IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BEAVOR, An Individual, Appellant, vs. JOSHUAS TOMSHECK, An Individual, Respondent.	)	**Case No.: 81964**

APPELLANT'S OPENING BRIEF

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CHRISTOPHER BEAVOR, An Individual, Appellant, vs. JOSHUAS TOMSHECK, An Individual, Respondent.	)	**Case No.: 81964**

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in *NRAP* 26.1(a), and must be disclosed.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and listing any publicly held company that owns 10% or more of the party's stock or states that there is no such corporation:

There is no such corporation.

2. The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear in this Court:

COHEN | JOHNSON

COHEN | JOHNSON | PARKER | EDWARDS

3. If any litigant is using a pseudonym, the statement must disclose the litigant's true name:

None.

DATED this 29th day of July 2021

/s/ H. Stan Johnson, Esq.
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STATUTES/RULES

JURISDICTIONAL STATEMENT

This is an Appeal from a July 10, 2020 Order and Findings of Fact, Conclusions of Law ("**Order**") granting a Motion for Summary Judgment ("**MSJ**"), from the *Eighth Judicial District*, before the Honorable James Crockett, brought by Plaintiff/Appellant, CHRISTOPHER BEAVOR, An Individual ("**Beavor**"), against Defendant/Respondent, JOSHUA TOMSHECK, An Individual ("**Tomsheck**") ("**Action**"). [AA 1-7; 582-99; 670-80; 681-702].

On August 7, 2020, Beavor timely filed a Motion to Alter/Amend the Order ("**Alter/Amend Motion**"), pursuant to *NRCP* 52(b) and 59(e). [AA 600-15]. The Order resolving the Alter/Amend Motion was entered and served on September 17, 2020. [AA 670-80]. Beavor timely filed his Notice of Appeal on October 16, 2020. [AA 681-83].

ROUTING STATEMENT

Beavor respectfully submits that this Appeal should be heard by the *Nevada Supreme Court* as it raises issues of first impression relating the right to assign the proceeds from a previously asserted legal malpractice claim. *See NRAP* 17(a)(11).

STATEMENT OF ISSUES ON APPEAL

Beavor respectfully submits the following Statement of Issues in this Appeal:

1. Whether the District Court erred in granting the MSJ against Beavor and dismissing the instant Action.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This Appeal arises from an Action filed by Beavor against Tomsheck on April 23, 2019 in the *Eighth Judicial District*. [AA 1-7].

On July 10, 2020, the District Court granted the MSJ in favor of Tomsheck, with Notice of Entry of the Order served on the same date. [AA 582-599].

On August 7, 2020, Beavor timely filed his Alter/Amend Motion, pursuant to *NRCP* 52(b) and 59(e). [AA 600-615]. On September 17, 2020, the District Court denied the Alter/Amend Motion, with Notice of Entry of the Order served on the same date, [AA 670-80].

Beavor timely filed his Notice of Appeal on October 16, 2020. [AA 681-83].

1. Underlying Action

The instant Action relates to an underlying lawsuit brought by Yacov Hefetz ("**Hefetz**") against Beavor for breach of a personal guaranty, arising from the non payment of a large commercial loan which could subject him to millions of dollars in damages. [AA 224]. The underlying action was filed on July 21, 2011 in the *Eighth Judicial District*, bearing Case No.: A-11-645353-C ("**Underlying Action**"). [AA 2-4; 238-47].

The Underlying Action was tried to a jury between February 25, 2013 and March 1, 2013, wherein the jury returned a verdict in favor of Beavor. [AA 97]. On May 21, 2013, the District Court entered judgment in favor of Beavor in the Underlying Action ("**Underlying Judgment**"). [AA 94-99].[1]

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[1] H. Stan Johnson did not represent Hefetz in the underlying case. On March 19, 2013, after the completion of the trial in the Underlying Action, H. Stan Johnson, Esq. was substituted in as Hefetz's new counsel. [AA 241].

a. New Trial Motion

On June 10, 2013, Hefetz's new counsel filed a Motion for a New Trial in the Underlying Action ("**New Trial Motion**") wherein he alleged:

1. During the trial of the Underlying Action, counsel for Beavor committed attorney misconduct in violation of the prohibitions in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008); and

2. The jury, by misunderstanding the issues presented in a separate bankruptcy court proceeding, ignored the jury instructions. [AA 19-20].

On or about June 19, 2013, Beavor also retained new counsel, Tomsheck as his attorney for all post-trial matters, including the New Trial Motion. [AA 59; 300; 360].

On June 20, 2013, Tomsheck filed Beavor's Opposition to the New Trial Motion ("**New Trial Opposition**"). In the New Trial Opposition, Tomsheck did **not** substantively oppose the New Trial Motion, **instead** choosing only to argue that the New Trial Motion had been untimely filed. [AA 59; 65-86; 101-02; 185-88]

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In his Reply, Hefetz argued that the New Trial Motion had been timely filed and that Beavor's failure to substantively oppose the New Trial Motion amounted to a waiver and consent to the granting of the New Trial Motion.[2] [AA 59; 191-94; 304-05; 308-13; 322-23; 328].

The District Court heard the New Trial Motion on August 7, 2013, whereupon it ruled that the New Trial Motion had been timely filed and that **but for** Beavor's failure to substantively oppose the New Trial Motion, it would have denied the New Trial Motion. [AA 192-93]. Accordingly, the District Court granted the New Trial Motion. [AA 59; 101-02].

b. New Trial Motion - Judicial Review

Instead of filing a direct appeal with this Court from the District Court's granting of the New Trial Motion, as expressly provided for in *NRAP* 3A(b)(2), Tomsheck filed a Petition for *Writ of Mandamus* ("**Petition**") on Beavor's behalf on or about May 13, 2014. [AA 60; 339].

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[2] *See EDCR* 2.20(e): "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." [2013 Version].

On or about September 16, 2014, this Court entered an order denying the Petition, wherein it noted that extraordinary writ relief was unavailable, as a direct appeal was the proper course of action. [AA 60; 104; 343-46].

By the time the Petition was denied, the time in which to file a direct appeal of the granting of the New Trial Motion had expired. *See NRAP* 4(a).

c. Underlying Action - Reinstatement

Due to Tomsheck's legal errors, instead of Beavor prevailing in the Underlying Action, the Underlying Judgment in Beavor's favor was vacated, thereby allowing for the re-trial of the Underlying Action, which could subject Beavor to millions of dollars of liability. [AA 60; 224].

Over the following several years, Beavor incurred substantial legal fees in defending against Hefetz in the Underlying Action. [AA 471-72].[3] During this time period, Beavor filed a Motion to Dismiss the Underlying Action based upon *NRS* 40.435 [One Action Rule] ("**Motion to Dismiss**"). [AA 243].

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[3] Tomsheck subsequently withdrew as counsel for Beavor on November 5, 2014. [AA 60]. On January 21, 2015, the law firm of Gordon & Silver filed a Notice of Appearance on behalf of Beavor, which legal representation was later substituted by the law firm of Dickinson Wright. [AA 60].

The District Court granted the Motion to Dismiss, and thereafter, dismissed the Underlying Action. [AA 243; 274-75]. Hefetz timely appealed the granting of the Motion to Dismiss, whereupon on July 6, 2017 this Court reversed the granting of the Motion to Dismiss and reinstated the Underlying Action. [AA 114-15; 174; 245].

d. Beavor Asserts Legal Malpractice Claim

During the pendency of Hefetz's appeal of the granting of the Motion to Dismiss, on September 16, 2015, Beavor noticed and asserted [4] a claim for legal malpractice against Tomsheck, including providing Tomsheck with a draft complaint for legal malpractice. [AA 106].

During an October 1, 2015 mandatory settlement conference conducted in Hefetz's appeal, representatives of Tomsheck's legal malpractice carrier attended the settlement conference. [AA 106; 218; 334; 346; 352; 356-57; 602-03].

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[4] Assert means "[t]o state positively" or "[t]o invoke or enforce a legal right." *Black's Law Dictionary* (11th Ed. 2019).

In March 2016, Beavor and Tomsheck agreed to toll the statute of limitations for claims of legal malpractice ("**Tolling Agreement**"). [AA 109-12].[5]

[5] While the District Court did not rule on Tomsheck's second argument in support of the MSJ in the instant Action, i.e. the statute of limitations, nevertheless the argument was without merit as the Tolling Agreement did not supplant Nevada's litigation malpractice tolling rule. *See NRS* 11.207(1)("must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier."); *Kim v. Dickinson Wright, PLLC*, 135 Nev. Adv. Rep. 20, 442 P.3d 1070, 1075 (2019) ("Instead, the litigation malpractice tolling rule applies to the two-year discovery rule, serving to toll a malpractice claim's statute of limitations until the underlying litigation is resolved and damages are certain."); *Branch Banking & Trust Co. v. Gerrard*, 134 Nev. 871, 432 P.3d 736 (2018). [AA 592]. The Tolling Agreement specifically provided:

> 8. **Remedies and Defenses upon Expiration of the Term of this Agreement**. Upon the expiration of the Term of this Agreement, **the Parties shall retain any and all legal and equitable** claims, **remedies, defenses**, **rights** and duties **to the fullest extent of law**, which they have or may have as of the Effective Date of this Agreement. [AA 109-112](emphasis).

The Tolling Agreement did not provide for a shortened statute of limitations period, as it merely tolled and prevented the filing of a lawsuit during its applicable time period. The Underlying Action was not dismissed until March 13, 2019. [AA 246; 249-52]. The instant Action was timely filed the following month on April 23, 2019. [AA 1-7].

e. Underlying Action - Second Trial

The parties settled the Underlying Action shortly before the commencement of the second trial date. On March 13, 2019, a Stipulation to Dismiss with Prejudice the Underlying Action was filed with the District Court. [AA 246; 249-52].

The settlement of the Underlying Action was comprised of a substantial financial payment from Beavor to Hefetz, as well as the assignment by Beavor to Hefetz of the proceeds of Beavor's previously asserted legal malpractice claim against Tomsheck ("**Settlement Agreement**"). [AA 143-48].

The Settlement Agreement, which included a severability provision and was executed by Hefetz and Beavor on January 8, 2019 and February 15, 2019 respectively, provided, among other matters[6] that:

- Beavor agreed to prosecute his legal malpractice claim and/or other claims he may have against Tomsheck; Beavor agreed that H. Stan Johnson, Esq. will serve as counsel.

- Beavor represented and warranted that he will fully pursue and cooperate in the prosecution of his claims.

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[6] The Settlement Agreement provided that "Hefetz agrees to release, discharge, and forever hold harmless: Beavor and his . . . legal representatives . . . ." [AA 143].

- Beavor would take any and all reasonable actions as reasonably requested by counsel to prosecute his claims.

- Beavor will do nothing intentional to limit or harm the value of any recovery related to his claims.

- Hefetz would indemnify Beavor for any attorney's fees resulting from the litigation of his claims.

- Beavor would assign all recovery or proceeds from his claims to Hefetz. [AA 144-45; 499].

B. COURSE OF PROCEEDINGS/DISPOSITION

On April 23, 2019, Beavor the prior client, sued Tomsheck, wherein his causes of action were: (1) Professional Negligence; and (2) Breach of Fiduciary Duty and Breach of Duty of Loyalty. [AA 1-7].

On May 16, 2019, Tomsheck filed his Answer to the instant Complaint, which included a Third-Party Complaint for contribution against Third-Party Defendant, MARC SAGGESE ("**Saggese**"). [AA 10-17].[7]

[7] Saggese represented Beavor in the Underlying Action. [AA 15; 38; 67]. In the instant Action, Saggese filed a Motion to Dismiss, or Alternatively, Motion for Summary Judgment against Tomsheck's Third-Party Complaint ("**Saggese Motion**"). [AA 170-214]. In Tomsheck's Opposition to the Saggese Motion, with regard to Saggese, Tomsheck wrote "Whether Tomsheck owed or breached any duty to Beavor (both of which are disputed) . . . ." [AA 278]. Since it granted Tomsheck's MSJ in the instant Action, the District Court determined that the Saggese Motion was moot, and therefore, declined to rule upon the matter. [AA 593; 698-700].

On March 9, 2020, Tomsheck filed the MSJ in the instant Action arguing that the Settlement Agreement violated Nevada law by assigning Beavor's entire legal malpractice claim to Hefetz. [AA 33-142; 143-48; 149-69].[8]

On March 27, 2020, Beavor filed his Opposition to Tomsheck's MSJ. [AA 215-256]. In his Opposition to the MSJ, among other matters, Beavor properly submitted a sworn declaration that provided:

- Beavor, as partial consideration for the Settlement Agreement, assigned the proceeds from any recovery against Tomsheck.
- Beavor had not assigned any cause of action to any third-party for any claims against Tomsheck.
- Beavor was the Plaintiff in the instant Action, was actively participating in the instant Action and was in frequent contact with his counsel.
- Although Beavor agreed to use H. Stan Johnson, Esq. as his counsel in the instant Action, Beavor maintained the legal right to use other counsel and/or replace current counsel.

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[8] The Settlement Agreement did not assign Beavor's legal malpractice claim to Hefetz, only the proceeds, i.e. "recovery or proceeds." [AA 145]. "A basic rule of contract interpretation is that every word must be given effect it at all possible." *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998). "In interpreting a contract, the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself." *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997).

- Beavor actively consulted with his counsel in the instant Action regarding pleadings and litigation strategy.

- It is Beavor's decision and his alone to accept or reject any settlement offers in the instant Action. [AA 255-56] (emphasis).[9]

In Tomsheck's Reply to Beavor's Opposition to the MSJ, filed on April 30, 2020, Tomsheck did not offer any rebuttal evidence to contradict Beavor's sworn declaration. [AA 494-534].

The District Court granted the MSJ following a June 25, 2020 hearing before the Honorable James Crockett. The District Court granted the MSJ, citing *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016) and *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982), wherein it found that Nevada law does not permit the assignment of a legal malpractice case. [AA 582-99]. However, the record reflects that the District Court misconstrued the Settlement Agreement. [AA 693-98]; *See infra*.

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[9] Beavor's sworn declaration, which did not constitute impermissible parole evidence, did not contradict the terms of the Settlement Agreement, as it reflected Beavor's actions relative to the instant Action. "Generally, parol evidence may not be used to **contradict the terms of a written contractual agreement**. The parole 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." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 15-16 (2001)(emphasis).

The District Court's Order on the MSJ was filed on July 9, 2020, with Notice of Entry of Order served on July 10, 2020. [AA 582-99].

On August 7, 2020, Beavor timely filed the Alter/Amend Motion. [AA 600-15]. The District Court denied, without argument, the Alter/Amend Motion on September 17, 2020, with Notice of Entry of Order served on September 17, 2020. [AA 670-80].

On September 12, 2020, the District Court properly denied Tomsheck's request for litigation costs and/or attorney's fees. [AA 660-67]

Beavor timely filed his Notice of Appeal on October 16, 2020. [AA 681-83].

STATEMENT OF FACTS RELEVANT TO APPEAL

The Underlying Action related to a claim by Hefetz against Beavor arising from his personal guaranty of a commercial real estate loan that was never repaid. [AA 172; 184]. In his declaration to the Saggese Motion, Beavor stated that he understood that the "one action rule" was a defense to the Underlying Action, i.e. he "understood that a creditor seeking to recover a debt secured by real property must first proceed against the security before pursing the debtor personally." [AA 184].

Beavor further stated that while he understood that the application of the "one action rule" could potentially end the Underlying Action, he did not want his own home foreclosed upon due to issues surrounding his elderly mother that lived next door, the raising of his children and the children of his deceased sister, as well as properties assigned to his ex-wife. [AA 184-85].

Beavor wanted the issues presented in the Underlying Action to be heard by jury. [AA 185]. Tomsheck admitted to Beavor that he [Tomsheck] had made a mistake in failing to address the substantive arguments presented in the New Trial Motion. [AA 185; 188].

In an email from Tomsheck, he states:

> In hindsight, given the result, Marc is right that I should have opposed their motion differently . . . Although I sincerely believe I had a good basis to handle the matter the way I did . . . And without the benefit of hindsight I likely wouldn't have handled it differently. That being said I intent to fully litigate this through until the right result is reached. [AA 188].

However, Tomsheck contends that Saggese is the cause of Beavor's damages. [AA 275]. Tomsheck did not substantively oppose the New Trial Motion nor file a direct appeal of the District Court's granting of the New Trial Motion as permitted under *NRAP* 3A(b)(2). [AA 60; 104; 343-46].

SUMMARY OF THE ARGUMENT

Beavor respectfully submits that Nevada law does not prohibit the assignment of only the proceeds from a previously asserted legal malpractice claim to another party, including an adversary in an underlying litigation matter.

The District Court erred in granting the MSJ by ignoring the terms of the Settlement Agreement, whereupon it improperly determined that the Settlement Agreement contemplated the assignment of Beavor's entire legal malpractice claim, as opposed to only the proceeds of Beavor's previously asserted legal malpractice claim against Tomsheck. Independently, the District Court should have properly allowed Beavor to maintain his timely legal malpractice claim, as he was the real party in interest.

There were genuine issues of material fact in dispute that should have properly prevented the District Court from granting the MSJ, i.e. regarding Beavor's control of the instant Action. Further, Tomsheck failed to rebut the substantial evidence submitted in the Opposition submitted by Beavor to the MSJ, which evidence established, among other matters, Beavor's continuing control and ownership of his legal malpractice claim against Tomsheck.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE MSJ, AS THE ASSIGNMENT OF ONLY PROCEEDS FROM A PREVIOUSLY ASSERTED LEGAL MALPRACTICE CLAIM IS PERMITTED UNDER NEVADA LAW

The District Court improperly granted the MSJ, as the Settlement Agreement only assigned to Hefetz the proceeds of Beavor's previously asserted legal malpractice claim against Tomsheck and Beavor was properly litigating the instant Action on his own behalf. [AA 145].[10]

As it is respectfully submitted that Nevada law does not prohibit the limited assignment as presented in the instant Action, the District Court erred in granting the MSJ, and therefore, this Court should properly reverse the Order in its entirety and remand the instant Action for a trial.

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[10] The standard of review for the granting of a motion for summary judgment is *de novo* review, i.e. this Court reviews the entire record anew without deference to the findings of the District Court. *See Caughlin Ranch Homeowners Ass'n. v. Caughlin Club*, 109 Nev. 264, 849 P.2d 310 (1993); *NRCP* 56. Summary judgment is only appropriate "where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party." *Alberter v. McDonald's Corp*., 70 F. Supp. 2d 1138, 1141 (D. Nev. 1999). When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009); *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005).

A. Nevada Law Does Not Prohibit Assignment of Proceeds

This Court's two prior published cases involving assignments in the context of underlying legal malpractice, i.e. *Chaffee* and *Tower Homes*, *supra*, while materially distinguishable based upon their respective facts and holdings, do not prohibit the assignment of only proceeds from a previously asserted legal malpractice claim.[11]

1. The *Chaffee* Case

In *Chaffee v. Smith*, 98 Nev. 222, 223, 645 P.2d 966, 966 (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, this 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).

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[11] *See NRAP* 36(c)(3), which provides in part: "Except to establish issue or claim preclusion or law of the case as permitted by subsection (2), unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose."

This Court in *Chaffee* further stated:

> 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) *Id.*

While mindful of the public policy rationale presented in *Goodley* and its progeny, including *Chaffee* and *Tower Homes*, relating to the nature of the attorney-client relationship and a client's decision to assert a claim for legal malpractice,[12] it is undisputed that Beavor had previously asserted a claim for legal malpractice against Tomsheck. [AA 106-07]. In fact, the parties to the Underlying Action were aware of Beavor's dissatisfaction with Tomsheck and were further aware that Beavor had asserted a claim for legal malpractice against Tomsheck. To this point, Tomsheck's legal malpractice insurer actually attended the settlement conference for Hefetz's appeal. [AA 106; 218; 334; 346; 352; 356-57; 602-03].

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[12] *See Goodley*, 62 Cal. App. 3d at 397, 133 Cal. Rptr. at 86 ("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."). In contrast, *see Eagle Mt. City v. Parsons Kinghorn & Harris*, P.C., 408 P.3d 322, 2017 UT 31 (Ut. 2017)(Utah allows for the assignment of legal malpractice claims).

See Christison, 83 Ill. App. 3d 334, 339, 405 N.E.2d 8, 12, which is cited in *Chaffee* ("It is worth noting, in passing, that in the instant case, the bankrupt Norman Sluis **found no fault with his attorney's representation of him in the prior suit**.")(emphasis). In contrast, Beavor had already found fault with Tomsheck's handling of the post judgment issues in the Underlying Action prior to entering into the Settlement Agreement. [AA 106-07; 143-48].[13]

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[13] As Tomsheck was not counsel for Beavor until after the trial in the Underlying Action, the nexus of Beavor's legal malpractice claim against Tomsheck relates to his failure to substantively oppose the New Trial Motion and to properly seek judicial review of the same. [AA 1-7; 59; 300; 360]. Beavor had already prevailed at trial in the Underlying Action. [AA 94-97]. Tomsheck turned a win into a loss for Beavor. Furthermore, the District Court expressly stated that it would have denied the Motion for New Trial had a substantive opposition to the New Trial Motion been filed. [AA 192-93]. As to trial issues presented in the Underlying Action, no "trial within a trial" would be required nor would this require any "role reversal" by Beavor's current counsel in the instant Action since neither Mr. Johnson nor Mr. Tomsheck were involved in the underlying litigation and trial. The only issue asserted by Tomsheck was that the new trial motion was untimely. Tomsheck's malpractice arises only from his failure to substantively oppose the new trial motion and failure to file a direct appeal, since he was not Beavor's counsel in litigating the Underlying Aase and trial.

Accordingly, *Goodley's* public policy rationale is inapposite, wherein *Goodley* stated:

> However, the ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an **irresponsible client** who, because of dissatisfaction with legal services rendered and **out of resentment** and/or for **monetary gain**, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession. *Id.*, 62 Cal. App. 3d at 397-98, 133 Cal. Rptr. at 86. (emphasis).

Further, Beavor is hardly an irresponsible client acting out of resentment, as Tomsheck's errors in handling the post judgment issues in the Underlying Action caused Beavor actual damages. [AA 144; 471-72]. In *Chaffee*, this Court utilized the terms "malpractice actions" and "claims" and not "proceeds." *Chaffee*, 98 Nev. at 223, 645 P.2d at 966.

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This Court's decision to "reserve opinion" in *Chaffee*, as well as this Court's later reference in *Tower Homes*, *infra*, supports the conclusion that Nevada law **does not prohibit** the assignment of proceeds from a previously asserted legal malpractice claim, wherein the underlying client maintains control over the claim.[14]

a. No Claim Assignment

The Settlement Agreement only assigned proceeds and not the entire claim and the District Court erred in finding otherwise.[15]

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[14] *See also, Reynolds v. Tufenkjian*, 136 Nev. Adv. Rep. 19, 461 P.3d 147 (2020)("Nevada is one of several jurisdictions that prohibits the assignability of certain causes of action, regardless of how the assignment is accomplished. *See, e.g., Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982) (generally prohibiting the assignment of **unasserted legal malpractice claims** on public policy grounds) . . ."). (emphasis).

[15] *See Grand Hotel Gift Shop v. Granite St. Ins.*, 108 Nev. 811, 815, 839 P.2d 599, 602 (1992)(contract interpretation reviewed *de novo* as a question of law). However, *see infra* regarding *de facto* assignment analysis; *Davis v. Nevada Nat'l Bank*, 103 Nev. 220, 737 P.2d 503 (1987)("Each of these provisions, however, is subject to established doctrines of contractual interpretation, including: the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself, *Barringer v. Gunderson*, 81 Nev. 288, 302-03, 402 P.2d 470, 477-78 (1965); and (2) ambiguities are to be construed against the party who drafted the agreement or selected the language used, *Caldwell v. Consolidated Realty & Management Co.*, 99 Nev. 635, 638, 668 P.2d 284, 286 (1983))." (internal reference omitted).

The Settlement Agreement provided limiting language, i.e. "Assigns any recovery or proceeds to Hefetz from the above referenced actions and agrees to taken any actions necessary to ensure that any recovery or damages are paid to Hefetz pursuant to the Agreement." [AA 145] (emphasis). "Proceeds" are defined as "that which results, proceeds, or accrues from some possession or transaction." *Black's Law Dictionary* 1084 (5th Ed. 1979). Nowhere in the operative section of the Settlement Agreement [Section 4] does it provide for the assignment of Beavor's previously asserted legal malpractice claim against Tomsheck. [AA 145].

2. The *Tower Homes* Case

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 and adversaries**, William Heaton, this 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).

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It is undisputed that Beavor, as Tomsheck's client, filed the instant Action in his name after previously asserting a claim for legal malpractice against Tomsheck years prior to entering into the Settlement Agreement. [AA 1-7; 106-07]. The subject September 16, 2015 claim letter stated:

> As indicated in the **attached draft complaint**, as a **direct result of your errors**, Mr. Beavor has incurred – and continues to incur – legal fees and **still faces potential liability** on a claim which was already defeated once at trial. Had you substantively opposed Mr. Hefetz's Motion for a New Trial, Mr. Beavor never would have had to incur additional fees because **the Court would have denied Mr. Hefetz's request for a new trial and closed the case**. [AA 106] (emphasis).

Goodley's public policy rationale is not implicated nor violated based upon the facts presented in the instant Action. Beavor respectfully submits that the central tenet in *Goodley's* rationale is the concept that the underlying client's decision whether to assert a legal malpractice claim should not be influenced by issues unrelated to the attorney-client relationship.

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In the instant Action, it is undisputed that no such improper influence occurred. Based upon Tomsheck complete failure to substantively oppose the New Trial Motion, Tomsheck turned Beavor's win in the Underlying Action into a loss. Beavor was rightfully displeased with Tomsheck's legal representation long before the parties entered into the Settlement Agreement. [AA 1-7; 106-07].[16] Tomsheck himself acknowledged his errors to Beavor. [AA 188].

a. Claim vs. Proceeds

The failed purchasers in *Tower Homes* contended, among other arguments, "that they were only assigned proceeds, not the entire malpractice claim against Heaton." *Id*. In response, this Court in *Tower Homes* stated:

> In *Edward J. Achrem, Chartered v. Expressway Plaza Ltd. Partnership*, this court determined that the assignment of personal injury claims was prohibited, but the assignment of personal injury claim proceeds was allowed. 112 Nev. 737, 741, 917 P.2d 447, 449 (1996).

[16] The Settlement Agreement also provided for the execution of conflict waivers. *See also NRPC* 1.6(b)(5)(allowing disclosure of confidential information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client).

> We are not convinced that *Achrem's* reasoning applies to legal malpractice **claims**; **however**, **even if an assignment of the claim is distinguished from a right to proceeds in the legal malpractice context, the 2013 bankruptcy stipulation and order constitute an assignment of the entire claim**. In *Achrem*, this court determined that the difference between an assignment of an entire case and an assignment of proceeds was the retention of control. *Id*. **When only the proceeds are assigned, the original party maintains control over the case**. *Id*. at 740-41, 917 P.2d at 448-49. **When an entire claim is assigned, a new party gains control over the case**. *Id*. Here, the bankruptcy court gave the purchasers the right to "pursue any and all claims on behalf of . . . [d]ebtor . . . which 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**. *Id*., 132 Nev. at 635, 377 P.3d at 122-23 (emphasis).

Beavor respectfully submits that *Tower Homes* does not hold that the assignment of only proceeds from a legal malpractice claim where the underlying client maintains control over the litigation is barred under Nevada law.

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This Court's comment in *Tower Homes* that "[w]e are not convinced that *Achrem's* reasoning applies to legal malpractice **claims**" does not include the term **proceeds**. *Id*. (emphasis). Instead, this Court, in *Tower Homes*, ruled against the failed purchasers based upon a finding that the "2013 bankruptcy stipulation and order **constitute an assignment of the entire claim**." *Id*.[17]

The Settlement Agreement does not assign Beavor's legal malpractice claim to Hefetz. It only assigns the proceeds. [AA 145]. "[W]hen a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written." *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).

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[17] While *Tower Homes* was nominally brought in the name of Tower Homes, LLC, due to the unique nature of the bankruptcy proceedings, the lawsuit was actually filed by the failed purchasers of the condominium units. This Court acknowledged in *Tower Homes* that in the context of bankruptcy proceedings, such claims could be brought provided that the requirements of 11 *U.S.C.* § 1123(b)(3)(B) were met, i.e. that the representative is prosecuting the claim "on behalf of the estate." *Id.*, 132 Nev. at 634, 377 P.3d at 122. Beavor, as the only named party-plaintiff and real party in interest, was prosecuting the instant Action on his behalf, with only the "proceeds" going to Hefetz.

Under the Settlement Agreement, Hefetz lacked any ability to bring the instant Action in his own name, i.e. it did not assign to Hefetz the right to pursue Beavor's legal malpractice claim against Tomsheck in Hefetz's own name. [AA 144]. In *Achrem*, this Court stated:

> In the present case, the district court ruled that the holding in *Maxwell* applies only to a subrogation clause in an automobile insurance policy. We partially agree. *Maxwell* clearly applied to a subrogation clause, but the reasoning of *Maxwell* applies equally wherever an assignment agreement assigns to a third party the right of an injured plaintiff to recover against a tortfeasor. *See Fifield Manor v. Finston*, 54 Cal. 2d 632, 354 P.2d 1073, 1078, 7 Cal. Rptr. 377 (Cal. 1960). **Because Expressway's assignment did not assign to Expressway the right to pursue Shawn's lawsuit**, we conclude that the district court properly distinguished the case at bar from the holding in *Maxwell*. *Id*., 112 Nev. at 740-41, 917 P.2d at 449.[18]

While this Court did not find in favor of the distinction argued by the failed purchasers in *Tower Homes*, i.e. the assignment of a claim versus the assignment of proceeds, **due to the nature of the bankruptcy court stipulation and order**, these are not the facts presented in the instant Action and a full reading of *Achrem* provides further substantial support for Beavor's position herein. In *Achrem*, this Court further stated:

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[18] *See Maxwell v. Allstate Ins. Co*., 102 Nev. 502, 728 P.2d 812 (1986). *See also NRS* 41.100 regarding assignment of tort actions.

> 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.
>
> In this case, Shawn and Marcia retained control of their lawsuit against the school district without any interference from Expressway. Thus, we conclude that the public policy against assigning tort actions was not present in this case. Accordingly, we affirm the district court's ruling that Expressway's assignment was not void as against public policy. *Id*., 112 Nev. at 741, 917 P.2d at 449. (emphasis).

The District Court's failed to recognized the "meaningful distinction" presented in the instant Action as exemplified in *Achrem* when it granted the MSJ. [AA 693-98]. *See Weston v. Dowty*, 163 Mich. App. 238, 242, 414 N.W.2d 165, 167 (Mi. App. 1987)(A promise to pay money when the promisor receives it from a specified source is not an assignment; there is no present transfer).

b. Beavor Controls Litigation

Beavor maintained control over the instant Action, after only assigning the proceeds to be derived from the instant Action. [AA 144-45; 255-56]. There was no express or *de facto* assignment the claim.[19] Beavor maintains control under the Settlement Agreement and Hefetz could not in any manner bring the claim directly. [AA 144-45].

While the Settlement Agreement provides that Beavor "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," this does not equate to ceding total control over the instant Action.

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[19] While Beavor acknowledges the existence of non-Nevada cases regarding various levels of control exerted by an assignee to a legal malpractice claim that those court's found dispositive, which cases Tomsheck cited to the District Court in the MSJ, it is submitted that these cases primarily involve the ceding of total control to the assignee. *See, e.g. Weiss v. Leatherberry*, 863 So.2d 368, 372 (2003)(Weiss "had no control over the litigation"); *Botma v. Huser*, 202 Ariz. 14, 16, 39 P.3d 538, 540 (Ct. App. 2002)("Botma also agreed that Himes could file a malpractice action in Botma's name, that Himes could control the case . . . ."); *Tate v. Goins, Underkoffer, Crawford & Langdon*, 24 S.W.3d 627, 633 (Tx. App. 2000)(assignee had "the unfettered right to settle on such terms as [assignee] determines."). As provided herein, this level of total control is not presented in the instant Action.

The Settlement Agreement language merely prevents Beavor from harming his own case and acting in good faith during the prosecution of the instant Action.

Importantly, the Settlement Agreement does not, either expressly and/or impliedly, abrogate Beavor's singular role in determining whether to settle the instant Action.[20]

The additional language contained in the Settlement Agreement, among other matters, also does not reflect the total ceding of Beavor's control over the instant Action, i.e. (1) Beavor will fully cooperate; (2) Beavor agreed to prosecute his claims; and (2) will take all reasonably requested actions by counsel. [AA 144].

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[20] Beavor states in his declaration, in conformity with the language of the Settlement Agreement, that it is his decision alone to accept/reject any settlement offers. [AA 255]. *See also NRPC* 1.2(a), in pertinent part:

> Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. **A lawyer shall abide by a client's decision whether to settle a matter**. (emphasis).

The Settlement Agreement does not provide that Beavor is ceding all control over the instant Action to Hefetz.[21]

As reflected above, Beavor had already asserted a claim for legal malpractice against Tomsheck prior to entering into the Settlement Agreement, i.e. to the point of preparing a draft complaint against Tomsheck. [AA 106-7].

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[21] Beavor's declaration also provided that: (1) Beavor was the Plaintiff in the instant Action, was actively participating in the instant Action, in frequent contact with his counsel and actively consulted with his counsel regarding pleadings and litigation strategy; and (2) Although Beavor agreed to use H. Stan Johnson, Esq. as his counsel in the instant Action, Beavor maintained the legal right to use other counsel and/or replace current counsel. [AA 255-56]. *See Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 401 F. Supp. 2d 1120, 1123 (D. Nev. 2005)("The *Nevada Supreme Court* has recognized that the nature of the attorney-client relationship is such that the client has the power to discharge his attorney at any time."). Beavor's declaration does not conflict with and/or contradict the terms of the Settlement Agreement and further reflect Beavor's actions in relation to the Settlement Agreement and the instant Action. [AA 144-45].

While Beavor maintains that he holds control over the instant Action and no assignment of the claim occurred, nevertheless, the amount of control that both Beavor and Hefetz had over the instant Action is a genuine issue of disputed material fact upon which the parties disagree, and therefore, is pivotal in determining whether a *de facto* assignment of the entire claim occurred.[22] *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("[A]n appellate court is not an appropriate forum in which to resolve disputed questions of fact.").

"[P]leadings and documentary evidence should be construed in a posture which is most favorable to the party against whom the motion for summary judgment is directed." *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985).

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[22] The granting of a motion for summary judgment is appropriate when there is no dispute as to a genuine issue of material fact and the moving party is entitled to judgment as a matter of law (or summary judgment as to any particular cause of action). *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993); *Short v. Hotel Riveriera, Inc*., 79 Nev. 94, 378 P.2d 979 (1963). A court may not consider the credibility of the witnesses or weigh the evidence in considering a motion for summary judgment. *See Hidden Wells Ranch v. Strip Realty*, 83 Nev. 143, 425 P.2d 599 (1967).

B. Beavor's Legal Malpractice Claim Survives

While Beavor submits that proceeds of a previously asserted claim for legal malpractice may properly be assigned and that he maintains control over the instant Action, nevertheless, any contrary findings by this Court should not result in the extinguishment of Beavor's legal malpractice claim against Tomsheck in the instant Action.

Upon any such adverse finding by this Court, the holding in *Goodley*, in harmony with *Chaffee* and *Tower Homes*, supports the conclusion that Beavor's instant Action against Tomsheck should properly be permitted to proceed in the absence of any assignment.[23]

Beavor filed the instant Action in his name. [AA 1-7]. In such case, the instant Action should be permitted to proceed against Tomsheck.

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[23] The Settlement Agreement provided:

> 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. [AA 146].

A court should not interpret a contract so as to make its provisions meaningless. *See Phillips v. Mercer*, 94 Nev. 279, 579 P.2d 174 (1978).

Goodley is limited on its facts to whether Goodley had standing to sue following an assignment by the underlying client, Eleanor Katz. "The sole issue was whether by virtue of the assignment plaintiff has standing to bring this action for legal malpractice." *Id*., 62 Cal. App. 3d at 392, 133 Cal. Rptr. at 89. The court in *Goodley* framed the issue as follows:

> The contention merely was that **plaintiff has no standing to sue**. Accordingly, we are not concerned with the sufficiency of the affidavits but with the sufficiency of the first amended complaint to state a cause of action **in this plaintiff**, the real issue being that the cause of action for tortious conduct by defendants, even if properly alleged and proved, **cannot be asserted by him**. That question may appropriately be determined on a motion for summary judgment. *Id*., 62 Cal App. 3d at 392, 133 Cal Rptr. at 84. (emphasis)

As Beavor is the plaintiff in the instant Action, after having retained Tomsheck as his counsel in the Underlying Action, there is no issue of standing presented in the instant Action.[24]

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[24] *Goodley* provides that with regard to the trial court's ruling on the motion for summary judgment, "[j]udgment was entered for defendants against Plaintiff [Goodley] on the order granting the motion." *Id.*, 62 Cal App. 3d at 391, 133 Cal Rptr. at 83. The underlying client, Ms. Katz, was not a party to the lawsuit. No judgment was rendered against Ms. Katz. This distinction, i.e. the 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 continues to have a valid claim for legal malpractice against Tomsheck in the instant Action.

Beavor should properly be entitled to maintain his claim for legal malpractice against Tomsheck, in the absence of the assignment. If logically and legally permissible, a contract should be construed to give effect to valid contractual relations rather than rendering an agreement invalid or rendering performance impossible or illegal. *See Mohr Park Manor v. Mohr*, 83 Nev. 107, 112, 424 P.2d 101, 104 (1967).

Dismissing Beavor's instant legal malpractice claim, even after severance, would unnecessarily penalize Beavor and reward Tomsheck.[25]

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[25] Other courts would not deny an underlying client's right to assert a legal malpractice claim following a voided assignment. *See Weston*, 163 Mich. at 243, 414 N.W.2d at 167 ("We note that, even if there had been an invalid assignment, this would not warrant dismissal of the lawsuit. Instead, the assignment would be void, but the underlying action would survive."); *Kommavongsa v. Haskell*, 67 P.3d 1068 (Wa. 2003)(allowing the underlying client of attorneys to substitute into the legal malpractice action); *Mallios v. Baker*, 11 S.W.3d 157, 159 (Tex. 2000)("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."); *Tate,* 24 S.W.3d at 634 (applying *Mallios*); *Weiss, supra,* 863 So. 2d at 373 ("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."); *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.").

While Beavor respectfully submits that he has properly assigned only the proceeds of his legal malpractice claim, he is still suing in his name for legal malpractice alleged to have been committed by Tomsheck in the Underlying Action.[26] As offending provision of the Settlement Agreement could be severed, thereby leaving intact the remainder of the Settlement Agreement.[27] *See Mack v. Bank of Lansing,* 396 F. Supp. 935, 940 (W.D. Mich. 1975)("The further argument of the defendant that the debtor in possession, having assigned his claim, may not now maintain this action is not persuasive. An invalid assignment does not operate so as to deprive the assignor from seeking recovery upon the claim in question.").

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[26] *See Botma*, 202 Ariz at 18, 39 P.3d at 542, "It is one thing to assert than an invalidly assigned claim is an unassigned claim in the eyes of the law and that the assignee cannot pursue the action against a third party or require performance by a reluctant assignor. It is another thing to assert that the assignor forfeits the claim by attempting to assign it." While Beavor asserts that the subject assignment presented in the instant Action, i.e. for only the proceeds, is a valid assignment under Nevada law, nevertheless, upon a severance of the assignment provisions, it would restore Beavor's full entitlement to all proceeds from the instant Action.

[27] *See e.g., United States v. Kim*, 806 F.3d 1161, 1175 (9th Cir. 2015)(regarding federal Anti-Assignment Act: "However, voiding the assignment is the extent of the Act's reach; applying the Act 'leaves the claim where it was before the purported assignment.'")).

The public policy reasoning and arguments presented in *Goodley* and its progeny are harmonized in the present Action, as Beavor had made the determination to assert a legal malpractice claim against Tomsheck well before entering into the Settlement Agreement. [AA 106-07].

Assuming the assignment was deemed invalid, which Beavor disputes, after severance, there would be no issue as to Beavor's control over the instant Action and Beavor would be entitled to recover any proceeds obtained through settlement and/or judgment.[28]

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[28] *See Community First State Bank v. Olsen*, 587 N.W.2d 364, 368 (Neb. 1998)("In the present case, it is clear that suit was brought in the name of CFSB, the real party in interest. CFSB allowed this suit in its name under the erroneous legal impression that the assignment to Abbott was valid. Although the affidavits of Knutson and Foss seem to indicate that CFSB has no interest at all in suing Olsen and the Firm, the phrase in these affidavits 'aside from this litigation' creates a question as to whether CFSB has an interest in pursuing the present litigation. Because of this question as to CFSB's intention to proceed with the lawsuit, we reverse the trial court's dismissal of this action and remand the cause for such further action as CFSB may wish to take."); *Colonial Navigation Co. v. United States*, 181 F. Supp. 237, 240 (Ct. Cl. 1960)(an invalid attempted assignment does not forfeit the claim; it leaves it as it was before the purported assignment).

Allowing the extinguishment of Beavor's legal malpractice claims would constitute a manifest error of law and create a manifest injustice to Beavor.[29]

CONCLUSION/PRAYER FOR RELIEF

Based upon the above arguments, it is respectfully requested that this Court vacate and reverse the Order granting the MSJ, and thereafter, remand the instant Action for trial on the merits in the District Court.

Respectfully submitted.

DATED this 29th day of July 2021

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[29] *See Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 744 S.E.2d 130, 134 (N.C. App. 2013)("Thus Carter's attempted assignment was invalid, and those tort claims remained with Carter. Moreover, it should be noted that Carter's right to assert this claim vested **prior to the attempted assignment**.")("Therefore, the trial court erred in holding that Carter no longer had standing to assert the malpractice claims as they remained with him, and we reverse and remand the 2010 Order on this issue.")) (emphasis).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this *Opening Brief* complies with the formatting requirements of *NRAP* 32(a)(4), the typeface requirements of *NRAP* 32(a)(5) and the type style requirements of *NRAP* 32(a)(6) because:

[x] This *Opening Brief* has been prepared in a proportionally spaced typeface using Word Perfect - Version X5 in 14 Point Times New Roman.

2. I further certify that this *Opening Brief* complies with the page or type-volume limitations of *NRAP* 32(a)(7) because it is less than 30 pages in length and/or excluding the parts of the brief exempted by *NRAP* 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains **8,359** words; and

3. Finally, I hereby certify that I have read this *Opening Brief* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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I further certify that this *Opening Brief* complies with all applicable *Nevada Rules of Appellate Procedure*, including *NRAP* 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the *Nevada Rules of Appellate Procedure*.

Respectfully submitted.

DATED this 29th day of July 2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July 2021, the above-referenced **APPELLANT'S OPENING BRIEF AND APPENDIX**, was filed electronically with the Clerk of the *Nevada Supreme Court* and served electronically through the Court's electronic service to the following persons:

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