

IN THE SUPREME COURT OF TEXAS

No. 98-0408

JOHN C. MALLIOS D/B/A MALLIOS & ASSOCIATES, MALLIOS & ASSOCIATES, P.C.,
AND JAMES D. BLUME, PETITIONERS

v.

MARK W. BAKER, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on December 8, 1998

JUSTICE GONZALES delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE HANKINSON, and JUSTICE O'NEILL joined.

JUSTICE HECHT filed a concurring opinion, in which JUSTICE OWEN, JUSTICE BAKER, and JUSTICE ABBOTT joined.

JUSTICE ENOCH filed a concurring opinion, in which CHIEF JUSTICE PHILLIPS joined.

In this case we must decide whether the trial court properly issued summary judgment for the defendants, an attorney and a law firm, on the theory that the plaintiff, contrary to Texas public policy, had assigned a portion of his legal malpractice claim to a third party and therefore should be barred from pursuing the claim. The court of appeals reversed the summary judgment and remanded. 971 S.W.2d 581. While we do not reach the question of whether the agreement between the plaintiff and the third party violated public policy, we agree that summary judgment for the defendants is improper on this record. Consequently, we affirm the court of appeals' judgment.

Mark Baker was seriously injured on his motorcycle when he fled from police officers attempting to stop him for driving while intoxicated on the wrong side of the road. Baker sued the owner of Mimi's Pub for selling him alcoholic beverages when he allegedly was so obviously intoxicated that he was a clear danger to himself and others. He hired attorneys John Mallios and James Blume, and their firm, Mallios and Associates, P.C. (collectively, "Mallios") to represent him. On Baker's behalf, Mallios sued Shades Automotive Glass Tinters, Inc., whom Mallios believed to be the owner of Mimi's Pub, and obtained a default judgment for more than \$1 million. Baker then sought out T. J. Herron after reading a local newspaper advertisement by Herron that he would buy judgments in excess of \$25,000. After some investigation, Herron concluded that Shades Automotive did not own Mimi's Pub, and that Mallios had sued the wrong person. Because Baker's personal injury claim against the real owner was by then barred by limitations, Baker decided to sue Mallios for legal malpractice.

Baker and Herron signed an agreement in which Baker assigned an interest in the proceeds from his malpractice claim against Mallios to Herron in exchange for Herron's assistance in pursuing the claim. The agreement provided that Herron would recommend legal counsel and negotiate the terms of employment for Baker subject to his approval, and would pay "all attorney fees, costs and expenses of the investigation, pursuit and prosecution" of those claims. Herron would be reimbursed out of any recovery from Mallios and would also be entitled to fifty percent of any recovery net of all expenses. The parties also agreed that Baker's claims could not be settled without both Baker's and Herron's consent and Baker would "fully cooperate in the investigation, pursuit and prosecution" of the claims against Mallios. The agreement also allowed Herron to terminate it if he determined that prosecuting Baker's claims "would prove not to be economically feasible."

Herron recommended to Baker that he engage attorney Darrell Minter to pursue his malpractice claim. Consistent with Herron's recommendation, Baker hired Minter to represent him on an hourly rate basis. At the same time, Baker, Minter, and Herron all signed an agreement providing that Herron would pay Minter's hourly fees, plus an additional contingent fee of ten percent of Herron's net recovery. Herron also guaranteed payment of all sums due to Minter and agreed to be solely responsible for such payment.

Minter then filed this lawsuit for Baker against Mallios. Mallios moved for summary judgment on the theory that Baker had assigned part of his claim to Herron and therefore Baker's prosecution of the claim contravened public policy. The trial court apparently agreed and granted summary judgment for Mallios. Concluding that the arrangement between Baker and Herron did not violate any public policy rationale expressed by Texas and other courts for precluding some assignments of legal malpractice claims, the court of appeals reversed. 971 S.W.2d 581.

The relief Mallios sought below dictates how we must consider this appeal. Mallios moved for and obtained summary judgment against Baker. Mallios's summary judgment motion could only have been based on one of two theories: either that Baker assigned his claim to Herron and therefore Baker is not the proper party to pursue it, or that Baker, by making an invalid assignment, is precluded from bringing the claim.

Mallios propounded only the second theory — that Baker's legal malpractice claim is barred because he purportedly assigned it to Herron and that such an assignment contravenes public policy. But even assuming Mallios is correct that the agreement between Baker and Herron violates Texas public policy, an issue we do not decide today, the question remains whether that invalidity would entitle Mallios to a take-nothing judgment on Baker's malpractice claim. The situation here is not

like the one in *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996), for example, in which we rendered a take-nothing judgment against the purported assignee of a claim because the assignment was void, leaving her no claim to pursue. *Id.* at 697; *see also Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. — San Antonio 1994, writ ref'd). Here, Baker is the alleged assignor, and assuming there was a partial assignment, Baker still retained a portion of his claim. Mallios does not dispute that Baker had the right to sue Mallios before Baker's agreement with Herron. And even if we were to reach the issue of the agreement's validity and determine that Mallios is correct that it is an invalid assignment, that would not vitiate Baker's right to sue Mallios. Thus, either way, summary judgment was improper and Baker may continue his suit. We therefore express no opinion on the validity of the underlying arrangement between Baker and Herron.

Accordingly, we conclude that the trial court should not have granted summary judgment against Baker, and we affirm the court of appeals' judgment.

Alberto R. Gonzales
Justice

Opinion delivered: January 6, 2000