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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

Fitzgerald v. Salsbury Chemical, Inc., 613 N.W.2d 275 (Iowa 2000)

Rogers v. Webb, 558 N.W.2d 155 (Iowa 1997)

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

Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995)

Strahin v. Sullivan, 647 N.E.2d 765 (W.V. 2007)

State Farm Fire and Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996)

ROUTING STATEMENT

The parties agree that this case should be retained.

REPLY TO APPELLEE STATEMENT OF THE CASE AND FACTS

The Appellee's Statement of the Case footnote 1 contains argument regarding facts not in the record and is not applicable to the case. Appellee Brief p. 10 ft nt 1. There is no insurance coverage involved in this matter. The argument being made appears to be that attorneys that defend civil cases "insure" the results of their efforts when their clients do not have insurance. Whether and to what extent Mr. Oliver committed malpractice or caused damage to Mr. Hohenshell is not before the court. The issue before this court is whether Mr. Oliver is entitled to a special immunity from suit not present in other contexts notwithstanding the interests of either Mr. Hohenshell or the public.

The Appellee's Statement of the Case also claims that "Mr. Hohenshell has never asserted any claims against Oliver arising out of Oliver's representation of him in the lawsuit." Appellee Brief p. 11. No admissible evidence is in the record as to what Mr. Hohenshell has or has not done, what he believes, or what claims he makes. The citation to Plaintiff's Petition only shows that Mr. Hohenshell is not personally bringing the current litigation at this time.

The Appellee's Statement of the Case misstates the alleged grounds for malpractice. Appellee Brief, p. 12. Those claims are primarily contained in paragraph 36 of the Plaintiff's Petition. (Plaintiff's Petition)(App. 8-15). If the facts shown at trial were that Mr. Oliver completely failed to even develop a trial strategy, failed to communicate with Mr. Hohenshell about the settlement offer, failed to advise Mr. Hohenshell about discovery, failed to advise Mr. Hohenshell about the effect of the discovery admissions and sanctions on the trial, failed to advise Mr. Hohenshell about the range of possible outcomes of the case, and failed to advise Mr. Hohenshell that accepting the offer, or making a counteroffer of some type might be in Mr. Hohenshell's interest, Mr. Oliver's actions could have caused damage to Mr. Hohenshell and Mr. Oliver's conduct could rise to a level of malpractice even though the full value of the claim awarded to the Grays by the jury was supported by the evidence.

The Appellee's Statement of Facts contains a lengthy response to the concept that this Court is allowed to assume certain facts as true for purposes of this appeal. Appellee Brief, p. 14-19. One of the bases for dispute is the notion held by the District Court and Appellee that asking questions of a represented party about facts to establish whether attorney-client privilege had been previously waived, questions about whether such privilege will be

waived in the future, or under what circumstances privilege might be waived, would be "improper" or "unethical", or amount to an "inducement" or even "solicitation." Appellee Brief, p. 14-19. There is no basis in the law for such a notion, as questions regarding privileged communications commonly come up in depositions. See e.g. *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504 (Iowa 1986) (privilege can be waived involuntarily); *Banks v. Office of Senate Sergeant-At-Arms*, 241 F.R.D. 476 (D.C. 2007); *Quiksilver Inc. v. Kymsta Corp.*, 247 F.R.D. 579 (C.D.Ca. 2007); *Thurmond v. Compaq Computer Corp.*, 198 F.R.D. 475 (E.D. Tx. 2000) (subsequent related proceedings unrelated to attorney-client privilege issue). The Grays are not aware of any reported case where a former attorney asserted that his former client and the client's new counsel should not have the right to determine issues of privilege on their own. Of course the Grays could have scheduled a discussion with Mr. Hohenshell and his counsel without court involvement of any kind, however, such action would have been argued by Oliver to be collusive. See Appellee's Brief, pp. 18, 28, 43 (arguing collusion or risk thereof).

ARGUMENT

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

The Appellee relies on *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275 (Iowa 2000) and *Rogers v. Webb*, 558 N.W.2d 155, 156-157 (Iowa 1997) as indicating that the Iowa Supreme Court encourages district courts to determine new public policies. Appellee Brief, pp. 20-21. Under *Fitzgerald* and *Rogers*, the Supreme Court had already issued a doctrine and mandate to district courts to review and establish public policy exceptions to other law in a particular context. See *Fitzgerald*, 613 N.W.2d at 275 (recognizing prior Supreme Court of Iowa case law establishing a public policy exception to at-will employment); *Rogers*, 558 N.W.2d at 156-157 (Supreme Court describes its history in establishing public policy exception to contract enforcement). In both instances the Iowa Supreme Court specifically created a public policy related element of a claim or defense and charged district courts to take action. Here, the Iowa District Court created a brand new public policy in a new context and used that public policy as an exception to other existing law established by the Iowa Supreme Court and the Iowa legislature.

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

Ultimately public policy issues involve the weighing of several relevant factors. The Appellee places great focus on what some other states have done, but has all but ignored what Iowa has done. This Court already heard these same arguments in *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995). Not all other jurisdictions agree with or follow this Court's decision in *Red Giant*. See e.g. *Strahin v. Sullivan*, 647 N.E.2d 765, 772-773 (W.V. 2007); *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). The emphasis Oliver places on other states' laws is understandable because our own law does not support his position.

Oliver cites 10 public policy issues that support the district Court's ruling. Appellee Brief, pp. 28-29. Those public policy reasons are not congruent with Oliver's stated argument that this ruling is limited to assignments to litigation adversaries, and therefore does not amount to an equal protection issue. See Appellee Brief, p. 59. The Court in reviewing these arguments should compare the right to an assignment of the claim against Oliver to the Grays to a hypothetical assignment of that same claim to a bank as collateral, or to some other creditor, or to a partnership in which Hohenshell had an interest. Of the public policy arguments raised by Oliver,

only #4 (the alleged shifting of positions) would apply more to an assignment to a litigation creditor as opposed to anyone else. Moreover, all such issues are virtually identical to those issues relating to insurers, and in the contexts of health care professionals, accounting professionals, or anyone else with positions of trust and confidence.

Contrary arguments are easily made to many of the public policy arguments asserted by Oliver, and few of Oliver's arguments apply based on the facts of this case. For example:

(1) Assignment imperils the sanctity of the attorney client relationship - that is not possible here when Oliver was already replaced as counsel by the client and has no relationship with the client. Further, we cannot address that here when we have no record of the position of the client on the malpractice allegations.

(2) Erodes the attorney client privilege – it is the client's privilege to waive or not. Here, that client has independent counsel, but it is the former lawyer that is asserting privilege <u>not over his own testimony but over that of the former client</u>. That is not an erosion, it would be a significant and unprecedented expansion of the privilege and the rights of *lawyers*.

(3) Restricts access to legal services for the poor or indigent – the poor and indigent are the clients who are the least likely to be able to be compensated from the malpractice or breaches of duty from their counsel. Granting this public policy insures that lawyers can take advantage of the poor or indigent and breach standards of care without consequence.

(4) Degrades the legal profession and the public's confidence in the court system by sanctioning an abrupt and shameless shifting of positions – The public's confidence would be more degraded by the shameless protectionism for lawyers when estoppel applies to everyone equally.

(5) Compromises zealous advocacy and the duty of loyalty – this just isn't possible when the lawyer involved has been replaced by separate counsel for the client. Malpractice still does not exist unless there has been a breach of a standard of care.

(6) Promotes collusion between adverse litigants against a targeted attorney – there is absolutely no claim of collusion here and the largest issue with collusion is the agreement to facts, whereas here a jury established the awards involved.

(7) Divests the client of the decision of whether to sue – this is just not true, the client still has control over the privilege and the clients' wishes will be heard by a court if the client wishes to make them known.

(8) Creates a commercial market for legal malpractice claims – there is not a market for any other malpractice claims, these types of claims are simply too fact intensive and client testimony focused to be financially feasible as an investment. Judgment creditors are uniquely situated to see value enough to be willing to front costs in a malpractice claim because of the intimate knowledge of the facts and law applicable already held by the judgement creditors' counsel.

(9) Fails to hold the wrongdoer accountable – how is having a wrongdoer/client who can't afford to pay a judgment being held accountable by not being able to provide value to the person he wronged? Further, if assignment is the only/best way to bring actual malpractice to light, a prohibition on assignment protects the wrongdoer.

(10) Places the defense attorney at a unique disadvantage – the attorney is not in a uniquely disadvantaged position. He is

entitled to conduct discovery of the claims and evidence to be used against him, in addition to any expert testimony or report, by certain deadlines, the same as physicians and accountants.

Also, this case is distinguishable from all cases in other jurisdictions because in this case: (1) there is no evidence of pre-litigation agreement or any collusive conduct between the Grays and Mr. Hohenshell, (2) Mr. Hohenshell's position and beliefs regarding the merits of the claims and intent to participate are not in the record, (3) the claims against Oliver need not be inconsistent with the prior verdict; (4) Iowa law has historically viewed chose in action as assignable property in contrast to the common law in other jurisdictions, (5) Iowa has a statute that requires sheriff sales to be treated as voluntary conveyances, and (6) Iowa has already ruled on these same issues in *Red Giant*.

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 Reply 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 Reply 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 Reply 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 1,841 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