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 REPLY BRIEF

Attorneys for Appellant:

H. STAN JOHNSON, ESQ.
Nevada Bar No. 265
RYAN D. JOHNSON, ESQ.
Nevada Bar No. 14724
COHEN | JOHNSON
375 East Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400
Email: sjohnson@cohenjohnson.com

IN THE SUPREME COURT OF THE STATE OF NEVADA

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 12th day of January 2022

/s/ H. Stan Johnson, Esq.
H. STAN JOHNSON, ESQ.
Nevada Bar No. 265
COHEN | JOHNSON
375 East Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES/RULES

I. INTRODUCTION

Plaintiff/Appellant, CHRISTOPHER BEAVOR, An Individual ("**Beavor**"), sued his former attorney, Defendant/Respondent, JOSHUA TOMSHECK, An Individual ("**Tomsheck**"), for legal malpractice ("**Action**") relating to Tomsheck's handling of Beavor's defense in an underlying lawsuit that was filed on July 21, 2011 in the *Eighth Judicial District*, bearing Case No.: A-11-645353-C, against Beavor by Jacob Hefetz ("**Hefetz**")("**Underlying Action**")[AA 1-7].

Prior to Beavor filing the instant Action against his former attorney, Tomsheck, Beavor asserted a claim against Tomsheck for legal malpractice, wherein Beavor's then counsel stated:

> We are writing to put you on notice that our client, **Christopher Beavor, has a professional malpractice claim against you**. The claim arises out of your representation of Mr. Beavor in the above-referenced case between June 2013 and November 2014, wherein your failure to substantively oppose Plaintiff Yacov Hefetz's Motion for a New Trial, legally erroneous opposition to the Motion for New Trial, and subsequent failure to properly appeal the District Court's Order granting a new trial **resulted in Mr. Beavor having to continue defending an action which the District Court has now made clear would have otherwise ended**. [AA 106](emphasis).

\\\

Placed in untenable legal jeopardy through the negligence of his former counsel, Tomsheck, Beavor ultimately entered into an arms-length settlement with Hefetz in the Underlying Action that removed the uncertainty of litigation, which settlement included a substantial monetary payment by Beavor. [AA 143-48; 184-85; 192-93; 343-46; 471-72].

Beavor permissibly assigned the **proceeds only** of his legal malpractice claim to Hefetz in partial settlement of the Underlying Action, which assignment occurred after Beavor had asserted a legal malpractice claim against Tomsheck and after Beavor had spent hundreds of thousands of dollars defending the Underlying Action. [AA 106; 143-48; 224].

The assignment does not abrogate Beavor's position in relation to Tomsheck, i.e.: (1) Beavor is seeking damages relating to Tomsheck's alleged legal malpractice in Tomsheck's legal representation of Beavor in the Underlying Action; (2) Beavor has not assigned any cause of action in the instant Action to any third-party - only the proceeds therefrom to Hefetz; (3) Beavor has actively participated in the litigation of the instant Action; and (4) the sole decision to accept or reject any settlement offer in the instant Action is Beavor's alone. [AA 143-48; 255].

Beavor respectfully submits that Nevada law does **not** prohibit the assignment of the **proceeds only** of his previously asserted legal malpractice claim.[1]

The District Court improperly granted its July 10, 2020 Order and Findings of Fact, Conclusions of Law ("**Judgment**") granting the Motion for Summary Judgment ("**MSJ**") in the instant Action.[2] [AA 582-99].

It is respectfully requested that this Court vacate and reverse the Judgment and remand the instant Action for trial in the District Court.

---

[1] While Tomsheck argues that the instant Appeal should be heard by the *Nevada Court of Appeals*, pursuant to *NRAP* 17(b)(5), there are no prior published Nevada court decisions involving the same facts presented in the instant Appeal, i.e. an assignment of proceeds only of a previously asserted legal malpractice claim. Accordingly, it is respectfully submitted that this instant Appeal raises issues of first impression, and therefore, should be properly heard by the *Nevada Supreme Court*. *See NRAP* 17(a)(11).

[2] 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. Response to Tomsheck's Factual Representations[3]

Contrary to Tomsheck's arguments, Beavor argued before the District Court both the nature and effect of Beavor's previously asserted legal malpractice claim. [*See* Answering Brief, Page 10; AA 4; 36; 39; 218; 220-21; 498; 590; 602–03; 646-59; 668-69; 694-98]. There is no waiver.[4]

Beavor asserted a claim against Tomsheck for legal malpractice prior to the filing of the instant Action, i.e. the instant Action alleges:

> 26. In the meantime, on or about September 16, 2015, Tomsheck was expressly placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the parties further agreed to toll the statute of limitations for the claims of malpractice until the expiration of 180 days following an appeal or final resolution. [AA 4].

---

[3] In preparing the Appendix to this Appeal, Beavor included all relevant and necessary documents required for a full review by this Court. *See NRAP* 30(b)(3). The documents objected to by Tomsheck include factual matters regarding the Underlying Action, as well as matters relevant to the instant Action and Appeal. [AA 2-4; 185-88; 191-94; 238-47; 278; 300; 304-13; 322-23; 328; 360; 471-72; 545-580; 660-67].

[4] *See Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), wherein it held, "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* further stated, "the appellant could have moved the district court for an amended judgment . . . ." *Id*. Beavor properly raised all of these matters before the District Court and they are properly before this Court. [AA 4; 36; 39; 218; 220-21; 498; 590; 602–03; 646-59; 668-69; 694-98].

Beavor's previously asserted legal malpractice claim was presented throughout the instant Action; i.e., in fact, Tomsheck argued in the MSJ:

> The evidence shows Plaintiff entered into a binding contract by which he and Mr. Tomsheck agreed that the statute of limitation applicable to Plaintiff's prospective legal malpractice claim against Mr. Tomsheck was to be stayed until two years after the resolution of Supreme Court Appeal No. 68438 (c/w 68843). [AA 36].[5]

At the District Court, Beavor contested that *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982) and *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016) required the granting of the MSJ given the limited assignment of only proceeds. The District Court stated: "Plaintiff Beavor also argues *Tower Homes, LLC* is distinguishable upon its facts . . . ." [AA 590]. Beavor respectfully submits that the District Court misconstrued the nature of the assignment, i.e. an assignment of a claim vs. an assignment of only the proceeds of a claim. However, Beavor argued before the District Court the factual and legal distinctions presented in the instant Action and the facts and holdings of *Chaffee* and *Tower Homes*. [AA 696-98].

---

[5] Tomsheck did not oppose in his Answering Brief Beavor's arguments regarding the inapplicability of Tomsheck's statute of limitations defense before the District Court. [*See* Tomsheck's Answering Brief, Page 6, n. 2 and Beavor's Opening Brief, Page 8, n. 5].

At oral argument on the MSJ, counsel for Beavor stated:

> **I know counsel is trying to argue that the Tower case addressed that issue, but it did not**. **It's very clear that in the Tower case the Supreme Court did not rule on that issue**. They said we're not sure that Achrem would apply. **If this is an assignment of only the proceeds, we're not sure about that, but we're not going to reach that issue because the Bankruptcy Court clearly assigned the entire case**, the matter, to the creditors, and it was the creditors that brought the action and are the ones that were asserting they had standing.
>
> That is not what we have here. We have the real client, the party in interest, filing and bringing the malpractice action against his attorney. **And this was something that was known clear back in 2015, that there was a malpractice action that Mr. Beavor intended to bring against Mr. Tomsheck**.
>
> **Mr. Beavor's counsel at that time wrote a letter to the insurance company and to Mr. Tomsheck and put them on specific notice that they felt there was a malpractice claim against Mr. Tomsheck. And this was known throughout** – [AA 694-96] (emphasis).[6]

\\\

---

[6] *See* Tomsheck's and Beavor's Undisputed Facts [AA 39; 218; 220-21]. While Beavor disagrees with Tomsheck's interpretation of *Chaffee*, Tomsheck argued in his Reply Brief to the MSJ:

> The timing is significant because in *Chaffee v. Smith*, Nev. 222, 645 P.2d 966 (1982), the *Nevada Supreme Court* expressly ruled that the assignment of a legal malpractice claim which had not been filed was prohibited and subject to summary judgment as a matter of law. *Chaffee* is controlling law in Nevada. [AA 498].

In Beavor's Motion to Alter and/or Amend ("**Alter/Amend Motion**") [AA 600-15], he argued:

> While the case was on appeal to the Supreme Court the parties participated in the Supreme Court settlement program during 2017. The Supreme Court settlement judge contacted Mr. Tomsheck's insurance carrier and involved them in the settlement discussion since the malpractice was quite evident and they had already been put on notice of the claim of Mr. Beavor. [AA 602-03].

Beavor's Reply to the Alter/Amend Motion further argued Beavor's previously asserted legal malpractice claim *vis-a-vis Chaffee* and *Tower Homes*. [AA 646-59]. The District Court considered Beavor's Reply to the Alter/Amend Motion, whereupon it found that it essentially reiterated arguments already raised, and therefore, it did not change the District Court's decision in granting the MSJ. [AA 669].

1. Beavor's Asserted Legal Malpractice Claim

Beavor's arguments before the District Court were further premised upon the assertion that the attorney-client relationship had broken down prior to initiating the instant Action. [AA 106; 109-12; 143-48; 185; 188].

\\\

\\\

While Tomsheck argues that Beavor's "unfiled" legal malpractice claim against Tomsheck was insufficient and constituted a "mere threat" that a lawsuit might be filed, Tomsheck ignores the undisputed fact that Beavor's counsel formally presented a claim and prepared and forwarded a draft complaint against Tomsheck and demanded that Tomsheck's legal malpractice insurer attend a settlement conference relating to the Underlying Action in order to minimize Beavor's damages relative to Tomsheck's action. [AA 106; 218; 334; 346; 352; 356-57; 602-03].

The fact that the parties entered into the Tolling Agreement further supports a factual finding that Beavor's asserted legal malpractice claim was actual and not a "mere threat." [109-12].[7] The Tolling Agreement provided, in part, **"that no legal or equitable action related to the Claims** will be initiated by any Party against another Party during the Term of this Agreement." [AA 110] (emphasis).

\\\

---

[7] *See e.g.*, a "claim" is a "right to payment." 11 *U.S.C.* §101(5)(A)[bankruptcy]; in the context of a fraudulent conveyance matter, "claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. *See NRS* 112.150(3).

Tomsheck's malpractice insurer, in fact, did attend the settlement conference in the Underlying Action. [AA 218; 602-03].[8]

\\\

\\\

\\\

\\\

---

[8] Beavor's counsel further stated in the September 16, 2015 letter:

> As indicated in the attached draft complaint, **as a direct result of your errors, Mr. Beavor has incurred - and continues to incur - legal fees and still faces potential liability on a claim which was already defeated once at trial**. Had you substantively opposed Mr. Hefetz's Motion for a New Trial, Mr. Beavor never would have had to incur additional fees because the Court would have denied Mr. Hefetz's request for a new trial and closed the case. **There can be no doubt of this because the District Court stated as much in a July 23, 2015 Order, a copy of which is also attached hereto**. See id. at 2:16-3:8.
>
> Please be advised that Mr. Beavor will be participating in a settlement conference with Mr. Hefetz on October 1, 2015 at 9:00 a.m. at the law offices of Jimmerson Hansen. This provides an opportunity for your coverage carrier to minimize the damages resulting from the professional negligence. Demand is hereby made that: (1) you place your coverage carrier on notice of Mr. Beavor's claim and the upcoming settlement conference and (2) that your coverage carrier participates in the upcoming settlement conference. [AA 106].

ARGUMENT

II. THE ASSIGNMENT OF LEGAL MALPRACTICE PROCEEDS IS PERMITTED UNDER NEVADA LAW

At the time that Beavor entered into the Settlement Agreement, wherein he properly assigned the proceeds only of his legal malpractice claim against Tomsheck, no published Nevada court decision prohibited such a contractual agreement.[9] It is respectfully submitted that this Court should not alter and/or prohibit the legality of such contractual agreements, and therefore, this Court should properly reverse the Judgment.

---

[9] While prohibiting the assignment of personal injury actions, Nevada allows for the assignment of the proceeds of such personal injury claims. *See e.g., Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp*., 112 Nev. 737, 917 P.2d 447 (1996). The *Achrem Court* further stated:

> Also, some states draw a distinction between the assignment of an action itself and the assignment of the proceeds of that action. **These courts reason that the policy considerations underlying the prohibition against assignments of tort actions are not present in the assignment of the proceeds of an action**. Specifically, when a tort action is assigned, the assignee loses the right to pursue the action. However, when the proceeds of an action are assigned, the assignor retains control of the action, and the assignee cannot pursue the action independently. Based on this reasoning, many courts allow assignment agreements that assign the proceeds of a tort action. *Id*., 112 Nev. at 739-40; 917 P.2d at 448 [internal citations omitted](emphasis).

A. Public Policy Rationale

In *Chaffee*, this Court stated, "[t]he decision whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Id*., 98 Nev. 224, 645 P.2d 966. It is undisputed that Beavor himself made the determination to bring a claim against his attorney, Tomsheck, and that Beavor himself has properly sued Tomsheck in the instant Action. [AA 1-7; 106; 143-148].

While Tomsheck cites to the dissent in this Court's unpublished decision in *Olson v. Eighth Judicial District Court of Nev*., 488 P.3d 572; 2021 Nev. Unpub. LEXIS 429 (June 4, 2021), Tomsheck's reference to *Olson* ignores the undisputed fact that in the instant Action, only Beavor is suing his attorney Tomsheck for legal malpractice.[10]

\\\

---

[10] *See* dissent in *Olson*:

> In contrast, equitable subrogation of a legal malpractice claim effectively removes the requirement of an attorney-client relationship by allowing a third party to sue an attorney for legal malpractice. *Id*. at 8.

There is no third-party present in the instant Acton. Beavor is suing in his name and against his former attorney, Tomsheck. Hefetz is not a party-plaintiff in the instant Action, nor could he be such. [AA 1-7; 143].

1. The *Chaffee* Case

In *Chaffee*, this Court adopted the public policy rationale presented in *Goodley v. Wank & Wank, Inc*., 62 Cal. App. 3d 389, 133 Cal.Rptr. 83 (Cal. App. 1976).[11] *See Chaffee*, 98 Nev. at 223-24; 645 P.2d at 966-67.

\\\

---

[11] *See contra Hedlund Mfg Co. v. Weiser*, 517 Pa. 522, 526, 539 A.2d 357, 359 (Pa. 1988), wherein the *Pennsylvania Supreme Court* held, in allowing for the assignment of a legal malpractice claim:

> **By contrast, a claim for damages based upon legal malpractice does not involve personal injury in that it arises out of negligence and breach of contract, and the injury alleged concerns purely pecuniary interests**. The rights involved are more akin to property rights which can be assigned prior to liquidation.
>
> The only matter which remains to be considered is whether public policy precludes a client from assigning a claim for negligence and breach of contract against his or her attorney. Some jurisdictions do not permit such assignments, as the courts seek to protect the relationship which exists between attorney and client. These courts also equate a legal malpractice action with torts involving personal injury or wrongs done to the person. *See, e.g., Clement v. Prestwich*, 114 Ill.App.3d 479, 70 Ill.Dec. 161, 448 N.E.2d 1039 (1983); *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982); *Goodley v. Wank & Wank, Inc*., 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976). **Other jurisdictions do, however, permit the assignment of a claim for legal malpractice**. *See Oppel v. Empire Mutual Insurance Co.*, 517 F.Supp. 1305 (S.D.N.Y. 1981); *Collins v. Fitzwater*, 277 Or. 401, 560 P.2d 1074 (1977).

However, *Chaffee* left unanswered the question as to whether a previously asserted legal malpractice action was assignable, wherein it stated: "We reserve opinion on the question as to whether previously asserted legal malpractice actions are transferrable." *Id*., 98 Nev. at 224, 645 P.2d at 966.

While the dissent in *Olson* stated that the "importance of protecting the attorney-client relationship is a paramount public policy concern supporting the prohibition of the assignment of legal malpractice claims," the *Pennsylvania Supreme Court* in *Hedlund* aptly provided context to such a relationship, wherein it stated:[12]

> We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. **Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected**. *Id*., 517 Pa. at 526, 539 A.2d at 359 [internal citations omitted](emphasis).

---

[12] When a tort claim alleges purely pecuniary loss, it may be assigned. *See Reynolds v. Tufenkjian*, 461 P.3d 147, 153-54 (2020)("A determination of whether a cause of action is assignable should be based upon an analysis of the nature of the claim to be assigned and on an examination of the public policy considerations that would be implicated if assignment were permitted." 6A *C.J.S. Assignments* § 42 (2016)(**recognizing that, aside from claims to recover personal damages or claims involving personal or confidential relationships, claims are generally, but not always, assignable**)." (emphasis).

There are no third-party plaintiffs in the instant Action, as the only plaintiff is Tomsheck's former client, i.e. Beavor. Further, there is no potential for unlimited liability toward Tomsheck, as the only potential liability Tomsheck has is to Beavor. [AA 1-7; 143-48]. Tomsheck has no individual liability to Hefetz.

2. The *Tower Homes* Case

Tower Homes does not prohibit the assignment of the proceeds only of a previously asserted legal malpractice claim.[13]

\\\

\\\

---

[13] *See also, Thurston v. Cont'l Casualty Co.*, 567 A.2d 922 (Me. 1989), allowing for the assignment of legal malpractice claims; *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tx. App. 2000)(case by case basis analysis); *Eagle Mt. City v. Parsons Kinghorn & Harris, P.C.*, 408 P.3d 322, 2017 UT 31 (Ut. 2017)(allowing assignment of legal malpractice claims); *Kozich v. Shahady*, 702 So. 2d 1289, 1290 (Fla. 4th App. 1997)("We note that Kozich did not assign the "cause of action," such as to change his status as a party in the case being tried. Rather, Kozich specifically stated that the assignment was to any "jury award." Without deciding what the impact might have been had the greater interest been assigned, at a minimum, the effect of assigning only his right to any future award was to retain in Kozich the ability to control the conduct of the trial, to accept or reject any settlement offers, and to maintain the attorney client relationship, with any corresponding obligations"). Beavor maintains control over the instant Action.

In *Tower Homes*, this Court did not rule upon the material distinction between a legal malpractice claim versus the proceeds of legal malpractice claim, as the "bankruptcy stipulation and order constitute an assignment of the entire claim." *Id*., 132 Nev. at 635, 377 P.3d at 122-23.[14]

In the instant Action, no such factual finding exists, as the Settlement Agreement only provides for the assignment of the proceeds from Beavor's previously asserted legal malpractice claim. [AA 144-45]. The actual legal malpractice claim stays with and solely belongs to Beavor. It is undisputed that only Beavor has the right to pursue his legal malpractice claim against Tomsheck. [AA 1-7; 143-45; 255-56].[15]

\\\

---

[14] In *Tower Homes*, this Court further distinguished its facts by stating, "[h]ere 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." *Id*.

[15] *See PADRM Gold Mine, LLC v. Perkumpulan Inv'r Crisis Ctr. Dressel - WBG*, 498 P.3d 1073 (Alaska 2021)("**And because we have approved the assignment of the proceeds from legal malpractice claims, existing law gives wronged clients a way to use their asset, should they wish to do so, to their financial gain**")(emphasis).

See Bielar v. Washoe Health Sys., 129 Nev. 459, 306 P.3d 360 (2013)(contract interpretation is subject to a *de novo* standard of review).

Beavor previously asserted a claim against Tomsheck. [AA 106; 109-12]. Moreover, *Chaffee's* reservation involved the assignment of "legal malpractice actions" and not the limited assignment of only proceeds from such matters. Beavor respectfully submits that *Tower Homes* did not find that the assignment of the proceeds of a previously asserted legal practice claim was impermissible. The undisputed facts presented in the instant Action do not align with the facts presented in either *Chaffee* or *Tower Homes*. The Judgment should properly be reversed.

i. Claim vs. Proceeds

Contrary to Tomsheck's analysis, *Tower Homes* doesn't stand for proposition that a claim and proceeds are the same thing. It only stands for the proposition that in *Tower Homes* they meant the same thing given the nature of the bankruptcy order. *Id*., 132 Nev. at 635, 377 P.3d at 122-23. These are not the facts of the instant Action.

Further, Tomsheck's reference to this Court's statement in *Tower Homes* that it is "not convinced that *Achrem's* reasoning applies to legal malpractice claims" ignores the material distinction between a claim and proceeds. [*See* Answering Brief, Page 18].

Tower Homes does not provide a "bright line test" prohibiting the type and nature of the assignment entered into in the instant Action.[16] In entering into the Settlement Agreement, Beavor only assigned the proceeds of his previously asserted legal malpractice claim to Hefetz.[17]

B. Control of Litigation

The only person that controls the instant Action as a party-plaintiff is Beavor. [AA 1-7; 143-48; 255-56]. Hefetz is not a party to the instant Action, nor could Hefetz be a party to the instant Action. [AA 1-7; 143].

---

[16] Beavor does not rely upon a "lone case" from Michigan, i.e. *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W. 2d 165 (Mich. Ct. App. 1987), as the facts and holdings in both *Chaffee* and *Tower Homes* fully support Beavor's arguments in the instant Action. Tomsheck's reliance upon *Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257, 885 A.2d 163 (2005) is misplaced as it ignores the critical distinction that Nevada's decisional law has not previously barred the assignment of the proceeds only of a legal malpractice claim; *see also Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745 (Alaska 1992); *Weston v. Dowty*, 414 N.W.2d 165 (Mi. App. 1987); *PADRM and Kozich*.

[17] *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538 (Ariz. App. 2002) is distinguishable upon its facts and Arizona's prior decisional law. In *Botma*, both the assignor and the assignee were party-plaintiffs and the agreement between the two involved the assignment of "any malpractice claim" and the assignee "could control the case." *Id*., 202 Ariz at 15-16, 39 P.3d at 540. These facts are not present in the instant Action. *Botma* is also distinguished as Arizona does not allow the assignment of the proceeds from a personal injury claim. *Id*., 202 Ariz at 18, 39 P.3d at 542. Finally, the Settlement Agreement in the instant Action contains a Severability Clause. [AA 146].

Beavor's obligation under the Settlement Agreement required him to (1) fully pursue and cooperate in the prosecution of the above referenced claims; and (2) that he will do nothing intentional to limit or harm the value of any recovery related to the above referenced cases. [AA 144]. These two provisions, in fact, highlight Beavor's actual control over the instant Action.

Hefetz did not file the instant Action. Hefetz has no ability to file any responses to any law and motion practice in the instant Action, nor does Hefetz have the ability to propound written discovery. Hefetz's only role in the instant Action is his entitlement to any potential proceeds, either by settlement and/or judgment. [AA 144-45].

Tomsheck argues that only Hefetz would benefit from the reversal of the Judgment. In fact, Beavor has a rightful legal malpractice claim that he has sought to pursue well prior to the filing of the instant Action. [AA 106].

Beavor's affidavit submitted in opposition to the MSJ confirmed what the Settlement Agreement provided, i.e. that Beavor is in control of the instant Action.

\\\

\\\

Beavor's affidavit does not contradict the terms of the Settlement Agreement. [AA 255-56].[18] Tomsheck's argument to the contrary are not supported by the facts presented in the instant Action.

C. Retention of Claim/Severance

Contrary to Tomsheck's arguments, in the event that this Court found against the assignment of proceeds only, there is no need for Beavor to be "given another opportunity to bring his claims against Tomsheck." [*See* Answering Brief, Page 25]. Beavor has already brought his claims against Tomsheck in the instant Action.

---

[18] Tomsheck's arguments regarding *Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965)(overruled on other grounds by *Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 801 (1998), are misplaced, as Beavor's affidavit, which confirmed what was provided for in the Settlement Agreement, does not in any manner implicate the "fabrication" issues presented in *Aldabe*. In *Aldabe* this Court stated: [t]hough aware that the summary judgment procedure is not available to test and resolve the credibility of opposing witnesses to a fact issue (*Short v. Hotel Riviera, Inc*., 79 Nev. 94, 378 P.2d 979), we hold that it may appropriately be invoked to defeat a lie from the mouth of a party against whom the judgment is sought, when that lie is claimed to be the source of a "genuine" issue of fact for trial." *Aldabe*, 81 Nev. at 285, 402 P.2d at 37. The parole evidence rule also does not preclude the admission of Beavor's affidavit in opposition to the MSJ. *See Kaldi v. Farmers Ins. Exch*., 117 Nev. 273, 281, 21 P.3d 16, 21 (2001)("Generally parole evidence may not be used to contradict the terms of the written contractual agreement"). Beavor's affidavit does not contradict the terms of the Settlement Agreement.

Tomsheck's reliance upon *Tower Homes* is misplaced given that it is distinguishable on its facts, i.e. in *Tower Homes* there was no factual distinction between the claim and the proceeds given the nature of the bankruptcy court order. *Id*., 132 Nev. at 635, 377 P.3d at 122-23. In *Tower Homes*, there was nothing to claw back. These are not the facts in the instant Action. Beavor has been the only party-plaintiff in the instant Action and the voiding of the assignment of the proceeds only will not alter Beavor's position as the only party-plaintiff in the instant Action.[19]

\\\

\\\

\\\

\\\

[19] "A court should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978). *See also Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745 (Alaska 1992)("HT argues that Bohna's malpractice claim against HT should have been dismissed because Bohna illegally assigned his cause of action to Stevens. We disagree. 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 HT and proceeded to enforce it"); *Botma*, 202 Ariz. at 18, 39 P.3d at 542 ("Although neither Botma's malpractice claim nor its proceeds are assignable, his malpractice claim does survive the invalid assignment").

In the instant Action, the Settlement Agreement contained a Severability Clause. [AA 146]. 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].

Unlike in *Tower Homes*, due to the nature of the bankruptcy order therein, in the instant Action, the Settlement Agreement's Severability Clause would allow for the proceeds to revert back to Beavor.[20]

\\\

\\\

---

[20] *See Tower Homes*, 132 Nev. at 636 n. 2, 377 P.3d at 123:

> 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. (emphasis).

"A basic rule of contract interpretation is that every word must be given effect if at all possible." *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998). [*See* AA 605-06; 622; 646-59].

Tomsheck's arguments regarding the irrevocable nature of the Settlement Agreement wholly ignores the Severability Clause. [AA 146].

Tomsheck argues that Beavor's legal malpractice claim should be forfeited. This is clearly against public policy in Nevada. The law abhors a forfeiture. *See Organ v. Winnemucca State Bank & Trust Co.*, 55 Nev. 72, 26 P.2d 237 (1933).[21]

Tomsheck should not be entitled to an undeserved windfall for not having to answer for his legal malpractice if the Judgment stands. Nevada has a policy of holding lawyers accountable for their legal malpractice, as the *Nevada Rules of Professional Conduct , Rule* 1.1 requires competence:

> Rule 1.1. Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

\\\

---

[21] *See e.g., Reynolds*, 461 P.3d at 148:

> Nevada law, in turn, restricts the right to convey certain claims by making them unassignable. Accordingly, we hold that a judgment debtor's claims that are unassignable similarly cannot be purchased at an execution sale. As such, respondents did not purchase the rights to appellants' unassignable claims.

The dismissal of the instant Action would condone the violation of the most basic and important rule of professional conduct, i.e. that of competence. The public has an interest in assuring that attorneys who commit legal malpractice may be held accountable for their actions. Legal malpractice actions are an important check on the bar in that they are an external means of policing attorney behavior. Forfeiture of a legal malpractice claim only benefits attorneys. The public's interest in ensuring that attorneys, as guardians of our judicial system, carry out their duties in a competent and professional manner is not served if the Judgment stands.

If the Judgment stands, which results in the dismissal of the instant Action, it will demean the public confidence in the legal profession. Providing shelter for attorneys by holding that a meritorious claim for legal malpractice is forfeited when by law it should revert back to the client, or be deemed to have remained with the client, would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection by dismissing claims that should be tried on the merits. *See New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 707 N.E.2d 332 (Mass. 1999).

CONCLUSION/PRAYER FOR RELIEF

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

Respectfully submitted.

DATED this 12th day of January 2022

/s/ H. Stan Johnson, Esq.
H. STAN JOHNSON, ESQ.
Nevada Bar No. 265
COHEN | JOHNSON
375 East Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this *Reply 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 *Reply Brief* has been prepared in a proportionally spaced typeface using Word Perfect - Version X4 in 14 Point Times New Roman.

2. I further certify that this *Reply 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 **5,455** words; and

3. Finally, I hereby certify that I have read this *Reply 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.

\\\

\\\

I further certify that this *Reply 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 12th day of January 2022

/s/ H. Stan Johnson, Esq.

H. STAN JOHNSON, ESQ.
Nevada Bar No. 265
COHEN | JOHNSON
375 East Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January 2022, the above-referenced **APPELLANT'S REPLY BRIEF**, was filed electronically with the Clerk of the *Nevada Supreme Court* and served electronically through the Court's electronic service to the following persons:

Max E. Corrick, Esq.
OLSON, CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129

Attorneys for Respondent

/s/ Sarah Gondek
An agent and/or employee of **COHEN | JOHNSON**