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 III OF III

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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. XXIV **JOSHUA TOMSHECK'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** **Hearing Date: May 7, 2020** **Hearing Time: 9:00 a.m.**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

Defendant JOSHUA TOMSHECK ("Mr. Tomsheck"), by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, has submitted his motion for summary judgment. Plaintiff has filed an opposition to that motion, to which Mr. Tomsheck hereby responds.

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DATED this 30th day of April, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Max E. Corrick, II
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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 B to Defendant's Reply to Plaintiff's Opposition to 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 LEGAL ISSUES FOR THIS COURT TO DECIDE

Mr. Tomsheck's summary judgment motion is based upon undisputed admissible evidence and controlling Nevada law, and it raises purely legal issues which this Court must decide. For ease of reference, the following illustrates the legal questions posed and Mr. Tomsheck's arguments concerning these dispositive legal questions.

Legal Question At Issue	Mr. Tomsheck's Argument
A. Did Plaintiff's settlement agreement with Yacov Hefetz ("Hefetz") assign, in whole or in part, any or all aspects of Plaintiff's then-unfiled legal malpractice lawsuit against Mr. Tomsheck to Hefetz?	A. **Yes**, Plaintiff did assign his then-unfiled legal malpractice lawsuit to his former adversary, Hefetz. It is undisputed that Plaintiff assigned all of the potential proceeds and recovery to Hefetz before this lawsuit was ever filed, and the undisputed admissible evidence shows that Plaintiff also sold Hefetz significant (if not complete) control over the current litigation.
B. If so, does that now bar Plaintiff from prosecuting this now-filed legal malpractice lawsuit as a matter of law pursuant to Nevada law, *e.g. Chaffee v. Smith,* and *Tower Homes v. Heaton.*	B. **Yes**, Plaintiff's assignment of his unfiled legal malpractice lawsuit to Hefetz, whether characterized as an express or *de facto* assignment, bars Plaintiff from prosecuting this legal malpractice lawsuit now. Nevada law, in line with the majority view across the country, compels this conclusion.
C. If Plaintiff is barred from prosecuting this legal malpractice lawsuit because he assigned all or part of it to Hefetz, is he entitled to a "do over", or is he prohibited from clawing back that claim for himself because: (1) Nevada law does not allow a "do over" or a claw back under these circumstances, and/or (2) Plaintiff irrevocably assigned all of his damages to Hefetz in their settlement agreement?	C. **Yes**, Plaintiff is not entitled to a "do over" and cannot claw back what he assigned to Hefetz to save himself from summary judgment now. Allowing him to do so is contrary to controlling Nevada precedent and defeats the strong public policy reasons Nevada law prohibits assignment in the first place. Moreover, Plaintiff cannot claw back anything he assigned to Hefetz because he irrevocably assigned all of his claims to any damage from Mr. Tomsheck to Hefetz. Equity and public policy strongly suggest Plaintiff's remedy for having sold his lawsuit to Hefetz, in whole or in part, must lay elsewhere.

D.	Irrespective of any assignment, does the time limit upon which Plaintiff and Mr. Tomsheck contractually agreed for Plaintiff to file a legal malpractice lawsuit against Mr. Tomsheck override the non-statutory litigation malpractice tolling rule? In other words, does the parties' freedom to contract for something that is not unconscionable, not against public policy, and not contrary to any statute, control?	D.	**Yes**, Plaintiff and Mr. Tomsheck's freedom to contract for a specific deadline for Plaintiff to file a legal malpractice lawsuit against Mr. Tomsheck, consistent with NRS 11.207, controls over the non-statutory litigation malpractice tolling rule. Nevada law expressly permits parties to contractually modify a limitations period for the filing of a lawsuit in the manner Plaintiff and Mr. Tomsheck agreed.

Mr. Tomsheck is making a straight-line, purely legal argument based upon undisputed facts and admissible evidence which warrant summary judgment in his favor. Plaintiff, on the other hand, is attempting to defeat summary judgment by: (1) relying upon inadmissible evidence in violation of NRCP 56(e); (2) relying upon rejected Nevada appellate arguments, and; (3) ignoring Mr. Tomsheck's legal arguments and the legal issues raised altogether. That is, Plaintiff is hoping this Court will not look too closely at his "evidence," his arguments, or his settlement agreement, for fear that this Court will realize Plaintiff is seeking to undermine settled Nevada law and sound public policy.

At bottom, Plaintiff's multiple wrongs do not make a right.[1] By assigning all of the potential proceeds of an unfiled legal malpractice lawsuit to Plaintiff's former adversary, turning over significant control of that lawsuit to that former adversary, and irrevocably assigning his rights to any damages in this case to that same former adversary, Plaintiff has no claim to prosecute against Mr. Tomsheck as a matter of law. And because Nevada's strong support for the freedom to

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[1] Plaintiff's opposition blusters that Mr. Tomsheck's motion is a "hail mary" designed to escape liability from his alleged evident malpractice. Far from it. As explained in Mr. Tomsheck's opposition to third-Party defendant Marc Saggese, Esq.'s pending motion to dismiss, incorporated herein by reference, Plaintiff's damages were not proximately caused by Mr. Tomsheck at all. The Nevada Supreme Court has already ruled that it was Mr. Saggese's failure to raise the one-action rule as an affirmative defense which prevented Plaintiff from incurring all of the fees and costs he is now attempting to collect from Mr. Tomsheck. Furthermore, expert opinion from Dennis Kennedy, Esq. – which is not yet due for disclosure – will support that conclusion as well. To summarize, Plaintiff will never be able to establish all of the elements of a legal malpractice claim against Mr. Tomsheck, and that is no "hail mary" defense at all.

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contract outweighs the litigation malpractice tolling rule in this situation, Plaintiff's legal malpractice claim is barred even if he had not assigned them to his former adversary.

Summary judgment should be granted.[2]

II.

ARGUMENT

A. Plaintiff's settlement agreement with Hefetz assigned all of the proceeds from, and a crucial degree of control over, the yet-to-be filed legal malpractice lawsuit against Mr. Tomsheck to Plaintiff's former adversary

Plaintiff concedes, as he must, that he assigned all of the proceeds and potential recovery from his then-unfiled legal malpractice lawsuit against Mr. Tomsheck to Plaintiff's former adversary, Hefetz. He did so in order to circumvent Nevada's strong public policy barring assignment of legal malpractice claims. However Plaintiff did not just assign those hypothetical proceeds to Hefetz. He irrevocably assigned them to his former adversary as part of a deal whereby Plaintiff was required to: (1) file a legal malpractice lawsuit against Mr. Tomsheck[3]; (2) waive the attorney-client privilege between Plaintiff and Mr. Tomsheck and provide potentially privileged communications to Hefetz; (3) use Hefetz's lawyer to prosecute the lawsuit; (4) cooperate with and do everything Hefetz instructs to maximize the potential value of Hefetz's investment, and; (5) not do anything that might reduce the value of that investment. This Court must now determine what the consequences of Plaintiff's bargain are upon this lawsuit.

The parties agree that Plaintiff entered into a settlement agreement with Hefetz on February 15, 2019 wherein Plaintiff agreed to the following (*verbatim* from the Confidential Settlement and

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[2] "Summary judgment is an important procedural tool by which "factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Boesiger v. Desert Appraisals, LLC,* 135 Nev. 192, 194, 444 P.3d 436, 438-39 (2019), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[3] The timing is significant because in *Chaffee v. Smith*, Nev. 222, 645 P.2d 966 (1982), the Nevada Supreme Court expressly ruled that the assignment of a legal malpractice claim which had not been filed was prohibited and subject to summary judgment as a matter of law. *Chaffee* is controlling law in Nevada.

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Mutual Release Agreement, Section 4 Beavor's Malpractice Claims):

1. Beavor agrees to prosecute any malpractice and/or any other claims he may have against his former counsel[4], 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.

2. H. Stan Johnson will serve as counsel for Beavor in his prosecution of said claims.

3. In order to permit H. Stan Johnson to serve as counsel, Beavor and H. Stan Johnson will execute any required conflict waivers.

4. Beavor represents and warrants that he will fully pursue and cooperate in the prosecution of the above referenced claims;

   a. that he will take any and all reasonable actions as reasonably requested by counsel to prosecute the above actions;

   b. and that he will do nothing intentional to limit or harm the value of any recovery related to the above referenced cases.

5. 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.

6. Beavor shall fully cooperate with Hefetz and his counsel regarding any claims initiated on behalf of Beavor for the above referenced actions.

7. 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.

8. 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.[5]

Plaintiff and Hefetz had their settlement agreement and the respective representations each

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[4] Former counsel being Mr. Tomsheck, Marc Saggese, Esq., or both of them. Plaintiff chose not to sue Mr. Saggese, who happens to be Plaintiff's close friend and business partner, despite Mr. Saggese having caused all of Plaintiff's damages.

[5] *See* Exhibit A to Mr. Tomsheck's motion for summary judgment (filed under seal), Section 4 Beavor's Malpractice Claims.

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made therein, sworn and notarized by a notary public.[6] The terms of the settlement agreement are clear and unambiguous, and they constitute Plaintiff's prior sworn statements. Those prior sworn statements outline exactly what Plaintiff is required to do *vis a vis* any future lawsuit which might be brought against Mr. Tomsheck, in exchange for Hefetz settling his lawsuit against Plaintiff. And they outline exactly what Hefetz is required to do, and stands to gain, in return.

In his opposition, Plaintiff relies significantly upon his March 27, 2020 declaration in order to avoid summary judgment. But that declaration severely contradicts his prior sworn representations in his settlement agreement. Read in context with that settlement agreement, Plaintiff's declaration is little more than another effort to skirt the law, manufacture an issue of fact and perpetuate an illusion of control over this litigation. Plaintiff's reliance upon the declaration cannot serve as any basis for defeating summary judgment and this Court must disregard it entirely.

1. Plaintiff's declaration contradicts his prior sworn statements and therefore cannot be used to defeat summary judgment

The general rule is that a party cannot defeat summary judgment by contradicting itself in response to an already-pending NRCP 56 motion. *See Aldabe v. Adams,* 81 Nev. 280, 284–85, 402 P.2d 34, 36–37 (1965) (refusing to credit a sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party), *overruled on other grounds by Siragusa v. Brown,* 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998); *see also Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 806–07, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999); *cf. Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 294, 357 P.3d 966, 976 (Nev. App. 2015) (in contrast to *Aldabe,* when no summary judgment motion is pending the inconsistent statement "may be considered for purposes of determining whether the conflicting testimony either creates judicial estoppel or represents a legal "sham" designed solely to avoid summary judgment," or for purposes of witness credibility).

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[6] *See id.* at Section 2 Settlement/Denial of Liability ("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..." (emphasis added); and p. 6 "SUBSCRIBED AND SWORN TO before me this 15 day of February, 2019 by Christopher Beavor."

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This rule has existed for over fifty (50) years and is deeply rooted in fairness and preserving the integrity of the civil justice system:

> When Rule 56 speaks of a "genuine" issue of material fact, it does so with the adversary system in mind. The word "genuine" has moral overtones. We do not take it to mean a fabricated issue. Though aware that the summary judgment procedure is not available to test and resolve the credibility of opposing witnesses to a fact issue, we hold that it may appropriately be invoked to defeat a lie from the mouth of a party against whom judgment is sought, when that lie is claimed to be the source of a "genuine" issue of fact for trial.

Id. at 285, 402 P.2d at 37; *Bank of Las Vegas v. Hoopes*, 84 Ne. 585, 445 P.2d 937 (1968).

Plaintiff's reliance upon his March 27, 2020 declaration is the heart of his opposition and it violates Nevada's bedrock rule against fabricating issues of fact for purposes of avoiding summary judgment. For instance, Plaintiff's declaration attempts to fabricate an issue of fact and re-characterize who has control over this litigation – pulling it from Hefetz's pocket back into Plaintiff's – when he states, for example, that "[i]t will ultimately be my decision, and my decision alone to accept or reject any settlement offers that are made."[7] His February 15, 2019 sworn representations say otherwise.[8]

To illustrate, Plaintiff's protestations that he "still maintains complete control of his case" and that he "has the ability to dismiss it at any point" beggar belief in the face of the explicit terms of the settlement agreement. Again, Plaintiff swore that he would "do nothing intentional to limit or harm the value of any recovery." Under their settlement agreement, since Plaintiff can do nothing to intentionally harm the value of Hefetz's recovery (e.g., unilaterally agreeing to dismiss the case or accept a settlement offer for an amount less than what Hefetz wants), it takes no logical leap to conclude Plaintiff has no actual voice in any decision to dismiss (or settle) the case without Hefetz's approval. Though Plaintiff now thinks he could do either upon a whim, his settlement

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[7] *See, e.g.,* Plaintiff's Opposition, Exhibit 5.

[8] When Plaintiff promised he "will do nothing intentional to limit or harm the value of any recovery related to the above referenced cases" he did not exempt out the decisions to accept or reject any settlement offers that are made. If it could limit or harm the value of Hefetz's recovery, Hefetz has the final word. There is no other rational way to interpret Plaintiff's settlement agreement.

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agreement says otherwise.[9]

And there is far more. Contrary to his sham declaration, Plaintiff's illusory control over this litigation can be fleshed out in myriad other ways. For example, Plaintiff may not agree with Hefetz's attorney's advice as to what "reasonable actions" Plaintiff should take to prosecute this case. But Plaintiff has zero incentive to reject Hefetz's attorney's advice – Hefetz has agreed indemnify Plaintiff and pay all the fees and costs associated with this litigation. Because of their financial arrangement, there is just no way to divorce Hefetz's whims and wishes from Plaintiff's own. The Plaintiff may think he controls of the core of this litigation, but his settlement agreement says otherwise.

As for the remainder of Plaintiff's declaration, it further cements Mr. Tomsheck's arguments that Plaintiff impermissibly assigned his legal malpractice lawsuit to Hefetz. For instance, the second paragraph confirms all proceeds are going to be turned over to Hefetz – meaning Plaintiff has nothing to gain from this lawsuit. The third paragraph (which is described in more detail below) ignores the reality that Nevada law, much like the law of other jurisdictions, treats *de facto* assignments the same as express ones and assignments of proceeds the same as assignment of causes of action. Each is impermissible.

The fourth paragraph does not help Plaintiff's cause either. Instead, Plaintiff's contact with his and Hefetz's counsel underscores Plaintiff's decision to waive the attorney-client privilege was for Hefetz's monetary gain. Similarly, the fifth, sixth, and seventh paragraphs also do far more harm to Plaintiff than good. Using an adversary's attorney is a touchstone of an impermissible assignment. *See Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005); *Kommavongsa v. Haskell*, 149 Wash.2d 288 (2003) (public policy considerations warrant the barring of an assignment of a legal malpractice action to an adversary in the underlying litigation); *Tate v. Goins, Underkoffer, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000); *Weiss v. Leatherberry*, 863 So.2d 368, 371 (Fla. App. 2003) (barring assignment to adversary in underlying litigation); *Otis v. Arbella Mutual Ins. Co.*, 443 Mass. 634, 824 N.E.2d 23 (2005) (barring assignment to adverse

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[9] The Court could ask this rhetorical question: What would Hefetz (Plaintiff's counsel's other client) have to say about Plaintiff's new interpretation of their settlement agreement?

party in underlying action); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *and see Goodley v. Wank & Wank, Inc.*, 133 Cal.Rptr. 83 (Cal. Ct. App. 1976); *Tower Homes*, 132 Nev. 628, 377 P.3d 118 (2016).[10]

Fundamentally, the Plaintiff's declaration and his sworn settlement agreement cannot be reconciled. This lack of any logical reconciliation renders the Plaintiff's new perspective on the settlement agreement's terms inadmissible, and it is compelling evidence that Plaintiff's current position is a legal sham at the very least. Whether Plaintiff now believes he can freely breach his contract with Hefetz to salvage an impending summary judgment is of no moment. Nevada law requires this Court to disregard the declaration and the Plaintiff's arguments which rely upon it. This Court must focus only upon the settlement agreement's clear language defining Hefetz's profound control over this litigation. It leaves almost nothing for Plaintiff to do other than serve as Hefetz's figurehead as the nominal plaintiff in this case, with no risks or consequences, and hand over any and all proceeds to Hefetz.

Simply put, a plaintiff who has nothing to gain or lose from litigation, and who is forced to do his former adversary's bidding, has no substantial control over the litigation at all. Plaintiff's misdirection aside, his declaration and his arguments are diametrically opposed to what Plaintiff unambiguously gave Hefetz. They are inadmissible and cannot serve as a basis to deny Mr. Tomsheck's motion pursuant to *Aldabe*.

2. Plaintiff's declaration is also inadmissible because it is parol evidence being used to contradict the terms of his settlement agreement with Hefetz

Plaintiff's declaration is inadmissible because it constitutes an improper use of parol evidence. This Court cannot rely upon it for purposes of ruling upon Mr. Tomsheck's motion.

Generally, parol evidence may not be used to contradict the terms of a written contractual agreement. *See Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21, (2001). "The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein." *Daly v. Del E.*

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[10] The eighth and ninth paragraphs of Plaintiff's declaration are discussed throughout this reply brief.

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Webb Corp., 96 Nev. 359, 361, 609 P.2d 319, 320 (1980). Where "a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning." *Geo. B. Smith Chemical v. Simon*, 92 Nev. 580, 582, 555 P.2d 216, 216 (1976).

On its face, the sworn settlement agreement obligates Plaintiff to file a lawsuit – one had not been filed yet. Thereafter, Plaintiff must "do nothing intentional to limit or harm the value of any recovery related to" the lawsuit because that entire recovery irrevocably goes only to Hefetz. Plaintiff must take "any and all reasonable actions as reasonably requested by [Hefetz's] counsel to prosecute" the legal malpractice lawsuit. He must "fully cooperate with Hefetz and his counsel". He must waive any attorney-client privilege by "provid[ing] Hefetz, through his attorney H. Stan Johnson, copies of any documents or correspondence that Beavor believes relate to" this lawsuit. And for all of his efforts, Plaintiff gets nothing other than immunity from having to pay any fees and costs incurred in this lawsuit.

At bottom, Plaintiff negotiated and sold his prospective legal malpractice lawsuit against Mr. Tomsheck to Hefetz for the right to be Hefetz's puppet. In this regard, Plaintiff sold every important stick in the bundle of rights to control this legal malpractice claim to Hefetz – except for his name on the caption. Plaintiff's alternating sworn statements are inconsistent, cannot be squared, and his declaration is inadmissible. Mr. Tomsheck is entitled to summary judgment as a result because Plaintiff has not presented any admissible evidence to contradict Mr. Tomsheck's arguments concerning the assignment.

B. Nevada law, in line with the majority view across the country, bars Plaintiff from prosecuting this legal malpractice lawsuit now.

There are very good reasons why legal malpractice lawsuits, whether in whole or in part, cannot be assigned. They include the following:

- Concerns about the sanctity of the attorney-client relationship: the attorney-client relationship is a uniquely personal, highly confidential and fiduciary relationship. It would severely undermine this relationship to allow a client to assign his claim to a stranger, or worse, as here, to the client's former adversary.[11]

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[11] The public policy concerns underlying the rule against assignments – particularly the one about respect for the legal profession – are quite serious where, as here, the assignment is

- Concerns about the effects of permitting merchandising of legal malpractice claims: turning legal services (and claims related to them) into a commodity to be bought and sold would encourage unjustified lawsuits, restrict the availability of legal services, promote champerty, and embarrass the attorney-client relationship.

- Concerns about the public's view of the legal profession: permitting assignments would bring disrespect on the legal profession by forcing parties to take positions directly contrary to the positions they took in the underlying litigation.

These concerns are described in a series of cases on the subject, including the seminal case, *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976), in which the Court stated:

> 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.

This very language, and this very case, has been cited, followed, and adopted as embodying the heart of Nevada law on the non-assignability of any legal malpractice claim, in whole or in

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made to the client's adversary in the underlying litigation. *See, e.g., Picadilly Inc. v. Raikos*, 582 N.E.2d 338, 344-45 (Ind. 1991); *Gurski, supra*; *Kommavongsa, supra*; *Thompson v. Harrie*, 404 F.Supp.3d 1233 (D. S.D. 2019) (interpreting South Dakota law and dismissing case by holding that a legal malpractice action cannot be assigned to the adversary in the underlying litigation); *Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. Ct. App. 1993); *Freeman v. Basso*, 128 S.W.3d 138, 142 (Mo. Ct. App. 2004) (holding that public policy bars assignment of a legal malpractice claim to an adversary in the underlying litigation because "the parties attempting to bring a claim for legal malpractice are the very parties who benefitted from that malpractice (assuming that it occurred) during a previous stage of this litigation.").

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part, express or *de facto. Tower Homes*, 132 Nev. at 634-35, 377 P.3d at 122-23.

This seminal case, *Goodley*, was also cited over 30 years prior to *Tower Homes* by the *Chaffee* Court, wherein the Nevada Supreme Court announced that "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), *citing Goodley; and see Tower Homes v. Heaton*, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016).[12]

So, the law of Nevada has been clear on the subject for nearly forty (40) years: the assignment of a legal malpractice claim is not just disfavored, it is fatal. Yet Plaintiff now seeks to upend Nevada's fundamental view of assignment and thereby open up the marketplace to legal malpractice lawsuits. His arguments are founded upon ignoring the core principles, language, rationale, and holdings of *Chaffee, Tower Homes*, *Goodley,* and the vast majority of other jurisdictions which have addressed the question of assignability of legal malpractice claims, whether in whole or in part.[13]

Following what Nevada's Supreme Court has instructed concerning Nevada law and Nevada public policy on the non-assignability of legal malpractice claims is the sensible approach, not Plaintiff's folly. Specifically, this Court should conclude that legal malpractice actions are

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[12] The Nevada Court of Appeals in *Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742, 457 P.3d 276 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition), reached the same conclusion. A copy of the *Oceania Insurance* decision is attached hereto as Exhibit A for the Court's benefit. *Oceania Insurance* is not being cited for any precedential value, nor is Mr. Tomsheck asking this Court to cite it as a basis for granting summary judgment. *See* NRAP 36(c)(3). However, it does provide some context for which way the wind is blowing, post-*Tower Homes*, at Nevada's appellate level.

[13] Aside from the multitude of jurisdictions cited in Mr. Tomsheck's motion, other jurisdictions have noted that the *de facto* assignment of a legal malpractice claim violates public policy and compels dismissal. *E.g. Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261 (Wash. Ct. App. 2013); *Paonia Res., LLC v. Bingham Greenebaum Doll, LLP,* 2015 WL 7431041 (W.D. Ky. Nov. 20, 2015), *Trinity Mortg.. Cos v. Dreyer*, 2011 WL 61680 (N.D. Okla. Jan 7, 2011). "It is the mere opportunity for collusion and the transformation of legal malpractice to a commodity that is problematic." *Kenco*, 291 P.3d at 263. "This reasoning applies whether or not the collusion is real." *Id.* The rule prohibiting either express or *de facto* assignment of legal malpractice claims cannot "be obfuscated by clever lawyers and legal subtleties." *Id* at 265.

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subject to summary judgment if they are assigned in whole or in part, and that the *Achrem* decision is not applicable to legal malpractice claims. That is, a Nevada plaintiff cannot just assign the proceeds to a legal malpractice claim as a means to avoid the general prohibition against the assignment of legal malpractice claims. This Court should also recognize that Plaintiff's primary argument,"Nevada law expressly allows for the assignment of a recovery in a malpractice suit," could not be further from the truth.

This point is made clear in *Tower Homes*, wherein the Nevada Supreme Court rejected the exact argument Plaintiff makes here. The *Tower Homes* Court directly rejected the premise that *Achrem* applies to the assignment of proceeds or causes of action in a legal malpractice lawsuit. In *Tower Homes*, the appellants attempted to sidestep the general prohibition against assignment of legal malpractice claims by making the very same argument Plaintiff offers to this Court:

> "To overcome these concerns [the absolute prohibition of assigning legal malpractice claims] the purchasers [appellants] contend that they were only assigned proceeds, not the entire malpractice claim against Heaton [the lawyer]."

Tower Homes, 132 Nev. at 634-35, 377 P.3d at 122.

Rather than confront the crucial next sentence in *Tower Homes*, Plaintiff's opposition opts to characterize the Court as "sidestepping" the issue of whether proceeds from a legal malpractice claim can be assigned so as to avoid the strict prohibition against assignment.[14] But that is completely false, and it is Plaintiff who is sidestepping the issue. The *Tower Homes* Court's next sentence lays bare Plaintiff's misrepresentations when it states that "**[w]e are not convinced that *Achrem's* reasoning applies to legal malpractice claims...**"[15] *Id.* at 635, 377 P.3d at 122

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[14] Plaintiff also attempts to distinguish *Tower Homes* on its facts. Mr. Tomsheck has laid out those facts in his motion (which Plaintiff curiously criticizes) and acknowledges that this case is not a bankruptcy court assignment case like *Tower Homes*. But Plaintiff asks this Court to not see the forest for the trees in his attempt to limit *Tower Homes* to bankruptcy assignments. Simply put, one cannot square the *Tower Homes* Court's citations and firm reliance upon the broad rationales of *Chaffee* and *Goodley* with Plaintiff's dim suggestion that *Tower Homes* and *Chaffee* do not control the field.

[15] Plaintiff's opposition quotes nearly every other sentence in *Tower Homes*, yet this sentence, which states the general rule of Nevada law, is surprisingly omitted completely from the opposition. It is as if Plaintiff hopes this Court will not read *Tower Homes*, or Plaintiff's opposition, or Plaintiff's settlement agreement with Hefetz, too closely.

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(emphasis added). If *Tower Homes* tells us anything at all it surely tells us that clever lawyers cannot avoid the holding in *Chaffee*, or the rationale of *Goodley*, by only assigning proceeds. It is a distinction without a difference. As the Connecticut Supreme Court aptly stated,

> [W]e 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.

Gurski, 276 Conn. 257, 285, 885 A.2d 163, 178 (2005) (emphasis added). This powerful, well-reasoned conclusion is stark and should not be ignored, though Plaintiff might want to wish it away.

Finally, although Plaintiff contends *Tower Homes* would Plaintiff to assign the proceeds from his legal malpractice claim to Hefetz if Plaintiff maintained control over the litigation, *Tower Homes* strongly suggests the contrary. This "meaningless distinction" is not a loophole to avoid the general prohibition against assignment. Regardless, Mr. Tomsheck has already identified the significant degree of control Plaintiff sold to Hefetz. *See* Section II.A, above. Plaintiff's reliance upon his inadmissible declaration to the contrary strains credulity. As before, Plaintiff's arguments are meritless.

C. Plaintiff does not get a "do over" and he cannot claw back the legal malpractice claim he sold to Hefetz

Once this Court determines Plaintiff's assignment of the proceeds and control over this legal malpractice lawsuit to Hefetz was impermissible and bars Plaintiff from proceeding with this lawsuit any further, the next question the Court must answer is whether Plaintiff gets a "do over" and can claw his lawsuit back from Hefetz. Plaintiff suggests he can, and he premises that suggestion upon three misplaced arguments which this Court should reject. They are the misrepresentation of Nevada law, the puzzling reliance upon rejected appellate arguments, and the disregard of Plaintiff's settlement agreement altogether.

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1. Plaintiff misrepresents, and thereafter misunderstands, Nevada law – along with the law of other jurisdictions – when he claims that he gets a "do over" and can claw back what he sold to Hefetz to avoid summary judgment

The first pillar of Plaintiff's unsteady argument that he should get a "do over" and be able to claw back his previously sold lawsuit from Hefetz is as follows: "In fact, *Tower* specifically cites *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 634 (Tex. App. 2000) [sic] 'The plaintiffs [sic] right to bring his own cause of action for malpractice in [sic] not vitiated by an invalid assignment of that claim. *Tower* further makes it clear that its holding to bar the legal malpractice action is limited to the "specific facts and circumstances of the *Tower* case and is not the general rule adapted [sic] by the Nevada Supreme Court.'" *See* Plaintiff's Opposition, p. 10:1-7. But *Tower Homes* actually says no such things. The *Tate* decision is never referenced, quoted or even cited in *Tower Homes* at all.[16] Nor does the phrase "specific facts and circumstances" appear anywhere in the decision. Neither *Tower Homes* nor *Chaffee* are limited to their "specific facts and circumstances" and Plaintiff is plainly wrong in his assertion to the contrary.

In fact, Nevada's appellate courts have had two (2) chances to adopt the "do over" or "claw back" argument in the past four (4) years. Both times our appellate courts have rejected the very invitation Plaintiff offers here. For instance, *Tower Homes* addressed the issue of whether, in the context of a bankruptcy court order, previously assigned proceeds can revert back to avoid summary judgment. The *Tower Homes* Court rejected the attempt to allow those proceeds to be clawed back when it stated:

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[16] *Tate* has been cited by numerous courts discussing whether legal malpractice claims are assignable – just not by *Tower Homes*. Notably, *Tate* first concluded that even the partial assignment of proceeds from a legal malpractice claim to a third-party (10%) violated public policy and constituted an impermissible *de facto* assignment. *Tate*, 24 S.W.3d at 633-34. The *Tate* Court, however, also held that such partial assignment could preclude summary judgment because plaintiff had kept some of the potential proceeds for himself. Such is not the case here. Moreover, Texas law provides that if the assignment is made to an adversary in the underlying litigation, the lawsuit is barred as a matter of law. *See Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994). Nevada law comports with *Zuniga* and the majority of jurisdictions which do not allow for a "do over" when the assignment is made to an adversary. *E.g. Kommavongsa, supra; Goodley, supra; Gurski,* 276 Conn. at 178 (invalidating the assignment and directing the lower court to enter judgment in favor of the law firm).

> 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.

Tower Homes, 132 Nev. at 635, 377 P.3d at 123, fn. 2.[17] Here, just like in *Tower Homes*, Plaintiff has cited no Nevada authority to support their "do over," claw back attempt. The reason for that is simple: no Nevada court has ever allowed a party a "do over" to claw back part or all of a legal malpractice claim to avoid summary judgment.

Having misrepresented Nevada law in hopes of misdirecting this Court, Plaintiff then turns to citing cases from other jurisdictions for the proposition that legal malpractice claims, once assigned, can be clawed back to avoid summary judgment or dismissal. But the cases cited by Plaintiff tell a far different story than the one Plaintiff is trying to sell.

For instance, the Arizona Court of Appeals decision cited by Plaintiff, *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538 (Ariz. Ct. Ap. 2002), does Plaintiff no service at all. Instead, it demonstrates why summary judgment should be granted here. In *Botma*, the appellant tried to bundle an assignment of an insurance bad faith claim with the assignment of a legal malpractice claim. The *Botma* Court refused to allow the assignment of the legal malpractice claim (but did allow the assignment of the insurance bad faith claim) and upheld the lower court's dismissal of that legal malpractice claim entirely. *Botma* noted that "neither Botma's malpractice claim nor its proceeds are assignable" and that once he assigned all of the proceeds to the legal malpractice he had "nothing to 'retain' in the present lawsuit." *Id.* at 19, 39 P.3d at 543. The *Botma* Court then held:

> "As the complaint candidly discloses, **the purpose of the assignment agreement 'was to allow Plaintiff Himes to recover any and all monies which might be owing to Plaintiff Botma' and that 'Plaintiff Himes will be the ultimate beneficiary of Plaintiff Botma's claims herein.' To allow the present lawsuit, which was born out of that assignment agreement, to proceed in Botma's name would be to wink at the rule against assignment of legal malpractice claims.** The trial court correctly ruled that this lawsuit cannot proceed in Botma's name."

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[17] The other instance is when the Nevada Court of Appeals in *Oceania Insurance* followed *Tower Homes* and rejected the argument that the impermissibly assigned portions of the legal malpractice claim could revert back to the original holder.

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Id. (emphasis added).

Plaintiff next pivots to *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Ct. App. 2003). In *Weiss*, the Court first noted that Florida (like Nevada) follows the majority rule that a cause of action for legal malpractice is not assignable due to strong public policy considerations. *Id.* at 371. The *Weiss* Court noted that the assignment in question allowed Green (the underlying plaintiff) to "trade[] her right to execute her judgment against Leatherberry [the underlying defendant] for the right to obtain the proceeds of Leatherberry's malpractice suit against Weiss." *Id.* at 372. The *Weiss* Court continued:

> Leatherberry was the plaintiff in the suit, at least nominally, but he had no control over the litigation. The [settlement] agreement required him to pursue the case and cooperate with a lawyer selected by Green as a condition of avoiding the execution of Green's judgment against him. The lawyer in question was one of the lawyers who represented Green in the previous negligence lawsuit and helped obtain Green's judgment against Leatherberry.

Id.

In ruling that the assignment was impermissible, the *Weiss* Court further stated: "Mr. Leatherberry has no control over the malpractice claim. He could not dismiss the claim without violating his agreement with Green. In fact, he would be unable to dismiss the case even if he concluded, at some point, that the claim was unmeritorious. Furthermore, he could not unilaterally decide to accept or reject an offer in the case, because the agreement requires him to cooperate with Green's lawyer. The potential conflict is apparent." *Id.*[18] In holding that the assignment was

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[18] Such potential conflicts and "position-shifting" are another touchstone of an impermissible assignment. *See, e.g., Tower Homes, supra; Goodley, supra.* Here is but one example of the actual (not just potential) position-shifting created by Hefetz forcing Plaintiff to use Hefetz's attorney to prosecute this case. Part of Plaintiff's damages are the attorneys fees incurred by successor counsel to have the underlying case dismissed because of the one-action rule. They were successful (at first) and sought attorneys fees from Hefetz pursuant to an offer of judgment. Plaintiff's counsel below argued against those fees for a variety of reasons, including that they were never recoverable because Plaintiff waived the one-action rule defense (which the Nevada Supreme Court determined was the case). Now that same attorney – having argued against the propriety of Plaintiff' damages, will be arguing those same damages are proper. When courts across this country speak of the compelling reason to bar the assignment of legal malpractice claims to an adversary in the underlying matter because of the mere risk of inconsistent positions would bring the legal profession ill-repute, this is the sort of example they are talking about. *See, e.g., Gurski, supra; Kommavongsa, supra; Zuniga, supra; Weiss,*

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unlawful, the *Weiss* Court described the sordid situation thusly:"Two former adversaries had joined together to find a method by which one of them could be discharged from a financial obligation and the other could collect on a judgment." *Id.* at 373-373.[19] That was impermissible then, and it is impermissible now.

Plaintiff next cites *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W. 2d 165 (Mich. Ct. App. 1987), as support for his "do over" plea. The *Weston* decision has been severely discredited for its result and failure to discuss the public policy concerns which predominate even the hint of an assignment of legal malpractice claims. Therein, the *Weston* Court determined that "[s]ince 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]" no assignment of a legal malpractice claim occurred. *Id.* at 242, 414 N.W.2d 165. As the Connecticut Supreme Court in *Gurski* correctly noted, the *Weston* Court 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." *Gurski*, 276 Conn. at 284, fn. 13. This Court should not follow suit, especially in light of *Chaffee* and *Tower Homes*.

Finally, Plaintiff relies upon an unpublished decision from Kentucky, *Scott v. Davis*, 2015 WL 3631136 (June 11, 2015), for the proposition that he gets a "do over" and can claw back what he sold and assigned to Hefetz. Setting aside that *Scott* is an unpublished decision not even suitable for citation in Kentucky, the underlying facts of the case – found in the published decision *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) – reveal why it should not be relied upon by this Court. In the published decision, the Kentucky Supreme Court confronted the dismissal of a legal malpractice lawsuit on the grounds that it had been unlawfully assigned to a business by appellant Davis. In reversing the lower court's decision, the Kentucky Supreme Court relied upon the fact, *inter alia*, that Davis had retained 20% of the proceeds from his legal malpractice lawsuit against Scott for

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supra; Otis, supra; Tower Homes, supra.

[19] Contrary to Nevada law, though, the *Weiss* Court reversed summary judgment in the law firm's favor to allow Leatherberry to proceed anew, as if the apparently revocable assignment never existed. As argued herein, this "do over" result has been rejected by Nevada's appellate courts.

himself, and therefore still had a claim of his own to prosecute. But that is not the case here; Plaintiff sold 100% of his claim to Hefetz and kept nothing for himself. And more importantly, Nevada has rejected the *Scott* "do over" argument already.[20]

In summary, public policy concerns require summary judgment in Mr. Tomsheck's favor. Our law does not reward Plaintiff with a "do over", especially when there is no reason to believe Plaintiff will not just turn the proceeds from this lawsuit over to Hefetz anyway.

2. Plaintiff relies upon the losing arguments in the unpublished *Oceania Insurance* decision to try to sway this Court from following *Tower Homes*

Having propped his arguments upon misrepresentations and misunderstandings of Nevada law, not to mention the law in the vast majority of jurisdictions, Plaintiff also relies upon the argument that Plaintiff should be afforded a "do over" because someone should still be able to prosecute those claims. Upon closer inspection, though, Plaintiff's arguments seem familiar. In fact, the arguments in Plaintiff's opposition at page 11:5-27 concerning this exact subject are little more than the poorly reworded sentences taken from Justice Tao's *Oceania Insurance* dissent, in particular Section IV of that dissent.[21] Again, Nevada's appellate courts have rejected Plaintiff's and Justice Tao's "do over" arguments on multiple occasions. Without belaboring the point, when you are citing the losing legal argument from a recent, unpublished appellate decision you must not have much of a compelling argument at all beyond begging this Court to not follow the applicable law.

This Court should reject Plaintiff's requests for a "do over". Not only is there no basis in Nevada law to reward Plaintiff with one, it is explicitly contrary to controlling Nevada law.

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[20] *Henry S. Miller Commer. Co. v. Newsom, Terry & Newsom, LLP*, 2016 WL 4821684 (Tex. Ct. App. 2016), is relied upon by Plaintiff, but it has the same problems as *Tate* and *Scott v. Davis*. In particular, as part of a reorganization plan the appellant, H.S.M., had retained a portion of its legal malpractice claim and proceeds for itself. Here Hefetz exacted all of the proceeds from Plaintiff, leaving Plaintiff nothing of his own.

[21] *See* Exhibit A.

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3. Plaintiff ignores that he cannot get a "do over" or claw back anything because he irrevocably assigned the proceeds from his unfiled legal malpractice lawsuit to Hefetz, meaning he has nothing to claw back

Plaintiff's final stab at getting himself a "do over" asks this Court to rewrite his settlement agreement with Hefetz. Therein, Plaintiff concedes he "**irrevocably** assign[ed] any recovery or proceeds to Hefetz" (emphasis added). There is legal significance to an irrevocable assignment. The term is defined as follows:

"IRREVOCABLE": Unalterable; committed beyond recall.

Black Law Dictionary (11TH ed. 2019). That is, that which is irrevocably assigned is "beyond recall" and cannot be called back like a boomerang.

Plaintiff, represented by an attorney in his arm's length negotiations of his settlement agreement with Hefetz, made the decision to irrevocably assign all of the proceeds from his yet to be filed legal malpractice lawsuit against Mr. Tomsheck to Hefetz. But now he wants this Court to help him recover that which he negotiated away. Nevada law does not allow it, and Plaintiff has offered no Nevada precedent or public policy which remotely support his arguments. The reason is clear: "irrevocable" has legal significance, it means it cannot be altered or recalled back, and it is absolutely enforceable. *See, e.g. Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 424 P.2d 101 (1967) (acknowledging that a unilateral contract can be enforced as being irrevocable).

As noted above, the *Botma* decision upon which Plaintiff relies is instructive here. In *Botma*, the appellants assigned all of the proceeds from their legal malpractice lawsuit against appellees. Rejecting appellants' arguments that they should be able to get back for themselves what they assigned, the *Botma* Court upheld dismissal of the case and held that once appellants assigned all of the proceeds to the legal malpractice claim they had "nothing to 'retain' in the present lawsuit." *Id.* at 19, 39 P.3d at 543. The principle underlying the result was clear: "To allow the present lawsuit, which was born out of that assignment agreement, to proceed in [Plaintiff's] name would be to wink at the rule against assignment of legal malpractice claims." *Id.*

Here, Plaintiff believes there is a loophole in Nevada law. He believes he can get around the general prohibition of assigning legal malpractice claims by only assigning the proceeds to an

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unfiled legal malpractice lawsuit. Not only does Plaintiff misread Nevada law in that regard, he made his assignment irrevocable. That was his second mistake. And like the first, it is fatal.

This Court should not reward Plaintiff with a "do over". It should give the words of Plaintiff's settlement agreement their fair and ordinary interpretation. Plaintiff holds no rights to any aspect of his legal malpractice claim, he cannot claw them back, and that requires summary judgment against him now.

D. Plaintiff's arguments about the litigation malpractice tolling rule miss the entire point of his separate tolling agreement with Mr. Tomsheck and fail to address the fact that Nevada law allowed them to contract for a specific statute of limitation which overrides a non-statutory tolling

The parties agree Mr. Tomsheck and Plaintiff entered into a contract (their tolling agreement) in which they agreed certain terms would govern their behavior going forward. As noted in Mr. Tomsheck's motion, at the time that contract became binding upon Plaintiff and Mr. Tomsheck the Plaintiff's legal malpractice claims were already tolled pursuant to the litigation malpractice tolling rule. No writing memorializing that was necessary.

But Plaintiff and Mr. Tomsheck chose to bargain for something to replace the litigation malpractice tolling rule. They sought to contractually modify the limitations period for Plaintiff to file any legal malpractice lawsuit against Mr. Tomsheck. And they did so in their tolling agreement.

Without actually addressing Mr. Tomsheck's arguments in his motion for summary judgment, Plaintiff now appears to be asking this Court to render meaningless the tolling agreement's negotiated terms in favor of the non-statutory litigation malpractice tolling rule. That rule, though, is inapposite to this situation because Plaintiff and Mr. Tomsheck contracted it away.

The statute of limitation issue before this Court, contrary to Plaintiff's opposition, is not whether the litigation malpractice tolling rule generally exists. There is no dispute that it does. However, the question Mr. Tomsheck has presented is whether the parties' tolling agreement supersedes that non-statutory rule. The answer is to that question is "Yes," the parties' tolling agreement can, and does, supersede what was already known to automatically be in place.

This conclusion is made more logical when the contractually agreed upon time frame for

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filing a lawsuit meets the minimum time provided by Nevada statute – in this case two (2) years pursuant to NRS 11.207. Contrary to Plaintiff's tacit suggestions, Nevada law expressly allows parties to "contractually agree to a limitations period shorter than that provided by statute." *Holcomb Condominium Homeowners Association, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 187, 300 P.3d 124, 128 (2013). If parties are free to contract for modified limitations periods which are less than the statutory time frame, they certainly can contract for modified limitations periods which meet the statutory time frame. That is what Plaintiff and Mr. Tomsheck agreed to here.

In *Holcomb*, the Nevada Supreme Court confronted the situation whereby parties to a construction defect action had contractually agreed to a statute of limitations period shorter than the one provided by statute. The Court began:

> Whether a party may contractually modify a statutory limitations period is an issue of first impression in Nevada.. However, in other jurisdictions, "it is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitation, provided that the shorter period itself shall be a reasonable period."

Id., *quoting Order of Travelers v. Wolfe*, 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947); *see, e.g., William L. Lyon & Assoc. v. Superior Court*, 204 Cal.App.4th 1294, 139 Cal.Rptr.3d 670, 679-80 (2012); *Country Preferred Ins. Co. v. Whitehead*, 365 Ill.Dec. 669, 979 N.E.2d 35, 42-43 (Ill.2012); *Robinson v. Allied Property and Cas. Ins.*, 816 N.W.2d 398, 402 (Iowa 2012); *Creative Playthings v. Reiser*, 463 Mass. 758, 978 N.E.2d 765, 769-70 (2012); *DeFrain v. State Farm*, 491 Mich. 359, 817 N.W.2d 504, 512 (2012); *Hatkoff v. Portland Adventist Medical Cent.*, 252 Or.App. 210, 287 P.3d 1113, 1121 (2012).

Citing Nevada's long recognized public interest in protecting the freedom to contract, the *Holcomb* Court joined these jurisdictions and held that "a party may contractually agree to a limitations period shorter than that provided by statute as long as there exists no statute to the contrary and the shortened period is reasonable, and subject to normal defenses including unconscionability and violation of public policy." *Id.*, *citing Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009) ("Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy."). As long as a party has a

reasonable opportunity to vindicate his or her rights, there is no statute prohibiting said shortening, and the limitations provision does not require a plaintiff to bring an action before any loss can be ascertained, a contractually modified limitations period is enforceable in Nevada. *Id.* at 188, 300 P.3d at 129, *citing Furleigh v. Allied Group Inc.*, 281 F.Supp.2d 952, 968 (N.D. Iowa 2003) (emphasis added).

Putting the facts of this case into the *Holcomb* analysis, Plaintiff was given a reasonable opportunity to vindicate his rights *vis a vis* Mr. Tomsheck. Their tolling agreement gave Plaintiff two (2) full years from the date the Nevada Supreme Court finally resolved Supreme Court Case No. 68483 c/w 68843 to do so. That period ran from September 26, 201**6** to September 26, 201**8**, a time period consistent with NRS 11.207's two-year time frame for filing legal malpractice lawsuits. Affording a party two (2) years from a date in the future in which to file a lawsuit is neither unconscionable nor illegal. No statute exists which prohibits it.

Moreover, during that time frame, per *Holcomb*, Plaintiff was able to ascertain that he had suffered any (not all) loss – in this case in the form of incurring attorneys fees which he is now seeking to recover from Mr. Tomsheck. This is established as follows: On April 24, 2020, Plaintiff disclosed, *inter alia*, invoices from his prior counsel for fees incurred which are dated from January 9, 2015 through November 2019.[22] Those fees serve as the basis for his damages claim in this case. There can be no argument Plaintiff was able to ascertain he had sustained any loss within the 2016 to 2018 time frame.

In fact, while the inapplicable litigation tolling rule may be interpreted to require that all damages be ascertainable, *Holcomb* does not. *Holcomb* only requires that a party be able to ascertain any aspect of his loss, not all of them. Meaning, whether Plaintiff's damages were complete at any point in time is not relevant to the *Holcomb* analysis or the enforceability of the tolling agreement. Rather, what matters is if Plaintiff was able to ascertain whether he had sustained some loss. Again, the evidence in this case conclusively establishes he was able to do so.

Therefore, the tolling agreement is enforceable. It passes muster under *Holcomb* and

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[22] *See e.g.,* Exhibit B, *Account Statement for Christopher Beavor identified as PLTF 1899.* The Statement shows Plaintiff made payments towards the invoices submitted.

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Nevada law, and its modification of the time for Plaintiff to have filed his legal malpractice lawsuit against Mr. Tomsheck should be enforced. And when enforced, it is clear Plaintiff's lawsuit was filed several months too late. Summary judgment must follow.

III.

CONCLUSION

The assignment of legal malpractice claims, whether in whole or in part, is prohibited in Nevada. There is no difference between assigning just the proceeds and the cause of action themselves. It is a meaningless distinction made to circumvent the longstanding public policies which undergird the prohibition.

In this case, Plaintiff irrevocably assigned all of the proceeds to his unfiled legal malpractice lawsuit to his former adversary. Aside from selling all of those proceeds, Plaintiff also sold significant control over the future litigation to that former adversary. Nevada law forbids this.

Having irrevocably assigned his lawsuit to Hefetz, Plaintiff is not entitled to a "do over" and he cannot claw back what he sold to Hefetz. Nevada law does not support that result, and the public policy behind the prohibition upon assigning legal malpractice would be severely undermined if Plaintiff were allowed his "do over."

Finally, Plaintiff and Mr. Tomsheck contractually agreed to limit the time frame in which Plaintiff could file a legal malpractice lawsuit against Mr. Tomsheck. That time frame was two (2) full years after the resolution of a specific Nevada Supreme Court case. The modification of the time for which Plaintiff to file a lawsuit against Mr. Tomsheck is legal and enforceable. Plaintiff and Mr. Tomsheck's freedom to contract, under these circumstances, outweigh the non-statutory litigation malpractice tolling rule which they contractually mooted.

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

DATED this 30th day of April, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2020, I sent via e-mail a true and correct copy of the above and foregoing **REPLY TO OPPOSITION 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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EXHIBIT A

457 P.3d 276 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Court of Appeals of Nevada.

OCEANIA INSURANCE CORPORATION, Appellant,
v.
Jeffrey A. COGAN; and Jeffrey A. Cogan, Esq., Ltd., a Nevada Professional Entity, Respondents.

No. 74958-COA
FILED FEBRUARY 19, 2020

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ORDER OF AFFIRMANCE

***1 Oceania** Insurance Corporation appeals from a district court order granting a motion to dismiss in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Oceania sued Jeffrey A. Cogan, Esq., and his law firm for legal malpractice and breach of fiduciary duty in connection with his prior representation of the company in a federal case.[1] **Oceania** alleged that Cogan committed malpractice when he failed to get a default that had been entered against the company set aside, leading to the entry of a default judgment in excess of $5 million in favor of the plaintiff in that case, Alutiiq International Solutions, LLC (Alutiiq). The district court dismissed **Oceania**'s complaint for failure to state a claim, concluding that the company could present no set of facts that would show that Cogan's professional negligence caused its damages. The court also concluded that **Oceania**'s breach of fiduciary duty claim was duplicative of the malpractice claim and therefore suffered the same defect. Finally, the court concluded that any attempt on the part of **Oceania** to amend its complaint would be futile. This appeal followed.

Originally, we reversed the district court's order and remanded the case on grounds that **Oceania**'s complaint, brought by **Oceania** in its own name, properly stated claims for legal malpractice and breach of fiduciary duty. However, Cogan filed a petition for rehearing arguing that we misapprehended the public policy concerns at the heart of the Supreme Court of Nevada's holding in *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016), which reaffirmed Nevada precedent prohibiting the assignment of legal malpractice claims.[2] Cogan argues that **Oceania** lacks standing to maintain this action because, in the original action giving rise to the underlying claims, the federal district court impermissibly assigned **Oceania**'s legal malpractice claim by transferring the majority of **Oceania**'s shares to Alutiiq (the adverse party in the underlying litigation) and ordering that "all causes of action belonging to **Oceania** are executed and applied toward satisfaction of [Alutiiq's] default judgment against [**Oceania**'s original majority shareholder] under NRS § 21.230."[3] We previously rejected that argument on grounds that **Oceania**, not Alutiiq, brought this action on its own behalf, and it therefore did not implicate Nevada's policy prohibiting the assignment of legal malpractice claims. However, in light of the public policy concerns presented in Cogan's rehearing petition, we granted the petition and set the matter for oral argument. After considering the parties' arguments on rehearing, we vacate our prior decision and affirm the district court's order dismissing the case.

***2** As an initial matter, we note that the facts of this case are distinguishable from *Tower Homes* in that—in spite of the federal district court's order assigning all of **Oceania**'s causes of action to Alutiiq—**Oceania**, not Alutiiq, brought this action and is entitled to receive any proceeds from it. *See Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 634 (Tex. App. 2000) ("[T]he plaintiff's right to bring his own cause of action for malpractice is not vitiated by [an] invalid assignment [of that claim]."). Nevertheless, we are persuaded that the public policy considerations underlying the prohibition of assigning legal malpractice claims act to bar this legal malpractice action under the specific facts and circumstances presented here.

By virtue of the federal court's order assigning a majority

of **Oceania**'s shares to Alutiiq, that company—as majority shareholder (and represented by the same counsel that litigated the federal case on its behalf)—is essentially controlling the litigation in this case. This is problematic because Alutiiq was **Oceania**'s adversary in the prior case, and part of proving a legal malpractice claim is showing that the claimant would have prevailed or at least obtained a better result in the prior case if not for the attorney's malpractice. *See Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 667-68, 765 P.2d 184, 185 (1988) (noting that the plaintiff in a legal-malpractice case must show that the breach of the attorney's duty proximately caused the client's damages). This means that **Oceania**'s current counsel and Alutiiq (as **Oceania**'s majority and controlling shareholder) are in the curious position of having to prove in this legal malpractice action that **Oceania** would have prevailed in the federal district court case but for Cogan's malpractice. Of course, this position is diametrically opposed to the position they took in that case, which resulted in a judgment in favor of Alutiiq. Stated another way, in this legal malpractice action, Alutiiq will have to take the position that it should not have prevailed in the underlying action in federal court, even though its victory in federal court is why it is in the position of being the majority shareholder of **Oceania** and being involved in this action in the first place.

This kind of position shifting is what at least one court has explicitly identified as a reason for prohibiting the assignment of legal malpractice claims to an adversary in the underlying action. *See Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) (en banc) (prohibiting the assignment of legal malpractice claims to adversaries in the litigation giving rise to the claim in part "because the 'trial 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"); *cf. Tower Homes*, 132 Nev. at 634, 377 P.3d at 122 (identifying *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Ct. App. 1976), as "detailing policy considerations that underlie the nonassignability of legal malpractice claims"); *Goodley*, 133 Cal. Rptr. at 87 (noting that allowing the assignment of a legal malpractice claim "convert[s] it to a commodity to be exploited" and "is rife with probabilities that could only debase the legal profession").

We recognize that Alutiiq's control over this litigation stems from its ownership interest in **Oceania** rather than from a direct assignment of the legal malpractice claim. But in light of the foregoing, we conclude (as have other courts in similar circumstances) that the transfer of ownership to Alutiiq nevertheless constituted a de facto assignment of the claim—which **Oceania** concedes is its only asset—in violation of Nevada's public policy. *See Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261, 264 (Wash. Ct. App. 2013) (citing *Kommavongsa* and holding that the acquisition of Kenco by its adversary in the underlying action "amounted to an assignment of [Kenco's legal malpractice] claim," which was Kenco's only asset); *see also Paonia Res., LLC v. Bingham Greenebaum Doll, LLP*, No. 3:14-cv-95-DJH, 2015 WL 7431041, at *3-4 (W.D. Ky. Nov. 20, 2015) (dismissing the case and concluding on similar facts that "a *de facto* assignment" of a legal malpractice claim occurred); *Trinity Mortg. Cos. v. Dreyer*, No. 09-CV-551-TCK-FHM, 2011 WL 61680, at *3 (N.D. Okla. Jan. 7, 2011) (addressing similar facts and concluding that even though "there was no *actual* transfer" of the relevant claims, there was nevertheless "a *de facto* transfer" sufficient to trigger the rule). Although the cases we have cited addressed situations where parties had expressly agreed to the transfers of ownership preceding the legal malpractice action—whereas the transfer here may or may not have been involuntary—it is the mere "opportunity for collusion and the transformation of legal malpractice to a commodity that is problematic." *Kenco*, 291 P.3d at 263 ("This reasoning applies whether or not the collusion is real.").[4]

***3** Accordingly, although corporate entities generally retain their causes of action following a change in ownership, *see Curtis v. Kellogg & Andelson*, 86 Cal. Rptr. 2d 536, 545 (Ct. App. 1999) (noting that, "for legal purposes, [a] [c]orporation has separate rights and a separate identity," and its causes of action are distinct from those of its owners), allowing **Oceania** in its current form to maintain this action would violate public policy in the same ways that a direct assignment would. We cannot allow Alutiiq to perform an end run around Nevada's public policy and achieve indirectly what it could not achieve directly. *See Schwende v. Sheriff, Washoe Cty.*, 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*, 291 P.3d at 265 ("We cannot allow th[e] rule to be obfuscated by clever lawyers and legal subtleties."). We therefore vacate our prior decision and affirm the district court's order dismissing the action. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

It is so ORDERED.

TAO, J., dissenting:

In the Hollywood blockbuster *Avengers: Endgame* (Marvel 2019), the villain Thanos collects the six primeval Infinity Stones and uses them to eradicate half of all life on Earth. Though the stones are supposedly indestructible, Thanos finds a way around this in order to prevent the eponymous heroes from reversing the havoc he wreaked: he uses the power of the stones to destroy the stones themselves.

A circularity like that—using something to destroy itself—may make for great drama. But it's bad law. Here's the result that the majority reaches: In the prior federal lawsuit, the federal court assigned all of **Oceania**'s "causes of action" (including its potential malpractice claim against Cogan) to litigation opponent Alutiiq. Everyone agrees that this violates the rule set forth in *Tower Homes* that legal malpractice claims cannot be assigned from one plaintiff to another. So everyone agrees that *Tower Homes* makes the claim revert back to **Oceania**. Fair enough. With this much I have no quibble, as even the parties stipulated to its correctness (indeed, that's why only **Oceania** and not Alutiiq is a party to this appeal).

But then the majority uses the same rule to cancel itself out: after *Tower Homes* made the malpractice claim revert back to **Oceania**, the majority then invokes *Tower Homes* to conclude that **Oceania** can't assert the claim either. Much like the Infinity Stones (or, for those more classically inclined, the mythical Greek King Erysichthon whom the gods forced to eat his own body), the majority loops *Tower Homes* back on itself to make the malpractice claim simply disappear into thin air. It uses *Tower Homes* to prevent **Oceania** from asserting a claim that was previously given back to it via *Tower Homes.* This isn't just circular, it's a misapplication of *Tower Homes. Tower Homes* is a rule prohibiting the assignment of malpractice claims from one party to another, but the circularity turns it into a rule requiring them to be dismissed at the pleading stage so that no party can assert them, whether assignor, assignee, or anyone else. Respectfully, I dissent.

The facts of this case are odd, and I agree with the majority that there are things about them that make me squeamish. If a corporation is taken over by its litigation adversary, it seems odd that the adversary can then induce the corporation to pursue a legal malpractice claim against an attorney who once represented its own adversary. That feels not only unseemly, but possibly rife with ethical quandaries. But is that enough to warrant immediate dismissal of the malpractice claim? The majority says yes and implements a rule that seems to come down to this: when a party acquires a majority of a litigation adversary's stock, it loses the right to assert any legal malpractice claim arising from that litigation when the malpractice claim is the sole asset of the acquired company. Thus, once Alutiiq acquired a majority of **Oceania**'s stock, **Oceania** could no longer sue Cogan for any malpractice that he might have committed before the acquisition. The majority softens its ruling by limiting it only to cases in which a legal malpractice claim is the only asset of the corporation whose stock was acquired. That seems to make it a narrow rule unlikely to have broad application, perhaps unlikely to ever come up again in the annals of Nevada jurisprudence. After all, how often would anyone wish to acquire stock in a company whose only asset is a legal malpractice claim against its own attorney? As a general rule legal malpractice claims are difficult to win so the investment value of such a claim isn't likely to be high, and if serious malpractice actually occurred, that's a sign that the corporation may have management problems unlikely to attract many investors.

***4** But a rule of dismissal has problems of its own. I may not like everything that will follow if we let the claim proceed, but "[a] judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels." AM. *v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting). There are four basic flaws here. First, it's premature. Second, the rule conflicts with foundational principles of corporate governance by making a corporation's right to sue for legal malpractice depend upon who owns its stock and how much of it they own. Third, the rule doesn't correctly interpret or apply the cases that it supposedly arises from, including *Tower Homes.* Fourth, as a practical matter, the rule might not be quite as narrow as my colleagues strive to make it.

I.

This appeal arises from the district court's dismissal of **Oceania**'s malpractice lawsuit against attorney Cogan.

Because this is an appeal from a motion to dismiss under NRCP 12(b)(5), we accept the facts alleged in the complaint as true and view all factual inferences in the light most favorable to the plaintiff. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

A corporation named Alutiiq sued **Oceania** in one federal lawsuit and sued both **Oceania** and **Oceania**'s 51% majority shareholder (Lyon) in another. Both **Oceania** and Lyon retained attorney Cogan to defend them in their respective suits. In both suits, Alutiiq obtained default judgments (allegedly due to Cogan's malpractice). To enforce the judgment against Lyon, the court awarded the shares Lyon owned in **Oceania** (which were 51% of all shares) to Alutiiq. To enforce the judgment against **Oceania**, the federal court assigned all of its causes of action (which were by then only the malpractice claim) to Alutiiq, an assignment everyone now agrees was invalid under *Tower Homes* because legal malpractice claims cannot be assigned between parties. In any event, Alutiiq thus became the majority owner of **Oceania**'s shares and the owner of all of its potential claims except the potential malpractice claim against Cogan that stayed with **Oceania**. **Oceania**, now 51% owned by Alutiiq, then sued Cogan for malpractice. The district court dismissed the suit. We originally resolved the appeal in an order, but then granted rehearing and oral argument, leading to the instant order.

The question before us (as framed in Cogan's petition for rehearing) is whether the fact that Alutiiq previously was **Oceania**'s litigation adversary, but now effectively controls **Oceania**, creates such a potential for conflicting duties that the malpractice suit against Cogan must be dismissed at the outset of litigation before discovery has even begun. From these facts, I concede a few points of agreement with my colleagues. The first is that this all looks very bad and puts a number of people in positions that appear highly compromising. Start with attorney Cogan. In the federal lawsuit, Cogan represented **Oceania** in its fight against Alutiiq, but now Alutiiq effectively controls **Oceania**. This puts Cogan in a place where his loyalty appears divided: he once was adversarial to Alutiiq, but now Alutiiq wants to drive a lawsuit asserting that Cogan's duties ran to it all along.

Loyalty aside, there's the question of privilege, confidentiality, and attorney work-product. During the federal litigation, Cogan presumably engaged in privileged and confidential communications with his client **Oceania** over how to best fight Alutiiq and presumably generated attorney work-product along those lines as well. But now that Alutiiq controls **Oceania**, it may now be privy to all of those communications and work-product. During oral argument, **Oceania** noted that privilege is frequently waived anyway during a malpractice suit; but it seems to me there's at least an arguable difference between waiving the privilege (potentially under seal or under the protection of a discovery protective order) in order to help mount a defense in court and turning over those communications and work product directly to your former litigation adversary without restriction or condition.

***5** Then there's the question of loyalty to Cogan's other client, Lyon. During the federal litigation, Cogan represented both Lyon and **Oceania**, and at the time their interests were mutually aligned against Alutiiq. But now that Lyon no longer owns most of **Oceania**'s shares, Lyon's interests are no longer aligned with **Oceania**'s. Indeed, their interests may now be opposing, which may place Cogan in the difficult position of juggling conflicting duties to two different clients. Alongside any questions of loyalty between those two clients stand questions of confidentiality and privilege: is Alutiiq now privy to privileged and confidential communications and work-product that took place between Cogan and Lyon at a time when Lyon's interests aligned with **Oceania**'s against Alutiiq?

Finally, there are questions about the incentives of the various parties to defend Cogan's actions. Proving a legal malpractice claim requires a showing that the attorney's conduct fell below the standard of care and that the client would have done better in the federal litigation but for the malpractice. *E.g., Mainor v. Nault,* 120 Nev. 750, 774, 101 P.3d 308, 324 (2004). When **Oceania** was mostly owned by Lyon, Alutiiq's interests more or less aligned with Cogan in that both would have preferred to show that the result of the federal suit would not have differed (after all, Alutiiq would not want to undermine its victory). But now that **Oceania** is mostly owned by former litigation adversary Alutiiq, Alutiiq will benefit by trying to prove that **Oceania** would have prevailed in the prior federal litigation, which is the exact opposite of the position Alutiiq would have taken previously. Indeed, during oral argument, appellate counsel for **Oceania** openly stipulated that this was the current situation, and the majority makes it a major focus of its order dismissing this claim.

The real issue that Cogan is trying to get at isn't just that there was a change in stock. It's that there was a change in management. It just so happens in the case of a closely-held corporation like **Oceania** that the shareholders, officers, managers, directors, and employees are all one and the same. Thus, the potential

problem here isn't that stock changed hands from one group of shareholders to their litigation adversary. It's that, even though the malpractice claim belongs to the corporation, the managers and directors who would control the litigation and reap its potential proceeds suddenly morphed into the litigation adversaries. But Cogan's duties always run to the corporation regardless of who the corporation employs as managers and employees. *See Upjohn v. United States,* 449 U.S. 383 (1981) (overruling a previous principle that corporate attorney's duties run to the corporation's "control group"). As long as the corporation remains the same entity (and so long as there's no allegation that the corporate veil should be pierced), the corporation remains Cogan's client regardless of who controls it or owns its stock.

II.

The first problem with a dismissal is that it's premature. Whether considered as a change in stock or a change in management, should this lawsuit proceed I agree that Cogan may be placed in difficult positions that could potentially conflict with various rules of professional responsibility. But unlike my colleagues, I don't believe that's enough to warrant outright dismissal of the claim at the pleading stage. The unstated but integral premise of an early dismissal is that those conflicts are not only hypothetical but real, and, beyond that, not only real but irreconcilable. But all we have is the complaint. Before an answer has been filed we don't even know which facts alleged in the complaint are disputed, much less what facts any future evidence will ultimately prove to be true or false. Under NRCP 12(b)(5) we must assume certain facts to be true that might not be true at all, so we have no idea how real any potential conflicts actually might turn out to be. And even if some problems would eventually arise, after dismissal nobody will ever have an opportunity to try to find any better way around them. Dismissal is simply too drastic a remedy for a claim about which we actually know so little.

III.

***6** The second problem with this approach is that it conflicts with settled law regarding corporate governance. A major engine fueling Nevada's economy is the stability and clarity of our laws relating to corporate governance, laws second in effectiveness only to those of the state of Delaware. Businesses feel comfortable investing in Nevada because they know their assets will be treated by the courts in a predictable and consistent manner. One settled principled of corporate governance—indeed, the foundational idea behind all of corporate law—is that corporations exist independently of whoever happens to own its shares. *See Curtis v. Kellogg & Andelson,* 86 Cal. Rptr. 2d 536, 545 (Ct. App. 1999) (noting that, "for legal purposes, [a] [c]orporation has separate rights and a separate identity," and its causes of action are distinct from those of its owners). The only exception to this is in those very rare scenarios in which the corporation is the effective "alter ago" of its shareholders and its corporate veil is a fiction that ought to be pierced.

But the majority's holding makes **Oceania**'s (a corporation) right to sue its attorney for legal malpractice depend entirely on who its shareholders are and when they acquired its shares, without any finding that the corporation was any kind of "alter ego." The outcome is this: If Alutiiq had never acquired or owned any of **Oceania**'s shares, then **Oceania** would be free to sue its lawyer for any malpractice it believes occurred. But because Alutiiq acquired a majority of **Oceania**'s shares after the alleged malpractice occurred, **Oceania** cannot sue its lawyer. Yet if Alutiiq owned less than a majority of the shares, then **Oceania** can apparently sue. And if Alutiiq owns a majority of **Oceania**'s shares, but acquired them well before the alleged malpractice occurred, maybe **Oceania** could sue. By inference, although Alutiiq owns a majority of **Oceania**'s shares right now, if Alutiiq sells those shares to someone else in the future, then maybe **Oceania** might again be able to sue its lawyer. This violates fundamental principles of corporate law by intertwining the corporation's rights with those of its shareholders, in something very much akin to an "alter ego" or "piercing the corporate veil" analysis, without such a claim having been made.

Indeed, in his petition for rehearing, Cogan expressly avoids any alter ego claim yet nonetheless argues that once a majority of the corporate stock changed hands, the corporation itself thereby became a different entity, creating what he calls a "standing" problem. But while a majority of **Oceania**'s stock changed hands, that only means the owners of the corporation changed. The corporation itself did not. Merely because a corporation undergoes a change in shareholders has no effect on the ongoing legal status of the corporation itself. Indeed, corporate stock is traded all the time without creating any

change to the corporate entity itself; that's the reason the New York Stock Exchange and NASDAQ even exist as open markets for the free and public sale of corporate stock. The fact that shares of corporate stock changed hands has no bearing on who Cogan's client was, and is.

Corporations might possess all kinds of claims against a variety of potential defendants, including competitors, vendors, or suppliers. There's no principle of law under which those claims just die (at the pleading stage, no less) whenever a litigation adversary acquires some or even most of the company's stock. Admittedly, claims for legal malpractice against the company's attorney may feel a little different because they might implicate ethical issues that other types of claims might not. But I know of no rule of law under which a corporation's right to sue anyone for anything, whatever the legal theory behind the claim, depends on who happens to own its stock at any given moment in time.

IV.

The third problem here is that existing precedent doesn't support this outcome. The basic holding of *Tower Homes* is that a claim for legal malpractice cannot be assigned from one entity to another because such a claim derives from an attorney-client relationship whose fundamental attributes—the duties of loyalty and confidentiality—always stay with the original client. This is the law in a number of other states as well. *Cf. Davis v. Scotty* 320 S.W.2d 87 (Ky. 2010); *Edens Tech. LLC v. Kile Goekjian Reed & McManus PLLC,* 675 F. Supp. 2d 75, 79-82 (D. D.C. 2009); *Gurski v. Rosenblum & Filan LLC*, 885 A.2d 163 (Conn. 2005); *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP,* 357 F. Supp. 2d 951 (E.D.Va. 2005); *Kommavongsa v. Haskell,* 67 P.3d 1068 (Wash. 2003); *Aleman 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, 343 (Ind. 1991); Okla. Stat. tit. 12, § 2017 (D) (1984).

*7 Everyone agrees that, under this rule, the federal court's attempt to transfer **Oceania**'s malpractice claim to Alutiiq was invalid, and the claim actually reverts back to and belongs to **Oceania**. But once **Oceania** took back the malpractice claim and asserted it in its own name, *Tower Homes* no longer applies to what happens next. Yet after recognizing that the claim reverted back to **Oceania** under *Tower Homes,* the majority then relies upon *Tower Homes* again to invalidate the claim—even though it's **Oceania** that now asserts it. This is, as I've noted, fundamentally circular: it's using *Tower Homes* to prevent **Oceania** from asserting a claim that was previously given back to it via *Tower Homes.*

The three cases the majority principally relies upon for its public policy analysis don't support this result. *See Paonia Resources, LLC v. Bingham Greenbaum Doll LLP*, 2015 WL 7431041 at *1 (W.D. Ky. 2015) (unpublished); *Kenco Enters. Nw., LLC, v. Wiese,* 291 P.3d 261 (Wash. 2013); *Trinity Mortg. Co., v. Dreyer,* 2011 WL 61680 (N.D. Ok. 2011) (unpublished). The rule of those three cases is simple and straightforward: they extend the prohibition against assignments to situations where there was no express assignment of the claim, but where the facts demonstrated a "de facto" assignment from one party to another that constituted an assignment in everything but name. In *Kenco*, the majority shareholders (the Kangs) assigned their malpractice claim to the corporation (Kenco), and then the ownership of Kenco was transferred to the litigation adversary (Sleeping Tiger). The court specifically noted that "Kenco/Kang and Sleeping Tiger entered into an assignment agreement that provided the Kangs would assign their legal-malpractice claims to Kenco." *Kenco*, 291 P.3d at 262. So, the adversary obtained not only the corporation's legal malpractice claim, but the malpractice claim of the previous shareholders as well. Similarly, in *Trinity,* the parties executed what the court called a "de facto" assignment cloaked as an assignment of shares coupled with exclusive contractual power over the course of the litigation. 2011 WL 61680 at *3. Likewise, in *Paonia,* the parties executed a contract in which the parties "agreed to a judgment ... transferred ownership and control ... and accepted a release of any [other] claims." 2015 WL 7431041 at *1.

In all three cases, the parties entered into a contract to transfer something. In all three, the court looked past the form of the transfer and concluded that the parties executed an effective assignment of the claim that they just endeavored to call something else. The difference here is there was no contractual agreement between **Oceania** and Alutiiq giving **Oceania** the claim; **Oceania** always had it (indeed, **Oceania** got it back precisely because the federal court's assignment of it to Alutiiq failed under *Tower Homes*). By dismissing the claim anyway, were not unraveling an assignment, whether formal or "de facto." Were doing something else.

The rule of *Tower Homes*, *Paonia, Kenco,* and *Trinity* is that SOMEONE may assert the malpractice claim, and the question is whether it ought to be the assignor or assignee.

But here, if we dismiss the claim, NOBODY can assert it. This isn't a rule invalidating an assignment. It's a rule dismissing a malpractice claim with prejudice even if nobody ever attempted to assign it. Whatever this is, it isn't the rule of *Tower Homes, Paonia, Kenco*, and *Trinity*, but an entirely new rule having nothing to do with assignments. And it's potentially dangerous to future cases. Corporations might not be able to pursue genuine malpractice cases, and attorneys who committed real malpractice might get away scot-free, all just because the corporation's stock happened to change hands at some point in time after the malpractice.

***8** To sidestep this pitfall, Cogan seems to suggest that there is something that can be invalidated that resurrects the malpractice claim, namely, the transfer of shares to Alutiiq. He implies that if Alutiiq sells off its interests in **Oceania**, **Oceania** then becomes its old self and can then freely sue him if it wants. The problem with this argument is obvious: it runs afoul of the basic principle that a corporation is a separate entity from its shareholders and the corporation's rights do not depend upon who holds its stock. Cogan effectively suggests that **Oceania** is only his client if someone other than Alutiiq (indeed, anyone in the world except Alutiiq) owns its shares (or perhaps if Alutiiq owns some shares but not a majority of them?), which self-evidently violates corporation law.

V.

There's another problem with trying to force this appeal into the boundaries of *Tower Homes*, *Paonia*, *Kenco,* or *Trinity.* It's the presence of minority shareholders.

In *Kenco* and *Paonia,* the litigation adversary acquired 100% of the stock of the adversary corporation. In *Trinity,* the adversary acquired 50% of the shares, but also acquired exclusive control over the litigation and the exclusive right to collect any recovery, making it the "sole decision maker" over the litigation. 2011 WL 61680 at *4. Thus, in all three cases, the adversary acquired complete control over the company and the complete right to collect all proceeds from the malpractice claim. Consequently, there were no minority shareholders whose interests could be adversely affected. The only interests that mattered belonged to the parties before the court.

But here, Alutiiq acquired only a 51% interest in **Oceania**'s shares. It possesses a 51% right to control the company, which might be enough to control decision-making, but we don't know from the existing record how any proceeds from a malpractice claim (if successful) might be distributed among the majority and minority shareholders. Unlike *Paonia, Kenco,* and *Trinity,* we do know that there exists at least one minority shareholder who might hold some stake in those proceeds. For purposes of a motion to dismiss, we can't conclude with certainty that Alutiiq's 51% interest is all that matters. If we dismiss the malpractice claim, we're dismissing something that might have brought value to minority shareholders who are not parties to this litigation, without an opportunity for them to weigh in on how this lawsuit might affect their shares. Indeed, everyone agrees that the malpractice claim is **Oceania**'s only remaining corporate asset. Dismissing it likely means the value of the minority shares will go to zero even though they have no say in any of this.

VI.

Even though the cases themselves don't apply directly, does the public policy behind them nonetheless support this outcome? Several discrete "public policy" concerns underlie why legal malpractice claims cannot be contractually assigned. "The worry is that allowing assignments would incentive collusion and convert legal malpractice into a commodity." *Paonia,* 2015 WL 7431041 at *3 (internal quotations marks omitted). "[T]he commercialization of malpractice claims ... in turn would span an increase in unwarranted malpractice actions." *Picadilly v. Raikos,* 582 N.E.2d 338, 342 (Ind. 1991). Additionally, such assignments "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 ...." *Id.* They also create a "disreputable public role reversal" that would reflect negatively on the legal profession and potentially "result in decreasing the availability of legal services to insolvent clients." *Trinity*, 2011 WL 61680 at *4.

Thus, courts cite these four concerns: the risk of collusion between the contracting parties; the commoditization or commercialization of malpractice claims which in turn might increase the number of frivolous claims; undermining confidential and privileged communications; and the potential adverse impact on the reputation of the legal profession. *Kenco* recognizes that that there need be

no actual collusion for a de facto assignment to be found, so long as the possibility exists. *Kenco,* 291 P.3d at 263 ("The reasoning applies whether or not the collusion is real.").

***9** The problem is that, of the four, two clearly do not apply here. There can be no risk of collusion between **Oceania** and Alutiiq when they never contractually transferred any claim between each other; all Alutiiq did was acquire stock, and that is not the same thing as acquiring a claim. And it acquired the stock by court order, not by contract. Additionally, without any such contractual transfer of a claim, there is no risk of commoditizing the claim by turning the claim itself into a saleable product (and again, the commercial sale of stock is not the same thing as the commercial sale of a claim).

Thus, of the four cited "public policy" concerns, the only two that can arise are the concerns over the potential exposure of privileged and confidential communications and how such claims might reflect poorly on the reputation of the legal profession. I agree that those are certainly valid concerns, at least in theory, and perhaps one can plausibly argue that they ought to be enough on their own to justify invalidating the claim here. On the other hand, those concerns aren't unique to this case. Legal malpractice cases are always ugly whether there was ever an attempted assignment or not. They arise when a relationship of trust and confidence has devolved into conflict and antagonism. They always bring disrepute to the legal profession, because they always result in the public airing of things that are supposed to remain private and confidential between an attorney and his client. The profession looks bad whenever an attorney is sued for malpractice, especially whenever one is found to have committed malpractice. But that's true of every malpractice case whether or not they spring from facts that have anything to do with this appeal. So to me, these two public policy concerns seem the least important of the four that courts usually consider because they are the least unique to this kind of appeal.

All things considered, my concern is this: when the rule itself expressly doesn't apply because there was no contractual assignment or sale of any claim, and further two of the four public policy concerns underlying the rule also do not apply, are we really allowed to force a square peg into a round hole and make it apply anyway? If we do, then were not really following the same rule of law that those courts applied. Instead, were making a new and different rule of our own. Maybe it's a good rule, and maybe it's not. But good or bad, it's not the same rule of *Tower Homes*, *Paonia, Kenco,* or *Trinity.*

VII.

The fourth problem with trying to create a rule even as purportedly narrow as this one is that it's never as narrow as you might think. Robert Jackson once warned of the dangerous "tendency of a principle to expand itself to the limit of its logic" and be extended in the future to factual scenarios it was never designed for, with the court ending up "now saying that ... we did decide the very things we [in the prior case] said we were not deciding." *Korematsu v. United States,* 323 U.S. 214, 246-47 (1944) (Jackson, J., dissenting). Ultimately, "the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case." *Morrison v. Olson,* 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

Cogan suggests that the holding can be limited only to situations where the legal malpractice claim is the corporation's only remaining asset after the adversary acquires the stock. At first blush this seems pretty narrow. But think it through, and suppose the adversary acquires stock in a corporation whose only assets are a legal malpractice claim along with a bank account containing a mere $10. Would the rule apply to bar the claim? Allowing the claim to proceed in that instance seems to implicate the exact same public policy concerns as if the $10 did not exist. But the presence of the $10 seems to mean that the rule would not apply, and the outcome becomes entirely different: if the corporation has a malpractice claim plus $10 then it can sue, but if it has a malpractice claim and no cash, then it can't. Why would $10 matter that much?

***10** Logically, it shouldn't. At the very least, I can think of no principle of law or public policy that ought to make so much depend on so little. So let's take the next step and assume that it doesn't make a difference. That leads us here: the next court handling this issue is allowed to conclude that the $10 represents a de minimis amount that it can ignore and still apply our rule to dismiss the malpractice claim. Seems reasonable. But then suppose in the next case that the next corporation's assets are a malpractice claim, plus $100. Probably still de minimis. What if the next corporation's assets are a malpractice claim, plus $1,000? Still de minimis? Take the next case with a malpractice claim, plus $2,000. Or the next case with a malpractice claim plus some old merchandise inventory worth $5,000. And so on, and so on. With each increment, the idea that the court's holding applies

exclusively when the malpractice claim is the "only" corporate asset becomes less and less clear. At some point the limitation shrinks away to just become a universal rule that malpractice claims disappear whenever a litigation opponent buys stock in an adversary, no matter what other assets exist. It applies when Alutiiq acquires stock in a minor adversary, and it applies when General Electric or Disney acquire stock in a Fortune 500 adversary.

Think about the holding from another perspective. Cogan argues that a corporation's legal "adversary" in a prior lawsuit cannot pursue the corporation's legal malpractice claim after acquiring a majority of shares. Is that limited only to a direct adversary (plaintiff against defendant), or does it also encompass third-party plaintiffs, third-party defendants, or other interveners to the original lawsuit? What about an assignor/assignee to the original claim, or a subrogor/subrogee or indemnitor/indemnitee to the original adversary? What about third-party beneficiaries or third-party obligors? In each of these instances, similar "public policy" concerns might or might not apply. The balance of those interests might resemble the instant appeal in many ways, but it also might be very different in many ways. So does the same rule apply to those entities and situations, or not?

It all comes down to this: The problem with relying on two of four cherry-picked "public policy" concerns rather than a clearly articulated rule of law is that the holding doesn't contain clear parameters one way or the other. Which means the answer as to all of these hypothetical scenarios is: your guess is as good as mine. And that lack of clarity captures my underlying concern with relying on vague "public policy" concerns to resolve a complex appeal like this one.

VIII.

Ultimately, there is no clear rule of law that requires the claim here to be dismissed while remaining consistent with fundamental principles of corporate law. It seems to me that this simple observation is enough to resolve this appeal.

In science, the absence of evidence is not always evidence of absence. Just because proof doesn't yet exist that something is true does not necessarily mean that it must be false. Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark* 213 (Ballantine, 1st. ed. 1997). For thousands of years nobody could come up with proof that the earth was round, but that obviously did not mean that it was always flat until the evidence finally emerged.

But sometimes the absence of evidence can establish the absence of an underlying fact. If scientists have run enough tests, all valid and well-designed to cover every possible iteration of every potential outcome under the scientific method, that all consistently show no evidence that the Loch Ness Monster exists, then perhaps there should come some point at which we can accept as true that it does not, in fact, exist.

Here, if there is no principle of law squarely on point that dictates that this legal malpractice claim must be dismissed, then perhaps the absence of a legal principle means there's nothing wrong with this claim. So maybe the answer to this appeal is just this: if there is no clear and neutral principle of law that says this claim must be dismissed, then it should not have been dismissed. The lack of a legal principle is itself the legal principle that we should apply.

From this, the conclusion must be **Oceania** remains Cogan's client, and it can still sue him no matter who owns its stock. Cogan might have to navigate a thicket of potential ethical issues during such a suit, but that has nothing to do with whether the claim itself is viable. I don't envy the position Cogan now finds himself in, and cannot offer any advice to him on how to conduct himself in this malpractice suit. I also don't envy the district court that will be tasked with resolving these questions. But just because a lawsuit may be difficult to handle and may force difficult choices does not mean that it must be dismissed at the pleading stage under NRCP 12(b)(5) before any of the potential ethical issues theoretically on the horizon manifest themselves as concrete and real problems actually at hand. Moreover, although no attorney wants to be sued for malpractice at all, there's no guarantee that Cogan will lose this suit if it goes to trial. As the majority notes, **Oceania**/Alutiiq may shift its position on whether it would have prevailed in the federal litigation. But that says nothing about whether Cogan's conduct fell below the applicable standard of care. Even better for Cogan, a jury may well recognize everything behind the shift in **Oceania**'s/Alutiiq's ownership and management and weigh it all accordingly in determining whether Cogan breached any duty that Alutiiq claims he owed.

***11** As much sympathy as I have for Cogan, my concern is less with him than it is for the next case. The problem with relying upon a balance of free-floating policy concerns (even when applied to facts that raise my

eyebrows, as the facts of this appeal do) is that doing so creates ambiguous guidance for other cases whose facts might be similar, but slightly different. The law cares about achieving a just and fair outcome for any individual litigant. But it cares equally, and perhaps even more, about ensuring predictability, consistency, stability, and clarity across the full spectrum of cases that could conceivably ever come before a court. "Law, ... unlike science, is concerned not only with getting the result right but also with stability, to which it will frequently sacrifice substantive justice." Richard A. Posner, *The Problems of Jurisprudence* 51 (1990). Appellate courts must therefore consider not only the case at hand, but also how any rule they apply in this case will fit other cases that might come up in the future, possibly involving considerably more complex or less palatable facts. Under the doctrine of *stare decisis*, appellate courts should not make rulings whose reasoning applies only to a single case and gives no guidance to any other. The purpose of the rule is to " 'promote[ ] the evenhanded, predictable, and consistent development of legal principles, foster[ ] reliance on judicial decisions, and contribute[ ] to the actual and perceived integrity of the judicial process." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Following rules of law that apply generally to all similar cases is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery,* 474 U.S. 254, 265 (1986).

Because in the end there is no clear and neutrally applicable rule of law that prohibits this malpractice claim from being litigated, I would conclude that the district court should not have dismissed it, and would reverse.

All Citations

457 P.3d 276 (Table), 2020 WL 832742

Footnotes

1 We do not recount the facts except as necessary to our disposition.

2 We note that the district court did not address whether there was an effective assignment of **Oceania**'s legal malpractice claim to Alutiiq against public policy considerations as articulated in *Tower Homes.* Rather, the court dismissed **Oceania**'s legal malpractice action for other reasons. We reached this issue in our prior order of reversal and remand because it implicates **Oceania**'s standing to maintain the action, which is an issue that "can be raised at any time in the litigation, even for the first time on appeal." *See Applera Corp. v. MP Biomedicals, LLC*, 93 Cal. Rptr. 3d 178, 192 (Ct. App. 2009).

3 We note that the federal court granted such relief on grounds that Alutiiq's motion seeking the same was unopposed, although the record does not reveal why it was unopposed. Moreover, the parties do not dispute that Alutiiq gained control of **Oceania** as a result of the order.

4 We take the opportunity to address a concern raised in the dissent that at least two of the four public policy considerations cited by courts prohibiting the assignment of legal malpractice claims are not applicable here. Specifically, the dissent contends that there can be no risk of collusion between **Oceania** and Alutiiq because they never contractually transferred a claim or even shares of stock between each other; rather, this was accomplished by court order. Thus, the dissent reasons, there is no risk of commoditizing the claim by turning it into a salable product. However, the mechanism of transfer—court order verses contract—does not make the risk of collusion between the parties more or less likely. Lack of evidence in the record demonstrating that the parties explicitly agreed to such an arrangement does not necessarily mean that it did not occur or, even more importantly, that it was not possible. To wit, because the federal court ordered the transfer of shares to Alutiiq on grounds that its request went unopposed, we cannot rule out the possibility that **Oceania**'s original majority shareholder willfully and collusively acquiesced to the transfer by failing to oppose it. Further, there is no question that the legal malpractice claim is **Oceania**'s only asset, meaning that **Oceania** must prevail on the claim for Alutiiq to have gained any benefit by acquiring a stake in the company. Plainly speaking, the malpractice claim appears to have been commoditized. Finally, even if some of the policy concerns set forth in the dissent did not apply to this case, we know of no authority requiring that all four concerns be present or that any given concern (e.g., collusion) predominate over the others (e.g., debasing the legal profession). Simply, there is no authority cited in the dissent barring application of the public policy considerations of *Tower Homes* and similar cases to the facts and circumstances presented here.

End of Document

EXHIBIT B

Client Name	Matter Number	Description	Invoice Nbr	Trans Type	Post Date	Transaction Amt	Rcpt Doc Num	Comments
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1012235	Bill	7/17/2015	6,189.96		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1012235	Receipt	9/22/2015	(6,189.96)	12017	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1016161	Bill	8/10/2015	6,207.90		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1016161	Receipt	9/22/2015	(6,207.90)	12019	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1023264	Bill	9/11/2015	3,465.38		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1023264	Receipt	4/14/2016	(3,465.38)	W041416	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1033776	Bill	10/24/2015	1,397.15		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1033776	Receipt	4/14/2016	(1,397.15)	W041416	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1037256	Bill	11/11/2015	2,625.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1037256	Receipt	4/14/2016	(2,625.00)	W041416	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1045419	Bill	12/10/2015	815.50		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1045419	Receipt	4/14/2016	(815.50)	W041416	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1054124	Bill	1/21/2016	1,120.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1054124	Receipt	4/14/2016	(1,120.00)	W041416	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1059706	Bill	2/15/2016	105.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1059706	Receipt	4/10/2017	(105.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1063540	Bill	3/7/2016	280.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1063540	Receipt	4/10/2017	(280.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1072570	Bill	4/15/2016	247.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1072570	Receipt	4/10/2017	(247.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1079298	Bill	5/12/2016	1,931.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1079298	Receipt	4/10/2017	(1,931.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1085781	Bill	6/14/2016	129.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1085781	Receipt	4/10/2017	(129.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1090895	Bill	7/7/2016	70.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1090895	Receipt	4/10/2017	(70.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1100921	Bill	8/12/2016	1,503.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1100921	Receipt	4/10/2017	(1,503.00)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1106702	Bill	9/9/2016	28,362.57		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1106702	Receipt	4/10/2017	(9,534.69)	W041017A	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1106702	Receipt	7/28/2017	(18,827.88)	2621	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1138038	Bill	1/19/2017	5,543.70		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1138038	Receipt	10/17/2017	(5,543.70)	W101717R	10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1190257	Bill	8/23/2017	665.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1190257	Receipt	5/31/2018	(665.00)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1196582	Bill	9/21/2017	1,449.50		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1196582	Receipt	5/31/2018	(1,449.50)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1204653	Bill	10/20/2017	2,763.31		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1204653	Receipt	5/31/2018	(2,763.31)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1212679	Bill	11/21/2017	5,275.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1212679	Receipt	5/31/2018	(5,275.00)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1214879	Bill	12/6/2017	4,053.80		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1214879	Receipt	5/31/2018	(4,053.80)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1225481	Bill	1/16/2018	58.50		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1225481	Receipt	5/31/2018	(58.50)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1233737	Bill	2/15/2018	2,226.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1233737	Receipt	5/31/2018	(2,226.00)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1242142	Bill	3/15/2018	221.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1242142	Receipt	5/31/2018	(221.00)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1253161	Bill	4/25/2018	768.70		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1253161	Receipt	5/31/2018	(768.70)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1258682	Bill	5/16/2018	2,997.00		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1258682	Receipt	5/31/2018	(2,997.00)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1267264	Bill	6/19/2018	817.50		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1267264	Receipt	7/17/2018	(817.50)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1273968	Bill	7/17/2018	6,493.36		10/30/19 Not in Invoice Tracker
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1273968	Receipt	7/17/2018	(6,493.36)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1283997	Bill	8/17/2018	3,888.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1283997	Receipt	8/17/2018	(2,211.33)	1503	
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1301648	Bill	9/23/2018	12,582.42		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1309811	Bill	10/18/2018	30,250.20		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1316019	Bill	11/13/2018	114.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1322943	Bill	12/6/2018	2,065.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1332620	Bill	1/14/2019	1,403.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1342101	Bill	2/13/2019	675.50		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1351309	Bill	3/15/2019	776.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1358524	Bill	4/9/2019	297.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1366535	Bill	7/12/2019	350.00		
Beavor, Christopher	065530-00001	Defense In Case No. A-11	1413291	Bill	10/13/2019	140.00		10/30/19 Not in Invoice Tracker
	065530-00001 Total					**50,329.79**		
	Grand Total					**50,329.79**		

Marcus Balance	20,189.79
Invs not in Inv Trkr	86,113.63
Pymt not in Inv Trkr	(59,992.16)
Missg Inv Trkr Pymt	4,018.53
DW Balance	50,329.79

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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.: 24 **THIRD-PARTY DEFENDANT MARC SAGGESE'S REPLY IN SUPPORT OF MOTION TO DISMISS/MOTION TO QUASH, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ. Third-Party Defendant.	

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Third-Party Defendant, MARC SAGGESE, ESQ., by and through his attorneys of record, LIPSON NEILSON P.C., hereby files the instant Reply in support of his Motion to Dismiss Defendant/Third-Party Plaintiff JOSHUA TOMSHECK'S Third-Party Complaint. This Reply is based upon the following Memorandum of Points and Authorities, the papers and pleadings on file, and any oral argument this Court may entertain at a hearing.

DATED this 30th day of April, 2020.

LIPSON NEILSON P.C.

/s/ Amanda A. Ebert

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Saggese is tied to this case by a single cause of action: contribution raised by third-party Plaintiff Tomsheck. Plaintiff Christopher Beavor's Complaint does not mention Mr. Saggese at all, and none of the allegations in his Complaint implicate any wrongdoing on the part of Mr. Saggese. This is because Mr. Saggese did not commit malpractice when representing Mr. Beavor in the underlying matter. Because there was no malpractice, there are no grounds to support the cause of action for contribution, and Mr. Saggese should be dismissed from the action outright.

Affidavits of Mr. Beavor and Mr. Saggese are attached as exhibits to Mr. Saggese's Motion to Dismiss. These affidavits leave no question about the material facts of the case pertaining to Mr. Saggese. Because the facts needed to decide this matter are contained in these affidavits, 56(d) relief is not warranted, as there is no need for additional discovery.

Finally, proper service on Mr. Saggese was never affected, and this failure in itself is grounds for dismissal. Pursuant to NRCP 4(e), Mr. Tomsheck had 120 days after filing his complaint to properly serve Mr. Saggese, but he failed to do so. Because Mr. Saggese was not properly served, he should be dismissed under NRCP 4(e)(2).

II. LEGAL ARGUMENT

Mr. Tomsheck's Opposition focuses on the same allegation regarding the one action rule ad nauseum in an attempt to distract from his own malpractice. His Opposition lacks substantive factual allegations that are necessary to support his contribution cause of action, and it is ripe for either dismissal or summary judgment.

A. Mr. Saggese Did Not Commit Legal Malpractice.

The loss at issue stems from Mr. Tomsheck's failure to adequately oppose a Motion for New Trial (filed after Mr. Saggese obtained a complete defense verdict at trial) which was filed by the plaintiff in the underlying matter. Mr. Tomsheck was retained, and filed an

Opposition to the Motion on timeliness grounds. He failed to address any of the substantive issues presented in the Motion for New Trial itself in his Opposition. This was a risky move; if the Court found that the Motion for New Trial was timely, it could grant it as unopposed on substantive grounds. The Court did just that, and granted the Motion on substantive grounds because those points were unopposed.

Now, Mr. Tomsheck alleges in his Opposition to the instant Motion that Mr. Saggese is somehow to blame for his own errors. This is belied by Mr. Saggese's affidavit, which confirms that he had no role in drafting the Opposition, nor was he consulted before it was filed.[1]

Even assuming for argument's sake that Mr. Saggese did consult with Mr. Tomsheck before he filed the Opposition, Mr. Tomsheck was not a client of Mr. Saggese's, and Mr. Saggese owed no duty of any kind to him. Mr. Tomsheck was counsel of record at the time, and his professional choices cannot be imputed to Mr. Saggese. Mr. Tomsheck, not Mr. Saggese, was the cause of the Mr. Beavor's damages. Because Mr. Saggese was not the cause, Mr. Tomsheck's contribution claim against him fails.

B. Assertion of the One Action Rule is not Mandatory and is not a Ground for Malpractice.

Mr. Tomsheck argues that the malpractice claims at issue are based on Mr. Saggese's failure to raise the one action rule as an affirmative defense to the underlying suit.[2] The affidavits of Mr. Beavor and Mr. Saggese are clear: Mr. Saggese advised Mr. Beavor of the rule, and then did not raise it as an affirmative defense on the specific instruction of his client. Following his client's advice is not evidence of malpractice here.

While a party may raise the one action rule as an affirmative defense, there is no requirement that it *must* be raised. See Keever v. Nicholas Beers Co., 96 Nev. 509, 611 P.2d 1079 (Nev. 1980). Because it is not mandatory to assert the one action rule, failure

[1] Affidavit of Marc Saggese at ¶ 9.
[2] Opposition at 3:18-20.

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to assert it cannot be considered malpractice. Additionally, Mr. Beavor himself chose not to assert the rule for strategic reasons.[3] Mr. Saggese advised him of the merits and disadvantages to raising this affirmative defense, and Mr. Beavor chose not do so because of the inherent risk to his home, where he lived with his four children. Mr. Beavor stated in his affidavit: "I demanded that we waive the one action rule defense in my answer and at all other stages of litigation."[4]

C. Mirch v. Frank is Persuasive and Shows that Mr. Saggese Owed no Duty to Fix Mr. Tomsheck's Errors

The errors that caused Mr. Beavor's damages were made by Mr. Tomsheck alone, and he cannot now attempt to shift the blame by pointing out the Mr. Saggese handled the case first. The order in which the case was handled does not matter, as there is no evidence that Mr. Saggese was negligent in his handling of the underlying claim. Still, Mr. Tomsheck questions the interpretation of Mirch v. Frank, 295 F.Supp.2d 1180, 1181 (D.Nev.,2003), and asks this Court to either disregard it entirely or to interpret it unreasonably to work in his favor.

The Court in Mirch held that an attorney's duty runs to his client, not to prior or successor counsel. Mirch at 1187. An attorney is under no duty "to lessen the damages resulting from predecessor's counsel's negligence." Id. Mr. Tomsheck argues that Mirch does not apply here, as this matter involves alleged malpractice committed by a successor attorney, who in turn is seeking contribution from his predecessor. While the inverse (malpractice alleged against a predecessor attorney, seeking contribution from his successor) is at issue in Mirch, the order of attorney involvement is unimportant. Mirch held that a lawyer's duty runs to this *client*, not to another attorney handling the matter. Mr. Saggese had no duty to instruct Mr. Tomsheck on how to handle the matter after he withdrew as counsel, and had no duty to attempt to fix Mr. Tomsheck's errors. There can

[3] Affidavit of Christopher Beavor.
[4] Affidavit of Christopher Beavor at ¶ 7.

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be no breach of a nonexistent duty, and Mr. Tomsheck's interpretations of Mirch do not support denying dispositive relief.

Next, Mr. Tomsheck cites to Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC, 209 W. Va. 318, 547 S.E.2d 256 (2011), from the Supreme Court of West Virginia, to argue that Mr. Saggese's "first act of negligence" (by not raising the one-action rule) was the catalyst in a chain of events that resulted in Mr. Beavor's injury. This case is completely inapplicable, as there is no evidence of such negligence on the part of Mr. Saggese. Again, the decision not to raise the one-action rule was a deliberate choice made by Mr. Beavor after he benefitted from the advice of Mr. Saggese. Mr. Beavor has not alleged that Mr. Saggese misinterpreted the law or otherwise advised him incorrectly. There is no negligence on Mr. Saggese's part, and as such the resulting injury that occurred later in the case is separate from his own representation in the underlying action.

D. Service was Improper and is Grounds for Dismissal

Service of Mr. Tomsheck's Third-Party Complaint was not affected within 120 days as required by NRCP 4(e). The Third-Party Complaint was filed May 16, 2019, and Mr. Tomsheck had until September 13, 2019 to properly serve it on Mr. Saggese. Mr. Tomsheck attempted to serve Mr. Saggese via a process server who failed to comply with NRS 14.090. Failure to properly serve Mr. Saggese should be remedied by dismissal.

Mr. Tomsheck now claims that Mr. Saggese tried to "slip" personal service of the Third-Party Complaint, and also claims that Mr. Saggese's arguments about service are unreasonable.[5] Mr. Tomsheck does not dispute that improper service is a ground to dismiss this matter pursuant to NRCP 4(e). Interestingly, Mr. Tomsheck never filed a motion regarding Mr. Saggese's alleged attempts to avoid service, and now attempts to malign Mr. Saggese in an effort to avoid dismissal. Mr. Tomsheck fails to offer evidence of evasion of service, and the purported service at Saggese's residence on August 21, 2019

[5] Opposition at 4:10-11

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should be quashed for failure to comply with NRS 14.090(a) if the Court will not dismiss the matter.

E. NRCP 56(d) Relief is Not Warranted

Finally, Mr. Tomsheck points to a lack of opportunity to conduct discovery in this matter as a ground for denial of dismissal or summary judgment, and seeks additional time to do so under NRCP 56(d). Rule 56(d) allows a nonmovant to show by affidavit that it "cannot present facts essential to justify its opposition" in a request to collect additional facts necessary to support an opposition. Additional discovery is not necessary here, however, because the affidavits of Mr. Beavor and Mr. Saggese cover all relevant points at issue.

Mr. Tomsheck claims that the affidavits of Mr. Beavor and Mr. Saggese are somehow insufficient evidence to support dismissal or summary judgment, as they are "self-serving." This is belied by the fact that Mr. Beavor has interests separate than those of Mr. Saggese, and is not likely to be motivated to "serve" Mr. Saggese's own interests here. It appears that Mr. Tomsheck disapproves of the facts contained in the affidavits, but this does not render them "self-serving."

Rather than rely on the affidavit, Mr. Tomsheck argues that the deposition of Mr. Saggese is necessary to respond to the instant Motion. Mr. Saggese agrees that, due to the COVID-19 outbreak and Order 20-09, it will be difficult to obtain his deposition in the upcoming months. As such, allowing his deposition will likely stall this case for several months. It will not be necessary to do so, as Mr. Saggese has already addressed all pertinent facts in his affidavit. The affidavit of Mr. Beavor states that he waived the one action rule as an affirmative defense. This is an admission of the key factual issue regarding Mr. Saggese, and no additional discovery is needed on the topic.

Further, even if Mr. Tomsheck was given leave to conduct additional discovery, he would not be able to question Mr. Saggese on issues related to his representation of Mr. Beavor, as that information is privileged. The law regarding attorney-client privilege in Nevada has been undisturbed for over 150 years. In 1866, the Nevada Supreme Court

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held: "It is undeniably a general rule of the law of evidence that an attorney or counselor cannot, without the consent of his client, be compelled to disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance or advice. Mitchell v. Bromberger, 2 Nev. 346, 348 (Nev. 1866).[6]

While privilege may be waived when defending a malpractice action, Mr. Saggese is not defending himself against his client, and the attorney-client privilege has not been waived. This is not a typical legal malpractice action, as Mr. Saggese's client did not sue him, and there is no claim of malpractice between Mr. Saggese and Mr. Beavor. Again, Mr. Saggese is *not even mentioned* in Mr. Beavor's Complaint, which focuses on Mr. Tomsheck. Because privilege is not waived, Mr. Saggese cannot be deposed on any topics protected by attorney-client privilege, nor can he be forced to disclose protected information pursuant to NRCP 16.1. Written discovery on this point will be objected to on privilege grounds. Granting 56(d) relief would be unnecessary and wasteful, and should not be used as grounds to avoid dismissal or summary judgment.

III. CONCLUSION

Mr. Tomsheck's Opposition argues: "It is both illogical and unfair to allow one party to be held accountable for the acts and damages caused by another."[7] Mr. Saggese agrees with Mr. Tomsheck, as it would be illogical and unfair to hold Mr. Saggese responsible for the actions of Mr. Tomsheck after he had withdrawn completely from the matter. Mr. Tomsheck's allegations against Mr. Saggese hinge on the failure to assert the one action rule, which was done deliberately by the client (and was not mandatory to raise in the first place). The contribution claim fails and is ripe for dismissal.

[6] "This rule can be waived when an attorney is defending against a legal malpractice suit: whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him." Mitchell v. Bromberger, 2 Nev. 346, 349, 1866 Nev. LEXIS 64, *4

[7] Opposition 15:3-4.

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Based on the foregoing, Mr. Saggese respectfully requests that this Court dismiss the Third-Party Complaint or enter summary judgment in his favor.

DATED this 30th day of April, 2020.

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert
_____

JOSEPH P. GARIN, ESQ.
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MEGAN H. HUMMEL, ESQ.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 30th day of April, 2020, I electronically served the foregoing **THIRD-PARTY DEFENDANT MARC SAGGESE'S REPLY IN SUPPORT OF MOTION TO DISMISS/MOTION TO QUASH, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** to the following parties utilizing the Court's E-File/ServeNV System:

Max E. Corrick, II, Esq. OLSON, CANNON, GORMLEY ANGULO & STOBERSKI 9950 W. Cheyenne Ave. Las Vegas, NV 89129 mcorrick@ocgas.com *Attorneys for Joshua Tomsheck*	H. Stan Johnson, Esq. COHEN JOHNSON PARKER EDWARDS 375 E. Warm Springs Rd., Suite 104 Las Vegas, NV 89119 sjohnson@cohenjohnson.com Charles ("CJ") E. Barnabi Jr., Esq. THE BARNABI LAW FIRM, PLLC 8981 W. Sahara Ave., Suite 120 Las Vegas, NV 89117 cj@barnabilaw.com *Attorneys for Plaintiff*

/s/ Sydney Ochoa
An Employee of LIPSON NEILSON P.C.

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Attorneys for Third-Party Defendant, Marc Saggese, Esq.

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. Third-Party Defendant. _____	Case No: A-19-793405-C Dept. No.: 24 **THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME** **ORAL ARGUMENT REQUESTED**

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Third-Party Defendant, MARC SAGGESE, ESQ., by and through his attorneys of record, LIPSON NEILSON P.C., hereby files the instant Motion to Strike on Order Shortening Time. The Motion is based upon the following Memorandum of Points and Authorities, the papers and pleadings on file, and any oral argument this Court may entertain at a hearing.

DATED this 4th day of May, 2020.

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert

JOSEPH P. GARIN, ESQ.
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DECLARATION OF AMANDA A. EBERT, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

I, Amanda A. Ebert, Esq., an attorney licensed to practice in the State of Nevada and an associate at the law firm of Lipson Neilson P.C., attest as follows:

1. Lipson Neilson P.C. is counsel for Third-Party Defendant Marc Saggese (hereinafter, "Mr. Saggese") in the above-entitled action.

2. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated on information and belief, and as to those matters, I believe them to be true.

3. This affidavit is in support of the request to shorten the time to hear Mr. Saggese's Motion to Strike the Supplemental Opposition of Third-Party Plaintiff Joshua Tomsheck.

4. Mr. Saggese filed a Motion to Dismiss, or in the Alternative, for Summary Judgment on March 11, 2020. Third-Party Plaintiff Joshua Tomsheck filed an opposition, and Mr. Saggese filed a reply brief in support on April 30, 2020. The Motion to Dismiss is currently set on this Court's calendar for hearing on May 7, 2020, at 9:00 a.m.

5. On April 30, 2020, Third-Party Plaintiff Joshua Tomsheck filed a document entitled "Defendant/Third-Party Plaintiff Joshua Tomsheck's Supplement to His Opposition to Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomsheck's Request for NRCP 56(d) Relief" (hereinafter, "supplemental opposition").

6. Mr. Tomsheck's counsel e-mailed me on April 30, 2020 indicating that he would be filing the supplemental opposition, and offering me additional time to file my own reply, but I did not consent to any late filing.

7. The supplemental opposition was filed 7 days before the scheduled hearing.

8. I am not aware of any leave of court that has been granted allowing Mr. Tomsheck's supplemental opposition to be filed.

9. If the attached Motion to Strike is calendared in the ordinary course, the supplemental opposition will have already been considered and heard.

10. The aforementioned circumstances constitute good cause and justify an order shortening time.

11. Accordingly, Mr. Saggese requests the Court's leave to hear his Motion to Strike on an order shortening time.

12. I declare under penalty of perjury that the matters stated herein are true.

DATED this 4th day of May, 2020.

/s/ Amanda A. Ebert

AMANDA A. EBERT, ESQ.

ORDER SHORTENING TIME

The Court, having reviewed Third-Party Defendant Marc Saggese's Motion for an Order Shortening Time, and good cause appearing, it is hereby ordered that Saggese's Motion to Strike will be heard on shortened time before the Eighth Judicial District Court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, on the 7 th day of May, 2020, at the hour of 9 : 00 am/~~pm~~. The time and place thereof shall be given to the other parties to this case by serving it with a copy of Saggese's Motion and this order no later than May 5, 2020.

DATED: May 5, 2020.

Opposition Due: 5/6/20 by 1 pm.

DISTRICT COURT JUDGE

LIPSON NEILSON P.C.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Tomsheck filed a document titled as a "supplemental opposition" to Mr. Saggese's motion to dismiss on April 30, 2020 (hereinafter, "supplemental opposition").[1] This document is in addition to Mr. Tomsheck's opposition that was initially filed on April 21. The original opposition was filed with unredacted exhibits that contained Mr. Saggese's personal address and photos of his home. The parties stipulated to strike the filing, and Mr. Tomsheck re-filed the identical opposition with the appropriate redactions. Mr. Saggese does not dispute the timeliness of this original opposition.

Mr. Saggese did not stipulate to allow a supplemental opposition to be filed, however, and certainly did not stipulate to allow new arguments to be raised by Mr. Tomsheck long after the opposition due date had passed. Even if Mr. Saggese did not oppose additional briefing, he does not have the authority to allow supplemental briefing, as that authority lies only with this Court. Because no leave of court was obtained allowing the supplemental opposition to be filed, it should be stricken.

II. LEGAL ARGUMENT

Mr. Tomsheck's supplemental opposition does not include any authority that allows a supplemental briefing to be submitted in this situation, because no such authority exists. Leave of court must be obtained before filing supplemental briefing, and leave of court was neither sought nor obtained here.

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[1] See Defendant/Third-Party Plaintiff Joshua Tomsheck's Supplement to His Opposition to Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomsheck's Request for NRCP 56(d) Relief, attached as Exhibit A.

The local rules allow only for a single opposition, and do not allow for supplemental briefing. Pursuant to EDCR 2.20(e):

> Within 10 days after the service of the motion, and 5 days after service of any joinder to the motion, the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion and/or joinder should be denied. Failure 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.

Because leave of court was not obtained prior to filing the supplemental opposition, it should be treated as a fugitive document and stricken from the record. It should not be considered by the Court, and should have no bearing on Mr. Saggese's motion to dismiss, which is currently set for hearing on May 7, 2020.

DATED this 4th day of May, 2020

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert
JOSEPH P. GARIN, ESQ.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 4th day of May, 2020, I electronically served the foregoing **THIR THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME** to the following parties utilizing the Court's E-File/ServeNV System:

Max E. Corrick, II, Esq. OLSON, CANNON, GORMLEY ANGULO & STOBERSKI 9950 W. Cheyenne Ave. Las Vegas, NV 89129 mcorrick@ocgas.com *Attorneys for Joshua Tomsheck*	H. Stan Johnson, Esq. COHEN JOHNSON PARKER EDWARDS 375 E. Warm Springs Rd., Suite 104 Las Vegas, NV 89119 sjohnson@cohenjohnson.com Charles ("CJ") E. Barnabi Jr., Esq. THE BARNABI LAW FIRM, PLLC 8981 W. Sahara Ave., Suite 120 Las Vegas, NV 89117 cj@barnabilaw.com *Attorneys for Plaintiff*

/s/ Sydney Ochoa

_____

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Attorneys for Defendant/Third-Party Plaintiff
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. XXIV
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

NOTICE OF ENTRY OF STIPULATION AND ORDER

PLEASE TAKE NOTICE that a Stipulation and Order Re: Briefing Schedule on Marc Saggese, Esq.'s Motion to Strike Supplemental Opposition of Joshua Tomsheck has been

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entered in the above-entitled Court on the 1st day of June, 2020, a copy of which is attached hereto.

DATED this 2nd day of June, 2020.

OLSON CANNON GORMLEY & STOBERSKI

/s/Max E. Corrick

MAX E. CORRICK, II
Nevada Bar No. 006609
9950 West Cheyenne Avenue
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Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 2020, I sent via e-mail a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

H. Stan Johnson, Esq.
Cohen Johnson Parker Edwards
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702-823-3500
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and

Charles ("CJ") E. Barnabi, Jr., Esq.
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Attorneys for Marc Saggese

/s/Jane Hollingsworth

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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. XXIV

STIPULATION AND ORDER SETTING BRIEFING SCHEDULE ON THIRD-PARTY DEFENDANT MARC SAGGESE, ESQ.'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY JOSHUA TOMSHECK ON ORDER SHORTENING TIME

Date of Hearing: June 25, 2019
Time of Hearing: 9:00 a.m.

JOSHUA TOMSHECK, an individual,

Third-Party Plaintiff,

v.

MARC SAGGESE, ESQ., an individual,

Third-Party Defendant.

COME NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK, by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and Third-Party Defendant MARC SAGGESE, ESQ., by and through his attorneys of record, LIPSON NEILSON P.C., and hereby stipulate and agree as follows:

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On March 11, 2020, Third-Party Defendant Marc Saggese, Esq. ("Saggese") filed his Motion to Dismiss, or Alternatively, Motion for Summary Judgment. Saggese's Motion was scheduled for hearing on May 7, 2020. Defendant/ Third-Party Plaintiff Joshua Tomsheck ("Tomsheck") filed an Opposition to that Motion on April 3, 2020, and later filed an amended Opposition with certain redactions, requested by Saggese, on April 27, 2020.

On April 30, 2020, Tomsheck filed a Supplement to his Opposition based upon new documentation which had been provided by Plaintiff Christopher Beavor pursuant to NRCP 16.1. On that same date, Saggese filed his Reply brief in support of his Motion.

On May 5, 2020, Saggese filed a Motion to Strike Tomsheck's Supplement to his Opposition. That Motion to Strike was set on an Order Shortening Time for hearing on May 7, 2020.

Prior to the May 7, 2020 hearing date, and before Tomsheck could file a written opposition to the Saggese Motion to Strike, the Court continued the hearings until June 25, 2020 at the request of Plaintiff and Tomsheck's counsel in order to allow the parties to participate in a private mediation.

In light of the changed circumstances, Saggese and Tomsheck have stipulated to the following briefing schedule concerning Saggese's Motion to Strike:

Tomsheck's Opposition to the Saggese Motion to Strike will be filed on or before June 8, 2020.

Saggese's Reply in support of his Motion to Strike will be filed on or before June 18, 2020.

DATED this 28th day of May, 2020.

LIPSON NEILSON P.C.

/s/ *Joseph P. Garin, Esq.*
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 006653
9900 Covington Cross Drive
Suite 120
Las Vegas, NV 89144
Attorneys for Third-Party Defendant
MARC SAGGESE, ESQ.

DATED this 28th day of May, 2020.

OLSON CANNON GORMLEY & STOBERSKI

/s/ *Max E. Corrick, II*
MAX E. CORRICK, II
Nevada Bar No. 006609
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

IT IS SO ORDERED.

May 29, 2020

JUDGE JIM CROCKETT

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OPP

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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. XXIV **DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME AND COUNTERMOTION TO ALLOW SUPPLEMENTATION OF THE RECORD ON MARC SAGGESE, ESQ.'S MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	Date of Hearing: June 25, 2020 Time of Hearing: 9:00 a.m. ***Hearing Date on Countermotion of June 25, 2020 Requested***

COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck"), by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and hereby submits his Opposition to Third-Party Defendant Marc Saggese's ("Saggese") Motion to Strike Supplemental Opposition of Third-Party Plaintiff Joshua Tomsheck on Order Shortening Time,

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and Tomsheck's Countermotion to allow for supplementation of the record on Marc Saggese's Motion to Dismiss/Motion for Summary Judgment.

This Opposition and Countermotion is based upon new documents produced by Plaintiff Christopher Beavor on April 24, 2020, and demonstrate that both Saggese's Motion to Strike and Motion to Dismiss/Motion for Summary Judgment must each be denied.

DATED this 8th day of June, 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/Third-Party
Plaintiff JOSHUA TOMSHECK

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POINTS AND AUTHORITIES

I.

RELEVANT PROCEDURAL BACKGROUND

The following events provide the relevant procedural background for purposes of Saggese's Motion to Strike and the reason why this Court should deny that Motion or, at a minimum, grant Tomsheck's Countermotion and take the newly disclosed documents under consideration.[1]

On March 9, 2020, Tomsheck filed his Motion for Summary Judgment. That Motion was set for hearing on May 7, 2020.

On March 11, 2020, Saggese filed a Motion to Dismiss, or alternatively, Motion for Summary Judgment ("the Saggese MTD"), on Tomsheck's Third-Party Complaint which seeks contribution from Saggese.

On March 18, 2020, Administrative Order 20-09 in Response to COVID-19 was issued. Significant limitations upon all forms of discovery in civil litigation were instituted. To date, those

[1] *See* Exhibit A, Affidavit of Max E. Corrick, II in support of Opposition to Marc Saggese's Motion to Strike Supplemental Opposition.

limitations remain in effect.

On April 3, 2020, Tomsheck filed his Opposition to the Saggese MTD. Tomsheck's Opposition set forth several arguments, both legal and factual, for denying Saggese's MTD. Tomsheck also submitted a proper NRCP 56(d) Request therein which identified several specific areas of discovery relevant to Saggese's liability for contribution and the factual underpinnings of the Saggese MTD – namely Saggese's failure to plead the one-action rule as an affirmative defense in the underlying *Hefetz v. Beavor* litigation. Tomsheck's Rule 56(d) Request also identified that Plaintiff was served with Rule 34 Requests for Production of Documents on March 18, 2020 which requested, *inter alia*, documentation directly related to Saggese's claims that Plaintiff specifically instructed him to not plead the one-action rule as an affirmative defense. To date, Plaintiff has not responded in any manner to the pending written discovery requests.

On Friday, April 24, 2020, Tomsheck and Saggese filed a stipulation to strike Tomsheck's Opposition filed on April 3, 2020 from public access and to allow Tomsheck to re-file the Opposition with certain information redacted. The basis for the stipulation was a concern that Saggese's publicly available home address was contained within exhibits to Tomsheck's Opposition which related to Saggese being served with the Third-Party Complaint on August 21, 2019. Although such publicly available information is not considered "personal information" as defined by any statute or rule of Court,[2] once Saggese's counsel raised and described Saggese's concern Tomsheck's counsel immediately agreed – as a professional courtesy to Saggese and his counsel – to take whatever steps Saggese felt appropriate to remove his address from the publicly filed Opposition.

On Friday, April 24, 2020 at 3:08 p.m., Plaintiff served his Second Supplemental NRCP 16.1 Disclosure and 16.1(a)(3) Trial Disclosure. The disclosure was 1906 pages long with over 100 different categories of itemized documents, including a privilege log, attached. The documents produced were not reviewed by the undersigned until April 29, 2020.

On Monday, April 27, 2020 at 10:52 a.m., Tomsheck re-filed his Opposition to the Saggese

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[2] *See* NRS 239B.030; *and see* NRS 603A.040(2).

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MTD with the information Saggese requested having been redacted.

On April 30, 2020 at 10:24 a.m., the undersigned sent electronic correspondence to Saggese's counsel advising that the newly produced documents by Plaintiff required supplementation to Tomsheck's Opposition. The undersigned offered Saggese's counsel additional time in which to review the Supplement for purposes of addressing its contents in Saggese's yet-to-be filed Reply brief. Saggese's counsel neither objected nor consented to the filing of a Supplement. At 3:33 p.m., Tomsheck electronically filed and electronically served the Supplement. At 4:26 p.m. Saggese electronically filed and electronically served his Reply brief. That Reply brief did not address the contents of the Supplement.

On May 5, 2020 at 8:42 a.m., Saggese filed his Motion to Strike. Later that day, the Court advised the parties that based upon the representations that a private mediation had been agreed upon by Plaintiff and Tomsheck to take place before June 12, 2020, the hearings on the pending motions were being continued to either June 25 or June 30, 2020 - to be chosen by the parties. Ultimately the parties agreed upon the June 25, 2020 date.

On May 26, 2020 at 5:04 p.m., the undersigned was advised by the assistant to Judge Jennifer Togliatti at ARM that Plaintiff's counsel had corresponded that Plaintiff no longer intended to participate in the agreed upon mediation set for June 9, 2020.

On May 27, 2020, the undersigned corresponded with Saggese's counsel to advise of the potential change in the mediation status and to prepare for the contingency that the mediation was, in fact, not going forward. After confirming that Saggese's Motion to Strike was still on the Court's June 25, 2020 calendar, the undersigned proposed a briefing schedule on that Motion to Saggese's counsel if the mediation were to be canceled. As requested by Judge Togliatti's assistant, the undersigned also made multiple attempts to confirm with Plaintiff's counsel whether the mediation date should be vacated.

On May 28, 2020, having received no response from Plaintiff's counsel, the undersigned and Saggese's counsel stipulated to a briefing schedule for Saggese's Motion to Strike which would afford both Tomsheck and Saggese a fair opportunity to fully brief the issues raised in the Saggese Motion to Strike. Later that day, the undersigned advised Judge Togliatti's assistant that

no response from Plaintiff's counsel was ever provided and, therefore, the previously agreed upon mediation could be vacated. Thus, no mediation went forward as originally agreed.

II.

ARGUMENT IN OPPOSITION AND COUNTERMOTION

The rationale behind Saggese's Motion to Strike, especially in light of the rescheduling of his underlying Motion to Strike from May 7, 2020 to June 25, 2020, is essentially moot and is not well-taken. *First*, when Saggese filed his Motion to Strike only one week had passed since Tomsheck's Supplemental Opposition was filed. Although that was ample time for Saggese to review the relevant documents and incorporate them into his Reply Brief (not filed until after Tomsheck filed the Supplemental Opposition and offered Saggese additional time in which to file his Reply Brief), Saggese relied upon the fast-approaching hearing date to suggest he would be prejudiced by this Court having additional evidence of Saggese's tortious conduct before it. With the hearing date moved to June 25, 2020, Saggese's suggestion that he would be prejudiced by the newly disclosed documents is a non-starter. By the time Saggese files his stipulated reply brief to the Motion to Strike (June 18, 2020), he will have had nearly 7 full weeks in which to formulate an argument as to why those documents are not compelling evidence that Tomsheck's contribution claim appears meritorious such that it would be an abuse of discretion to grant Saggese's Motion to Strike and MTD at this stage. That is no prejudice at all.[3]

Second, Saggese's Motion to Strike is a kneejerk attempt to prevent this Court from knowing the real story behind his representation of Plaintiff Christopher Beavor in the underlying *Hefetz v. Beavor* case. That is the only fair conclusion one can draw from Saggese's current Motion

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[3] As noted below, Saggese is technically correct in citing EDCR 2.20(i) with respect to the Court's consideration of supplemental briefs. However, in this instance, such stringent adherence to that Rule runs afoul of NRCP 1 and the principle that the Court's Rules be "construed, administered, and employed by the court to secure the just, speedy, and inexpensive determination of every action and proceeding." NRCP 1. Saggese's technical argument supplants the just, speedy, and inexpensive determination of his Motion to Strike by inviting needless additional briefing in the form of possible motions for reconsideration pursuant to EDCR 2.24. Judicial economy strongly supports considering the newly discovered documents. At a minimum, this Court should grant Tomsheck's requested Countermotion to Supplement the Record to avoid needless future motion practice on this issue.

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to Strike because there is no question the newly produced documents severely call into question Saggese's representations in support of the Saggese MTD. Stated another way, Saggese would have this Court rule upon the Saggese MTD based solely upon information Saggese and Plaintiff carefully curated to cast Saggese in the best light possible. But neither the past nor the truth is so easily manipulated, and Tomsheck must be permitted to prosecute his legal and equitable right to contribution from Saggese.[4] In that light, Saggese's Motion to Strike should be denied for several reasons.

A. Saggese mischaracterizes the purpose of Tomsheck's Supplemental Opposition to the Saggese MTD

Saggese has grossly mischaracterized Tomsheck's Supplemental Opposition. Tomsheck's Supplemental Opposition does not advance new arguments at all.[5] It merely provides newly uncovered evidence, previously withheld from Tomsheck by Plaintiff but only recently produced, for the arguments Tomsheck has already placed before this Court. These new documents bolster the arguments contained in Tomsheck's Opposition to the Saggese MTD and would have been provided in Tomsheck's Opposition if they had been available to Tomsheck when the Opposition to the Saggese MTD came due.

The new documents further demonstrate that Plaintiff and Saggese provided falsifiable, self-serving affidavits concerning their respective conduct which should undergo the scrutiny of the discovery process afforded by the Nevada Rules of Civil Procedure before this Court can deny Tomsheck his requested Rule 56 discovery. Although Mr. Saggese and Plaintiff seem to think their word is enough, the fact of the matter is that these newly disclosed documents cast severe doubt upon their self-serving affidavits and create far more questions than answers which discovery must be permitted to further unearth. Although Saggese would rather this new evidence not see the light

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[4] This Court should – though need not– consider Tomsheck's Supplement in reaching a decision to deny the Saggese MTD. The Supplement, however, bears out Tomsheck's points in his opposition to the Saggese MTD that it would inequitable to not permit Tomsheck to prosecute his contribution claim against Saggese.

[5] The same cases cited in the Supplemental Opposition were already placed before this Court in Tomsheck's Opposition to the Saggese MTD.

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of day, the parties' respective duties of candor to this Court compel Tomsheck and Saggese to place them before this Court.

B. Saggese's rigid approach to supplementation breeds judicial inefficiency

Saggese's Motion to Strike is impractical and invites increasing litigation costs, while at the same time breeding judicial inefficiency and delay. For reasons unknown, Plaintiff waited until April 24, 2020 in which to produce the 515 pages of documents Saggese located on his own and turned over to his attorneys in order to respond to the Plaintiff's subpoena.[6] Saggese's arguments now unfairly suggest he would prefer neither Tomsheck nor this Court be aware of those documents until after ruling upon Saggese's motion to dismiss. As noted above, this invites future motion practice in the form of motions for reconsideration pursuant to EDCR 2.24. *See, e.g., Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."); *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976) (holding that motions for reconsideration may be appropriate when changes in law or newly discovered or additional facts are presented). The far better course is for the Court to take the newly discovered documents into consideration, along with the arguments to be found in Saggese's Reply Brief to his Motion to Strike, and rule upon the Saggese MTD based upon the universe of what we know and what has been properly been requested pursuant to NRCP 56.[7]

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[6] The other 1400 pages of documents the Plaintiff dumped on April 24, 2020 came from others.

[7] To the extent Saggese tries to argue that Tomsheck's Rule 56 request should be denied because Saggese and Plaintiff will invoke a blanket attorney-client privilege going forward, the viability of that claim of privilege appears very dubious given, for example, Plaintiff's affidavit statements which reveal some of the relevant communications (therefore waiving the privilege), the applicability of NRS 49.115(3), and the types of damages Plaintiff is seeking in this case. Again, the privilege issue is premature and will likely be the subject of extensive briefing before the Discovery Commissioner before this Court has to rule upon it.

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C. There is no prejudice to Saggese in allowing Tomsheck to supplement the record with actual evidence of Saggese's alleged misconduct

Saggese is not procedurally prejudiced by the Court considering the newly uncovered documents at all. Some of them came directly from Saggese himself pursuant to a subpoena. He surely knew they would be uncovered at some point in time by Tomsheck and, therefore, should not be surprised to see them before this Court now. For instance, the $10,000.00 payment to Saggese which Plaintiff is claiming Tomsheck is responsible for only came to light when Saggese's counsel provided information about it to Plaintiff's counsel in February 2020.[8] Tomsheck was not told about it until April 24, 2020. At the time Tomsheck filed his Opposition to the Saggese MTD, Tomsheck knew that Saggese continued to provide legal advice and counsel to Plaintiff at the same time Tomsheck was doing so. But Tomsheck did not know Saggese was continuing to get paid far more than Tomsheck even after Saggese withdrew as Plaintiff's counsel (while still representing Plaintiff's wife in the litigation). As with the remainder of the documents included in Tomsheck's Supplemental Opposition, the proof of the payment lends strong support to Tomsheck's contribution claim against Saggese.

II.

CONCLUSION

Saggese's Motion to Strike should be denied, or Tomsheck's Countermotion should be granted. The Supplemental Opposition is relevant to the issues before the Court on Saggese's MTD, and Saggese has been given sufficient time in which to fold the newly discovery documents into any arguments he may have regarding his MTD. Finally, there is no prejudice to Saggese in

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[8] *See* Exhibit B, *Letter dated February 13, 2020.*

allowing this Court to take Tomsheck's Supplemental Opposition into consideration when the Court rules upon Saggese's MTD.

DATED this 8th day of June, 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/Third-Party
Plaintiff JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2020, I sent via e-mail a true and correct copy of the above and foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME AND COUNTERMOTION TO ALLOW SUPPLEMENTATION OF THE RECORD ON MARC SAGGESE, ESQ.'S MOTION TO DISMISS/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:

H. Stan Johnson, Esq.
Cohen Johnson Parker Edwards
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com

and

Charles ("CJ") E. Barnabi, Jr., Esq.
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Attorneys for Marc Saggese

/s/Jane Hollingsworth

An Employee of OLSON CANNON GORMLEY & STOBERSKI

EXHIBIT A

AFFIDAVIT OF MAX E. CORRICK, II IN SUPPORT OF OPPOSITION TO MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, MAX E. CORRICK, II, being first duly sworn, depose and state as follows:

1. I am a resident of the State of Nevada, I am older than 18 years old, I am an attorney licensed to practice in the State of Nevada, and I am competent to offer this Affidavit based upon my personal knowledge, observations and information. I am the attorney retained to represent defendant Joshua Tomsheck in the lawsuit styled *Beavor v. Tomsheck* (Case No. A793405). All information contained in this Affidavit is true and correct to the best of my knowledge.

2. On March 9, 2020, Tomsheck filed his Motion for Summary Judgment. That Motion was set for hearing on May 7, 2020.

3. On March 11, 2020, Saggese filed a Motion to Dismiss, or alternatively, Motion for Summary Judgment ("the Saggese MTD"), on Tomsheck's Third-Party Complaint which seeks contribution from Saggese.

4. On March 18, 2020, Administrative Order 20-09 in Response to COVID-19 was issued. Significant limitations upon all forms of discovery in civil litigation were instituted. To date, those limitations remain in effect.

5. On April 3, 2020, Tomsheck filed his Opposition to the Saggese MTD. Tomsheck's Opposition set forth several arguments, both legal and factual, for denying Saggese's MTD. Tomsheck also submitted a proper NRCP 56(d) Request therein which

identified several specific areas of discovery relevant to Saggese's liability for contribution and the factual underpinnings of the Saggese MTD – namely Saggese's failure to plead the one-action rule as an affirmative defense in the underlying Hefetz v. Beavor litigation. Tomsheck's Rule 56(d) Request also identified that Plaintiff was served with Rule 34 Requests for Production of Documents on March 18, 2020 which requested, inter alia, documentation directly related to Saggese's claims that Plaintiff specifically instructed him to not plead the one-action rule as an affirmative defense. To date, Plaintiff has not responded in any manner to the pending written discovery requests.

6. On Friday, April 24, 2020, Tomsheck and Saggese filed a stipulation to strike Tomsheck's Opposition filed on April 3, 2020 from public access and to allow Tomsheck to re-file the Opposition with certain information redacted. The basis for the stipulation was a concern that Saggese's publicly available home address was contained within exhibits to Tomsheck's Opposition which related to Saggese being served with the Third-Party Complaint on August 21, 2019. Although such publicly available information is not considered "personal information" as defined by any statute or rule of Court, once Saggese's counsel raised and described Saggese's concern Tomsheck's counsel immediately agreed – as a professional courtesy to Saggese and his counsel – to take whatever steps Saggese felt appropriate to remove his address from the publicly filed Opposition.

7. On Friday, April 24, 2020 at 3:08 p.m., Plaintiff served his Second Supplemental NRCP 16.1 Disclosure and 16.1(a)(3) Trial Disclosure. The disclosure was 1906 pages long with over 100 different categories of itemized documents, including a privilege log, attached. The documents produced were not reviewed by the undersigned until April 29, 2020.

8. On Monday, April 27, 2020 at 10:52 a.m., Tomsheck re-filed his Opposition to the Saggese MTD with the information Saggese requested having been redacted.

9. On April 30, 2020 at 10:24 a.m., the undersigned sent electronic correspondence to Saggese's counsel advising that the newly produced documents by Plaintiff required supplementation to Tomsheck's Opposition. The undersigned offered Saggese's counsel additional time in which to review the Supplement for purposes of addressing its contents in Saggese's yet-to-be filed Reply brief. Saggese's counsel neither objected nor consented to the filing of a Supplement. At 3:33 p.m., Tomsheck electronically filed and electronically served the Supplement. At 4:26 p.m. Saggese electronically filed and electronically served his Reply brief. That Reply brief did not address the contents of the Supplement.

10. On May 5, 2020 at 8:42 a.m., Saggese filed his Motion to Strike. Later that day, the Court advised the parties that based upon the representations that a private mediation had been agreed upon by Plaintiff and Tomsheck to take place before June 12, 2020, the hearings on the pending motions were being continued to either June 25 or June 30, 2020 - to be chosen by the parties. Ultimately the parties agreed upon the June 25, 2020 date.

11. On May 26, 2020 at 5:04 p.m., the undersigned was advised by the assistant to Judge Jennifer Togliatti at ARM that Plaintiff's counsel had corresponded that Plaintiff no longer intended to participate in the agreed upon mediation set for June 9, 2020.

12. On May 27, 2020, the undersigned corresponded with Saggese's counsel to advise of the potential change in the mediation status and to prepare for the contingency that the mediation was, in fact, not going forward. After confirming that Saggese's Motion to Strike was still on the Court's June 25, 2020 calendar, the undersigned proposed a briefing schedule on that

Motion to Saggese's counsel if the mediation were to be canceled. As requested by Judge Togliatti's assistant, the undersigned also made multiple attempts to confirm with Plaintiff's counsel whether the mediation date should be vacated.

13. On May 28, 2020, having received no response from Plaintiff's counsel, the undersigned and Saggese's counsel stipulated to a briefing schedule for Saggese's Motion to Strike which would afford both Tomsheck and Saggese a fair opportunity to fully brief the issues raised in the Saggese Motion to Strike. Later that day, the undersigned advised Judge Togliatti's assistant that no response from Plaintiff's counsel was ever provided and, therefore, the previously agreed upon mediation could be vacated.

14. This Affidavit is not intended to create any undue delay and is made in good faith based upon all information currently available.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 8th day of June, 2020.

MAX E. CORRICK, II

SUBSCRIBED AND SWORN to before me this 8th day of June, 2020.

Notary Public in and for the State and County aforesaid.

E. JANE HOLLINGSWORTH
Notary Public-State of Nevada
APPT. NO. 94-0792-1
My Appt. Expires February 28, 2021

EXHIBIT B

BARRY J. LIPSON
(1955-2003)

OFFICE LOCATIONS

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From the desk of:

Megan H. Hummel, Esq.
mhummel@lipsonneilson.com

February 13, 2020

VIA HAND DELIVERY

Charles ("CJ") E. Barnabi Jr., Esq.
THE BARNABI LAW FIRM, PLLC
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119

Re: ***Subpoena Duces Tecum to Saggese & Associates, LTD.***
Christopher Beavor vs. Joshua Tomsheck
Case No. A-19-793405-C

Dear Mr. Barnabi:

Enclosed please find documents responsive to Plaintiff Christopher Beavor's Subpoena Duces Tecum to Saggese & Associates, LTD., Bates Stamped Nos. SAG000001-SAG000515. We have also enclosed the executed Certificate of Custodian of Records.

Please note that there are no invoices included in these documents as your client paid Mr. Saggese a one-time fee of $10,000 for legal services. We are diligently searching for a copy of the check and will provide the same once located.

Finally, we confirm that Mr. Saggese is out of town on Friday, February 14, 2020 and is consequently unavailable for deposition. We understand this is acceptable to your client and we will be happy to produce a witness for a Custodian of Records deposition at a later date, if necessary.

Should you have any questions, please do not hesitate to contact our office.

Very truly yours,

LIPSON NEILSON P.C.

/s/ Megan H. Hummel

MEGAN H. HUMMEL, ESQ.

JPG/MHH/bc/SA8796-000

Enclosures: *Certificate of Custodian of Records*
SAG000001-SAG000515 (CD)

LIPSON NEILSON P.C.
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
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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. Third-Party Defendant. _____	Case No: A-19-793405-C Dept. No.: 24 **THIRD-PARTY DEFENDANT MARC SAGGESE'S REPLY IN SUPPORT OF MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK AND OPPOSITION TO COUNTERMOTION TO ALLOW SUPPLEMENTATION OF THE RECORD** **ORAL ARGUMENT REQUESTED**

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Third-Party Defendant, MARC SAGGESE, ESQ., by and through his attorneys of record, LIPSON NEILSON P.C., hereby files the instant Reply in Support of Motion to Strike on Order Shortening Time and Opposition to Countermotion to Allow Supplementation of Record. The Reply and Opposition are based upon the following Memorandum of Points and Authorities, the papers and pleadings on file, and any oral argument this Court may entertain at a hearing.

DATED this 18th day of June, 2020.

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert

JOSEPH P. GARIN, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Reply In Support of Motion to Strike and Opposition to Countermotion

A. Mr. Tomsheck's Supplemental Reply was Procedurally Improper.

Mr. Tomsheck's Opposition and Countermotion ("Opposition") offers no grounds on which the supplemental briefing at issue may be allowed. Instead, the Opposition argues that Mr. Saggese's interpretation of proper procedure is too strict and rigid, and asks for relief that would require ignoring the rules in place that prohibit such a fugitive document to be considered.

EDCR 2.20(e) does not permit the supplemental briefing that Mr. Tomsheck has submitted. Leave of court should be sought *before* a supplemental response is filed, not afterwards, so that all parties may have the proper opportunity to address the arguments therein. This was not done here, and Mr. Saggese is not being "too harsh" in his insistence that proper procedure be followed.

Mr. Tomsheck's Opposition and Countermotion also notes that Mr. Saggese somehow had ample time to address the arguments raised in the improper supplement, and that there will be no prejudice to Mr. Saggese if it is considered. However, Mr. Saggese has no proper procedural grounds to file such a response, as he cannot properly reply to a fugitive document. Mr. Tomsheck cannot grant another party leave to respond to his improper supplement. Therefore, allowing it to stand will deprive Mr. Saggese of the opportunity to meaningfully respond.

B. The Potential Need for a Motion to Reconsider is Premature and has Nothing to do with the Instant Motion to Strike.

Mr. Tomsheck speculates as to his potential need to file a motion to reconsider in the future, assuming that the motion to dismiss is decided against his favor. This is not a ground to oppose striking the fugitive document. Further, this contention is premature and actually provides yet another ground to strike the fugitive document in question.

As Mr. Tomscheck is clearly aware, should the Court rule against him in the future, he has procedurally proper avenues to seek reconsideration which Mr. Saggese (and

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Mr. Beavor) would have the ability to respond to. While Mr. Tomsheck believes that it is better for the Court to review the supplemental briefing now, it is simply improper for it to do so. The Court should not review fugitive documents simply because a party threatens to file a motion to reconsider in the future, as to do so would set a negative precedent for all cases, which could be argued with an overhanging threat of a motion to reconsider in the future.

C. The Supplemental Opposition Serves no Purpose.

Next, Mr. Tomsheck argues that his Supplemental Opposition "does not advance new arguments at all."[1] If that is the case, then the Supplemental Opposition serves no purpose here, and this argument further supports striking this fugitive document. The Supplemental Opposition is clearly meant to bolster the arguments of the Supplemental Opposition or it would not have been filed. Arguments to the contrary are belied by the document itself.

Finally, the Opposition notes that Mr. Tomsheck served requests for production of documents on Plaintiff Beavor which have not been answered. Mr. Saggese has nothing to do with this issue, and is not tasked with producing documents that have been requested of Mr. Beavor. However, to the extent that Mr. Tomsheck seeks documents proving that Mr. Beavor instructed Mr. Saggese not to raise the one-action rule in the underlying lawsuit, no documents need be provided, as both Mr. Saggese and Mr. Beavor have submitted affidavits, made under oath, attesting to such. The argument that there is outstanding written discovery having to do with an entirely separate party is a red herring for purposes of the underlying motion to strike.

D. Conclusion.

Mr. Tomsheck's Opposition and unnecessary Countermotion complicate a simple, straightforward issue: that he improperly filed a supplemental brief without authority which is procedurally unsound. Proper procedure is vital to the administration of the Court, and

[1] Opposition at 6:10-11.

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it should not be discounted simply because Mr. Tomsheck wants even more opportunity to raise duplicative arguments. The supplemental briefing at issue is not properly before the Court and should not be considered.

DATED this 18th day of June, 2020

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 18th day of June, 2020, I electronically served the foregoing **THIRD-PARTY DEFENDANT MARC SAGGESE'S REPLY IN SUPPORT OF MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK AND OPPOSITION TO COUNTERMOTION TO ALLOW SUPPLEMENTATION OF THE RECORD** to the following parties utilizing the Court's E-File/ServeNV System:

Max E. Corrick, II, Esq. OLSON, CANNON, GORMLEY ANGULO & STOBERSKI 9950 W. Cheyenne Ave. Las Vegas, NV 89129 mcorrick@ocgas.com *Attorneys for Joshua Tomsheck*	H. Stan Johnson, Esq. COHEN JOHNSON PARKER EDWARDS 375 E. Warm Springs Rd., Suite 104 Las Vegas, NV 89119 sjohnson@cohenjohnson.com Charles ("CJ") E. Barnabi Jr., Esq. THE BARNABI LAW FIRM, PLLC 8981 W. Sahara Ave., Suite 120 Las Vegas, NV 89117 cj@barnabilaw.com *Attorneys for Plaintiff*

/s/ Sydney Ochoa

An Employee of LIPSON NEILSON P.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

Legal Malpractice	**COURT MINUTES**	**June 25, 2020**

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

June 25, 2020 **09:00 AM** **All Pending Motions**

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Lord, Rem

RECORDER: Maldonado, Nancy

REPORTER:

PARTIES PRESENT:

Harold Stanley Johnson	**Attorney for Plaintiff**
Joseph P Garin	**Attorney for Third Party Defendant**
Max E Corrick	**Attorney for Defendant, Third Party Plaintiff**

JOURNAL ENTRIES

THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGEMENT ... JOSHUA TOMSHECK'S MOTION FOR SUMMARY JUDGEMENT ... THIRD PARTY DEFENDANT MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME

Court reviewed the procedural history of the case. Following arguments by counsel COURT stated its findings and ORDERED Joshua Tomsheck's Motion for Summary Judgement GRANTED. COURT FURTHER ORDERED Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgement and Third Party Defendant Marc Saggese's Motion to Strike Supplemental Opposition to Third Party Plaintiff Joshua Tomsheck on Order Shortening Time MOOT. Mr. Corrick to prepare and submit a single Order within fourteen days. COURT ORDERED, status check SET for the filing of the Order.

7/23/2020 STATUS CHECK: FILING OF ORDER

MAX E. CORRICK, II
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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. XXIV
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

NOTICE OF ENTRY OF ORDER

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PLEASE TAKE NOTICE that an Order has been entered in the above-entitled Court on the 9th day of July, 2020, a copy of which is attached hereto.

DATED 10th day of July, 2020.

OLSON CANNON GORMLEY & STOBERKI

/s/Max E. Corrick

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Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2020, I sent via e-mail a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** 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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/s/Jane Hollingsworth

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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. XXIV

ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW ON:

1. **JOSHUA TOMSHECK'S MOTION FOR SUMMARY JUDGMENT;**

2. **THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT; and**

3. **THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME**

Date of Hearing: June 25, 2020

Time of Hearing: 9:00 a.m.

JOSHUA TOMSHECK, an individual,

Third-Party Plaintiff,

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v.

MARC SAGGESE, ESQ., an individual,

Third-Party Defendant.

These matters having come on for hearing on the 25th day of June, 2020, before the Honorable Judge Jim Crockett, on JOSHUA TOMSHECK's Motion for Summary Judgment, Third-Party Defendant MARC SAGGESE's Motion to Dismiss, or alternatively, Motion for Summary Judgment, and Third-Party Defendant MARC SAGGESE's Motion to Strike Supplemental Opposition of Third-Party Plaintiff JOSHUA TOMSHECK on Order Shortening Time.

Plaintiff CHRISTOPHER BEAVOR, appearing by and through his counsel of record, H. Stan Johnson, Esq.; Defendant/Third-Party Plaintiff JOSHUA TOMSHECK, appearing by and through his counsel of record, Max E. Corrick, II, and; Third-Party Defendant MARC SAGGESE, Esq., appearing by and through his counsel of record, Joseph P. Garin, Esq. The Court having reviewed the papers and pleadings on file, having heard the representations and arguments of counsel, and good cause appearing therefore, makes the following Findings of Fact and Conclusions of Law, and issues its Order on the motions pending before the Court.

FINDINGS OF FACT

The Court makes the following Findings of Fact:

1. On April 23, 2019, Plaintiff CHRISTOPHER BEAVOR ("Plaintiff Beavor") filed a legal malpractice lawsuit against Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck") arising out of alleged legal malpractice committed by Tomsheck. Tomsheck filed an Answer and Third-Party Complaint against Third-Party Defendant Marc Saggese, Esq. on May 16, 2019, seeking Contribution.

2. On March 9, 2020, Tomsheck filed his Motion for Summary Judgment. Tomsheck filed an Errata to his Motion for Summary Judgment on March 11, 2020 which corrected

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certain representations regarding relevant dates in the Tomsheck Motion for Summary Judgment. Plaintiff Beavor filed an Opposition to the Tomsheck Motion for Summary Judgment on March 27, 2020. Tomsheck filed his Reply on April 30, 2020.

3. On March 11, 2020, Third-Party Defendant Marc Saggese, Esq. ("Saggese") filed his Motion to Dismiss, or alternatively, Motion for Summary Judgment. Tomsheck filed an Opposition to the Saggese Motion to Dismiss, or alternatively, Motion for Summary Judgment, and Request for NRCP 56(d) Relief, on April 3, 2020. Saggese filed his Reply on April 30, 2020. That same day, April 30, 2020, Tomsheck filed a Supplement to his Opposition to Saggese's Motion to Dismiss, or alternatively, Motion for Summary Judgment, and Request for NRCP 56(d) Relief.

4. On May 5, 2020, Saggese filed his Motion to Strike Supplemental Opposition of Third-Party Plaintiff Tomsheck on Order Shortening Time. Tomsheck filed an Opposition to the Saggese Motion to Strike on June 8, 2020, along with a Countermotion to Allow Supplementation. Saggese filed his Reply and Opposition to the Countermotion on June 18, 2020. Tomsheck did not file a Reply to the Saggese Opposition.

5. The Court recognizes that the Tomsheck Motion for Summary Judgment may be dispositive of the entire case. Therefore, while the Court reviewed each of the motions pending before it, for the reasons set forth below the Court declines to rule upon the Saggese Motions or the Tomsheck Countermotion.

6. In Tomsheck's Motion for Summary Judgment he raises the following arguments: *First*, Tomsheck argues he is entitled to summary judgment because Plaintiff Beavor impermissibly assigned his legal malpractice claim against Tomsheck to Beavor's adversary in the underlying matter of *Hefetz v. Beavor* (Case No. A645353), Yacov Hefetz ("Hefetz"). Tomsheck argues this is evidenced by the settlement agreement reached between Hefetz and Plaintiff Beavor on February 15, 2019. The Court notes Tomsheck never represented Hefetz, nor does Plaintiff Beavor contend that he did. The relevant terms of the Hefetz/Beavor settlement agreement, which the Court has reviewed in its entirety, include the following:

   Section 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.

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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.

7. Tomsheck argues that, based upon the explicit terms of the Hefetz/Beavor settlement agreement, Plaintiff Beavor impermissibly assigned his legal malpractice claim to Hefetz – whether characterized as an express assignment or as a *de facto* assignment.

8. Tomsheck argues that "in Nevada, legal malpractice claims are absolutely unassignable and subject to summary judgment if assigned." Tomsheck cites, *inter alia*, the Nevada Supreme Court decisions of *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982), and *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016), for this general proposition, as well as cases from several other jurisdictions, including the case of *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976), which has been directly relied upon and quoted by the Nevada Supreme Court.

9. *Second*, Tomsheck argues Plaintiff Beavor filed this legal malpractice lawsuit after the statute of limitation period elapsed for Plaintiff Beavor to file the lawsuit. Specifically, Tomsheck notes he and Plaintiff Beavor negotiated and entered into a binding contract, namely a tolling agreement, which affixed the time in which Plaintiff Beavor would be required to file a legal malpractice lawsuit to within two (2) years of the Nevada Supreme Court resolving Supreme Court Appeal No. 68838 (c/w 68843). Although it is not entirely clear to the Court, based upon the Errata filed by Tomsheck it appears Tomsheck is alleging the latest date Plaintiff Beavor had to file his legal malpractice

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lawsuit against Tomsheck was September 26, 2018, but that the lawsuit was not filed until April 23, 2019.

10. For the reasons set forth below, the Court declines to rule upon Tomsheck's statute of limitations argument. Instead, the Court chooses to focus upon Tomsheck's impermissible assignment of a legal malpractice claim argument.

11. With respect to that impermissible assignment argument, Tomsheck's Motion for Summary Judgment argues Plaintiff Beavor is prosecuting an impermissibly assigned legal malpractice claim which violates public policy and which is subject to summary judgment. To that end, Tomsheck states that "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 Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976); *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).

12. Tomsheck further argues that in *Tower Homes*, "the Nevada Supreme 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."

13. Summarizing Tomsheck's argument in his Motion for Summary Judgment, the depth and breadth of control over this litigation which Hefetz (Plaintiff Beavor's adversary in

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the underlying matter) has been given pursuant to the settlement agreement, along with the assignment of all of the proceeds which Plaintiff Beavor might receive from this lawsuit, equates to an impermissible assignment of the legal malpractice claim itself. As Tomsheck puts it, "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."

14. In Opposition, Plaintiff Beavor concedes he assigned all of the proceeds from his then-unfiled legal malpractice lawsuit against Tomsheck to his former adversary. Plaintiff Beavor argues that Nevada law, as stated in *Edward J. Achrem, Chtd. v. Expressway Plaza Pshp.*, 112 Nev. 737, 917 P.2d 447 (1996), allows a party to assign proceeds from a tort action to a third party. In that regard, Plaintiff Beavor argues the *Tower Homes, LLC* decision does not prohibit the assignment of the recovery in a legal malpractice claim.

15. Plaintiff Beavor also argues *Tower Homes, LLC* is distinguishable upon its facts, and that while Plaintiff Beavor did assign all of the proceeds of this legal malpractice lawsuit to Hefetz, Plaintiff Beavor contends he "still maintains complete control of his case." In this respect, Plaintiff relies upon his Declaration dated March 27, 2020 for this proposition and insists that "[t]he only thing that has been assigned in this matter is the recovery."

16. Plaintiff Beavor further argues that even if this Court finds the assignment of proceeds to be invalid, or that the settlement agreement constitutes a *de facto* assignment of Plaintiff Beavor's legal malpractice lawsuit to Hefetz, Plaintiff Beavor should still be permitted "to pursue the matter directly against the Defendant" and that "any of the assigned rights must revert back to Plaintiff Beavor."

17. Tomsheck's Reply argues that the terms of the Hefetz/Beavor settlement agreement make clear that Plaintiff Beavor "assigned all of the proceeds and potential recovery from his then-unfiled legal malpractice lawsuit against [] Tomsheck…in order to circumvent Nevada's strong public policy barring assignment of legal malpractice claims." In fact, Tomsheck argues Plaintiff Beavor *irrevocably* assigned them and therefore has nothing to assert against Tomsheck on his own. Moreover, Tomsheck argues Plaintiff Beavor's March 27, 2020 Declaration is inadmissible parol evidence and constitutes Plaintiff Beavor's attempt to violate Nevada's prohibition upon "fabricating issues of fact for purposes of avoiding summary judgment" because the representations in the Declaration are contrary to the terms of the Hefetz/Beavor settlement agreement which Plaintiff Beavor signed under oath. *See Aldabe v. Adams*, 81 Nev. 280, 284–85, 402 P.2d 34, 36–37 (1965) (refusing to credit a sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998).

18. Tomsheck further argues in his Reply that, contrary to Plaintiff's assertions, "[a]side from the multitude of jurisdictions cited in [] Tomsheck's motion, other jurisdictions

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have noted that the *de facto* assignment of a legal malpractice claim violates public policy and compels dismissal. *E.g. Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261 (Wash. Ct. App. 2013); *Paonia Res., LLC v. Bingham Greenebaum Doll, LLP*, 2015 WL 7431041 (W.D. Ky. Nov. 20, 2015); *Trinity Mortg.. Cos v. Dreyer*, 2011 WL 61680 (N.D. Okla. Jan 7, 2011). 'It is the mere opportunity for collusion and the transformation of legal malpractice to a commodity that is problematic.' *Kenco*, 291 P.3d at 263. 'This reasoning applies whether or not the collusion is real.' *Id*. The rule prohibiting either express or *de facto* assignment of legal malpractice claims cannot 'be obfuscated by clever lawyers and legal subtleties.' *Id* at 265."

19. Tomsheck further argues in his Reply that *Tower Homes, LLC* rejected Plaintiff Beavor's position that *Achrem* applies to assignment of proceeds from legal malpractice actions, citing *Tower Homes, LLC's* assertion that "[w]e are not convinced that *Achrem's* reasoning applies to legal malpractice claims…" *Tower Homes, LLC* at 635, 377 P.3d at 122. Indeed, Tomsheck argues this conclusion is consistent with rulings from other jurisdictions which have held that there is a "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." *Gurski*, 276 Conn. 257, 285, 885 A.2d 163, 178 (2005); *and see Botma v. Huser*, 202 Ariz. 14, 19, 39 P.3d 538, 543 (Ariz. Ct. Ap. 2002) (finding an assignment agreement was impermissible and subject to summary judgment because it "allow[ed] Plaintiff Himes to recover any and all monies which might be owing to Plaintiff Botma' and that 'Plaintiff Himes will be the ultimate beneficiary of Plaintiff Botma's claims herein.' To allow the present lawsuit, which was born out of that assignment agreement, to proceed in Botma's name would be to wink at the rule against assignment of legal malpractice claims.").

20. Tomsheck's Reply further distinguishes the cases relied upon by Plaintiff Beavor in his Opposition, noting, *inter alia*, that those cases either do not support Plaintiff Beavor's arguments, rely upon facts far different from those found in this case, or represent a "severely discredited" view of the assignability of legal malpractice claims.

21. Finally, Tomsheck's Reply argues no Nevada court has permitted an assignor to "claw back" and assert for himself a previously assigned legal malpractice claim, particularly where 100% of the proceeds have been assigned. Tomsheck further notes that Plaintiff Beavor's irrevocable assignment of those proceeds prevents him from pursuing the matter against Tomsheck now, and that no Nevada case law, whether published or unpublished, supports Plaintiff Beavor's "do over" arguments.

22. In their totality, Tomsheck's arguments regarding the impermissible assignment of this legal malpractice lawsuit by Plaintiff Beavor's to Hefetz are persuasive, if not compelling, and they are sufficient to justify summary judgment in his favor. While Plaintiff Beavor appears to rely upon rhetoric and arguments related to whether Tomsheck committed legal malpractice in his representation of Plaintiff Beavor, that is

not the legal issue before the Court. In fact, the Court believes each of Plaintiff Beavor's arguments in Opposition, in the briefs and at oral argument, is effectively defeated by the case law and arguments advanced in Tomsheck's Reply Brief and oral argument.

23. As a result, the Court need not reach the issues raised in Tomsheck's Motion for Summary Judgment concerning the statute of limitations acting as a bar to Plaintiff Beavor's lawsuit.

24. When questioned by the court, counsel for the parties each represented to the Court that they believe the net effect of the Court's decision on Tomsheck's Motion for Summary Judgment allows the Court to decline to address the merits of both Saggese Motions or any Countermotion thereto. The Court shares this belief.

CONCLUSIONS OF LAW

Based upon the Findings of Fact itemized herein, controlling Nevada precedent, the persuasive rationale from other jurisdictions which have ruled upon the issue, as well as the arguments contained in the parties' briefing on Tomsheck's Motion for Summary Judgment, the Court makes these Conclusions of Law as follows:

1. The terms of the settlement agreement between Plaintiff Beavor and his former adversary in the underlying case *Hefetz v. Beavor* (Case No. A645353), Yacov Hefetz, are admissible evidence of Plaintiff Beavor's assignment of his then-unfiled legal malpractice lawsuit against Tomsheck to Hefetz. Such assignment is impermissible under Nevada law. *See Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982); *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).

2. Plaintiff Beavor irrevocably assigned 100% of the proceeds from his then-unfiled legal malpractice lawsuit against Tomsheck to Hefetz. He also assigned substantial, if not complete, control over the current litigation to Hefetz. Nevada law, consistent with other jurisdictions, forbids this.

3. Even assuming Plaintiff Beavor had only assigned the proceeds from the current litigation to Hefetz, Nevada law does not allow a party to simply assign the proceeds from a legal malpractice lawsuit in order to avoid the appearance of an impermissible assignment of the legal malpractice lawsuit itself. *See Tower Homes, LLC*, 132 Nev. at 635, 377 P.3d at 122. In fact, the *Tower Homes, LLC* Court rejected this very approach.

4. Indeed, other jurisdictions have specifically held that the assignment of proceeds from a legal malpractice claim, rather than the assignment of the claim itself, is a meaningless distinction which is made to circumvent the public policy barring assignment of legal malpractice claims. *E.g., Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005); *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538 (Ariz. Ct. Ap. 2002) *Town & Country Bank*

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of Springfield v. Country Mutual Ins. Co., 121 Ill.App.3d 216, 76 Ill.Dec. 724, 459 N.E.2d 639 (1984). Such conclusion is both compelling and consistent with Nevada law and the rationale underpinning Nevada's prohibition of the assignment of legal malpractice claims. *See, e.g., Chaffee v. Smith, supra; Tower Homes, LLC, supra; Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976).

5. Whether characterized as an express or *de facto* assignment of his legal malpractice lawsuit, Plaintiff Beavor's assignment bars him from prosecuting this legal malpractice lawsuit now, and Plaintiff Beavor cannot claw back for himself that which he assigned to Hefetz. Nor is Plaintiff Beavor entitled to a "do over". Plaintiff Beavor irrevocably assigned his legal malpractice claim to Hefetz and therefore has nothing to prosecute for himself. But more importantly, allowing Plaintiff Beavor to do so, under the facts of this case, would be contrary to controlling, longstanding Nevada precedent and would defeat the strong public policy reasons behind Nevada law's prohibition of assignment of legal malpractice claims entirely.

6. As such, Tomsheck is entitled to summary judgment based upon Plaintiff Beavor's impermissible assignment of his legal malpractice claim to Hefetz.

7. By granting Tomsheck's Motion for Summary Judgment on that basis, the Court need not consider, and therefore declines to rule upon, Tomsheck's separate statute of limitations argument as well as Saggese's pending Motions and any Countermotion thereto.

ORDER

Based upon the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendant Tomsheck's Motion for Summary Judgment is granted;

2. The Court declines to rule upon Third-Party Defendant Saggese's pending Motions, and any Countermotion thereto; and,

3. Counsel for Tomsheck shall prepare the Order, which should be an abridged version of the arguments made by the parties in their respective briefs and at oral argument, and should submit that Order to the Court in compliance with EDCR 7.21, but no later than 14 days from the date of the hearing unless additional time is requested and granted by this Court.

IT IS SO ORDERED.

Dated this 9th day of July, 2020

DATED this ___ day of July, 2020.

JUDGE JIM CROCKETT

Approved as to Form and Content:

COHEN JOHNSON PARKER EDWARDS

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From: H. Stan Johnson <sjohnson@cohenjohnson.com>
Sent: Thursday, July 9, 2020 11:36 AM
To: Max Corrick; CJ Barnabi (cj@barnabilaw.com); Joe Garin
Cc: Jane Hollingsworth
Subject: RE: Beavor adv. Tomsheck -- FFCL and Order on Motions

Max I will approve the order as to form but not content; can you make that change and use my e-signature.

Thanks
Stan

H. Stan Johnson, Esq.
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From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, July 1, 2020 3:04 PM
To: H. Stan Johnson <sjohnson@cohenjohnson.com>; CJ Barnabi (cj@barnabilaw.com) <cj@barnabilaw.com>; Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: Beavor adv. Tomsheck -- FFCL and Order on Motions

All: Please see the attached proposed FFCL and Order on the motions hearing on June 25. I have tried to follow Judge Crockett's request for it to be an "abridged" version of the briefs and therefore rely heavily upon what has been written in the briefs, rather than the colloquy at oral argument – except where necessary. Given the fulsome briefing on all sides I think this is as abridged as I can get and still be faithful to the positions of the parties and the comments from the Court.

If you have any proposed edits please offer them. July 9 is the due date for the Order.

Once we have mutually agreed upon language I will request a separate email from you authorizing me to include your e-signature so that this can be transmitted to Dept. 24 per its protocols.

Thanks.

Max Corrick
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Phone No.: 702-384-4012

From: Joe Garin <JGarin@lipsonneilson.com>
Sent: Thursday, July 9, 2020 10:21 AM
To: Max Corrick
Cc: sjohnson@cohenjohnson.com; CJ Barnabi (cj@barnabilaw.com); Jane Hollingsworth
Subject: Re: Beavor adv. Tomsheck proposed Order

I approved and you can sign for me

Sent from my iPhone

On Jul 9, 2020, at 10:53 AM, Max Corrick <mcorrick@ocgas.com> wrote:

Gentlemen: I have not received any comments or requested edits from Beavor's camp on my draft Order which I sent on July 1. I have received approval from Mr. Garin to insert his esignature as the proposed Order now stands.

Unless I receive some communication back by 1 pm today I will indicate that Beavor has not responded as to form and content.

Please let me know how you intend to proceed. Thanks.

Max Corrick
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Christopher Beavor, Plaintiff(s)	CASE NO: A-19-793405-C
vs.	DEPT. NO. Department 24
Joshua Tomsheck, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/9/2020

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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.

ALL RELATED MATTERS.

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

PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) and 59(e)

HEARING REQUESTED

COMES NOW, Plaintiff Christopher Beavor ("Beavor"), by and through his undersigned counsel of record, submits this Motion to Alter or Amend Pursuant to NRCP 59(e) and 59(e). This Motion is supported by the accompanying memorandum of points and authorities, the papers and pleadings on file herein, and any oral argument the Court may allow.

Dated this 7th day of August, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Court's decision to grant summary judgment in this matter is not based upon the law or facts of this case but was instead crafted by Defendant and fails in a number of ways. The Court does not make findings that are required in this matter and so the Court's order is impermissibly vague. Moreover, the Court's Order fails as a matter of law and is not properly based on Nevada law. For these reasons, the Court should alter or amend its order and deny the Defendant's Motion for Summary Judgment.

II.

RELEVANT FACTS AND PROCDURAL HISTORY

This matter began in a previous case in the District Court, (A-11-645353-C, *Hefetz v. Beavor*). This matter proceeded to a jury trial, in which Mr. Beavor prevailed. At that point, Hefetz retained new counsel and filed a motion for a new trial. Counsel for Mr. Beavor, Mr. Tomsheck, (Hereinafter "Defendant"), filed an opposition that failed so completely to oppose the motion for a new trial that the Judge hearing the matter stated that he considered the matter unopposed and that he had no choice but to grant it. The Judge further stated that had any opposition been brought, the Motion would have been denied.

Accordingly, due to the Defendants Malpractice, Mr. Beavor (hereinafter "Plaintiff") had to endure additional years of litigation, including an appeal to the Supreme Court of Nevada. This cost Plaintiff in excess of $120,000.00 in legal fees and the stress of continued litigation. While the case was on appeal to the Supreme Court the parties participated in the Supreme Court settlement program during 2017. The Supreme Court settlement judge contacted Mr. Tomsheck's insurance carrier and involved them in the settlement discussion since the malpractice was quite

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evident and they had already been put on notice of the claim of Mr. Beavor. As Mr. Beavor and Mr. Hefetz approached the second jury trial in this matter, the parties participated in another settlement conference in this matter on April 2nd, 2018.

Mr. Tomsheck's legal malpractice insurance was present through their counsel. The matter did not settle at this settlement conference and continued towards a second trial. On the eve of that trial, the parties reached a settlement. As part of the settlement, Plaintiff assigned the proceeds of his malpractice suit to Mr. Hefetz. Thereafter, this matter was filed. The Motion for Summary Judgment was fully briefed by April 30th, 2020. However, due to the parties' decision to attend a settlement conference, which was later canceled, this matter was not heard until June 25th, 2020. The Court granted this Motion and now Plaintiff files this Motion to Alter or Amend pursuant to NRCP 59(e) and 52(b).

III.

LEGAL STANDARD

NRCP 59(e). A motion to alter or amend a judgment must be filed "no later than 28 days after service of written notice of entry of judgment…" NRCP 59(e). As NRCP 59(e) echoes its federal counterpart, Nevada courts should "consult federal law interpreting" Rule 59(e). *AA Primo Builders,. LI,C v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1192-93 (2010). A motion to amend or alter under NRCP 59(e) should be granted to correct a clear error, whether of law or of fact, and to prevent a manifest injustice. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) So long as the Rule 59(e) motion is timely filed, the courts have considerable discretion. *Lockheed Martin Corp*., 116 F.3d at 112. Although the courts are not required to consider new legal arguments

or mere restatements of old facts or arguments, the court can and should correct clear errors in order to "preserve the integrity of the final judgment." *Turkmani v. Republic of Bolivia*, 273 F.

Supp. 2d 45, 50 (D.D.C. 2002). See, also *Dist. Of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010); *State of New York v. United States*, 880 F. Supp. 37,38 (D.D.C. 1995)

There are four "basic grounds available to support a Rule 59(e) motion: (1) where the motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) where the motion is necessary to present newly discovered or previously unavailable evidence; (3) where the motion is necessary to prevent manifest injustice; and (4) where the amendment is justified by an intervening change in controlling law. *Allstate Insurance Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). A district court is afforded "considerable discretion in granting or denying" a Rule 59(e) motion. *Id.*

NRCP 52(b). The purpose of the Rule is to allow for supplementing the court's findings, correcting manifest errors of law or fact or, in limited circumstances, presenting newly discovered evidence. See, *Fontenot v. Mesa Petroleum Co*., 791 F.2d 1207, 1219 (5th Cir. 1986). Except in the instance of bona fide newly discovered evidence, the district court is limited to amending its findings based on evidence contained in the record; to do otherwise would defeat the compelling interest in finality of judgments. *Id.* 1. The basis for a motion to add or amend findings includes incomplete findings. See, *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply*, 45 F.3d 1550, 1555-56 (Fed. Cir. 1995); *United States v. Tosca*, 18 F.3d 1352, 1355 (6th Cir. 1994). Manifest error of fact or law. See, *Fontenot*, 791 F.2d at 1219; see also *Nat'l Metal Finishing Co. v. Barclays American/ Commercial, Inc*., 899 F.2d 119, 123 (1st Cir. 1990) and newly discovered evidence. See, *Fontenot*, 791 F.2d at 1219.

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IV.

LEGAL ARGUMENT

A. THE COURT'S ORDER DOES NOT CLARIFY WHAT, IF ANY, EFFECT IT HAS ON THE PARTIES' SETTLEMETN AGREEMENT AND THEIR RIGHT TO CONTRACT.

A court should not interpret a contract so as to make its provisions meaningless. *Phillips v. Mercer*, 94 Nev. 279, 579 P.2d 174 (1978). If logically and legally permissible, a contract should be construed give effect to valid contractual relations rather than rendering an agreement invalid or rendering performance impossible or illegal. *Mohr*, 83 Nev. at 112, 424 P.2d 104.

Severance is preferred to rendering the entire agreements unenforceable, as it preserves the intent of the agreements and complies with the policies favoring arbitration. See *Cox v. Station Casinos, LLC*, (Slip Copy) No. 2:14-CV-638-JCM-VCF, 2014 WL 3747605, *4 (D. Nev. June 25, 2014) (citing *Vincent v. Santa Cruz*, 647 P.2d 379, 381 (Nev. 1982). Severability preserves the contracting parties' intent by maintaining the existence of a contract but striking illegal provisions that are unenforceable. See *Linebarger v. Devine*, 214 P. at 534 (1923); see also *8 Williston on Contracts § 19:70* (4th ed. 2014) (citing *Restatement Second, Contracts § 183*, comment a) ("An illegal portion of an agreement that relates to the remedy is more readily separable.")
("[T]he strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement.").

The Settlement Agreement between Beavor and Hefetz contained the following severance clause:

> 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.

See, Exhibit 1 to Tomsheck's Motion for Summary Judgment.

Therefore, the court should have severed any unenforceable provisions of the Settlement Agreement and allowed the rest of the contract to survive. In apparently finding the entire agreement unenforceable the court creates additional legal issues. For example: Are the parties back at the status quo before they signed the agreement and settled the case? Are they now required to go back and hold the trial on the original case between Beavor and Hefetz? Does Hefetz have to repay the money paid by Beavor of $250,000.00? Are the mutual releases in the settlement agreement valid? And many other issues that will arise if the court invalidates the entire settlement agreement.

The Court, in its Findings of Fact and Conclusions of Law fails to address if the entire contract is unenforceable and therefore void. The Court should pursuant to NRCP 59(e) and 52(b) clarify if it is striking paragraph 4 in its entirety; certain parts of paragraph 4, and whether or not it is applying the Settlement Agreement's clear severability clause.

Further, Plaintiff in this matter, and Mr. Hefetz, have a constitutionally protected right to contract as they see fit. Accordingly, the Court is prohibited from interpreting a contract is such a way that it is rendered meaningless. Likewise, the Court must give effect to valid contractual provisions wherever possible. Accordingly, the specific actions which the Court is taking regarding the parties' contract must be spelled out in clear detail.

Accordingly, the Court's decision should be altered or amended to clarify what if anything it is striking from the settlement agreement and reasons for doing so. It is an error of fact and law to ignore the severance provision contained in the agreement that the Court is analyzing.

B. IT IS AN ERROR OF LAW FOR THE COURT TO BASE ITS DECISION ON THE *GOODLEY* CASE OUT OF CALIFORNIA.

The sole question at issue in the *Goodley* case, a California case, is whether Plaintiff had standing to bring the malpractice case assigned to them. The Court states as follows, "The sole issue was whether by virtue of the assignment plaintiff has standing to bring this action for legal

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malpractice." *Goodley v. Wank & Wank*, 62 Cal. App. 3d 389, 392, 133 Cal. Rptr. 83, 83-84 (1976). The *Goodley* Court further states: "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." This Court should have applied the same standard as *Goodley*. Namely, does Plaintiff, the actual client have standing to bring a malpractice action against his former lawyer Tomsheck. The answer can only be yes. Regardless of certain terms that maybe unenforceable in the Settlement Agreement or even if the entire agreement is void, Beavor as the former client and Plaintiff, has standing to sue. The order granting summary judgment must be amended and/or new findings added to correct this error of law.

The Nevada Supreme Court's decision in *Tower Homes*, also deals with the explicit assignment from one party to another and that party's standing to pursue it. *Tower Homes* reads as follows:

> 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**. Supreme Court.
>
> *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016). Emphasis added.

The Court's order cites these cases for the proposition that:

> "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*."

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This is in direct conflict with the actual words of *Goodley*¸ which plainly state that the only issue before the court is that of standing which is implicated in both of these matters when a case is assigned from one party to another to pursue.

Here, there can be no question of standing as Plaintiff brought his own case in his own name. The Court's order does not address how these cases which invalidate an assignment on the basis of standing can be applied to this matter when standing cannot be at issue. Further, the Court does not address the question of standing at all. If in fact, standing is the basis of the Court's ruling, (per its reliance on a case in which the express issue was standing) it must make express findings which explain how Plaintiff Beaver does not have standing to pursue his own case. The Court's order should be altered or amended to include these express findings.

C. THE COURTS ORDER DOES NOT STATE WHETHER IT CONSIDERED THE ALLEGED ASIGNMENT OF THE CASE AN EXPRESS OR DE FACTO ASSIGNMENT.

To support the Court's award, the Court must make findings that there was an express assignment of the cause of action or a de facto assignment. Without making such a determination, it is unclear what the Court's actual findings were. The Court made the following findings:

1. The terms of the settlement agreement between Plaintiff Beavor and his former adversary in the underlying case Hefetz v. Beavor (Case No. A645353), Yakov Hefetz, **are admissible evidence of Plaintiff Beavor's assignment of his then-unfiled legal malpractice lawsuit against Tomsheck to Hefetz. Such assignment is impermissible under Nevada law.** See *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982); *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).

2. **Plaintiff Beavor irrevocably assigned 100% of the proceeds from his then-unfiled legal malpractice lawsuit against Tomsheck to Hefetz**. He also **assigned substantial, if not complete, control over the current litigation to Hefetz. Nevada law, consistent with other jurisdictions, forbids this**.

3. **Even assuming Plaintiff Beavor had only assigned the proceeds from the current litigation to Hefetz**, Nevada law does not allow a party to simply assign the proceeds from a legal malpractice lawsuit in order to avoid the appearance of an impermissible assignment of the legal malpractice lawsuit itself. See *Tower Homes, LLC*, 132 Nev. at 635, 377 P.3d at 122. In fact, the *Tower Homes, LLC* Court rejected this very approach. *See Paragraphs 1-3 of the Court's Conclusions*

of Law.

Is it an express assignment of the cause of action or is it a de facto assignment of the cause of action? The Court should alter or amend its order to give Plaintiff the clarity they are entitled to under the law.

This confusion is even more pronounced when the facts of this case are considered. On the face of the settlement agreement, this is an assignment of the proceeds of this matter only. The agreement reads:

> 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.

This fact that this is not an express assignment is indisputable. Despite this undisputed fact, Defendant argued that the language in the Settlement Agreement was an assignment of the entire cause of action. It is unclear if the Court is adopting this reasoning or ruling that it was an express assignment of the cause of action despite the plain meaning of these words or if it were a de facto assignment. In which case the court failed to make the necessary finding to support that factual and legal finding. While the Court does quote from the settlement agreement, it is left unsaid what factors led the Court to determine that a de facto assignment had occurred. Without this analysis, finding a de facto assignment is clear error. Accordingly, the Court should alter or amend its ruling to provide Plaintiff with the clarity they are entitled to regarding the question of assignment.

D. THE COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

1. THE COURT'S DECISION IS NOT SUPPORTED BY NEVADA LAW.

Nevada has two principle cases which deal with the assignment issues, the *Achrem* and the *Tower Homes*. Neither supports the Court's ruling. In *Achrem*, the Court recognized that personal injury claims were not, as a matter of law, assignable. *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.*, 112 Nev. 737, 741, 917 P.2d 447, 449 (1996). However, the Court found a

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meaningful distinction between assigning the cause of action itself and the proceeds from the cause of action. *Id.* The Court held that:

> The district court also considered Expressway's assignment to be allowable because it assigned a portion of Shawn's proceeds from his action against the school district, not Shawn's tort action itself. ***We conclude that the district court was correct in ruling that a meaningful legal distinction exists between assigning the rights to a tort action and assigning the proceeds from such an action.*** See *In re Musser*, 24 Bankr. at 920-21. When the proceeds of a settlement are assigned, the injured party retains control of their lawsuit and the assignee cannot pursue the action independently. See *Charlotte Hosp. Auth*., 455 S.E.2d at 657. Also, the ability to assign portions of the proceeds of the suit allows an injured plaintiff to obtain an attorney through a contingency fee arrangement and allows the plaintiff to pursue the action without being burdened by medical bills associated with the accident. *Id.* at 741. *Emphasis added.*

Here, the facts are substantially similar to those in *Achrem.* A legal malpractice case cannot be assigned. However, assigning the proceeds form a malpractice case is fundamentally different just as it was in *Achrem.* Beavor still remains in control of his case. He was simply required to bring the case. The settlement agreement says nothing about any actions he must take in the litigation neither does it give Mr. Hefetz any control over the case.

Defendant does not specify what, if any, control Mr. Hefetz is given. The entire clause in question, does not contain a single mention of any control which Mr. Hefetz has. Beavor only agrees to 1) actually bring the case and cooperate in its prosecution, 2) use H. Stan Johnson as counsel and execute any conflict waiver necessary, and 3) assign the proceeds of this case to Hefetz. The Court did not specify how this constitutes a de facto assignment as a matter of law. It is unclear how there can be a de facto assignment when the Settlement Agreement does not give Hefetz actual control and the only declaration in this matter of the Plaintiff states just the contrary. See, argument of statements from Beavor's declaration above.

The second case on point, *Tower Homes,* dealt with a bankruptcy court order "authorizing the bankruptcy trustee to permit a group of creditors to pursue a debtor's legal malpractice claim in the debtor's name." *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 630, 377 P.3d 118, 119 (2016).

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In *Tower Homes,* the Court sidestepped the issue of assigning the proceeds from a malpractice claim. Holding, "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 constituted an assignment of **the entire claim**." *Id.* The Court specifically declined to evaluate the *Achrem* case in this matter, simply stating that "we are not convinced that *Achrem*'s reasoning applies to legal malpractice claim." Not withstanding this statement, the Court continues to say this about *Archem*:

> 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. When only the proceeds are assigned, the original party maintains control over the case. When an entire claim is assigned, a new party gains control over the case. 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 at 122-23. *Internal citations omitted.*

As these cases do not support the Court's findings, and there is no Nevada case law on point, the Court's decision impermissibly relies on dozens of out of state decisions. While such decisions can be persuasive in certain circumstances, they are not here. First and foremost, they cannot fill a void in Nevada law. Rather, the Court should have denied this Motion for Summary Judgment and allowed this matter to be taken up on appeal by the Defendant. This squares with Nevada's mandate that matters be heard on their merits. Moreover, many all of these cases are completely distinguishable from these facts. Without delving into these facts, the Court's reliance on these cases is misplaced. Accordingly, the Court's decision is clearly erroneous and should be altered or amended.

2. THERE ARE CLEAR ISSUES OF FACT WHICH THE COURT IGNORED

In *Brandon Apparel Group v. Kirkland & Ellis,* 382 Ill. App. 3rd 271 (2008) the Illinois appellate court reversed the lower court's order granting summary judgment since whether a de facto assignment occurred of the legal malpractice claim was a fact question not properly decided

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on summary judgment. The *Brandon* Court went on to state: "Neither our research nor that of either of the parties has disclosed a case addressing the precise question before us: when is de facto assignment of a legal malpractice claim established as a matter of law"?

The only declaration before the court was of the Plaintiff Beavor. In the declaration Beavor stated the following:

> 2. As partial consideration part for of a settlement agreement with a third party in another case, I agreed to assign the proceeds from any recovery in this matter, and only any proceeds from any recovery to that third party.
> 3. I have not assigned any cause of action to any third party for any action against Joshua Tomsheck, his firm, or any other attorney.
> 3. I am pursuing this matter as the Plaintiff and have been an active participate and in frequent contact with my counsel since the beginning of this matter by phone and email. I have met in person with my counsel as well.
> 4. I also agreed to use H. Stan Johnson, Esq. as counsel, and Charles "CJ" Barnabi, Esq. has also been retained to represent me in this matter. As in any legal matter I have the right to use other counsel and replace my current counsel if I decided to do so.
> 5. I consulted with my counsel to aid in the matter and to draft the initial complaint.
> 6. I have also been consulted with by my counsel regarding the strategic decisions in my case.
> 7. It will ultimately be my decision, and my decision alone to accept or reject any settlement offers that are made.
> 8. I have not assigned any party the right to pursue this, or any other matter, on my behalf.

These factual statements by Beavor were not considered by the Court. They are undisputed. For the Court to ignore these facts and testimony is an error of fact and law. The Court should amend its findings to acknowledge that there issues of fact and that summary judgment therefore cannot be granted.

3. BEAVOR'S CAUSE OF ACTION SHOULD NOT BE DISMISSED

The general rule is that an invalid assignment has no effect on the validity of the underlying action. "[I]f an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name." 6 Am. Jur. 2d Assignments § 122 (2010). Thus, it would follow that Beavor can pursue his malpractice claim as the real party in interest. Indeed, several other jurisdictions considering

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similar circumstances have acknowledged that the underlying legal malpractice claim survives an invalid assignment. See *Weiss v. Leatherberry*, 863 So.2d 368, 373 (Fla. Dist. Ct. App. 2003) (remanding matter to trial court because "invalidity of the agreement [to assign] has no effect on the underlying cause of action for legal malpractice"). See also *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538, 542 (Ariz. Ct. App. 2002); *Weston v. Dowty*, 163 Mich. App. 238, 414 N.W.2d 165, 167 (Mich. Ct. App. 1987); *Tate v. Goins, et al*, 24 S.W.3d 627, 635 (Tex. App. 2000). The *Tate* case was also cited by the Nevada Appellate Court in *Oceania Ins. Corp. v. Cogan*, 2020 Nev App Unpub. Lexis 141 for the general rule of the law regarding that issue. Therefore, the Court should make additional findings and amend its order to allow Beavor to pursue his action even if some parts of the Settlement Agreement maybe invalid.

The Court should amend it findings to reject Tomsheck's claim that the entire agreement is void. The alleged de facto assignment reflects only a portion of the overall Settlement Agreement between Beavor and Hefetz. The invalidity of the de facto assignment provision does not automatically void the entire Settlement Agreement.

Under no circumstance does the record support a dismissal of the action with prejudice. Beavor has not forfeited his malpractice claim, however if the Court believes the current suit, born of the improper de facto assignment, cannot be permitted to continue then it should be dismissed without prejudice. Should Beavor wish to reassert his claim against Tomsheck, he will be able to do so upon a showing that the attempted de facto assignment is no longer in place and that he is the real party in interest.

V.

CONCLUSION

The Court should alter or amend its judgment or enter additional findings and modify the judgment to conform with its findings in this matter. As stated above, its finding of facts and

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conclusions of law are insufficient unclear and show errors of both fact and law. Accordingly, the Court should grant this Motion pursuant to NRCP 59(e) and 52(b) and make the necessary amendments or additional findings to the order granting Defendant's Motion for Summary Judgment.

DATED this 7th day of August 2020.

COHEN JOHNSON PARKER EDWARDS

/s/ H. Stan Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and complete copy of the foregoing **PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 59(e) and 52(b)** to be filed and served upon all persons registered to receive same via the Court's Odyssey E-file and E- Serve System.

DATED this 7th day of August 2020.

/s/ Sarah K. Gondek
An employee of Cohen Johnson Parker Edwards

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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. XXIV **DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND 59(e)**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	**Hearing Date: September 17, 2020** **Hearing Time: 9:00 a.m.**

COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck"), by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and hereby submits his Opposition to Plaintiff's Motion to Alter or Amend pursuant to NRCP 52(b) and 59(e).

This Opposition 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 be presented upon the hearing of this Motion.

DATED this 21st day of August, 2020.

OLSON CANNON GORMLEY & STOBERSKI

/s/Max E. Corrick

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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 Tomsheck in this matter and have personal knowledge of the contents of this Declaration.

3. The documents attached as Exhibits to this Opposition are true and accurate copies of those documents.

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POINTS AND AUTHORITIES

I.

SUMMARY OF THE ARGUMENT

Plaintiff has filed a grab bag, mix and match Rule 52(b) and Rule 59(e) Motion to Alter or Amend for completely improper purposes.[1] On the one hand, Plaintiff's Motion seeks to inject irrelevant matters into this Court's Order and Findings of Fact and Conclusions of Law (hereinafter "Order") which were never argued *by anyone* to this Court before now. On the other, Plaintiff improperly reargues the exact positions he took in opposing Tomsheck's Motion for Summary Judgment.

Substantial evidence, outlined in this Court's comprehensive Order and presented through admissible evidence submitted with the summary judgment briefing, support this Court's Order granting summary judgment. Moreover, Plaintiff has not come close to meeting the burden necessary to warrant granting him relief under either Rule.

In summary, Plaintiff has failed to articulate any legal or factual basis to support granting either a Rule 52(b) or Rule 59(e) motion. As such, Plaintiff's Motion should be denied in its entirety.

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[1] Plaintiff's logic and arguments are byzantine in many instances – perhaps by design in hopes that Tomsheck may miss following one of the many intersecting threads in the Motion to its end so that Plaintiff can argue waiver in his Reply. It is not Tomsheck's intent to ignore any of Plaintiff's meandering claims or suggest any of Plaintiff's arguments are meritorious.

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II.

ARGUMENT

A. Plaintiff's Rule 52(b) request is an improper attempt to relitigate the same arguments this Court has already considered, as well as an improper attempt to inject irrelevant matters which have no bearing on the basis for the Court's Order and which Plaintiff could have easily raised earlier

Plaintiff partially relies on Rule 52 to support his Motion to Alter or Amend. Rule 52(b) permits the Court to amend its findings or make additional findings in limited circumstances, none of which are present here. Specifically, Rule 52(b) is a vehicle which allows the trial court to amend its findings so that the appellate court can understand the factual issues that were determined by the trial court and the basis for its conclusions and judgment. *Estate of Herrmann*, 100 Nev. 1, 21 n. 16, 677 P.2d, 594, 607 n. 16 (1984). Here, this Court's findings are detailed and certainly require no further explanation for an appellate court to understand the basis for the decision.[2]

Commentators have squarely rejected the idea that Rule 52 may be used as Plaintiff is trying to use it here: "A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and a conclusion of law." *Id.* (*quoting* 9 Wright & Miller, *Federal Practice and Procedure* 722, § 2582). The Rule permits the Court in its discretion to "'amend' findings of fact or to 'make additional findings', thus amplifying and expanding the facts. The Rule does not provide for a reversal of the judgment or for a denial of

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[2] This Court received, reviewed, and analyzed exhaustive briefing on Tornsheck's Motion for Summary Judgment – all of which are incorporated herein by reference. This Court issued comprehensive Findings of Fact as a result – 23 separate ones. *See* Order. Notably, Plaintiff was offered ample opportunity (nearly 8 full days) in which to suggest any amendments he thought were necessary to the proposed Order. Plaintiff offered no requested or suggested changes in that time frame – making Plaintiff's Rule 52 request to add new, irrelevant findings now all the more improper.

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the facts as found, which is what the plaintiff requests..." *Id.* (*quoting Matyas v. Feddish*, 4 F.R.D. 385, 386 (M.D. Pa. 1945). The Rule "was not intended to be used as a vehicle for securing a rehearing on the merits." *Id.* (*citing Noice v. Jorgensen*, 378 P.2d 834 (Colo. 1963)); *Minneapolis-Honeywell Regulator Co. v. Midwestern Instruments, Inc.*, 188 F.Supp. 248 (N.D. Ill. 1960).

Regardless, the general rule in Nevada is when there is substantial evidence to sustain the judgment, it will not be disturbed. *Brechan v. Scott*, 92 Nev. 633, 634, 555 P.2d 1230 (1976). "Substantial evidence" means "evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

Here, setting to the side Plaintiff's improper use of Rule 52(b), this Court clearly had "substantial evidence" in which to support its decision. Generally speaking, that evidence included the explicit terms of the Plaintiff's settlement agreement in which he irrevocably assigned all proceeds and turned over substantial, if not complete control over an unfiled legal malpractice lawsuit to his former adversary -- Hefetz. More specifically, such admissible evidence considered by the Court included but was not limited to: (1) Plaintiff's sworn settlement agreement terms which he "represents and warrants that he will fully pursue and cooperate in the prosecution" of the then-unfiled legal malpractice lawsuit; (2) "that he will take any and all reasonable actions as reasonably requested" by Hefetz's counsel to prosecute the matter; (3) that "he will do nothing intentional to limit or harm the value of any recovery related to" the then-unfiled legal malpractice lawsuit; (4) that he will waive attorney-client privilege and give to Hefetz's attorney "copies of any documents or correspondence that Beavor believes relate to" the then-unfiled legal malpractice lawsuit; (5) that he will "fully cooperate with

Hefetz and his counsel regarding any claims initiated on behalf of Beavor" for the then-unfiled legal malpractice lawsuit; and (6) that he "irrevocably assigns any recovery or proceeds to Hefetz" and "agrees to take any actions necessary to ensure that any recoery or damages are paid to Hefetz." *See e.g.,* Order, Findings of Fact Nos. 6-22, and Conclusions of Law 1-6.[3]

Using these prior sworn statements from Plaintiff, taken as a whole, a reasonable mind could accept as true the conclusion that Plaintiff impermissibly assigned his unfiled legal malpractice lawsuit to his adversary. As such, this Court had substantial evidence to reach the factual and legal conclusions it did.

And yet Plaintiff is now using Rule 52 as an improper vehicle to put entirely new matters which were not before this Court on Tomsheck's Motion for Summary Judgment and which were completely irrelevant to Plaintiff's case against Tomsheck. Similarly, Plaintiff's Motion, throughout, appears to be using Rule 52 as a separate means from Rule 59 to reargue factual and legal issues which this Court has thoroughly analyzed, considered, and ruled upon.[4] That is also improper.

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[3] Plaintiff describes his sham Declaration as not having been considered by the Court. Not so. Plaintiff forgets the Declaration was before the Court as part of his Opposition to Tomsheck's summary judgment motion and was refuted by Tomsheck's arguments in his Reply Brief and the terms of the settlement agreement themselves. As this Court tersely put it, "each of Plaintiff Beavor's arguments in Opposition, in the briefs and at oral argument, is effectively defeated by the case law and arguments advanced in Tomsheck's Reply Brief and oral argument." *See* Order, Finding of Fact No. 22.

[4] To the extent Plaintiff is suggesting a Rule 52(b) motion is the correct vehicle for arguing clear error – which is redundant of how NRCP 59(e) is interpreted by the Nevada Supreme Court – Tomsheck will address those points within this Opposition in the Rule 59(e) discussion below. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010), *quoting Coury v. Robison*, 115 Nev. 84, 124-127, 976 P.2d 518 (1999) ("Among the 'basic grounds' for a Rule 59(e) motion are 'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need to 'prevent manifest injustice,' or a 'change in controlling law.'").

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For instance, Plaintiff is now asking this Court to amend the Order to "clarify" how the Court's ruling affects Plaintiff's contractual relationship with Hefetz. Plainly, this Court has never been asked to address how Plaintiff's decision to irrevocably assign over his legal malpractice claim against Tomsheck to Hefetz affects the Plaintiff's overall contractual relationship with Hefetz. The reason for this is clear: it is irrelevant with respect to Plaintiff's claims against Tomsheck and no controversy currently exists between Plaintiff and Hefetz related to their contract over which this Court has any jurisdiction now. Plaintiff did not sue Hefetz, nor Hefetz sue Plaintiff, in a declaratory action seeking interpretation of their respective contractual rights flowing from their settlement agreement. That has never been part of this case, has never been argued before this Court, and has no place being appended to this Court's Order now.

Stated another way, the issue before the Court was the impact Plaintiff's assignment to Hefetz had on the legal malpractice lawsuit against Tomsheck – that impact being that pursuant to Nevada law and public policy it mandated summary judgment in Tomsheck's favor. This Court has no need to offer up an advisory opinion now, to anyone, on how this Court's decision to grant Tomsheck summary judgment affects Plaintiff's contractual relationship with Hefetz going forward. It also has no need to comment upon any severability issues because they have been and always will be irrelevant *vis a vis* Tomsheck. Judicial restraint requires that such issues must wait for another day, if at all, in a separately filed action not involving Tomsheck.

Moreover, while Plaintiff suggests that a Rule 52(b) motion is appropriate to rectify incomplete findings, or address newly discovered evidence (a debatable point), neither exists in this case. As noted above, this Court made exhaustive Findings of Fact related to the pertinent issues before the Court. This Court clearly ruled as a matter of law that "whether characterized

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as an express or *de facto* assignment of his legal malpractice lawsuit", that assignment barred Plaintiff from prosecuting this lawsuit any further. *See* Order, Finding of Fact No. 7, and Conclusions of Law Nos. 4-5.[5] No amendment to the Court's Order is necessary because the same result ensues – Nevada law and public policy (in line with numerous other jurisdictions) prohibits both. *Id.; and see Chaffee v. Smith,* 98 Nev. 222, 645 P.2d 966 (1982); *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).[6]

Lastly, Plaintiff proffers no newly discovered evidence either. Instead, taking the Plaintiff's Motion as a whole, it is obvious Plaintiff is seeking a rehearing on the merits and a denial of facts this Court specifically found. Plaintiff reargues the exact points raised (and addressed) in the full briefing, oral arguments, and Order on Tomsheck's summary judgment motion.[7] The same subject matter – and even cases – which were fully briefed and argued

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[5] Plaintiff claims his settlement agreement only irrevocably assigned the proceeds to his adversary which, in Plaintiff's dim view, means "that this was not an express assignment", a conclusion which Plaintiff characterizes as "indisputable." *See* Plaintiff's Motion, p.10:5-11. Not so. Plaintiff continues to ignore the arguments raised in Tomsheck's Reply Brief and at oral argument, which this Court accepted, as well as the entire provision in Plaintiff's settlement agreement with Hefetz wherein Plaintiff turned over substantial, if not complete, control of the then-unfiled lawsuit to his adversary. *See, e.g.,* Order, Conclusions of Law Nos. 2-5.

[6] Plaintiff goes back to the well and cites *Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742, 457 P.3d 276 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition), in his Motion – though only relying upon Justice Tao's dissent. Since that decision was handed down, the Nevada Supreme Court rejected Tao's dissent (and Plaintiff's repeated arguments here) when it issued its Order denying the appellant insurance company's petition for review on June 4, 2020. *See* Exhibit A, *Order Denying Petition for Review*. To put it mildly, the arguments Plaintiff has relied upon regarding the assignability of legal malpractice claims and *de facto* assignments being different from express assignments remain firmly resolved against Plaintiff's strained interpretations.

[7] Plaintiff suggests this Court needs to amend its findings "to reject Tomsheck's claim that the entire agreement is void." *See* Plaintiff's Motion to Alter or Amend, p. 14:13-14. This comes as news to Tomsheck, as he never sought a ruling that Plaintiff's entire settlement agreement with Hefetz was void. That issue was never placed before this Court, nor would it have been. The

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before this Court is peppered throughout Plaintiff's Motion. In that respect, Plaintiff is explicitly asking this Court to reverse its judgment and issue findings contrary to its prior Order. This is not permitted by Rule 52. *See Estate of Herrmann*, 100 Nev. 1, 21 n. 16, 677 P.2d, 594, 607 n. 16.[8]

This Court should deny Plaintiff's Rule 52(b) request for relief, in its entirety, as a matter of law.

B. Plaintiff's Rule 59(e) request is as flawed as his Rule 52(b) request, and it fails to provide any legitimate reason why this Court's Order needs to be altered or amended in any way

Plaintiff also relies upon Rule 59(e) for purposes of his Motion to Alter or Amend. It is clear Rule 59(e) also does not provide any support for Plaintiff's Motion.

Rule 59(e) allows a litigant to file a "motion to alter or amend a judgment." *Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020) (interpreting FCRP 59).[9] The Rule gives a district court the chance "to rectify its own mistakes in the period immediately following" its decision, *Id.*, *quoting White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1984). Courts will not address new arguments or evidence that the moving party could have raised before the decision issued. *Banister*, 140 S.Ct. at 1703. The motion is therefore tightly tied to the underlying judgment. *Id.*

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issue before this Court was the effect Plaintiff's irrevocable assignment has on Plaintiff's ability to continue to prosecute that lawsuit against Tomsheck. No more, and no less.

[8] Although there is nothing substantively new in Plaintiff's Motion, the fact remains that nothing prevented Plaintiff from raising his newest spin on the law and facts of this case when the briefing and oral arguments on Tomsheck's summary judgment motion were still pending.

[9] "NRCP 59(e) and NRAP 4(a)(4)(C) echo Fed.R.Civ.P 59(e) and Fed.R.App.P., and we may consult federal law in interpreting them." *AA Primo Builders, LLC*, 126 Nev. at 582, 245 P.3d at 1193.

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Stated another way, "Rule 59(e) provides an opportunity…to seek correction at the trial court level of an erroneous order or judgment, thereby initially avoiding the time and expense of appeal." *Chiara v. Belaustegui*, 86 Nev. 856, 477 P.2d 857 (1971). The district court cannot, however, amend a judgment *nunc pro tunc* to change a judgment actually rendered to one which the court neither rendered nor intended to render. *McClintock v. McClintock*, 122 Nev. 842, 845, 138 P.3d 513, 515 (2006) (*citing Finley v. Finley*, 65 Nev. 113, 119, 189 P.2d 334, 337 (1948)). In this case, Plaintiff is asking this Court to do just that - to change the judgment actually rendered to one which the Court never intended. This is not permitted under Nevada law and Plaintiff's Motion must be denied.

To the extent Plaintiff is seeking reconsideration, federal courts have identified three major grounds justifying reconsideration under Rule 59(e): (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Carrol v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003); Sch. *Dist. No. 1J, Multnomah County, Or. v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) (citations omitted). Nevada, in turn, recognizes the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law." *AA Primo Builders, LLC,* 126 Nev. at 582, 245 P.3d at 1193, *citing Coury v. Robison*, 115 Nev. at 124-27, 976 P.2d 518 (1999).

Also, it is accepted as true that motions to alter or amend judgment "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment." *Haskell v. State Farm Mut. Auto. Ins. Co.*, 187 F.Supp.2d 1241, 1244 (D. Haw. 2002) (construing FRCP 59(e)).

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In this case, Plaintiff has not identified any intervening change in controlling law or the availability of new evidence which compel granting Plaintiff the Rule 59 relief he seeks. Instead, Plaintiff improperly reargues and seeks to relitigate both the law and the evidence placed before this Court on Tomsheck's summary judgment motion. In this regard, Plaintiff has not identified any instance of clear error, or manifest injustice, which would warrant granting Plaintiff Rule 59 relief. Rather, Plaintiff makes sweeping evidentiary and legal conclusions based upon his rehashing of both the factual and legal arguments made to this Court on Tomsheck's summary judgment motion. This is insufficient to support a Rule 59(e) motion as a matter of law.

At bottom, Rule 59 does not permit the relief Plaintiff seeks and his Motion must be denied.

1. Plaintiff reargues the same factual issues already considered and ruled upon by this Court, along with adding new arguments which could have been raised before, in his attempt to fabricate a clear error of fact where none exists

Interspersed throughout Plaintiff's Motion are two old, related "factual" error arguments paired with what Plaintiff now describes as a new "error in fact and law." None establishes that the Court made a clear error of fact when it granted Tomsheck's summary judgment motion.

First, Plaintiff reargues and seeks to relitigate that there is an open question of "control" concerning the litigation against Tomsheck which, according to Plaintiff, this Court incorrectly decided. Plaintiff's argument is premised upon his belief that this Court never considered Plaintiff's Declaration which contradicted the sworn settlement agreement terms in the Hefetz-Beavor settlement agreement. Plaintiff, not this Court, had it wrong then and has it doubly wrong now. Moreover, he is precluded from trying to recast those arguments here. *See Banister*,

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140 S.Ct. at 1703, *supra* ("Courts will not address new arguments or evidence that the moving party could have raised before the decision issued.").

As noted above, Tomsheck specifically addressed Plaintiff's Declaration and its contents in his Reply Brief on the summary judgment motion. Pages 7 through 11 of Tomsheck's Reply Brief provided thorough analysis and argument for the Court to consider regarding Plaintiff's sham Declaration and illusory claims of "control" – which this Court fully considered and accepted as "effectively defeat[ing]" each of Plaintiff's arguments in Opposition. *See* Order, Finding of Fact No. 22.

To summarize those arguments, the admissible evidence presented in support of Tomsheck's summary judgment motion, along with Nevada law, established Plaintiff's Declaration was not admissible because: (1) it was in direct conflict with his prior sworn statements and was offered after the motion for summary judgment was pending; (2) it was Plaintiff's attempt to fabricate an issue of fact and re-characterize who has control over this litigation; and (3) at best it was a legal sham which the Court could reject. *See Aldabe v. Adams*, 81 Nev. 280, 284–85, 402 P.2d 34, 36–37 (1965) (refusing to credit a sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998); s*ee also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806–07, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999); *cf. Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 294, 357 P.3d 966, 976 (Nev. App. 2015) (in contrast to *Aldabe*, when no summary judgment motion is pending the inconsistent statement "may be considered for purposes of determining whether the conflicting testimony either creates judicial estoppel or represents a legal "sham" designed solely to avoid summary judgment," or for purposes of witness credibility). Furthermore, the

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Declaration's contents were impermissible parol evidence being used to contradict the terms of an unambiguous written contractual agreement which the Court could not receive as evidence. *See Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21, (2001); D*aly v. Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980); *Geo. B. Smith Chemical v. Simon*, 92 Nev. 580, 582, 555 P.2d 216, 216 (1976).[10]

This Court agreed with Tomsheck and disagreed with the same arguments Plaintiff made both then and now. *See* Order, Findings of Fact Nos. 17 and 22. Plaintiff's latest attempt to recast and reargue the contents of his Declaration, which were clearly disputed by Tomsheck and remain contrary to Plaintiff's prior sworn settlement agreement terms, is not a proper basis for granting Plaintiff the Rule 59(e) relief he seeks.[11]

Second, Plaintiff argues that his Declaration created a blended issue of fact and law which this Court ignored. In this respect, Plaintiff now cites to *Brandon Apparel Group v. Kirkland & Ellis*, 382 Ill.App.3rd 271 (2008), for that proposition. As noted above, motions to alter or amend judgment "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment." *Haskell v. State Farm Mut. Auto. Ins. Co.*, 187 F.Supp.2d 1241, 1244 (D. Haw. 2002) (construing FRCP 59(e)); *see*

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[10] Tomsheck's Reply Brief also demonstrated how the statements in Plaintiff's Declaration actually served to further cement the conclusion that he had impermissibly assigned the legal malpractice action to his adversary.

[11] Even if Plaintiff's sham Declaration was admissible, what is undisputed is that Plaintiff irrevocably assigned all of the proceeds to his former adversary and the settlement agreement – a contract which this Court could interpret as a matter of law – bore all of the hallmarks of an impermissible assignment of a legal malpractice claim in violation of Nevada law and public policy. *See* Order, Conclusions of Law Nos. 2-5.

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Banister, 140 S.Ct. at 1703, *supra* ("Courts will not address new arguments or evidence that the moving party could have raised before the decision issued.").

Here, nothing prevented Plaintiff from citing to, and arguing for the application of, the *Brandon Apparel* case, in his Opposition to the summary judgment motion or at oral argument. But more to the point, the *Brandon Apparel* case lacks the same type of compelling factual basis for granting summary judgment as found here. Indeed, Plaintiff's point about *Brandon Apparel* seems to be that in 2008 an Illinois court was not aware of any cases which addressed whether a *de facto* assignment is established as a matter of law.

Interestingly, Tomsheck cited to several cases decided since 2008 in his Reply Brief – which this Court acknowledged in its Order – which filled the gap the *Brandon Apparel* Court remarked upon. *See* Order, Finding of Fact 18. Even more interesting is that each of those cases, *Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261 (Wash. Ct. App. 2013), *Paonia Res., LLC v. Bingham Greenebaum Doll, LLP*, 2015 WL 7431041 (W.D. Ky. Nov. 20, 2015), and *Trinity Mortg. Cos v. Dreyer*, 2011 WL 61680 (N.D. Okla. Jan 7, 2011), was cited with approval by the Nevada Court of Appeals in *Oceania Insurance Corporation v. Cogan, et al.*, 2020 WL 832742, *3 457 P.3d 276 (Nev. Ct. Ap. Feb. 19, 2020) (unpublished disposition). Notably, *Oceania Insurance* was decided by the underlying district court on a dispostive motion to dismiss, *Kenco* was decided on summary judgment, and both *Paonia* and *Trinity Mortg.* were partial summary judgment cases.

So, yet again, Plaintiff's claims of clear error of fact do not warrant giving him the Rule 59(e) relief he seeks.

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2. Plaintiff also reargues the same legal issues already considered and ruled upon by this Court in his attempt to fabricate a clear error of law where none exists

Plaintiff offers three other instances where he claims this Court made clear legal error in granting summary judgment to Tomsheck. All three were previously argued at length in the briefing and oral arguments held on Tomsheck's summary judgment motion. None establishes any such clear legal error at all.

First, Plaintiff claims this Court should not have relied upon *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976). In this respect, Plaintiff reargues whether the rationale adopted by the Nevada Supreme Court in *Chaffee*, and reiterated in *Tower Homes*, deriving from *Goodley*, was warranted. To that end, Plaintiff now argues that *Goodley* is distinguishable on its facts and that this Court should have confined its ruling to merely stating, one way or other, whether Plaintiff had standing to continue to prosecute the claim against Tomsheck he irrevocably assigned to Hefetz. That is, Plaintiff is now recasting his prior arguments into one which suggests this Court committed clear legal error by not disregarding the strong rationale against allowing assignment of legal malpractice claims explained in *Goodley* and adopted in Nevada and numerous other jurisdictions as well. *See* Order, Findings of Fact Nos. 11-12.[12]

Aside from being an improper attempt to relitigate and reargue the significance of the *Goodley* rationale, *see Haskell* and *Banister, supra*, this Court correctly concluded that once Plaintiff irrevocably assigned the proceeds of his unfiled legal malpractice lawsuit to his

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[12] Plaintiff seems to be arguing that any case which has relied upon or cited *Goodley* with approval (nearly 150 of them at last count per Westlaw – vastly more than those which have rejected the *Goodley* rationale), was incorrectly decided. This Court should reject Plaintiff's extreme position.

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adversary, and also gave that adversary substantial, if not complete, control over this litigation, Plaintiff had nothing left to prosecute. Characterizing it as "standing" or not has no bearing on the result.[13] The rationale against allowing a plaintiff to do what Plaintiff impermissibly did here -- expressed in *Goodley* and adopted and expanded in other jurisdictions (including Nevada) -- is what matters:

> 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.

Goodley, 62 Cal. App. 3d at 397. This Court was clearly correct in relying, in part, upon the *Goodley* rationale and Nevada's adoption of it.

Next, Plaintiff reargues both the *Achrem* and *Tower Homes* decisions in hopes of convincing this Court that Nevada law does not support its decision. Not so. Each of those cases was fully briefed and argued throughout the pleadings and oral arguments associated with

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[13] Plaintiff's reference to "standing" is his code for asking this Court to adopt the Justice Tao dissent in *Oceania Insurance*, *supra*. The reasons why the Tao dissent should be a non-starter have been fully explored throughout the briefing on Tomsheck's summary judgment motion, and above.

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Tomsheck's Motion for Summary Judgment. It is improper for Plaintiff to relitigate the exact points he failed to mislead the Court into accepting then. *See Banister*, 140 S.Ct. at 1703, *supra* ("Courts will not address new arguments or evidence that the moving party could have raised before the decision issued."). Additionally, Plaintiff's stubborn attempts to ignore the clear statement from the *Tower Homes* refusing to extend *Achrem* to legal malpractice cases also ignores the rationale of several other jursidictions which have explicitly rejected the same type of legal shenanigans Plaintiff expected this Court to condone. *See* Order, Finding of Fact No. 19, and Conclusion of Law No. 4.

More finely, Plaintiff continues to attempt to bolster his regurgitated *Achrem* and *Tower Homes* arguments by completely ignoring his own settlement agreement terms, thereby misrepresenting and altering this Court's factual findings. Order, Findings of Fact Nos. 6-7, and 17. Plaintiff cannot fabricate a "clear error of law" by misrepresenting and contradicting his own prior sworn statements or this Court's Findings of Fact. *See* Plaintiff's Motion to Alter or Amend, p. 11:16-23. Once again, just because Plaintiff does not like the facts, which he actively created, or the law does not mean this Court committed clear legal error in relying upon both Nevada law and the public policy undergirding that law to grant summary judgment to Tomsheck.

Finally, Plaintiff seeks to relitigate and reargue his "do over" claim by asking this Court to alter its Order to a dismissal without prejudice to allow him to claw back what he voluntarily and irrevocably gave away to his adversary. As before, this Court has thoroughly examined and been provided with significant briefing on this issue. Plaintiff argued for a "do over" in his Opposition to Tomsheck's summary judgment motion, and Tomsheck's Reply Brief spent almost six (6) full pages addressing the numerous reasons why Plaintiff was neither entitled to a

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"do over" under Nevada law nor could he claw back anything he irrevocably gave to Hefetz. Specifically, pages 15:18 through 22:6 of Tomsheck's Reply Brief more than adequately addressed why Plaintiff's lawsuit had to be dismissed with prejudice. Since the hearing on Tomsheck's Motion for Summary Judgment, nothing has changed in Nevada law – or elsewhere – to support Plaintiff's reheated arguments for a "do over" now. In fact, given the *Oceania Insurance* decision, it appears to have worsened for Plaintiff.

In total, Plaintiff has failed to establish any legitimate basis for this Court to conclude it committed clear legal error in granting summary judgment to Tomsheck. Plaintiff is not entitled to any of the Rule 59(e) relief he seeks. His Motion should be denied.

III.

CONCLUSION

Plaintiff has failed to meet his burden for either Rule 52(b) or Rule 59(e) relief. He has not even come remarkably close to those targets. He has not identified any actual instances of clear error of law or fact. He has not identified any instances of a change in the law or newly discovered evidence. He has not identified any manifest injustice which has occurred. He has not demonstrated that this Court did not have substantial evidence to support granting Tomsheck's Motion for Summary Judgment. Rather, Plaintiff has violated the letter and spirit of both Rules by almost exclusively attempting to relitigate and reargue arguments the Court has fully considered and rejected. This Court must reject Plaintiff's arguments and deny his Motion as unwarranted in both fact and law.

WHEREFORE, Tomsheck respectfully requests that this Court enter an Order denying Plaintiff's Motion to Alter or Amend pursuant to NRCP 52(b) and 59(e).

DATED this 21st day of August, 2020.

OLSON CANNON GORMLEY & STOBERSKI

/s/Max E. Corrick

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JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2020, I sent via e-mail a true and correct copy of the above and foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND** 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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/s/Jane Hollingsworth

An Employee of OLSON CANNON GORMLEY & STOBERSKI

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

OCEANIA INSURANCE CORPORATION,
Appellant,
vs.
JEFFREY A. COGAN; AND JEFFREY A. COGAN, ESQ., LTD., A NEVADA PROFESSIONAL ENTITY,
Respondents.

No. 74958

FILED

JUN 04 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

Review denied. NRAP 40B.[1]

It is so ORDERED.

J.
Hardesty

J.
Parraguirre

J.
Cadish

J.
Silver

PICKERING, C.J., and STIGLICH, J., dissenting:

We would grant the petition for review and therefore dissent.

C. J.
Pickering

J.
Stiglich

[1]The Honorable Mark Gibbons, Justice, did not participate in the decision of this matter.

cc: Hon. Douglas Smith, District Judge
Carney Badley Spellman
Black & LoBello
Jeffrey A. Cogan, Esq., Ltd.
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk

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

August 27, 2020 09:00 AM All Pending Motions

HEARD BY: Crockett, Jim COURTROOM: Phoenix Building 11th Floor 116

COURT CLERK: Lord, Rem

RECORDER: Maldonado, Nancy

REPORTER:

PARTIES PRESENT:

Amanda A. Ebert	**Attorney for Third Party Defendant**
Harold Stanley Johnson	**Attorney for Plaintiff**
Max E Corrick	**Attorney for Defendant, Third Party Plaintiff**

JOURNAL ENTRIES

PLAINTIFF'S MOTION TO RETAX OR DENY COSTS ... DEFENDANT/THIRD PARTY PLAINTIFF JOSHUA TOMSHECK'S MOTION FOR COSTS ... DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S MOTION FOR ATTORNEYS' FEES PURSUANT TO NRS 18.010 (2) (B)

Court stated inclinations. Following arguments by counsel COURT ORDERED, Plaintiff's Motion to Retax or Deny Costs GRANTED. COURT FURTHER ORDERED, Defendant's Motions for Costs and Attorneys' fees DENIED. Mr. Johnson to prepare and submit the Order within two weeks. COURT ORDERED, status check SET for the filing of the Order.

9/24/2020 STATUS CHECK: FILING OF ORDER (CHAMBERS)

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JOSEPH P. GARIN, ESQ.
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MEGAN H. HUMMEL, ESQ.
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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. Third-Party Defendant. _____	Case No: A-19-793405-C Dept. No.: 24 **THIRD-PARTY DEFENDANT MARC SAGGESE'S SUBSTANTIVE JOINDER TO DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND 59 (e)**

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Third-Party Defendant, MARC SAGGESE, ESQ., by and through his attorneys of record, LIPSON NEILSON P.C., hereby files his Substantive Joinder to Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59 (e), filed on August 21, 2020.

This Joinder is made and based on the Memorandum of Points and Authorities contained in Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion To Alter Or Amend Pursuant To NRCP 52(b) and 59 (e), which is incorporated by reference as if set forth fully herein, the pleadings and papers on file herein, and such other and further oral and documentary evidence as may properly come before the Court at the time of hearing on this matter.

DATED this 28th day of August, 2020.

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert
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I. Legal Argument

A. Plaintiff's motion to amend could impact Mr. Saggese.

Plaintiff apparently seeks to overturn this Court's decision granting Mr. Tomsheck's motion for summary judgment in its entirety. Mr. Tomsheck filed an opposition to the motion to amend on August 21, 2020. As Mr. Tomsheck's opposition outlines, Plaintiff does not meet the necessary standards to warrant amending the Court's decision, and the motion should be denied outright. While Plaintiff titles the motion as a motion to amend, it could feasibly also be interpreted as a motion to reconsider. As such, this substantive joinder follows.

Mr. Saggese has standing to oppose Plaintiff's motion to amend, as he could be impacted if the motion to amend is granted; the matter could be re-opened for additional briefing, and it is possible that Mr. Saggese's motion for summary judgment (which was found by this Court to be moot, as Mr. Tomsheck's motion for summary judgment disposed of Plaintiff's claims) would once again be before this Court. Although the merits of Mr. Saggese's own motion for summary judgment are not addressed in the briefing submitted to date regarding the motion to amend, a decision granting the motion could impact Mr. Saggese's position in the case.

B. Even if treated as a motion to reconsider, Plaintiff's motion should not be granted.

Mr. Saggese anticipates the possibility that Plaintiff may argue that the motion to amend be treated as a motion to reconsider. Even if this Court is so inclined, the motion does not meet the standards necessary to warrant reconsideration.

i. Legal Standard

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n, 113 Nev. 737, 741, 941 P.2d 486, 489, 1997 Nev. LEXIS 83, *7-8." "Only in very rare instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be

granted." Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (emphasis added). "[A] court will reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous and would work manifest injustice. Little Earth of United States Tribes v. Department of Housing, 807 F.2d 1433, 1441 (9th Cir. 1986).

Motions to reconsideration are also governed by EDCR 2.24, which states that "No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced by reheard, unless by leave of the court granted upon motion therefore…" EDCR 2.24(a).

ii. Reconsideration is Not Appropriate Here.

Even if this Court is inclined to treat Plaintiff's motion to amend as a motion to reconsider, it should be noted that the motion does not meet the necessary standards to be granted as a motion to reconsider. In order for reconsideration to be allowed at all, Plaintiff must show the existence of either new facts or new law that was not available to him at the time that the initial motion was filed and heard. There are neither new facts or new law presented here. Instead, Plaintiff argues that additional reasoning must be provided by this Court. This request for analysis and reasoning could have been made during the hearing itself, and is inappropriate at this stage in proceedings, well after the motion was argued and decided.

Further, Plaintiff's motion to amend apparently seeks amendment simply because Plaintiff disagrees with this Court's reasoning and ruling. This is not an appropriate ground for relief. While Plaintiff may be unhappy with the outcome of the motion, there is no evidence that a portion of this Court's ruling is "clearly erroneous" *and* would result in "manifest injustice" if allowed to stand. The motion therefore does not raise to the level necessary to allow reconsideration.

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II. Conclusion

Even if the motion to amend is used to seek reconsideration, it does not meet the necessary standard to do so. Otherwise, Mr. Saggese joins in the arguments raised in Mr. Tomsheck's opposition to Plaintiff's motion to amend filed August 21, 2020.

DATED this 28th day of August, 2020.

LIPSON NEILSON P.C.

By: /s/ Amanda A. Ebert

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 28th day of August, 2020, I electronically served the foregoing **THIRD-PARTY DEFENDANT MARC SAGGESE'S JOINDER TO DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND 59 (e)** to the following parties utilizing the Court's E-File/ServeNV System:

Max E. Corrick, II, Esq. OLSON, CANNON, GORMLEY ANGULO & STOBERSKI 9950 W. Cheyenne Ave. Las Vegas, NV 89129 mcorrick@ocgas.com *Attorneys for Joshua Tomsheck*	H. Stan Johnson, Esq. COHEN JOHNSON PARKER EDWARDS 375 E. Warm Springs Rd., Suite 104 Las Vegas, NV 89119 sjohnson@cohenjohnson.com Charles ("CJ") E. Barnabi Jr., Esq. THE BARNABI LAW FIRM, PLLC 8981 W. Sahara Ave., Suite 120 Las Vegas, NV 89117 cj@barnabilaw.com *Attorneys for Plaintiff*

/s/ Juan Cerezo

_____

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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. **ALL RELATED MATTERS.**	Case No.: A-19-793405-C Dept. No.: XXIV **REPLY TO DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND AND THIRD-PARTY DEFENDANT' SUBSTANTIVE JOINDER**

COMES NOW Plaintiff, by and through his counsel of record, H. Stan Johnson, Esq. and Kevin M. Johnson, Esq. and replies to Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion to Alter or Amend and Third-Party Defendant' Substantive Joinder. This Reply is based upon the Memorandum of Points and Authorities, the papers and pleadings on file, and any oral argument allowed by the Court on this matter.

Dated this 11th day of September, 2020.

COHEN JOHNSON

/s/ H. Stan Johnson

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant's Opposition deals only in generalities and does not address the principal arguments in Plaintiff's Motion. Defendant merely states that the Court made "exhaustive Findings of Fact related to the pertinent issues before the Court." However, Defendant does not address the specific issues raised by Plaintiff. Instead, Plaintiff merely argues that this Motion is an attempted do over and the Court should ignore it for that reason. This is unsupported by both NRCP 59(e) and 52(b), which specifically allow the Court to correct errors of law or fact and to add to or amend incomplete findings and to clarify the same.

II.

LEGAL ARGUMENT

A. RELIEF UNDER NRCP 52(b) IS APPROPRIATE.

The Court's findings of facts and conclusions of law closely follow the arguments contained in the Defendant's reply. As such, they fail to address several key issues. NRCP 52(b) is designed to allow the Court to supplement its findings to address situations such as this.

The basis for a 52(b) motion to add or amend findings includes:

- Incomplete findings. See, *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply*, 45 F.3d 1550, 1555-56 (Fed. Cir. 1995)
- Manifest error of fact or law. See, *United States v. Tosca*, 18 F.3d 1352, 1355 (6th Cir. 1994).
- Newly discovered evidence. See, *Fontenot v. Mesa Petroleum Co.,* 791 F.2d at 1207, 1219 (5th Cir. 1986)

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The courts factual findings and conclusions of law are incomplete and do not address key issues in the case. For example, paragraph 5 of the conclusions of law states:

> Whether characterized as an express or de facto assignment of his legal malpractice lawsuit, Plaintiff Beavor's assignment bars him from prosecuting this legal malpractice lawsuit now, and Plaintiff Beavor cannot claw back for himself that which he assigned to Hefetz. Nor is Plaintiff Beavor entitled to a "do over". Plaintiff Beavor irrevocably assigned his legal malpractice claim to Hefetz and therefore has nothing to prosecute for himself. But more importantly, allowing Plaintiff Beavor to do so, under the facts of this case, would be contrary to controlling, longstanding Nevada precedent and would defeat the strong public policy reasons behind Nevada law's prohibition of assignment of legal malpractice claims entirely.

Here the Court does not specify if it found an express direct assignment or a de facto assignment of the malpractice claim. This is an important distinction that the court should clarify. Especially since the Supreme Court of Nevada has not adopted the use of de facto assignments in analyzing these types of cases.

In addition, there are additional errors of fact and law. Paragraph 5 states: "Beavor's assignment bars him from prosecuting this legal malpractice lawsuit now." There is no reference to any Nevada law to support this, because there is no Nevada law does.

Tower Homes, LLC v. Heaton, 132 Nev. 628 (2016). In *Tower,* the court ruled that Nevada law prohibited the assignment of legal malpractice claims from a bankruptcy estate to creditors. Therefore, Tower Purchasers to whom the claim was assigned by bankruptcy court order did not have standing to maintain the claim since it was void and of no effect. Likewise, *Chaffee v. Smith*, 98 Nev. 222, (1982) does not address the issue or support the Court's findings in paragraph 5. Chaffee was decided

on the issue of standing since the plaintiff had impermissibly obtained the claim through a levy and execution sale. Even in *Oceania Ins. Corp v. Cogan*, 2020 Nev. App. defendant Cogan argued Oceania did not have standing because the claim was impermissibly assigned to Alutiiq by a de facto assignment when Oceania's shares were transferred to Alutiig by the federal court order, which gave control of the claim to Alutiig. However, the Oceania court in dismissing the case did not reach the issue of claim survival since its dismissal was specifically limited to "**the specific facts and circumstances presented here."** In addition, the Oceania court cited with favor: *Tate v. Goins, Underkofler, Crawford & Langdon,* 24 S.W.3d 627, 634 (Tex. App. 2000) **("[T]he plaintiffs right to bring his own cause of action for malpractice is not vitiated by [an] invalid assignment [of that claim]".**

Further, paragraph 5 states: "Plaintiff Beavor irrevocably assigned his legal malpractice claim to Hefetz and therefore has nothing to prosecute for himself." This conclusion of law is error for two reasons: if the assignment is void as against public policy then it is void *ab initio* and Beavor maintains the claim and has standing. Second, it is factually incorrect and misleading to state "Plaintiff Beavor irrevocably assigned his legal malpractice claim to Hefetz: This is not what the Settlement Agreement stated. The Agreement states as follows: "Beavor further irrevocably assigns any **recovery or proceeds** to Hefetz from the above referenced Actions…"

A failed attempt to assign proceeds from a malpractice action does not eliminate Beavor's ownership or standing to bring a claim against the Defendant. Justice requires that cases be heard on the merits. Beavor as the person that had the attorney client relationship is entitled to have his malpractice claim heard on the

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merits. It is not fair or just that Defendant should not have to answer for their actions because the Court finds a de facto assignment.

B. STANDING IS THE KEY ISSUE IN ALL CASES DEALING WITH ASSIGNMENT OF LEGAL MALPRACTICE CLAIMS.

Standing is the key issue in the seminal cases of: Goodley, Chaffee, Tower, and Oceania. If the assignment to the plaintiff is prohibited, void, invalid or ineffective there is no standing. It is the lack of standing that prevented the plaintiffs in all of the Nevada cases and Goodley from pursuing the action. An attempted or void assignment does not vitiate the cause of action. As the Goodley court stated: **"The sole issue was whether by virtue of the assignment plaintiff has standing to bring this action for legal malpractice".**

There is no question Beavor had, and still has, standing and ownership of the claim against Defendant. Beavor does not have to "claw back" the claim. If the assignment by fact or de facto is prohibited and void, nothing was assigned to Hefetz and Beavor maintains ownership and standing. Beavor should not forfeit his right to pursue his meritorious claim against the Defendant since public policy is also against forfeitures. See, *Grand Prospect Partners, L.P. v. Ross Dress for Less,* 232 Cal.App.4th 1332, 1365 (2015).

Constrained by the decisions of the Nevada courts and the majority of all courts that have addressed this matter, the Defendant is forced to advocate an impossible thing: that somehow, Beavor's cause of action against him disappeared. Assignment directly or de facto of a legal malpractice claim, even if invalid, does not render the claim the jurisprudential equivalent of being stuck in Superman's Phantom Zone. The cause of action against the Defendant is ***alive*** and exists with Beavor. See,

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Mallios v. Baker, 11 S.W. 157 (Tex. 2000) (Even if the assignment were invalid, invalidity would not vitiate the right to sue and plaintiff may continue his suit.) *Tate v. Goins*, 24 S.W. 3d 627 (Tex. App.2000) (The client-plaintiff has the right to bring the malpractice claim in his own name regardless of any invalid assignment.)

C. THE COURT SHOULD SUPPLIMENT OR AMEND ITS FINDING UNDER NRCP 52(b) AND 59(e) TO ADDRESS THE FOLLOWING.

- Was there a direct assignment of a de facto assignment of the cause of action?
- If the assignment is prohibited and against public policy is it void?
- If the assignment is void nothing was assigned to Hefetz and the claim remained with Beavor.
- Since there was no valid assignment to Hefetz, Beavor as the client/plaintiff has standing to maintain his action against the Defendant.
- If Beavor is barred from pursuing the claim what is the legal basis for that conclusion.
- What controlling, longstanding Nevada precedent supports the conclusions of law in paragraph 5 of the Conclusions of Law.
- What strong public policy reasons behind Nevada law's prohibition of assignment of legal malpractice claims would be violated by allowing Beavor the client/plaintiff from continuing his suit against his former counsel?

D. NRCP 59(e) EXPLICITLY ALLOWS FOR THE COURT TO CORRECT CLEAR ERRORS OF LAW OR OF FACT AND TO PREVENT MANIFEST INJUSTICE.

The express purpose of NRCP 59(e) is to allow the parties a means of "avoiding the time and expense of appeal." *Chiara v. Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857, 858 (1970). Accordingly, NRCP 59 is not implicated until "issues have been litigated and resolved." *Id.* Accordingly, a rule NRCP 59 motion can radically change a Court's decision, including "to alter a judgment of dismissal without prejudice to a dismissal with prejudice and vice versa; to include an award of costs; or to change the time and conditions of the payment of a master." *Id.*

Defendant attempts to stretch this *Chiara* case, and combine it with the *McClintock* decision to argue that the Court cannot revisit an issue it has already

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decided. This of course is clear error. In the *Chiara* decision, the Court expressly contemplated a number of areas in which a Court could make radical changes to its decisions. *Id.* These changes included substantive changes to its findings. *Id.* This is logical as Courts have long held that NRCP 59(e) allows for changes to correct clear errors of law and to avoid manifest injustice. The *McClintock* decision has nothing to do with and does not reference NRCP 59. It deals with the Court changing the date of a Decree of Divorce *nunc pro tunc. McClintock v. McClintock*, 122 Nev. 842, 843, 138 P.3d 513, 514 (2006). There is nothing in these two cases to support Defendant's contention that the Court cannot alter its findings.

In fact, one of the changes requested by Beavor was contemplated by the *Chiara* Court. Plaintiff asks this Court to correct what he believes is an error of law and fact made when the Court declared that Plaintiff's cause of action was now lost. This is very similar to the Court's statement in *Chiara*, that changing a decision from dismissal with prejudice, to without prejudice, is a proper use of a NRCP 59(e) motion.

E. THE NEVADA CASES RELIED ON BY DEFENDANT AND THE COURT ARE MATERIALY DISTINGUISABLE

The Nevada cases relied upon by Defendant, as well as this Court, are materially distinguishable based upon their respective facts and holdings. This Court should properly alter and amend its findings of fact, conclusions of law and judgment pursuant to NRCP 52(b) and 59(e).

In *Chaffee v. Smith*, 98 Nev. 222, 223, 645 P.2d 966, 223-24 (1982), wherein Kyoko Chaffee had not been the underlying client of attorney Franklin Smith, instead buying the chose in action through a levy and execution sale, the Nevada

Supreme Court stated:

> Here, however, the transferred interest involves a **previously unasserted claim**. As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment or by levy and execution sale, **but which was never pursued by the original client**. See Goodley v. Wank & Wank, Inc., 133 Cal.Rptr. 83 (Cal.App. 1976); Christison v. Jones, 405 N.E.2d 8 (Ill.App. 1980). The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client. See Christison, supra at 11. **We reserve opinion on the question as to whether previously asserted legal malpractice actions are transferable.** See Goodley, supra; Collins v. Fitzwater, 560 P.2d 1074 (Ore. 1977)(emphasis).

Beavor's legal malpractice claim against Defendant was hardly "unasserted" at the time he and Hefetz entered into the Settlement Agreement. In fact, after Defendant's legal malpractice turned Beavor's "win" in the underlying action into a "loss", Beavor asserted a claim against Defendant for legal malpractice.

Due to Defendant's legal malpractice, Beavor had to re-litigate the underlying action for years, including through the appellate process. During this time period, Defendant's legal malpractice insurer was involved and participated in the Nevada Supreme Court Settlement Program.

In Tower Homes, LLC v. Heaton, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016), wherein the real parties in interest **were not the underlying clients of attorney,** William Heaton, the Nevada Supreme Court stated:

> 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. (emphasis) While the legal malpractice lawsuit in Tower Homes was nominally brought

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in the name of Tower Homes, LLC, due to the unique nature of the bankruptcy proceedings, the lawsuit was actually brought by the failed purchasers of the condominium units and not the original client. However, these are not the facts presented in the instant Action involving Beavor and Defendant.

It is undisputed that Beavor had already made the decision to seek a claim against Defendant for legal malpractice prior to entering into the Settlement Agreement. Not only did Beavor personally pursue his claim, he and Defendant entered into a tolling agreement regarding the legal malpractice claim pending completion of the underlying action.

While Beavor maintains that the Settlement Agreement is enforceable and that he only permissibly assigned the proceeds of his legal malpractice claim, it is respectfully submitted that the Nevada Supreme Court's prior rulings would not hold that such an assignment was impermissible, as Beavor had already asserted a claim for legal malpractice against Defendant prior to entering into the Settlement Agreement.

Against the backdrop of the above-referenced Nevada cases, the holding in Goodley v. Wank & Wank, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976), supports the conclusion that the instant Action is squarely permissible in its present form, i.e. that Beavor is properly maintaining a claim against Defendant for legal malpractice arising from Defendant's representation of Beavor.

The facts in Goodley provide that, with regard to the trial court's ruling on the motion for summary judgment, A '[j]udgment was entered for Defendant against Plaintiff [Goodley] on the order granting the motion.' Id., 62 Cal App. 3d at 391, 133

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Cal Rptr. at 83. **Importantly, the actual underlying client, Ms. Katz was not a party to the lawsuit.** No judgment was rendered against Ms. Katz. This important distinction, i.e. the continuing viability of a legal malpractice claim by the actual underlying client, even after an assignment of that claim was deemed in violation of public policy, supports a finding that Beavor has and continues to have a valid claim for legal malpractice against Defendant in the instant Action.

In *Mallios v. Baker*, 11 S.W. 3d 157 (Tex. 2000), the underlying client, Mark Baker, assigned a portion of his legal malpractice claim against Mallios to another person. **However, Baker filed the lawsuit in his name**. After the trial court granted the underlying attorneys summary judgment based upon a claim that the assignment violated public policy, the intermediate appellate court reversed finding no public policy violation for the assignment. The Texas Supreme Court then framed the issue and decision as follows:

> **The relief Mallios sought below dictates how we must consider this appeal. Mallios moved for and obtained summary judgment against Baker.** Mallios's summary judgment motion could only have been based on one of two theories: either that Baker assigned his claim to Herron and therefore Baker is not the proper party to pursue it, **or that Baker, by making an invalid assignment, is precluded from bring the claim.**
>
> Mallios propounded only the second theory-- **that Baker's legal malpractice claim is barred because he purportedly assigned it to Herron and that such an assignment contravenes public policy.** But even assuming Mallios is correct that the agreement between Baker and Herron violates Texas public policy, an issue we do not decide today, **the question remains whether that invalidity would entitle Mallios to a take nothing judgment on Baker's malpractice claim**. The situation here is not like the one in *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996), for example, in which we rendered a take nothing judgment against the purported assignee of a claim because the assignment was void, leaving her no claim to pursue. Id. at 697; see also *Zuniga v. Groce*,

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Locke & Hebdon, 878 S.W.2d 313 (Tex. App. San Antonio 1994, writ ref'd). Here, Baker is the alleged assignor, and assuming there was a partial assignment, Baker still retained a portion of his claim. **Mallios does not dispute that Baker had the right to sue Mallios before Baker's agreement with Herron. And even if we were to reach the issue of the agreement's validity and determine that Mallios is correct that it is an invalid assignment, that would not vitiate Baker's right to sue Mallios. Thus, either way, summary judgment was improper, and Baker may continue his suit. We therefore express no opinion on the validity of the underlying arrangement between Baker and Herron. Id.**, 11 S.W. 3d at 159. (emphasis)

See also, *Weiss v. Leatherberry,* 863 So. 2d 368, 373 (Fl. App. 2003)("The invalidity of the agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by the proper person.")(emphasis); *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 760 (Ak. 1992)("Assuming that the Stevens-Bohna agreement constituted an assignment, it was held invalid by the trial court. Therefore, **Bohna, retained his cause of action** against [his former counsel] HT and proceeded to enforce it.")(emphasis).

In the present Action, Beavor is the underlying client of Defendant and the only plaintiff in this Action. While he has properly assigned the proceeds of his legal malpractice claim, he is still suing in his name for legal malpractice committed by Defendant. The public policy reasoning and arguments presented in *Goodley* and its progeny are inapplicable to the present Action, as Beavor had made the determination to present a legal malpractice claim against Defendant well before entering into the Settlement Agreement.

Defendant argues in his Opposition to the instant Motion, i.e. A[t]his Court clearly ruled as a matter of law that "whether characterized as an express of de

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facto assignment of his legal malpractice lawsuit,' that assignment barred Plaintiff from prosecuting this lawsuit any further." [See Opposition, Page 7-8]. **Not so.** Even assuming that the assignment is deemed invalid, which Beavor disputes, this would not as a matter of law invalidate Beavor's legal malpractice claims against Defendant. No case cited by Defendant provides for such a "take-nothing judgment" against Beavor. Allowing the extinguishment of Beavor's legal malpractice claims would constitute a manifest error of law and create a manifest injustice to Beavor.

This Court should properly amend its findings of fact, conclusions of law and judgment to properly reflect that Beavor's legal malpractice claim remain inviolate. See NCRP 52(b) and 59(e). Contrary to Defendant's arguments, Beavor seeks to correct the manifest error of law and facts presented in the Court's findings of fact, conclusions of law and judgment. [See Opposition, Page 10].

V.

CONCLUSION

Based upon all of the above, this Court should properly amend its findings of fact, conclusions of law and judgment to properly reflect that Beavor's legal malpractice claim remain inviolate. And amend and correct other findings of facts and conclusions of law as set forth herein pursuant to NRCP 52(b) and 59(e).

DATED this 11th day of September 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and complete copy of the foregoing **REPLY TO DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND AND THIRD-PARTY DEFENDANT' SUBSTANTIVE JOINDER** to be filed and served upon all persons registered to receive same via the Court's Odyssey E-file and E- Serve System.

DATED this 11th day of September 2020.

/s/ Sarah K. Gondek
An employee of Cohen Johnson

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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.

ALL RELATED MATTERS.

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE than an Order Granting Plaintiff's Motion To Retax Or Deny And Denying Defendant's Motion For Costs And Motion For Fees was entered in the above-entitled court on the 12th day of September 2020, a copy of which is attached hereto.

Dated this 14th day of September 2020.

COHEN JOHNSON

/s/ Kevin Johnson
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and complete copy of the foregoing **NOTICE OF ENTRY OF ORDER** to be filed and served upon all persons registered to receive same via the Court's Odyssey E-file and E- Serve System.

DATED this 14th day of September 2020.

/s/ Sarah K. Gondek
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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.

ALL RELATED MATTERS.

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

ORDER GRANTING PLAINTIFF'S MOTION TO RETAX OR DENY AND DENYING DEFENDANT'S MOTION FOR COSTS AND MOTION FOR FEES

THESE MATTERS having come on for a hearing before this Court this 27th day of August 2020, and Plaintiff Christopher Beavor, appearing by and through his counsel of record, Kevin M. Johnson, Esq. of the firm Cohen Johnson Parker Edwards, Defendant/Third Party Plaintiff Joshua Tomsheck appearing by and through his attorney of record, Max Corrick, Esq. of the firm Olson Cannon Gormley & Stoberski, and Marc Saggese, Third Party Defendant, appearing by and through his attorney of record, Amanda Ebert, Esq., of the firm Lipson Neilson P.C., the Court, having considered the Motions, Oppositions, Replies, all papers and pleadings on file herein, and arguments of Counsel, rules as follows:

IT IS HEREBY ORDERED that Plaintiffs Motion to Retax or Deny Costs is hereby GRANTED and all of Defendant's costs are denied.

IT IS FURTHER ORDERED that Defendant's Motion for Costs is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Legal Fees Pursuant to NRS 18.010(2)(b) is DENIED.

IT IS SO ORDERED.

Dated this 12th day of September, 2020

3DB 902 D41A 71F4
Jim Crockett
District Court Judge

DISTRICT COURT JUDGE

PREPARED AND SUBMITTED BY:

COHEN JOHNSON PARKER EDWARDS

/s/ Kevin M. Johnson
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Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

RE: Order from yesterday's hearing

Max Corrick <mcorrick@ocgas.com>

Mon 8/31/2020 9:54 AM

To: Kevin Johnson <kjohnson@cohenjohnson.com>; Megan Hummel <MHummel@lipsonneilson.com>
Cc: Amanda Ebert (AEbert@lipsonneilson.com) <AEbert@lipsonneilson.com>

Kevin: Can you indicate it was Amanda Ebert who was present for Saggese, and add a "y" to where it says Defendant/Third Part Plaintiff Joshua Tomsheck? "Party" instead of "Part".

Otherwise, with those changes you have my permission to insert my esignature.

Thanks.

Max Corrick
OLSON CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129

Phone No.: 702-384-4012

From: Kevin Johnson [mailto:kjohnson@cohenjohnson.com]
Sent: Friday, August 28, 2020 3:13 PM
To: Max Corrick; Megan Hummel
Subject: Order from yesterday's hearing

Let me know if you have any revisions. Thank you.

Kevin Johnson
COHEN|JOHNSON|PARKER|EDWARDS
375 E. Warm Springs Road, Suite 104
Las Vegas, NV 89119
kjohnson@cohenjohnson.com
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Christopher Beavor, Plaintiff(s)	CASE NO: A-19-793405-C
vs.	DEPT. NO. Department 24
Joshua Tomsheck, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/12/2020

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Sydney Ochoa	sochoa@lipsonneilson.com
Kevin Johnson	kjohnson@cohenjohnson.com
Charles ("CJ") Barnabi Jr.	cj@barnabilaw.com
Michael Morrison	mbm@cohenjohnson.com
Amanda Ebert	aebert@lipsonneilson.com

Marie Twist marie@barnabilaw.com

DISTRICT COURT
CLARK COUNTY, NEVADA

Legal Malpractice	**COURT MINUTES**	**September 14, 2020**

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

September 14, 2020 3:00 AM Motion to Amend

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Carolyn Jackson
Dara Yorke

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by the parties without oral argument since the court deems oral argument unnecessary.

This matter was reviewed 9/11/20. The pleadings reviewed were as follows:
1. 8/7/20 Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e)
2. 8/21/20 Opposition to Plaintiff s Motion to Alter or Amend
3. 8/28/20 Third Party Defendant Saggese s Substantive Joinder to the Opposition
The last day for a Reply to be filed by Plaintiff's was 9/10/20 and no Reply was filed. Plaintiff's motion to alter or amend is really just a motion for reconsideration coupled with the injection of entirely new information that was not presented during the initial briefing on the underlying motion. The attempted introduction of new information not previously considered is improper, whether the motion is to alter or amend or reconsider. Additionally, Plaintiff reargues the same factual and legal issues that were already considered by the court prior to rendering the decision which Plaintiff seeks to alter or amend. Rearguing the same legal and factual issues that have already been argued and considered is not an appropriate basis to alter or amend the court's decision nor is it a proper basis for

reconsideration of the court's ruling. This Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) is DENIED. Counsel for Defendant Tomsheck to submit the order for signature and filing within 14 days per EDCR 7.21. COURT FURTHER ORDERED, matter SET for Status Check.

10/15/20 (CHAMBERS) STATUS CHECK: FILING OF ORDER DENYING MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND 59(e) (9/14/20)

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Carolyn Jackson, to all registered parties for Odyssey File & Serve. /cj 09/14/20

CLERK'S NOTE: The above minute order has been amended to reflect changes as to the title for Pleading #3 as Third Party Defendant Saggese s Substantive Joinder to the Opposition, and the Third Part Defendant Saggese's Substantive Joinder to Defendant / Third Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59 (e) was no longer GRANTED. The Amended Minute Order was electronically served to all parties via Odyssey File & Serve. // 9-14-20/ dy

CLERK'S NOTE: The court reviewed all briefing in this case on 9/11/20, the day after any Reply brief was due. On 9/14/20, when the court was doing a last-minute check of the matters on calendar, it noted that Plaintiff's counsel had filed a Reply on 9/11/20, the day after the Reply was due and the day after the court issued directions to the Clerk to enter a minute order stating that the motion was denied and an order to that effect was to be submitted. It should be noted that the court did review the late-filed Reply but since it essentially reiterated arguments raised in the motion, it did not change the court's analysis and the court found no reason to reconsider or recall its decision to deny the motion.

CLERK S NOTE: This Minute Order was electronically served by Courtroom Clerk, April Watkins, to all registered parties for Odyssey File & serve. aw 9/16/2020

MAX E. CORRICK, II
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mcorrick@ocgas.com
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

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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. XXIV
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion to Alter or Amend has been entered in the above-entitled Court on the 17th day of September, 2020, a copy of

which is attached hereto.

DATED this 17th day of September, 2020.

OLSON CANNON GORMLEY & STOBERSKI

/s/Max E. Corrick

MAX E. CORRICK, II
Nevada Bar No. 006609
9950 West Cheyenne Avenue
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Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2020, I sent via e-mail a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

H. Stan Johnson, Esq.
Cohen Johnson Parker Edwards
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com
Attorneys for Plaintiff

Joseph P. Garin, Esq.
Amanda A. Ebert, Esq.
Lipson Neilson P.C.
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702-382-1500
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aebert@lipsonneilson.com
Attorneys for Marc Saggese

/s/Jane Hollingsworth

An Employee of OLSON CANNON GORMLEY & STOBERSKI

MAX E. CORRICK, II
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JOSHUA TOMSHECK

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(702) 384-4012 Fax (702) 383-0701

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. XXIV **ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) and 59(e)** **Date of Hearing: September 17, 2020** **Time of Hearing: 9:00 a.m.**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

This matter of Plaintiff CHRISTOPHER BEAVOR's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) having been scheduled for hearing on the 17th day of September, 2020, before the Honorable Judge Jim Crockett.

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

The court has reviewed the following pleadings:

1. Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e);
2. Defendant/Third-Party Plaintiff's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e);
3. Third-Party Defendant's Substantive Joinder to Defendant/Third-Party Plaintiff's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e)
4. Plaintiff's Reply to Defendant/Third-Party Plaintiff's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e).

The court has determined that pursuant to the discretion provided to this court this matter may be decided on the briefs and pleadings filed by the parties without oral argument because the court deems oral argument unnecessary. *See* EDCR 2.23(c). Accordingly, the court finds and orders as follows:

FINDINGS

Plaintiff's motion to alter or amend is really just a motion for reconsideration coupled with the injection of entirely new information that was not presented during the initial briefing on the underlying motion. The attempted introduction of new information not previously considered is improper, whether the motion is to alter or amend or reconsider.

Additionally, Plaintiff reargues the same factual and legal issues that were already considered by the court prior to rendering the decision which Plaintiff seeks to alter or amend. Rearguing the same legal and factual issues that have already been argued and considered is not an appropriate basis to alter or amend the court's decision, nor is it a proper basis for reconsideration of the court's ruling.

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(702) 384-4012 Fax (702) 383-0701

ORDER

Based upon the above Findings, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) is DENIED.

IT IS SO ORDERED.

Dated this 17th day of September, 2020

DATED this ___ day of September, 2020.

JUDGE JIM CROCKETT

Approved as to Form and Content:

COHEN JOHNSON

Approved as to form only
/s/H. Stan Johnson

H. STAN JOHNSON, ESQ.
Nevada Bar No. 000265
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
Attorney for Plaintiff
CHRISTOPHER BEAVOR

OLSON CANNON GORMLEY & STOBERSKI

BB8 2E0 E598 FE61
Jim Crockett
District Court Judge
/s/Max E. Corrick, II

MAX E. CORRICK, II
Nevada Bar No. 006609
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

LIPSON NEILSON P.C.

Approved as to form and content
/s/Amanda A. Ebert

AMANDA A. EBERT, ESQ.
Nevada Bar No. 12731
9900 Covington Cross Drive
Suite 120
Las Vegas, NV 89144
Attorneys for Third-Party Defendant
MARC SAGGESE, ESQ.

From: H. Stan Johnson <sjohnson@cohenjohnson.com>
Sent: Wednesday, September 16, 2020 5:14 PM
To: Max Corrick; Kevin Johnson; Amanda Ebert (AEbert@lipsonneilson.com); Joe Garin
Cc: Jane Hollingsworth
Subject: RE: Beavor adv. Tomsheck -- Proposed Order

Max if you would change it to approved as to form only for me that would be good and you can submit it.

H. Stan Johnson, Esq.
Cohen-Johnson, LLC
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com

From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, September 16, 2020 1:17 PM
To: H. Stan Johnson <sjohnson@cohenjohnson.com>; Kevin Johnson <kjohnson@cohenjohnson.com>; Amanda Ebert (AEbert@lipsonneilson.com) <AEbert@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: Beavor adv. Tomsheck -- Proposed Order

All: Please review the attached Proposed Order on Plaintiff's Motion to Alter/Amend. It tracks the amended minute orders to reflect what the court reviewed, as well as what the minute order states.

Let me know if you have any proposed edits or comments. If it meets with your approval, please respond as to whether I have your authority to insert your electronic signature.

Thanks.

From: Amanda Ebert <AEbert@lipsonneilson.com>
Sent: Wednesday, September 16, 2020 5:46 PM
To: Max Corrick
Cc: H. Stan Johnson; Kevin Johnson; Joe Garin; Jane Hollingsworth
Subject: Re: Beavor adv. Tomsheck -- Proposed Order

Looks good to me as well- please go ahead and insert my E-signature. Thanks.

On Sep 16, 2020, at 5:22 PM, Max Corrick <mcorrick@ocgas.com> wrote:

Understood.

Sent from my Sprint Samsung Galaxy S10e.

-------- Original message --------
From: "H. Stan Johnson" <sjohnson@cohenjohnson.com>
Date: 9/16/20 5:13 PM (GMT-08:00)
To: Max Corrick <mcorrick@ocgas.com>, Kevin Johnson <kjohnson@cohenjohnson.com>, "Amanda Ebert (AEbert@lipsonneilson.com)" <AEbert@lipsonneilson.com>, Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: RE: Beavor adv. Tomsheck -- Proposed Order

Max if you would change it to approved as to form only for me that would be good and you can submit it.

H. Stan Johnson, Esq.
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702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com

contents, or any part thereof. Anyone else must immediately delete the message, and reply to the sender only, confirming you have done so.

From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, September 16, 2020 1:17 PM
To: H. Stan Johnson <sjohnson@cohenjohnson.com>; Kevin Johnson <kjohnson@cohenjohnson.com>; Amanda Ebert (AEbert@lipsonneilson.com) <AEbert@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: Beavor adv. Tomsheck -- Proposed Order

All: Please review the attached Proposed Order on Plaintiff's Motion to Alter/Amend. It tracks the amended minute orders to reflect what the court reviewed, as well as what the minute order states.

Let me know if you have any proposed edits or comments. If it meets with your approval, please respond as to whether I have your authority to insert your electronic signature.

Thanks.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Christopher Beavor, Plaintiff(s)	CASE NO: A-19-793405-C
vs.	DEPT. NO. Department 24
Joshua Tomsheck, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/17/2020

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Sarah Gondek	sgondek@cohenjohnson.com
Sydney Ochoa	sochoa@lipsonneilson.com
Kevin Johnson	kjohnson@cohenjohnson.com
Charles ("CJ") Barnabi Jr.	cj@barnabilaw.com
Michael Morrison	mbm@cohenjohnson.com
Amanda Ebert	aebert@lipsonneilson.com

Marie Twist marie@barnabilaw.com

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Facsimile: (702) 823-3400
Attorneys for Plaintiff Christopher Beavor

EIGHTH JUDICIAL 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.: XXIV **NOTICE OF APPEAL**
JOSHUA TOMSHECK, an individual, Third-Party Plaintiff, v. MARC SAGGESE, ESQ., an individual, Third-Party Defendant.	

Notice is hereby given that Plaintiff Christopher Beavor, by and through his counsel, H. Stan Johnson, Esq., of the law firm of Cohen Johnson Parker Edwards, hereby appeals to the Supreme Court of Nevada from the following:

1. "ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW ON:

1. JOSHUA TOMSHECK'S MOTION FOR SUMMARY JUDGMENT;

2. THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT; AND

3. THIRD-PARTY DEFENDANT MARK SAGGESE'S MOTION TO STRIKE SUPPLEMENTAL OPPOSITION OF THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK ON ORDER SHORTENING TIME

filed on July 9, 2020, with notice of entry of which was served electronically on July 10, 2020, as well as any and all orders, decisions, judgments, findings, conclusions and, or recommendations relating thereto. *Attached as Exhibit 1.*

2. ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) and 59(e) filed on September 17, 2020, with notice of entry of which was served electronically on September 17, 2020, as well as any and all orders, decisions, judgements, findings, conclusions and, or recommendations relating thereto. *Attached as Exhibit 2.*

3. All judgments and orders in this case; and

4. All rulings and interlocutory orders made appealable by any of the foregoing.

Dated this 16th day of October, 2020.

COHEN JOHNSON LLC

By: */s/ H. Stan Johnson*
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
KEVIN M. JOHNSON, ESQ.
Nevada Bar No. 14724, ESQ.
375 E Warm Springs Rd., Suite 104
Las Vegas, Nevada 89119
Attorneys for Plaintiff Christopher Beavor

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

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I hereby certify that on the 16th day of October 2020, I caused a true and correct copy of **NOTICE OF APPEAL** to be served via the Court's Wiznet E-Filing system on all registered and active parties.

/s/ Sarah Gondek
AN EMPLOYEE OF COHEN JOHNSON LLC

COHEN JOHNSON LLC
375 E. Warm Springs Rd., Suite 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Electronically Filed
3/16/2021 1:34 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, Plaintiff, vs. JOSHUA TOMSHECK, Defendant.	CASE#: A-19-793405-C DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE

THURSDAY, JUNE 25, 2020

RECORDER'S TRANSCRIPT OF HEARING:
ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff: HAROLD STANLEY JOHNSON, ESQ.

For the Defendant: MAX E. CORRICK, ESQ.

For Third Party Defendant: JOSEPH P. GARIN, ESQ.

RECORDED BY: NANCY MOLDENADO, COURT RECORDER

Las Vegas, Nevada, Thursday, June 25, 2020

* * * * *

[Hearing began at 9:49 a.m.]

THE CLERK: Case No. A-19-793405, Christopher Beavor versus Joshua Tomsheck.

MR. GARIN: Good morning, Your Honor. Joe Garin for third party defendant, Marc Saggese.

THE COURT: Good morning.

MR. JOHNSON: Your honor, Stan Johnson on behalf of the plaintiff, Chris Beavor.

THE COURT: I can barely hear you.

MR. JOHNSON: Is that better?

THE COURT: A little bit. I don't know why the –

[Colloquy]

THE COURT: And then, Mr. Corrick.

MR. CORRICK: Good morning, Your Honor. Max Corrick on behalf of the defendant.

THE COURT: All right.

So we have third party defendant Mark Saggese's motion to dismiss or, alternatively, motion for summary judgment. We have Joshua Tomsheck's motion for summary judgment, and we have third party defendant Mark Saggese's motion to strike supplemental opposition of third party plaintiff, Joshua Tomsheck, and that's on an OST.

So the way I have these things in sequence in my notes is,

first, Joshua Tomsheck's motion for summary judgment.

This began as a suit for legal malpractice by Beavor versus Tomsheck that was filed April 23rd, 2019. On May 16, 2019, defendant Tomsheck filed his answer and a third party complaint against Saggese for contribution.

Before I continue, am I pronouncing Saggese correctly or incorrectly?

MR. GARIN: Your Honor, it's actually Saggese.

THE COURT: Saggese, all right, thank you.

Against Saggese for contribution but it does not specify or allege what Saggese may have done to warrant contribution. Tomsheck's motion for summary judgment was filed first, and that's why I'm considering it first.

Tomsheck's motion for summary judgment makes two arguments. First, legal malpractice claims are not assignable in Nevada, and this claim is based on the assignment of a legal malpractice claim, and, second, that the case was filed beyond the statute of limitations for legal malpractice claims.

Tomsheck says there was a specific written agreement regarding the statute of limitations that would expire September 2nd, 2018, but Tomsheck argues the suit was not filed until April 23rd, 2019, well after the expiration of the agreed upon statute date of September 2nd, 2018.

The Court finds defendant's arguments persuasive if not compelling. The Tower Homes case makes it abundantly clear that the

Nevada Supreme Court will not allow assignment of a legal malpractice claim as opposed to assigning the proceeds of a legal malpractice claim, because in making a claim, the claimant controls all aspects of pursuit of the claim and ensuing litigation.

Whereas, in an assignment of proceeds only, that element of control is not present. Either the claimant will succeed or but fail, and if they succeed, then only the assigned proceeds are payable to the assignee.

Here, the facts make it clear to the Court the depth and breath of control that Hefetz has over the claim make it clear that this is a prohibitive assignment of a legal malpractice claim rather than just an assignment of the proceeds of a legal malpractice claim. That alone is sufficient to justify summary judgment in favor of defendant, Tomsheck.

The statute of limitations argument is interesting. The parties prescribed when the statute of limitations would expire in this case in a written agreement, and, based upon those dates, the plaintiff filed the claim too late.

Interestingly, the party has filed an errata regarding when the statute of limitations began to run, and at first they said May 26, 2018, and then, frustratingly for the Court, after filing its motion for summary judgment on March 9th, 2020, defendants filed a document entitled Errata which was essentially a regurgitation of the very same motion for summary judgment filed on March 9, 2020, with the exception that buried in the body of the two documents was a different date of which the statute of limitations expired, May 26, 2018, versus September 26,

2018.

This is frustrating because rather than make a straight forward explanation that this errata is being filed to correct the date from May 26th to September 26th, counsel simply said that the new or Amended Information was in bold print. In the future, I would request that counsel is admonished to use common sense in communicating to the Court and opposing counsel what the purpose of the filed errata truly is without burying the golden needle in a haystack of other needles.

On the statute of limitations, there's also the possibility of giving a broader reading to the tolling agreement. It could be read to apply to either 180 days after the signatures or two years after the appeal is resolved. The remittitur was issued May 10, 2016. And that is a third date in addition to the May 26, 2018, whichever is later, as opposed to those two provisions of the tolling agreement equating to being a firm statute of limitations.

However, because of the vagueness of the possible interpretations that could be applied to the statute of limitations, I think that the only issue that needs to be addressed is the assignability of a legal malpractice claim which the Court finds that this is, and it is clear beyond question that in the State of Nevada legal malpractice claims are not assignable which invalidates the attempt to do so.

In plaintiff's opposition, plaintiff seems to resort to rhetoric in an effort to compensate for a lack of legal authority to oppose defendant's position or support the plaintiff's. Also, plaintiff seems to struggle with the notion that the Court is not being asked to determine

that Tomsheck did nothing wrong, even if defendant's professional actions were, for the sake of argument, deemed to constitute legal malpractice as a matter of law, the fact remains legal malpractice claims are not assignable in Nevada.

I think that defendant's reply brief effectively defeats the arguments presented by plaintiff in its opposition, but I'm inclined to grant defendant Tomsheck's motion for summary judgment on the grounds that a legal malpractice claim is not assignable.

I decline to rule on the statute of limitations issue because I think interpretation leaves it subject to question as to when the statute of limitations began to run and expired. And it's not necessary to make a determination of the case.

With regard to third party defendant Mark Saggese's motion to dismiss or alternatively motion for summary judgment, it's a motion to dismiss the third party complaint against Saggese by Tomsheck.

Interestingly, it is not until page 8 of this motion that Saggese addresses the concern that the Court had from the very beginning when reading the third party complaint.

There are no factual assertions or allegations that give any indication as to what Saggese is alleged to have done that amounted to malpractice or otherwise entitles Tomsheck to seek contribution against him. Considering that this is a motion to dismiss, that should have been the attention of everyone's attention instead.

First, Saggese's motion to dismiss based upon ineffective service of process is denied. The record supports a finding and

conclusion that Saggese was effectively served.

Second, Saggese's arguments attempting to justify the contribution action are hollow. Tomsheck simply avoids making even the slightest effort to allege in the complaint or in these pleadings what Saggese did that would constitute contributory legal malpractice during his representation of Beavor.

Regarding Tomsheck's claim that Saggese is presumed to be the cause of Beavor's damages, that bold assertion is not supported by any legal authority holding that Saggese is the former attorney, is presumed to be the cause of damages alleged to have been caused by Tomsheck. In fact, that flies in the teeth of logic.

And Tomsheck's claim that the affidavits of Beavor and Saggese regarding waiving the one action rule are self-serving and not corroborated by any other evidence is self-contradictory. They do corroborate each other.

Finally, at about the 160th page of this 185-page tome, we finally see an affidavit from Tomsheck which doesn't actually contradict the affidavits of Beavor and Saggese, but says, "If they did have that discussion and waive the one-action rule, they never told me, and I never saw documentation of it." That's kind of a collateral contradiction.

Then we have the NRCP 56(d) affidavit of Mr. Corrick, pages 158 to 160, and Mr. Corrick says he has an expert witness who's prepared to testify that Saggese was the proximate cause of all of Beavor's damages, and says that he's been trying to schedule the deposition of Beavor and Saggese, but due to Covid-19 restrictions has

been unable to do so.

Mr. Corrick also says that he has made requests for production of documents which have gone unanswered. Then, three days later, Corrick files a 45-page supplement to his 185-page opposition.

It says the document dump provides even greater support for Tomsheck's claim that the one-action rule was not discussed and knowingly and intelligently waived by Beavor. It says they need time to work their way through the information.

Saggese's reply is succinct and glib, and even superficially persuasive, but the Court thinks that 56(d) relief is appropriate, so the question is what's the scope of the 56(d) discovery and how long will it take?

So Rule 56 says when facts are unavailable to the nonmovant, if a nonmovant shows by affidavit or by declaration that for specified reasons it cannot present facts essential to justify its opposition, the Court may defer considering the motion or allow time to obtain affidavits or declarations, or to take discovery, or issue any other appropriate order.

And then one other concern I had is if Tomsheck is entitled to summary judgment as a defendant, does that defeat any claim for contribution against Saggese.

So I realize I've probably given you a lot to think about, but let me first hear from counsel for Tomsheck.

MR. CORRICK: Your Honor, Max Corrick on behalf of Mr.

Tomsheck.

THE COURT: And, Mr. Corrick, could you scoot close to your microphone? We're having a – we have the volume raised as high as we can get it raised in the courtroom, but your voice sounds very faint like you're down there at volume level 3 on a potential volume of 10.

MR. CORRICK: I am putting it on volume level ten, Your Honor, is that better?

THE COURT: Actually, it's not. I don't know what the deal is. Are you perhaps on a speaker phone?

MR. CORRICK: How about that? I have now picked up from a speaker phone.

THE COURT: Okay. It's still pretty faint.

MR. CORRICK: And I have it at the highest volume. Let me try some more.

THE COURT: Okay. There you go. That's perfect. That's good.

MR. CORRICK: Very good. Thank you, Your Honor.

So, Your Honor, Max Corrick on behalf of Mr. Tomsheck. I am not going to address the summary judgment inclination and decisions because I think those are fairly clear.

With respect to the last question which I think is the most interesting one, is if – because Tomsheck is entitled to a summary judgment, I believe that at this point in time, because the contribution claim and any damages which would accrue would not flow unless and until Mr. Tomsheck was required to either settle or a judgment was

entered against him.

I think that has booted now, at least for the time being, the contribution claim and, therefore, this Court, while it indicated that it would grant Rule 56(d) relief, I think the Court may decline to rule on the Saggese motion as moot in light of the ruling upon the summary judgment motion.

THE COURT: Okay. Well, that's my inclination too, but let me hear from counsel for Saggese.

MR. GARIN: Your Honor, I agree with counsel. I think that by granting Mr. Tomsheck's motion and renders the claims against my client moot, and consequently the motions are moot.

THE COURT: All right. Let me hear from counsel for Mr. Beavor.

MR. JOHNSON: Yes, Your Honor, Stan Johnson.

Your Honor, there's two issues here. I think, initially, the issue is one of standing in the Goodley vs. Wank case, which is the California appellate case that Tower relies on and which everyone has basically indicated is kind of the seminal case on the assignment of a legal malpractice action, the Court was very clear in defining the issue there.

The issue was, and they stated, the sole issue was whether the written assignment -- by virtue of the written assignment, the plaintiff has standing.

Now, the distinction in our case is that the plaintiff is the client. None of the cases cited by defendants are cases that were brought by the client. Clearly, factually, legally, Mr. Beavor, the client, has standing

to bring a legal malpractice action.

Now, the Court may be differentiating it and saying, well, if the assignment, the settlement agreement, constitutes some sort of de facto assignment of the claim. Now, that's the case with what I think the Court would have to do is indicate that the assignment or the settlement agreement, the de facto assignment, if that's what the Court is basing it on, would be unenforceable or invalid.

But Mr. Beavor as the client, as the direct holder of the malpractice claim, still would have standing to move forward with the malpractice action.

I know counsel is trying to argue that the Tower case addressed that issue, but it did not. It's very clear that in the Tower case the Supreme Court did not rule on that issue. They said we're not sure that Achrem would apply. If this is an assignment of only the proceeds, we're not sure about that, but we're not going to reach that issue because the Bankruptcy Court clearly assigned the entire case, the matter, to the creditors, and it was the creditors that brought the action and are the ones that were asserting they had standing.

So there's a very large and clear difference between the Tower case and the case before the Court, and it's our position that Mr. Beavor still has standing to bring a malpractice action. And the fact that the Court may say, well, this is a de facto assignment because of control issues, that, we think, is a different issue.

And, in fact, I'd like to just point out, I understand the Court's made a preliminary ruling here, but what I'd like to point out is at this

point in the litigation, it's very early on, it's a summary judgment matter and if there's any issues of fact.

Now, we believe that the control issue is an issue of fact. The Court has an affidavit of Mr. Beavor where he's saying I do have control over this case. I make the decisions, I can dismiss it, I can settle it, I can do those things that a normal plaintiff would do. So those control issues were retained or not part of any agreement.

The only real thing that Mr. Beavor agreed to do was to bring the case and pursue it in good faith. And that's not different from frankly many of the other cases I'm sure the Court is familiar with dealing with personal injury actions, where someone may loan money, or advance money, or fees, or costs in exchange for an assignment of the proceeds.

THE COURT: Yeah, Mr. Johnson, that's the difference. That's an assignment of proceeds not to claim, and that's a very –

MR. JOHNSON: Well, if – well, the settlement agreement does not assign the claim. The settlement agreement specifically states that proceeds are being assigned. It does not assign the claim. That's why Mr. Hefetz did not bring the action in his own name because it was not assigned. The proceeds were assigned.

And there is no case in the State of Nevada where the Supreme Court or Appellate Court has made that ruling that an assignment of proceeds is a direct assignment of the claim or a de facto assignment of the claim.

The Tower case does not do that, the Goodley case which Tower relies on, the California case, does not do that. In the Goodley

case it was an entirely different person who brought the lawsuit, it was not the client. It was a totally different person, and the Court said, look, this is really just a standing issue. Does this person who is not the client have the ability to bring the case because of the assignment? The Court basically said, no, the assignment's invalid, so this plaintiff does not have standing to bring the cause of action.

That is not what we have here. We have the real client, the party in interest, filing and bringing the malpractice action against his attorney. And this was something that was known clear back in 2015, that there was a malpractice action that Mr. Beavor intended to bring against Mr. Tomsheck.

Mr. Beavor's counsel at that time wrote a letter to the insurance company and to Mr. Tomsheck and put them on specific notice that they felt there was a malpractice claim against Mr. Tomsheck. And this was known throughout –

THE COURT: Mr. Johnson, the issue is not whether or not there was or whether or not Beavor believed there was a legal malpractice claim against Tomsheck. That is not in dispute. If Hefetz is really receiving an assignment of proceeds, then why didn't Hefetz pursue this case in his own name, under that document, and claim that he was entitled to an assignment of the proceeds, and go from there?

MR. JOHNSON: No, that's the very point, Your Honor. The claim was not assigned to Mr. Hefetz.

THE COURT: No, I said – we're talking about that legal malpractice claim versus the proceeds of a legal malpractice claim.

MR. JOHNSON: Correct.

THE COURT: If this is not an assignment of legal malpractice claim as you're arguing, then that would mean that in order for it to survive it would have to be an assignment of legal malpractice claim proceeds, and if that were the case, then Hefetz would be the real party in interest and pursue it in his own name, as someone who is an assignee of the proceeds of a legal malpractice claim.

So what we see in the pleadings here contradicts what's being – what we're being told as to what this document really was. It was not an assignment of a legal malpractice claim. That was an assignment of a legal malpractice claim proceeds.

So it doesn't look like a duck, it doesn't walk like a duck, and so I don't know why we're supposed to call it a duck.

MR. JOHNSON: Well, I guess I just want to clarify this one point, Your Honor, is that the settlement agreement does not assign the cause of action to Mr. Hefetz. That's very clear.

THE COURT: What does it assign to Mr. Hefetz?

MR. JOHNSON: The proceeds.

THE COURT: Okay. So if Mr. Hefetz is the assignee of the proceeds, why would he shy away from pursuing the case in his own name based upon the assignment of proceeds?

MR. JOHNSON: Well, Your Honor, it's just like the Achrem case, which is well known and has been cited, you know, hundreds of times in regards to that very issue. And the issue at Achrem, and it was a personal injury case, and as the Court knows, the assignment of a

personal injury action is also prohibited because that is a personal type of claim that belongs to the party injured. So courts have found that you cannot outright assign the personal injury cause of action to a third party.

But what Achrem stands for is that you can assign the proceeds. Now, that does not --

THE COURT: No. No. Everything you're saying is understood and very clear. I'm just saying that this is a case where a tail is attempting to wag the dog.

So Mr. Corrick, what do you have to say?

MR. CORRICK: Yes, Your Honor. I believe every argument that Mr. Johnson has placed before you now it was referred to and addressed in our reply brief, which I believe you described as being effectively defeating the argument.

I think this is quite clear. It's a distinction without a difference here, and this was an assigned malpractice claim that proceeds were assigned. I think as Tower Homes, as Chaffe v. Smith, and, as most recently the Nevada Court of Appeals in the Oceania Insurance case, has indicated Nevada law does not permit that. So Summary Judgment should be granted.

THE COURT: Yeah, I agree. So, Mr. Corrick, I'm going to ask you to prepare an Order granting the motion for summary judgment.

Now, let's turn our attention to the issue of – is everybody agreed that would moot the third party claim for a contribution against Saggese, or does anybody disagree?

The thing about a claim for contribution is dismissal of that

claim without prejudice at this juncture wouldn't foreclose the possibility of a later action for contribution, but I do think that granting summary judgment to Tomsheck moots out his third party claim against Saggese, and so I just want to hear if anybody disagrees with that, and if so, please tell me why.

So let me first ask Mr. Johnson, do you agree or disagree with that? (Inaudible) any dog in the fight, but do you agree or disagree?

MR. JOHNSON: Well, I don't know that any – yes. I would agree in general, Your Honor.

THE COURT: All right. Mr. Corrick.

MR. CORRICK: Yes, Your Honor. I believe it moots it. I think for purposes of going forward in the event that this matter somehow comes back, I think we could indicate that it is mooted, and no decision is reached with respect to the – because of the granting of the summary judgment, no decision was required to be made with respect to Saggese's motion to dismiss or motion for summary judgment.

THE COURT: Mr. Garin, I'm assuming you agree.

MR. GARIN: Your Honor, I agree on behalf of Mr. Saggese with – in particular with Mr. Corrick's comments.

THE COURT: Okay. So, and then there was also a motion to strike the supplemental response as untimely. I'm going to deny that.

So I'm going to ask Mr. Corrick to prepare a single Order that addresses all three of these matters. The first one –

MR. CORRICK: Your Honor.

THE COURT: Pardon?

MR. CORRICK: I apologize. Go ahead, Your Honor.

THE COURT: Who was speaking.

MR. CORRICK: I apologize, Your Honor. That was Max Corrick.

THE COURT: Okay. So you need to prepare an Order that grants Tomsheck's motion for summary judgment, and the Court declares moot the third party contribution action.

MR. CORRICK: Your Honor, Max Corrick –

THE COURT: Yeah, hold on.

So you'll be preparing an Order that grants the motion for summary judgment. You'll prepare an Order including in that Order the granting – not granting, but deciding that the third party complaint against Saggese is moot because of the ruling on the summary judgment, and deny the Saggese's motion to strike the supplemental opposition of third party plaintiff, Joshua Tomsheck.

All right. So, Mr. Corrick, did you have any questions?

MR. CORRICK: I do. I have a couple of questions, Your Honor.

Starting with the motion to strike, given the ruling on the motion for summary judgment, it would seem to follow that the Court could decline to rule upon that as well as moot. However, if the Court wants the Order to say denying it, I'm perfectly fine with that. I just wanted there to be some consistency.

THE COURT: Okay. Let's see here. All right. You're right.

We'll declare that as moot too, the motion to strike.

MR. CORRICK: Okay. That along with the motion to dismiss motion for summary judgment filed by Mr. Garin's client shall be declined as moot based upon the Court's ruling on the motion for summary judgment, and then with respect to the motion for summary judgment, for the findings of fact and conclusions of law, as you did in the case prior to ours, would you like me to summarize, take from the briefs in the summarization of the arguments and provide them –

THE COURT: Yeah. I'd like you to use an abridged version of what was said in the motion and in the reply, and I would focus probably on the reply because it was more succinct in recapping some of what had been said in the motion and then dealing with the reply to the opposition.

MR. CORRICK: Very good. Thank you, Your Honor.

THE COURT: Now, I'll look for that Order within 14 days which would be what?

THE CLERK: It'll be July 9th.

THE COURT: July 9th. We'll put that on the calendar, the chambers calendar, and I'm sure I'll have it by then. It'll be signed and filed. And then we can set a status check for the filing of the Order two weeks after July 9th.

THE CLERK: That'd be July 23rd.

THE COURT: All right, counsel. Anything else?

MR. CORRICK: No, Your Honor.

MR. GARIN: Nothing further, Your Honor.

MR. JOHNSON: Okay. Thank you.

MR. GARIN: Thank you, Your Honor.

[Hearing concluded at 10:22 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Susan Schofield

SUSAN SCHOFIELD
Court Recorder/Transcriber