COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2009-SC-000159
CASE NO. 2009-SC-000391

TIM DAVIS and TIM DAVIS & ASSOCIATES, INC. — APPELLANTS/ CROSS APPELLEES

v. **APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT**
CASE NO. 05-CI-00800

COURT OF APPEALS
2007-CA-002279

JOHN J. SCOTT and WHITLOW & SCOTT — APPELLEES/ CROSS APPELLANTS

BRIEF FOR APPELLANTS/CROSS APPELLEES

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CERTIFICATE OF SERVICE

It is hereby certified that on the 16th day of October 2009, a true and correct copy of Brief for Appellants/Cross Appellees was served via U.S. First Class Mail to the following: Matthew W. Breetz, Demetrius O. Holloway, Stites & Harbison, 400 West Market Street, 1800 Aegon Center, Louisville, Kentucky 40202; Hardin Circuit Court Clerk, Hardin County Courthouse, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; Hon. Robert A. Miller, Meade County Courthouse, 516 Hillcrest Drive, Brandenburg, Kentucky 40108; five copies to Hon. Sam Givens, Jr. Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and the original and ten copies Via U.S. Registered Mail to: Susan Stokley Clary, *Clerk Kentucky Supreme Court*, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601-3415.

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Introduction

Tim Davis and Tim Davis and Associates (collectively "Davis" or "Appellants/Cross Appellees") appeal the trial court's entry of summary judgment dismissing their legal malpractice case against their former attorney and his law firm. By dismissing Appellants/Cross Appellees' legal malpractice claim because of a partial assignment of proceeds, and by prohibiting Davis from pursuing his claim in his own name, the trial court and Court of Appeals place Kentucky at odds with twelve of the thirteen states having addressed this issue. The dismissal also makes Kentucky the only state to have dismissed a legal malpractice action for lack of jurisdiction over a settlement agreement.

Statement Concerning Oral Argument

Appellants/Cross Appellees Davis respectfully requests the opportunity to be heard and believes oral argument will be helpful to the Court. This case contains several issues of first impression in Kentucky regarding legal malpractice actions including:

- Whether an assignment of proceeds from a legal malpractice action is against public policy;
- Whether the real-party-in-interest can maintain a legal malpractice action regardless of whether the assignment is against public policy;
- What Kentucky's legal malpractice statute (KRS 411.165) means by allowing a plaintiff to recover "all damages:" [To be addressed in Cross-Motion for Discretionary Review]

The resulting Opinion of this Court will be of significant importance not only to Appellants/Cross Appellees, but also to every future legal malpractice claim filed in Kentucky and, perhaps, across the country.

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Tim Davis and Tim Davis & Associates lost over $600,000 by following the un-researched legal advice of their attorney, John Scott. The trial court and Kentucky Court of Appeals allowed Scott to avoid the consequences of his malpractice by dismissing Davis' suit against Scott. Dismissal cannot be the appropriate response to Davis' attempt to mitigate his damages by assigning a portion of the proceeds from this lawsuit.

The Underlying Malpractice

In 2002, Appellee/Cross Appellant Attorney John Scott (Scott) provides legal advice to Appellant/Cross Appellee Davis regarding the potential purchase of a business in Tennessee, called PICA (Dep. of Tim Davis, June 13, 2007, pp. 63-66).

During the due diligence phase of the negotiations, PICA requires Davis to execute a "non-solicitation" agreement on September 30, 2002 prohibiting Davis from contacting or soliciting any of PICA's customers should the sale not take place. [Exhibit 1 to Dep. of John Scott, October 26, 2005]

In November 2002, the Davis/PICA deal falls through and the non-solicitation agreement kicks in, prohibiting Davis from communicating with any of PICA's customers for fifteen months. [Dep. of Tim Davis, June 13, 2007, pp. 62-63]

In February of 2003, Davis learns PICA has been purchased by Global Risk Management. [Dep. of Tim Davis, June 13, 2007, pp. 70-71] Davis calls Scott to tell him about the purchase and asks Scott how this might affect the enforceability of the non-solicitation agreement, and whether Davis can communicate with the former PICA customers. [Dep. of Tim Davis, June 13, 2007, pp. 81-83] Without doing any research, and without knowing whether Kentucky or Tennessee law governs enforceability of the

agreement, Scott advises Davis that the non-solicitation agreement likely no longer applies because PICA no longer exists. ***Specifically, Scott tells Davis "once PICA no longer existed...the were free game.*** [Dep. of John Scott, October 26, 2005, p. 49, l. 11-15] This legal advice is incorrect.

PICA/Global Sue Davis in Tennessee Federal Court.

In April of 2003, Davis receives notice from PICA that he is in violation of the terms of the non-solicitation agreement and he must cease all communication with PICA customers. [Dep. of Tim Davis, June 13, 2007, pp. 113-114] Davis forwards the letter to Scott. [Dep. of Tim Davis, June 13, 2007, pp. 113] Again, Scott performs no research and advises Davis the agreement will not prevent Davis from communicating with PICA's former customers. [Dep. of John Scott, October 26, 2005, pp. 80-84]

PICA/Global sue Davis in federal court in Tennessee alleging $750,000 in damages and invoking Tennessee's treble damages statute, raising the damages claim to more than $2,000,000. [R. at 3; Compl.]

The Tennessee federal court enters an injunction against Davis and rules the non-solicitation agreement was transferred from PICA to Global as goodwill in the purchase. [R. at 1579] The federal court rules the non-solicitation agreement is valid and enforceable against Davis. [R. at 1579-1585] The Tennessee federal court's injunction requires Davis to escrow every dollar derived from the former PICA customers. [R. at 1579]

After eleven months of contentious litigation, Davis' attorneys (Frost Brown & Todd) recommend settling with Global. [Dep. of Tim Davis, June 13, 2007, pp.148-156]

Ultimately, Davis pays Global $300,000 and assigns Global a portion of any proceeds recovered in a potential legal malpractice action against Scott. [R. at 563-569; Settlement Agreement, Exhibit 3] Under the terms of the Settlement Agreement, only Davis has the substantive right to prosecute the legal malpractice claim. [R. at 564; Settlement Agreement, Exhibit 3]

Davis Sues John Scott for Legal Malpractice and the Trial Court Enters Summary Judgment Against Davis Based on the Assignment of Proceeds.

Davis hires a legal malpractice attorney and timely files a legal negligence complaint against Scott and his firm. [R. at 2-4; Compl.] Shortly before trial, Scott files multiple motions for summary judgment, including a motion to dismiss based on the assignment of a portion of the legal malpractice proceeds. [R. at 838-932; Scott Mot. to Dismiss] Four days before trial, Scott's attorney requests a continuance due to a conflict in his trial calendar. [Telephonic Hearing, Trial Tape 8/16/07] Instead of hearing the motion for continuance, the court grants Scott's motion for summary judgment based on the partial assignment. [R. at 1541-1546; Trial Ct. Order, Exhibit 2]

The trial court determines, as a result of the Global/Davis Settlement Agreement, that "an assignment of the legal malpractice claim has occurred as a matter of law. [R. at 1545; Trial Ct. Order, Exhibit 2] The Settlement Agreement is, therefore, void and unenforceable as a matter of law." [R. at 1541-1546; Trial Ct. Order, Exhibit 2]

Not only does the trial court rule the Settlement Agreement between Davis and Global is unenforceable, the trial court goes a step further and completely dismisses Davis' suit against Scott. [R. at 1546; Trial Ct. Order, Exhibit 2]

Davis files a timely Motion to Alter, Amend or Vacate Judgment and Order pointing out multiple misstatements of fact and law made by the trial court. [R. at 1569-1592; Davis Mot. to Alter, Amend or Vacate] The motion is denied. [R. at 1651-1653, Exhibit 4] Davis then takes an appeal.

Court of Appeals Opinion

On February 13, 2009, a panel of the Kentucky Court of Appeals affirms the trial court in a "To Be Published" Opinion. The panel holds the Settlement Agreement is void as against public policy due to the partial assignment of proceeds. [*Davis v. Scott*, 2009 WL 367219, Exhibit 1, p. 4] The panel further holds that Davis is precluded from continuing the legal malpractice suit as the real-party-in-interest because the trial court does not have jurisdiction to invalidate the Settlement Agreement. [Exhibit 1 p. 16-17]

The panel acknowledges this is a novel issue of law; however, it fails to identify any real-party-in-interest capable of pursuing the legal malpractice claim against Scott in lieu of Davis. Indeed, there is none. Thus, under the Court of Appeals' reasoning, a negligent attorney is completely absolved of liability if his client attempts to mitigate damages by offering a judgment creditor a portion of the proceeds recovered from the negligent attorney.

ARGUMENT

I. Standard of Review

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the

moving party was entitled to judgment as a matter of law. Ky. R. Civ P. 56.03. Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, this Court need not defer to the trial court's decision or the Court of Appeals decision and reviews the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001); *see also, Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky.1992). Rather, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991). Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest* at 480 (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky.1985)). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]" *Huddleston By and Through Lynch v. Hughes*, 843 S.W.2d 901, 903 (Ky.App.1992).

II. It is Improper to Dismiss a Real-Party-In-Interest's Legal Malpractice Action Based on a Partial Assignment of Proceeds.

A. Kentucky case law does not require dismissal of the real-party-in-interest's legal malpractice claim because of a partial assignment of proceeds.

In *Coffey v. Jefferson County Board of Education*, Kentucky joined the majority of states by finding an assignment of a legal malpractice claim is "void as against public policy." 756 S.W.2d 155 (Ky. App. 1988) Importantly, in *Coffey* the assignee asserted the claim – not the real party in interest as in this case. *Coffey* does not address the distinction between an assignment of an entire claim as occurred in *Coffey*, and an

assignment of proceeds, as occurred in this case. Both the trial court and Court of Appeals rely on *Coffey* to arrive at the erroneous conclusion that Davis assigned his entire cause of action through the Settlement Agreement and, as a result, the case should be dismissed. To the contrary, Davis only assigned a portion of the proceeds of his legal malpractice claim and his case should not have been dismissed.

The issue of an assignment of the proceeds of a legal malpractice claim was not discussed in *Coffey* and, until now, has never been addressed by any appellate court in Kentucky; however, thirteen other states have addressed the issue of an assignment of proceeds of a legal malpractice action. Of these thirteen, twelve states allow the action to proceed, despite the assignment of proceeds. Breaking it down further, seven of the twelve will not enforce the assignment but will allow the case to proceed if it is filed by the real party in interest (the injured client.) The remaining five states specifically recognize a distinction between an assignment of proceeds and an assignment of the entire claim and hold that an assignment of proceeds is not against public policy.

Michigan is one of the states that recognizes the distinction and allows an assignment of the proceeds of a legal malpractice action. In *Weston v. Dowty*, 414 N.W.2d 165, (Mich. App. 1987) [Exhibit 5] Ella Sharpe was injured while at someone's home. *Id.* at 166. Sharpe filed suit against the homeowners who subsequently hired lawyers to defend them against Sharpe. *Id.* A default judgment was entered against the homeowners who, in order to mitigate their damages, entered into a consent judgment with Sharpe and agreed to file a legal malpractice action against their lawyers and to give Sharpe any monies obtained. *Id.*

The lawyers sought dismissal of the legal malpractice action alleging the assignment of proceeds violated Michigan law. The trial court granted summary judgment to the lawyers. *Id.* The appellate court disagreed stating, "In the instant case, [homeowners] did not assign the claim or cause of action to Sharpe. [Homeowners] merely agreed to give Sharpe any proceeds recovered." *Id.* The court went on to define this transaction as being something other than an "assignment" because "[A] promise to pay money when the promissor receives it from a specified source is not an assignment." The court held that "Since [homeowners] agreed to assign only a portion of their recovery, if any, from the malpractice suit, and since they did not specifically assign the claim or cause of action to Sharpe, we conclude that no assignment of a legal malpractice action occurred." *Weston* at 242. The appellate court, in reversing the trial court's summary judgment, noted, **"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."** *Id.* (*citing Joos v. Drillock*, 338 N.W.2d 736 (Mich. App., 1983)) "Thus, the trial court erred in granting partial summary disposition in favor of [lawyers] and in dismissing [homeowners'] complaint..." *Id.*

The New Mexico Court of Appeals also addressed this issue in *First Nat. Bank of Clovis v. Diane, Inc.*, 102 N.M. 548 (N.M.App. 1985) [Exhibit 6]. The *Clovis* court, like this Court, was faced with a plaintiff who entered into a release and satisfaction agreement with a former adversary, Diane, Inc. *Id.* at 556. The agreement stated the plaintiff would pay the former adversary $45,000 and assign the first proceeds from his legal malpractice action against his former attorney to the adversary up to an amount that would satisfy the original judgment. *Id.*

The *Clovis* court allowed the assignment holding "Defendant contends that since plaintiff assigned away a contingent right to the proceeds, he ceased being the real party in interest as to any amount exceeding $45,000 and Diane, Inc., is the real party in interest as to that amount. We reject defendant's argument...." The *Clovis* court further held, "The test to determine if one is a real party in interest is whether he is the owner of the rights sought to be enforced, or whether he is in a position to release and discharge defendant from the liability upon which the action is grounded." (*citing Hall v. Teal,* 77 N.M. 780, 427 P.2d 662 (1967))." The *Clovis* court concluded by ruling "Here, Kapnison owed money to Diane, Inc., and assigned 'the first proceeds of any Judgment' against defendant. **The release and satisfaction agreement assigned only the proceeds and not the right of action against defendant. Kapnison continued to be the owner of the right sought to be enforced and thus the real party in interest.**" *Clovis* at 556-557 (emphasis added)

In addition to the New Mexico and Michigan Courts, the Georgia Court of Appeals, the Supreme Court of Montana and the Supreme Court of Alaska all recognize that there is a distinction between an assignment of a legal malpractice claim and an assignment of the proceeds of a legal malpractice claim. *See Alpine Buffalo, Elk and Llama Ranch, Inc., v. Anderson,* 38 P.3d 815 (Mont. 2001)(court ordered debtor to assign proceeds from separate legal malpractice action to creditor); *Bohna v. Hughes, Thorsness, Gantz, Powell and Brundin,* 828 P.2d 745 (Alaska 1992)(*superseded by statute on other grounds)*(lawsuit funded by loan with no obligation to repay without recovery); and *In re Estate of Sims,* 578 S.E.2d 498 (Ga.App. 2003)(contract between individual with un-

assignable tort and one who advances litigation expenses and shares in recovery not prohibited).

An assignment of proceeds, as discussed by the above courts, is different and distinct from an assignment of an entire claim or cause of action. An assignment of proceeds was never addressed, and was certainly not prohibited, by the Court of Appeals decision in *Coffey,* 756 S.W.2d 155. Here, as in the cases cited above, Davis did not assign his entire claim or cause of action to Global, he merely assigned a portion of the speculative proceeds from his legal malpractice claim. [R. at 564; Settlement Agreement, Exhibit 3] Here, Davis is bringing this claim in his own name and is the real-party-in-interest. [R. at 2; Compl.] Based on the aforementioned case law and rationale, the Plaintiff respectfully requests this Court place Kentucky with the majority of states addressing this issue and allow Davis to proceed with his claim.

B. An assignment of proceeds does not raise the same public policy concerns as an assignment of the entire legal malpractice claim.

The Court in *Coffey* held that an assignment of a legal malpractice claim is void as against public policy. The strongest arguments against allowing assignments of legal malpractice claims, or torts in general, are based on public policy.[1] There are several public policy concerns raised by the assignment of an entire legal malpractice claim. Such policy concerns include; (1) the risk of tempering the attorneys aggressive representation of the client due to a concern that a prospective adversary may become the purchaser or holder of a client's prospective malpractice action; (2) the risk of eroding the

[1] The general rule in Kentucky is that tort claims for personal injuries may not be assigned. *State Farm Mutual Automobile Co., v. Roark*, 517 S.W.2d 737 (Ky. 1974); however, tort claims founded upon contracts and growing out of the contractual relationship can be assigned. *Grundy v. Manchester*, 531 S.W.2d 493 (Ky. 1975)

confidences and disclosures within the attorney-client relationship; (3) requiring the lawyer to defend himself by arguing against a position he once took on behalf of his client; (4) the risk of creating an underground commercial market for legal malpractice claims; and, (5) the fact that an adverse party has no concern whether pursuing the malpractice claim may in fact damage the former client. RONALD E. MALLEN, JEFFREY M. SMITH, LEGAL MALPRACTICE, (2007 ed. § 7:11 Pg. 864). Although not specifically cited by MALLEN, other public policy considerations include (6) jury confusion, and (7) the difficulty a defending lawyer might face in having to defend herself from a claim brought by a third party to whom she has no relation and against whom she never imaged she would need to defend. These are all valid public policy concerns surrounding the assignment of an *entire* legal malpractice claim. In this case, such policy considerations are not raised by Davis' assignment of a portion of the proceeds of his legal malpractice claim. All of the aforementioned public policy considerations are rendered moot when the real-party-in-interest, the injured client, brings the claim.

First, because Davis only assigned a portion of the proceeds of the claim and is bringing the claim in his own name, the concern that a prospective adversary may become the purchaser or holder of a client's prospective malpractice action is rendered moot. Davis is still the real-party-in-interest and is the only party with an interest in the outcome of this case. No one but Tim Davis has standing to bring this case and he is doing so in his own name for his own benefit.

Second, there are no attorney-client privilege concerns because the former client, Davis, is bringing the claim against his former attorney, John Scott. The privilege has not been assigned or transferred to any other party and remains with Davis and, since Davis

brought a malpractice suit against Scott, the privilege was waived by operation of law and Scott has been able to defend himself fully. *See* SCR 3.130(1.6)(b)(2) and (3) [R. at 189 Trial Court Order on Waiver of Privilege; 425-431 Court of Appeals Opinion on Writ regarding waiver of privilege]

Third, the concern that requiring the lawyer to defend himself by arguing against a position he once took on behalf of his client is not present here. Scott will likely argue the advice he gave Tim Davis was reasonable and valid. He will not be arguing against any position he has previously taken.

Fourth, there is no public policy concern raised regarding the risk of creating an underground market for legal malpractice claims because Tim Davis did not sell or market his legal malpractice claim against John Scott. Tim Davis merely negotiated and assigned away a portion of the potential proceeds in order to mitigate his damages.[2] He did not auction the claim off to the highest bidder but, instead, negotiated that he would pay Global $300,000 and a portion of the proceeds (if any) of his legal malpractice claim to satisfy Global's $2,000,000 lawsuit against him.

Fifth, there is no concern an adverse party may in fact damage the former client by pursuing this claim because Davis is the former client and he is pursuing this claim in his own name for his own benefit.

Sixth, when this case goes to trial, the jury will not be confused by an unrelated third party or a former adversary sitting down at the plaintiffs' table. The only party bringing this claim against Scott is Davis and the jury will readily be able to understand the reasons behind this case and the identities and role of the parties will be obvious to all.

[2] Global alleged more than $2,000,000 in damages during the underlying case.

Finally, John Scott is not faced with the daunting task of defending himself against an organization with which he had minimal contact and from whom he never imagined he would need to defend. Scott's defense will be aimed at Tim Davis, the plaintiff and his former client. Global has nothing to do with this case at this stage of the game and is out of the picture. Scott is not defending himself against Global and never was, as a result, this public policy concern is not implicated.

On the other side of the public policy coin, there are real benefits to allowing legal malpractice plaintiffs to assign a portion of their proceeds to other parties. First, it allows plaintiffs a way to mitigate their damages after they are injured by negligent attorneys. Second, it prevents negligent attorneys from escaping unharmed from an attorney-client relationship in which they damaged their client. Attorneys hold the lofty task of, in many cases, holding other professions responsible for their negligence. There is no reason why attorneys should not be held to the same, or even a higher, standard than that to which we hold others accountable. Allowing severely injured plaintiffs to mitigate their damages, and perhaps fund their legal malpractice action, by assigning away a portion of the proceeds of the action does not threaten the bedrock of our profession but strengthens it by creating a more aware and conscientious bar.

Because Davis assigned only a portion of the proceeds of his claim and not the entire cause of action, and because he brought the claim in his own name, this assignment of proceeds does not implicate the same concerns found when the entire claim is assigned to a third party to which the lawyer had no duty. As a result, because this situation was not contemplated by the court in *Coffey*, and because the public policy concerns expressed in *Coffey* and other case law are moot when it comes to a mere assignment of

proceeds, Tim Davis respectfully requests this court allow him to proceed with his claim against John Scott.

III. Regardless of Whether a Partial Assignment of Proceeds is Invalid, Kentucky Should Join the Overwhelming Majority of States Addressing the Issue and Allow the Assignor (Tim Davis, the Real-Party-In-Interest) To Maintain His Action, Despite the Attempted Assignment.

Davis, as the assignor, is the **real-party-in-interest**, as opposed to an assignee bringing an assigned legal malpractice claim. The trial court and Court of Appeals failed to recognize this distinction and erroneously held that the partial assignment of proceeds to Global was void because the Global/Davis Settlement Agreement somehow stripped Davis of his right, as the injured party, to bring this claim in his own name. In addition to the fact that an assignment of proceeds does not violate public policy (*infra sec II)*, Tim Davis remains injured (out of pocket losses in excess of $600,000) and as the real-party-in-interest should be allowed to pursue his claim against John Scott.

The states addressing this issue fall into two camps: (1) assignments of proceeds are permissible; or, (2) assignments of proceeds are not permissible, but the assignment does not prevent the assignor from maintaining the legal malpractice lawsuit in his own name. As discussed in section I, five states allow an outright assignment of the proceeds and seven states do not permit the assignment but do permit the real-party-in-interest to pursue the claim despite an invalid assignment of proceeds.

a) Case law supporting the right of real-party-in-interest to bring a claim despite invalid assignment.

Florida is one of the seven states that allows the real-party-in-interest to bring the claim despite an invalid assignment. In *Greene v. Leasing Associates,* 935 So.2d 21, 25 (Fla. App. 4 Dist. 2006), the court held that an invalid assignment of proceeds does not prevent the real-party-in-interest from pursuing a legal malpractice claim [Exhibit 7]. In *Greene,* attorney Greene represented Leasing Associates in asserting a complaint against U.S. Pool in bankruptcy court. The bankruptcy court dismissed Leasing Associate's claim and, on advice of Greene, Leasing Associates appealed and filed various other claims and actions against U.S. Pool. All of Leasing Associate's actions and appeals were dismissed and the law firm representing U.S. Pool (Berger Singerman) requested costs and sanctions against Leasing Associates and Greene. The court held U.S. Pool and Berger Singerman were entitled to attorney's fees, costs, and damages to be determined by the bankruptcy judge. *Id.*.

In coming to a partial settlement, Leasing Associates and Greene's co-counsel agreed to pay U.S. Pool and Berger Singerman $250,000; however, Greene refused to settle. "As a condition of settlement, Leasing Associates agreed to pursue a malpractice action against Greene and pay Berger Singerman proceeds from the malpractice suit in an amount sufficient to cover five specified categories of legal fees and costs. Only after paying these five specified claims was Leasing Associates entitled to any money from a recovery from Greene." *Id.* Additionally, Leasing Associates agreed to (1) co-operate and assist in the prosecution, and (2) waive the "attorney-client" privilege. *Id.* Leasing Associates was also required to retain Berger Singerman (its former adversary's attorney) to represent Leasing Associates in its legal malpractice action against Greene. The

engagement letter between Leasing Associates and Berger Singerman provided that "bills for professional fees and costs [the firm] will incur and expend in the representation will be paid only from the proceeds of the malpractice suit against Greene." *Id.* The settlement agreement further provided that if Leasing Associates settled with Greene without the "written consent" of Berger Singerman, or if it fired Berger Singerman, Leasing Associates was required to pay the remainder owed on the settlement plus a reasonable hourly fee. *Id.*

Leasing Associates, consistent with the settlement agreement, filed a legal malpractice suit in its own name against Greene. The court granted Leasing Associates summary judgment on its claims against Greene. On appeal, Greene argued the court should have dismissed Leasing Associate's complaint because "the settlement agreement was tantamount to an assignment that made ... Berger Singerman the 'actual but unnamed plaintiffs in the malpractice lawsuit.'" *Id.* at 24.

Florida, like Kentucky, follows the general rule that "a cause of action for legal malpractice may not be assigned or transferred." *Id.* (quoting *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 759-61 (Fla. 2005)). Florida relies on policy reasons similar to those enunciated in Kentucky's *Coffey* decision, mainly the concerns that "assignment 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." *Id.*

Even though the Florida court of appeals determined the assignment of proceeds was invalid, it also held, **"The invalidity of the agreement has no effect on the**

prosecution," (3) Herron would be reimbursed out of any recovery from Mallios and would also be entitled to fifty percent of any recovery net of all expenses, (4) Baker's claims could not be settled without both Baker's and Herron's consent and Baker would "fully cooperate in the investigation, pursuit and prosecution" of the claims against Mallios. *Id.* at 157.

The trial court granted summary judgment to Mallios because of the assignment. Baker appealed to the Texas Court of Appeals which reversed the trial court by holding "the arrangement between Baker and Herron did not violate any public policy rationale expressed by Texas and other courts for precluding some assignment of legal malpractice claims." *Id.* (*citing* the underlying Court of Appeals' opinion at 971 S.W.2d 581 (1998)) Mallios appealed to the Texas Supreme Court.

The Texas Supreme Court framed the issue on review as follows: "[e]ven assuming Mallios is correct that the agreement between Baker and Herron violates Texas public policy, an issue we do not decide today, the question remains whether that invalidity would entitle Mallios to a take-nothing judgment on Baker's malpractice claim." (emphasis added)

In affirming the court of appeals, the Texas Supreme Court held that in spite of an invalid assignment, summary judgment against the assignor is reversible error:

> Here, Baker is the alleged assignor, and assuming there was a partial assignment, Baker still retained a portion of his claim. Mallios does not dispute that Baker had the right to sue Mallios before Baker's agreement with Herron. **And even if we were to reach the issue of the agreement's validity and determine that Mallios is correct that it is an invalid assignment, that would not vitiate Baker's right to sue Mallios. Thus, either way, summary judgment was improper and Baker may continue with his suit.**

Id. at 159 (emphasis added).

Soon after the *Mallios* decision, the Texas Court of Appeals was faced with a situation very similar to that faced in this case. *Tate v. Goins, Underkofler, et al.*, 24 S.W.3d 627 (Tex. App.-Dallas 2000) In *Tate*, the Texas Court of Appeals adopted and expanded the holding of *Mallios*. Here, for the first time, a Texas court was confronted with a situation where there was a partial assignment of proceeds to an adversary, as opposed to a partial assignment of proceeds to a third-party as in *Mallios,* or an assignment of the entire claim to an adversary as in *Zuniga v. Groce, et al.*, 878 S.W.2d 313 (Tex App. 1994).

Tate hired Goins' law firm to represent her in a collection suit against SIDCO International (SIDCO). SIDCO then filed an action against Tate in a different county. Goins represented Tate on this matter as well but failed to file an answer. SIDCO obtained a default judgment against Tate for $233,166. Following the trial court's refusal to set aside the default and allow the matter to proceed on the merits, Tate fired Goins and hired new counsel. *Id* at 630.

Ultimately, Tate and SIDCO reached a settlement. Under the terms of the settlement, Tate agreed to drop her collection suit against SIDCO and "SIDCO agreed not to execute on the default judgment in exchange for Tate's agreement to assign a portion of the proceeds of his malpractice suit against Goins to SIDCO." *Id.*

More specifically, the settlement agreement required Tate to "prosecute, fully cooperate and diligently pursue any and all claims against Goins as directed by SIDCO." *Id.* The agreement also gave SIDCO exclusive control over the litigation. If the action against Goins was successful, Tate would receive ten percent (10%) of the net recovery

up to $250,000 and fifty percent (50%) of any amount in excess of $250,000, but Tate would not receive in excess of $75,000. *Id.* at 631.

Tate, in his own name, filed suit against Goins for legal malpractice. Goins moved for summary judgment and argued, among other things: Tate is not the real-party-in-interest in this case and the assignment of his malpractice claim to SIDCO violates public policy. The trial court granted the summary judgment without stating specific grounds for the ruling.

Tate appealed the trial court's summary judgment order arguing, "if an impermissible assignment occurred, it does not effect Tate's cause of action against Goins brought by Tate, himself." *Id.* at 631.

Recognizing the *Mallios* court left open the issue of whether an assignment of proceeds (as opposed to assignment of a claim) is against public policy, the *Tate* court framed the issue as follows: "Therefore, unlike the Texas Supreme Court in its recent decision in *Mallios v. Baker*, 11 S.W.3d 157 (Tex. 2000), discussed in greater detail below, we must decide whether the agreement is an assignment and, if so, whether Tate's legal malpractice claim assigned to SIDCO was enforceable against Goins. For purposes of clarity and logic, we first address Tate's third point of error where he argues he did not assign his legal malpractice claim. Then we address Tate's fourth point of error where he contends summary judgment was improper even if the settlement agreement was an assignment." *Id* at 632.

In reviewing the holding of *Zuniga,* the court of appeals determined that the settlement agreement at issue placed Tate and SIDCO "in the same situation as the parties in *Zuniga*: two former adversaries joined together for the purpose of 'enabling the

defendant-client to extricate himself from liability, and funding the original plaintiff's judgment.'" *Id.* at 634. **Even though the *Tate* court determined the Tate/SIDCO assignment of legal malpractice proceeds was invalid, it went on to hold that the invalid assignment had no effect on Tate's right to purse his legal malpractice claim.**

> Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO. **Tate emphasizes he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim. In this respect, Tate is correct.** In *Mallios*, the Texas Supreme Court held that when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment." [citation omitted] "While expressing no opinion on the validity of the underlying 'arrangement' between the plaintiff and a third party, the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm." [citation omitted] "We find the holding in *Mallios* controlling on this issue and sustain Tate's fourth point of error."

Id at 634. (emphasis added)

The Arizona Court of Appeals has also addressed this issue and held that an invalid assignment of a legal malpractice action or its proceeds does not prohibit the real-party-in-interest from bringing the legal malpractice claim and dismissal because of an invalid assignment is reversible error. *Botma v. Huser*, 39 P.3d 538 (Az. App., 2002) [Exhibit 10]

In September of 1994, Botma caused an accident resulting in significant injuries to Holly Castano [throughout the opinion, Castano is referred to by and through her personal representative, Hines. For simplicity, only the name Castano is used here].

Botma's car was insured by Safeway; however, Castano's injuries far exceeded Botma's policy limits. *Id* at 538. Castano filed suit against Botma and Safeway hired attorney Huser to defend Botma. *Id* at 540.

Castano's lawyer (Attorney Roush) came to believe Huser and his law firm had an ownership interest in Safeway Insurance. During Botma's deposition, Roush suggested Botma get a personal attorney other than Huser. *Id.* Attorney Roush wrote Huser a letter indicating his belief there was a conflict of interest in Huser continuing to represent Botma as he believed Botma had a potential legal malpractice claim against Huser for failing to accept Castano's offer to settle within policy limits. Huser and his firm withdrew from representing Botma and Safeway hired a new lawyer to represent Botma. *Id.*

Castano and Botma entered into a "Settlement[,] Assignment[,] and Covenant Not to Execute" in which (1) Castano agreed not to execute against Botma's personal assets, (2) Botma stipulated to a $12,000,000 judgment against himself, and (3) Botma assigned to [Castano] any malpractice claim he had against [Huser], and any bad faith claim he had against Safeway." Botma also agreed that Castano could file a malpractice action in Botma's name, that Castano could control the case, and that "the proceeds of any judgment in an action brought in [Botma's] name pursuant to this agreement will be assigned to [Castano] following judgment upon request of [Castano]." *Id.*

Castano filed two lawsuits, a federal bad faith action against Safeway, and a state legal malpractice action against Huser and his law firm. *Id.* The attorney defendants moved to dismiss the complaint, arguing "Arizona prohibits assignment of legal malpractice claims, and, therefore, that the complaint failed to state a claim for which

relief can be granted." *Id* at 541. The trial court granted the motion to dismiss and Castano appealed.

The Arizona Court of Appeals recognized "malpractice claims are personal injury claims, and personal injury claims are not assignable in Arizona." *Id.* (citing *Schroeder v. Hudgins*, 690 P.2d 114, 118 (Az. App. 1984). In expanding this rule, the court further held there is no distinction between the assignment of the claim and the assignment of the proceeds. *Id.* (*citing Allstate Ins. Co., v. Druke*, 576 P.2d 489 (Az. 1978).

Regardless of the invalidity of the assignment, the court went on to hold: **"Although neither Botma's malpractice claim nor its proceeds are assignable, his malpractice claim does survive the invalid assignment."** *Id.* at 542 (citing *Monthofer Invs. Ltd. P'ship v. Allen*, 943 P.2d 782, 785 (Az. App. 1997). The court explained **"the fact that Botma entered into a settlement agreement that is in part contrary to Arizona law and unenforceable does not prevent him from suing Appellees for legal malpractice."** *Id.*

b) The Davis v Scott Malpractice Action

Here, as in all of the cases discussed above, Davis did not assign his cause of action to Global; he assigned a portion of the proceeds. [R. at 563-571;Settlement Agreement, Exhibit 3] Here, as in all of the cases cited above, Davis brought the action against Scott in his own name. [R. at 2-4; Compl.] Here, as in all of the cases cited above—even if the partial assignment to Global is void as against public policy—dismissing the claim brought by the real-party-in-interest is error. All of the

aforementioned cases find that, despite an invalid assignment of proceeds, the real-party-in-interest may still bring the claim in his own name.

CR 17.01, the "Real party in interest" rule, provides in relevant part: "Every action shall be prosecuted in the name of the real party in interest, but a...person with whom or in whose name a contract is made for the benefit of another...may bring an action without joining the party or parties for whose benefit it is prosecuted. Nothing herein, however, shall abrogate or take away an individual's right to sue." The generally accepted view is that "the real party in interest is the party (person) who, by substantive law, possesses the right sought to be enforced." PHILLIPS, et. al., 6 KY. PRACT. R. CIV. PROC. ANN., Commentary to Rule 17.01 (6th ed. 2007), citing *Brandon v. Combs*, 666 S.W.2d 755 (Ky. App. 1983).

The only parties who possess the substantive right to pursue this legal malpractice claim are Tim Davis and Tim Davis & Associates. Without them, there is only a cause of action without a claimant. Such a result not only violates Kentucky case law, the modern view of the real-party-in-interest, and the language of CR 17.01, but also Sections 14 and 54 of the Kentucky Constitution which prohibit the elimination or dilution of legal remedies. Section 14 of the Kentucky Constitution states, "all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." KY Const § 14. Section 54 states, "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." KY Const § 54. These statutes reflect the desire of the drafters to maintain individuals' claims and preclude dilution or elimination of their causes of action and/or

remedies under the law. To refuse to allow Tim Davis, the real-party-in-interest, to continue with his claim is in clear contravention of Kentucky law.

Further, Kentucky case law holds that, despite assignment of a tort claim, the assignor still retains the title of real-party-in-interest. "Although an assignor may bring an action initially, either for the entire claim or for the part unassigned, where the assignor has brought suit for the whole claim, a defendant has a right to demand the assignee be made a party and assert his claim, but where defendant fails to make such demand, he may not use the assignment as a defensive measure to reduce amount awarded to the assignor." *Luttrell v. Goins*, 333 S.W.2d 949, 951 (Ky.App. 1960). *See* also *Clark v. Robert Anderson Trust*, (Not Reported in S.W.3d, 2005 WL 3333417 Ky.App., 2005).(holding an invalid assignment and collusion of a judgment does not prevent the real-party-in-interest from enforcing a judgment and assigning the proceeds).

Davis may have assigned a portion of any legal malpractice proceeds ultimately recovered, but he and his company are the only real-parties-in-interest capable of pursuing the legal malpractice claim. Davis brought the claim in his own name, has controlled the litigation from the very beginning, and has a real and vested interest in the fruits of the litigation.

The trial court refused to believe Davis was in full control of the litigation despite an affidavit from both Davis and his counsel, Hans Poppe. Mr. Poppe tendered an affidavit to the court specifically reciting that, after reviewing the Settlement Agreement, he informed Global that he could neither represent them nor communicate with them, and that if Tim Davis wanted representation, he should contact Mr. Poppe directly. [R. at 342-

343, Poppe Aff., Exhibit 11] Poppe further swore in his affidavit that he only represented Tim Davis and Davis & Associates. [R. at 342-343, Poppe Aff., Exhibit 11]

Tim Davis tendered a similar affidavit swearing that Mr. Poppe represents only Tim Davis and Tim Davis & Associates and does not represent Global or any other third party with an interest in this litigation. [R. at 344-345, Davis Aff., Exhibit 11] Davis' affidavit also recites that, regardless of the terms of the Settlement Agreement, Global was never in control of this litigation. [R. at 344-345, Davis Aff., Exhibit 11] Davis corroborated his affidavit in his deposition.

23:16 Q. Okay. So, did Global find
23:17 Mr. Poppe for you and hire Mr. Poppe?
23:18 A. Well, ultimate --
23:19 MR. POPPE: I'll object to the
23:20 extent that it was a compound question that
23:21 asked if they hired me.
23:22 MR. BREETZ: Okay.
23:23 MR. POPPE: I only represent Tim
23:24 Davis. I only have a contract with Tim Davis.
23:25 MR. BREETZ: Okay.
24:1 MR. POPPE: And to the extent
24:2 that he knows, he can answer.
24:3 MR. BREETZ: All right.
24:4 THE WITNESS: I hired Mr. Poppe.
24:5 Q. Okay. Did Global tell you to?
24:6 A. They were looking for a firm, and
24:7 Mr. Poppe is the one that -- I was tired of
24:8 looking.
24:9 Q. Okay. Did they recommend
24:10 Mr. Poppe?
24:11 A. Not that I recall recommending,
24:12 it was just a name that was given.
24:13 Q. Okay. Was Global satisfied, or
24:14 did you receive any further communications
24:15 from Global after you advised them that you
24:16 had retained Mr. Poppe?
24:17 A. No, I didn't -- I don't know if
24:18 they were satisfied, or not.
24:19 Q. Have you had any future

24:20 communications with Global since you've
24:21 retained Mr. Poppe?
24:22 A. I've had conversations with
24:23 Mr. Henningsen asking where we were at in
24:24 this, and I referred all that communication to
24:25 Mr. Poppe. I don't have a desire to talk with
25:1 him anymore.

Dep. of Tim Davis, June 13, 2007, pp. 24-25

Global has never been in control of this litigation and Global did not hire or negotiate with Hans Poppe. **Global has never attempted to enforce the terms of the Settlement Agreement in any way.** Tim Davis is in control of this litigation and has been from the start.

Dismissal is especially egregious in this case because Global has gone out of business and cannot and will not attempt to enforce the Settlement Agreement against Davis. Based on counsel's phone conversations and letter communications with the departments of insurance and secretaries of states in both Tennessee and North Carolina, Global sold its assets to a third party which has since dissolved.[3] [R. at 1591-1592; Letters to Poppe from Insurance Departments, Exhibit 12] **Meaning simply this, Davis is <u>fully in control</u> of this litigation and is entitled to 100% of the proceeds of this action.**

There can be no argument that Tim Davis is not the real-party-in-interest. There are only four parties left in this litigation. Tim Davis, Tim Davis and Associates, and John Scott and the firm of Whitlow & Scott. Tim Davis, as the real-party-in-interest, should be allowed to bring his claim regardless of the validity or enforceability of the

[3] Additionally, even if the third party had not dissolved, the enforceability of the Settlement Agreement was never before the trial court as Global has never been a party to this case and no party has ever moved to enforce the Settlement Agreement.

Settlement Agreement. Appellant/Cross Appellee Davis respectfully requests this Court allow him to proceed with his claim.

c) *The Court of Appeals and trial court's reliance on Kim v. O'Sullivan is misplaced as Kim did not dismiss the plaintiffs claims based on an assignment of proceeds.*

The trial court relied on *Kim v. O'Sullivan*, 137 P.3d 61 (Wash. Ct. App. 2006) [Exhibit 13], a case on which even the Appellee/Cross Appellant did not rely, or cite to, in their motion for summary judgment. [R. at 1541; Trial Ct. Order, Exhibit 2] Davis does not dispute *Kim* involved an assignment of proceeds of a legal malpractice action; however, the *Kim* court did NOT dismiss the case because of the assignment. The *Kim* court dismissed the case because the plaintiff suffered no injury as a result of the legal malpractice. In fact, the *Kim* court recognized the assignment of a legal malpractice case had previously been addressed by the state's highest court, the Supreme Court of Washington, in *Kommavongsa v. Haskell*, 67 P.3d 1068 (Wash. 2003). [Exhibit 14] **The *Kim* court noted "*Kommavongsa* did not dismiss the assignor's malpractice lawsuit altogether, instead remanding to the trial court so that the assignor could, if he chose, be substituted as the real party in interest and 'so that the legal malpractice claim may proceed in normal course as between the proper parties thereto.'"** *Kim* at 563 (*quoting Kommavongsa* at 67 P.3d 1068). The *Kim* court went on to recognize that **the *Kommavongsa* court "did not intend for its ruling to be applied so as 'to protect lawyers from the consequences of their own legal malpractice.'"** *Id.* at 565. In fact, *Kim* explicitly recognized that "To the extent Kim might have a valid malpractice claim that he could pursue as the real-party-in-interest, **the correct remedy under**

Kommavongsa would be a remand, not dismissal. [] In this case dismissal is justified because even if Kim would now choose to proceed as the real-party-in-interest, he has not produced evidence of damage caused by [his former attorney's] alleged breach" *Id.* at 563-564.

Kim's case was dismissed because he suffered no injury, not because of the assignment of proceeds.

The Kentucky Court of Appeals used the *Kim* case to justify the trial court's decision to grant summary judgment because the Kentucky Court of Appeals felt the real-party-in-interest must be in full control of the litigation in order to be the real party in interest and, because of the Settlement Agreement's terms, Davis was not in control. This is incorrect. The style of this case is, and has always been, *Tim Davis and Tim Davis & Associates v. John Scott.* [R. at 2-4; Compl.] Global was never a named party because they never possessed any claim against John Scott. Davis' counsel has never taken direction from Global, nor has Global attempted to control the litigation. Global will not and has not ever been in control of any facet of this litigation despite what the Settlement Agreement may state. Global is simply a memory. Tim Davis is entitled to 100% of any proceeds of this litigation and has been and will continue to be in full control of every aspect. As a result, Davis is the one and only real-party-in-interest.

The trial court and Court of Appeals based their decision to dismiss Davis's claim on a Kentucky case which does not address the issue faced in this case, *Coffey*, and a Washington case that dismissed the plaintiff's claim because the plaintiff was not truly injured, *Kim.* The trial court and Court of Appeals failed to take notice of the case law cited by the Appellant/Cross Appellee, instead relying on cases not on point on this issue.

As a result, Appellant/Cross Appellee Davis respectfully requests this Court reverse and remand this case to the trial court and allow Tim Davis, the real party in interest, to bring his claim.

IV. The Trial Court Did Not Need Jurisdiction Over the Settlement Agreement in Order to Allow Davis Proceed With the Legal Malpractice Suit.

Even though the trial court declared the Settlement Agreement "void and unenforceable," it refused to allow Davis to proceed for his own benefit. [R. at 1545; Trial Ct. Order, Exhibit 2] In affirming the trial court, the Court of Appeals held "the settlement agreement herein is the product of the federal litigation and thus is not within the purview of the trial court's jurisdiction." [Exhibit 1 p. 16] The Court of Appeals then held "As a result, the trial court herein is without the power to simply invalidate the settlement agreement and allow Davis to proceed with his malpractice claim against Scott." [Exhibit 1 p. 16]

As discussed above, of the thirteen states addressing this issue, twelve would permit Davis to proceed with his action against Scott. Kentucky is the only state to dismiss a legal malpractice lawsuit because of a lack of jurisdiction over an assignment-of-proceeds agreement. The Court of Appeals makes Kentucky a legal island unto its own. Kentucky is all the more isolated if one considers that dismissal of the malpractice claim for lack of jurisdiction over the assignment-of-proceeds agreement frustrates (if not wholly invalidates) an agreement which a Tennessee federal district court has exclusive jurisdiction to enforce or deny. Thus, the *de facto* invalidation of the assignment-of-proceeds agreement via dismissal of the legal malpractice claim touches issues of federalism and federal jurisdiction.

In support of its opinion, the Court of Appeals cited two cases: *Kim v. O'Sullivan*, 137 P.3d 61 (Wash. Ct. App. 2006) and *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005) [Exhibit 15]; however, neither of these cases dismissed the plaintiff's lawsuit because of lack of jurisdiction over the settlement agreement. In fact, as *previously discussed, infra* at 28, *Kim* was not dismissed because of an improper assignment, nor was it dismissed because the court lacked jurisdiction over the settlement agreement. It was dismissed because the plaintiff suffered no damages. Such is not the case here.

Likewise, the Court of Appeals' reliance on *Gurski* is misplaced. Gurski assigned his legal malpractice claim to a bankruptcy creditor who sued him for medical malpractice. The trial court allowed the case to proceed to verdict and the law firm appealed. At first blush, *Gurski* seems to support the Kentucky Court of Appeals' opinion to dismiss the claim outright; however, a significant distinction exists between *Gurski* and this case. As in *Kim*, the *Gurski* court recognized that Gurski and his former adversary had entered into an agreed judgment and agreement not to execute and so Gurski had suffered no injury. The Connecticut Supreme Court held "Gurski had no personal obligation to [his former adversary] on that judgment and no financial interest in the action against the law firm." 885 A.2d 163, 175.

Davis and Global have not entered into an agreed judgment or agreement not to execute. In fact, Davis actually paid Global $300,000 and Davis also incurred over $300,000 in legal fees defending the Global lawsuit. (Dep. of Tim Davis, June 13, 2007, pp.13) By anyone's measure, Davis suffered a legitimate and substantial injury as a result of Scott's legal malpractice.

The trial court and Kentucky Court of Appeals cite, and erroneously rely, on two distinguishable cases; however, neither court addresses the cases in the twelve states that support Davis' position. Of the thirteen states addressing an assignment of proceeds in a legal malpractice action, twelve allow the assignor to continue with the legal malpractice action. Kentucky should join the majority on this issue because to do otherwise would create a greater public policy concern by "protecting lawyers from the consequences of their own legal malpractice." *See Kommovongsa v. Haskell*, 67 P.3d 1068 (Wash. 2003)(allowing assignor to proceed against attorney in order to avoid protecting lawyer from his malpractice). Certainly the tortfeasor should not benefit from the *de facto* invalidation of a Tennessee agreement which no one has sought to enforce.

V. The Trial Court Failed to Consider Evidence Presented by Davis That Created Genuine Issues of Material Fact

The trial court granted summary judgment and dismissed Appellant/Cross Appellee Davis's case without fully considering all the evidence that Davis and his counsel presented. Summary judgment is not to be granted lightly and, unfortunately, the trial court did so.

In order for Appellee/Cross Appellant Scott to prevail on his motion for summary judgment, he needed to meet the burden of CR 56.03. Scott was required to prove two things: (1) that upon review of all of the pleading, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, "there is no genuine issue as to any material fact **and** (2) that [Scott] is entitled to judgment as a matter of law." CR 56.03.

In *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky., 1991), this Court identified the following attributes of the Kentucky standard for summary judgment:

> While it has been recognized that summary judgment is designed to expedite the disposition of cases and avoid unnecessary trials when no issues of material fact are raised... this court has also repeatedly admonished that the rule is to be cautiously applied....The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.... Even though a trial court may believe that the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. (emphasis added).

Steelvest requires summary judgment be denied when there is any issue of material fact when the facts are viewed in a light most favorable to the non-moving party, or where the non-moving party may prevail under any circumstances. *Id.* (*Citing Gullett v. McCormick*, 421 S.W.2d 352 (Ky., 1967); *Continental Casualty Company v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914 (Ky., 1955)).

"[T]he burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment..." and, **"Unless and until the moving party has properly shouldered the initial burden of establishing the apparent non-existence of any issue of material fact, the non-movant is not required to offer evidence of the existence of a genuine issue of material fact."** *Goff v. Justice*, 120 S.W.3d 716,724 (Ky. App. 2002) (*reversing* trial court's entry of summary judgment) (emphasis added).

"Summary judgment should not be granted lightly, and, in fact, is not to be granted at all unless the 'right to judgment is shown with such clarity that there is no

room left for controversy.'" *Kirk v. Watts,* 62 S.W.3d 37, 38 (2001) (*reversing* trial court's entry of summary judgment) (*quoting Steelvest, supra).*

In this case, Davis provided ample evidence to create issues of material fact yet this evidence was brushed aside by the trial court and not even addressed by the Court of Appeals. The Court of Appeals failed to consider the affidavits of Davis and his attorney when deciding whether Davis was the real-parties-in-interest. The Court of Appeals erroneously affirmed summary judgment based on "facts" provided by Scott in his motion for summary judgment and ignored contrary evidence presented by Davis. This is in clear contravention of Kentucky's summary judgment.

For example, the trial court erroneously found no material issues of fact existed on the following issues:

(1) Global "selected" Davis' attorney to pursue the legal malpractice action,

(2) Global negotiated the attorney's fee of malpractice counsel,

(3) Global controlled the settlement discussion in the malpractice action,

(4) Global controlled the litigation of the malpractice action,

(5) Global is responsible for the costs of the legal malpractice action,

(6) Global required Davis to waive his attorney-client privilege.

[R. at 1540-1541; Trial Ct. Order, Exhibit 2]

Davis and his counsel submitted affidavits showing all of the above were incorrect. Specifically, the affidavits reveal that Davis' counsel only represented Davis and only took directions from Davis. [R. at 342-343; 344-345; Poppe & Davis Aff., Exhibit 11] Davis also provided the court with evidence that (a) Global is no longer in existence, (b) former Global executives have no interest in pursuing the terms of the

Settlement Agreement, (c) Global representatives never attended any hearings, mediation, or proceeding of any kind; and, (d) letters from the North Carolina and Tennessee Secretaries of State showed Global has ceased to exist as a business entity. [R. 1591-1592, Exhibit 12] In fact, every piece of evidence suggests that Davis controlled and will continue to control every aspect of this litigation, and if Davis prevails in this legal malpractice action he will receive 100% of any award.

The affidavit provided by Davis' counsel, the letter from the North Carolina and Tennessee secretaries of state, and the other evidence Davis provided to the trial court is more than sufficient to show material questions of fact remained about who controlled this litigation. The trial court and Court of Appeals should not have ignored these matters.

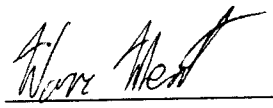
Because material issues of fact exist and were ignored, summary judgment was granted when it should not have been. Appellant/Cross Appellee Davis respectfully requests this Court reverse and remand this case to the trial court for a trial on the merits.

CONCLUSION

The trial court and Court of Appeals have placed Kentucky in the minority of states addressing this issue. The dismissal of Davis' legal malpractice suit violates Kentucky law and public policy. Further, in reaching this decision both the trial and appeals court ignored issues of material fact. As a result, the Appellant/Cross Appellee respectfully requests this Court reverse and remand for a trial on the merits.

As to Brief for Appellants/
Cross Appellants

Respectfully submitted,



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