

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant

v.

DC & Sons, LLC, Counterclaim Defendant,
Of Whom Nexsen Pruet, LLC is the Respondent.

**APPELLANT'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE DOCUMENTS
IN THE DESIGNATION OF MATTER AND REQUIRE APPELLANTS TO FILE AN
AMENDED BRIEF**

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SC Court of Appeals

a) Introduction

In its Motion to Strike Documents in the Designation of Matter and to Require Appellants to File an Amended Brief, Respondent Nexsen Pruet, LLC (“Nexsen Pruet”) makes three arguments: (1) that the pleadings in the underlying malpractice case were not presented to the lower court and should be stricken from Appellants’ Designation of Matter on Appeal (Motion pg 5); (2) that matters relating to the “merits” of the underlying case, *even though they were presented to the lower court* should be stricken from Appellants’ Designation of Matter because this appeal concerns the legality of the assignment of legal malpractice claims and does not relate to the merits of the legal malpractice case (Motion pgs 5-7); and (3) the first two pages of the fact section of Appellants’ brief should be amended to cite “documents presented to the trial court” and a footnote deleted (Motion pg 9).

Nexsen Pruet argues that this appeal concerns only the novel legal issue of whether an assignment of a legal malpractice claim is void as against public policy in the state of South Carolina. This is, in fact, one of the issues on appeal; however it is not the only issue. The lower court did not simply find the assignment void as against public policy and allow the suit to continue in the name of the assignor, instead the lower court, without any discovery being done, found collusion in the underlying settlement and dismissed the legal malpractice claim with prejudice. The heart of this appeal is the lower court’s factual finding of collusion where the underlying settlement was entered into the morning of the trial and approved as reasonable by the Honorable Roger M. Young, Sr. Therefore, the matters before Judge Young the morning of trial, his orders regarding the liability of Nexsen Pruet’s former clients (the Appellants), the settlement documents and transcript where the settlement was put on the record, the evidence of

damages against Appellants that Judge Young had before him, are all relevant and necessary to this appeal. These matters were presented to the lower court, which Nexsen Pruet concedes, as evidence that there was no collusion in the underlying settlement and thus no basis to grant Nexsen Pruet a dismissal of the legal malpractice action *with prejudice*. Nexsen Pruet never objected to Appellants' presentation of these matters to the lower court; in fact, it is Nexsen Pruet who raised the issue of collusion in their pleading and presented this argument to the lower court.

b) The Matters Nexsen Pruet alleges were presented to the lower court but are not relevant to this appeal.

Some brief explanation of how the final order came to be entered is necessary to show exactly what matters were before the lower court as there were numerous submittals and proposed orders provided to the court after the hearing on Nexsen Pruet's motion for summary judgment.

At the hearing on Nexsen Pruet's motion for summary judgment the lower court articulated that, although South Carolina courts have not ruled on the assignability of legal malpractice claims, Judge Nicholson was inclined to adopt the reasoning articulated by those states that hold an assignment of legal malpractice claim is void as against public policy. With regard to the remedy for a voided assignment, Judge Nicholson reasoned:

THE COURT: If the Court just sets -- partially agrees with you on a partial summary judgment against public policy, just strike that assignment, it's gone, and let y'all proceed on the legal malpractice issue, see if there is liability, appeal the whole thing at that time.

MS. GRAY: Here is the problem with that --

THE COURT: Why? How would that be any different than what you want to do? You're telling me that Pavilion could sue Nexsen Pruet straight up. The problem is the assignment. If I just

wanted to make the assignment, that problem is gone. I mean --

MS. GRAY: First of all, that's not necessarily the remedy. There are several other remedies that the Courts have found.

THE COURT: So eliminate that assignment and let y'all proceed with the legal malpractice case, win, lose, or draw?

MS. GRAY: Because you can't just set aside the assignment. It is part of an overall settlement that included confession of judgment.

THE COURT: If I agree with your argument, and I do a partial summary judgment, public policy strike that, they can't proceed on that and make the legal malpractice case proceed, and y'all will have to argue about all the other issues during that trial, or – the prosecution of that case.

MS. GRAY: And the control of the litigation is gone, the attorneys are gone.

THE COURT: If Pavilion had sued Nexsen Pruet you wouldn't be standing here. Correct?

MS. GRAY: Depends on who brought the suit and what the underlying private agreement was.

THE COURT: Pavilion was the party that was wronged, theoretically, by their attorney. If they sued Nexsen Pruet, we wouldn't be standing here --

MS. GRAY: I think that is correct. If they were the real party in interest and had not signed away --

THE COURT: But if I eliminate that assignment and it's gone, they are the real party in interest, and -- what's the name of the other company? DC & Sons and Pavilion would have to work that out down the road, and that would grant you a partial summary judgment.

MS. GRAY: Invalidating all the controls in litigation so the litigation then is entirely within control of Pavilion.

THE COURT: If you want to address that by memo, I'll be happy for you to do that. I'm not trying to spring something on you that you weren't prepared for.

MS. GRAY: Well, I really had not thought it through to that degree, Your Honor, but I think that they would have to satisfy the Court that Pavilion was acting as the real party in interest.

THE COURT: That would give a partial summary judgment. That would eliminate the problem. Yes or no?

MS. GRAY: I think that's correct.

THE COURT: Well, if you want to address that issue, I'll be glad for you --

MS. GRAY: No, but I think the concern we have at this point is are they really the real party in interest?

THE COURT: The only thing -- really, the real party at interest should be DC & Sons on the assignment. Now, Mr. Epting gave a good reason why that wasn't done, and I accept that, but the real party in interest, if I eliminate the assignment because against public interest, as you have alleged, partial summary judgment, y'all trying a legal malpractice case. Yes or no?

MS. GRAY: Yes, sir. Your Honor, I would point out one thing, which is that the South Carolina Supreme Court at 2008 in the case of Linog versus Yampolsky, Justice Toal stated in that opinion that the mere fact a case involves a novel issue does not render summary judgment inappropriate. I just thought I would -- in terms of developing --

THE COURT: I think if you read the cases, it's sort of discretionary with the Court on that.

(Exh. A. Transcript of March 13, 2013 Hearing Before Judge Nicholson, pgs 40-43) (emphasis added). However, despite the Court's reasoning, Nexsen Pruet submitted a proposed order to the Court that held the assignment void as against public policy and dismissed the action with prejudice based on the finding of collusion.¹ Appellants objected to the order and provided one of its own, which reflected the lower court's reasoning at the hearing and objecting to the findings in the order relating to collusion. (See Exh. B letter to Judge Nicholson and Appellants' proposed order). Ultimately, Nexsen Pruet's order was signed, Appellants' motion to reconsider was denied without hearing and this appeal followed.

The lower court, in its order granting Nexsen Pruet summary judgment, articulated nine "circumstances" regarding the underlying settlement that allegedly show the settlement was collusive. Each of these "circumstances" is discussed and refuted in Appellants' brief. All of the

¹ See e.g. Exh. A to Nexsen Pruet's Motion, Order pg 19: "The facts and circumstances under which the assignment was entered created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment. Accordingly, the Court concludes that the appropriate remedy is to dismiss the case with prejudice."

matters that Nexsen Pruet argues are irrelevant to this appeal were specifically argued and/or submitted to the lower court to refute these “circumstances” and provide evidence that there was no collusion in the underlying settlement and that the settlement was approved as reasonable by Judge Young the morning of the underlying trial. Accordingly, not only were these matters before the lower court, they are relevant and necessary for the adjudication of this appeal. Nexsen Pruet seeks to argue collusion in the underlying settlement while barring Appellants from arguing, and this Court from seeing all of the evidence that was presented to the lower court that proves there was no collusion and thus no basis for dismissing the action against Nexsen Pruet with prejudice.

The underlying case out of which the legal malpractice claim arose was between DC & Sons, LLC and Pavilion Development Corporation (the client of Nexsen Pruet and Appellant in this appeal). The trial of the underlying case between DC & Sons and Pavilion was to commence on January 18, 2011. On January 14, 2011, DC & Sons submitted its 47 page pre-trial brief to Judge Young, complete with binders of DC & Sons’ 147 trial exhibits, including all of the documentation for DC & Sons’ actual damages. Before the trial commenced, DC & Sons had asked, and Judge Young allowed, DC & Sons to renew its motion for summary judgment as to Pavilion’s liability for abuse of process and breach of contract. Judge Young allowed rehearing and on January 18, 2011, the morning of trial, and granted DC & Sons motion.

After Judge Young entered the order granting DC & Sons summary judgment, Dan David, (the attorney Pavilion and McNair hired after Nexsen Pruet was relieved as counsel), asked Judge Young if the parties could have some time to discuss settlement. (See Exh. C Transcript of January 18, 2011 Trial, pg 16). A recess was taken and the parties returned, asking

to put the settlement on the record. The agreement reached was that Mr. McNair and Mr. Frazier (the principals of Pavilion) would be released individually and DC & Sons would waive its right to punitive damages against Pavilion if Pavilion would confess judgment to DC & Sons for actual damages and agree to assign certain of the proceeds of any suit against Nexsen Pruet for legal malpractice to DC & Sons (See Exh. C Transcript of January 18, 2011 Trial pg 17). The settlement documents, including the handwritten assignment and confession of judgment were handed up to Judge Young, and the Judge asked counsel for DC & Sons to explain how the settlement figure was reached. (See Exh. C Transcript of January 18, 2011 Trial pgs 17-21).

Judge Young then stated:

THE COURT: All right. Well, I have, needless to say, not as much time and energy invested In this case as y'all. Needless to say, this is something I have lived with the past couple of years as well, so I'm very familiar with the facts and what has given rise to the damages, and I think it is a fair resolution of the dispute between these parties, and so I will approve the settlement and we will enter it on the record accordingly, and I want to thank you very much for working it out.

(See Exh. C Transcript of January 18, 2011 Trial pg 21). DC & Sons' pretrial brief submitted to Judge Young contained the proof of DC & Sons' actual damages. Judge Young entered a form Order concluding the case and attached the handwritten settlement to his Order. (See Exh. D Form 4). The assignment that Nexsen Pruet finds fault with was part of the handwritten settlement document.

Appellants made the argument to the lower court before the order granting Nexsen Pruet summary judgment was entered and again in its motion to reconsider, that the circumstances of the underlying settlement do not support the lower court's finding of collusion. The finding of collusion, or the opportunity for collusion, is the basis for the lower court's remedy of dismissal

of the malpractice complaint with prejudice. Accordingly, all the evidence submitted to the lower court to show that there was not collusion is not only relevant to this appeal it is necessary to fully adjudicate the appeal of the remedy of dismissal with prejudice entered by the lower court. Despite this, Nexsen Pruet argues that Judge Young's orders, the trial brief showing that Judge Young had all of the evidence of damages before him when he approved the settlement as a "fair resolution" are irrelevant to the appeal and should be stricken from the record.

Nexsen Pruet also argues that the discovery Appellant served on Nexsen Pruet with its complaint should not be included in the Record on Appeal as it is also not relevant to the appeal. This matter too was argued before the lower court and is properly included on appeal. Appellant included the discovery to show that, though discovery was served, Nexsen Pruet refused to move forward with discovery. Appellants argued to the lower court (Exh. A Transcript of March 13, 2013 Hearing Before Judge Nicholson pgs 31-32) and argue again on appeal that summary judgment as to whether the assignment of a legal malpractice claim is void as against public policy is not appropriate considering no discovery has been done. This is especially so considering the lower court's dismissal with prejudice is based on the finding that "the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form." *See Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326, 331 (Ct. App. 2003) in which the court stated: "We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case." *Id.* at 318, 331. Accordingly, including Appellants' discovery in the Record on Appeal is appropriate.

c) The matters Nexsen Pruet alleges were not presented to the lower court.

Nexsen Pruet argues that the pleading in the underlying suit, Designation of Matter Nos. 8-10, should be stricken from the record as they were not presented to the lower court. It is true that the pleadings were not physically handed up to the judge at the hearing on Nexsen Pruet's motion; however the pleadings are a matter of public record and the allegations were argued before the lower court (see Exh. A Transcript of March 13, 2013 Hearing Before Judge Nicholson pgs 20-22; see Exh. E sur-reply) and were provided in the fact section of Appellants' brief as background information. Nexsen Pruet never objected to the inclusion of these facts before the lower court and never made a motion to exclude before the lower court.

d) The amendment to Appellants' brief that Nexsen Pruet seeks.

Nexsen Pruet takes no issue with the Issues on Appeal or Argument presented by Appellants, but asks this Court to order the removal of a footnote and an amendment to the first two pages of Appellants' statement of facts. Nexsen Pruet states:

In their brief, Appellants appear to recognize the limited nature of the issues on appeal. The Statement of Issues and Argument sections of the brief focus on whether the assignment of the legal malpractice claim was lawful and whether dismissal with prejudice was the proper remedy. Appellants focus on the merits of the underlying case in the Statement of Facts only

(Motion pg 3).

The first two pages of Appellants statement of facts describe background information regarding the underlying case, which Appellants believe are necessary to this Court's understanding of the issues on appeal, in particular the lower court's error in dismissing the legal malpractice suit with prejudice. These facts show the history of the underlying case, the fact that

the trial judge and the judge who granted summary judgment against Nexsen Pruet's former client and ultimately approved the settlement agreement at issue as a "fair resolution" was assigned to the case by way of the business court and was intimately familiar with the case. These facts arise from the documents described in section "c" and are part of the record before the lower court.

The footnote Nexsen Pruet seeks to remove concerns the evidence before Judge Young at the time the settlement was put on the record. For the reasons argued above, Appellants contend these matters are not only relevant but necessary to refute the lower court's finding of collusion in the settlement.

e) **Conclusion**

As the matters Nexsen Pruet claims should be stricken from the record on appeal and removed from Appellants' brief were presented to the lower court and are necessary to refute the lower court's finding of collusion in the underlying settlement and corresponding dismissal of the legal malpractice claim with prejudice, Nexsen Pruet's motion should be denied in its entirety.

Respectfully Submitted By:

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By  _____

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Attorneys for Appellants

Dated this 21 day of May, 2014
Charleston, South Carolina

EXHIBIT A

1 MR. EPTING: Yes, sir.

2 THE COURT: To buy?

3 MR. EPTING: Right.

4 THE COURT: Okay.

5 MR. EPTING: What happens is there is a
6 backup contract for \$5.5 million, a second contract in
7 addition to the Pavilion contract. So DC & Sons says,
8 Pavilion, if you want to buy it, buy it. You're suing
9 for specific performance. We agree. Pavilion won't buy
10 it, and they withdraw the specific performance claim, but
11 they won't release the lis pendens.

12 And they don't release it, Judge, for two
13 years, two years. So the lis pendens stays on the
14 property, and all the sales are lost, Judge, because 2008
15 occurs and the market tanks. Judge Young issued an order
16 that the filing of this lis pendens and maintaining this
17 lis pendens, trying to get your earnest money of \$50,000
18 back is wrongful, and you can't do that.

19 So that's the posture of the case.

20 THE COURT: Okay.

21 MR. EPTING: Mr. Wallace of Nexsen Pruet
22 decides he has to withdraw because there is a problem.
23 Not only that, Judge, Pavilion does not even know that
24 they've been sued by DC & Sons because New South
25 Construction Supply doesn't tell them. They don't even

1 understand they're being sued until they get another
2 lawyer.

3 So with that, Judge, the case comes to trial.
4 Judge Young says, I want to advise you that I'm probably
5 going to grant judgment on everything but damages, and he
6 asked that we present, on the morning of trial, an order.

7 We do that. The jury is downstairs. Our two
8 colleagues are with the jury, and Judge Young basically
9 turns to Dan David, and says, Dan, I see this as nothing
10 more than a damage trial. There's no question this lis
11 pendens was wrongful. I've already ruled that. It blew
12 the sale. The sale was for \$5.5 million. You guys need
13 to talk.

14 And so in that room right there, we
15 adjourned, and Dan David, Judge, essentially recognizes
16 he's representing an individual, and he says, Well, I can
17 get my individual out, get the punitive damages off of my
18 client, and Pavilion winds up with a \$4.5 million
19 judgment against them. It's the best that's going to
20 happen, but it's going to get worse. Those are the facts
21 that led us to here.

22 Now, here's what Judge Breeden said, Judge:
23 The defendants, Nexsen Pruet, argue alternatively that
24 the assignment of proceeds from the present case is
25 tantamount to the assignment of the case itself, such

1 THE COURT: Rather than DC.

2 MR. EPTING: Right. Yes, sir.

3 THE COURT: That's one way of coming in the
4 back door, and I appreciate your ingenuity on that.

5 MR. EPTING: Well, Judge, it's the way
6 assignment is handled. For example, in insurance
7 policies, there is oftentimes a prohibition against the
8 assignment of a policy. There is never a prohibition
9 against the assignment of the proceeds of the policy, and
10 that's recognized in virtually every state in the union,
11 and so it's not a question of -- I don't think it's a
12 question of ingenuity.

13 I think you understand that the suit needs to
14 be brought in the name of the attorney. It is more
15 typical to assign proceeds, and so you do what you do in
16 virtually any other context, insurance, bad faith, you
17 name it.

18 But back to my point, Judge. The remedy
19 here -- because what has happened, Judge, is we served
20 discovery with our complaint, deposition notices and the
21 like. The first thing that happened is there was a
22 motion filed to disqualify us. There was no record.

23 THE COURT: Disqualify --

24 MR. EPTING: George and myself, as attorneys.

25 THE COURT: Because y'all had represented one

1 party and now you represent the other party?

2 MR. EPTING: Right. So there was a motion to
3 disqualify. That went on for a year, year and a half,
4 and Nexsen Pruet refused to respond to discovery other
5 than giving us a file, but we noticed depositions, et
6 cetera, et cetera.

7 Then there is this motion. So none of the
8 discovery on the day we filed this lawsuit, January 18th,
9 2011, has ever been responded to, and what's going on,
10 Judge, is there has been an effort to let our -- to
11 provide them an argument that the underlying statute of
12 limitations has run so that this wrong done to Pavilion,
13 they get viewed to say this action can't be brought, so
14 it is dismissed and has to be refiled.

15 And then they come in and they say, Well, the
16 statute of limitations is wrong.

17 So what the Courts have done, Judge, in these
18 cases, is if it would have been brought in the name of DC
19 & Sons -- and I'm reading from the Washington case that
20 they relied on. It's spelled K-o-m-m-a-v-o-n-g-s-a,
21 Kommavongsa. The trial Court erred in denying the
22 request that Mr. Soratsavong's substitution relate back
23 to the filing of a legal malpractice claim.

24 We reverse and remand so that the legal
25 malpractice claim may proceed in the normal course as

1 the issue --

2 THE COURT: I'm sorry, what?

3 MR. EPTING: I don't think that's so much the
4 issue.

5 THE COURT: What do you think is the issue?

6 MR. EPTING: Well, first of all, there are a
7 lot of states, Judge, who find contrary, nine of them,
8 and we're going to talk about some of that and the
9 reasons.

10 THE COURT: Okay.

11 MR. EPTING: Number two: One thing you're
12 not going to find, Judge, in that 23 page brief and
13 recitation of the law, you're not going to find a case
14 decided in South Carolina by Judge Breeden on this exact
15 issue against Nexsen Pruet in which he holds the
16 assignment of proceeds is in all respects valid.

17 That's not in the brief, but before I get
18 there, a little background, Judge. George and I
19 represented DC & Sons. DC & Sons owned a piece of
20 property over on Shem Creek. Nexsen Pruet filed a lis
21 pendens in the name of Pavilion against that property
22 saying that they were seeking specific performance. The
23 litigation goes on for years.

24 THE COURT: It's a contract between DC and
25 Pavilion?

1 aside and let the medical malpractice proceed with the
2 right party in interest and he is the plaintiff in this
3 case? They just set that aside?

4 MS. GRAY: Well, because I think the issue --

5 THE COURT: You understand what I'm saying?

6 MS. GRAY: No, sir, if you'll run that by me
7 one more time.

8 THE COURT: If the Court just sets --
9 partially agrees with you on a partial summary judgment
10 against public policy, just strike that assignment, it's
11 gone, and let y'all proceed on the legal malpractice
12 issue, see if there is liability, appeal the whole thing
13 at that time.

14 MS. GRAY: Here is the problem with that --

15 THE COURT: Why? How would that be any
16 different than what you want to do? You're telling me
17 that Pavilion could sue Nexsen Pruet straight up. The
18 problem is the assignment. If I just wanted to make the
19 assignment, that problem is gone. I mean --

20 MS. GRAY: First of all, that's not
21 necessarily the remedy. There are several other remedies
22 that the Courts have found.

23 THE COURT: So eliminate that assignment and
24 let y'all proceed with the legal malpractice case, win,
25 lose, or draw?

1 MS. GRAY: Because you can't just set aside
2 the assignment. It is part of an overall settlement that
3 included confession of judgment.

4 THE COURT: If I agree with your argument,
5 and I do a partial summary judgment, public policy strikes
6 that, they can't proceed on that and make the legal
7 malpractice case proceed, and y'all will have to argue
8 about all the other issues during that trial, or -- the
9 prosecution of that case.

10 MS. GRAY: And the control of the litigation
11 is gone, the attorneys are gone.

12 THE COURT: If Pavilion had sued Nexsen Pruet
13 you wouldn't be standing here. Correct?

14 MS. GRAY: Depends on who brought the suit
15 and what the underlying private agreement was.

16 THE COURT: Pavilion was the party that was
17 wronged, theoretically, by their attorney. If they sued
18 Nexsen Pruet, we wouldn't be standing here --

19 MS. GRAY: I think that is correct. If they
20 were the real party in interest and had not signed
21 away --

22 THE COURT: But if I eliminate that
23 assignment and it's gone, they are the real party in
24 interest, and -- what's the name of the other company?
25 DC & Sons and Pavilion would have to work that out down

1 the road, and that would grant you a partial summary
2 judgment.

3 MS. GRAY: Invalidating all the controls in
4 litigation so the litigation then is entirely within
5 control of Pavilion.

6 THE COURT: If you want to address that by
7 memo, I'll be happy for you to do that. I'm not trying
8 to spring something on you that you weren't prepared for.

9 MS. GRAY: Well, I really had not thought it
10 through to that degree, Your Honor, but I think that they
11 would have to satisfy the Court that Pavilion was acting
12 as the real party in interest.

13 THE COURT: That would give a partial summary
14 judgment. That would eliminate the problem. Yes or no?

15 MS. GRAY: I think that's correct.

16 THE COURT: Well, if you want to address that
17 issue, I'll be glad for you --

18 MS. GRAY: No, but I think the concern we
19 have at this point is are they really the real party in
20 interest?

21 THE COURT: The only thing -- really, the
22 real party at interest should be DC & Sons on the
23 assignment. Now, Mr. Epting gave a good reason why that
24 wasn't done, and I accept that, but the real party in
25 interest, if I eliminate the assignment because against

1 public interest, as you have alleged, partial summary
2 judgment, y'all trying a legal malpractice case. Yes or
3 no?

4 MS. GRAY: Yes, sir. Your Honor, I would
5 point out one thing, which is that the South Carolina
6 Supreme Court at 2008 in the case of Linog versus
7 Yampolsky, Justice Toal stated in that opinion that the
8 mere fact a case involves a novel issue does not render
9 summary judgment inappropriate. I just thought I
10 would -- in terms of developing --

11 THE COURT: I think if you read the cases,
12 it's sort of discretionary with the Court on that.

13 MS. GRAY: But in this situation --

14 THE COURT: Do I think it needs to be more
15 fully developed and not granted on the novel issues.

16 MS. GRAY: Yes, sir.

17 THE COURT: And some are granted and some
18 aren't.

19 MS. GRAY: I understand that, but in this
20 situation, there is really not an ambiguity in the facts
21 that would not render a conclusion by this Court.

22 THE COURT: You want to address the issue of
23 the partial summary judgment more --

24 MS. GRAY: May I brief that?

25 THE COURT: -- after you think about it?

EXHIBIT B

ANDREW K. EPTING, JR., L.L.C.

ATTORNEYS AT LAW

July 3, 2013

The Honorable J.C. Nicholson, Jr.
Circuit Judge
Charleston County Courthouse
100 Broad Street
Charleston, S.C. 29401

Re: Pavilion Development & Larry McNair v. Nexsen Pruet, LLC, et al.
Case No.: 2011-CP-10-5774

Dear Judge Nicholson,

You asked that the Defendant prepare an order on the basis of the “public policy issue” raised by the Defendant. You stated at the hearing that this is what you were going to do. The hearing then turned to the remedy. Rather than describe what occurred, I include the Court’s colloquy with Defendant’s Counsel:

THE COURT: If the Court just sets -- partially agrees with you on a partial summary judgment against public policy, just strike that assignment, it's gone, and let y'all proceed on the legal malpractice issue, see if there is liability, appeal the whole thing at that time.

MS. GRAY: Here is the problem with that --

THE COURT: Why? How would that be any different than what you want to do? You're telling me that Pavilion could sue Nexsen Pruet straight up. The problem is the assignment. If I just wanted to make the assignment, that problem is gone. I mean --

MS. GRAY: First of all, that's not necessarily the remedy. There are several other remedies that the Courts have found.

THE COURT: So eliminate that assignment and let y'all proceed with the legal malpractice case, win, lose, or draw?

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MS. GRAY: And the control of the litigation is gone, the attorneys are gone.

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THE COURT: Pavilion was the party that was wronged, theoretically, by their attorney. If they sued Nexsen Pruet, we wouldn't be standing here --

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THE COURT: But if I eliminate that assignment and it's gone, they are the real party in interest, and -- what's the name of the other company? DC & Sons and Pavilion would have to work that out down the road, and that would grant you a partial summary judgment.

MS. GRAY: Invalidating all the controls in litigation so the litigation then is entirely within control of Pavilion.

THE COURT: If you want to address that by memo, I'll be happy for you to do that. I'm not trying to spring something on you that you weren't prepared for.

MS. GRAY: Well, I really had not thought it through to that degree, Your Honor, but I think that they would have to satisfy the Court that Pavilion was acting as the real party in interest.

THE COURT: That would give a partial summary judgment. That would eliminate the problem. Yes or no?

MS. GRAY: I think that's correct.

THE COURT: Well, if you want to address that issue, I'll be glad for you --

MS. GRAY: No, but I think the concern we have at this point is are they really the real party in interest?

THE COURT: The only thing -- really, the real party at interest should be DC & Sons on the assignment. Now, Mr. Epting gave a good reason why that wasn't done, and I accept that, but the real party in interest, if I eliminate the assignment because against public interest, as you have alleged, partial summary judgment, y'all trying a legal malpractice case. Yes or no?

MS. GRAY: Yes, sir. Your Honor, I would point out one thing, which is that the South Carolina Supreme Court at 2008 in the case of Linog versus Yampolsky, Justice Toal stated in that opinion that the mere fact a case involves a novel issue does not render summary judgment inappropriate. I just thought I would -- in terms of developing --

THE COURT: I think if you read the cases, it's sort of discretionary with the Court on that.

The issue arose as cases cited by the Defendant for the proposition that such assignments violated public policy struck the assignment and allowed the case to proceed. (I attach the case the Defendant relied upon in their brief).

I attach an order that conforms first to your request in your email and secondly adopts your views in the colloquy above. The order also includes your expressed deference to the principal that novel issues should not be decided on summary judgment.

As to the proposed order provided to you by the Defendant, I offer the following comments:

1. At page 22 of the proposed order, the Defendant states at paragraphs 3 and 4 that counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim. However, not only was the settlement and assignment given to Judge Young to review and approve, Judge Young attached the assignment to his Form 4 Order.
2. The proposed order submitted by Nexsen Pruet goes on to find that Plaintiffs and their counsel have **“brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship.”** (See proposed order pgs 13-14)(emphasis added). Pretty strong stuff given Judge Young’s approval and that no discovery has been done.
3. The proposed order submitted by Nexsen Pruet has you finding there was collusion in the underlying settlement such that it warrants a dismissal with prejudice of the legal malpractice claims. (See proposed order pgs 7, 18, 19, 26). Forgetting for the moment that Judge Young found the settlement reasonable¹ and that the Defendant has refused to allow depositions or engage in discovery, there are no facts before you that would allow you to reach this conclusion.

We ask that you strike the assignment, but otherwise allow the case to proceed as even a dismissal without prejudice will result in the Defendant claiming the statute of limitations has run even though the new suit without the assignment would be filed in the names of the now Plaintiffs.

Thank you for your consideration.

With kindest regards,

ANDREW K. EPTING, JR., LLC.



Andrew K. Epting, Jr.

AKE/agg

Enclosures

Cc: Elizabeth Gray, Esquire
Tina Cundari, Esquire
George Kefalos, Esquire

¹ See Transcript of January 18, 2011 Hearing Before Judge Young, pg 21: “THE COURT: All right. Well, I have, needless to say, not as much time and energy invested In this case as y’all. Needless to say, this is something I have lived with the past couple of years as well, so I’m very familiar with the facts and what has given rise to the damages, and I think it is a fair resolution of the dispute between these parties, and so I will approve the settlement and we will enter it on the record accordingly, and I want to thank you very much for working it out.”

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)

CASE NO. 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,
Plaintiffs,
vs.
NEXSEN PRUET, LLC,
Defendant,
vs.
DC & SONS, LLC,
Counterclaim Defendant.

**ORDER GRANTING IN PART AND
DENYING IN PART NEXSEN PRUET'S
MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendant Nexsen Pruet LLC's ("Nexsen Pruet's") motion for summary judgment. The motion was heard on March 13, 2013. Nexsen Pruet seeks an order granting summary judgment in its favor as to all causes of action in the complaint and counterclaim on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Nexsen Pruet further asks this Court to find that there was collusion between the parties in the settlement of the underlying case such that the legal malpractice claims brought by Nexsen Pruet's former clients should be dismissed with prejudice.

Plaintiffs first advance that legal malpractice claims can be assigned. Plaintiffs further argue they have not assigned their claims against Nexsen Pruet to DC & Sons. Rather, as part of the agreement to avoid the exposure of a trial in the underlying case of actual and punitive damages, Plaintiffs agreed to assign a portion of the proceeds of this litigation to DC & Sons. Finally, Plaintiffs argue that if this Court considers the assignment to be one of claims rather than simply proceeds and if the Court is persuaded by the public policy argument raised by Nexsen Pruet, the assignment should be voided and the malpractice case allowed to proceed.

After considering the arguments presented by counsel and the written memoranda filed, I find as follows:

1. The Law on Assignment of Legal Malpractice Claims

South Carolina appellate courts have not addressed the question of whether a legal malpractice claim is assignable and there is a split in the jurisdictions that have addressed this issue.

One view holds that legal malpractice claims are not assignable because they are void as against public policy. Many states have adopted this view: California, *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); Colorado, *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); Florida, *Law Office of David J Stern v. Sec. Nat'l Servicing Corp.*, 969 So.2d 962 (Fla. 2007); Indiana, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); Kansas, *Bank IV Wichita, Nat'l Ass'n v. Am. Mullins*; Kentucky, *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010); Michigan, *Joos v. Drillock*, 338 N.W.2d 736 (Mich. Ct. App. 1983); Minnesota, *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993); Nevada, *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982); New Jersey, *Aleman Servs. Corp. v. Samuel H Bullock, p.e.*, 925 F. Supp. 252 (D.N.J. 1996); Tennessee, *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996); West Virginia, *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003); North Carolina, *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, _ S.E.2d _, 2013 WL 1876777 (N.C. Ct. App. May 7, 2013).

The public policy for prohibiting such assignments is often stated as follows: "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003). Assignments of legal

malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of the relationship between an attorney and a client and the need to preserve the sanctity of that relationship" counsel against permitting such assignments. *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005).

Other jurisdictions, including Pennsylvania, New York, Massachusetts, Maine, Oregon, and the District of Columbia, allow the assignment of legal malpractice claims. See *Richter v. Analex Corp.*, 940 F.Supp. 353 (D.D.C.1996); *Thurston v. Continental Cas. Co.*, 567 A.2d 922 (Me.1989); *Vitale v. City of New York*, 183 A.D.2d 502, 583 N.Y.S.2d 445 (1992); *Collins v. Fitzwater*, 277 Or. 401, 560 P.2d 1074 (1977), rev'd on other grounds, *Lancaster v. Royal Ins. Co.*, 302 Or. 62, 726 P.2d 371 (1986); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 539 A.2d 357 (1987); *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 209, 707 N.E.2d 332, 336 (Mass.,1999). These jurisdictions have rejected the public policy concerns stated above, reasoning:

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, 526.¹ The Supreme Court of Pennsylvania stated:

We see no threat, if this assignment is upheld, to the duty of loyalty or the duty of confidentiality owed by a lawyer to his or her client. It is farfetched to imagine that a lawyer will be discouraged from zealously representing a client out of fear that the client may later offer a

¹ The Supreme Court of Massachusetts has held that the duty of confidentiality is also not threatened by the assignment of a legal malpractice claim as a client assigns his malpractice claim with the full awareness that he is waiving his attorney-client privilege, which is a privilege intended to protect **the client**. *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 210. (emphasis added).

malpractice action against the lawyer as a part of the resolution of another case.

Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526.

The Court concludes that the assignment in this case violates public policy, and to this extent, I accept Nexsen Pruet's position.

2. The Remedy

Nexsen Pruet asks this Court to hold that the assignment by Pavilion and McNair of their malpractice claim operates as a waiver of the right to bring the claim, and thus Pavilion and McNair do not have the right to sue their former attorneys for malpractice. However, even those jurisdictions that hold the assignment of a legal malpractice claim is void as a matter of law do not disallow the claim, rather the assignment is voided and the action continues in the name of the client.² Nexsen Pruet cites case law from Texas in support of its motion. Texas Courts hold that a client's right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim. *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000).

The Court in *Tate* held:

Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO. Tate emphasizes he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim.

In this respect, Tate is correct. In *Mallios*, the Texas Supreme Court held that when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment. *Mallios*, 11 S.W.3d at 159. While expressing no opinion on the validity of the underlying "arrangement" between the plaintiff and a third party, **the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm.**

² Here the action is already in the name of the clients.

Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 634 (2000)(emphasis added). Most jurisdictions, including those cited by Nexsen Pruet, simply void the assignment and allow the legal malpractice lawsuit to “proceed in the normal course, as between the proper parties thereto.” See *Kommavongsa v. Haskell*, 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003).

Nexsen Pruet argues that the proper remedy is dismissal with prejudice of the malpractice suit because “the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form.” I find the reasoning of those courts that void the assignment and allow the legal malpractice claim to continue. As to whether a client’s right to bring a cause of action for legal malpractice is vitiated by an invalid assignment of the claim, I find the invalidity of the assignment does not undermine the validity of the malpractice claim. My holding comports with the the general law of assignment³ and the same logic has been applied in the context of the assignment of legal malpractice claims. See *Tate* and *Kommavongsa*, supra. Someone should have the right to bring the claim as the law abhors a wrong without a remedy. See *State ex rel. Daniel v. Strong*, 185 S. C. 27, 43, 192 S. E. 671, 678 (1937).

This is especially true where the issue is novel and there is no record before me on collusion as no discovery has been done. See *Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326, 331 (Ct. App. 2003) in which the court stated: “We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel

³ See 6 AM. JUR. 2D Assignments § 155 (2004). See also *Postal Instant Press v. Jackson*, 658 F. Supp. 739, 741 (D. Colo. 1987) (“Once an assignment is made, all interests and rights of the assignor are transferred to the assignee. However, if the assignment is invalid or incomplete, the assignor may maintain a suit in his own name.”)

issue involved in this case.” Id. at 318, 331. The question of collusion would likely be a question of fact for the jury.⁴

Accordingly, I deny Nexsen Pruet’s motion for summary judgment to the extent that it seeks a dismissal of the malpractice suit. The assignment by Plaintiffs to DC & Sons is void and the malpractice lawsuit shall proceed as captioned.

IT IS SO ORDERED.

The Honorable J.C. Nicholson, Jr.

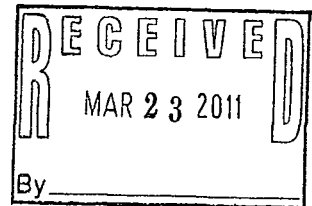
On this ____ day of July 2013
Charleston, SC

⁴ Though, see the Transcript of January 18, 2011 Hearing Before Judge Young, pg 21: “THE COURT: All right. Well, I have, needless to say, not as much time and energy invested in this case as y’all. Needless to say, this is something I have lived with the past couple of years as well, so I’m very familiar with the facts and what has given rise to the damages, and I think it is a fair resolution of the dispute between these parties, and so I will approve the settlement and we will enter it on the record accordingly, and I want to thank you very much for working it out.”

EXHIBIT C

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

DC & SONS, LLC,)	TRANSCRIPT OF RECORD
)	
Plaintiffs,)	January 18, 2010
)	
-vs-)	Charleston, South Carolina
)	
RICHARD H. COEN, LOWCOUNTRY)	08-CP-10-4675
CAPITAL, OCEAN I REALTY,)	
JAMES R. MAULL, JR., LARRY)	
McNAIR, COENCO, LLC &)	
PAVILION DEVELOPMENT)	
)	
Defendants.)	



* * * * *)	
PAVILION DEVELOPMENT)	
CORPORATION,)	
)	
Plaintiff,)	07-CP-10-1475
)	
-vs-)	
)	
DC & SONS, LLC,)	
)	
Defendant.)	

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

for the jury to decide, and so ultimately, I find that DC & Sons would be entitled then to a summary judgment, and basically all we would do at this point is instruct the jury that liability is not an issue for them to consider but only the issue of damages, including punitive damages, would be for their consideration.

So I find that proper to grant the summary judgment to DC & Sons, and we'll enter an order to that effect. Okay?

MR. EPTING: Thank you, sir.

MR. DAVID: You can give us just a few minutes to see if we can reach some conclusion on this?

THE COURT: Absolutely.

(Recess taken.)

THE COURT: Okay. Y'all asked for a few minutes to work it out, and maybe you've worked something out, I understand. I have, in the meantime, signed the proposed order granting summary judgment that you asked me to take a look at.

MR. EPTING: Judge, in light of the Court's comments, comments then and before concerning the summary judgment, we have reached an agreement.

THE COURT: All right.

MR. EPTING: And, effectively, if it's all right with Your Honor, the effective deal is Mr. McNair

is relieved from liability. That is what he insisted on, and the judgment is entered for the amount of the actual damages claimed by DC & Sons and that we waive any claim to punitive damages, and the claims that Mr. McNair or Pavilion have or are assigned or the proceeds are assigned at DC & Sons election to DC & Sons, and so I would like to proffer, Judge, and there is a confession of judgment against Pavilion for the action of damages.

THE COURT: What amount is that?

MR. EPTING: \$4,580,015.93.

THE COURT: Okay.

MR. EPTING: And, Judge, I only have one copy, but I would like to enter this settlement into the court record because it has a confession, and I would ask, given your familiarity with the case, that the Court, for the parties' benefit here, find that it is a fair settlement for all the parties in light of the circumstances and facts as the Court has come to understand it, so with that, I would like to offer this up, Your Honor.

THE COURT: What is the breakdown on that number? How did you come up with 4,580,00?

MR. EPTING: I think I can do it from memory, Judge. The other purchase was at \$5 million and the debt on the property was 2,142,000; therefore, the sale alone

would have realized a profit of \$2,852,000.

At that time, Judge, rather than having a sale and paying off the mortgage that existed on the property, my client has continued to bear the interest on that property right up through today's date, and that interest is \$675 plus thousand dollars, and as I'm speaking now, Judge, I realize all this is in the booklet that I gave you, but I'm happy to go through this.

When the lis pendens was not lifted -- and there really is, Judge, a terrifying piece in this, and it has a lot to do with you and Mr. Dan David. My client, because this lis pendens was ultimately lifted, and Mr. David, unlike Nexsen Pruet, refused to appeal the order, my client was able to close the entire transaction the cost of which was \$43,000, but had they not been able to close that transaction, Judge, they would have lost this property, they would have lost Red's, and they would have lost the entire Wings Over America and the franchise.

And so thank God we finally got the lis pendens released, and thank God Mr. David came to a different conclusion about appealing something that was just not in doubt, because this would have been a \$50 million lawsuit had we gone down that road.

The other component, Judge, of damages of the

profit that we realized on the sale that did not occur, it would be a liquidated sum of 2,852 and so to that we added interest at 8 and three-quarters, and those numbers are added together. It comes to \$4,580,015.93.

THE COURT: All right.

MR. EPTING: Can I tender this to the Court?

THE COURT: Does that represent your understanding of what the settlement is?

MR. DAVID: It does, Your Honor, and what can I say? My clients personally, Mr. McNair who was sued, and also the president of the corporation, the two of them are released from the personal liability, and under the circumstances, especially with your ruling this morning, I feel I have no choice but to agree to this to remove my clients from any possible damages that they may suffer.

THE COURT: Mr. McNair, you have already entered into this settlement?

MR. McNAIR: Yes, sir.

MR. DAVID: He has spoken with the president of the company, Pavilion Development, and has informed them of everything that was going on that they consented to.

THE COURT: All right.

MR. DAVID: I have one little thing I want to

take up. Can you just give me one second, Your Honor?

THE COURT: Sure.

MR. EPTING: Judge, it could be after this is over. Dan has a suggested word to change in the order that doesn't change any substance, but maybe we can simply --

THE COURT: This is which order?

MR. EPTING: The order that you signed, but, I mean, it's a couple words here or there which I don't have any objection.

THE COURT: Well, I can just scratch through the old one.

MR. EPTING: Fine.

THE COURT: All right. Well, then, you want a form four then entered saying this is assigned or that it settled, judgment is entered against Pavilion in the amount of \$4,580,015.93 in actual damages only, and how do you want the assignment reflected?

MR. EPTING: The assignment is actually, Judge, reflected in the agreement that is handwritten and provided to the Court, so I don't think there needs to be something in form four.

THE COURT: All right. Well, do you want us to just put on a form four then that the parties have advised the Court that the case was settled and

settlement was put on the record in lieu of the money damages being put on the form four?

MR. EPTING: That would work, Judge.

THE COURT: All right. Well, I have, needless to say, not as much time and energy invested in this case as y'all. Needless to say, this is something I have lived with the past couple of years as well, so I'm very familiar with the facts and what has given rise to the damages, and I think it is a fair resolution of the dispute between these parties, and so I will approve the settlement and we will enter it on the record accordingly, and I want to thank you very much for working it out.

MR. DAVID: It's not been easy, Judge.

- - -

(Whereupon, the proceedings were concluded.)

- - -

EXHIBIT D

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

DC & Sons, LLC

v

Pavilion Development Corp

CASE NO. 2008-CP-10-4675

FILED
2011 JAN 19 PM 11:20
JULIE J. ARNOLD
CLERK OF COURT

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

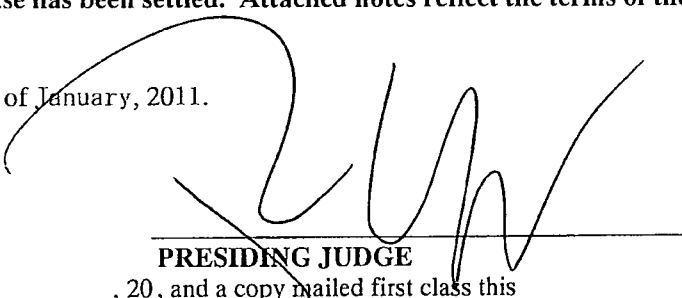
- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit) Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other

- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order. (Formal order to follow)
 Statement of Judgment by the Court:

Court has been advised by the parties that the case has been settled. Attached notes reflect the terms of the settlement.

Dated at Charleston, South Carolina, this 18th day of January, 2011.



PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

①

This agreement is entered into by & between
Parlson Dev. Corp, Larry M^E Nair and DC & Sons:

Recital:

1 The Court has ruled that Parlson will be
trying the case on damages alone leaving
M^E Nair & Parlson exposed to damages, actual &
punitive.

2 M^E Nair represents in this recital that he
relied on advice of counsel & did not know
& was not told that a lis pendens could not be
filed or continued where:

a. Parlson ~~was~~ was in breach;

b the inability of DC & Sons was
related to ~~third~~ actions of a
third party;

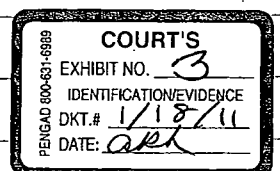
c. Parlson was no longer willing to
close on the terms of the contract

d. Parlson failed to ~~sewer~~ needed
parties.

e. a stipulation was entered
stating Can had no claims and became an

f. Parlson sought a lower price
or a return of the earnest money
before it would remove the lis pendens

DK



Agreement

1 The Recitals are part of this agreement
2 In light of the Courts ruling Paulson + M^o Nair have proposed + DC + Sons has agreed as follows:

a. DC + Sons releases M^o Nair ^{the Lowell Frange} from all claims the subject of this ~~act~~ ^{act} + waives trial against Paulson ~~on~~ on punitive damages. In return Paulson confesses judgment in the amount of DC + Sons claimed actual damages in the amt + form shown on Ech A. M^o Nair + Paulson release DC + Sons from all claims ^{which are} the subject of this acton.

b. Paulson + M^o Nair assign to DC + Sons all proceeds from a suit or suits to be filed by Paulson + M^o Nair against its counsel Neyer Punt + all other responsible parties. Further, Paulson + M^o Nair place full control of the said litigation in the hands of DC + Sons, this to include the handling of the

JK

AT DC + Sons election Paulson + M^o Nair assign all claims Bk of by / control to include Ad. liability / negligent / Professional negligence etc.

lit. gta, trial, appeal, settlements
the waiver of the atty client
& work product privilege with the
Nexen Trust firm. Further, P+M
agree to cooperate in the prosecution
of this action & to pursue the litigation
as if they retained the right to
all proceeds. The cost of the litigation
~~will be~~ ~~split~~ will be borne by
D C & Sons alone. ~~But~~ P+M
acknowledges suit will be brought
in their names

c. P+M direct that the earnest money
& interest shall be turned over
to D C & Sons & their counsel

d. D C & Sons agree that in the
event of a settlement or judgment
that the first \$25,000 will be split
equally between D C & Sons &
P+M so as to defray their

I witnessed the signature
of all three parties.

defense cost & compensation for loss
of business & emotional distress

John W. Akerman 1/18/2011
JOHN W. AKERMAN
NOTARY EXPIRES 11/7/2016

All further funds shall be
for the benefit of D C & Sons.

The parties agree to this 1/18/2011

Daniel Cleveland V.P.
D C & Sons Parkton

Harry M. Mann

EXHIBIT E

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)

CASE NO. 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

vs.

NEXSEN PRUET, LLC,

Defendant,

vs.

DC & SONS, LLC,

Counterclaim Defendant.

**SUR-REPLY TO DEFENDANT
NEXSEN PRUET'S MEMORANDUM IN
SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT**

Plaintiffs Pavilion Development Corp. ("Pavilion") and Larry McNair hereby submit the following in opposition to the motion for summary judgment filed by Defendant Nexsen Pruet, LLC ("Nexsen Pruet"):

INTRODUCTION

Nexsen Pruet seeks summary judgment, not on the merits of the malpractice claim, but by misapplying a public policy concern in order to claim the statute of limitations has run, and this is a case in which the Honorable Roger M. Young has already found malpractice (see *infra*).

Nexsen Pruet's motion should be denied as this is a novel issue in South Carolina, no discovery has been done because Nexsen Pruet has refused to comply with discovery, and the assignment is one of proceeds and not claims. Finally, even if the assignment is invalid, the remedy is to simply set aside the assignment and allow Nexsen Pruet's former clients, Pavilion and McNair, to continue the existing lawsuit.

BRIEF BACKGROUND ON THE UNDERLYING LITIGATION

Nexsen Pruet has provided this Court with its version of what happened in the underlying litigation as well as with the settlement between DC & Sons, LLC ("DC & Sons") and Plaintiffs.

Plaintiffs take this opportunity to share the facts as they actually unfolded in order to dispel any concern this Court may have that the settlement agreement was collusive as Nexsen Pruet claims.

On August 11, 2006, Pavilion entered into a contract to purchase real property on Shem Creek owned by DC & Sons. Pavilion deposited \$50,000 with its escrow agent as an earnest money deposit. When closing did not occur, on April 9, 2007, Pavilion sued DC & Sons for specific performance and filed its *lis pendens*. Pavilion ultimately determined it did not want specific performance and Nexsen Pruet filed an amended pleading seeking damages for breach of contract and seeking to impose an equitable lien on the real property for the return of the earnest money. After being repeatedly asked by DC & Sons to remove the *lis pendens* to allow a new prospective buyer to close on the property, Nexsen refused to remove it. Instead, Nexsen Pruet kept the *lis pendens* in place in an effort to negotiate a lower purchase price of the property and to force DC & Sons to return the \$50,000 escrow deposit to Pavilion. As a result of Nexsen Pruet's refusal to remove the *lis pendens* from DC & Sons property, DC & Sons lost its second buyer and a \$5,000,000 sale.

The Honorable Roger M. Young had sole jurisdiction over the case as it was referred to the Business Court by order of Justice Toal, and in Judge Young's own words, he "lived with the case for a couple of years." Judge Young entered two orders in the case which Plaintiff allege conclusively establish the legal malpractice of Nexsen Pruet. The first Order was entered by the Judge Young on March 23, 2009 (attached here as "Exhibit A"), and directed the removal of the *lis pendens* from the property. Judge Young held:

It is well settled that under South Carolina law, a breach of contract cause of action does not "affect title to real property", and therefore will not support the filing of a *lis pendens*.
(March 23, 2009 Order p 2).

Pavilion's claim for a release of its earnest money does not affect title to real property.
(March 23, 2009 Order p 3).

The second Order of Judge Young was entered the morning of trial, January 18, 2011. Pre-trial briefs and trial exhibits had been submitted to the Judge by both parties. DC & Sons asked, and Judge Young allowed, DC & Sons to renew its motion for summary judgment as to Pavilion and McNair's liability for abuse of process and breach of contract before the trial began. Judge Young heard the arguments of counsel and stated he was granting DC & Sons motion. (See Exhibit B pp 12-16 for Judge Young's reasoning for granting DC & Sons' motion). In his January 18, 2011 order (attached here as "Exhibit C"), Judge Young held:

DC & Sons' motion is hereby granted as: (1) Larry McNair and his counsel concede the *lis pendens* was filed for the ulterior purpose of obtaining a lower purchase price and a return of the escrow funds; and (2) I find as a matter of law that the filing of the *lis pendens* was an act in the use of the process not proper in the regular conduct of the proceeding. (January 18, 2011 Order p 1).

In the present case, Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons. (January 18, 2011 Order p 4).

Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing. (January 18, 2011 Order p 5).

The fact that the Defendants failed to join a serve the very party who allegedly created the cloud on title shows the *lis pendens* was based on pretext. (January 18, 2011 Order p 4).

While Pavilion refused to close and filed suit in April of 2007 because of Richard Coen's claims, Pavilion stipulated there was no cloud on title on January 17, 2008...while these claims may have justified not closing, the thinness of the merits of these arguments are an artifice. Despite the stipulation, Pavilion waited almost eight months before amending its complaint to drop its

cause of action for specific performance and refused to remove the *lis pendens* from the property even after dropping the specific performance claim.
(January 18, 2011 Order p 5).

The continued maintenance of a *lis pendens* and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title.
(January 18, 2011 Order p 5).

As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper.
(January 18, 2011 Order p 6).

As cited above, the Court finds McNair and his previous counsel were using the lawsuit and the *lis pendens* to compel a better purchase price and a return of the earnest money deposit. This is not a legitimate use of a *lis pendens*, but is rather a form of coercion, done in the course of negotiation.
(January 18, 2011 Order p 6).

It is therefore ORDERED, that DC & Sons' motion for summary judgment is granted and no evidence or testimony disputing Pavilion's liability for breach of contract and abuse of process will be allowed and no mention of it made in counsel's opening arguments.
(January 18, 2011 Order p 6)

After Judge Young entered the order granting DC & Sons summary judgment, Mr. Dan David, (the attorney Pavilion and McNair hired after Nexsen Pruet was relieved as counsel), asked Judge Young if the parties could have some time to discuss settlement. (Transcript p 16). A recess was taken and the parties returned, asking to put the settlement on the record. The agreement reached was that Mr. McNair and Mr. Frazier (the principals of Pavilion) would be released individually and DC & Sons would waive its right to punitive damages against Pavilion if Pavilion would confess judgment to DC & Sons for actual damages and agree to assign the proceeds of any suit against Nexsen Pruet for legal malpractice to DC & Sons (Transcript p 17). The settlement documents, including the handwritten assignment and confession of judgment

were handed up to Judge Young, and the Judge asked counsel for DC & Sons to explain how the settlement figure was reached. (Transcript pp 17-21). Judge Young then stated:

THE COURT: All right. Well, I have, needless to say, not as much time and energy invested in this case as y'all. Needless to say, this is something I have lived with the past couple of years as well, so I'm very familiar with the facts and what has given rise to the damages, and I think it is a fair resolution of the dispute between these parties, and so I will approve the settlement and we will enter it on the record accordingly, and I want to thank you very much for working it out.

(Transcript p 21).

Pavilion and McNair filed their legal malpractice suit against Nexsen Pruet on August 16, 2011, serving written discovery and notices of deposition with the complaint. Nexsen Pruet has refused to participate in depositions and responded to Plaintiffs' written discovery requests over a year after they were served.

Nexsen Pruet now asks this Court to grant it summary judgment, not on the merits of the legal malpractice suit, but on a novel issue in South Carolina, whether the assignment of a legal malpractice claim is invalid,¹ and if it is, what is the proper remedy.

AMENDMENT OF THE ASSIGNMENT DOCUMENT

In its brief, Nexsen Pruet states "Plaintiffs have acknowledged the illegality of the assignment" (not true) and makes much of the fact that DC & Sons and Plaintiffs, in an effort to resolve Nexsen Pruet's issue with the assignment have agreed to voluntarily void the assignment. (See Exhibit D, Proposed Amended Agreement).

Counsel for Nexsen Pruet, upon being questioned by the Court at the March 13, 2013 hearing, agreed if the assignment was removed the case could proceed. As a result of that

¹ Plaintiffs maintain the assignment was a not an assignment of Pavilion and McNair's malpractice claims against Nexsen Pruet, but rather a partial assignment of the proceeds of Pavilion and McNair's suit against Nexsen Pruet. However, rather than rehash those arguments, Plaintiffs' focus is on those new arguments made by Nexsen Pruet in its memorandum dated April 10, 2013.

representation, DC & Sons and Plaintiffs appeared before Judge Young to be sure that if the parties did wish to amend the agreement, they would not be violating any order of Judge Young and Judge Young would not hold them in contempt. DC & Sons and Plaintiffs, through counsel described the exact posture of this case, Nexsen Pruet's motion, and that it had been argued before the Honorable J.C. Nicholson, Jr.; these parties were simply anticipating Nexsen Pruet's attempt at using this procedural challenge to have the case dismissed so a refiling would be barred by the Statue of Limitations. Judge Young, recognizing that the matter was pending before this Court and that Nexsen Pruet was not present, indicated he would not venture to approve such an agreement but that he would not hold the parties in contempt nor would the parties be prohibited from amending the agreement.

THE CURRENT LITIGATION & NEXSEN PRUET'S MOTION

Contrary to Nexsen Pruet's assertion, there are jurisdictions that have permitted the assignment of a legal malpractice claim to an adverse party. See *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 205, 707 N.E.2d 332, 334 (1999)(As a part of the terms of the settlement, New Hampshire and the Crantons agreed to: "sell, assign, and transfer... any and all of our rights, claims, demands and causes of action of any kind whatsoever ... which we have had, or may have against ... attorney John W. McCann and the law firm of Madan & Madan ..."); see also *Thurston v. Continental Casualty Co.*, 567 A.2d 922 (Me. 1989).

The Supreme Court of Massachusetts, when faced with the argument that the assignment of a legal malpractice claim as part of a settlement in the underlying case fosters collusion and creates a "distasteful role reversal which would demean and reduce the public's confidence in the legal process," held:

There is no logic to this argument. The fact that an attorney might be called on to defend against an assigned malpractice claim does not always mean that the attorney's former adversary will

compromise the strength of his underlying claim, resulting in some sort of role reversal which diminishes public confidence in the legal profession. In this case, for example, which concerns a pretrial settlement, the merits of the underlying lead paint poisoning action are irrelevant to the issues concerning the defendants' alleged malpractice. 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.

New Hampshire Ins. Co., Inc. v. McCann, 429 Mass. 202, 211, 707 N.E.2d 332, 337 (1999).

Here, like in *New Hampshire v. McCann*, the assignment does not require Plaintiffs attorneys to perform a “distasteful role reversal” of any sort as there are not one but two orders of the circuit court finding it was wrongful and an abuse of process to take the actions Nexsen Pruet took in the underlying lawsuit. The only real substantive question in the legal malpractice suit is whether Nexsen Pruet was acting at their clients direction, or whether as Mr. McNair testified, Nexsen Pruet acted on its own, failing to even inform Pavilion or McNair that they had been sued by DC & Sons for Nexsen Pruet’s use of the *lis pendens*.

THE REMEDY FOR AN INVALID ASSIGNMENT OF A LEGAL MALPRACTICE CLAIM

A “client's right to bring a legal malpractice claim against his former attorney in his own name [i]s not affected by any invalid assignment of his malpractice claim to his former adversary.” *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000). In its memorandum, Nexsen Pruet seems to accept this proposition as black letter law (See Nexsen Pruet Memorandum Dated April 10, 2013 p 9) and refers to this as an “unremarkable proposition.” *Id* at 11. Despite this, Nexsen Pruet asks this Court to hold that the purported assignment by Pavilion and McNair of their malpractice claim operates as a waiver of the right to bring the claim, and thus neither DC & Sons nor Pavilion and McNair have the right to sue

Nexsen Pruet. Nexsen Pruet argues in the alternative that the proper remedy is to dismiss the case, and have Pavilion and McNair re-file the same case because, “[t]his case has been tainted with collusion from its inception and the taint cannot be cured.” (i.e. the statute of limitations ambit) (See Nexsen Pruet Memorandum Dated April 10, 2013 p 8). However, as explained above Nexsen Pruet’s malpractice is established by Court order. There was no collusion as Judge Young was “very familiar with the facts and what has given rise to the damages, and I think it is a fair resolution of the dispute between these parties, and so I will approve the settlement and we will enter it on the record accordingly.” (Exhibit C, Transcript p 21).

The alleged invalidity of any assignment to DC & Sons does not undermine the validity of the malpractice claim. This is true under the general law of assignment (*see* 6 AM. JUR. 2D *Assignments* § 155 (2004); *see also* *Postal Instant Press v. Jackson*, 658 F. Supp. 739, 741 (D. Colo. 1987) (“[o]nce an assignment is made, all interests and rights of the assignor are transferred to the assignee. However, if the assignment is invalid or incomplete, the assignor may maintain a suit in his own name”) and the same logic has been applied in the context of the assignment of a legal malpractice claim. Most jurisdictions, including those cited by Nexsen Pruet, simply void the assignment and allow the legal malpractice lawsuit to “proceed in the normal course, as between the proper parties thereto.” *Kommavongsa v. Haskell*, 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003).

The Texas Supreme Court framed the issue on review as follows: “[e]ven 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.” In affirming the court of appeals, the

Texas Supreme Court held that in spite of an invalid assignment, summary judgment against the assignor is reversible error:

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 with his suit.**

Id. at 159 (emphasis added).

Soon after the *Mallios* decision, the Texas Courts were faced with a situation very similar to that faced in this case. *Tate v. Goins, Underkofler, et al.*, 24 S.W.3d 627 (Tex. App.-Dallas 2000). The *Tate* Court reasoned:

Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO. **Tate emphasizes he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim.**

In this respect, Tate is correct. In *Mallios*, the Texas Supreme Court held that when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment. *Mallios*, 11 S.W.3d at 159. While expressing no opinion on the validity of the underlying "arrangement" between the plaintiff and a third party, **the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm. Id. We find the holding in Mallios controlling on this issue and sustain Tate's fourth point of error.**

Id. at 634.

In *Weston v. Dowty*, 163 Mich. App. 238, 414 N.W.2d 165 (1987), the Michigan Appellate Court held the remedy for an invalid assignment is voiding the assignment and allowing the lawsuit to continue. In *Weston*, Ella Sharpe was injured while at another's home. *Id.* at 166. Sharpe filed suit against the homeowners who subsequently hired lawyers to defend them

against Sharpe. *Id.* A default judgment was entered against the homeowners who, in order to mitigate their damages, entered into a consent judgment with Sharpe and agreed to file a legal malpractice action against their lawyers and to give Sharpe any monies obtained. *Id.* The lawyers sought dismissal of the legal malpractice action alleging the assignment of proceeds violated Michigan law. The trial court granted summary judgment to the lawyers. *Id.* The appellate court, in reversing the trial court's summary judgment, held:

“even if there had been an invalid assignment, this would not warrant dismissal of the lawsuit. Instead, the assignment would be void, but the underlying action would survive.” *Id.* (citing *Joos v. Drillock*, 338 N.W.2d 736 (Mich. App., 1983))
“Thus, the trial court erred in granting partial summary disposition in favor of [lawyers] and in dismissing [homeowners'] complaint...” *Id.* (emphasis added).

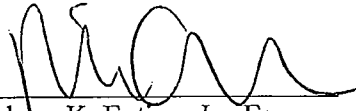
Accordingly, even if this Court finds the assignment between DC & Sons and Plaintiffs is an assignment of a legal malpractice claim and not simply an assignment of proceeds, and even if Nexsen Pruet is correct that South Carolina would hold the assignment of a legal malpractice claim void as against public policy, the remedy is to void the assignment and allow the case to continue as pled.

CONCLUSION

If this Court does not adopt the rationale of Pennsylvania, New York, Massachusetts, Maine, Oregon, and the District of Columbia that assignment of the proceeds of a legal malpractice claim or even the claim itself is proper, then this Court should void the assignment and allow the case to continue as pled, or, if the Court prefers, the parties to the assignment are amenable to simply amending their agreement to remove the assignment as set forth in Exhibit D.

[signatures on following page]

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On this 19th day of April 2013
Charleston, SC

ATTORNEYS FOR PLAINTIFFS