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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
JUNE 17, 2009
(FILE NO. 2009-SC-000159-DG)**

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002279-MR
&
NO. 2007-CA-002308-MR

TIM DAVIS AND TIM DAVIS &
ASSOCIATES, INC. APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT
v. HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 05-CI-00800

JOHN J. SCOTT AND
WHITLOW & SCOTT APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

DIXON, JUDGE: Appellants, Tim Davis and Tim Davis & Associates, Inc., appeal from an order of the Hardin Circuit Court granting summary judgment in favor of Appellees, John J. Scott and Whitlow & Scott, and dismissing their claim for legal malpractice. Appellees have filed a cross-appeal challenging several rulings of the trial court as well. Finding no error, we affirm.

Tim Davis is the founder and president of Tim Davis & Associates, Inc., (collectively "Davis"), a third-party administrator of health care benefits. In 2002, Davis entered into negotiations to purchase PICA Group Services, Inc.'s third-party administrator business. On September 30, 2002, Davis and PICA entered into a binding letter of intent for the purchase of all of PICA's third-party administrator assets in which Davis agreed to pay a minimum of $200,000, with a contingency of the lesser of $25,000 or 15 percent of one-year's worth of revenue for the assets. As part of the due diligence review, the agreement permitted Davis to review PICA's books, business operations and records, as well as to speak with PICA's customers. On the same day that the letter of intent was signed, Davis and PICA executed a supplemental agreement wherein Davis agreed that if it did not acquire PICA's third-party administrator business, Davis would not communicate or solicit PICA customers for a period of fifteen months from the date of termination of the letter of intent.

In November 2002, the deal between Davis and PICA fell through due to a disagreement over how the purchase price was to be paid. Thereafter, on

December 30, 2002, PICA sold its third-party administrator assets to Global Risk Management ("GRM") for $225,000.

In February 2003, Davis received a letter from Coal Exclusive, a customer of PICA, indicating that PICA had been purchased by GRM and that Coal Exclusive was interested in receiving a quote from Davis to become the third-party administrator for Coal Exclusive's benefits plan. Davis thereafter sought advice from attorney Appellee John Scott. Davis apparently asked Scott whether he could contact the former customers of PICA since PICA had sold all of its assets to GRM. Scott informed Davis that he could still potentially be sued and did not advise him to solicit PICA's former customers. Davis later stated in his deposition that Scott gave him the "yellow light," cautioning him that he could be sued but that Scott never specifically told him he could not solicit the customers. [1]

Davis proceeded to solicit and secure the business of three former PICA customers. On April 23, 2003, PICA sent Davis a letter informing him that his communications with Coal Exclusive were in violation of the September 30, 2002, nonsolicitation agreement. Davis then faxed a copy of the letter to Scott on April 24, 2003. Both Davis and Scott agree that they discussed the letter, but neither can remember the content or substance of the conversation. There is no evidence in the record as to whether Scott provided Davis with any legal advice during the conversation.

[1] The trial court's order notes that Davis also solicited and received legal advice from two other attorneys regarding the nonsolicitation agreement, both of whom gave Davis more positive advice than Scott.

On July 22, 2003, GRM and PICA sued Davis in federal court in Tennessee alleging a violation of the September 2002 nonsolicitation agreement. In May 2004, Davis met with GRM's President/Chairman of the Board, Lee Henningsen, to discuss a potential settlement. During the meeting, Henningsen told Davis that he felt Scott had given Davis incorrect advice and that Davis should sue Scott. Henningsen suggested that Davis review Scott's deposition taken during the federal litigation because he believed that Scott had committed malpractice and there was probably insurance available.[2]

Davis and Henningsen subsequently reached a settlement agreement wherein Davis would pay GRM $300,000. The settlement, however, was expressly conditioned upon Davis pursuing a legal malpractice claim against Scott and assigning 80 percent of the proceeds of that claim to GRM. Specifically, the settlement agreement provided, in relevant part:

> d) TDA and/or Davis has provided written notice to Attorney John Scott ("Mr. Scott") of TDA and/or Davis's legal malpractice claims against Mr. Scott based on the advice that he gave TDA and/or Davis regarding the non-solicitation, non-communication and confidentiality agreement that TDA and Davis entered into with PICA Group Services, Inc. and/or PICA, and which was an issue in the lawsuit. By execution of this Agreement, GRM acknowledges receipt of a copy of the written notice provided by TDA and/or Davis;
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> e) In its discretion, GRM will secure the services of an attorney ("Malpractice Counsel"), on behalf of TDA and/or Davis, to pursue TDA's and/or Davis's legal

[2] Interestingly, Davis testified in his deposition that prior to his conversation with Henningsen, he never felt that Scott had provided negligent representation. In fact, Scott continued to represent Davis in numerous other matters.

> malpractice claim ("Malpractice Claim") against Mr. Scott. TDA and Davis agree that they will act in good faith to cooperate with and use their best efforts to assist Malpractice Counsel to successfully pursue the Malpractice Claim, and TDA and Davis agree that they will not settle the Malpractice Claim without the express written consent of GRM. TDA and/or Davis further agree that they will enter into a common interest agreement, or other appropriate agreement under Kentucky Law, with GRM and Malpractice Counsel that allows Malpractice Counsel to communicate with GRM about the Malpractice Claim, including the sharing of attorney-client privileged information. Any money recovered from the Malpractice Claim will, after payment of attorney's fee and any litigation costs, be divided between GRM and TDA and/or Davis, with 80% distributed to GRM and 20% distributed to TDA and/or Davis. TDA's and Davis's commitment to use their best efforts to assist in the Malpractice Claim does not include any obligation to provide any financial assistance for the prosecution of the malpractice claim. Should GRM, for any reason, not secure the services of an attorney to pursue the Malpractice Claim, TDA and GRM will be considered to have fulfilled their obligations under this Paragraph 1(e) of the Agreement.

On June 7, 2004, Davis and GRM executed the settlement agreement ending the underlying federal litigation.

GRM subsequently retained attorney Hans G. Poppe to represent Davis in the malpractice claim. In the complaint filed on May 5, 2005, in the Hardin Circuit Court, Davis sought to recover the $300,000 paid to GRM to settle the federal litigation, $318,000 in attorney fees and costs incurred during the litigation, attorney fees and costs of the malpractice litigation, as well as emotional distress damages not to exceed $500,000. Over the course of the next two years, the parties conducted discovery and filed numerous motions.

On August 3, 2007, the trial court held oral arguments on Scott's motions for summary judgment and both parties' numerous motions in limine. In a 43-page Factual Background, Conclusions of Law, Judgment and Order, the trial court found that the settlement agreement constituted an assignment of a legal malpractice claim void as against public policy, and granted summary judgment in favor of Scott, dismissing Davis's legal malpractice complaint with prejudice. However, acknowledging that the case involved issues of first impression in Kentucky, the trial court addressed the remaining issues concerning attorney's fees, motions in limine to exclude expert witness testimony and the settlement agreement, as well as the claim for emotional distress damages. Both parties thereafter appealed to this Court.

The central issue to be determined is whether Davis's assignment to GRM of the proceeds from the legal malpractice action constitutes an impermissible assignment of the legal malpractice claim and, if so, does such preclude Davis from maintaining the legal malpractice action against Scott. Davis argues that the assignment of proceeds is not an assignment of the claim itself. Further, Davis contends that even if we agree that an impermissible assignment occurred, the malpractice action survives summary judgment because it was brought in the name of the real party in interest, as opposed to an assignee bringing an assigned malpractice claim.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were

no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001)(citing *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480-82 (Ky. 1991)).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.' " *Lewis*, 56 S.W.3d at 436(citing *Steelvest,* 807 S.W.2d at 482). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Id.* at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, *supra*, at 436. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Id*.

The parties agree that the general rule in Kentucky, as well as a majority of jurisdictions, is that an assignment of a claim for legal malpractice is

"void as against public policy." *Coffey v. Jefferson County Board of Education*, 756 S.W.2d. 155 (Ky. App. 1988). As noted by a panel of this Court in *Coffey*:

> [T]hat a chose in action for legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy consideration based thereon.

Id. at 157 (quoting *Goodley v. Wank & Wank, Inc*., 62 Cal.App.3d 389 (1976)). *See also Gurski v. Rosenblum and Filan, LLC, et al*., 885 A.2d 163 (Conn. 2005). The majority of jurisdictions disapprove of an assignment of a legal malpractice claim to an adverse party in the underlying action because it would "necessitate a duplicitous change in the positions taken by the parties in [the] antecedent litigation." *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 633 (Tex. App. 2000).

In the seminal case on this issue, *Goodley v. Wank & Wank, Inc.*, the California Court of Appeals held,

> The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force

> attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

62 Cal.App.3d at 397. *See also Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994) ("to allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest . . . and the malpractice case would cause a reversal of the positions taken by each set of lawyers and clients, which would embarrass and demean the legal profession.")

Kentucky, however, has yet to address the question of whether the assignment of proceeds from a legal malpractice claim is the equivalent of an assignment of the claim itself. In concluding that under the facts of this case it does, the trial court herein relied upon the decision of the Washington appellate court in *Kim v. O'Sullivan*, 137 P.3d 61 (Wash. Ct. App. 2006).

In *Kim*, bar owners Dong Wang Kim and his wife were sued by Thomas Reina for injuries that Reina received during a scuffle that occurred on the business premises. Ultimately, Kim and Reina entered into a settlement agreement. Reina agreed not to enforce a stipulated three-million-dollar judgment against Kim in exchange for Kim's assignment of his malpractice claim against the attorneys Kim's insurers had provided to represent him. However, in response to a

2003 decision from the Washington Supreme Court barring the assignment of legal malpractice claims, *Kommavongsa v. Haskell*, 67 P.3d 1068 (Wash. 2003), Kim and Reina signed an addendum to the settlement agreement providing that Kim would file the malpractice claim in his own name and assign the proceeds of such to Reina.[3] The trial court subsequently granted summary judgment against Kim and dismissed the case. On appeal, the Washington Court of Appeals held:

> Kim contends that his suit is not barred by *Kommavongsa* because it is his own direct action against O'Sullivan rather than an action undertaken by an assignee. *Kommavongsa* did not dismiss the assignor's malpractice lawsuit altogether, instead remanding to the trial court so that the assignor could, if he chose, be substituted as the real party in interest and "so that the legal malpractice claim may proceed in normal course as between the proper parties thereto." *Kommavongsa*, 149 Wash.2d at 291, 67 P.3d 1068. The court did not intend for its ruling to be applied so as [sic] "protect lawyers from the consequences of their own legal malpractice." *Kommavongsa*, 149 Wash.2d at 311, 67 P.3d 1068. The decision permits assignment of judgments or proceeds from legal malpractice suits to the adversary in the underlying case after the litigation has ended:
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> > "Prohibiting the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice claim will not prevent clients from pursuing their own legal malpractice claims to judgment, *and then* assigning their judgments in order to satisfy their own liabilities or submitting to execution upon such judgments. Thus, prohibiting such assignments will not protect lawyers from the consequences of their own legal malpractice."

[3] Kim also assigned the proceeds from a bad faith action he filed against his two insurers.

> *Kommavongsa*, 149 Wash.2d at 311, 67 P.3d 1068 (emphasis added).
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> Kim contends he has satisfied *Kommavongsa* because he has assigned only the proceeds rather than the claim itself. But as the above excerpts illustrate, the client must be the real party in interest when the malpractice suit is litigated. Under the terms of the addendum to the agreement between Reina and Kim, Kim is not the real party in interest; Reina is. Reina and his attorney are in complete control of the malpractice lawsuit and only Reina will benefit from a settlement or judgment in the lawsuit. Consequently, it remains in substance a suit on an assigned claim of legal malpractice brought by the adverse parties in the underlying litigation in which the alleged malpractice occurred, and it implicates the same policy concerns that motivated the *Kommavongsa* court to bar such assignments.
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> The Connecticut Supreme Court, endorsing and following the rationale of *Kommavongsa*, concluded that an assignment of proceeds similar to the one contained in the Reina-Kim Addendum was "made merely to circumvent the public policy barring assignments" because the assignee retained control of the litigation. *Gurski v. Rosenblum & Filan*, *LLC*, 276 Conn. 257, 885 A.2d 163, 178 (2005). *See also Weiss v. Leatherberry*, 863 So.2d 368, 372 (Fla.Dist.Ct.App.2003). We similarly conclude that *Kommavongsa* bars Kim's suit in its present posture because the assignment of proceeds that underpins it is in reality an assignment of the claim.

Kim, 137 P.2d at 64-65.

In *Gurski v. Rosenblum & Filan*, *LLC,* the Connecticut Supreme Court discussed those cases that have distinguished between the assignment of a claim and the assignment of the proceeds:

> We note that only a handful of jurisdictions that bar assignment of a legal malpractice claim to the adverse party in the underlying litigation, either as a per se rule or

> under the particular facts of the case, have considered whether the proceeds of a legal malpractice can be assigned. Of those jurisdictions, two have barred the assignment, one has permitted the assignment and one has cases going both ways. *See Botma v. Huser, supra*, 202 Ariz. at 18, 39 P.3d 538 (barring assignment of proceeds to party in underlying litigation as legal equivalent to impermissible assignment of claim if contract made prior to settlement or judgment); *Weiss v. Leatherberry, supra*, 863 So.2d at 371 (barring assignment to party in underlying litigation as tantamount to impermissible assignment of claim, but leaving open possibility that assignment of proceeds permissible if assignee retains control over litigation); *Weston v. Dowty, supra*, 163 Mich.App. at 241-43, 414 N.W.2d 165 (permitting assignment to party in underlying litigation, noting importance of fact that partial assignment was made and that assignor was real party in interest); *Tate v. Goins, Underkofler, Crawford & Langdon, supra*, 24 S.W.3d at 633 (barring assignment to former adversary on policy grounds when assignor retained 10 percent of any net recovery and assignee given absolute control over litigation);
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> . . . .
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> Finally, we agree with those courts that have identified the "meaningless distinction" between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments. *Town & Country Bank of Springfield v. Country Mutual Ins. Co.*, 121 Ill.App.3d 216, 218, 76 Ill.Dec. 724, 459 N.E.2d 639 (1984). We will not engage in such a nullity.

Gurski, 885 A.2d at 177-178.

After analyzing the foreign case law, the trial court herein concluded:

> One does not have to delve very deeply into the facts of this action to see elements of all these policy concerns strewn throughout the settlement process in the underlying federal litigation. In a carefully drawn

> [settlement agreement], a minimal retention of proceeds to Davis and TDA is incorporated to circumvent the ban of assignments of legal malpractice claims adopted by a majority of jurisdictions. In effect however, there is a complete assignment of control of all aspects of this legal malpractice action with a minimal distribution of proceeds to the Plaintiffs. GRM first recovers its costs and attorney fees and 80% of the net proceeds. If this minimalist retention of proceeds and control of litigation is approved under the subterfuge of this [settlement agreement], the courts might as well do away with the public policy against assignments.
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> Applying existing legal authority, an assignment of the legal malpractice claim has occurred as a matter of law. . . . Based upon the undisputed fact herein that GRM has absolute control of (a) selection of Plaintiff's counsel, (b) the negotiation of Plaintiff's counsel fees, (c) the initiation of this action by Plaintiffs, (d) the costs of litigation, (e) the attorney-client privilege between Plaintiffs and Poppe, and (f) the continuation, settlement and/or dismissal of this action, an assignment of Plaintiff's legal malpractice claim has occurred as a matter of law. The argument there is a distinction herein because Plaintiffs have assigned only a portion of the proceeds and have brought the action as real parties in interest fails under the specific facts herein. Truly, "If it walks like a duck, and quacks like a duck, it's probably a duck."

We, too, are of the opinion that neither a legal malpractice claim nor the proceeds from such claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice. "Whatever the form, whatever the label, whatever the theory, the result is the same." *Botma, supra*, at 542. Indeed, the trial court aptly observed that Davis and GRM essentially joined forces "to pave the way toward this malpractice action," and "instead of standing toe to toe in battle, the parties are now walking hand in hand. . . ."

Next, we must turn to the question of whether our holding that the settlement agreement between Davis and GRM is, in fact, an unlawful assignment of a legal malpractice claim compels a conclusion that Davis's cause of action cannot be maintained apart from an assignment. Davis relies upon case law from numerous jurisdictions finding that the invalidity of an agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by the real party in interest. *Green v. Leasing Associates, Inc.*, 935 So.2d 21 (Fla. Dist. Ct. App. 2006); *Mallios v. Baker*, 11 S.W.3d 157 (Tex. 2000); *Botma v. Huser*, 39 P.3d 538 (Az. Ct. App. 2002). Davis argues that he is the real party in interest and that he suffered ascertainable damages as a result of Scott's negligent representation. As such, he maintains that the trial court erred in dismissing the malpractice action. We disagree.

In both *Kim* and *Kommavongsa*, the Washington courts noted that to the extent that a party might have a valid malpractice claim that he could pursue as the real party in interest in the absence of an invalid assignment, the correct remedy would be a remand, not a dismissal, of the case. *Kim,* 137 P.3d at 65; *Kommavongsa,* 67 P.3d at 1070 ("[W]e remand so that the legal malpractice claim may proceed in the normal course as between the proper parties thereto."). However, as observed by the trial court herein, a "key point of law addressed in *Kim v. O'Sullivan, supra*, is that for a party to be a **real** party in interest to an action, the party must have **real** control of the litigation." (Emphasis in original). Indeed, in *Taylor v. Hurst*, 186 Ky. 71, 216 S.W. 95, 96 (1919), Kentucky's

highest court held that "[t]he test of whether one is the real party in interest . . . is: Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation?" (Internal citation omitted). *See also Gay v. Jackson County Board of Education*, 205 Ky. 277, 265 S.W. 772, 773 (1924) ("[t]he real party in interest is one who has actual and substantial interest in the subject-matter as distinguished from one who has only nominal interest therein.").

What distinguishes this case from those relied upon by Davis is that the settlement agreement herein is the product of the federal litigation and thus, is not within the purview of the trial court's jurisdiction. As the trial court determined:

> Herein, [Davis/TDA] affirmatively assert the Settlement Agreement approved by the federal court in Tennessee is absolutely binding upon this Court. Therefore, no provision therein may be altered by this court to bring it into conformity with Kentucky law. It may not be altered or amended by GRM and Davis/TDA to vary its provisions to conform to Kentucky law. This court is applying the law based upon the express terms of the [settlement agreement].

As a result, the trial court herein is without the power to simply invalidate the settlement agreement and allow Davis to proceed with his malpractice claim against Scott. Under the express terms of the settlement agreement, GRM has absolute control of the litigation and receives the majority of any proceeds derived from the action. Clearly, the plain language of the settlement agreement dictates that Davis cannot be the real party in interest in the malpractice action. *See Kim,*

supra. Accordingly, the trial court was correct in concluding that the action could not survive the invalid assignment. Thus, dismissal of the complaint was proper.

Because we have determined that the trial court was correct in granting summary judgment and dismissing the malpractice action herein, all other issues discussed in the summary judgment order are necessarily rendered moot.

The Judgment and Order of the Hardin Circuit Court granting summary judgment in favor of Appellees, John J. Scott and Whitlow & Scott, and dismissing Appellants, Tim Davis and Tim Davis & Associates, Inc.'s, legal malpractice action is affirmed.

ALL CONCUR.

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