IN THE IOWA SUPREME COURT

NO. 18-2076

JEFFERIE SCOTT GRAY, JANICE GRAY, AND J.G., as successors in interest to JAMES LEE HOHENSHELL,
Plaintiff/Appellant,

v.

MICHAEL B. OLIVER, OLIVER LAW FIRM, P.C. AND OLIVER GRAVETT LAW FIRM, P.C.,
Defendants/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, THE HONORABLE JEANIE VAUDT

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

Appellants claim that the issues in this matter involve substantial questions of enunciating or changing legal principles, fundamental issues of broad public importance requiring ultimate determination by the Supreme Court, and substantial issues of first impression, such that transfer of this matter to the Court of Appeals is not warranted. Iowa Rs. Civ. P. 6.1101(1) and 6.1101(2)(c)(d)&(f).

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the District Court's grant of a defendant's pre-discovery motion for summary judgment as well as certain adverse rulings on motions for protective orders to prevent discovery and prosecution of the case in a malpractice/professional negligence action. The basis of the dismissal was a finding by the District Court that the prosecution of this malpractice action against a member of the bar was against public policy.

Appellants, Jefferie Scott Gray, Janice Gray, And J.G., as Successors in Interest to James Lee Hohenshell (hereinafter referred to as the "**Grays**") were awarded a judgment against James Lee Hohenshell (hereinafter "**Hohenshell**") in Polk County Case No. LACL 133379 (the "**Judgment Action**") in the approximate amount of $127,000,000 (the "**Hohenshell**

Judgment"). (Petition)(App. 8-15); (Appeal docketed as Supreme Court Case No. 17-1100 (affirmed, application for further review pending)). Hohenshell was represented in the Judgment Action by one of the Defendants in this case, Michael Oliver, who was associated with each of the other Defendants, Oliver Law Firm, P.C. and , later, its successor, Oliver Gravett Law Firm, P.C. (hereinafter Defendants are collectively referred to as "**Oliver**") during the period of time he represented Hohenshell in the Judgment Action. (Petition)(App. 8-15). After the entry of Hohenshell Judgment, Oliver withdrew as counsel for Hohenshell on or about July 12, 2017. (Petition ¶ 25; Amended Answer, ¶ 25)(App. 11, 28). The Grays then, requested the sheriff of Polk County to levy and sell the rights of Hohenshell against Oliver at public auction pursuant to Iowa Code chapter 626. (Oliver MSJ Ex. G)(App. 177-178). After public auction, the Grays were the successful bidder on the claims and received a Sheriff's Bill of Sale wherein "All right, title and interest of James Lee Hohenshell in Claims of any Kind or Nature against Michael Oliver, Against Oliver Law Firm, PC, or Against Oliver Gravett Law Firm, PC, each at 974 73rd Street #10, Windsor Heights, IA 50324" was transferred to the Grays. (Oliver MSJ Ex. G)(App. 177-178). The Grays, now standing in the shoes of Hohenshell, then

brought a professional negligence/malpractice action against Oliver (the "**Malpractice Action**"). (Petition)(App. 8-15).

Ultimately, the District Court granted Oliver's Motion for Summary Judgment and dismissed the Malpractice Action. (Ruling, p. 5)(App. 462). The District Court found that Hohenshell's assignment of his malpractice claim to Gray violated public policy even if the facts asserted by the Grays were to be proven in discovery. (Ruling, p. 5)(App. 462). Prior to that ruling, the District Court had entered injunctive orders preventing discovery of information by the Grays. (Order Granting Def Motion Protective Order; Order Expanding Scope of Protective Order)(App. 450-452; 455-457).

The issues before this Court concern whether the District Court erred in determining that it had the power to declare public policy, and in determining that public policy in Iowa should specially protect legal counsel that commits malpractice. These matters are of first impression. (Ruling, p. 5)(App. 462).

B. Course of Proceedings

The Grays filed their Petition at Law and Jury Demand in this case on November 16, 2017. (Petition)(App. 8-15). The Petition contained counts for professional malpractice, breach of fiduciary duty and breach of written contract, all relating to and arising out of the relationship between Oliver and

Hohenshell. On May 8, 2018, the District Court entered an order setting trial for May 6, 2019 and approving a discovery plan that provided, inter alia for initial disclosures to be made by May 23, 2018. (Trial Sched. & Disc. Plan; Order Setting Trial)(App. 16-21; 22-24). Defendants filed a motion to amend and an amended answer to the Petition timely, and without objection, on May 29, 2018. (Motion to Amend Answer)(App. 25-31). The amended answer denied the claims in the petition and asserted, inter alia, an affirmative defense that the plaintiffs' claims violate public policy. (Amended Answer)(App. 27-31). On May 30, 2018, Oliver filed a motion for summary judgment, statement of undisputed facts and brief (hereinafter the "**Oliver MSJ**"). (Oliver MSJ; Stmt. of Facts; Brief in Support)(App. 32-34; 35-275; 276-302). The Oliver MSJ solely argued that the assignment of Hohenshell's rights against Oliver were against public policy.

Also on May 30, 2018, Oliver filed a motion for protective order "requesting that the Court enter an order … prohibiting the Grays and their attorneys from asking Hohenshell questions relating in any way to the legal malpractice action against Oliver, including but not limited to, questions designed to waive the attorney-client privilege." (Oliver Motion Protective Order)(App. 303-315). Oliver intended the requested order to cover both the Malpractice Action and the Judgment Action. (Oliver Motion Protective

Order)(App. 303-315). The motion for protective order requested expedited relief. (Oliver Motion Protective Order)(App. 303-315).

On May 31, 2018, the District Court sent an email to counsel regarding the setting of the judgment debtor's examination discussed in the motion for protective order. (Kramer Aff. 02/20/2019 - May 31 Email)(App. 528-529). Also on May 31, 2018, the Court set a hearing on the motion for summary judgment to take place on June 15, 2018. (Order Setting Hrg on MSJ)(App. 316-318). The District Court did not enter an order setting a hearing on the motion for protective order.

On June 4, 2018, counsel for the Grays responded to the Court's email. (Kramer Aff. 02/20/2019 - June 4 Email)(App. 528-529). On June 6, 2018, Oliver filed a supplement to the motion for protective order, in part to respond to the June 4, 2018 email. (Oliver Supplement Protective Order)(App. 319-321).

On June 11, 2018, the Grays filed a resistance to the motion for protective order. (Grays' Resistance Protective Order)(App. 323-329). On June 13, 2018, Oliver filed a reply to the resistance to the motion for the protective order. (Oliver Reply Protective Order)(App. 330-340).

On June 14, 2018, at about noon, the Grays filed a motion for extension of time to resist the motion for summary judgment, noting that

Oliver's counsel had objected to the request. (Gray Motion Extension)(App. 341-342). On the same date and time, the Grays' counsel sent an email to the Court advising of the motion for extension of time and seeking clarification on the hearing set for June 15, 2018. (Kramer Aff. 02/20/2019 - June 14 Email Chain)(App. 531-532). Oliver's counsel responded to that email a few minutes later. (Kramer Aff. 02/20/2019 - June 14 Email Chain)(App. 531-532). On June 14, 2018, at about 3 p.m., the Court responded to that email chain making it clear that the motion for extension of time would be denied and that all issues would be heard on June 15, 2018. (Kramer Aff. 02/20/2019 - June 14 Email Chain)(App. 531-532). On June 14, 2018, at about 10:30 p.m., Grays filed a resistance to the motion for summary judgment, statement of disputed and undisputed facts, appendix, and brief. (Gray Resistance MSJ; Stmt. of Facts; Brief in Supp.; Appendix in Supp.)(App. 343-344; 345-352; 353-364; 365-418).

On June 15, 2018, the Court held a hearing on Oliver's motions for protective order and motion for summary judgment. (06/15/2018 Tr p. 1)(App. 433). On June 15, 2018, Oliver filed a reply to the resistance to the motion for summary judgment. (Oliver Reply MSJ)(App. 421-432). On June 21, 2018, the court granted the motion for protective order. (First Protective Order)(App. 450-452). On June 22, 2018, at about 11:20 a.m.,

Oliver filed a motion to expand the protective order. (Second Protective Order Motion)(App. 453-454). That same day, at about 1:10 p.m., the District Court granted the motion to expand the protective order. (Second Protective Order)(App. 455-457). On June 26, 2018, the District Court granted the motion for summary judgment and dismissed the case. (Ruling)(App. 458-482). On June 29, 2018, the Grays filed an affidavit relating to proposed orders to supplement the record. (Kramer Aff. re: Orders)(App. 483-517). On July 2, 2018, the Grays filed a motion to enlarge or amend ruling for error preservation purposes. (Gray Motion to Enlarge)(App. 518-519). On July 3, 2018, Oliver filed a response to the motion to enlarge or amend, largely consenting to the motion. (Oliver Response to Motion to Enlarge)(App. 520-521). On November 20, 2018, the District Court denied the motion to enlarge or amend. (Order Mot to Enlarge)(App. 522-524). Notice of Appeal was timely filed by the Grays on November 29, 2018. (Notice of Appeal)(App. 525-526).

STATEMENT OF FACTS

The Grays do not expect any dispute as to material facts. Pursuant to the District Court's Ruling, the court determined that even assuming the Grays proved all facts in their favor, public policy prevents the case from

continuing forward. (Ruling p. 5)(App. 462). Therefore for purposes of this appeal, the Grays are entitled to the following facts being deemed true.

Oliver represented Hohenshell in the Judgment Action. (Olivers' Stmt. of Undisputed Facts ¶1)(App. 35). Oliver filed an appearance to represent Hohenshell on May 6, 2016. (Olivers' Stmt. of Undisputed Facts ¶6)(App. 35). On September 15, 2016, the Grays filed a motion for summary judgment to establish Hohenshell's liability on certain counts. (Olivers' Stmt. of Undisputed Facts ¶7; Grays' Stmt. of Disputed Facts ¶ 7, Grays' Stmt. of Add'l Undisputed Facts ¶¶ 4-5; Gray MSJ Ex. 3)(App. 35; 346; 350; 387-388). Oliver did not respond to this motion on behalf of Hohenshell. (Grays' Stmt. of Add'l Undisputed Facts ¶ 6)(App. 350). On October 13, 2016, Oliver received an offer to settle the case from the Grays. (Olivers' Stmt. of Undisputed Facts ¶8; Oliver MSJ Ex. D; Grays' Stmt. of Add'l Undisputed Facts ¶ 10)(App. 36; 155-156; 350). Oliver, on behalf of Hohenshell, never responded to the settlement offer. (Grays' Stmt. of Add'l Undisputed Facts ¶ 11)(App. 350). On October 14, 2016, Oliver, on behalf of Hohenshell, provided the Grays with a discovery response admitting

liability on all six counts of the Petition in the Judgment Action.[1] (Grays' Stmt. of Add'l Undisputed Facts ¶ 3; Gray MSJ Ex. 2)(App. 350; 377-386). On October 25, 2016, the court in the Judgment Action granted summary judgment in favor of the Grays. (Oliver MSJ Ex. B – Tr. V1 p. 4)(App. 47). On October 31, 2016, the Grays filed a motion for sanctions and a second motion for summary judgment to establish liability on the remaining counts against Hohenshell. (Grays' Stmt. of Add'l Undisputed Facts ¶ 5)(App. 350). Oliver did not respond to that motion on behalf of Hohenshell.[2] (Grays' Stmt. of Add'l Undisputed Facts ¶ 6)(App. 350). On November 14, 2016, the Court in the Judgment Action entered an order establishing liability in favor of the Grays against Mr. Hohenshell on all counts. (Oliver MSJ Ex. B – Tr. V1 p. 5; Gray MSJ Ex. 6)(App. 48; 407-409). During the period of time Oliver represented Hohenshell, Oliver conducted no discovery. (Oliver MSJ Ex. B – Tr. V1 p. 7)(App. 48). Oliver made no motions in limine. (Oliver MSJ Ex. B – Tr. V1 p. 12)(App. 49). Oliver stipulated to the Grays exhibits at trial. (Oliver MSJ Ex. B; Tr. V1 p. 16)(App. 50). Oliver made no objections to prospective juror

[1] This fact was noted by a panel of the Iowa Court of Appeals in a recent decision on Hohenshell's appeal of the original case. *Gray v. Hohenshell,* No. 17-1100, 2019 WL 325015 at *5 (Iowa Ct. App. Jan. 23, 2019).

[2] This fact was noted by a panel of the Iowa Court of Appeals in a recent decision on Hohenshell's appeal of the original case. *Id.*

questionnaires submitted by the Grays. (Oliver MSJ Ex. B – Tr. V1 p. 10)(App. 49). Oliver did not offer any prospective juror questionnaires. (Oliver MSJ Ex. B – Tr. p. 10)(App. 49). Oliver did not develop a record to strike any potential juror for cause. (Oliver MSJ Ex. B – Tr. V1 pp. 51-53, 67-75, Tr. V2 pp. 23-28, 36-37; Oliver MSJ Ex. E, p. 10)(App. 59-60, 63-65, 91-92, 94-95; 166). Oliver told the jury in his opening statement that "Mr. Hohenshell admitted to his conduct" but only "after extensive police investigation and prosecution." (Oliver MSJ Ex. B – Tr. V1 p. 71)(App. 64). Oliver described his client's conduct as "heinous" and stated that he did not "deserve sympathy." Oliver MSJ Ex. B – Tr. V1 pp. 26, 71-72)(App. 53, 64). Oliver made arguments post-trial without preserving error, and made post-trial arguments that were stricken because they were untimely.[3] (Oliver MSJ Ex. B – Tr. V1 p. 4; Oliver MSJ Ex. E; Gray MSJ Exs. 7-8)(App. 47; 157-172; 410-417). Oliver made no post trial motion for judgment notwithstanding the verdict or for remittitur.[4] (Gray MSJ Ex. 7)(App. 410-411).

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[3] Both the untimely resistance and the lack of preservation of error were noted by Judge Mullins (Docket 17-1100, January 23, 2019 Court of Appeals Ruling, p.9 ft. 2, pp. 19-20).

[4] This fact was noted by Judge Mullins (Docket 17-1100, January 23, 2019 Court of Appeals Ruling, p.2 ft. 1).

Further, the District Court decided its public policy argument assuming as true that: (1) Hohenshell has waived or will waive attorney-client privilege, in whole or in part, to facilitate a full hearing in this matter; (Stmt. of Assumed Facts ¶ 26; Kramer MSJ Aff. ¶¶ 3, 9; Ruling)(App. 351; 419, 420; 458-482) (2) Hohenshell encourages Plaintiffs' bringing of this lawsuit; (Stmt. of Assumed Facts ¶ 27; Kramer MSJ Aff. ¶¶ 3, 4, 6, 8-10; Ruling)(App. 351; 419-420; 458-482) (3) Hohenshell would bring this lawsuit himself but cannot afford to do so; (Stmt. of Assumed Facts ¶ 28; Kramer MSJ Aff. ¶¶ 4-6; Ruling)(App. 352; 419-420; 458-482) (4) Hohenshell believes that Oliver lied to him about his situation and the options available to avoid a jury trial and jury award; (Stmt. of Assumed Facts ¶ 29; Kramer MSJ Aff. ¶ 5; Ruling)(App. 352; 419-420; 458-482) and (5) Hohenshell believes Oliver made misrepresentations of fact and opinion in order to continue to receive fees from Hohenshell (Stmt. of Assumed Facts ¶ 29; Kramer MSJ Aff. ¶ 5; Ruling)(App. 352; 419-420; 458-482). The facts also demonstrate that there was no collusion between Hohenshell and the Grays. (Kramer MSJ Aff. ¶¶ 7-8)(App. 420).

On February 24, 2017, the jury returned a verdict against Hohenshell for $127,000,000, and this was entered by the court as a judgment. Of the

amount awarded, $75,000,000 was for punitive damages, and $52,000,000 was for compensatory damages.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT IT HAS THE POWER TO ESTABLISH PUBLIC POLICY IS IN ERROR

1. Preservation of Error

The District Court specifically addressed and ruled upon this issue. (Motion to Enlarge ¶ 2(b); Ruling on Motion to Enlarge)(App. 518; 522-524). Grays timely filed this appeal. (Notice of Appeal)(App. 525-526).

2. Scope and Standard of Review.

The scope and standard of review on constitutional issues is *de novo*. *Silva v. Emp't Appeal Bd.*, 547 N.W.2d 232, 234 (Iowa 1996).

3. The District Court Erred When it Determined that a District Court has the Power to Establish Public Policy.

Article V of the Iowa Constitution sets forth the creation of the judicial branch. Article V Section 4 states in part that the Supreme Court of Iowa "shall have the power to issue all writs and process necessary to secure justice to parties." Iowa Const. Art. V Sec. 4. Article V section 6 states in part that the District Court shall "have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be proscribed by law. Iowa Const. Art. V Sec. 6. The Iowa Supreme Court has

held that it does not have the power to determine, or undermine, the penalty for a crime set by the legislature. See *State v. Erickson*, 225 Iowa 1261, 282 N.W. 728, 729 (Iowa 1938). It has also stated that "[i]t is not our province to determine the merits of the law as enacted by the legislature" so long as such statue does not "offend constitutional provisions." *Merchants Supply Co. v. Iowa Emp't Sec. Comm'n*, 235 Iowa 372, 384, 16 N.W.2d 572, 579 (Iowa 1944). In the event an act of the legislature is inconsistent with the Constitution, the act is void. Iowa Const. Art. XII, section 1; *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009).

The question for the Court today, in part, is whether a district court has the power, without prior precedent or statutory authority, to establish new public policies or to interpret unwritten public policies of the State of Iowa in the first instance. The Grays argue that the language of Iowa Constitution Article V, Section 6 when compared to the language in the Iowa Constitution Article V, Section 4 establishes that such district courts are not granted the power to take such action, and that such action is specifically reserved for the Supreme Court of Iowa. This view is consistent with the general mandate of the Iowa Supreme Court that "[a] court may not give public policy protection that the legislature has chosen not to provide

under a statutory scheme." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 766 (Iowa 2009), as amended on denial of reh'g (Mar. 5, 2009).

Article V, Section 6 states "The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law." The phrase "in such manner as shall be prescribed by law" has the effect of limiting the jurisdiction and power of the district court. Such language, because of the separation from the preceding clause, indicates that the limiting language is to be applied to the original clause "[t]he District Court shall be a court of law and equity" rather than modifying the clause "and have jurisdiction in civil and criminal matters arising in their respective districts…." See Iowa Const. Art. V, Sec. 6. The Grays do not argue that the District Court does not have jurisdiction to hear any particular case – rather that the Iowa Constitution does not grant the District Court the power to determine new public policies not previously announced by either the legislature or the Supreme Court of Iowa.

II. THE DISTRICT COURT'S DETERMINATION THAT IOWA DOES OR SHOULD HAVE A PUBLIC POLICY THAT PROTECTS LAWYERS IS IN ERROR

1. Preservation of Error

This issue has many parts, each of which the District Court specifically addressed and ruled on. (Grays Memorandum of Authorities pp. 2-11; Ruling; Motion to Enlarge ¶¶ 2(a), 2(c); Ruling on Motion to Enlarge)(App. 354-363; 458-482; 518-519; 522-524). The Grays timely filed this appeal. (Notice of Appeal)(App. 525-526).

2. Scope and Standard of Review.

The scope and standard of review on constitutional issues is *de novo*. *Silva v. Emp't Appeal Bd.*, 547 N.W.2d 232, 234 (Iowa 1996). Similarly, to the extent that the District Court was exercising equity jurisdiction, the standard of review is *de novo*. Iowa Court Rule 6.907.

3. The District Court Erred When it Determined that the Assignment of Claims in this Case Violates Public Policy.

Ultimately public policy issues involve the weighing of several relevant factors. The Grays argue that the District Court erred in giving great weight to certain factors and little weight to others, such that the District Court developed a conclusion differently than this Court, and differently than is in the best interests of the State of Iowa. The Grays argue

that when this Court weighs all factors on *de novo* review, it should reverse and remand this case for further proceedings.

A. The District Court Gave Insufficient Weight to Existing Law.

The undisputed facts are that the Grays used existing laws contained in Iowa Code chapter 626 to cause the right at issue to be sold at public auction, that public auction occurred, and the Grays paid consideration for the property rights at issue. (Oliver MSJ Ex. G)(App. 177-178). The District Court's ruling has the effect of depriving the Grays of a property right, which is a ruling contrary to existing law. Although argued to the District Court, the District Court's ruling did not address the current law. In response to the Grays' Motion to Enlarge, the District Court did not analyze current law except to conclude that "the constitutional and statutory provisions Plaintiff cites simply do not and cannot contemplate protecting the narrow interests Plaintiff seeks to advance here over preserving the integrity and advancement of society as a whole and promoting the public good, including but not limited to preserving the highly principled practice of law."

a. Existing Law Supports Property Rights.

The right to acquire property is a fundamental right protected by Article I, Section 1 of the Iowa Constitution. All men and women have the

right to acquire, possess and protect property. Iowa Const. art. I, § 1. There is no dispute as to the status of the Grays as being the true and rightful holder of the claims involved in this matter, except as to the public policy arguments being made by the defendants. There can be no greater announcement of the public policy of this state, than the statements contained in its Constitution.

The public policy of the State of Iowa includes a goal that people who owe money pay it and that the judgments of this state have meaning. Iowa Code Section 626.21 specifically provides that "[j]udgments, money, bank bills, and other things in action may be levied upon, and sold or appropriated thereunder, and an assignment thereof by the officer shall have the same effect as if made by the defendant." A cause of action against another is a "thing in action" allowed to be sold pursuant to the statute. *Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 304 (Iowa 1994) (citing *Arbie Mineral Feed Co. v. Farm Bureau Mut. Ins. Co.*, 462 N.W.2d 677, 680 (Iowa 1990) and *Citizens State Bank v. Hansen*, 449 N.W.2d 388, 389 (Iowa 1989)). As described in those cases, Iowa's statute specifically allows levy on choses in action although that was not allowed at common law. *See, e.g., Arbie Mineral Feed*, 462 N.W.2d at 680. A cause of action is personal property in Iowa. Iowa Code § 4.1(21); *Arbie Mineral Feed*, 462 N.W.2d at

680 (citing *Steffens v. Am. Standard Ins. Co.*, 181 N.W.2d 174 (Iowa 1970)); *McKinnes Excavating & Grading v. Morton Bldgs.*, 507 N.W.2d 405, 410 (Iowa 1993). Generally, "[a]n assignment is a transfer to another of the whole of any property or right in the property. In such transfers, the assignee assumes the rights, remedies and benefits of the assignor. On the other hand, the assignee also takes the property subject to all defenses to which the assignor is subject." *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 533 (Iowa 1995) (internal citations omitted). "Choses in action whether for breach of contract or for tort are assignable in this state." *Id.*; see also *Fischer v. Klink*, 234 Iowa 884, 14 N.W.2d 695, 698 (Iowa 1944) ("Under our law **all choses in action are assignable**") (emphasis added). Further, a cause of action, whether against a lawyer or otherwise, is not identified as property exempt from execution pursuant to Iowa's exemption scheme. See Iowa Code chapter 627. It is with this background of existing law that the Grays establish the absolute right to obtain the assignment and bring these claims.

The best evidence of public policy is the policy that the legislature has already adopted and the legislature and courts have not adopted the policy the defendants have proposed in this case. *Boyer v. Iowa High Sch. Athletic Assoc.*, 256 Iowa 337, 347, 127 N.W.2d 606, 612 (Iowa 1964) (citing *State*

v. Bruntlett, 240 Iowa 338, 355, 356, 36 N.W.2d 450, 460 (Iowa 1949); see also *Jasper v. H. Nizam, Inc.*, 764 N.W.2d at 766. This Court's announcement of a public policy prohibiting the assignment of legal malpractice claims, when other similar claims are freely assignable and the precedent in this State is in favor of such free assignment would have the effect of undermining and contravening the established public policies of the legislative branch and the Constitution. Certainly, to date, this Court has not articulated such a public policy.

b. The District Court's Adoption of Public Policy Would Be Unconstitutional.

"It is a fundamental rule of statutory construction that where a statute is fairly open to two constructions, one of which will render it constitutional and the other unconstitutional or of doubtful constitutionality, the construction by which it may be upheld will be adopted." *Kruidenier v. McCulloch*, 258 Iowa 1121, 1133, 142 N.W.2d 355, 362 (Iowa 1966) (citations omitted). This concept demonstrates the public policy inherent in the Constitution of the State of Iowa.

The District Court's ruling raised two separate and distinct constitutional issues. The first issue is that the ruling effectively deprives both the Grays, and Mr. Hohenshell, of property rights. The second issue is

that the prohibition against legal malpractice assignments violates equal protection under the law.

i. *Property Rights.* The legal malpractice claim that is the subject of this matter was properly acquired by the Grays pursuant to their rights as judgment holders under to Iowa Code section 626.21. The Grays acquired their rights at a public auction. Acquiring property through a public auction is a legitimate and common form of attaining title to property. Article I, Section 1 protects their right to do so. See Iowa Const. art. I, § 1. Under Article I, Section 1, "all men and women are, by nature, free and equal, and have certain inalienable rights- among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property . . ." The right to enjoy property is constitutionally protected. *Farmers Trust & Sav. Bank v. Manning*, 359 N.W.2d 461, 463 (Iowa 1984) (citing *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S. Ct. 1113, 1122 (1972)).

The Grays have a right to not be deprived of that property without both substantive and procedural due process. Iowa Const. Art. I, Section 9; U.S. Const. amend. XIV, Section 1. See, e.g. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). Iowa provides a heightened level of scrutiny for a depravation of fundamental rights. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351-352 (Iowa 2013). The District Court's interference

with the Grays' assertion of their claim, if upheld, violates substantive due process by preventing them from exercising their validly acquired property interest. See *Sanchez v. State*, 692 N.W.2d 812, 819-820 (Iowa 2005).

In federal constitutional litigation, the analysis of a depravation of a right to property focuses on due process requirements in the 14th Amendment. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2593. Iowa's Constitution is different from the federal Constitution in that the due process clause of the Iowa Constitution is in Article I, Section 9 and that there is an additional protection to guarantee the inalienable right to acquire property in Article I, Section 1. Iowa Const. art. I, §1. Iowa provides a heightened level of scrutiny for deprivations of fundamental rights. *Gartner*, 830 N.W.2d at 351-352 (Iowa 2013). Therefore, an infringement of the right to engage in commerce and acquire a legal malpractice claim as property would require the Court to find such infringement substantially related to an important government objective. *Id.*

No evidence of any government objective exists in the record. Particularly, neither Oliver nor the District Court explained how any of the objectives set forth in favor of making this public policy could not be addressed through normal pre-trial procedure, such as the use of protective orders, jury instructions, and the existing protections of attorney work

product and attorney-client privilege. Although the District Court explains that one of the public policy arguments is that attorney-client privilege would be eroded, that argument is undermined by the fact that attorney-client privilege has been or will be waived in this case. (Stmt. of Assumed Facts ¶ 26; Kramer MSJ Aff. ¶¶ 3, 9; Ruling)(App. 351; 419-420; 458-482).

This property right issue also deprives Hohenshell of rights. The assumed facts of this case include that Hohenshell supports this litigation and would bring it himself but he lacks the funds to do so. (Stmt. of Assumed Facts ¶¶ 27-28; Kramer MSJ Aff. ¶¶ 3, 4, 6, 8-10; Ruling)(App. 351-352; 419-420; 458-482). The assumed facts also include that Hohenshell believes that Oliver lied to him about his situation and the options available to avoid a jury trial and jury award in order to personally benefit. (Stmt. of Assumed Facts ¶ 29; Kramer MSJ Aff. ¶ 5; Ruling)(App. 352; 419-420; 458-482). When rejecting the same arguments being made by Oliver and the District Court, the Supreme Judicial Court of Massachusetts cited to the states of Maine and Pennsylvania by saying the "voluntary assignment of a legal malpractice claim to a party with an interest in the claim who has 'the time, energy and resources to bring the suit' may be the most efficient way, in some instances, to realize the value of such a claim." *Thurston v. Continental Cas. Co.*, 567 A.2d 922, 923 (Me. 1989). The

Supreme Court of Pennsylvania rejected the defendants' purported public policy concerns and stated, "We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected." *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 526, 539 A.2d 357 (Pa.1988); *New Hampshire Inc. Co. v. McCann*, 707 N.W.2d 332 (Mass. 1999). A property interest is of lesser or no value if one cannot transfer it.

ii. *Equal Protection.* The District Court ruling appears to apply only to malpractice claims against attorneys. This type of rule violates the Equal Protection Clause of the Iowa Constitution in Article I, Section 6. Under Article I, Section 6, "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." In determining that legal malpractice claims are unassignable, the District Court effectively created a new privilege for practicing attorneys; and one not held by other practitioners in similar professional capacities. The Equal Protection Clause requires that similarly situated persons be treated alike under the law. *In re Det. of Williams*, 628

N.W.2d 447, 452 (Iowa 2001). This is similar to the public policy argument pointed out by the Supreme Court of Massachusetts in *New Hampshire Inc. Co. v. McCann*, 707 N.W.2d 332, at 335-338 (Mass. 1999) (quoted below). "[P]roviding shelter for attorneys by prohibiting the voluntary assignment of malpractice claims, would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection." *Id*.

Determining the level of scrutiny to apply in an equal protection claim under Iowa Constitution Article I, Section 6 is a two-part analysis. First, Iowa courts' "threshold inquiry" is to determine whether the proffered law treats similarly situated individuals similarly. *Gartner*, 830 N.W.2d at 350-351 (Iowa 2013). Then, the courts determine which level of scrutiny to apply. *Id.* A claimant with a claim against a lawyer, a claimant with a claim against a non-lawyer professional, and a claimant with a claim against a non-professional are all similarly situated and are not treated equally if the lawyer has a protection against assignability not prohibited for the other types of claims. Therefore, the Court should apply heightened scrutiny. The generalized interests regarding the value of the attorney-client relationship cited by Oliver and the District Court are insufficient to meet that standard, especially when, as here, the former client is presumed for purposes of pre-

discovery summary judgment to (1) support the lawsuit, and (2) have waived attorney-client privilege.

The Grays request that the Court reverse the District Court's ruling based on the ruling's adverse effect on the constitutional rights of the Grays, Mr. Hohenshell and all Iowans.

B. The District Court's Concern for Protecting Iowa Lawyers is Misplaced and Unnecessary.

The District Court weighed the fact that this was an assignment of a legal malpractice claim heavily. (06/15/2018 Tr pp. 24-26, 31, 35; First Protective Order; Second Protective Order Ruling; Ruling on Motion to Enlarge)(App. 434-436, 441, 445; 450-452; 455-457; 522-524). The District Court believed that this type of assignment could undermine the legal profession. (Ruling)(App. 458-482). The Supreme Judicial Court of Massachusetts, in rejecting such arguments, explains in detail why the allegations of public policy concerns of other jurisdictions are unwarranted. *New Hampshire Inc. Co. v. McCann*, 707 N.W.2d 332 (Mass. 1999).

> We suspect that fear of "open trading" is based in part on outmoded concepts and protectionism. We "have long abandoned the view that litigation is suspect," and have recently abolished the rule against champerty, now permitting the litigation of claims financed by others in return for their receipt of a portion of the proceeds of the litigation. *Saladini v. Righellis*, 426 Mass. 231, 234, 235, 687 N.E.2d 1224 (1997). There is nothing to show that, in those jurisdictions that permit

> the voluntary assignment of a malpractice claim, there has been an increase in baseless lawsuits.
>
> We are also not persuaded that assignment of legal malpractice claims will demean public confidence in the legal profession. The defendants argue that, "where a legal malpractice claim is assigned to one's former adversary in litigation, that adversary, as the plaintiff in the malpractice action, may be required to show that he was successful in the underlying litigation not because of the strengths of his case, but because of the incompetence of opposing counsel." Thus, the defendants see the assignment as creating a distasteful role reversal which would demean and reduce the public's confidence in the legal process.
>
> **There is no logic to this argument. . . . It could be argued just as forcefully that, providing shelter for attorneys by prohibiting the voluntary assignment of malpractice claims, would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection**. See Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. Tex. L. Rev. 1203, 1206 (1996); Comment, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. Chi. L. Rev. 1533, 1551 (1992).

New Hampshire Inc. Co. v. McCann, 707 N.W.2d at 335-338 (Mass. 1999) (emphasis added).

Iowa's legal profession enjoys a comparative camaraderie and civility envied around the country. It is difficult to find lawyers willing to accept meritorious, or even egregious malpractice cases against other counsel for those reasons. That said, the public does not benefit from further protecting a lawyer, who, as here, is presumed to have lied to his own client for

personal gain. (Stmt. of Assumed Facts ¶ 29; Kramer MSJ Aff. ¶ 5; Ruling)(App. 352; 419-420; 458-482).

C. The District Court Weighed the Opinions of Courts With Law Dissimilar to Iowa Too Highly.

Virtually all of the cases that find malpractice claims not assignable do so on the basis that personal injury claims are differently assignable than property claims. *See, e.g., Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 395-98 (1976). Iowa's history of allowing assignment of tort claims goes back as far as 1910 and is different than all those other jurisdictions. See *Kithcart v. Kithcart*, 145 Iowa 549, 554, 124 N.W. 305, 306 (Iowa 1910). The Court should ignore the idea of a chose in action being "personal" to the debtor, in favor of the analysis that is more akin to our own Court's and legislature's sensibilities.

Although some courts have prohibited alienation of such property, more recently decided cases tend to hold that these claims are assignable. In 2012, Mississippi held that "Mississippi law does not prohibit the assignment of legal-malpractice claims." *Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So.3d 453, 466 (Miss.App. 2012) (affirmed in part and reversed in part on other grounds in *Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So.3d 420 (Miss. 2012)). In 2013, the Georgia Supreme Court held "that the

assignment of legal malpractice claims is not prohibited as a matter of law." *Villanueva v. First Am. Title Ins. Co.*, 292 Ga. 630, 740 S.E.2d 108, 110 (Ga. 2013).

There are several persuasive reasons for upholding transfers of legal malpractice claims. In *Gregory v. Lovlien*, the Oregon Court of Appeals held that legal malpractice claims are transferrable. 26 P.3d 180, 185 (Or. Ct. App. 2001). The Court explained that "[t]he underlying theme [in other jurisdictions prohibiting transfer of legal malpractice claims] is the perceived threat to the attorney-client relationship that would accompany the assignments of legal malpractice claims." *Id.* at 184. The Court noted that in many cases, these issues are not present; for example, "[a]n assignment of a malpractice claim by one corporation to another as part of a merger or acquisition does not present these concerns. The same is true when the defendant in the underlying action assigns its malpractice claim against its attorney to the plaintiff as part of a settlement." *Id*.

New York courts have examined this issue and upheld transfers of legal malpractice claims on the basis, in part, that there are no persuasive public policy rationales sufficient to justify prohibiting these transfers in light of their statutory scheme that allows assignability. *Greevy by Greevy v.*

Becker, Isserlis, Sullivan & Kurtz, 240 A.D.2d 539, 541 (N.Y.A.D. 2 Dept. 1997).

Idaho takes a similar policy-focused approach by refusing to adopt a flat prohibition on these transfers, and instead examining legal malpractice transfers on a case-by-case basis to determine whether the specific transfer at issue implicates public policy concerns. *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 293 P.3d 661, 668 (Idaho 2013).

The most closely related case to the one at bar is the Utah case. In *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 1999 UT 49, 980 P.2d 208 (Utah 1999), a judgment creditor purchased the judgment debtor's legal malpractice claim at a sheriff's sale. 980 P.2d at 209 (Utah 1999). The Utah Supreme Court held "that a legal malpractice claim, like any other chose in action, may ordinarily be acquired by a creditor through attachment and execution." *Id.* at 210. The Court found no sufficient reason for creating a "legal malpractice" exception to the rule that a creditor can acquire a debtor's legal claims through attachment and execution. *Id.*

CONCLUSION

The District Court erred when it dismissed the case on summary judgment by creating a new public policy that voided the assignment of a malpractice claim. This Court should reverse the District Court's ruling and

its protective orders, and remand the case for discovery and trial on the merits.

Respectfully, submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Final Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on May 1, 2019, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(*b*).

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Appellant's Final Brief was filed with the Iowa Supreme Court by electronically filing the same on May 1, 2019, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.302(1).

/s/Jonathan Kramer
Jonathan Kramer

CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Appellant's Final Brief is $ 0.00 .

/s/Jonathan Kramer
Jonathan Kramer

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt and contains 6,504 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Tara Johnson
Signature

May 1, 2019
Date