IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BEAVOR, an individual,

Appellant,

v.

JOSHUA TOMSHECK, an individual,

Respondent.

Supreme Court No. 81964
District Court Case No. A-19-793405-C

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons or entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning ten (10) percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this Court:

   Olson, Cannon, Gormley, Angulo & Stoberski

   Olson Cannon Gormley & Stoberski

3. If litigant is using a pseudonym, the litigant's true name: None.

DATED this 13th day of September, 2021.

OLSON CANNON GORMLEY & STOBERSKI

/s/ Max E. Corrick, II
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JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider the appeal from the underlying summary judgment because Appellant Christopher Beavor (hereinafter "Beavor") filed an appeal contesting the district court's order granting summary judgment to Respondent Joshua Tomsheck (hereinafter "Tomsheck"). *See* NRAP 3A(b)(1).

ROUTING STATEMENT

Tomsheck disagrees with Beavor's Routing Statement. This case is not presumptively assigned to the Supreme Court of Nevada because it does not involve as a principal issue a question of first impression. *See* NRAP 17(a)(11). This case also does not involve a matter of statewide public importance, there is no inconsistency in any published decisions of the Court of Appeals or of the Supreme Court, and there is no conflict between published decisions of the two courts. *See* NRAP 17(a)(12) .

Rather, this case is presumptively assigned to the Court of Appeals because it involves the appeal of a judgment, exclusive of interest, attorneys' fees, and costs, of $250,000 or less in a tort case. *See* NRAP 17(b)(5) .

ISSUE PRESENTED

Did the district court correctly interpret Nevada law in concluding that Beavor impermissibly and irrevocably assigned his unfiled legal malpractice lawsuit against Tomsheck to Beavor's adversary in the underlying matter, Yacov Hefetz, thereby entitling Tomsheck to summary judgment pursuant to controlling Nevada case law? *See Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016); *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982).

STATEMENT OF THE CASE

This is an appeal of the district court's order granting summary judgment to Tomsheck after Beavor sued him for professional negligence and breach of fiduciary duty / breach of duty of loyalty arising out of Tomsheck's representation of Beavor in the underlying *Hefetz v. Beavor* matter (Case No. A645353). I AA 1-7.[1] Specifically, the district court found Beavor impermissibly and irrevocably assigned substantial, if not complete, control and all the potential proceeds from his unfiled lawsuit to Beavor's adversary, Hefetz. III AA 585-594.

The district court correctly interpreted and applied Nevada law in determining, under the facts of this case, Beavor's irrevocable assignment to his adversary barred him from prosecuting the case against Tomsheck, and that allowing Beavor to do so 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." III AA 593.

The judgment below should be affirmed.

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[1] Beavor did not confer or attempt to reach an agreement with Tomsheck concerning a possible joint appendix. *See* NRAP 30(a). As a result, the Appellant's Appendix contains various documents on "matters not essential to the decision of the issues presented by the appeal" which should have been omitted. *See* NRAP 30(b). These include the following: I AA 170-214; II AA 257-263; II AA 264-448; II AA 449-493; III AA 545-551; III AA 558-574; III AA 575-580; and III AA 660-667.

STATEMENT OF RELEVANT FACTS

This matter involves an underlying claim for legal malpractice. Beavor retained Mr. Tomsheck on or about June 19, 2013 to provide post-trial legal services related to a civil trial between Beavor and Hefetz in *Hefetz v. Beavor*, Eighth Judicial District Court Case No. 645353. I AA 38. Marc Saggese, Esq. was Beavor's trial counsel and Tomsheck was not hired until after the conclusion of that trial for the limited purpose of filing and responding to post-trial motions. I AA 38. Hefetz was represented by Stan Johnson, Esq. in the post-trial motion practice. I AA 99-102. Tomsheck then withdrew as Beavor's counsel on November 5, 2014. I AA 39.

After Tomsheck withdrew, this Court issued a remittitur in Nevada Supreme Court Case No. 68483 c/w 68843 (the *Hefetz adv. Beavor* Appeal). I AA 40. Hefetz was represented by Stan Johnson, Esq. for the Appeal. I AA 114. Stan Johnson, Esq. remained as Hefetz's counsel of record upon the remand until the *Hefetz v. Beavor* case was closed by the district court. II AA 238-247.

On April 23, 2019, Beavor filed a legal malpractice lawsuit against Tomsheck arising out of Tomsheck's legal services. I AA 1-7. He was represented by Stan Johnson, Esq. at the time. I AA 1.

Discovery commenced in the case and to substantiate his damages claim Beavor disclosed the "Confidential Settlement and Mutual Release Agreement" between himself and Hefetz ("the Settlement"). I AA 143-148. The Settlement was sworn and notarized by both Beavor and Hefetz, and finalized on February 15, 2019, over two months before Beavor filed his lawsuit against Tomsheck. I AA 148. At the time, Hefetz remained represented by Stan Johnson, Esq. I AA 143.

Pursuant to the explicit terms of the sworn Agreement, Hefetz (Beavor's prior adversary) was given near, if not total, control over Beavor's unfiled lawsuit. I AA 40; I AA 144-145. Hefetz: (1) required Beavor to execute a conflict waiver and discard his own attorney -- in favor of Stan Johnson, Esq. -- to prosecute the unfiled lawsuit; (2) retained full responsibility for all invoices for attorneys fees and costs incurred in the yet to be filed lawsuit; (3) agreed to indemnify Beavor for any fees and costs that might be incurred by Beavor in prospective lawsuit; (4) was irrevocably assigned the right to all of the proceeds which might be gained from the unfiled lawsuit; (5) required Beavor to "represent[] and warrant[] that he will fully pursue and cooperate in the prosecution" of the unfiled lawsuit against Tomsheck for Hefetz's sole benefit; (6) required Beavor to "do nothing intentional to limit or harm the value of any recovery related to" the unfiled lawsuit; (7) required Beavor to waive attorney-client privilege in order to "provide Hefetz, through his counsel [Stan Johnson, Esq.], copies of any documents or

correspondence that Beavor believes relate to" the legal malpractice claim against Tomsheck; and (8) required Beavor to "fully cooperate with Hefetz and his counsel [Stan Johnson, Esq.] regarding any claims initiated on behalf of Beavor" relative to Tomsheck. I AA 144-145.

Based, in part, upon Beavor's impermissible assignment of his unfiled legal malpractice lawsuit to his former adversary, Tomsheck filed a motion for summary judgment on March 9, 2020. I AA 33-142.[2] Over Beavor's opposition, notice of entry of order granting Tomsheck's motion was entered on July 10, 2020. III AA 582-599. The district court's order addressed each of the arguments raised by Beavor's opposition and at oral argument and found them to have been "effectively defeated by the case law and arguments advanced in Tomsheck's Reply Brief and oral argument." III AA 592.

Beavor filed a motion to alter or amend pursuant to NRCP 52(b) and 59(e) on August 7, 2020. III AA 600-615. Tomsheck opposed Beavor's motion, and the district court denied Beavor's post-judgment motion by way of minute order. III

[2] Tomsheck presented an alternative basis for summary judgment as well, the untimeliness of Beavor's lawsuit.I AA 50-52. The district court did not reach that issue in ruling upon Tomsheck's motion, and it is not before this Court now. III AA 582-599.

AA 670-680. Beavor filed his notice of appeal on October 16, 2020. III AA 681-683.

STANDARD OF REVIEW

An order granting summary judgment is reviewed by this Court using a *de novo* standard of review. *Pressler v. City of Reno*, 118 Nev. 506, 50 P.3d 1096 (2002).

ARGUMENT

"Cui bono fuisset?"[3] Or, "Who stands to benefit?" That question casts a as large a shadow over Beavor's arguments to unsettle Nevada public policy and law as Beavor's former adversary does over this appeal. On the one hand, Beavor asks this Court to create unprincipled, dangerous exceptions to Nevada's general rule prohibiting the assignment of legal malpractice claims. On the other, Beavor asks this Court to do so not for his own benefit, nor Nevadans at large, but for his former adversary. The only person who stands to gain anything from accepting Beavor's arguments to reverse the district court decision, under the facts of this

[3] *See* Karl Felix Halm, John Eyton Bickersteth Mayor (ed.), Cicero's Second Philippic, p. 87 (London, 1861).

case, is a non-party to this litigation whom Tomsheck never represented: Beavor's former adversary, Yacov Hefetz.[4]

This Court should affirm the district court's ruling below. The district court correctly granted Tomsheck's motion for summary judgment considering well-established Nevada precedent, in line with a multitude of other jurisdictions, which prohibits the assignment of legal malpractice claims, especially those irrevocably assigned to a former adversary. III AA 592-593.

The undisputed facts and evidence properly placed before the district court, unequivocal Nevada law, and the strong public policy arguments which have been recognized and adopted in Nevada and across the country, compelled the district court's conclusion that Beavor had irrevocably assigned his unfiled legal malpractice lawsuit to his former adversary. III AA 592-593. The assignment of a legal malpractice claim is, and has been, impermissible in Nevada since 1982 and that prohibition required summary judgment be entered against Beavor. *See Chaffee v. Smith,* 98 Nev. 222, 645 P.2d 966 (1982)*; and see Tower Homes, LLC v. Heaton,* 132 Nev. 628, 377 P.3d 118 (2016). Furthermore, the district court

[4] Beavor spends considerable time attempting to paint the legal malpractice lawsuit against Tomsheck as a *fait accompli*. Tomsheck denied the allegations against him in the complaint. I AA 10-17. Just as the district court noted Beavor's arguments in this regard were mere rhetoric and not addressing the legal issue before the court, this Court should disregard Beavor's *ad hominem* attacks and address the legal question before it. III AA 591-592.

correctly determined Beavor had no good faith basis to claw back what he had irrevocably given to his former adversary. III AA 593.

This Court should decline Beavor's invitation to erode and overrule *Chaffee* and *Tower Homes, LLC*, particularly under the facts of this case. This Court should continue to provide clear guidance that any assignment of legal malpractice claims, which includes the proceeds, is prohibited in Nevada. *See Reynolds v. Tufenkjian*, 136 Nev. 145, 150-51, 461 P.3d 147, 148-49 (2020) (holding that "Nevada is one of several jurisdictions that prohibits the assignability of certain causes of action, regardless of how the assignment is accomplished", and citing *Chaffee* as "generally prohibiting the assignment of unasserted legal malpractice claims on public policy grounds"). This Court should reiterate that attempts by clever litigants to commoditize their legal malpractice claims and undermine the fiduciary relationship between attorney and client by selling their legal malpractice lawsuits to their adversaries are appropriately met with summary judgment.

A. Beavor's primary arguments to erode Nevada's strong public policy against assignment of legal malpractice claims were neither raised below nor are they principled

Beavor starts his attack on Nevada law and the attorney-client relationship

by suggesting that a previously asserted legal malpractice action is assignable under Nevada law while accepting that *Chaffee* squarely prohibits those which were not. Beavor misses his target in his effort to undermine Nevada law.

First, this Court should not lose sight of the irony of Beavor's arguments which rely upon his "asserted" v "unasserted" distinction – the irony being that Beavor never actually *asserted* those arguments in the district court below. They appear in no briefing nor did Beavor raise it at oral argument. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.3d 981, 973 (1981). Therefore, all Beavor's arguments which rely upon his casual definition of "asserted" cannot be considered by this Court.

Second, even if Beavor had raised the point below, it fails to move the needle. Under Beavor's strained interpretation, *Chaffee* should be read to mean that if someone merely gives voice to the idea of bringing a legal malpractice lawsuit a loophole has been created which allows for the assignment of that lawsuit later. Stated another way, Beavor's view of Nevada law is that a party does not even need to file a lawsuit to enforce a legal right; the mere threat that a lawsuit might be filed in the future is enough to overcome the general prohibition against assignment.

Setting aside the fact that *Tower Homes* involved a "previously asserted" legal malpractice action which this Court held had been impermissibly assigned and was subject to summary judgment and which immediately defeats Beavor's argument, *see Tower Homes*, 132 Nev. at 631-32, 377 P.3d at 120-21, Beavor's interpretation surely cannot be Nevada law. Not only is Beavor's proposition entirely unprincipled and contrary to the public policy behind Nevada's general prohibition, but it also ignores what the *Chaffee* Court was saying when it reserved "opinion on the question as to whether previously asserted legal malpractice actions are transferable." *Chaffee*, 98 Nev. at 224, 645 P.2d at 966. Aside from its obvious context -- referring to actions for legal malpractice which have already been initiated -- "asserted" modifies "legal malpractice actions", which refers to "one form of action – the civil action" which "is commenced by filing a complaint with the court." *See* NRCP 2, *One Form of Action*; *and see* NRCP 3, *Commencing an Action*.[5] Whispering a thought, attending a meeting, speaking on a call, or writing a letter, does not mean you have asserted an actionable legal malpractice claim. And *Chaffee* cannot not mean that if you talk about a legal malpractice

[5] In the 2019 Advisory Committee Notes to Rule 3, it states that a "complaint" includes a petition or other document that initiates a civil action. A demand letter, email, or a conversation does not initiate a civil action.

lawsuit before filing it you still get to assign it to your adversary.[6] That would be an absurd interpretation in service to chaos over clarity.

B. The district court correctly concluded Nevada law, consistent with the majority of jurisdictions nationwide, does not allow assignment of unfiled legal malpractice lawsuits, especially to a former adversary

Since at least 1982, Nevada courts have consistently adhered to the maxim that an unasserted legal malpractice lawsuit cannot be assigned and is subject to summary judgment if it is assigned. "As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment or by levy or execution of sale, but which was never pursued by the original client." *Chaffee*, 98 Nev. at 222, 645 P.2d at 966; *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016); *Reynolds v. Tufenkjian*, 136 Nev. 145, 150-51, 461 P.3d 147, 148-49 (2020). Among the public policy reasons for this prohibition is that "[t]he decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Id*.

[6] Beavor's suggestion that an insurance adjuster's voluntary telephonic attendance at Beavor's settlement conference with his adversary is somehow meaningful is puzzling. What is relevant is that Tomsheck was not a party to any litigation when Beavor and Hefetz were plotting – with the aid of their shared attorney -- to violate Nevada law.

More recently, this Court in *Tower Homes* echoed the *Chaffee* Court's public policy arguments, adopted from the seminal case of *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976) and expanded upon them by stating "[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. 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." *Tower Homes*, 132 Nev. at 635, 377 P.3d at 123, *quoting Goodley*, 133 Cal. Rptr. at 87.[7]

[7] Two Justices currently sitting on this Court were involved in the *Tower Homes* decision and its reliance upon *Goodley*. Justice Hardesty authored the opinion, and Justice Pickering concurred. Of note, the "*Goodley* principle" has been acknowledged nationwide. The principle continues:

> "The assignment of such claims could relegate the legal malpractice action to the marketplace 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

Nothing has changed in Nevada jurisprudence on this topic since *Tower Homes*. In fact, as noted above, this Court reiterated the general prohibition in *Reynolds* last year.[8] This is in concert with the vast majority of other jurisdictions which have followed *Goodley* and prohibit the assignment and prosecution of legal malpractice claims in various contexts. *E.g.*, *Gray v. Oliver*, 943 N.W.2d 617, 623-24 (Iowa 2020) (canvassing cases and the "surfeit of reasons"[9] why "the vast

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> champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client."

Id. at 87. While Beavor suggests *Goodley* stands for different, narrower propositions, that is akin to saying *Hamlet* is a play about a king dying in Denmark.

[8] And in the context of whether Nevada law might recognize a claim for equitable subrogation, three Justices currently sitting on this Court recently endorsed the prohibition against assigning legal malpractice claims as vital and robust. *See Olson, Cannon, Gormley, Angulo & Stoberski v. Eighth Judicial District Court*, 488 P.3d 572, 2021 WL 2328474 *2-3 (June 4, 2021) (JJ. Silver, Parraguirre, and Herndon concurring in part and dissenting in part) (unpublished disposition) (*citing Goodley* and stating "[t]he importance of protecting the attorney-client relationship is a paramount public policy concern supporting the prohibition of the assignment of legal malpractice claims.").

[9] "(1) Assignment divests the client of the decision to sue; (2) assignment imperils the sanctity of the attorney–client relationship; (3) assignment erodes the attorney–client privilege; (4) assignment compromises zealous advocacy and the duty of loyalty; (5) assignment degrades the legal profession and the public's confidence in the court system by sanctioning an abrupt and shameless shifting of positions; (6)

majority of other jurisdictions have followed *Goodley*" and prohibit assignments regardless of whether they are voluntary or involuntary); *Skipper v. ACE Prop. & Cas. Ins.*, 413 S.C. 33, 775 S.E.2d 37, 37 (2015) (stating the majority rule is to prohibit assignment); 6 Am. Jur. 2d Assignments § 57, at 197 & n.3 (2018) (stating "[m]ost jurisdictions have held that legal malpractice claims are nonassignable" and citing cases); *Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261 (Wash. Ct. App. 2013)[10]; *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); *Alcman Servs. Corp. v. Bullock*, 925 F. Supp. 252, 258 (D.N.J. 1996) (*quoting Chaffee*); *Coffey v. Jefferson County Bd. of Educ.*, 756 S.W.2d 155 (Ky.App.1988) (*citing Goodley*).

Moreover, where the assignment is made to a former adversary – just like in this case – it appears no jurisdiction other than Utah would ever allow it. *See, e.g.*, *Picadilly Inc. v. Raikos*, 582 N.E.2d 338, 344-45 (Ind. 1991); *Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005); *Kommavongsa v. Haskell*, 149 Wash.2d 288, 67 P.3d 1068, 1072 (2003) ("In sum, we can see no advantage flowing to the

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assignment restricts access to legal services by the poor or indigent; and (7) assignment creates a commercial market for legal malpractice claims." *Gray*, 943 N.W.2d at 624.

[10] "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*.

legal system or the public that it serves from permitting assignments of malpractice claims to adversaries in the same litigation that gave rise to the alleged malpractice."); *Skipper v. ACE Prop. & Cas. Ins.,* 413 S.C. 33, 775 S.E.2d 37 (2015); *Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC,* 675 F. Supp. 2d 75, 80 (D.D.C. 2009) (stating "the majority of courts have found that the costs to society outweigh the benefits and that overriding public policy concerns render … assignments [to former adversaries] invalid"); *Tate v. Goins, Underkoffer, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994); *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 party in underlying action); *Jackson v. Rogers & Wells*, 210 Cal.App.3d 336, 258 Cal. Rptr. 454, 461 (1989) (noting that the element of trust between an attorney and client would "be impaired if the attorney perceives a future threat of the client's assignment to a stranger or adversary of a legal malpractice claim"); *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); *Molina v. Faust Goetz Schenker & Blee, LLP*, 230 F. Supp. 3d. 279, 287–89

(S.D.N.Y. 2017) (stating there is a "recurring problem in cases where legal malpractice claims are assigned to former litigation adversaries ... that often leads to the application of judicial estoppel…"); *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.").[11] This Court should continue to follow the majority approach and not allow assignment of legal malpractice claims, especially to former adversaries.

C. The district court correctly identified that assigning proceeds from a legal malpractice claim is an impermissible attempt to circumvent the general prohibition against assignment

This Court has previously addressed and rejected the attempt to expand *Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 737, 917 P.2d 447 (1996) and graft it onto legal malpractice cases. In *Tower Homes*, the very

[11] Utah appears to condone assignment to a former adversary except in carefully select circumstances. *See Eagle Mountain City v. Parsons Kinghorn & Harris, P.C.*, 408 P.3d 322 (Utah 2017). However, *Goodley* and its progeny have long been the guiding stars in Nevada. They should continue to remain as such.

same arguments Beavor offers here were found to be unconvincing, and this Court should reject Beavor's overtures again because they ignore the fundamental difference between legal malpractice claims and garden variety personal injury torts. This Court stated five years ago that it is "not convinced that *Achrem*'s reasoning applies to legal malpractice claims." *Tower Homes*, 132 Nev. at 635, 377 P.3d at 122. This Court should reaffirm that conclusion under the facts of this case.[12] As this Court embraced the *Goodley* principle forty (40) years ago, this Court should reaffirm it now. *Id*. (*quoting Goodley*).

The reasons are evident. *Tower Homes* provides a bright line test. It guides Nevadans that clever lawyers and litigants cannot circumvent Nevada public policy, or the rationale of *Goodley*, by fabricating an end run around the general prohibition against assigning legal malpractice claims by trying to cabin the

[12] Beavor relies upon a lone opinion from one of the courts of appeals in Michigan to overrule *Tower Homes* and apply *Achrem* to legal malpractice cases. That decision, *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W. 2d 165 (Mich. Ct. App. 1987), 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. 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 *Weston*, especially considering *Chaffee* and *Tower Homes*.

assignment to merely proceeds. It is a distinction without a difference, as reasonable minds would agree. 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 v. Rosenblum and Filan, LLC, 276 Conn. 257, 285, 885 A.2d 163, 178 (2005) (emphasis added).

This sentiment has been echoed in other jurisdictions. For example, *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538 (Ariz. Ct. Ap. 2002), the Arizona Court of Appeals rejected the same efforts employed by Beavor and Hefetz 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. The *Botma* Court 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:

> "…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."

Id. (emphasis added).

Both *Gurski* and *Botma* are instructive here, and the district court was correct to rely upon their rationale for not allowing a purported assignment of only proceeds to circumvent the public policy barring assignment of legal malpractice claims. III AA 592. Beavor readily admits that he assigned, at a minimum, all the proceeds from his unfiled lawsuit to his former adversary, Hefetz. That being the case, the district court correctly intuited that Hefetz – the recipient of all the potential proceeds – was the ***ultimate beneficiary*** to Beavor's claims and no meaningful distinction exists between having been given the legal malpractice claim and the potential proceeds from it.

Rather than upend Nevada law, this Court should uphold the district court's determination that "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." III AA 592. Beavor offers no substance to why forty (40) years of Nevada law prohibiting the assignment of legal malpractice claims, whether in whole or in part, under the facts of this case, should be swept away. This Court should affirm.

D. The district court correctly identified Hefetz had substantial, if not complete, control over Beavor's legal malpractice claim, that this was not just an assignment of proceeds, and it properly applied *Aldabe v. Adams* in not allowing Beavor to fabricate an issue of fact with his Declaration while a summary judgment motion was pending

Beavor's Settlement with Hefetz gave Beavor's former adversary essentially total control over the legal malpractice lawsuit Beavor had yet to file against Tomsheck. The district court wisely saw the arrangement for what it was: among other things, an attempt to shuttle money from Tomsheck to Hefetz where Hefetz had no claim against Tomsheck at all. That object – the money – coupled with all the other restrictions Hefetz and Beavor agreed to saddle Beavor with – made a mockery of Nevada law and public policy which compelled summary judgment against Beavor.

Although this was thoroughly fleshed out in Tomsheck's reply brief below, III AA 500-504, and need not be reiterated here, the record below makes clear that as part of their conspiracy the district court acknowledged that Beavor and Hefetz propped Beavor up as a mere figurehead plaintiff in a lawsuit which had not been filed. I AA 143. To be sure, Beavor and Hefetz colluded to protect Beavor from any exposure in the lawsuit, making Hefetz the sole beneficiary of what might be recovered in the to-be-filed lawsuit. I AA 143-144. Beavor and Hefetz agreed that Beavor would do nothing to impact how much money would be coming Hefetz's

way at the end of the case – which necessarily included not settling the case for less than what Hefetz wanted. I AA 143.

In sum, Beavor and Hefetz conspired to accomplish what Nevada law prohibited. The district court rooted out Beavor and Hefetz's plan and correctly determined that his Settlement gave Hefetz substantial, if not total, control over the litigation. III AA 592. This was no mere assignment of proceeds. It was something far more, and it could not be argued away.

Indeed, the district court correctly accepted Tomsheck's arguments below that Beavor's declaration – upon which he continues to rely – was submitted in violation of decades-old Nevada precedent which holds 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).

Here, Tomsheck's motion for summary judgment, which brought Beavor's

and Hefetz's conspiracy to light, was filed on March 9, 2020. I AA 33-142. The unambiguous terms of their sworn Settlement, along with the terms' significance, were laid before the district court. The degree of Hefetz's control over Beavor's yet-to-be-filed lawsuit was overwhelming, essentially eclipsing all interest and control Beavor held.

With Tomsheck's summary judgment motion pending, Beavor crafted his declaration and submitted it on March 27, 2020. II AA 255-256. Therein, Beavor attempted to distance, dispute, and re-contextualize the clear terms of the Settlement to overcome summary judgment.[13] The Settlement terms which did not refer to Hefetz being the sole and ultimate monetary beneficiary of Beavor's to-be-filed lawsuit evidenced the degree of control Hefetz was given over the litigation – making their agreement, at a minimum, a *de facto* assignment.[14]

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[13] Notably, Beavor never offered any declaration from Hefetz – the person ultimately affected by Beavor's arguments -- to support Beavor's interpretation of the Settlement below.

[14] The term "*de facto*" in the context of this case, and the case law which applies to it, has dual meaning. First, Beavor concedes that he assigned the proceeds, which the Settlement explicitly states that Beavor "irrevocably assigns" them. I AA 145. There is nothing "*de facto*" about that. The Settlement is an express assignment in that regard. The other form of "*de facto*" assignment has to do with looking past the explicit language of the Settlement to see if there are the hallmarks of control which would turn an agreement which does not use the term "assign" or "assignment" into one that should be construed as such. Here, the district court was correct in noting that under the totality of the circumstances, whether the Settlement is deemed an express assignment or a *de facto* one does not change the

The district court correctly interpreted that *Aldabe* forbade Beavor's attempts to fabricate a genuine issue of material fact, and the district court gave Beavor's declaration its deserved weight.[15] It was not proper, and it was most certainly contradicted by the Settlement and Tomsheck's arguments to the district court below.

Put plainly, the district court recognized that a party who has nothing to gain or lose from litigation, and who is forced to do his former adversary's bidding in the process, has no substantial control over the litigation at all. And it carries over to this appeal. Here, the only person who stands to benefit from a reversal of the district court's decision is a man who is not a party to this case, was never represented by Tomsheck, and who was Beavor's adversary in the underlying matters below. Beavor and Hefetz installed Beavor as a figurehead and impermissibly sought to avoid Nevada's general prohibition against assigning legal malpractice claims. The district court saw Beavor's and Hefetz's conduct and Settlement for what it is: a sham and affront to Nevada law and the attorney-client relationship. This Court should arrive at the same result.

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result because both violate Nevada public policy and the rationale behind prohibiting assignment of legal malpractice claims. III AA 592-593.

[15] For reasons similar to the inadmissibility of Beavor's declaration under Rule 56, Tomsheck also argued Beavor's declaration was inadmissible under the parol evidence rule. The same result would be reached under either framework.

E. The district court correctly determined Beavor had no basis to "claw back" that which he had completely and irrevocably given to Hefetz, and that there is no basis under Nevada law to allow Beavor another bite at the apple

Caught with his hand in the proverbial cookie jar, Beavor has argued he should be given another opportunity to bring his claims against Tomsheck. Each of the three main points Beavor relies upon for such a perverse reversal of fortune is contrary to the terms of the Settlement and Nevada public policy which prohibits assignment of legal malpractice cases.

First, the district court aptly noted that in Beavor's Settlement he irrevocably assigned all the proceeds to his former adversary, a non-party, and therefore had nothing to claw back for himself. III AA 593. While there are other jurisdictions which *might* allow for such claw back (*e.g.*, Florida, Michigan, and Kentucky) – particularly where a certain percentage of proceeds is retained by the figurehead – Nevada is not one of those jurisdictions and Beavor's Settlement left nothing on the bone for Beavor. As noted above, however, the calculus changes when a former adversary is involved such that it appears only one jurisdiction *might* allow

it (Utah). Beavor cites to no principled reason why Nevada should change course to reward his conduct now.[16]

Second, this Court has rejected Beavor's "do over" argument and it should do so again. In *Tower Homes*, this Court 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 "do over" argument when it stated:

> 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. In the context of this case, Beavor still offers no case law nor principled reason why this Court's rationale in *Tower Homes* should apply any differently here, particularly when there is nothing which would prevent Beavor from still doing his former adversary's bidding and giving him any proceeds in the future. Moreover, there is no need to re-write the

[16] Beavor's suggestion that Tomsheck would be rewarded if this Court does not overturn *Chaffee* and *Tower Homes* is illogical. Tomsheck denied the allegations against him. I AA 10-17. That was the state of play when the district court granted summary judgment and noted the irrelevancy of Beavor's allegations against Tomsheck. III AA 591-592.

Settlement as there is no live dispute between Beavor and Hefetz which is before this Court.

Third, Beavor's lamentations that he has been stripped of his "standing" to prosecute his own claim against Tomsheck ring hollow. Beavor's predicament is self-inflicted, and yet he wishes to be rewarded for having conspired with his former adversary to harm the attorney client relationship. While there may be other jurisdictions which *might* try to find a way to turn a blind eye to Beavor's and Hefetz's assault on the attorney-client relationship and reward Beavor (*e.g.*, Alaska), under the circumstances of this case the far better reasoned result is to follow the collective rationale of *Chaffee, Tower Homes, Goodley, Gurski, Edens Tech, LLC, Picadilly, Wagener, Zuniga, Kommavongsa, Skipper, Tate, Weiss, Otis, Thompson, et al.* None of these jurisdictions have provided do overs after a party had irrevocably assigned his claim, especially to his former adversary. None would reward Beavor and Hefetz. Nevada has never allowed it, and we should not start now.

F. Beavor's remaining arguments about severability and interpreting his Settlement with Hefetz have nothing to do with the district court's decision to grant summary judgment to Tomsheck; instead, those issues remain for Beavor and Hefetz and are not ripe for review

The remainder of Beavor's arguments rest upon how the district court's decision may have impacted his contractual relationship with his former adversary. That was neither before the district court nor relevant to the legal issue created by Beavor's assignment of his legal malpractice claim to Hefetz. In fact, the enforceability of the Settlement *vis a vis* Beavor and Hefetz is not properly before this Court. Future litigation between them may bring that issue to the surface, but it is not relevant now. The district court did not need to consider any enforceability issue, and this Court need not entertain what rights Beavor and Hefetz retain. The decision below should stand.

CONCLUSION

Nothing makes this case so exceptional that the general prohibition of assigning legal malpractice claims should not apply. In fact, the circumstances are such that enforcing the general rule is all the more prudent. The district court correctly interpreted and applied Nevada law in granting Tomsheck's motion for summary judgment under the admissible facts and the circumstances presented below. Beavor impermissibly and irrevocably assigned his unfiled legal malpractice claim to his former adversary, a man whom Tomsheck never represented. Therein, Beavor permanently gave away any rights to any proceeds to

his speculative lawsuit against Tomsheck. Beavor also gave essentially total control over the litigation to Hefetz. Beavor and Hefetz tried to circumvent Nevada public policy in service to benefitting Hefetz, alone. No other conclusion could be reached.

The district court's decision that Beavor's assignment barred him from prosecuting the lawsuit against Tomsheck, and the decision that precluded Beavor from clawing back that which he had given away – in strict violation of Nevada law – were well-founded in both law and fact. The district court's decision granting summary judgment in Tomsheck's favor, under the facts of this case, should be affirmed.

DATED this 13th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font in Times New Roman, and is double-spaced; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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[ ] Does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular 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.

DATED this 13th day of September, 2021.

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CERTIFICATE OF SERVICE

On the 13th day of September, 2021 the undersigned, an employee of Olson Cannon Gormley & Stoberski, hereby served a true copy of **RESPONDENT'S ANSWERING BRIEF** to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order (Administrative Order 14-2) effective June 1, 2014, and or mailed:

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