

2016

Eagle Mountain City, Plaintiff/ Appellant, vs. Parsons Kinghorn & Harris, 'p.c., Defendant/ Appe1lee. Parsons Kinghorn & Harris, p.c., Third-Party Plaintiff, vs. Williams & Hunt, p.c., Third-Party Defendants.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EAGLE MOUNTAIN CITY,

Plaintiff/Appellant,

vs.

PARSONS KINGHORN & HARRIS,
P.C.,

Defendant/Appellee.

BRIEF OF APPELLANT

Case No. 20150915-CA

District Court No. 130300194

PARSONS KINGHORN & HARRIS,
P.C.,

Third-Party Plaintiff,

vs.

WILLIAMS & HUNT, P.C.,

Third-Party Defendants.

**APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
JUDGE JAMES BRADY**

Stuart H. Schultz
Byron G. Martin
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111

Attorneys for Defendant-Appellee

Mark O. Morris (4636)
Amber M. Mettler (11460)
Douglas P. Farr (13208)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004

Attorneys for Plaintiff-Appellant

May 18, 2016

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15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004

Attorneys for Plaintiff-Appellant

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COMPLETE LIST OF PARTIES

In addition to the parties listed in the caption, the Answer and First Amended Third-Party Complaint (R. 141-67), filed by Third-Party Plaintiff Parsons Kinghorn & Harris, P.C. added the following parties, who were each dismissed pursuant to the district court's October 7, 2014 Memorandum Decision (R. 739-48) and October 17, 2014 Order of Dismissal, (R. 767-73):

- Monte Vista Ranch, L.C.
- Legends Land and Ranch, LLC
- Eagle Mountain Communities, LLC
- Eagle Mountain Properties, LC
- EM Development, LLC
- John W. Walden, LLC
- Cedar Valley Investments of Utah, LLC
- MVR Management, LLC
- John Walden
- Robyn Walden
- Cedar Valley-White Ranch, LC
- Andrew Zorbis

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue 1: When it was undisputed that Plaintiff Eagle Mountain City brought suit in its own name, sought compensation for the actual and very real harm it suffered, and maintained exclusive control over the litigation, did the district court err when it granted Defendant Parsons Kinghorn & Harris, P.C.'s ("PKH") motion for summary judgment by concluding, based merely on agreement recitals, that the City's pre-suit agreement to share proceeds from any potential recovery from PKH constituted a partial, implied assignment in violation of Utah's public policies?

Standard of Review: An appeal of a summary judgment decision is considered "under a *de novo* standard of review, granting no deference to the district court's analysis." L.C. Canyon Partners, L.L.C. v. Salt Lake County, 2011 UT 63, ¶ 8, 266 P.3d 797. "A trial court's legal conclusions are accorded no particular deference; we review them for correctness." Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989). Whether a party receives something "by assignment . . . is a question of law that [the Utah Supreme Court] review[s] for correctness, incorporating a clearly erroneous standard of review for . . . subsidiary factual determinations." Spears v. Warr, 2002 UT 24, ¶ 38, 44 P.3d 742 (abrogated on other grounds by RHN Corp. v. Veibell, 2004 UT 60, ¶ 35, 96 P.3d 935).

Preservation: (R. 2724-35 (8/17/2015 Hearing Tr. at 22:18-33:22), 3426-3451.)

Issue 2: Did the district court err in depriving the City of the trial counsel of its choice nearly two years into the litigation by ruling, without any motion to disqualify, that the City could not use counsel “associated” with a non-party to the litigation, Cedar Valley Water Company (“Cedar Valley”)?

Standard of Review: Appellate review of a district court’s findings concerning the existence of an alleged conflict in a law firm’s representation “involve mixed questions of fact and law which, on review, do not require the deference due to findings on questions of pure fact.” Margulies By and Through Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985). “[T]he proper standard of review of that portion of the trial court’s order which allow[s] [a law firm] to remain as counsel in [a] malpractice action is the abuse of discretion standard.” Id. The Utah Supreme Court, “however, has a special interest in the administration of the Rules of Professional Conduct and the discretion granted to the trial court in matters of disqualification is quite limited when there are no factual disputes.” Spratley v. State Farm Mut. Auto. Ins. Co., 2003 UT 39, ¶ 8, 78 P.3d 603.

Preservation: (R. 2724 (8/17/2015 Hearing Tr. at 22:5-17), 3428.)

STATEMENT OF THE CASE

On June 3, 2009, Cedar Valley, represented by Snell & Wilmer L.L.P. (“Snell & Wilmer”), brought a lawsuit against the City as Cedar Valley Water Company, LLC v. Eagle Mountain City, et. al, Case No. 090402122 (the “Underlying Lawsuit”). In the Underlying Lawsuit, Cedar Valley alleged that the City breached a contract known as the 2000 Town Well #1 Capacity Purchase Agreement (the “Capacity Purchase Agreement”). PKH had served as the City’s counsel since before that agreement, advising the City concerning it and administering it on behalf of the City.

At the trial of the Underlying Lawsuit, Cedar Valley intended to show damages exceeding \$8 million. In the weeks prior to trial, trial counsel for the City, Williams & Hunt (“WH”) advised the City that PKH’s advice and administration of the Capacity Purchase Agreement was likely legal malpractice, and had subjected the City to millions of dollars in liability. Shortly before the trial scheduled in February 2013, Cedar Valley and the City settled the Underlying Lawsuit. In connection with this settlement, Cedar Valley and the City executed a settlement agreement dated February 5, 2013 (the “Settlement Agreement”). Pursuant to the Settlement Agreement, the City agreed to pay Cedar Valley more than \$4.5 million over time.

Because the City desired to pursue claims against PKH in order to recoup the losses resulting from the Underlying Litigation, the City, Cedar Valley, and Snell & Wilmer executed a Contingent Fee Agreement, incorporated by reference into the Settlement Agreement. Pursuant to the Contingent Fee Agreement, the City agreed to share a third of any recovery with Cedar Valley. Also, because Snell & Wilmer had years

of familiarity with the facts and legal issues in the matter, the City selected it to represent the City in the claims against PKH, and also agreed to share a third of any recovery with Snell & Wilmer.

On December 10, 2013, the City filed this lawsuit against PKH. PKH was already aware of the terms of both the Settlement Agreement and the Contingent Fee Agreement before the City brought its claims. PKH waited over a year to argue that the Settlement Agreement and Contingent Fee Agreement amounted to an improper assignment of the City's malpractice claim, and on February 13, 2015, after a year of extensive and expensive discovery, PKH filed a Motion for Summary Judgment seeking a dismissal of the City's claims. On October 2, 2015, the district court granted PKH's motion for summary judgment and dismissed the City's claims without prejudice. The district court concluded that the agreements constituted a "partial," implied assignment of control of the City's malpractice claims to Cedar Valley because under the agreements (1) Cedar Valley had a right to seek an independent determination of the reasonableness of any settlement the City was inclined to accept and (2) Cedar Valley had an interest in any recovery from PKH. The district court determined that malpractice claims are not assignable under Utah law as a matter of public policy. The district court further held that the City could renew its claims against PKH only if the litigation was not controlled in any way by Cedar Valley *and* the City was not represented by attorneys associated with Cedar Valley. The City now appeals the district court's ruling.

STATEMENT OF FACTS

The City filed its Complaint with the district court on December 10, 2013, seeking damages for PKH's (i) negligence and gross negligence in breaching the standard of care, (ii) breach of its fiduciary duties, and (iii) breach of contract (collectively, the "Claims"). (R. 1-24.) The City's Claims arose from the legal advice and contract administration the City received from its counsel, PKH, related to the Capacity Purchase Agreement between the City and Cedar Valley.

A. The City Agrees to Purchase a Well and Water Capacity from Cedar Valley.

In or about July 1997, the City entered into a "Water Agency and Equity Participation Agreement" with Cedar Valley ("1997 Agreement"). (R. 3630-47.) Under the 1997 Agreement, Cedar Valley was the exclusive water agent for the City. In 1998, PKH, as counsel for the City, approached Cedar Valley about entering into a new agreement to replace the 1997 Agreement. Ultimately, Cedar Valley and the City entered into the Capacity Purchase Agreement dated February 15, 2000, wherein Cedar Valley agreed to sell its well ("Well #1") and all of the remaining water capacity in Well #1 to the City. (R. 3658-76.) The Capacity Purchase Agreement reflected the parties' agreement that the value of the remaining water capacity was \$3,539,000.00. (R. 3661 at ¶ 6.) As a means of funding this purchase over a period of years, the City agreed it would collect impact fees from developers whose building lots would connect to the City's water system and would, as a result, use water from Well #1. (R. 3660-61 at ¶¶ 3-6.) The Capacity Purchase Agreement specified that the City "shall collect an impact fee of

\$720.00 for each equivalent residential unit of capacity as provided in the 2000 Impact Fee Ordinance of the Town and under the terms of this Agreement.” (R. 3661 at ¶ 5.) Importantly, the City’s obligation to pay the \$3.5 million to Cedar Valley was not dependent on its collections and existed independently of amounts collected. (R. 3360-64.) In other words, the City owed the money even if it failed to collect it from others.

B. PKH Advised the City Not to Collect Impact Fees as Required by the Capacity Purchase Agreement.

Subsequent to the signing of the Capacity Purchase Agreement, PKH advised the City that—despite the language of the Capacity Purchase Agreement—it was not actually obligated to collect water impact fees from developers, and should not remit any monies to Cedar Valley. (See, e.g., R. 3409-11 at ¶ 16 (citing R. 3504-24, 3605-19, 3526-51), ¶ 17 (citing R. 3722-29), ¶ 18 (citing R. 3731-34, 3590-3600, 3526-51, 3736), ¶ 19 (citing R. 3738, 3526-51, 3740-41, 3743-44, 3746-47, 3749-50), ¶ 23 (citing R. 3785).) The City contends this advice was negligent, a breach of the standard of care, and a breach of PKH’s fiduciary duties. (R. 19-22.) Specifically, the City alleged that PKH breached its professional duties by (i) advising the City not to collect impact fees from developers despite clear and express contractual language directing the City to do so, (ii) advising the City not to pay any monies to Cedar Valley notwithstanding the fact that PKH acknowledged at least some monies were owed and in fact some monies had been collected, (iii) advising the City that credit letters from Cedar Valley existed to support the City’s defenses against Cedar Valley’s claims when, in fact, such letters did not exist, and (iv) advising the City against accepting a settlement offer from Cedar Valley before

the Underlying Lawsuit, for reasons unsupported by facts or law, that would have substantially reduced the City's potential liability and exposure. (R. 19 at ¶ 66.)

Between 2000 and 2007, Cedar Valley made repeated inquiries to PKH and the City about the status of payments under the Capacity Purchase Agreement. (R. 11.) Finally, in July 2007, Cedar Valley filed a GRAMA request and discovered that the City had been using Well #1 as a primary water source for the City for years, and had pumped billions of gallons of water from it without making a single payment to Cedar Valley. (R. 12.) Between 2007 and 2009, Cedar Valley engaged in discussions with the City in an effort to resolve the parties' dispute over payment. (*Id.*, R. 3411 ¶ 24 (citing R. 3458-65, 3787-89).) During these negotiations, PKH repeatedly advised the City that it had no obligation to collect impact fees or to make payments to Cedar Valley under the Capacity Purchase Agreement. (*See, e.g.*, R. 3411-14 ¶ 25 (citing R. 3787-89, 3791-92, 3653-56, 3795-97), ¶ 26 (citing R. 3799-3807, 3526-51), ¶ 27 (citing R. 3809-10), ¶ 28 (citing R. 3812-26), ¶ 29 (citing R. 3812-26, 3458-65, 3605-19), ¶ 30 (citing R. 3828-33, 3835-39, 3841-43, 3845-47, 3605-19, 3415), ¶ 31 (citing R. 3835-39, 3812-26), ¶ 32 (citing R. 3849-51).) After the parties failed to reach a resolution, in June 2009, Cedar Valley filed the Underlying Lawsuit against the City. (R. 2801-23.)

C. The City Executes the Settlement Agreement and Contingent Fee Agreement with Cedar Valley.

Trial of Cedar Valley's claims against the City was scheduled for February 2013. Shortly before trial, in January 2013, Cedar Valley and the City settled the Underlying Lawsuit and entered into the Settlement Agreement. (R. 3360-63; Add. 1.) The City's

trial counsel recommended the settlement by reason that PKH's advice and misrepresentations to the City had made a defense to Cedar Valley's claims untenable. The Settlement Agreement incorporated by reference the Contingent Fee Agreement. (R. 3362.) The City and Cedar Valley entered into the Contingent Fee Agreement with Snell & Wilmer, who had acted as counsel for Cedar Valley in the Underlying Lawsuit, had extensive knowledge of the facts and history, and had essentially uncovered PKH's negligence and malpractice. (R. 3365-73; Add. 2.) Pursuant to the Contingent Fee Agreement, the City agreed to share with Cedar Valley a portion of the proceeds from any recovery of the City's planned lawsuit against PKH. (Id.) Under the Contingent Fee Agreement, Snell & Wilmer agreed to represent the City in its malpractice case against PKH. (Id. at Preamble and ¶¶ D, E, 1.)

D. The City Sues PKH for Malpractice.

The City tried to settle its claims against PKH before bringing suit. In those discussions the City disclosed to PKH the terms of the Settlement Agreement and the Contingent Fee Agreement. After a failed mediation (R. 3319-23), on December 10, 2013 the City brought this lawsuit. (R. 1-24.) The suit asserted claims for professional negligence, breach of fiduciary duty, and breach of contract. (Id.) The City alleged that PKH provided negligent advice to the City about the collection of impact fees and the payment of monies due to Cedar Valley under the Capacity Purchase Agreement. (R. 19 at ¶ 66.) The City further alleged that PKH had a duty of honesty and candor to the City and breached that duty when it falsely advised the City that written credit letters existed to support the City's primary defense against Cedar Valley. PKH knew that no such

credit letters existed. (R. 21 at ¶ 76.)¹ The City also alleged that PKH had a contractual obligation to provide competent legal advice and that PKH breached that obligation when it gave incorrect legal advice related to the City's performance under the Capacity Purchase Agreement. (R. 23 at ¶ 84.)

After the City filed its Complaint, PKH brought a third-party complaint against WH alleging that, as litigation counsel of record for the City in the Underlying Lawsuit, WH was negligent in its representation of the City and responsible for the damages incurred by the City in settling with Cedar Valley. (R. 141-67.)

E. PKH Moves for Summary Judgment.

In spite of being aware of the terms of the Settlement Agreement and Contingent Fee Agreement at the time of suit, PKH did not move at that time to dismiss the City's complaint on any grounds, including on the basis of a purported partial or other assignment allegedly in violation of public policy. PKH and the City engaged in expensive discovery for over a year. (R. 3426 at ¶ 84.) Prior to the conclusion of fact discovery, on February 13, 2015, PKH filed its Motion for Summary Judgment seeking a dismissal of the City's claims on the purported ground that the City improperly assigned its malpractice claim under the Settlement Agreement and Contingent Fee Agreement. (R. 3065-3373.) Specifically, PKH claimed that pursuant to these agreements Cedar Valley obtained a substantial interest in the legal malpractice case and that the legal

¹ Under the Capacity Purchase Agreement, Cedar Valley was permitted to assign a credit against the equity buy-in capacity for Well #1 to third-party developers. In the event Cedar Valley elected to do so (which it never did), Cedar Valley was to provide written notice to the City that it was not to charge impact fees to those third-party developers. (R. 3660-61.)

malpractice claim was somehow used as a marketable commodity. (R. 3094-95.) Although Cedar Valley is not a party, PKH also claimed it was being forced to defend itself against an entity with which it never had an attorney-client relationship, and to which it owed no duty. (Id.) Finally, PKH claimed “champerty” was promoted because Cedar Valley had agreed to pay the costs of litigation, and that Snell & Wilmer’s involvement in the case was improper. (Id.; see also R. 3107.) PKH, however, never filed a motion to disqualify Snell & Wilmer as counsel for the City and lodged no objection to Snell & Wilmer’s involvement in the case for well over a year. In support of its arguments, PKH relied on the terms of the Settlement Agreement and Contingent Fee Agreement. (R. 3068-3108, 4081-4159.)

In opposition to PKH’s motion, the City pointed out there was no assignment and that the language of the agreements did not support PKH’s arguments. (R. 3426-29.) Moreover, aside from paying costs, it was undisputed that Cedar Valley had absolutely no involvement, let alone control, over the litigation against PKH. (R. 3427-28; R. 3832 at ¶¶ 18-19 (Add. 3); R. 3951 at ¶¶ 4-5 (Add. 4); R. 3957-58 at ¶¶ 17-19 (Add. 5).) It was also undisputed that the City never received a settlement offer from PKH that it was inclined to accept. (R. 3832 at ¶ 21; R. 3951 at ¶ 5; R. 3957-58 at ¶¶ 18-19.) Finally, Snell & Wilmer’s representation of the City posed no conflict. (R. 3426-35.) The City submitted declarations to support these facts, none of which were addressed or rebutted by PKH. (See, e.g., R. 3831 at ¶ 14 (“[T]he City never intended to transfer or assign the [legal malpractice] claim, or control over the claim to [Cedar Valley].”); id. (“[I]t was always my understanding that the City would bring the claims and control the

litigation.”); *id.* at ¶ 15 (“The City agreed to using Snell & Wilmer because Snell & Wilmer was the logical choice . . . [because] it was already well acquainted with the complicated facts of the underlying case and the documents related thereto.”); *id.* at ¶ 16 (“The City Attorney at the time of the settlement, Jeremy Cook from PKH, never indicated . . . that an agreement to share proceeds with [Cedar Valley] of a malpractice claim would be improper or voidable.”).) Instead, PKH (and ultimately the district court) ignored the declarations and the undisputed facts contained therein.

F. The District Court Grants PKH’s Motion for Summary Judgment and Precludes the City from Using Snell & Wilmer.

On October 2, 2015, the district court issued its Ruling, wherein it granted PKH’s motion for summary judgment and dismissed the City’s claims without prejudice. (R. 2626-42; Add. 6.) The district court expressly advised the parties it was not ruling that the Settlement Agreement or the Contingent Fee Agreement were unenforceable. (*Id.* at 7.) The district court did, however, conclude that the agreements constituted a partial, implied assignment of the City’s malpractice claims to Cedar Valley because the agreements granted Cedar Valley the right to question whether a settlement was reasonable, allowed Cedar Valley to advance costs, and granted Cedar Valley a one-third interest in any proceeds recovered in the litigation. (*Id.* at 15-16.) The district court opined that legal malpractice claims were not assignable and that, as a consequence, the agreements violated public policy. (*Id.*) The district court concluded that the City was prohibited from pursuing its claims against PKH under terms of the agreements and that the City would be “permitted to pursue its claim against PKH [only] if it satisfies the

Court that it will be prosecuted independently of the settlement agreement. To do so, at a minimum, [the City] needs to establish that its litigation is not controlled in any way by [Cedar Valley], and that [the City] is not represented by attorneys associated with [Cedar Valley].” (Id. at 16.)

In reaching its conclusion that the Contingent Fee Agreement granted Cedar Valley enough control over the City’s malpractice claim to constitute an improper assignment, the district court identified the following provisions from the Contingent Fee Agreement:

- The City’s agreement to “file and prosecute a complaint against PKH . . . solely on the terms and conditions of this Agreement” (R. 2633 (citing R. 3365));
- The City and Cedar Valley agreeing to retain Snell & Wilmer to bring the lawsuit against PKH (Id. (citing R. 3365));
- The communications between the City and Cedar Valley and Snell & Wilmer are not privileged because the parties are jointly represented (Id. (citing R. 3367-68));
- The City and Cedar Valley agreed that each would receive one-third of any recovery from PKH in the malpractice lawsuit (Id. (citing R. 3365));
- The City and Cedar Valley agreed that Snell & Wilmer would receive one-third of any recovery from PKH in the malpractice lawsuit (Id. (citing R. 3366));
- Cedar Valley would pay all costs incurred in connection with the malpractice lawsuit (Id. (citing R. 3366)); and

- If PKH made an offer to settle and the City and Cedar Valley could not agree on the terms of the settlement, the City and Cedar Valley were required to negotiate in good faith. If the City and Cedar Valley could not agree, then they agreed to mediate. If mediation was unsuccessful, the question of whether to accept or reject PKH's offer would be submitted to an arbitration panel. (*Id.* at 2633-34 (citing R. 3369).)

The district court then surmised that the Settlement Agreement and Contingent Fee Agreement granted "partial control" to Cedar Valley in the following ways:

- 1) File the present lawsuit as a condition to settle the underlying litigation.
- 2) Be represented by a specific attorney agreed to by [Cedar Valley].
- 3) Allow the attorney to jointly represent [the City and Cedar Valley] in this case.
- 4) Waive client confidentiality with the attorney in this case to allow [Snell & Wilmer] to disclose information regarding the litigation to [Cedar Valley].
- 5) Obtain prior approval by [Cedar Valley] before it can settle the claim, or if the parties disagree, ultimately submit its rights to settle its case to binding arbitration.

(R. 2634.)

Eagle Mountain filed its notice of appeal on November 2, 2015. (R. 2669-71.) Thereafter, the district court entered an order dismissing without prejudice PKH's First Amended Third-Party Complaint against WH. (R. 2689-91.) Lastly, this litigation has not permanently destroyed the attorney-client relationship, as the City continues to use PKH as its City Attorney on many matters.

SUMMARY OF ARGUMENTS

Utah has not yet decided whether legal malpractice claims are assignable. And while Utah law permits the purchase of such claims from bankrupt estates and judgment execution sales, this Court need not address the specific question because the City did not

assign its claims as a matter of law. The City has paid out millions, and continues to pay out hundreds of thousands of dollars because PKH committed malpractice. The City seeks those monies from PKH, whose negligence and bad advice led to a completely avoidable liability. In agreeing to share a portion of any recovery with Cedar Valley in exchange for payment of costs, and with Snell & Wilmer in exchange for legal services, Cedar Valley did not assign its claims against PKH or surrender control of the litigation.

The district court recognized that neither the Settlement Agreement nor the Contingent Fee Agreement expressly assigned or surrendered control of the City's legal malpractice claim against PKH. The Court went on from those agreements, however, to erroneously opine that the City transferred its legal malpractice claim through a partial, implied assignment. In so doing, the Court attributed motives and conduct that the language of the agreements, the undisputed facts, and certainly all reasonable inferences therefrom, do not support. The City was the sole plaintiff. It filed suit in its own name, through attorneys the City selected because of their depth of knowledge and experience with the claims and many years of history at issue. The City was authorized to and in fact controlled every aspect of the litigation. The undisputed facts showed that Cedar Valley's sole role in the prosecution of claims was to pay litigation costs, over which it had no discretion. Most importantly here, while Utah law has not embraced all of the public policy reasons against assignments that other states have embraced, none of those public policy reasons are implicated by the facts of this case. The City did not transfer its legal malpractice claims – through an implied assignment or otherwise – but even if there were some sort of partial transfer here, it did not violate the public policy reasons with which

Utah is concerned and should, therefore, be deemed valid. Thus this Court should reverse the district court's decision.

Finally, the district court erred when it embraced PKH's one sentence argument and improperly held that the City could pursue its legal malpractice claim only so long as it was not represented by attorneys "associated" with Cedar Valley. The district court's holding purportedly disqualified Snell & Wilmer from representing the City despite the fact that a motion to disqualify was never filed, the district court never considered facts requiring disqualification, and the district court never requested that the matter be briefed. The district court's decision infringed on the City's right to select the counsel of its choice and could unfairly prejudice the City by forcing it to find new counsel, who must get up to speed in a case that has over six years of history between the Underlying Lawsuit and this case. The district court's depriving the City of its counsel of choice nearly two years into the litigation was prejudicial error, and this Court should reverse it.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SETTLEMENT AGREEMENT AND CONTINGENT FEE AGREEMENT CONSTITUTED A PARTIAL, IMPLIED ASSIGNMENT OF THE CITY'S LEGAL MALPRACTICE CLAIM.

The district court incorrectly concluded that the City improperly transferred its legal malpractice claim against PKH through the Settlement Agreement and Contingent Fee Agreement. The district court's conclusion ignored the undisputed facts, and all reasonable inferences favoring the City, and instead was based on its erroneous

determination that the agreements constituted a partial, implied assignment as a matter of law.

A. **Utah Law Sanctions Non-Clients Suing Lawyers for Malpractice.**

The Utah Supreme Court has yet to decide whether a legal malpractice claim is assignable under Utah law. See Snow, Nuffer, Engstrom & Drake v. Tanasse, 1999 UT 49, ¶ 8, 980 P.2d 208 (“[T]here is no need to decide whether a legal malpractice claim is assignable under Utah law in order to resolve this particular dispute.”). While the Utah Supreme Court did not reach that specific issue in the Tanasse case, it did expressly sanction the *purchase* of a legal malpractice claim from a bankruptcy estate, or in executing upon a judgment. Id. at ¶¶ 10-11. In other words, under Utah law, a total stranger to an attorney-client relationship may own the client’s malpractice claim, control it, and prosecute it against that party’s lawyer or law firm, and keep 100% of the recovery. Thus, Utah has not embraced all public policy issues identified by other courts as important or essential to the assignability issue. The present case, however, does not require this Court to delineate the types of transfers of claims that are or are not permissible because there was no transfer or implied assignment of the City’s claims against PKH.

I. *“Assignment” is a vague term that invokes a broad range of circumstances.*

As the City pointed out to the district court, there is an entire range of circumstances that would give rise to whether a malpractice claim has been “assigned” in such a way as to violate Utah’s public policies. (R. 3436-51.) And, the City

acknowledged that the majority of courts that have considered the issue have held that at least at some levels, legal malpractice claims should not be assigned. (R. 3432-35.) The City did not dispute the proposition that the Utah Supreme Court would likely adopt the idea that in some circumstances the transfer of a legal malpractice claim for consideration could violate some important public policies, and thus be barred. (*Id.*); see, e.g., Tanasse v. Snow, 929 P.2d 351, 352-53 (Utah Ct. App. 1996) (explaining that the majority of jurisdictions have determined that legal malpractice claims cannot be assigned, but recognizing that a small minority, including New York, Maryland, Oregon, and Pennsylvania, have held that legal malpractice claims are freely assignable), aff'd in part, rev'd in part on other grounds, Tanasse, 1999 UT 49.

2. *There is no need here to flesh out Utah law on assignments.*

Here, however, just as in Tanasse, the Court need not decide whether legal malpractice claims are assignable under Utah law because the City did not assign its legal malpractice claim against PKH to Cedar Valley. Instead, the City entered into a Settlement Agreement with Cedar Valley, (R. 3360-63), and a Contingent Fee Agreement with Cedar Valley and Snell & Wilmer, (R. 3365-73). It is undisputed that, as a matter of law, and as the district court recognized, neither agreement expressly assigned the City's legal malpractice claim to Cedar Valley. To the contrary, in releasing its claims against Cedar Valley, the City "[e]xpressly excluded from this Release . . . any and all claims the City may have against its own attorneys, as set forth in the Contingent Fee Agreement." (R. 3361 at ¶ 5.) Thus, not only did the City *not* assign its legal malpractice claim, it expressly retained it.

Similarly, the Contingent Fee Agreement, which was incorporated by reference into the Settlement Agreement, does not include a single provision wherein the City expressly assigned its malpractice claim to Cedar Valley or any other entity. (See generally R. 3365-73; see also R. 3362 at ¶ 7 (“Except as expressly stated herein, this [Settlement] Agreement and a companion Contingent Fee Agreement, contain the entire agreement and understanding of the parties with respect to the subject matter hereof.”).) Accordingly, the district court appropriately held that “[t]he Settlement Agreement and Contingency Fee Agreement do not expressly assign the malpractice claim to [Cedar Valley].” (R. 2635.)

Despite the above clear contract language, the district court went beyond and held that the City’s “argument that it has not assigned the claim to [Cedar Valley is] inconsistent with the content of the [Contingent Fee] Agreement.” (R. 2632.) In determining whether there is an *implied* assignment the district court properly recognized that “the creation and existence of an assignment is to be determined according to the intention of the parties, which is to be discerned not only from the instruments executed by them, if an [sic], but from the surrounding circumstances.” (R. 2635 (quoting 6A C.J.S. Assignments § 57 (2010)).) The district court concluded that there was a partial, implied assignment because “the Agreements grant [Cedar Valley] and [sic] interest in both controlling the litigation and in the potential proceeds from the litigation.” (R. 2634.) These are merely conclusions that neither the agreements nor the undisputed facts and inferences support. In reaching these conclusions (really characterizations), the district court failed to properly analyze whether there was an implied assignment because

the district court did not consider the “surrounding circumstances” of the agreements, including the undisputed facts submitted by the City.

3. *The district court unreasonably inferred conditions and facts disputed by the record evidence.*

The district court ignored the undisputed facts constituting the “surrounding circumstances” that determine whether in fact an implied assignment exists. (Compare R. 3828-3833, R. 3950-58 with R. 2626-42.) It is undisputed the City brought its legal malpractice claim in its own name and on its own behalf. (R. 1-24; R. 3832 at ¶¶ 18-21; R. 3951 at ¶¶ 3-5; R. 3956-58 at ¶¶ 12-19.) Perhaps most importantly, Cedar Valley had no control over the conduct of the litigation. (R. 3832 at ¶¶ 18-21; R. 3951 at ¶¶ 3-5; R. 3956-58 at ¶¶ 12-19.) As the City’s own representative, Mr. Ifo Pili, testified by declaration, “the City never intended to transfer or assign the claim, or control over the claim to [Cedar Valley].” (R. 3831 at ¶ 14.) Mr. Pili and the City’s mayor, Mr. Christopher Pengra, further testified that they communicated directly with Snell & Wilmer about this case and they have never been involved with any communications (directly or indirectly) with any representative of Cedar Valley concerning the prosecution of the malpractice claim or strategy. (R. 3832 at ¶¶ 18-21; R. 3951 at ¶ 4.) There is nothing in the record to rebut this. Thus, the district court’s holding improperly interpreted the agreements without looking at the intent of the parties as borne out by their many months of conduct. And, as set forth in more detail below, each of the reasons underpinning the district court’s decision is contrary to the law and the facts.

B. The Filing of the Lawsuit Was Not a Condition to Settlement.

The district court incorrectly concluded that the City's filing of the instant lawsuit was a condition of its settlement with Cedar Valley. The district court's conclusion was based solely on a recital from the Contingent Fee Agreement. (R. 2633 (citing R. 3365).) The district court's conclusion is wrong in at least three ways.

1. The recitals do not describe conditions.

First, the district court misread the recital. The recital states that "[a]s part of the Settlement Agreement, City has agreed to make demand and if needed file and prosecute a complaint against PKH . . . alleging negligence and related malpractice claims ("Lawsuit"), solely on the terms and conditions of this agreement." (R. 3365 at ¶ C.) Nowhere in the recital does it state that the City's agreement to bring a lawsuit was a condition of settlement. If PKH refused the City's demands and settlement overtures, as it did, of course the City was interested in pursuing those claims. There is no record evidence that Cedar Valley made the City's prosecution of its claims a condition to settlement, and thus the district court erred to broaden the scope of the agreement by concluding that this suit was a "condition" of settlement.

2. Recitals are not contract terms.

Second, a recital is not binding. A recital is not a contractual term between the parties. See, e.g., Garrett v. Ellison, 72 P.2d 449, 453 (Utah 1937) (holding that a portion of a promissory note that identified two individuals as payees was a mere recital and not a contractual term between the parties). Therefore, the district court further erred in construing the recital as a binding contractual term.

3. *The facts directly contradict the district court's inferences.*

Third and finally, the district court's conclusion is contrary to the undisputed facts. The undisputed facts showed that the filing of the lawsuit was not a condition to settlement, and the City would have filed a lawsuit against PKH even if the City did not settle with Cedar Valley. Specifically, the city administrator's unrebutted, sworn declaration, stated "[i]f the City and [Cedar Valley] had not entered into an agreement to share proceeds as part of its settlement, [he] would have strongly recommended pursuing, and [he] believe[d] the City would have pursued, the legal malpractice claim to recover whatever damages PKH's misrepresentations and poor legal advice had caused the City." (R. 3831-32 at ¶ 17; see also R. 3957 at ¶ 15.)

The filing of the City's malpractice claim against PKH was not a condition of settlement at all. At most, the City used its pre-existing intent to sue PKH for malpractice to negotiate a more favorable settlement agreement with Cedar Valley and to obtain the benefit of litigation costs being advanced by a third party, much the same way a law firm might advance costs on behalf of a contingent fee client. (R. 3830-31 at ¶¶ 12-14.) There is no evidence in the record that the City's decision to file a lawsuit gave Cedar Valley any control of the litigation. And the undisputed facts show, too, that after the agreements were signed Cedar Valley played no role whatsoever in making any decisions or strategy calls. Thus, it was error for the district court to infer from this vacuum that it did.

C. **Cedar Valley Did Not Choose the City's Attorney.**

The district court's decision also was based on its erroneous belief that Cedar Valley had a say in the selection of the City's counsel in this case. Again, the district

court's belief was improperly based on a recital in the Contingent Fee Agreement. (R. 2633 (citing R. 3365).) Recitals are not part of the contractual agreement between the parties, and the recital relied on by the district court does not state or even imply that Cedar Valley selected Snell & Wilmer as counsel for the City. Rather, the recital states that the "City and Cedar Valley desire to retain [Snell & Wilmer] to bring the Lawsuit against PKH." (R. 3365.) The plain language of the recital states that both parties desire Snell & Wilmer to be counsel for the City, not that settlement or anything else was conditioned on Snell & Wilmer being counsel.

Moreover, the undisputed testimony presented by the City in opposition to PKH's motion for summary judgment demonstrates that *the City* chose Snell & Wilmer as counsel, not Cedar Valley. Mr. Ifo Pili, the City's administrator, testified that the "City agreed to using Snell & Wilmer because Snell & Wilmer was a logical choice to represent the City in the malpractice lawsuit. It was already acquainted with the complicated facts of the underlying case and the documents related thereto. Further, Snell attorneys had been instrumental in exposing PKH's misrepresentations As such, we believed Snell & Wilmer could litigate the case effectively and efficiently." (R. 3831 at ¶ 15.) Similarly, Ms. Heather Jackson, the City's mayor during the Underlying Lawsuit and settlement, testified that "[She] was comfortable with the idea of the City's retaining Snell & Wilmer L.L.P. to bring the claims. . . . [and the City] believed Snell & Wilmer could litigate the case effectively and efficiently." (R. 3956-57 at ¶ 13.) Neither PKH nor the district court pointed to any record evidence refuting the undisputed fact that the City, not Cedar Valley, selected Snell & Wilmer to be the City's counsel. Thus, the recital

relied upon by the district court—to the extent it had any effect at all—did not grant Cedar Valley any control of the litigation and thus cannot be considered an element in determining whether there was an implied assignment.

D. Simultaneous Representation and Waiver of Confidentiality do not Equate to Surrender of Control.

The district court further incorrectly reasoned that because the City and Cedar Valley were jointly represented by Snell & Wilmer and the City waived confidentiality, this was sufficient to give Cedar Valley some control over the litigation. But attorneys may jointly represent multiple clients, and frequently do so, albeit in the face of a waivable conflict. See Utah R. Prof. Conduct 1.7. Parties may also choose to waive confidentiality in a lawsuit. See, e.g., Strohm v. ClearOne Comms., Inc., 2013 UT 21, ¶ 61, 308 P.3d 424 (recognizing the sharing of confidential information through a joint defense agreement).

Here, Mr. Pili’s undisputed testimony is that he had “not been involved with any conversation with any [Cedar Valley] representative concerning the prosecution of claims or strategies undertaken . . . [and he is] not aware of any other City official having such a conversation. In all of [his] communications with [the City’s] counsel on this matter, no one from [Cedar Valley] has directed any communications to [him] concerning the prosecution of claims or strategies undertaken.” (R. 3832 at ¶ 21; see also R. 3951 at ¶ 4 (Decl. of Mayor Christopher Pengra) (“I have been one of two primary points of contact for the City in communicating with our attorneys, Snell & Wilmer L.L.P., regarding the legal malpractice case against Parsons Kinghorn & Harris, P.C. . . . In all of my

communications with our counsel on this matter, no one from Cedar Valley . . . has directed any communications to me concerning the prosecution of claims or strategies undertaken.”).)

The City surrendered no control over the litigation by merely allowing Snell & Wilmer to continue its pre-existing attorney-client relationship with Cedar Valley. Joint representation and joint defense agreements are common practice in Utah. These agreements do not evidence an impermissible assignment.

E. Cedar Valley Neither Has Settlement Authority Nor the Ability to Force the City to Accept or Reject a Settlement Offer.

Finally, the district court erroneously held that the City effectively transferred control of the litigation to Cedar Valley by agreeing to obtain approval from Cedar Valley before accepting or rejecting a settlement offer. The Contingent Fee Agreement does not say this. It states in pertinent part,

In the event PKH and/or its insurer(s) make an offer of settlement to [the City and/or Cedar Valley], and they cannot mutually agree on the terms of negotiated settlement of the Lawsuit, then the clients agree to first negotiate in good faith. Failing an agreement then, the parties shall mediate their dispute before a mediator . . . In the event the dispute is not resolved by mediation, each of the [two parties] shall select an arbitrator and the two selected arbitrators shall select a third arbitrator The decision of the three arbitrators regarding whether to accept or reject the pending offer shall be binding on the clients.

(R. at 3369 at ¶ 7.)

First, the Court should take note of the fact that PKH has never made a settlement offer to the City that it was inclined to accept, and thus if PKH never makes an attractive

offer to the City, the clause is moot. No “rights” of Cedar Valley have been, and they may not ever be, triggered.

Second, the language of the agreement does not support the district court’s reading. Pursuant to the plain terms of the Contingent Fee Agreement, Cedar Valley cannot force the City to accept or reject a settlement offer. Rather, in the event that the City desires to accept a settlement offer from PKH, the Contingent Fee Agreement merely allows Cedar Valley to comment upon and mediate the reasonableness of the offer to determine whether such a settlement offer from PKH is “reasonable.” Failing that, an independent neutral may need to become involved. This is no different from a standard contingency fee agreement between an attorney and her client. The district court ruled that the right to test the reasonableness of a settlement offer amounts to a surrender of control. That is not the law.

F. The Policy Reasons for Not Allowing the Assignment of Legal Malpractice Claims Are Not Present Here.

After considering the factors above and holding that the City partially assigned its legal malpractice claim against PKH to Cedar Valley by granting “partial control” of the litigation to Cedar Valley, the district court next analyzed the policy reasons for not allowing the assignment of a legal malpractice claims. The district court identified the following public policy concerns: (1) avoiding the exploitation and merchandising of malpractice claims, (R. 2637-38 (citing Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 389 (Cal. Ct. App. 1976))); (2) preserving the sanctity of the attorney-client relationship, (R. 2638 (citing Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991))); (3) preventing

collusion, (R. 2639 (citing Gurski v. Rosenblum and Filan, LLC, 885 A.2d 163 (Conn. 2005), Kommavongsa v. Haskell, 67 P.3d 1068 (Wash. 2003))); (4) avoiding an abrupt and shameless shift of positions in the malpractice case, (R. 2639 (citing Picadilly, 582 N.E.2d 338)); and (5) eliminating any distinction between assignment of a cause of action and an assignment of recovery, (R. 2639-40 (citing Town & Country Bank of Springfield v. Country Mut. Ins., Co., 121 Ill. App. 3d 216 (Ill. Ct. App. 1984), Gurski, 885 A.2d 163)). After analyzing these public policy concerns, the district court “adopt[ed] the majority position that malpractice claims should not be assignable.” (R. 2640.) Whether, and to what extent, these policies come into play is a highly fact sensitive inquiry.

Because the City did not assign its legal malpractice claim, partially or otherwise, there is no need for this Court to determine whether Utah law prohibits the assignment of legal malpractice claims. Assuming, however, the agreements included some sort of transfer, and even if that transfer could be characterized as a “partial assignment,” the undisputed facts of this case show that this case does not implicate the public policy issues with which courts are concerned. Thus, there was no assignment in violation of Utah’s public policy and the district court’s ruling should be reversed.

1. The City did not exploit or merchandise its malpractice claim.

The first public policy reason the district court identified was the risk of exploitation of legal malpractice claims. (R. 2637-38 (citing Goodley, 62 Cal. App. 3d 389.) In Goodley, the California Court of Appeals held that legal malpractice claims are not assignable because “[t]he assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and

transferred to economic bidders who have never had a professional relationship with the attorney.” 62 Cal. App. 3d at 397. In Goodley, the party with the legal malpractice claim actually sold the claim to an assignee and the assignee brought the claim in his own name. Id. at 392.

In contrast to Goodley, however, the Utah Supreme Court has already held that legal malpractice claims can be sold to total strangers to the relationship. Tanasse, 1999 UT 49 at ¶¶ 10-11. The idea of multiple bidders on a legal malpractice claim in a bankruptcy auction or in the execution sale on a judgment *is not* offensive to Utah public policy. See id. Notwithstanding that, the City did not sell or assign its malpractice claim. The City did not post its legal malpractice claim on eBay or otherwise put it up for bid in the market place. The City brought the malpractice claim in its own name, controlled the litigation, and stood to recover from any judgment against PKH. The City’s actions did not rise to any exploitation of a legal malpractice claim.

2. *The sanctity of the attorney-client relationship is preserved.*

Next, the district court identified the public policy concern of the sanctity of the attorney-client relationship. (R. 2638 (citing Picadilly, 582 N.E.2d 338.)) In Picadilly, the court held that “[t]he assignment of a legal malpractice claim is perhaps most incompatible with the attorney’s duty of loyalty” because that duty can be weakened if zealous advocacy could be threatened by the knowledge that “a client can sell off a malpractice claim, particularly if an adversary can buy it.” Picadilly, 582 N.E.2d at 342. Picadilly continued that “[i]f assignments were permitted, . . . they would become an important bargaining chip in the negotiation of settlements An adversary might well

make a favorable settlement offer to a judgment-proof or financially strapped client in exchange for the assignment of that client's right to bring a malpractice claim against his attorney." Id. at 343. Again, this case does not implicate this policy.

First, the Tanasse case shows that Utah's public policies are not offended if a stranger to the attorney-client relationship is the plaintiff suing the lawyer. In Utah, a lawyer representing a client whose financial circumstances could lead to bankruptcy or an adverse judgment always runs the risk a malpractice claim will go to bid. Moreover, this policy is not offended by the facts here because Cedar Valley did not purchase the claim from the City. In Picadilly, by contrast, the assignee purchased the claim in a bankruptcy proceeding (which Utah law allows), and although brought in the assignor's name, the assignor had no involvement in the malpractice suit. Id. at 339. Picadilly has no application here to suggest the City assigned its claim in any impermissible way.

Second, Cedar Valley never made a settlement offer in exchange for an assignment of a legal malpractice claim. Pursuant to the Settlement Agreement, the City paid Cedar Valley over \$4.5 million to settle the Underlying Lawsuit. The Contingent Fee Agreement allowed the City to obtain the benefit of legal services and the payment of costs by agreeing to share a portion of any recovery. As detailed above, this granted no control to Cedar Valley over the litigation.

Third, the City was not judgment-proof or financially strapped, and thus was not susceptible to the sort of financial vulnerabilities that concern other courts. And again, being financially vulnerable, as in bankruptcy, is not a bar to a malpractice claim being transferred to a third party willing to pay value for it. Tanasse, 1999 UT 49 at ¶¶ 10-11.

Finally, it is undisputed the City was inclined to bring these claims to seek compensation for the multimillion dollar exposure to which PKH's negligence subjected it. Neither the Settlement Agreement nor the Contingent Fee Agreement did any violence to the attorney-client relationship between the City and PKH, *which relationship continues today*.

3. *The City and Cedar Valley did not collude.*

The district court next identified the public policy concern of protecting against collusion. (R. 2639 (citing Gurski, 885 A.2d 163; Kommavongsa, 67 P.3d 1068).) In Gurski and Kommavongsa, the courts held that permitting assignments creates an opportunity for a party to stipulate to damages in exchange for an agreement from the other party not to execute on the judgment and instead to take an assignment of a legal malpractice claim. 885 A.2d at 174; 67 P.3d at 1078. Those courts rightly observed that when a party stipulates to damages, or to a judgment, but faces no risk of collection, the damages are not real. It is merely a number that the parties generated through collusion. Of course nothing like that happened here.

The City did not stipulate to judgment. Cedar Valley did not agree to forebear collection on a judgment in exchange for an assignment of a legal malpractice claim. Rather, to avoid claims exceeding \$8.8 million, the City agreed to pay Cedar Valley over \$4.5 million in cash money, to the prejudice of its citizens. (R. 3384 at Resp. to ¶ 5.) This was not a hollow judgment. It was a real and very substantial loss occasioned by PKH's negligence and misrepresentations to its client. There was no collusion.

4. *Any shift of positions in this case is present in any malpractice case.*

The district court next considered the “role reversal” that inevitably occurs in legal malpractice claims. (R. 2639 (citing Picadilly, 582 N.E.2d 338).) In Picadilly, the court described the nature of a legal malpractice claim, which requires a party to show that (i) they employed the attorney, (ii) the attorney failed to exercise ordinary skill and knowledge, (iii) proximate cause, and (iv) loss to the party/plaintiff. 582 N.E.2d at 344. “To prove causation and the extent of the harm, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorneys’ negligence. This proof typically requires a ‘trial within a trial.’” Id. The Picadilly court then explained that “[b]ecause of the unique nature of the trial within a trial . . . the jurors hearing the evidence . . . would rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered.” Id. at 345. That rationale is, however, an indictment of every legal malpractice case, of any kind. And, to the extent a legal malpractice claim purchased out of a bankruptcy or from a judgment debtor through execution involves a shift in legal position, Utah public policy is not concerned with it. Tanasse, 1999 UT 49 at ¶¶ 10-11.

Neither the district court nor the court in Picadilly explain or analyze why the assignment of a legal malpractice claim would increase a juror’s disregard for the law or lawyers any more than a non-assigned legal malpractice case. And in fact, the Picadilly court explained that “[s]hifts in position are inevitable as long as clients are allowed to bring malpractice claims, and attorneys are permitted to fight them.” 582 N.E.2d at 345,

n.10. Here, there is nothing untoward about the City's believing PKH's advice for years and then suddenly realizing that advice was negligent and wrong when put under the scrutiny of the Underlying Lawsuit.

Thus, this public policy concern exists in any legal malpractice case. It does nothing to determine whether a claim is assignable, nor whether here an actual assignment, partial or otherwise, occurred.

5. *The City and Cedar Valley did not attempt to bypass public policy concerns.*

Finally, the district court analyzed the "meaningless distinction" between an assignment of a cause of action and an assignment of recovery from such an action in order to circumvent the public policy concerns. (R. 2639-40 (citing Town & Country Bank of Springfield, 121 Ill. App. 3d 216; Gurski, 885 A.2d 163).) Here, as the district court correctly recognized "[t]he Settlement Agreement and Contingency Fee Agreement do not expressly assign the malpractice claim to [Cedar Valley]." (R. 2635.) Yet without any further factual basis the district court held that the agreement between the City and Cedar Valley to share in the proceeds of any recovery from the legal malpractice action was an attempt to bypass the other public policy concerns. That was error as a matter of law. The City settled the Underlying Lawsuit with Cedar Valley. In doing so, the City did not assign or give up control of its legal malpractice claim. The City obtained the benefit of having its litigation costs paid, and it obtained the benefit of legal counsel whose familiarity with the facts of the case made it the natural choice. In exchange, the City agreed to share proceeds from a recovery, which is standard in any contingency fee

agreement. The district court's ruling effectively calls into question the validity of every contingency fee agreement.

The district court erred in going beyond the agreement, ignoring undisputed facts, and finding a partial, implied assignment here. Thus this Court should reverse the district court and remand for trial.

II. THE DISTRICT COURT ERRED IN PLACING CONDITIONS ON THE CITY'S CHOICE OF COUNSEL.

If this Court concludes that the district court erred in concluding that the City did not assign its legal malpractice claim against PKH to Cedar Valley, then Snell & Wilmer is certainly permitted to represent the City in this case. If, however, the Court elects to reach this issue, the Court should nevertheless reverse the district court and allow the City to use the counsel it chose to represent it in this lawsuit.

A. The District Court Ignored the City's Right to the Counsel of Its Choice.

It is well-settled that a trial court "must recognize a presumption in favor of [the party's] counsel of choice." Wheat v. United States, 486 U.S. 153, 164 (1988). This "presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." Id. Here, the district court neither acknowledged the presumption in favor of the City's right to the counsel of its choice nor found an actual or potential conflict. Thus, even assuming Cedar Valley had control of the litigation (it did not) and the City's malpractice claim was assigned to Cedar Valley (it was not), the district court's decision to essentially disqualify any firm that merely has a vague "association" with Cedar Valley was error.

B. Placing Conditions on the City's Counsel Was Unsupported.

In the final sentences of its Ruling, and with no analysis, the district court held that the City “is permitted to pursue its claim against PKH . . . [if it] is not represented by attorneys associated with [Cedar Valley].” (R. 2641.) Importantly, the district court did not say that Snell & Wilmer, by name, was barred from representing the City. By implication, if for example the association between Snell & Wilmer and Cedar Valley were terminated, Snell & Wilmer would still be entitled to represent the City in pursuing the claims to trial. Unfortunately, the district court provided neither reasoning nor analysis for its decision on attorneys. Thus it is difficult, if not impossible, for the City or this Court to know the grounds for this decision. Regardless, the district court’s *sua sponte* holding depriving the City of the counsel of its choice violates the City’s rights for at least two reasons.

C. PKH Did Not Move to Disqualify Counsel.

The district court erred because this question was never properly before it. In fact, in spite of the fact that PKH was aware of Snell & Wilmer’s representation months before this case was filed, and in spite of going through expensive discovery and negotiations for months with Snell & Wilmer, PKH never filed a motion to disqualify Snell & Wilmer. No one suggested, and no one briefed, the existence of an alleged conflict or other reason why Snell & Wilmer could not adequately or ethically represent the City. Instead, the very last sentence of PKH’s argument in support of its Motion for Summary Judgment stated, without explanation or citation to controlling or persuasive authority, that “[i]f this court dismisses the case without prejudice and [the City] chooses

to re-file, [the City] cannot be controlled in any way in that litigation by [Cedar Valley] and cannot be represented by [Snell & Wilmer].” (R. 3107.) The district court erred when it embraced this back door and naked effort to prejudice the City’s ability to prosecute its claims.

D. The Sole Authority for Disqualifying Counsel Has No Resemblance to this Case.

Even if the matter were properly before the district court, the district court erred in concluding that a firm “associated” with Cedar Valley could not represent the City. PKH cited to only a single case, without any analysis, in support of its argument that Snell & Wilmer could not represent the City. (R. 3106-07 (citing Edens Tech., LLC v. Kile Goekjian Reed & McManus, PLLC, 675 F. Supp. 2d 75 (D.D.C. 2009).) Edens is easily distinguishable and does not support the district court’s ruling here.

In Edens, a technology company sued its former attorneys for legal malpractice stemming from the former attorneys’ representation of the company against a competitor in a patent infringement case. 675 F. Supp. 2d at 76. The defendant attorneys moved to dismiss, alleging in part that the company had improperly assigned the legal malpractice claim to its competitor. Id. The malpractice lawsuit arose from a settlement agreement entered into between the company and its competitor in the underlying lawsuit. Id. Pursuant to the settlement agreement, the company consented to judgment in the underlying lawsuit and the competitor agreed not to collect on the consent judgment in exchange for “a partial assignment of the proceeds” from the company’s legal malpractice action against its former attorneys, which the competitor agreed would be

considered satisfaction in full of the amount of the consent judgment. Id. at 77. The settlement agreement allowed the company to keep any amounts it recovered in excess of the consent judgment. Id.

Most importantly, the settlement agreement in Edens wrested from the plaintiff its choice of counsel, and made that choice subject to the whims of the assignee of the claim. “The malpractice action against [the former attorneys], although filed with [the company] named as the plaintiff, *is to be prosecuted by counsel selected by [the competitor]*, and [the company] must cooperate in the suit.” Id. (emphasis added.) Finally, the settlement agreement provided that “*all decisions relating to this malpractice action are ‘controlled’ by [the competitor]*, with [the competitor] paying all litigation costs and attorneys’ fees.” Id. (emphasis added.) Accordingly, pursuant to the terms of the settlement agreement, the competitor selected the attorneys who would represent the company in the malpractice claim. Id. at 78. The court held that the company improperly assigned its malpractice claim because it essentially gave up all control of the claim in the settlement agreement. Id. at 86. The court then dismissed the complaint without prejudice allowing the company to refile its complaint if (1) the competitor had no control over the malpractice claim and (2) the company was not “represented by attorneys associated with [the competitor].” Id.

E. The City’s Case Contrasts to Edens.

The district court apparently embraced the policy reasons and rationale of the Edens decision, but without any facts resembling those in that case. Here, as opposed to Edens, the Settlement Agreement required the City to pay a total settlement amount of

\$4,560,000 to Cedar Valley, regardless of the outcome of this malpractice action. (R. 3051-52.) Additionally, the City (not Cedar Valley) chose Snell & Wilmer to represent the City. (R. 3365, 3831 at ¶ 15, 3956-57 at ¶ 13.) The undisputed facts showed that the City carefully selected Snell & Wilmer as counsel because “it was already well acquainted with the complicated factual history of the events giving rise to the claims, and the documents related thereto. . . . As such, [the City] believed Snell & Wilmer could litigate the case effectively and efficiently.” (R. 3956-57 at ¶13.) The facts also showed that—consistent with the terms of the Contingent Fee Agreement and the Settlement Agreement—the City controlled the litigation, interacted directly with Snell & Wilmer throughout the course of the legal malpractice case, and never communicated with anyone from Cedar Valley concerning the prosecution of the City’s claims or strategy. (R. 3832 at ¶¶ 20-21, 3951 at ¶ 4, 3957 at ¶ 17.)

Without any analysis or even allowing proper briefing, the district court ordered that the City could pursue its claim if it could demonstrate that its counsel was not associated with Cedar Valley in any way. This robbed the City of its choice of counsel, and effectively disqualified Snell & Wilmer from representing its client merely by “association” with another firm client. The law does not support this violation of an essential right to counsel of one’s choosing.

F. PKH Seeks a Strategic, Not an Ethical, Advantage.

Finally, PKH’s self-serving motive in trying to deprive the City of Snell & Wilmer’s help is apparent. Since 2009, when Snell & Wilmer first began examining the City’s conduct under the Capacity Purchase Agreement in light of the advice it was

receiving from PKH, it has developed a familiarity with the facts and issues in this case that could not be duplicated without a very significant financial and time commitment. No evidence is necessary to show the City will be greatly prejudiced and harmed if it is not permitted to proceed with Snell & Wilmer as its counsel. This case has been pending since 2013. The parties have conducted extensive and very expensive discovery. If the City is forced to select new attorneys, these new attorneys would not only need to get up to speed on the issues surrounding this case, but on a decade plus of history in the Underlying Lawsuit as well. Under these circumstances, it is unjust and unfairly prejudicial to force the City to retain new counsel.

Because the trial court, without explanation or analysis, abused what little discretion it had to tell the City it may no longer have the six years of history and experience Snell & Wilmer has in this case, this Court should reverse the district court's holding and permit the City to move forward with its legal malpractice claims against PKH with Snell & Wilmer as counsel, whether or not Snell & Wilmer is "associated" with Cedar Valley. And finally, if that association causes any concern, this Court should clarify that Snell & Wilmer may continue to represent the City if its former association with Cedar Valley is concluded.

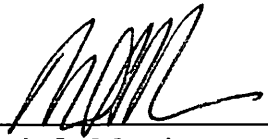
CONCLUSION

For all of the reasons set forth herein, the City respectfully requests that the Court reverse the district court's grant of summary judgment and remand to the district court for proceeding with expert discovery and a trial on the merits. The City further requests that the Court reverse the district court's decision depriving the City of its choice of counsel,

including clarification that if Snell & Wilmer no longer represents Cedar Valley, it is not
“associated” with Cedar Valley for purposes of the district court’s Ruling.

DATED this 18th day of May, 2016.

Snell & Wilmer L.L.P.



Mark O. Morris
Amber M. Mettler
Douglas P. Farr

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)

because:

- ☒ this brief contains 10,565 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B), or
- ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b)

because:

- ☒ this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 13, or
- ☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state name of characters per inch and name of type style*].

Dated: May 18, 2016



CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2016, two copies of the foregoing
BRIEF OF APPELLANT were served by U.S. mail on the following:

Stuart H. Schultz
Byron G. Martin
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111

Timothy K. Conde
Lauren A. Shurman
Jose A. Abarca
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84180

Phillip A. Cole
LOMMEN ABDO, P.A.
1000 International Centre
920 Second Avenue South
Minneapolis, MN 55402



ADDENDA

1. Settlement Agreement
2. Contingent Fee Agreement
3. Declaration of Ifo Pili, 03/16/2015
4. Declaration of Mayor Christopher Pengra, 03/11/2015
5. Declaration of Heather Jackson, 03/11/2015
6. Ruling on Defendant's Motion for Summary Judgment, 10/02/2015

Tab 1

SETTLEMENT AGREEMENT

Cedar Valley Water Company, LLC, a Florida limited liability company, ("CV"), and Eagle Mountain City, a municipality and political subdivision of the State of Utah ("City"), hereby enter into this Settlement Agreement (the "Agreement") as of the 5th day of February, 2013 ("Effective Date"), for the purpose of settling and resolving certain claims, controversies and disputes between them on the terms and conditions and for the consideration set forth below.

1. Intent of the Parties. There is a dispute between the parties to this Agreement arising from the performance, administration and payment under a contract between them dated February 15, 2000 that is commonly referred to as the "2000 Water Capacity Agreement." The dispute resulted in the filing of that certain legal action now pending in the Fourth Judicial District Court for Utah County, State of Utah, captioned Cedar Valley Water Co. v. Eagle Mountain City, Case No. 090402122 (the "Litigation"). Without waiving or conceding their respective positions in the Litigation, it is the intent and purpose of the parties to this Agreement to fully and completely settle, compromise and resolve all claims and controversies between them arising out of or in any way referring or relating to the Litigation and the 2000 Water Capacity Agreement up to the date of this Agreement. Upon execution of this Agreement, the obligations of the City under the 2000 Water Capacity Agreement shall be deemed fulfilled.

2. Dismissal of Litigation. The parties hereby agree that subsequent to the approval of this Agreement by the City Council of Eagle Mountain City pursuant to a meeting duly noticed, a Stipulation, Motion and Order of Dismissal shall be executed by the respective counsel for CV and the City and filed in the Fourth Judicial District Court dismissing the Litigation with prejudice and upon the merits, with all parties to bear their own costs and attorney's fees.

3. Payment by City. As consideration for dismissal of the Litigation and as part of this Agreement, City shall pay jointly to CV and its counsel, Snell & Wilmer in current U.S. funds, the sum of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00), without accruing interest, payment to be made on the following schedule: a) Two Million Dollars within ~~fourteen~~ (14) business days of the approval of this Agreement by the Eagle Mountain City Council; b) Five Hundred Thousand Dollars (\$500,000.00) on or before March 1, 2014; and c) the balance of Three Hundred Thousand dollars (\$300,000.00) on or before February 5, 2015.

4. Additional Consideration. In addition to the monetary payments described above, beginning on the second anniversary of the Effective Date, the City shall pay to CV the sum of One Million Seven Hundred Thousand Dollars (\$1,760,000.00) ("1.76M

Principal"), without accruing interest, as follows:

a. The sum of Seven Hundred Twenty Dollars (\$720.00) multiplied by the number of residential building permits issued anywhere in the City after February 5, 2015 until the \$1.76M Principal is paid in full. The City shall make these payments to CV on a quarterly basis, beginning on April 1, 2015, and shall simultaneously provide CV an accounting of building permits issued during the quarter just ended.

b. At any time prior to the City's \$1.76M Principal obligation being satisfied, CV shall have the right in the following limited circumstances to utilize a credit to be applied by the City against payments owing towards the \$1.76M Principal. Upon receiving a writing from CV requesting a credit against Building Department Plan Review Fees, and all Submittal, Application, Processing, Review and Recording Fees as identified in the City Consolidated Fee Schedule being City Resolution No. R-18-2012, which fees and monies the City would otherwise have the right to collect from third parties seeking approvals from the City, the City shall credit against the \$1.76M Principal the amount of any such fees and monies. These credits, if any, shall have no effect on the City's obligations to make quarterly payments to CV beginning two (2) years after the Effective Date, other than to reduce the total number of such payments by reason of reductions in the total \$1.76M Principal. The City shall provide to CV written accountings of these credits on a quarterly basis, even if there are no such credits to report. By way of example only, if CV requested in writing a credit in May, 2013 of \$500 towards a City plan check fee that the City would otherwise charge in connection with a new building permit, such credit would have no impact on the City's obligation to make the first payments towards the \$1.76M Principal after the Effective Date, nor on the amount of such initial payments, but rather the \$1.76M Principal amount would be reduced by the \$500.00 credit along with the number of such payments made to CV by the City. This credit mechanism cannot be used to avoid payment of impact fees.

c. The parties acknowledge that the City's payments hereunder are for completion of the payments owed by City to CV for the assets acquired by City from CV as set forth and described in the 2000 Water Capacity Agreement, including without limitation, well, water capacity, well casing, well pumps, pipelines, water tanks, real property, easements, rights of way, and related infrastructure and improvements.

5. Mutual General Release of All Claims. As part of this Agreement, CV and the City, for and on behalf of themselves and their respective employees, agents, representatives, indemnitors, insurers, successors, and assigns, hereby release and forever discharge one another, together with their employees, agents, representatives, indemnitors, insurers, successors, and assigns, from any and all claims, demands, liabilities, damages, causes of action, costs and expenses, including attorney's fees, arising out of or in any way related to the Litigation and the subject matter of this Agreement. Expressly excluded from this Release are any and all claims the City may have against its own attorneys, as set forth in the Contingent Fee Agreement identified in paragraph 7 hereof. The foregoing release specifically excludes release from the terms and obligations of this Agreement.

6. Attorney's Fees. In the event of any legal action between the parties hereto

arising out of or related to the enforcement of the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorney's fees, including accounting expenses.

7. Integration. Except as expressly stated herein, this Agreement and a companion Contingent Fee Agreement, contain the entire agreement and understanding of the parties with respect to the subject matter hereof, and integrates all prior conversations, discussions or undertakings of whatever kind or nature and may only be modified by a subsequent writing duly executed by the parties hereto.

8. Counterparts. This document may be executed in one or more counterparts, which together shall constitute one and the same document.

9. Amendment. This Agreement may not be modified except by an instrument in writing signed by the parties hereto.

10. Additional Acts. The parties shall do such further acts and things and shall execute and deliver such additional documents and instruments as may be reasonably necessary or reasonably requested by a party or its counsel to obtain approvals or other benefits described in this Agreement.

12. Authorization. Each individual executing this Agreement does thereby represent and warrant to the other signers that the individual has been duly authorized to execute and deliver this Agreement in the capacity and for the party specified.

13. Mutual Participation in Document Preparation. Each party has participated materially in the negotiation and preparation of this Agreement and any related items; in the event a dispute concerning the interpretation of any provision of this Agreement or any related item, the rule of construction to the effect that certain ambiguities are to be construed against the party drafting a document will not apply.

14. No Third-Party Beneficiary Interests. Except as expressly provided herein, nothing contained in this Agreement is intended to benefit any person or entity other than the parties to this Agreement; and no representation or warranty is intended for the benefit of, or to be relied upon by, any person or entity which is not a party to this Agreement.

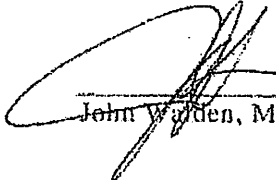
15. No Waiver. One or more waivers of the breach of any covenant, term or condition hereof by either party shall not be construed as a waiver of a subsequent breach of the same or of any other covenant, term or condition.

16. Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, representatives, officers, agents, employees, members, successors and assigns.

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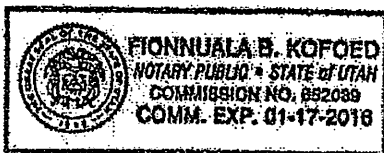
WHEREFORE, the parties have executed the foregoing to be effective as of the Effective Date.

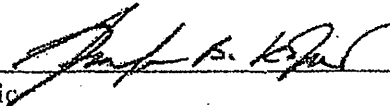
"CV"
Cedar Valley Water Company, LLC


John Walden, Managing Member

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

On this 5 day of February, 2013, before me personally appeared John Walden, known to me to be the person who executed the Settlement Agreement herein in behalf of CV and acknowledged to me that he executed the same for the purposes therein stated.




Notary Public

EAGLE MOUNTAIN CITY

By _____

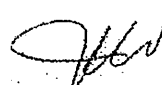
Heather Jackson, Its Mayor

Attest:

Eagle Mountain City Recorder, Finnoula Kofoed

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Tab 2

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CONTINGENT FEE AGREEMENT

THIS AGREEMENT ("Agreement") is entered into effective as of February 5, 2013 among Eagle Mountain City ("City"); Cedar Valley Water Company, LLC ("Cedar Valley") and Snell & Wilmer LLP. ("Attorney"). City and Cedar Valley are sometimes referred to herein collectively as "Clients."

RECITALS

A. In the course of defending against claims brought against the City by Cedar Valley for, among other things breach of contract, City has been advised and today understands that it may have claims for legal malpractice against the law firm of Parsons Kinghorn Harris, a Utah professional corporation ("PKH"), arising from PKH's advice to City regarding an agreement entitled "2000 Town Walden Well #1 Capacity Purchase Agreement" (the "2000 Agreement"), entered into between Cedar Valley and City on or about the 15th day of February, 2000. Many of the facts and legal theories came to the City's attention through many months of efforts by Attorney to demonstrate that the City's acts and omissions on the advice of PKH were in fact breaches of the 2000 Agreement, exposing City to Cedar Valley's claims for damages, interest, and attorneys' fees in excess of \$8 million. These facts and legal theories are also the product of Cedar Valley's expending monies out of pocket for costs towards the litigation.

B. To resolve the above litigation, City and Cedar Valley have entered into that certain Settlement Agreement, dated effective February 5, 2013, resolving all claims between them arising from the 2000 Agreement in the action, *Cedar Valley Water Company, LLC v. Eagle Mountain City*, Civ. No. 09042122, Fourth Judicial District Court ("Settlement Agreement").

C. As part of the Settlement Agreement, City has agreed to make demand and if needed file and prosecute a complaint against PKH in the Third Judicial District Court, Salt Lake County, State of Utah, alleging negligence and related malpractice claims ("Lawsuit"), solely on the terms and conditions of this Agreement.

D. City and Cedar Valley desire to retain Attorney to bring the Lawsuit against PKH, in part, because Attorney has extensive experience with and knowledge of the facts and has developed evidence supporting the City's claims against PKH in the Lawsuit.

E. In the Settlement Agreement, City and Cedar Valley agreed that after payment of costs, each would receive one-third, and Attorney would receive as its fee for legal services one-third, of the recovery, if any, from PKH in the Lawsuit. To that end, the parties are entering into this Agreement.

F. Clients and Attorney now desire to enter into this Agreement in accordance with the terms set forth herein.

AGREEMENT

NOW THEREFORE, IT IS AGREED between Clients and Attorney as follows:

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1. Fee Payment. Except as provided by Section 2 below, if the Lawsuit is resolved by way of an agreed settlement, in consideration of the services to be rendered by Attorney in connection with the Lawsuit, Clients each agree that Attorney is entitled to one-third (1/3) of the sums recovered from PKH (including its insurers), after out of pocket costs are first deducted from such recovery. In the event that the Lawsuit is tried and the court awards damages, and if City obtains an award of attorney fees and Costs (defined below) from the court ("Award"), the Award shall not be added to the damages portion of the judgment for purposes of calculating the one-third contingency fee owed to Attorney. Cedar Valley and City shall receive from the Award all sums allocated to Costs as reimbursement for their respective obligations and payments towards Costs.

2. Appeal. In the event of an appeal in connection with the Lawsuit, Attorney shall have the option to (i) represent City in appeal or (ii) withdraw from representation of City, as follows:

a. If Attorney represents City and City prevails on appeal or post-trial motion, or if the case settles or is in any way otherwise resolved during the pendency of the appeal, Clients shall pay Attorney forty percent (40%) of the total sum recovered, if any, by reason thereof, leaving their respective recovery to be 30% each.

b. Attorney may withdraw, and if Attorney does not represent City and City prevails on appeal or post-trial motion, or if the case settles or is in any way otherwise resolved during the pendency of the appeal, Clients shall pay Attorney one-third (1/3) of the total sum recovered, if any, by reason thereof.

3. Costs. As used herein, the term "Costs" means sums expended for subpoenas, photos, photocopies, scanning, facsimiles, telephone tolls, exhibits used at hearings, depositions, court reporter costs, reports, witness statements, expert witnesses, and all other out-of-pocket expenses directly incurred in investigating or litigating the Lawsuit. Costs shall also include the out of pocket expenses that Cedar Valley and City incurred in connection with the prosecution of the claims on the 2000 Agreement, which amounts the parties agree shall be reimbursed from the first proceeds of any recovery on the Lawsuit.

a. Cedar Valley and City hereby agree that in addition to the payment of fees to Attorney required under Section 1 and Section 2 above, and regardless of whether any amounts are recovered on City's behalf or the outcome of any lawsuit, all Costs incurred in connection with the Lawsuit shall be paid by Cedar Valley, but all amount of such Costs shall be first repaid from any recovery received. To that end, Cedar Valley shall pay Costs in advance when requested by Attorney or required by any experts, consultants or vendors.

b. SHOULD CITY'S CASE NOT RESULT IN A RECOVERY, EITHER BY SETTLEMENT, TRIAL, APPEAL, ARBITRATION OR OTHERWISE, CLIENTS SHALL OWE ATTORNEY ABSOLUTELY NOTHING FOR ITS TIME AND LEGAL SERVICES; HOWEVER, CEDAR VALLEY ACKNOWLEDGES THAT IT IS REQUIRED TO REIMBURSE ATTORNEY'S OUT-OF-POCKET COSTS INCURRED IN CONNECTION WITH THE LAWSUIT, REGARDLESS OF THE OUTCOME OF THE LAWSUIT.

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4. Termination. Attorney may terminate/cancel this Agreement if the Clients are in breach of their obligations under this Agreement, or Attorney's investigation discloses that certain claims do not appear to have merit or are not economically practical to pursue, or if the Attorney is otherwise required to do so, in accordance with the rules of professional conduct governing attorneys. The relationship established by this Agreement is subject to termination as follows:

a. Attorney reserves the right to withdraw from this matter if the Clients fail to honor this Agreement or for any just reason as permitted or required under the Utah Rules of Professional Conduct or as permitted by the Rules of the Courts of the State of Utah. Notification of withdrawal shall be made in writing to the Clients. In the event of such withdrawal, the Clients agree to promptly pay the Attorney for all Costs and obligations incurred pursuant to this Agreement prior to the date of such withdrawal. Such withdrawal shall have no effect upon Clients' payment obligations under subsections 1 and 2 above.

b. Clients reserve the right to terminate the representation with or without cause, and shall notify the Attorney in writing of any such termination; provided, however, that in the event Clients terminate the representation for any reason, Clients must pay Attorney the applicable contingency fee amount specified in Section 1 and Section 2 above on sums, if any, recovered by Clients at any future time (whether through a judicial proceeding, settlement, or otherwise) in connection with the Lawsuit. In the event of any such termination, Clients agree to promptly pay the Attorney for all services rendered by the Attorney per this Agreement and for all Costs incurred pursuant to the terms of this Agreement prior to receipt of notice of the termination by the Attorney.

c. Upon termination of this representation by either party, Attorney agrees to cooperate with any successor counsel to accommodate a smooth transition of the representation, and upon request of Clients to turn over to City all papers relating to the Litigation.

5. Joint Representation. Inasmuch as a lawyer is prohibited by Rule 1.7 of the Rules of Professional Responsibility from representing multiple parties in matters involving the same subject matter without full disclosure to and written waiver by the parties, it will be necessary for each of the Clients to consent to Attorney's joint representation of all Clients collectively.

a. At the present time, in light of the Settlement Agreement and notwithstanding the City's ongoing obligations of payment to Cedar Valley under the terms of the Settlement Agreement, Clients' respective interests appear to be aligned, and the parties agree that there are no facts that would support adverse claims between or among the Clients. Clients agree and acknowledge that facts can come to light, and circumstances can change, such that the Clients' respective interests may come into conflict. Each of the Clients acknowledges that Attorney could not represent either of the Clients against the other. In the event that any facts or circumstances were to arise creating a conflict between or among any of the Clients, Attorney may be required to withdraw from representing all of the Clients, and Attorney's withdrawal may require that each of the Clients hire other counsel. Clients acknowledge they may incur attorney fees and costs in connection with educating their new attorney on the matter.

b. Joint representation also has consequences for the applicability of the

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attorney-client privilege. Specifically, communications between the jointly represented Clients and Attorney are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. Accordingly, Attorney is free to share with both Clients communications and information which Attorney has or obtains from any of the Clients respecting the instant case. In the event that Attorney receives any information from one of the Clients with instructions that it be kept confidential from the other, Attorney may be required to withdraw from representing all of the Clients, unless the party disclosing the information consents to the disclosure of the information to the other after consultation. If Attorney is required to withdraw, each of the Clients may incur attorney fees and costs in connection with educating their new attorney on the situation.

6. Conflicts of Interest. Clients acknowledge that Attorney is a large law firm which has represented, and continues to represent, many different corporate and individual clients with various business interests in numerous industries. Attorney's clients include land developers, home builders, contractors, water right holders, utilities, contract bidders, landowners, oil, gas and mining companies, lenders, landlords, tenants, among many others who have or may in the future have dealings within the City. It is possible that, during the time Attorney is representing Clients under this Agreement, Attorney may be asked to represent interests, belonging to one of Attorney's present or future clients, which are adverse to Clients' interests. If such a conflict were to arise between Clients' interests and those of another present or future client of Attorney, Attorney reserves the right to represent the interests of the other client with respect to that particular matter, so long as no substantial interests of the other client are directly adverse to Clients' substantial interests in the matter for which Attorney is engaged.


a. Clients understand, consent, and agree that Attorney may continue to represent, or may undertake in the future to represent, existing or new clients in any matter that is not substantially related to the matter under this Agreement, even if the interests of such other clients in those other matters are directly adverse to Clients', and even if those other matters ripen into or involve litigation between such other clients and the Clients. In such a case, Attorney will conduct itself regarding Clients' interests as required by the Rules of Professional Responsibility.

b. Attorney and Clients agree that Clients' prospective agreement and consent to such conflicting representation shall not apply in any instance where, as a result of Attorney's representation of Clients, Attorney has obtained sensitive, proprietary or other confidential information of a nonpublic nature that, if known to such other client, could be used to the material disadvantage of Clients' interests in the matter involved. Nor shall it apply to permit Attorney to represent any client against Clients in any litigation or similar proceeding in which Attorney represents Clients.

c. Attorney and Clients further agree that nothing stated herein is intended as a waiver or consent by Clients (unless specifically and clearly set forth herein), or a narrowing of the requirements of, the Rules of Professional Responsibility regarding conflicts of interest.

d. Clients acknowledge they understand the potential consequences of such a prospective conflict of interest waiver by virtue of their business sophistication and experience with legal matters.

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e. Clients each consent to Attorney's continued representation of Cedar Valley in connection with the enforcement of, or any dispute arising from or between the City and Cedar Valley relating to, the Settlement Agreement. Should a dispute arise between the City and Cedar Valley relating to the Settlement Agreement, except as may be required by the Utah Rules of Professional Responsibility, Attorney will represent the interests of Cedar Valley against the interests of the City. City currently has separate counsel as to the Settlement Agreement, and understands that it must continue retaining other counsel to represent its interests as to the Settlement Agreement.

f. Nothing in this Agreement is intended to nor shall operate as a waiver of the attorney client and work product privileges that attached to communications between Attorney and Cedar Valley prior to this Agreement, and information relating to the Settlement Agreement or *Cedar Valley Water Company, LLC v. Eagle Mountain City*, Civ. No. 09042122, Fourth Judicial District Court.

7. Settlement Impasse. In event that PKH and/or its insurer(s) make an offer of settlement to Clients, and they cannot mutually agree on the terms of negotiated settlement of the Lawsuit, then the clients agree to first negotiate in good faith. Failing an agreement then, the parties shall mediate their dispute before a mediator selected among the two choices of the Clients by a flip of a coin.

a. In the event the dispute is not resolved by mediation, each of the Clients shall select an arbitrator and the two selected arbitrators shall select a third arbitrator. The arbitration panel shall receive simultaneous position papers from each of the Clients within 14 days of their selection, and reply position papers within 7 days following that.

b. At the request of either of the Clients, without any prior discovery by the Clients, the panel shall conduct a no more than 2 hour hearing permitting each Client to present their reasons for accepting or rejecting the settlement offer in accordance with the International Institute for Conflict Prevention & Resolution Rules for Non-Administered Arbitration in effect as of the date of this Agreement. The decision of the three arbitrators regarding whether to accept or reject the pending offer shall be binding on the Clients.

c. The arbitration shall be governed by the Utah Uniform Arbitration Act, Utah Code Ann. § 78-11-101 et seq., and the decision rendered by the arbitrators may be enforced, if necessary, by resort to Fourth Judicial District Court of Utah County, Utah. The place of arbitration shall be Provo, Utah.

d. Each of the Clients shall pay one-half of the costs and fees related to the mediated and/or arbitrated settlement. Attorney is not obligated to pay any costs of resolving such a deadlock. Any amount recovered by way of a settlement accepted hereunder shall be subject to the terms and conditions of this Agreement.

e. Attorney shall not represent either of the Clients or otherwise participate in the arbitration. If they want to be represented in the arbitration, each of the Clients must retain its own legal counsel

8. Miscellaneous Provisions.

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a. Clients shall fully cooperate with the Attorney and provide all information relevant to the issues and subject matter of this Agreement; pay all expenses as required herein; keep Attorney apprised of the whereabouts of its principals and officials; cooperate in the preparation and trial of the Lawsuit; appear on reasonable notice for depositions and court appearances, and comply with all reasonable requests made by Attorney in connection with the preparation and presentation of the Litigation.

b. Clients agree that associate counsel and support staff may be employed at the discretion and expense of Attorney, and that any attorney so employed may be designated to appear on City's behalf or undertake City's representation in the Lawsuit.

c. All of Attorney's work product generated under this Agreement will be owned by the Attorney.

d. If in the course of representing multiple clients the Attorney determines in its sole discretion that a conflict of interest exists, the Attorney will notify all of the affected clients of such conflict and may withdraw from representing any one or more of the multiple clients to the extent such a withdrawal would be permitted or required by applicable provision of the Utah Rules of Professional Conduct.

e. Attorney cannot and does not warrant, predict or guarantee results of the final outcome of this or any case. CLIENTS AGREE AND ACKNOWLEDGE THAT ATTORNEY HAS MADE NO PROMISES, REPRESENTATIONS OR GUARANTEES REGARDING THE OUTCOME OF OR LIKELY AMOUNT RECOVERABLE FROM CITY'S CLAIMS IN THE LAWSUIT.

f. This Agreement includes the entire agreement between the Clients and the Attorney regarding this matter, and can only be modified if another written agreement is signed by the Clients and the Attorney. This Agreement shall be binding upon both the Clients and the Attorney and their respective heirs, legal representatives and successors and assigns in interest.

g. In the event a dispute should arise between Attorney and Clients with regard to the fee which is to be paid by Clients to Attorney, any such dispute shall be resolved through compulsory arbitration in accordance with the rules of arbitration, or fee disputes of the State Bar of Utah, before the Fee Dispute Committee.

h. Clients represent that Attorney has advised Clients in writing of the desirability of seeking and has been given a reasonable opportunity to seek the advice of independent legal counsel on the terms and conditions of this Agreement.

i. Clients acknowledge that Attorney is not providing tax advice to either of them in connection with this engagement, and that they have read and understand Attorney's "Statement of Policy Regarding Tax Advice" that is incorporated into this Agreement as Exhibit A.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of

CONFIDENTIAL

JW

CONFIDENTIAL

the date first above written.

"Client" - EAGLE MOUNTAIN CITY

By: [Signature]

Its: CITY ADMINISTRATOR

"Client" - CEDAR VALLEY WATER COMPANY, LLC

By: [Signature]
John Walden, Managing Member

"Attorney" - SNELL & WILMER L.L.P.

By: [Signature]
Bradley R. Carlson
Mark O. Morris, Partner

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CONFIDENTIAL

[Handwritten mark]

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Tab 3

Mark O. Morris (4636)
Bradley R. Cahoon (5925)
M. Lane Molen (11724)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1531
Telephone: (801) 257-1900
mmorris@swlaw.com
bcagoon@swlaw.com
lmolen@swlaw.com

Attorneys for Eagle Mountain City

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

EAGLE MOUNTAIN CITY,

Plaintiff,

vs.

PARSONS KINGHORN & HARRIS, P.C.,

Defendant.

DECLARATION OF IFO PILI

Civil No. 130300194

Judge Brady

PARSONS KINGHORN HARRIS, a
professional corporation,

Third-Party Plaintiff,

vs.

WILLIAMS & HUNT, P.C.,

Third-Party Defendants.

I, Ifo Pili, declare as follows:

1. I am over the age of 18 years, a resident of the State of Utah, and am fully competent in all respects to testify regarding the matters set forth herein.
2. I have been City Administrator for Eagle Mountain City since approximately August of 2012.
3. Before that time I served as a Management Analyst for the City from September of 2006 to April of 2007 as Economic Development Director and Assistant City Administrator, from approximately May of 2007 until becoming City Administrator.
4. As Assistant City Administrator and later as City Administrator I became generally acquainted with the facts and circumstances of the lawsuit between Cedar Valley Water Company ("CVWC") and the City (the "Underlying Lawsuit").
5. During the Underlying Lawsuit, I conducted, or was present at, a number of conversations with Gerald Kinghorn concerning the Underlying Lawsuit and, specifically among other things, (i) the facts and circumstances regarding the 2000 Town Well #1 Capacity Purchase Agreement ("2000 Purchase Agreement") predating and/or leading up to CVWC filing the Underlying Lawsuit, and (ii) the City's position and arguments in the Underlying Lawsuit.
6. Mr. Kinghorn told me and others on more than one occasion that the City had no liability to CVWC for obligations under the 2000 Purchase Agreement.
7. According to Mr. Kinghorn, one of the City's primary defenses to CVWC's claims was that CVWC had given credits to the City against the \$720 impact fee associated with the 2000 Purchase Agreement. Mr. Kinghorn said that CVWC had given him letters.

8. There came a time in the Underlying Lawsuit when the court awarded CVWC at least \$418,871.34, plus attorney fees, for breaching the 2000 Purchase Agreement. This came as a surprise to me, given what I had been told by PKH since before the Underlying Lawsuit began—that the City had no liability.

9. I thereafter came to realize that PKH's advice over the course of the previous twelve years or so had put the City in the position of being sued in the Underlying Lawsuit and vulnerable to a potential judgment in a very significant amount.

10. After the credit letters promised by Mr. Kinghorn could never be found and produced, and realizing that PKH's advice regarding the 2000 Purchase Agreement had subjected the City to significant exposure, I believed that the City should hold PKH responsible for any damages it incurred, and intended to recommend to the City that it seek recovery for those damages, and for any further damages it would incur by way of jury verdict, settlement, or otherwise.

11. In December of 2012, the City began settlement discussions with CVWC hoping to avoid a jury trial and potentially enormous judgment which the City lacked resources to satisfy.

12. The City and CVWC participated in an unsuccessful mediation on December 13, 2012. In that December 2012 mediation, I do not recall the possibility of the City's sharing in proceeds of the City's eventual malpractice claim being raised by either party. When the City's mayor authorized me to negotiate directly with CVWC, it was my idea to suggest that the City may be able to share proceeds of any settlement or judgment in the malpractice claim against

PKH that I had already determined would be in the City's best interest. These discussions with CVWC took place primarily during January 2013.

13. The City and CVWC eventually settled the Underlying Lawsuit, with the City obligating itself to pay to CVWC a total of over \$4.5 million over time. The City later entered into the Contingent Fee Agreement in connection with settling the Underlying Lawsuit.

14. In proposing to share contingent proceeds in an eventual settlement or lawsuit with CVWC, the City never intended to transfer or assign the claim, or control over the claim to CVWC. During the time the City was negotiating settlement with CVWC and considering the Contingent Fee Agreement, it was always my understanding that the City would bring the claims and control the litigation.

15. Also as part of the settlement negotiations, we discussed using Snell & Wilmer L.L.P. as the attorneys to bring the malpractice lawsuit. The City agreed to using Snell & Wilmer because Snell & Wilmer was a logical choice to represent the City in the malpractice lawsuit. It was already well acquainted with the complicated facts of the underlying case and the documents related thereto. Further, Snell attorneys had been instrumental in exposing PKH's misrepresentations and malpractice through the processes of the Underlying Lawsuit. As such, we believed Snell & Wilmer could litigate the case effectively and efficiently.

16. The City Attorney at the time of the settlement, Jeremy Cook from PKH, never indicated to me that an agreement to share proceeds with CVWC of a malpractice claim would be improper or voidable.

17. If the City and CVWC had not entered into an agreement to share proceeds as part of its settlement, I would have strongly recommended pursuing, and I believe the City would

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have pursued, the legal malpractice claim to recover whatever damages PKH's misrepresentations and poor legal advice had caused the City.

18. Since the settlement, I have been one of two primary points of contact for the City in communicating with our attorneys, Snell & Wilmer L.L.P., regarding the legal malpractice case against PKH. These have included face-to-face meetings, phone calls, letters, and emails concerning case updates, strategy and coordination of the City's claims.

19. During the course of its attempt to resolve the claim, the City through its attorneys Snell & Wilmer, L.L.P., provided PKH with materials in hopes of persuading PKH to settle the claim for a reasonable amount. Among other things, these documents included the expert reports of a retired judge and a law professor, each of whom had opined that PKH had breached the standard of care and committed legal malpractice as to the City.

20. The City and PKH attempted mediation on October 30, 2013, before this suit was filed. The mediation was unsuccessful. PKH made no settlement offer at the 2013 mediation that I was willing to bother recommending to the City Council.

21. Since the City filed this Lawsuit on December 10, 2013, it has not received any settlement offer from PKH. During the pendency of the Lawsuit, I have not been involved with any conversation with any CVWC representative concerning the prosecution of claims or strategies undertaken. Further, I am not aware of any other City official having such a conversation. In all of my communications with our counsel on this matter, no one from CVWC has directed any communications to me concerning the prosecution of claims or strategies undertaken.

I declare under penalty of perjury, pursuant to Utah Code Ann. § 78B-5-705, that the foregoing statements are true to the best of my knowledge, information, and belief.

Executed on this 16th day of March, 2015.



Ifo Pili

Tab 4

Mark O. Morris (4636)
Bradley R. Cahoon (5925)
M. Lane Molen (11724)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1531
Telephone: (801) 257-1900
mmorris@swlaw.com
bcagoon@swlaw.com
lmolen@swlaw.com

Attorneys for Eagle Mountain City

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

EAGLE MOUNTAIN CITY,

Plaintiff,

vs.

PARSONS KINGHORN & HARRIS, P.C.,

Defendant.

DECLARATION OF MAYOR
CHRISTOPHER PENGRA

Civil No. 130300194

Judge Brady

PARSONS KINGHORN HARRIS, a
professional corporation,

Third-Party Plaintiff,

vs.

WILLIAMS & HUNT, P.C.,

Third-Party Defendants.

I, Christopher Pengra, declare as follows:

1. I am over the age of 18 years, a resident of the State of Utah, and am fully competent in all respects to testify regarding the matters set forth herein.

2. I am the Mayor of Eagle Mountain City ("City"). I was elected Mayor in November 2013 and began serving in 2014.

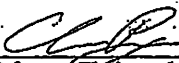
3. As Mayor I have become familiar with the facts and circumstances involved with the City's legal malpractice claim against Parsons, Kinghorn and Harris, P.C. ("PKH").

4. Since taking office, I have been one of two primary points of contact for the City in communicating with our attorneys, Snell & Wilmer L.L.P., regarding the legal malpractice case against Parsons Kinghorn & Harris, P.C. These have included face-to-face meetings, phone calls, letters, and emails concerning case updates, strategy and coordination of the City's claims. In all of my communications with our counsel on this matter, no one from the Cedar Valley Water Company ("CVWC") has directed any communications to me concerning the prosecution of claims or strategies undertaken.

5. Since I became Mayor in 2014, no one has presented to me a settlement offer made by PKH, nor am I aware of any settlement offer of any kind being made by PKH in this case since the Complaint was filed.

I declare under penalty of perjury, pursuant to Utah Code Ann. § 78B-5-705, that the foregoing statements are true to the best of my knowledge, information, and belief.

Executed on this 16th day of March, 2015.



Mayor Christopher Pengra

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Tab 5

Mark O. Morris (4636)
Bradley R. Cahoon (5925)
M. Lane Molen (11724)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1531
Telephone: (801) 257-1900
mmorris@swlaw.com
bcahoon@swlaw.com
lmolen@swlaw.com

Attorneys for Eagle Mountain City

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

EAGLE MOUNTAIN CITY,

Plaintiff,

vs.

PARSONS KINGHORN & HARRIS, P.C.,

Defendant.

**DECLARATION OF
HEATHER JACKSON**

Civil No. 130300194

Judge Brady

PARSONS KINGHORN HARRIS, a
professional corporation,

Third-Party Plaintiff,

vs.

WILLIAMS & HUNT, P.C.,

Third-Party Defendants.

I, Heather Jackson, declare as follows:

1. I am over the age of 18 years, a resident of the State of Utah, and am fully competent in all respects to testify regarding the matters set forth herein.
2. I am a former Mayor of Eagle Mountain City ("City"). I was elected Mayor in November 2007 and began serving in 2008. Prior to my time as Mayor, I had served on the City Council since 2006.
3. As Mayor I became aware of claims asserted by Cedar Valley Water Company ("CVWC") concerning alleged breaches of the 2000 Town Well #1 Capacity Purchase Agreement, dated February 15, 2000 ("2000 Purchase Agreement").
4. At all times since I took office until his death in 2012, Jerry Kinghorn, the City Attorney and partner with the firm of Parsons, Kinghorn & Harris, was known to me and to my knowledge, all of the City Councilmembers to be the person most knowledgeable about the 2000 Purchase Agreement, its administration and the history of the City's performance under the 2000 Purchase Agreement.
5. I consulted with Mr. Kinghorn on many occasions concerning CVWC's claims, and discussed with Mr. Kinghorn my concerns regarding the City's potential liability for those claims, and about the City's defenses to those claims. Mr. Kinghorn provided advice to me and to the City Council in various settings including in closed session council meetings, conversations, email, and through official correspondence.
6. During the course of those discussions, Mr. Kinghorn advised me and City councilmembers that a primary defense to CVWC's claims in the lawsuit that was ultimately brought ("**Underlying Litigation**") was a credit mechanism contained in the Contract, which the City could automatically invoke against CVWC.

7. Mr. Kinghorn also advised me and the City Council that there were credit letters that absolved the City of its obligations to collect the \$720 Well #1 impact fees and pay those monies over to CVWC under the 2000 Purchase Agreement.

8. Mr. Kinghorn's statements about the credit letters turned out to be unfounded, and I later concluded that the purported letters did not exist to support the credit mechanism that Mr. Kinghorn had for years asserted had been invoked by CVWC.

9. I also came to believe that PKH's advice regarding the administration of the 2000 Purchase Agreement had subjected the City to significant exposure, and that the City should hold PKH responsible and seek recovery for those damages and any further damages it would incur by way of jury verdict, settlement, or otherwise.

10. Around December of 2012, the City engaged in settlement discussions with CVWC. The City and CVWC participated in an unsuccessful mediation on December 13, 2012.

11. In the context of those settlement discussions and mediation, I do not recall that the possibility of the City's sharing any portion of proceeds of the City's potential malpractice claim against PKH was raised by either party during the 2012 mediation in the Underlying Lawsuit.

12. Following the unsuccessful mediation, I authorized Ifo Pili to negotiate directly with CVWC regarding a potential settlement, which of course would ultimately have to be approved by the City Council. I understood that in the course of settlement discussions that occurred mostly in January 2013, Ifo Pili, on behalf of the City, and CVWC first discussed the possibility of including as part of the settlement an agreement to share proceeds of any claims the City asserted against PKH by reason of its malpractice concerning the 2000 Purchase Agreement.

13. I was comfortable with the idea of the City's retaining Snell & Wilmer L.L.P. to bring the claims. Snell & Wilmer was a logical choice to represent the City in the malpractice lawsuit because it was already well acquainted with the complicated factual history of the events

giving rise to the claims, and the documents related thereto. Further, Snell & Wilmer attorneys had been instrumental in exposing PKH's misrepresentations to and wrong legal advice through the processes of the Underlying Lawsuit. As such, we believed Snell & Wilmer could litigate the case effectively and efficiently.

14. I do not remember Mr. Cook, the City Attorney in February, 2014, or anyone else from PKH stating, before the Settlement Agreement was entered into on February 5, 2013, that a contingent agreement to share proceeds of a malpractice lawsuit would be improper or voidable.

15. Regardless of whether the City had entered into an agreement to share proceeds as part of any settlement, I believe the City would have pursued the legal malpractice claim to recover damages it incurred in the Underlying Litigation.

16. After settling the Underlying Lawsuit in February 2013, the City then attempted in good faith to resolve the claim against PKH without having to file a lawsuit. The City made extraordinary efforts to avoid publicity about the case, and we made a conscious choice to not pursue Mr. Kinghorn's estate.

17. Since the February 2013 settlement, and until I left office at the end of 2013, I was one of two primary points of contact for the City in communicating with our attorneys, Snell & Wilmer L.L.P., regarding the legal malpractice case against PKH. These included face-to-face meetings, phone calls, letters, and emails concerning case updates, strategy and coordination of the City's claims.

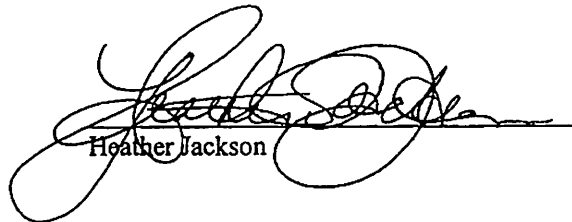
18. As part of the efforts to settle the legal malpractice claim against PKH, the City and PKH attempted mediation on October 30, 2013. The mediation was unsuccessful. PKH made no settlement offer at the mediation that I was willing to recommend to the City Council for approval.

19. Since the unsuccessful 2013 mediation until I left my position as Mayor, I am aware of no settlement offers of any kind made by PKH in this case. Also during that time I was

not involved with any conversation with CVWC about litigation strategy or any other decision making on any issue in the case. Further, I am not aware of any other City official having such a conversation.

I declare under penalty of perjury, pursuant to Utah Code Ann. § 78B-5-705, that the foregoing statements are true to the best of my knowledge, information, and belief.

Executed on this 11 day of March, 2015.


Heather Jackson

Tab 6

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4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

FOURTH DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, SPANISH FORK DEPARTMENT

EAGLE MOUNTAIN CITY,

Plaintiff,

vs.

PARSONS KINGHORN HARRIS,

Defendant.

**RULING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGEMENT**

PARSONS KINGHORN HARRIS,

Third-Party Plaintiff,

vs.

WILLIAMS & HUNT, P.C.; et al.

Third-Party Defendants.

Case No. 130300194

Judge James Brady

This matter comes before the court on Defendant's motion for summary judgment. Defendant seeks the dismissal of Plaintiff's complaint on the basis that Plaintiff has assigned interests in its legal malpractice lawsuit in a manner that violates public policy. Plaintiff's complaint includes three separate causes of action. The first cause of action is based on a claim that Defendant negligently performed its duties as legal counsel for Plaintiff. The second cause of action is based on a claim that Defendants breached its fiduciary duties as legal counsel to Plaintiff. The third cause of action is based on a claim that Defendant breached contractual obligations owed to Plaintiff as legal counsel. All three causes of action are based on the attorney-client relationship between Plaintiff and Defendant, and Plaintiff alleges Defendant's

deficient legal services violated standards, established in both tort and contract. All three of Plaintiff's claims have in common that they allege legal malpractice by Defendant. The parties briefed and argued this motion on the basis of the assignment of a legal malpractice claim and did not differentiate between the three types of malpractice alleged in the complaint. Neither party argued for individual causes of action to be dismissed or to survive. After reviewing the memoranda, affidavits, exhibits, pleadings on file and hearing the parties' oral arguments, the court took this motion under advisement. Having considered the facts and issues presented, the court now enters this ruling GRANTING defendant's motion. In granting this motion, the Court intends this order to dismiss all three causes of action, without prejudice, subject to Plaintiff's right to re-file its Complaint if it meets the conditions stated below.

The standard for summary judgement applied by the Court is that summary judgment "shall be rendered if the pleadings, deposition, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), URCP. Additionally, "the facts and all reasonable inferences drawn therefrom [are viewed] in the light most favorable to the nonmoving party." Jackson v Mateus, 2003 UT 18, §2, 70 P.3d 78 (internal citation omitted). Summary judgement "denies the opportunity of trial [and so] should be granted only when it clearly appears that there is no reasonable probability the party moved against could prevail." Utah State Univ. Of Agric. And Applied Sci. V. Sutro & Co., 646 P.2d 715, 720 n. 14 (Utah 1982).

UNDISPUTED MATERIAL FACTS

Defendant's motion addresses two legal issues, 1) Does Eagle Mountain City's ("EMC")

Settlement Agreement with Cedar Valley Water Company ("CVWC") and their joint Contingent Fee Agreement with Snell & Willmer ("SW"), (here after jointly referred to as "Agreements") constitute an assignment of a malpractice claim; and, 2) If it is an assignment of a malpractice claim does it bar EMC from pursuing its malpractice claims against Parsons Kinghorn Harris ("PKH"). Both parties spent much time and effort informing the Court of the facts and issues raised in the underlying case, most of which are not material to either question. From the affidavits and other evidence presented, the court finds the following facts are both material and uncontested:

1. EMC is suing PKH claiming legal malpractice based on tort and contract theories.
2. EMC alleges, among other things, that:
 - a. Pursuant to the 2001 Town Well #1 Capacity Purchase Agreement, an Impact Fee Ordinance ("IFO") was enacted by EMC, City Ordinance No. 00-02, in 2000.
 - b. Under the terms of the IFO, EMC would collect impact fees under certain specific triggering events from "development applicants" that transferred water rights to EMC which relied on Well #1 as the point of diversion.
 - c. EMC did not collect impact fees from developers based on PKH's alleged incorrect advice.
 - d. PKH, through attorney Gerry Kinghorn, who was EMC's City Attorney, allegedly incorrectly advised EMC from 2000 through 2011 not to collect impact fees.
 - e. PKH's improper advice allegedly damaged EMC because EMC is required to pay CVWC money it would not have had to pay if EMC had collected impact fees from developers, including \$4,560,000 that EMC is required to pay CVWC as

part of the February 5, 2013 Settlement of the Underlying Case. This allegedly constitutes professional negligence, breach of fiduciary duty, and breach of contract.

3. Snell & Willmer represented CVWC in the Underlying Case against EMC.
4. On February 5, 2013, EMC and CVWC finalized the settlement of the underlying case and memorialized it in a signed written Settlement Agreement and a separate Contingent Fee Agreement.
5. Excluded from the Release contained in the Settlement Agreement "are any and all claims [EMC] may have against its own attorneys [PKH], as set forth in the Contingent Fee Agreement identified in paragraph 7" of the Settlement Agreement.
6. Paragraph 7 of the Settlement Agreement, entitled "Integration," states: Except as expressly stated herein, this Agreement and a companion Contingent Fee Agreement, contain the entire agreement and understanding of the parties with respect to the subject matter hereof, and integrates all prior conversations, discussions or undertakings of whatever kind or nature and may only be modified by a subsequent writing duly executed by the parties hereto.
7. EMC and CVWC entered into the Contingent Fee Agreement in connection with settling the underlying Case.
8. The Contingent Fee Agreement is binding upon EMC, CVWC and SW and their respective heirs, legal representatives and successors and assigns in interest.
9. The Contingent Fee Agreement provides among other things that:
 - a. As part of the settlement of the Underlying Case, EMC is obligated to file and

prosecute the Malpractice Case against PKH.

- b. Both EMC and CVWC retain SW as their attorney to prosecute the Malpractice Case on EMC's and CVWC's behalf against PKH.
- c. Since both CVWC and EMC are clients of SW, "communications between the jointly represented Clients and [SW] are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. Accordingly, [SW] is free to share with both Clients communications and information which [SW] has or obtains from any of the Clients respecting the [Malpractice Case]."
- d. EMC, CVWC, and SW will each receive one-third of any recovery from PKH in the Malpractice Case, after payment of costs, and absent an appeal.
- e. SW's one-third contingent fee is calculated on the amount of sums recovered from PKH (including its insurers), after out of pocket expenses are first deducted from such recovery.
- f. All costs incurred in connection with the Malpractice Case shall be paid by CVWC, including payments in advance when requested by SW, and such costs shall be reimbursed to CVWC first from any recovery realized in the Malpractice Case. Those costs include "sums expended for subpoenas, photos, photocopies, scanning, facsimiles, telephone calls, exhibits used at hearings, depositions, court reporter costs, reports, witness statements, expert witnesses, and all other out-of-pocket expenses directly incurred in investigating or litigating the [Malpractice Case against PKH].
- g. Costs shall also include the out of pocket expenses that [CVWC] and [EMC]

incurred in connection with the prosecution of the claims on the 2000 Agreement, which amounts the parties agree shall be reimbursed from the first proceeds of any recovery on the [Malpractice Case against PKH].

- h. EMC cannot settle the Malpractice Case without CVWC's consent. Absent mutual agreement, the parties must first mediate and subsequently submit, if necessary, to mandatory arbitration.
 - i. EMC and CVWC consent to SW's continued representation of CVWC in connection with the enforcement of, or any dispute arising from or between [EMC] and [CVWC] relating to the Settlement Agreement [in the Underlying Case]. Should a dispute arise between [EMC] and [CVWC] relating to the Settlement Agreement, except as may be required by the Utah Rules of Professional Responsibility, [SW] will represent the interests of [CVWC] against the interests of [EMC].
- 10. John Walden signed the Contingent Fee Agreement on behalf of CVWC as its Managing Member.
 - 11. Ifo Pili signed the Contingent Fee Agreement on behalf of EMC as its City Administrator.
 - 12. Mark Morris signed the Contingent Fee Agreement on behalf of SW as a Partner.

ANALYSIS:

Does the Settlement Agreement and the Contingent Fee Agreement Constitute an Assignment of EMC's Claim of Legal Malpractice.

It is important to note that although PKH asks the court to declare the Agreements are *unenforceable*, nothing in this ruling is intended to rule on the enforceability or respective rights of SW, CVWC and EMC in the Settlement Agreement and Contingent Fee Agreement. These are issues between SW, CVWC and EMC and are not before this court. A resolution of those issues would require, at a minimum, the inclusion of SW and CVWC as parties, and an opportunity to be heard. The issue before this court is not the enforceability of the Settlement Agreement and Contingent Fee Agreement between its interested parties, but rather whether as a consequence of entering these agreements, has EMC apparently assigned interests in a legal malpractice claim, and if so, does the assignment violate public policy.

EMC argues the Contingency Fee Agreement is merely a means of EMC sharing proceeds with CVWC, a common practice. The Court disagrees. EMC's argument that it has not assigned the claim to CVWC are inconsistent with the content of the Agreement. Even the Recitals to the Contingency Fee Agreement provides that, "City [EMC] and Cedar Valley [CVWC] desire to retain Attorney to bring the Lawsuit against PKH. . ." This provision begs the question, if CVWC did not receive even an assignment of interest in EMC's claims, why does CVWC "desire to retain the attorney" to pursue the claim? Paragraph 5, 5 b., and 6 e. of the Contingency Fee Agreement also support the position that EMC and CVWC believe they each have the need for legal representation to pursue their interests in the EMC malpractice claim.

The Court finds the following provisions of the Contingent Fee Agreement grant some of EMC's interests in the current case to CVWC:

- a. As part of the settlement of the Underlying Case, EMC agrees to . . . file and prosecute a complaint against PKH . . . alleging negligence and related malpractice claims, solely on the terms and conditions of this agreement (Contingent Fee Agreement, Recitals Paragraph C).
- b. City [EMC] and Cedar Valley [CVWC] desire to retain Attorney [SW] to bring the lawsuit against PKH. . . (Contingent Fee Agreement, Recitals Paragraph D).
- c. . . . communications between the jointly represented Clients [EMC and CVWC] and Attorney [SW] are privileged as to third parties but are not privileged as to the Clients which are being jointly represented. (Contingent Fee Agreement, Paragraph 5.b)
- d. In the Settlement Agreement, City [EMC] and Cedar Valley [CVWC] agreed that after payment of costs, each would receive one third. . . of the recovery, if any, from PKH in the Lawsuit. (Contingent Fee Agreement Recital Paragraph E).
- e. Clients each agree that Attorney [SW] is entitled to one-third (1/3) of the sums recovered from PKH (including its insurers), after out of pocket costs are first deducted from such recovery. (Contingent Fee Agreement, Paragraph 1).
- f. . . . all costs incurred in connection with the Lawsuit shall be paid by Cedar Valley [CVWC] but all amount of such costs shall be first repaid paid from any recovery received. (Contingent Fee Agreement Paragraph, 3.a).
- g. In the event PKH (and/or its insurers) make an offer of settlement to Clients, and

they can not mutually agree on the terms of negotiated settlement of the Lawsuit, then the clients agree first to negotiate in good faith. Failing an agreement then the parties agree to mediate their dispute before a mediator. . .

a. In the event the dispute is not resolved by mediation, each of the two parties shall select an arbitrator and the two selected arbitrators shall select a third arbitrator . . .

b. . . . The decision of the three arbitrators whether to accept or reject the pending offer shall be binding on the clients. . .

Contingent Fee Agreement, Paragraph 7).

Assignment of Control of Litigation.

Assignment of rights to a legal claim, or chose in action, may include assignment of the right to control litigation of the claim, and/or assignment of property interest in the proceeds from the litigation. EMC argues the Agreements only grant CVWC an interest in the potential proceeds from the litigation, the Court disagrees. The Court finds that the Agreements grant CVWC and interest in both controlling the litigation and in the potential proceeds from the litigation. The provisions of the Agreements requiring EMC to 1)File the present lawsuit as a condition to settle the underlying litigation. 2)Be represented by a specific attorney agreed to by CVWC. 3) Allow the attorney to jointly represent EMC and CVWC in this case. 4)Waive client confidentiality with the attorney in this case to allow SW to disclose information regarding the litigation to CVWC. 5)Obtain prior approval by CVWC before it can settle the claim, or if the parties disagree, ultimately submit its rights to settle its case to binding arbitration.

The Settlement Agreement states it is integrated with the Contingent Fee Agreement. Therefore CVWC appears to have the ability to enforce these conditions, with the threat that EMC will suffer the consequences of a failed Settlement Agreement in the underlying case if EMC were to exercise independence in controlling its litigation decisions. Whether or not EMC and CVWC currently have any disagreements regarding these conditions is immaterial. It is sufficient for purposes of this motion that CVWC has the apparent ability to force EMC to forego its ability to independently control its litigation in the event a disagreement arises in the future. The Court finds the Agreements transfer a substantial degree of control over litigation decisions from EMC to CVWC in the EMC's malpractice claim.

Assignment of Property Interest

The Agreements also grant CVWC a property interest in EMC's claim. The Agreements go beyond providing security for payment of the Settlement amount in the underlying case. Instead of granting a security interest for a sum certain, the Agreements grant an uncertain amount, based on a percentage of the total amount of recovery. The Agreements grants CVWC an interest in EMC's property rights. It also grants CVWC a pecuniary incentive to maximize the amount of recovery by EMC.

The Settlement Agreement and Contingency Fee Agreement do not expressly assign the malpractice claim to CVWC. However, "the creation and existence of an assignment is to be determined according to the intention of the parties, which is to be discerned not only from the instruments executed by them, if an, but from the surrounding circumstances." 6A C.J.S. Assignments §57 (2010). From the Agreements, and the apparent intent of the parties the court finds that the Agreements constitute a partial assignment of EMC's malpractice claims.

Does the Partial Assignment of Property Interests in and Partial Control of a Malpractice Claim Bar EMC from Pursuing the Claim?

PKH argues that the public policies that would prohibit an assignment of EMCs malpractice claim should also apply to this partial assignment. Whether assigning all or a part of a malpractice claim violates a public policy and bars the assignor from pursuing its claim is a matter of first impression in Utah. Neither of the parties were able to find a controlling Utah case on this point. Although PKH asks the court to rely on the 1999 Utah Supreme Court case of *Snow v Tanasse*, 1999 UT 49 for support the Court finds that case is not helpful. *Snow* sheds no light on the question of partial assignments, and expressly declines to address the question of whether malpractice claims are assignable in Utah. When the same case was previously before the Court of Appeals as *Tanasse v Snow*, the Court laid out the majority and minority positions on the issue of whether a malpractice claim is voluntarily assignable, but the Appellate Court also expressly passed on deciding that issue for Utah. Where there is no controlling precedent, both parties have relied on the persuasiveness of cases from other states.

Majority Position:

According to *Snow v Tanasse*, and *Gurski v Rosenblum & Filian*, 885 A.2d 163, states that have adopted the position that legal malpractice claims are personal and can not be assigned include: Arizona, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Nevada Tennessee, Virginia, West Virginia. These states identify many overlapping public policy considerations including the unique and personal nature of the relationship between attorney and client, the need to preserve the sanctity of that relationship, confidentiality, and conflicts of interests among others, to support their adoption of

this majority position.

Minority Position:

According to *Snow v Tanasse*, states that adopted the position that legal malpractice claims are assignable include New York, Oregon and Pennsylvania. These states generally hold that legal malpractice claims are based on routine negligence or contract theories and should be assignable as are any routine tort or contract claim.

Neither party argued that this Court should adopt the minority position. Because of the public policy issues supporting the non-assignability of legal malpractice claims, this court adopts the majority position.

Public Policy Issues:

The court considered the following public policy concerns and rulings by courts in other states regarding assignability of legal malpractice claims:

- **Exploitation and merchandising of malpractice claims.** "It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The

commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession.” (See, *Goodley v Wank & Wank*, 62 Cal. App. 3d 389)

- **Preservation of the Sanctity of the client-lawyer relationship.** “The assignment of a legal malpractice claim is perhaps most incompatible with the attorney’s duty of loyalty. An attorney’s loyalty is likely to be weakened by the knowledge that a client can sell off a malpractice claim, particularly if an adversary can buy it. If an attorney is providing zealous representation to a client, the client’s adversary will likely be motivated to strike back at the attorney in any permissible fashion. If an adversary can retaliate by buying up a client’s malpractice action, attorneys will begin to rethink the wisdom of zealous advocacy. A legal system that discourages loyalty to the client, disserves that client.” “Unlike any other commercial transaction, the client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client’s interests.” (See, *Picadilly, inc. v Raikos*, 582 N.E.2d 338) For example, EMC’s relationship with PKH was maintained for one purpose, to defeat CVWC’s suit against EMC. CVWC was the antagonist who by initiating its lawsuit against EMC drove EMC to seek out the protection offered by the client-lawyer relationship with PKH.

- **Opportunity for Collusion.** One compelling argument against assignment is that "[p]ermitting an assignment of a legal malpractice claim to the adversary in the underlying litigation that gave rise to the legal malpractice claim . . . creates the opportunity and incentive for collusion in stipulating to damages in exchange for an agreement not to execute on the judgment in the underlying litigation." (*See, Gurski*, 885 A.2d at 174). Nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action. While it is not necessary to find that the consent judgment in the underlying litigation was the product of collusion or that the stipulated damages were unreasonable, the Court "merely observes that the opportunity and incentive for collusion were certainly present." (*See, Kommavongsa v. Haskell*, 67 P.3d at 1077).
- **An abrupt and shameless shift of positions in the malpractice case.** "The trial of this assigned malpractice claim would feature a public and disreputable role reversal. The mechanics of trying this case would magnify the least attractive aspects of the legal system. . . . Because of the unique nature of the trial within a trial [the] change in position would be obvious to all the jurors hearing the evidence. . . . They would rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered." *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338.
- **No distinction between as assignment of a cause of action and an assignment**

of recovery. Courts have found a “meaningless distinction” between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments (*See, Town & Country Bank v Country Mutual Ins.*, 121 Ill. App. 3d 216 and *Gurski v Rosenblum & Filian*, 885 A.2d 163).

The court recognizes that each of these are important public concerns that oppose the assignability of malpractice claims. These public policy concerns, combined with the parties failure to present support for the minority position, are sufficient to persuade the Court to adopt the majority position that malpractice claims should not be assignable. The Court also agrees with the reasoning of the Court in *Town & Country* that “. . . the distinction between the assignment of a cause of action for personal injuries and the assignment of the expectancy of recovery from such an action [is] a fiction not necessary to support some public policy. . . and [the Court] will not adopt this meaningless distinction to circumvent that public policy. If the assignment of the cause of action is void, the assignment of the expectancy of the proceeds is also void.”

Although there is no express assignment of the claim in this case, it is obvious that the Agreements transfer to CVWC a substantial level of EMC control over the litigation decisions and a substantial portion of EMC's property rights. Although the Contingency Fee Agreement was drafted to state, “the parties agree,” the Contingency Fee Agreement and the Settlement Agreement are merged, establishing the potential that a violation of the Contingency Fee Agreement's terms may result in consequences to EMC's benefits under the Settlement Agreement.

Based on the assignment of substantial control over litigation decisions and an interest in the potential proceeds of the current litigation the court finds the Agreements violate public policy.

EMC May Pursue its Claims Under Certain Conditions.

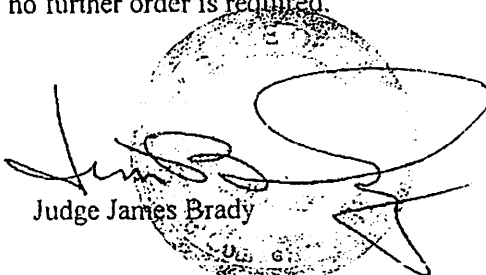
Nothing in this order prohibits EMC from pursuing its claims against PKH for malpractice. However, EMC may not do so under the restrictions placed on it by the Agreements. Similar to the decision in *Davis v Scott*, 320 S.W. 3d 87, the Court finds that EMC “has not forfeited its claim, but [the Court] can not ignore the fact that the present suit is born of the . . . assignment and is, therefore, tainted in some respect.” EMC is permitted to pursue its claim against PKH if it satisfies the Court that it will be prosecuted independently of the settlement agreement. To do so, at a minimum, EMC needs to establish that its litigation is not controlled in any way by CVWC, and that EMC is not represented by attorneys associated with CVWC.

ORDER

EMC’s complaint against PKH is dismissed without prejudice. EMC may re-file its claims against PKH if it establishes that it is not controlled in any way by CVWC and is not represented by attorneys associated with CVWC.

This Ruling and Order is final, and no further order is required.

October 2, 2015.


Judge James Brady

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130300194 by the method and on the date specified.

MANUAL EMAIL: JOSE A ABARCA jaabarca@stoel.com

MANUAL EMAIL: PHILLIP A COLE phil@lommen.com

MANUAL EMAIL: MARK O MORRIS mmorris@swlaw.com

MANUAL EMAIL: STUART H SCHULTZ sschultz@strongandhanni.com

10/05/2015

/s/ JENNY HUGHES

Date: _____

Deputy Court Clerk