed Plaintiff's case instead of continuing it. However, in order to do so, the Court must also discuss the troubled and tortured history of this case.

While this Court in no way abused its discretion when it properly applied a statutory remedy, and Plaintiff confirms that there is no legal standard to specifically guide district courts when determining whether to dismiss pursuant to NRS 40.435(2)(a) or continue pursuant to NRS 40.435(2)(b), the Court will entertain Plaintiff's suggestion to consider the following factors when determining which statutory remedy to apply: (1) good faith of the plaintiff; (2) interests of judicial economy; and (3) unfair prejudice to defendant.

First, it is this Court's opinion this case was brought in bad faith. Without specifically discussing the numerous substantive mistakes that were made by counsel for both sides in this case, the testimony at trial was unequivocal that a settlement was reached and an enforceable contract was completed when Mr. Frey (the original real party in interest) authored and delivered a written settlement agreement to the Defendant who signed the agreement and returned it to Mr. Frey's office only to be told by his partner, the Plaintiff (who was later assigned the claim), that Mr. Frey changed his mind. After the trial on the merits and a defense verdict, Defense counsel failed to oppose the motion for a new trial on the merits and, as this court stated during argument on the motion, it would not have been granted except for the lack of a timely and written opposition. Defendant's motion for a new trial was first based on *Lioce* challenges that were not objected to at time of trial, and therefore waived; and second, that the jury misunderstood the issues in Bankruptcy Court and

therefore ignored the Jury Instructions. However, both of these arguments were without merit, and without an opposition, the Court granted the motion. Plaintiff was well aware of the violation of the One Action Rule, or should have been, since this action was initiated or at least for the last year, and never sought to amend his Complaint in a timely manner. Using these criteria, the decision is clear: Plaintiff's claim was not brought in good faith and if Defense counsel had not made several errors, including failing to bring a motion to enforce the written settlement agreement and/or failing to file an opposition to the motion for a new trial, this case would have been concluded several times.

Second, dismissing without prejudice does serve judicial economy under the facts of this case.

Third, there is clear prejudice to Defendant to further delay and prolong this case, given the countless missteps on both sides. Given the Plaintiff's suggested criteria, this Court finds the weight of factors lies heavily with the more appropriate decision to dismiss without prejudice, the interests of justice would not be served by allowing the alternative.

While Defendant's Motion for Leave to Strike Reply; or, in the Alternative, Motion to File Sur-Reply was not noticed and set for hearing either in the ordinary course or on order shortening time, the Court has considered it and Plaintiff's opposition thereto, and DENIES it as moot. Whether or not Plaintiff's "Motion to Re-Open the Case and for Reconsideration of an Order of Dismissal without Prejudice" qualifies as a NRCP 59(e) motion to alter or amend judgment or is an EDCR 2.24 motion for reconsideration is immaterial to this Court as discussed above. Determination of a NRAP 4(a)(4) tolling motion is within the province of the Nevada Supreme Court.

IT IS HEREBY ORDERED that the June 17, 2015 Order is amended to incorporate the clarification and analysis provided in this Decision and Order, noting, however, that this Court considers its amendment to be for clarification purposes only and not a substantive alteration of the judgment.

IT IS FURTHER ORDERED that Plaintiff's motion is DENIED as lacking merit pursuant to EDCR 2.20(c).

IT IS FURTHER ORDERED Defendant's motion is DENIED as moot.

IT IS SO ORDERED.

DATED this 23 day of July, 2015.

DISTRICT JUDGE RONALD J. ISRAEL

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2015, I electronically served a true and correct copy of the foregoing ORDER as follows:

Joel Z. Schwarz, Esq.
Gabriel A. Blumberg, Esq.
DICKINSON WRIGHT PLLC
All e-service recipients listed in Wiznet/Odyssey (See attached list)

H. Stan Johnson, Esq.
Michael V. Hughes, Esq.
COHEN-JOHNSON, LLC
All e-service recipients listed in Wiznet/Odyssey (See attached list)

Sandra Jeter, Judicial Executive Assistant
A-11-645353-C

$ 3.50 - E-Filing & E-Service Fees

Close Service Recipients

7 of 7 selected

Select All Select None

Cohen-Johnson, LLC

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Calendar	calendar@cohenjohnson.com	☑
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Lisa M. Stewart	lstewart@dickinsonwright.com	☑

Iglody Law Offices

Name	Email	Select
Lee Iglody	lee@iglody.com	☑

Your File Number : A-11-645353-C

Thursday, July 23, 2015 1:40:40 PM

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT OF MARC A. SAGGESE, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Marc A. Saggese, attest as follows:

1. I am an attorney licensed to practice law in the State of Nevada and the managing member of The Law Offices of Saggese & Associates.

2. I make this Affidavit in support of my motion to dismiss, or alternatively, motion for summary judgment filed in the action entitled *Christopher Beavor v. Joshua Tomsheck*, et al.; Case No. A-19-793405-C. I have personal knowledge of the information contained in this Affidavit, except where stated on information and belief, and would qualify as a competent witness if called upon to testify to the facts contained herein.

3. In or around October 2011, I was retained by Christopher Beavor to defend him in the now settled matter of *Yacov Jack Hefetz v. Christopher Beavor*, et al.; Case No. A-10-645353-C ("Underlying Matter").

4. During my initial meetings with Mr. Beavor, we discussed the background of Hefetz's claim, as well as Mr. Beavor's potential defenses. I also reviewed the loan and payment guarantee attached to Hefetz's complaint. During my review, I noticed that the payment guarantee Mr. Beavor executed purported to waive any rights he had under the one action rule codified at NRS 40.430.

5. I explained to Mr. Beavor that the one action rule is a legal defense premised on the idea that a creditor seeking to recover a debt secured by real property must first proceed against the security before pursuing the debtor personally. I further explained to Mr. Beavor that if we did not assert the one-action rule as an affirmative defense, he would waive it permanently.

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6. After extensive discussion, Mr. Beavor advised me that he did not want his home foreclosed on, or any of the properties assigned to his ex-wife, who at the time was a named defendant in the Underlying Matter. He also advised me that he wanted the dispute heard by a jury. We agreed that Mr. Beavor would therefore not raise the one action rule defense and would take the case to trial.

7. In March 2013, the jury returned a defense verdict in Mr. Beavor's favor and after judgment was entered, I withdrew as counsel of record. A true and correct copy of the Jury Verdict Form is attached hereto as **Attachment 1**.

8. In June 2013, Hefetz filed a Motion for a New Trial in the Underlying Matter. Given the nature of the assertions in the Motion for a New Trial, I did not feel that reappearing as counsel for Mr. Beavor was possible, as I could best serve as a fact witness. Mr. Beavor understood my position and hired new counsel, Joshua Tomsheck accordingly.

9. I had several communications with Mr. Tomsheck relaying the facts of the Underlying Matter, but I had no role in drafting the Opposition to the Motion for New Trial, nor was I consulted on its content prior to filing.

10. Sometime after the opposition was filed, I was informed that Mr. Tomsheck had only opposed the motion based on its purported untimeliness. I relayed my disagreement with this decision to Mr. Tomsheck, and demanded that he add substantive argument directly addressing arguments made in Defendant's Motion for New Trial, but Mr. Tomsheck refused.

11. After the Motion for New Trial was granted, Mr. Tomsheck emailed Mr. Beavor and myself and admitted that I was right in telling him he should have opposed the Motion for New Trial on its merits. A true and correct copy of the email I received from Mr. Tomsheck is attached hereto as **Attachment 2**.

12. After the Motion for New Trial was granted, I had very few, if any, communications with Mr. Beavor or Mr. Tomsheck regarding the status of litigation. I had no role in drafting or filing the Motion for Reconsideration filed on August 28, 2013. I

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

also had no role in the decision to file a petition for a writ of mandamus instead of a direct appeal.

13. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 11 day of March, 2020.

MARC A. SAGGESE, ESQ.

SUBSCRIBED AND SWORN to before me this 11th day of MARCH 2020.

NOTARY PUBLIC, in and for said County and State

EILEEN AFRICA-NOCOM
Notary Public, State of Nevada
Appointment No. 06-105096-1
My Appt. Expires Apr 18, 2022

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

ATTACHMENT 1

ATTACHMENT 1

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 01 2013 423pm
BY, KATHY KLEIN, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

YACOV JACK HEFETZ, an individual, Plaintiff, vs. CHRISTOPHER BEAVOR, an individual, Defendant.	CASE NO: A-11-645353-C DEPT NO.: XXVIII

VERDICT FORM

We, the jury in the above-entitled action find:

For Plaintiff _____.

For Defendant O.

If you find in favor of Plaintiff: $_____.

DATED this 1 day of March, 2013.

Holly Howard
FOREPERSON

RECEIVED
MAR 04 2013
CLERK OF THE COURT

A-11-645353-C
VER
Verdict
2270479

ATTACHMENT 2

ATTACHMENT 2

Marc A. Saggese

From: Gmail <joshua.tomsheck@gmail.com>
Sent: Thursday, September 26, 2013 9:52 AM
To: Chris Beavor; Marc A. Saggese
Subject: Judge Israel

Follow Up Flag: Follow up
Flag Status: Flagged

Bad news and good news. He denied the motion for reconsideration, but then made a record that he tended to agree with our position on the issues. He stated that he couldn't hear a motion for reconsideration without new facts or law and then cited a rule that says no such thing. I verbally requested a stay, and informed him we are filing a writ on the issue to the Supreme Court, which I will take care of... His statements on the record today are good for the writ issue.

In hindsight, given the result, Marc is right that I should have opposed their motion differently... Although I sincerely believe I had a good basis to handle the matter in the way I did... And without the benefit of hindsight I likely wouldn't have handled it any differently. That being said, I intend to fully litigate this through until the right result is reached.

I just tried a jury trial in front of Judge Israel and from my perspective I can tell you one thing that I am sure of -- that Judge Israel is just simply not very smart -- and one thing I an quite certain of -- that Judge Israel does not like your case solely because of the "Jewish" issue and the references by Marc at trial to the plaintiff being "an Israeli businessman." I know Marc and know he 100% didn't intend anything in the form of prejudice when he asked those questions and Israel's hypersensitivity to it is exactly the thing we should not have from our Judges. His rulings are being made based on his own personal feelings and not based on the law.

Chris, I will call you later today or tomorrow to discuss. Talk to you soon.

Josh Tomsheck - Attorney at Law
Certified Specialist in Criminal Trial Advocacy by State Bar of Nevada
Board Certified in Criminal Trial Law by National Board of Trial Advocacy
228 SOUTH FOURTH STREET
1ST FLOOR
LAS VEGAS, NV 89101
OFFICE: (702) 895-6760
FAX: (702) 731-6910
EMAIL: jtomsheck@hoflandlaw.com
www.hoflandlaw.com
www.las-vegas-criminal-law-attorney.com

www.LasVegasNevadaDUIAttorneys.com

Hofland &
Tomsheck
ATTORNEYS AND COUNSELORS AT LAW

EXHIBIT 3

EXHIBIT 3

Electronically Filed
8/26/2019 2:55 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

Christopher Beavor,
Plaintiff(s),
VS.
Joshua Tomsheck,
Defendant(s),

CASE NO: A-19-793405-C
DEPT NO: VIII

AFFIDAVIT OF SERVICE

STATE OF NEVADA
COUNTY OF CLARK } ss.

Robert Howard, being duly sworn, states that at all times herein Affiant was and is over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. Affiant is a licensed process server whose license number is stated below.

That Affiant received a copy of the Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint on July 23, 2019. That Affiant personally served Marc Saggese with a copy of the above stated documents on August 21, 2019 at 6:48 PM.

By delivering and leaving a copy with John Doe Gate Guard who is a person of suitable age and discretion that lives with the above stated party at [redacted], Las Vegas, NV [redacted].

That the description of the person actually served is as follows: Gender: Male Skin: White Age: 18 - 25 Height: 5'1 - 5'6" Weight: 181 -- 200 Hair: Brown Eyes: Brown Marks:

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated August 23, 2019.

Robert Howard
Signature of Affiant
State License# R-2018-03569
Clark County Process Service LLC
720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License# 2031C

Order #:CC21682
Their File 1325-30301

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*	FOR COURT USE ONLY
Max E. Corrick, II SBN: **6609** **Olson, Cannon, Gormley, Angulo & Stoberski Law Firm** **9950 W. Cheyenne Ave. Las Vegas, NV 89129** TELEPHONE NO.: **(702) 384-4012 x 158** FAX NO.: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*: Client File #**1325-30301**	
DISTRICT COURT STREET ADDRESS: **200 LEWIS AVENUE** CITY AND ZIP CODE: **LAS VEGAS, NV 89115**	
PLAINTIFF/PETITIONER: **Christopher Beavor** DEFENDANT/RESPONDENT: **Joshua Tomsheck**	
DECLARATION OF DILIGENCE	CASE NUMBER: **A-19-793405-C**

I received the within assignment for filing and/or service on July 23, 2019 and that after due and diligent effort I have not been able to serve said person.I attempted service on this servee on the following dates and times:

Servee: **Marc Saggese**

Documents: **Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint;**

As enumerated below:

7/31/2019 -- 10:25 AM 723 S. Sixth Street #201, Las Vegas, NV 89101
I spoke with the receptionist a Caucasian blond woman In her 40's approximately 5'5"-5'7" between 190lbs-210lbs. She stated the defendant was not available at the moment and asked If there was something else she could do for me so I asked If I could set an appointment and she said yes and took my Information and asked what it was In regards to and I told her I am a process server that has papers for the defendant and we have been trying to reach him. She stated she would pass the Information to the defendant and he should call me back soon
Robert Howard

8/7/2019 -- 10:24 AM [redacted], Las Vegas, NV [redacted]
I spoke with Phyllis a Caucasian female in her 70s with dyed black hair approximately 5'2" to 5'5" tall and approximately 120 pounds to 150 pounds. She stated the defendant moved out about two years ago but she knows for a fact that he lives in this community she just does not know where
Robert Howard

8/7/2019 -- 10:46 AM [redacted], Las Vegas, NV [redacted]
[redacted]., Las Vegas, NV [redacted] was confirmed by the gate security as the current address for the defendant there is a silver Honda accord Nevada license plate [redacted] parked in front of the residence. I attempted to ring the ring doorbell multiple times and knocked on the door with no response
Robert Howard

Continued on Next Page

Registration No.: **R-2018-03569**
Clark County Process Service LLC
720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License #2031C

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Signature: _____
Robert Howard

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*	FOR COURT USE ONLY
Max E. Corrick, II SBN: 6609 Olson, Cannon, Gormley, Angulo & Stoberski Law Firm 9950 W. Cheyenne Ave. Las Vegas, NV 89129 TELEPHONE NO.: (702) 384-4012 x 158 FAX NO.: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*: Client File #1325-30301	
DISTRICT COURT STREET ADDRESS: 200 LEWIS AVENUE CITY AND ZIP CODE: LAS VEGAS, NV 89115	
PLAINTIFF/PETITIONER: **Christopher Beavor** DEFENDANT/RESPONDENT: **Joshua Tomsheck**	
DECLARATION OF DILIGENCE	CASE NUMBER: A-19-793405-C

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Documents: **Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint;**

As enumerated below:

Continued from Previous Page

8/8/2019 -- 7:06 AM [redacted], Las Vegas, NV [redacted]
I attempted the front door multiple times ringing the ring doorbell with no response I left a notice card with my contact information posted in the front door
Robert Howard

8/21/2019 -- 7:25 AM [redacted], Las Vegas, NV [redacted]
I arrived at the residence at 05:05am for a surveillance to try and serve the defendant. At 06:21 the blinds to the left of the front door as seen from the curb were opened. I departed the property at 07:23 as the defendant was on the docket to appear in court as counsel in RJC courtroom 8C.
Robert Howard

8/21/2019 -- 8:50 AM 200 Lewis Ave, Las Vegas, NV 891016300
I arrived at the courtroom 8C at 08:05. I checked with the Marshall and asked if the defendant had signed in and was told not yet but he always does eventually. At 08:45 the case the defendant was supposed to be representing was called and another attorney from the defendants practice appeared in his place.
Robert Howard

8/21/2019 -- 4:55 PM [redacted], Las Vegas, NV [redacted]
I arrived at the residence at 16:00 and a silver Honda accord NV license plate [redacted] was parked in front of the residence that was not present earlier in the morning. At 16:33 the Neighbor at [redacted] came out and began questioning me as to why I was there and then stated she was going to call security. At 16:43 a guard from the front gate arrived in a white Toyota Tacoma. I exited my vehicle and he informed me that he was there to escort me out the front gate.
Robert Howard

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720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License #2031C

Continued on Next Page

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Signature: _____
Robert Howard

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DISTRICT COURT STREET ADDRESS: 200 LEWIS AVENUE CITY AND ZIP CODE: LAS VEGAS, NV 89115	
PLAINTIFF/PETITIONER: **Christopher Beavor** DEFENDANT/RESPONDENT: **Joshua Tomsheck**	
DECLARATION OF DILIGENCE	CASE NUMBER: A-19-793405-C

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As enumerated below:

Continued from Previous Page

8/21/2019 -- 4:55 PM [redacted] Las Vegas, NV [redacted]

I complied and served him the papers according to NRS 14.090 (a) A guard posted at the gate and the guard denies access to the residence for service of process, service of process is effective upon leaving a copy thereof with the guard. As he was removing me from the property.
Robert Howard

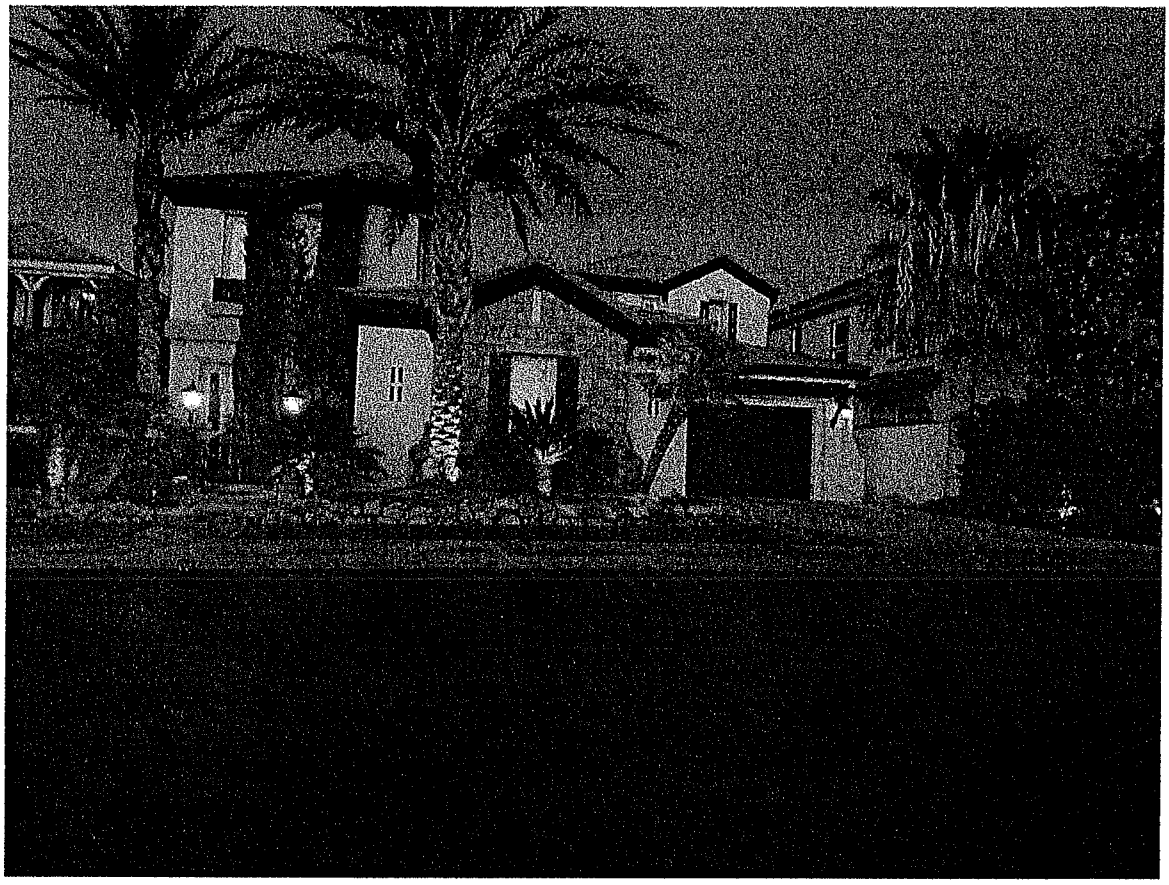
Registration No.: **R-2018-03569**
Clark County Process Service LLC
720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License #2031C

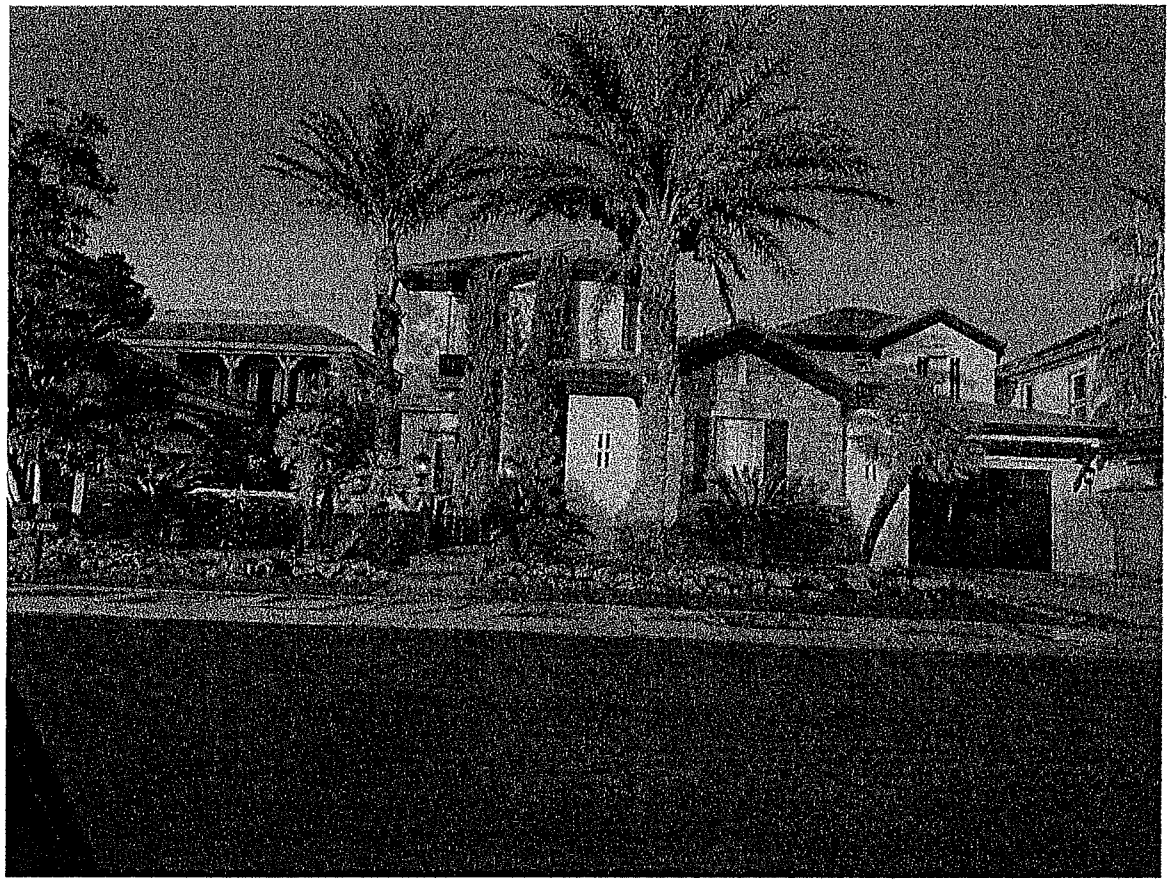
I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

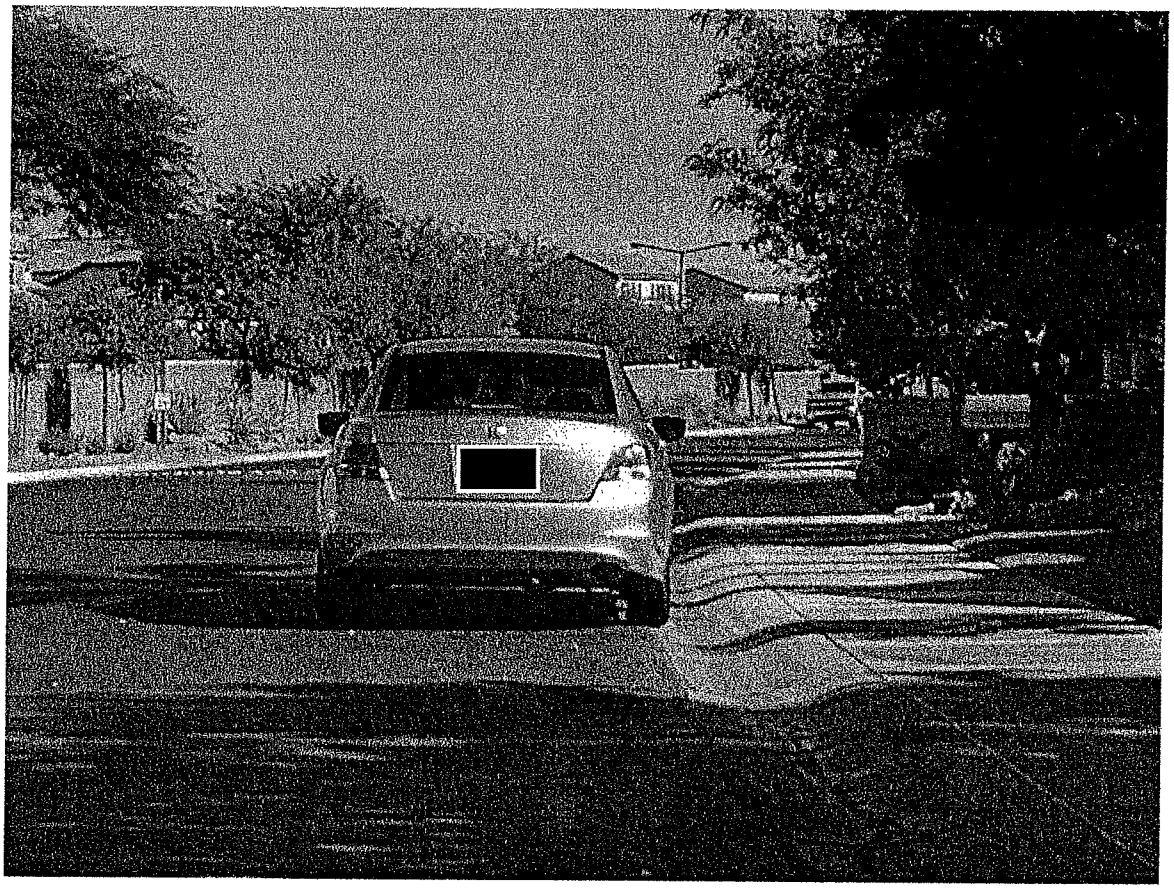
Signature: _____
Robert Howard

DECLARATION OF DILIGENCE

Order#: CC21682/DilFormat.mdl







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