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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.	**REPLY BRIEF OF APPELLANT**
PARSONS KINGHORN & HARRIS, P.C., Third-Party Plaintiff, vs. WILLIAMS & HUNT, P.C., Third-Party Defendants.	Case No. 20150915-CA District Court No. 130300194

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

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September 21, 2016

FILED
UTAH APPELLATE COURTS

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SUMMARY OF ARGUMENT

This Court should reverse the district court's ruling of October 2, 2015 ("Order") to allow Eagle Mountain City ("City") to pursue its claims against Parsons, Kinghorn, Harris ("PKH"), represented by the counsel of its choice, Snell & Wilmer. The district court correctly found that the Settlement Agreement and Contingent Fee Agreement (collectively, the "Agreements"), executed by and between the City, Cedar Valley Water Company ("Cedar Valley"), and Snell & Wilmer did not expressly assign the City's legal malpractice claim against PKH to Cedar Valley. The district court erred, however, by misinterpreting the Agreements' language, making inferences against the City as the non-moving party, and ignoring several critical, undisputed facts. These errors led to the incorrect conclusion that the Agreements constituted a "partial," implied assignment of a legal malpractice claim that Utah law purportedly would not permit. This was error because the undisputed record evidence showed that the City did *not* transfer substantial control or a substantial portion of its property rights to Cedar Valley. The City (1) brought this lawsuit in its own name as the sole plaintiff, (2) selected Snell & Wilmer to represent the City based on Snell & Wilmer's knowledge and experience with the claims, (3) controlled all aspects of the litigation, and (4) agreed to share an *equal* portion—not a substantial portion—of any recovery against PKH with Snell & Wilmer and Cedar Valley.

Finally, the district court erred and deprived the City of its inherent right to choice of counsel by holding that the City could refile its malpractice claims only if it could establish that the litigation is not controlled by Cedar Valley and that the City is not

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represented by attorneys "associated" with Cedar Valley. PKH now seeks to expand this ruling into a perpetual disqualification of Snell & Wilmer, although a motion to disqualify was never filed.

RESPONSE TO PKH'S STATEMENT OF FACTS

The parties appear to agree generally on the relevant facts. However, PKH was wrong about the following points:

A. Snell & Wilmer Does Not Jointly Represent the City and Cedar Valley in this Case.

In its brief, PKH repeatedly said that the City and Cedar Valley "agreed . . . to jointly retain [Snell & Wilmer] to represent them and to prosecute the Malpractice Case against PKH." (PKH Br. at 3.) Nowhere in the Contingent Fee Agreement does it state that the City and Cedar Valley retained Snell & Wilmer to *jointly* represent the City and Cedar Valley in this case. (See R. 3365-73.) Rather, the Contingent Fee Agreement recites that the "City and Cedar Valley desire to retain [Snell & Wilmer] to bring the Lawsuit against PKH, in part, because [Snell & Wilmer] has extensive experience with and knowledge of the facts and has developed evidence supporting the *City's* claims against PKH in the Lawsuit." (R. 3365, at ¶ D (emphasis added).) Cedar Valley brought no claims, owns no claims, and is not a party to this case. (R. 1-24.)

The Contingent Fee Agreement does include a "Joint Representation" provision because, as it clearly states, attorneys are prohibited "from representing multiple parties in matters involving the same subject matter without full disclosure and written waiver by the parties." Such informed disclosure was necessary because Snell & Wilmer had

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previously represented Cedar Valley in the Underlying Lawsuit that brought PKH's malpractice to the City's attention. (R. 3367, at ¶ 5.) This "Joint Representation" provision cannot be read to imply what PKH suggests—that Snell & Wilmer represented both the City and Cedar Valley *in this case*. There was and is no joint representation here. In fact, when PKH deposed Cedar Valley as a third-party witness in this case, Cedar Valley was independently represented by Florida counsel, and not by Snell & Wilmer.

B. The City's Damages in the Underlying Lawsuit Were Not Capped at $420,000.00.

PKH also claimed that "the district court [in the Underlying Lawsuit] ruled that [Cedar Valley] *was only owed approximately $420,000*, including prejudgment interest." (PKH Br. at 3 (emphasis added).) "Only" $420,000? This statement wrongly suggests that an interlocutory order of partial summary judgment somehow was a final order. It was not. Once the district court in the Underlying Lawsuit issued its preliminary rulings, the City realized its exposure *started* at $420,000, and soon learned that it could face much more exposure if the Underlying Lawsuit went to trial.

PKH painfully understood this exposure. On November 13, 2012, less than three months before the settlement, PKH told the City that PKH "remain[ed] very concerned about the outcome of the litigation" and that the "case is an absolute mess with a huge potential damage award." (R. 3418, at ¶ 49.) A week later, on November 20, 2012, PKH told the City that the "best-case scenario" would be a final judgment in the amount of approximately $420,000, but the worst-case scenario would be a judgment of "about $6

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million." (R. 3418-19, at ¶ 50.) It got worse. On December 4, 2012, PKH referred to the worst-case scenario as being a $7 million judgment. (R. 3420, at ¶ 55.) Then, on January 15, 2013, PKH claimed it was right on its advice, but that it is "a hard thing to risk eight and a half million dollars." (R. 3420, at ¶ 56.)

PKH's suggestion that the City's damages were capped in the Underlying Lawsuit at $420,000—and therefore that the City's agreement to pay Cedar Valley $4,560,000 was unwarranted—is insupportable. (See PKH Br. at 3, n.6.) Based on PKH's own cautionary correspondence, the City faced potential exposure of up to $8.5 million when it reached a settlement to pay a little more than half that amount.

C. PKH's Objections to Certain Declarations Were Implicitly Overruled.

Recognizing that the district court improperly failed to make factual inferences in favor of the City, PKH next claimed that those facts did not belong in the record and that it had objected to the declarations of Ifo Pili (the City's administrator) and Heather Jackson (the City's mayor at the time of the Underlying Lawsuit and the settlement). (PKH Br. at 9-10.) It is true that PKH lodged certain objections in its reply memorandum in support of its motion for summary judgment. The district court never expressly ruled on PKH's objections, but it certainly overruled them by implication when it openly considered the declarations. (See R. 2627-28, 2635.) As PKH later had to admit, the district court claimed it considered "all the evidence, including the affidavits in deciding which facts were material and undisputed." (PKH Br. at 19.) Finally, PKH's objections

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do not correct or justify the district court's disregard of the City's undisputed evidence, and its failure to make inferences in the City's favor.

D. Cedar Valley Is Not Required to Consent to Any Settlement Between the City and PKH.

Lastly, in its recitation of the facts, PKH initially claimed the City "cannot settle the Malpractice Case without [Cedar Valley's] consent." (PKH Br. at 14.) Later in its brief, however, PKH clarified that the City cannot "independently settl[e] the malpractice claim without [Cedar Valley's] consent *or* a mandatory arbitration." (PKH Br. at 19 (emphasis added); see also R. 3369, at § 7.) Based on PKH's own admission and the plain language of the Contingent Fee Agreement, Cedar Valley's consent is not required to effectuate a reasonable settlement. And, of course there is no dispute that PKH never presented an offer that interested the City, which means Cedar Valley had nothing to say about the litigation or settlement.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE CITY ASSIGNED ITS LEGAL MALPRACTICE CLAIM TO CEDAR VALLEY.

The district court erred when it improperly broadened the language of the Agreements and ignored undisputed material facts. The Record does not support the district court's conclusion that the City "transfer[ed] to [Cedar Valley] a substantial level of . . . control over the litigation decisions and a substantial portion of [the City's] property rights." (R. 2640.)

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Whether Utah allows assignments of legal malpractice claims is irrelevant here, because there was no assignment. Yet even if there were an assignment, Utah has approved some assignments. The City concedes that at some level, Utah would likely prohibit assignments bearing characteristics that are not present here. Therefore, in Utah there appears to be a sliding scale or range of circumstances that must be considered to determine whether there is a prohibited assignment. On one end of the spectrum could be the naked auctioning and selling of a malpractice claim on eBay or craigslist. On the other end of the spectrum could be a mere promise to share a nickel of any malpractice recovery with a third party. What is known in Utah is that it is permissible and allowed for a legal malpractice claim to be sold to a total stranger. See, e.g., Snow, Nuffer, Engstrom & Drake v. Tanasse, 1999 UT 49, ¶ 19, 980 P.2d 208 (holding that the only limitation on the selling of a malpractice claim in bankruptcy is that the defendant law firm could not purchase it) (hereinafter "Snow"). Most importantly here, in Snow, the Court's concern was whether collusion would *prevent* the claim from being brought. That concern does not exist here.

A. In Determining Whether a Legal Malpractice Claim Can Be Transferred, Utah Law Correctly Focuses on the Risk of Collusion.

The Utah Supreme Court is not concerned with many of the public policy concerns that other jurisdictions consider when determining whether to permit the assignment of legal malpractice claims. This is evidenced by the Court's decision in Snow, which sanctioned the purchase of a legal malpractice claim from a bankruptcy estate or a judgment execution sale. Id. at ¶¶ 10-11. In other words, regardless of

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whether the Utah Supreme Court would ultimately adopt the majority rule for some circumstances, the Utah Supreme Court does allow a complete stranger to the attorney-client relationship to purchase a legal malpractice claim, prosecute the claim in its own name against the injured client's former attorney, and keep all of the proceeds from any recovery.

In its opposition brief, PKH attempted to minimize the significance of Snow to the current facts by arguing that a bankruptcy or judgment execution sale is an *in*voluntary transfer. (PKH Br. at 33-34.) This is a distinction without a difference, and ignores the real concern of the Snow Court. The Court's approval of the transfer of a legal malpractice claim through a bankruptcy or judgment execution sale implicitly rejects many of the public policy concerns that PKH touts in support of its motion here.

PKH claims that the following public policy reasons apply here: (1) the exploitation and merchandising of a legal malpractice claim; (2) the sanctity of the attorney-client relationship is not preserved; (3) there is an opportunity and incentive for collusion; and (4) it creates a shift in positions. (PKH Br. at 33-37.) Yet just as with a "voluntary" assignment—as PKH alleges occurred here—an "involuntary" transfer of a legal malpractice claim, too, allows a malpractice claim to be exploited and merchandised "to economic bidders who have never had a professional relationship with the attorney." Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 389, 397 (Cal. Ct. App. 1976). Similarly, the sanctity of the attorney-client relationship is not preserved when a complete stranger to the attorney-client relationship is permitted to purchase a client's legal malpractice claim and pursue it against the client's former attorney. Yet Utah law

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permits this. Finally, an involuntary transfer of a legal malpractice claim necessarily creates a change of positions, as does any prosecution of a legal malpractice claim—assigned or otherwise. No matter who pursues a legal malpractice claim, the plaintiff must prove that the attorney was the cause of the injury, including that the positions originally relied upon were wrong and led to damages. Thus, a "role reversal" is inherent in any legal malpractice case, and no public policy is offended here.

Of course the Utah Supreme Court is concerned with the risk of collusion, which is why the Court ultimately prohibited a law firm from purchasing a legal malpractice claim against itself. See Snow, 1999 UT 49 at ¶¶ 12-18. PKH misunderstands the central concern there. The fear was collusion would lead to the claim never being brought, benefitting the malpracticing attorney. Here, in contrast, there is no evidence of collusion. And even if there were any evidence, the district court was obligated to make inferences against that evidence and allow the claims to go to a fact finder. And as in Snow, the Court does not need to 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. Thus, the district court erred when it held that the Agreements constituted a partial, implied assignment and violated public policy. (R. 2641.)

B. The District Court Failed To Consider the Undisputed Surrounding Circumstances.

When it concluded there was a partial, implied assignment, the district court ignored the undisputed facts constituting the "surrounding circumstances." (Compare R. 3828-33, R. 3950-58 with R. 2626-41.) In reaching its decision, the district court

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recognized correctly 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) (emphases added)).) The district court correctly said it was required to consider the Agreements *and* the surrounding circumstances, yet declined without explanation to do so.

Although the district court rejected the idea, PKH argued in opposition that the Agreements are integrated and the district court should not consider parol evidence. (PKH Br. at 31.) Since the district court correctly ruled that there was no express assignment, it had to look at the intention of the parties in order to determine whether there was an implied assignment. (R. 2635 (quoting 6A C.J.S. Assignments § 57 (2010)).) The district court claimed it reviewed the affidavits and other evidence on file, but the court's ruling rests solely on the language of the Agreements and ignores the undisputed affidavit testimony presented by the City. (R. 2626-41.) As a result, the following rulings of the district court are in error and should be reversed.

1. The filing of this lawsuit was not a condition to settlement.

First, the district court held that the City assigned control of the litigation to Cedar Valley by agreeing to bring the lawsuit as a condition of settlement. (R. 2634; R. 2633 (citing R. 3365, at ¶ C).) This ignores the City's sworn statements that it was likely to bring the claims regardless of any settlement. (R. 3831-32 at ¶ 17; see also R. 3957 at ¶ 15.) The more important point is that the undisputed facts prove the City did not file this lawsuit purely as a condition of settlement. The undisputed facts and all inferences from

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them show this lawsuit was filed because PKH provided bad legal advice to the City that cost it over $4 million.

2. *The City selected Snell & Wilmer to represent it.*

Second, the district court held that the City transferred control of the litigation to Cedar Valley by entering into the Contingent Fee Agreement, which purportedly required the City to be represented by a specific attorney agreed to by Cedar Valley. (R. 2634; R. 2633 (citing R. 3365, at ¶ D).) This, too, is not supported by the record. The City's administrator testified that the City chose Snell & Wilmer as the logical choice because it was already familiar with the facts, issues, and related documents. (R. 3831 at ¶ 15.) The City's former mayor further testified that the City retained Snell & Wilmer because the City believed Snell & Wilmer could litigate the case effectively and efficiently. (R. 3956-57 at ¶ 13.) PKH never challenged the truth of this evidence. And contrary to the district court's ruling, the City (not Cedar Valley or anyone else) decided to retain Snell & Wilmer. Snell & Wilmer was the logical choice based on its knowledge of the facts and circumstances of the Underlying Lawsuit.

3. *Snell & Wilmer does not jointly represent the City and Cedar Valley in this case.*

Third, the district court held that the City transferred control of the litigation to Cedar Valley through the Contingent Fee Agreement, which purportedly allows Snell & Wilmer to jointly represent the City and Cedar Valley in this case. (R. 2634; R. 2633 (citing R. 3367-68, at § 5).) This too is incorrect. When it was deposed, Cedar Valley retained separate counsel to represent it. Based on the undisputed facts, Cedar Valley is

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neither a party to this case nor has any control of the litigation. (R. 1-24; R. 3832 at ¶¶ 18-21; R. 3951 at ¶¶ 3-5; R. 3956-58 at ¶¶ 12-19.)

4. Cedar Valley had no control of, or input about, the litigation of this case.

Fourth, the district court held that under the Contingent Fee Agreement the City transferred control of the litigation to Cedar Valley by waiving client confidentiality and allowing Snell & Wilmer to disclose information regarding the litigation to Cedar Valley. (R. 2634; R. 2633 (citing R. 3367-68, at § 5).) The fact is that Cedar Valley provided no input about, and had no control of, the litigation. The City administrator testified that neither he nor anyone at the City had any communications with Cedar Valley about prosecution of the claims or strategy. (R. 3832 at ¶ 21; see also R. 3951 at ¶ 4.) PKH never challenged the truth of that testimony.

5. The City never received an offer it was inclined to accept.

Finally, the district court held that the City transferred control of the litigation to Cedar Valley because the Agreements purportedly required Cedar Valley to approve a settlement. (R. 2634.) Approval is not necessary. If the City ever receives an offer it is inclined to accept, it can obtain that settlement over Cedar Valley's objections by simply establishing the reasonableness of the offer to a neutral arbitrator. (R. 3369 at § 7(b).) Thus, settlement can be achieved without Cedar Valley's approval. Finally, unless PKH makes a settlement offer the City is inclined to accept, Cedar Valley has no role at all in the decision process. It is undisputed that PKH never made a settlement offer the City

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was inclined to accept. (R. 2380.) Thus, in fact, as opposed to hypothetically, no "control" of the litigation or settlement ever arose.

C. The District Court Improperly Relied on Recitals.

In addition to ignoring the undisputed record evidence that showed no assignment occurred here, the district court improperly relied on "recitals" as binding contract terms. Specifically, two of the district court's findings—that the filing of the lawsuit was a condition to settlement and the City was required to retain Snell & Wilmer—are improperly based on an interpretation of recitals, and not upon actual contract terms or surrounding circumstances. (See R. 2633 (citing R. 3365, at ¶¶ C-D).) A recital is not a contractual term between the parties. See, e.g., Garrett v. Ellison, 72 P.2d 449, 453 (Utah 1937).

In response, PKH argued that the City waived its right to argue that recitals are not contract terms because the City never raised this issue before the district court. (PKH Br. at 32.) But the issue regarding whether recitals are binding contract terms did not arise until the district court issued its ruling and held that certain recitals *were binding contract terms*. Thus the City had no opportunity to rebut this argument before the district court ruled.

PKH further argues that Recital C of the Contingent Fee Agreement (which the district court improperly held required the City to file the lawsuit as a condition of settlement) is a binding contract term because it contains information that describes the parties' agreement. (PKH Br. at 32-33 (citing Paloni v. Beebe, 110 P.2d 563 (Utah 1941).) Yet under Utah law, a contract term is only binding "to those elements or parts

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of the writing which are contractual between the parties and not merely recitals of fact." Garrett, 72 P.2d at 451. In Paloni, the Utah Supreme Court held that some recitals can be contractual terms if they "constitute[] an essential element of the contract." 110 P.2d at 565. Here, Recital C is not an essential element of the Contingent Fee Agreement because it merely 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 . . . ." (R. 3365, at Recital C.) Describing an agreement is not, itself, an agreement. Thus, it was error for the district court to construe Recital C as a contractual term.

D. PKH's Opposition Brief Relies on Inapplicable Case Law.

Much of PKH's opposition brief is dedicated to a recitation of three cases PKH relied on heavily in its summary judgment briefing. (See PKH Br. at 24-31 (citing and analyzing Davis v. Scott, 320 S.W.3d 87 (Ky. 2010); Gurski v. Rosenblum & Filan, LLC, 885 A.2d 163 (Conn. 2005); Greene v. Leasing Assocs., Inc., 935 So. 2d 21 (Fla. 4th Dist. Ct. of App. 2006).) Each of these non-Utah cases is dissimilar to the facts here.

1. Davis involved complete surrender of control.

First, in Davis, an administrator was sued by a competitor for breach of a contract after receiving bad legal advice regarding the enforcement of the contract. 320 S.W.3d at 89. The administrator settled the lawsuit with the competitor for $300,000. Id. The settlement agreement contained the following provisions: (1) the competitor "[i]n its discretion . . . will secure the services of an attorney" to pursue the administrator's legal malpractice claim; (2) the administrator would cooperate with new legal counsel in the prosecution of the legal malpractice claim; (3) the administrator could not settle the

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lawsuit "without the express written consent of [the competitor]"; (4) the parties agreed to enter into a common interest agreement; and (5) after payment of attorneys' fees and costs, the competitor would receive 80% and the administrator would receive 20% of any recovery. Id. After considering these factors, the Kentucky Supreme Court unsurprisingly held that "[t]he terms of the settlement agreement essentially placed the control of the malpractice suit in [the competitor's] hands and rendered [the administrator's] interest merely nominal. Id. at 91.

Here, unlike in Davis, the City chose litigation counsel. (R. 3831 at ¶ 15; R. 3956-57 at ¶ 13.) The City does not require the "express written consent" of Cedar Valley to settle the claim and Cedar Valley has had no input about, or control over, the litigation of the case. (PKH Br. at 19; see also R. 3369, at § 7; R. 3832 at ¶ 21; R. 3951 at ¶ 4.) And the City and Cedar Valley agreed to share equally (50/50) in any recovery, after payment of attorneys' fees and litigation costs, which is much different than the competitor's right to "receive[] the lion's share of any judgment" as in the Davis case. 320 S.W.3d at 91.

2. *Gurski does not support dismissal.*

In Gurski, a bankruptcy debtor expressly "assign[ed] to [a creditor] the estate's interest in a certain legal malpractice claim." 885 A.2d at 165. The Gurski court followed the minority approach and held that it was "not persuaded that every voluntary assignment of a legal malpractice action should be barred as a matter of law." Id. at 171. But the court held "that public policy considerations warrant the barring of an assignment of a legal malpractice action to an adversary in the underlying litigation." Id. at 175. The major factor the court considered in making this ruling is whether the "assignment to an

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adverse party in the underlying action . . . would necessitate a duplicitous change in the positions taken by the parties in [the] antecedent litigation." Id. at 173 (internal quotation marks and citations omitted).

Here, unlike Gurski, there was no express assignment. More importantly, the Gurski court prohibited a debtor from selling its malpractice claim to a judgment creditor, which Utah law expressly permits. See Snow, 1999 UT 49 at ¶¶ 10-11. Finally, the major public policy concern identified by Gurski—the role reversal taken by the parties—is inherent in all legal malpractice cases where a party's legal position turns out to have been premised on negligent legal advice. In all such cases the former client will pursue a different course of action.

3. Greene involved surrender of control, not present here.

Finally, in Greene a client sanctioned for pursuing a frivolous appeal settled his case with the adverse party. 935 So. 2d at 23. "As a condition of the settlement, [the client] agreed to pursue a malpractice action against [its attorney]" and use the proceeds to fully pay the adverse party's judgment before the client recovered anything. Id. The settlement agreement described the malpractice action as "the essence of th[e] Agreement." Id. The settlement agreement required the client to retain certain counsel. Id. The court held that this was an invalid assignment because the client had "little actual control; the [client's] right to recover money was sixth on a list of prioritized categories and if it settled or dismissed the lawsuit without [counsel's] written consent" the client was responsible to counsel for damages. Id. at 25.

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Again, this case is distinguishable. The City was inclined to seek a recovery from PKH regardless of the settlement. (R. 3831-32 at ¶ 17; see also R. 3957 at ¶ 15.) The City had actual control of the litigation, with no input from Cedar Valley. (R. 3832 at ¶ 21; R. 3951 at ¶ 4.) The City and Cedar Valley equally share in the recovery after payment of attorneys' fees and costs, rather than paying Cedar Valley first and leaving the City with any leftovers. (R. 3366, at §§ 1, 3; R. 3831-32 at ¶ 17.) The City selected counsel, not Cedar Valley. (R. 3831 at ¶ 15; R. 3956-57 at ¶ 13). Finally, Cedar Valley cannot stop a settlement. (PKH Br. at 19; see also R. 3369, at § 7). And in the event of no recovery, the City does not have to pay Snell & Wilmer, or Cedar Valley, any fees or damages. (R. 3366.)

E. It Is Improper to Speculate about Future Events or to Rely on "Facts" Not Found by the District Court.

Presumably recognizing that these cases are distinguishable from the facts of this case, PKH attempted to bolster the Order by speculating about future events or new "facts" *not* relied on by the district Court. For example, PKH argued that Cedar Valley has significant control over settlement negotiations because if the City and Cedar Valley "reach[] the point of a mandatory arbitration, then they are adversaries in the arbitration, and under the terms of the [Contingent Fee Agreement], [Snell & Wilmer] can represent [Cedar Valley] against [the City]." (PKH Br. at 28.) The Contingent Fee Agreement says no such thing. In fact, it provides that Snell & Wilmer "shall *not represent* either of the Clients or otherwise participate in the arbitration. If [Cedar Valley and the City] want

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to be represented in the arbitration, each of the Clients must retain its own legal counsel." (R. 3369, at §7(e) (emphasis added).)

Moreover, PKH argued that Cedar Valley's "interest in the Malpractice Case plainly exceeds the interest of [the City]" because Cedar Valley "pays all the costs of the Malpractice Case and is entitled to reimbursement **up front** of those costs." (PKH Br. at 27 (emphasis in original).) The district court never made this finding, and the record does not support it. The mere fact that Cedar Valley is entitled to a reimbursement of litigation costs it paid does not mean its interest exceeds the City's interest. Once the monies advanced are netted out, Cedar Valley and the City equally share in any recovery. And the City is entitled to the same reimbursement of costs. (See PKH Br. at n.62 (the Contingent Fee Agreement "provides that [the City] is to be reimbursed its costs incurred in the Underlying Case").) In other words, both Cedar Valley and the City are entitled to be reimbursed for their costs in the Underlying Lawsuit.

Next, PKH argued that the City is incentivized not to dispute Cedar Valley's "interpretation of the Settlement Agreement" because in the event of a dispute the City would be forced to retain new counsel and "incur fees for separate counsel." (PKH Br. at 28.) PKH argued that this "adds to [Cedar Valley's] overall control of the Malpractice Case." (PKH Br. at 28.) Yet the district court never came to PKH's curious conclusion that one party having to spend money amounted to control over the other party spending money.

Finally, PKH alleged that the City cannot independently settle this lawsuit because "[Cedar Valley] would undoubtedly claim that [the City] was in breach of the

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[Agreements]." (PKH Br. at 28.) Nowhere in the record is there any evidence that Cedar Valley has, or would, allege the City breached the Agreements to stop a settlement. Most importantly, the district court made no such finding.

F. The Public Policy Reasons for Disallowing the Assignment of a Legal Malpractice Claim Are Not Present Here.

1. The City and Cedar Valley did not collude.

PKH admits no actual collusion occurred here. Instead, PKH argued that "actual collusion does not have to be presented for public policy concerns to be triggered" and that "[a]n opportunity and incentive for collusion clearly exist in this case." (PKH Br. 35.) According to PKH, "nothing . . . prevents [the City] and [Cedar Valley] from stipulating to artificially inflated damages and using the inflated stipulation as grounds for an unjustly high damage award . . . ." (PKH Br. at 35.) While such collusion could conceivably have occurred years ago, the fact is it did not.

There is no allegation that the City stipulated to damages in exchange for an agreement from Cedar Valley not to collect and instead to take an assignment of a legal malpractice claim. PKH knows that the City has suffered actual, cash damages to avoid the risk of an $8 million judgment PKH warned it about. And even if the Agreements could be characterized as a partial, implied assignment, Utah law does not prohibit this kind of assignment because there is no collusion. A consideration of the remaining public policy concerns analyzed by other courts does not change this result.

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2. *The City did not exploit or merchandise its malpractice claim.*

PKH argued that the City exploited its legal malpractice claim by using it to negotiate a more favorable settlement. (PKH Br. at 33-34.) In its ruling, the district court quoted Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 342 (Ind. 1991), for the proposition that legal malpractice claims should not be 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." (R. 2637-38 (citing Goodley, 62 Cal. App. 3d at 389).) First, Utah law allows a complete stranger to the attorney-client relationship to purchase a malpractice claim at a bankruptcy sale and then bring suit. More importantly, perhaps, the district court never analyzed (or concluded) whether the facts of this case gave rise to the public policy concern identified in Picadilly. They do not.

The City never placed its legal malpractice claim up for bid, let alone exploited or transferred it to economic bidders. Rather, the City offered to share proceeds of a suit. The City brought the malpractice claim in its own name, controls the litigation, and stands to recover substantially from any judgment against PKH. And as detailed above, the Utah Supreme Court has authorized a judgment creditor to execute on a legal malpractice claim and conduct a private or public sale, which would result in the legal malpractice claim being exploited as a commodity. Snow, 1999 UT 49 at ¶¶ 10-11. Utah law does not bar the cost-funding arrangement here.

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

PKH next argued that the sanctity of the attorney-client relationship is destroyed because the City can share its attorney-client communications with Cedar Valley. (PKH Br. at 34.) As detailed in the City's opening brief, the facts of this case do not implicate this policy concern. (City Br. at 27-29.) Rather than address the City's arguments, PKH simply argues that the City's private communications with PKH are open to Cedar Valley—the City's former adversary. (PKH Br. at 34.) Yet this is true regardless of whether there has been an assignment or even whether a legal malpractice claim has been asserted, because a client is free to share its private attorney-client communications with anyone it wants. The attorney-client relationship is designed to protect and benefit the client, not the attorney, and it can be voluntarily waived by a client. See, e.g., State v. Johnson, 2008 UT App 5, ¶ 20, 178 P.3d 915. Regardless, the facts here show Cedar Valley was not included in the City's litigation strategies and decisions.

4. *Role reversal is inherent in all malpractice cases.*

Finally, PKH argued that the "role reversal" that inevitably occurs in all legal malpractice claims is present here. (PKH Br. at 36-37.) There is no question that in the Underlying Lawsuit the City "argued that the triggering events for collection and payment of the water impact fees had not occurred" but here the City "has shifted its position and adopted [Cedar Valley's] molecule theory argument . . . ." (PKH Br. at 36.) This change in position is inherent in any legal malpractice case. It is no surprise that after the court in the Underlying Lawsuit rejected the City's PKH-advised positions, the City now relies on positions the court found to be valid. The City relied on PKH's

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negligent advice for years and defended itself based on that negligent advice. Now, after paying millions of dollars to settle the Underlying Lawsuit, the City's position is that Cedar Valley was likely to prevail in the Underlying Lawsuit, and therefore it was reasonable for the City to settle and seek relief from the party who caused the City's injury—PKH. The law does not prohibit the rejection of bad advice.

G. PKH's Request for Dismissal with Prejudice Is Improper.

Without appealing the district court's decision, PKH requests that this Court reverse the district court's dismissal without prejudice and remand to the district court with a mandate requiring dismissal *with* prejudice. (PKH Br. at 37.) This Court should decline PKH's invitation because PKH is legally precluded from extending it. PKH failed to file a cross-appeal in this case. See, e.g., Halladay v. Cluff, 739 P.2d 643, 645 (Utah Ct. App. 1987) ("Cross-appeals are properly limited to grievances a party has with the judgment as it was entered . . . ."). Wisely, PKH quickly abandoned this two-sentence argument. (See PKH Br. at 37.)

II. THE DISTRICT COURT ERRED BY INTERFERING WITH THE CITY'S CHOICE OF COUNSEL.

PKH's last self-serving overture was to argue that the City should be deprived of Snell & Wilmer as legal counsel with approximately eight years' experience with these facts. PKH's desperation to burden the City with entirely new counsel is evident from its willingness to characterize the Order with restrictions the district court never imposed. PKH argued that the Order concluded that the City "is not to be represented by any attorney who is *or has been associated* with [Cedar Valley]." (PKH Br. at 40 (emphasis

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added).) Those words never came from the district court. Rather, the district court ruled that the City must "establish . . . that [it] is not represented by attorneys associated with [Cedar Valley]." (R. 2641.) In other words, PKH's ad lib is just that.

PKH then argued that the Order effectively disqualified Snell & Wilmer. (PKH Br. at 38-42.) But the Order neither mentions nor specifically disqualifies Snell & Wilmer. The Court should reject PKH's argument on this basis alone. But even if PKH was right, the Order should be reversed for multiple reasons.

First, PKH admitted it did not file a separate motion to disqualify, but argues—without any supporting legal authority—that a separate motion was not required. (PKH Br. at 38-39.) Under Utah law, "[a] request for an order must be made by motion." Utah R. Civ. P. 7(b). If the district court intended to disqualify Snell & Wilmer, it could easily have said so. And if PKH's intent was to seek disqualification, Snell & Wilmer should have an opportunity to oppose such a request. In reversing the district court's decision, this Court should clarify that even if PKH had made such a motion, PKH had already waived its right to seek disqualification by not filing a motion to disqualify immediately on its becoming aware of the basis for the disqualification. See, e.g., D.J. Inv. Group, LLC, v. DAE/Westbrook, LLC, 2007 UT App 207, ¶ 6, 113 P.3d 1022 (denying a motion to disqualify as untimely because it was not "immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification") (internal quotation marks and emphasis omitted).

Second, PKH argued that Snell & Wilmer's disqualification is warranted because certain "conflicts" exist with Snell & Wilmer's representation of the City. (PKH Br. at

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39.) Of course PKH cannot assert these "conflict" issues here because PKH never raised them with the district court. State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346 ("As a general rule, claims not raised before the trial court may not be raised on appeal."). Even if PKH had raised these supposed conflicts before the district court, a request for disqualification by showing a serious potential of conflict still requires a separate and fully-briefed motion, and it must be "immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification." D.J. Inv. Group, 2007 UT App 207 at ¶ 6. Additionally, even assuming there were conflicts, this would be the City's (or Cedar Valley's) argument to assert, not PKH's.

Third, PKH argued that the Order "did not violate [the City's] ability to choose its counsel." (PKH Br. at 38.) But in the next breath, PKH asserts that Snell & Wilmer had to be disqualified "because [the City] cannot have its adversary's lawyer represent it in the Malpractice Case." (PKH Br. at 40.) PKH cannot have it both ways. Either the City can choose its attorney or it cannot. This Court should recognize the City's inherent right to counsel of its choice.

Finally, PKH, anticipating that Snell & Wilmer could terminate its association with Cedar Valley, argued that "[e]ven if [Snell & Wilmer] were to cease its representation of [Cedar Valley], an 'association' would still exist . . . based on their previous interactions, representations and dealings . . . ." (PKH Br. at 41.) This ignores the law. Utah R. Prof. Conduct 1.9. If that were the law, firms would regularly be disqualified from representing clients based on their "previous interactions, representations and dealings" of former clients. The fact remains the district court never

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said Snell & Wilmer could not represent the City. PKH's attempt to disqualify Snell & Wilmer from this case has nothing to do with ethics, and everything to do with putting the City at a strategic disadvantage.

CONCLUSION

For all of the reasons set forth herein and in the City's opening brief, 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 (fact discovery is over) and a trial on the merits. The City further requests that the Court make clear that Snell & Wilmer may continue as counsel to the City, with or without a present association with Cedar Valley. Finally, if the Court determines that concurrent representation of the City and Cedar Valley is problematic for the City continuing its claims against PKH, this Court should clarify that the problem is remedied by the termination of all engagements between Snell & Wilmer and Cedar Valley.

DATED this 21st day of September, 2016.

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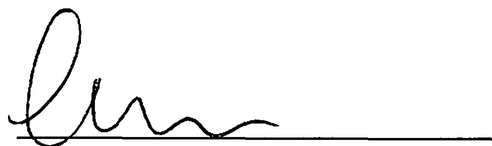

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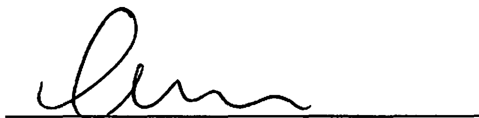

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