

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-002796
Trial Court Case No. 2011-CP-10-05774

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JUN 02 2014

SC Court of Appeals

Pavilion Development Corp. & Larry McNair,Appellants,

v.

Nexsen Pruet, LLC,Respondent,

v.

DC & Sons, LLC,Counterclaim Defendant.

REPLY

Respondent Nexsen Pruet, LLC, submits this reply brief in response to Appellants' Opposition to Respondent's Motion to Strike Documents in Designation of Matter and to Require Appellants to File Amended Brief.

1. Discovery Served with the Complaint. Appellants do not explain how the discovery served with the complaint is relevant to the issues on appeal or how it supports Appellants' arguments. In their initial brief, Appellants argue that summary judgment was premature and that Nexsen Pruet "refused to move forward with discovery," doing so without a single reference to the discovery itself. (Opp'n p. 7.) Because the discovery is

not relevant to the issues on appeal and is not cited to or relied upon in Appellants' initial brief, it should be stricken from the Designation of Matter.

2. Pleadings from the Underlying Litigation. Appellants admit that the pleadings from the underlying litigation "were not physically handed up to the judge at the hearing," but contend that the documents should be part of the record in this case because they are matters of public record and Appellants argued from the allegations in court. (Opp'n p. 8.) The fact that the pleadings are matters of public record does not make them part of the record in this case, nor does the fact that Appellants argued from the documents. The record shall contain only those matters presented to the lower court, and because the pleadings were not presented to the lower court, they should not be part of the record on appeal. *See* Rule 210, SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").

3. Pre-Trial Brief of DC & Sons. Appellants contend that the pre-trial brief of DC & Sons and exhibits are necessary to refute the trial court's finding of collusion by providing proof of DC & Sons's actual damages. First of all, the trial court did not find collusion. The trial court found that "the *opportunity for collusion* was present" and that the circumstances "*strongly suggest* that collusion has occurred." (Order p. 25) (emphasis added).

Second, the trial court's finding that an opportunity for collusion existed was not based on the merits of the underlying case. Instead, it was based on the circumstances surrounding the settlement between Appellants and DC & Sons, and conduct that occurred after the settlement, including: (1) Appellants and DC & Sons did not tell Judge Young that the settlement included an assignment of a legal malpractice claim to be filed

against Nexsen Pruet; (2) Appellants did not reveal the existence of the assignment to the court when they filed the case against Nexsen Pruet; (3) the same lawyers who represented DC & Sons now represent Appellants; (4) Appellants' own lawyers have advocated for the confession of judgment remaining in place even if the assignment is stricken; and (5) after the hearing on the motion for summary judgment Appellants and DC & Sons went to a different judge, without notice to Nexsen Pruet, seeking to have the agreement amended to remove the assignment so as to avoid an unfavorable ruling. None of this conduct relates to the merits of the underlying case.

Third, the pre-trial brief does not contain "proof" of DC & Sons's actual damages. (Opp'n p. 6.) The pre-trial brief contains an exhibit list but does not contain the exhibits themselves, which were never admitted into evidence in the underlying case, and which were never presented to the trial court in this case.

Because DC & Sons's pre-trial brief does not contain proof of DC & Sons's actual damages and is not relevant to the finding that the opportunity for collusion existed, the brief should be stricken from the Designation of Matter.

4. Orders on the Merits of the Underlying Litigation. Appellants do not explain how the orders regarding the merits of the underlying case relate to the issues on appeal, other than to say that the orders were part of the evidence that Judge Young had before him when he said that the settlement was a "fair resolution" of the issues. (Opp'n p. 7.) Whether the settlement as it was presented to Judge Young was a "fair resolution" of the issues between Appellants and DC & Sons is not relevant to the issues on appeal. The issues on appeal are whether the assignment of the legal malpractice claim was void as against public policy and whether the trial court properly dismissed the case with

prejudice. The fact that Judge Young may have said that the resolution was “fair,” based on what counsel for DC & Sons told him about the settlement, does not mean that the settlement agreement was free from being challenged by a third party, especially when it contained an assignment of a legal malpractice claim that was not mentioned to the court.

Further, the orders are not relevant to the trial court’s finding that the opportunity for collusion existed because the finding was based on the terms of the settlement and the conduct that took place after the settlement, not on the merits of the underlying case.

5. The Remedy. Nexsen Pruet agrees with Appellants that one of the issues on appeal is whether the trial court properly dismissed the case with prejudice, but does not agree that the trial court was bound by statements made at the hearing on the motion for summary judgment in making the ruling. At the hearing on the motion for summary judgment, which Appellants quote from at length in their opposition, the trial court expressly permitted the parties to submit further briefing on the remedy issue, stating “[i]f you want to address that by memo, I’ll be happy for you to do that,” and “if you want to address that issue, I’ll be glad for you” (Opp’n p. 3.)

The transcript goes on to read:

The Court: You want to address the issue of partial summary judgment
more –

Ms. Gray: May I brief that?

The Court: -- after you think about it?

Ms. Gray: Yes, sir.

The Court: Because I think I sprung that on you.

...

The Court: I don't want to prejudice you and your client on this particular issue and not give you the right to address that real issue by something that I do.

Ms. Gray: Yes, sir, and I appreciate that, and I would like to consider the continuation of the action in terms of the remedy for the void assignment, if Your Honor would indulge us, you know, a week, or ten days. I don't know when they want to file their –

Mr. Epting: Whatever you want, or whatever the Court says.

The Court: Doesn't matter to me.

Mr. Epting: Ten days is fine with me.

(Ex. A., Hr'g Tr. 43:22 – 44:3; 44:22 – 45:8, Mar. 13, 2013.)

As discussed at the hearing, the parties further briefed the issues, and based on the materials provided, as well as Appellants' conduct following the hearing – when they, along with DC & Sons, obtained a hearing before a different judge without notice to Nexsen Pruet, seeking to have the assignment of the legal malpractice claim amended so as to avoid a ruling on the motion for summary judgment – the trial court dismissed the case with prejudice. In doing so, the trial court was not required to stick to statements made at the hearing, especially when the issue was expressly left open and further briefing was provided.

CONCLUSION

Nexsen Pruet requests that the Court strike the pleadings and *lis pendens* filed in the underlying litigation (Designation of Matter Nos. 8, 9, and 10) because they were not filed or otherwise presented to the trial court. Additionally, the discovery served with the complaint (Designation of Matter No. 1, in part) should be stricken because it is not relevant to the issues on appeal.

Nexsen Pruet further requests that the Court strike the following documents from Appellants' Designation of Matter because they relate solely to the merits of the underlying case, which were not adjudicated by the trial court and are not relevant to the issues on appeal: (1) the exhibits to Appellants' motion to reconsider (Designation of Matter No. 5, in part); (2) orders regarding the merits of the underlying litigation (Designation of Matter Nos. 11 and 13); and (3) the pre-trial brief of DC & Sons in the underlying litigation (Designation of Matter No. 12).


Additionally, Nexsen Pruet requests that Appellants be required to amend their initial brief so that it is consistent with the Court's ruling on this motion and so that the Statement of Facts is supported by references to the record as required by Rule 207(b), SCACR. Nexsen Pruet also requests that the Court strike Footnote 3 in Appellants' brief because it refers to documents that were not made a part of the record in this case.

Finally, Nexsen Pruet requests that the deadline to file its initial brief and designation of matter be stayed pending a ruling on this motion.

Respectfully submitted,

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2011-CP-10-05774

PAVILION DEVELOPMENT)	
CORPORATION and LARRY)	
McNAIR,)	TRANSCRIPT OF RECORD
)	
Plaintiffs,)	March 13 , 2013
)	
-vs-)	Charleston, South Carolina
)	
DC & SONS, LLC,)	
)	
Defendant.)	

B E F O R E:

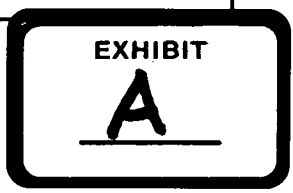
The Honorable J.C. Nicholson, Jr., Judge.

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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?

1 MS. GRAY: Yes, sir.

2 THE COURT: Because I think I sprung that you
3 on you.

4 MS. GRAY: You did, and we would also like to
5 respond to their brief they submit on the main issue, and
6 we would like a chance to consider that partial summary
7 judgment.

8 THE COURT: Only reason I say that,
9 assuming -- and I don't know what could happen. Y'all
10 might settle the case, I don't know, but let's assume it
11 goes to trial and this is a verdict against your client,
12 then you can appeal all these issues.

13 MS. GRAY: Assuming, I mean, the --

14 THE COURT: The issue we've been talking
15 about.

16 MS. GRAY: About the partial summary
17 judgment?

18 THE COURT: Right. You can appeal it at that
19 time. I mean, I don't want to prejudice your client on
20 this issue, is my point.

21 MS. GRAY: Yes, sir.

22 THE COURT: I don't want to prejudice you and
23 your client on this particular issue and not give you the
24 right to address that real issue by something that I do.

25 MS. GRAY: Yes, sir, and I appreciate that,

1 and I would like to consider the continuation of the
2 action in terms of the remedy for the void assignment, if
3 Your Honor would indulge us, you know, a week or ten
4 days. I don't know when they want to file their --

5 MR. EPTING: Whatever you want, or whatever
6 the Court says.

7 THE COURT: Doesn't matter to me.

8 MR. EPTING: Ten days is fine with me.

9 THE COURT: Let me say this: The week after
10 next I'm starting a four-week trial in Berkeley on a
11 construction case. I'll be pressed, and, honestly, I
12 won't be looking at it until after that trial, okay?

13 MS. GRAY: Did you say a four-week trial?

14 THE COURT: Four weeks. From my perspective,
15 you can have as much time as you want.

16 MR. EPTING: Judge -- I'm sorry. I want to
17 add one other thing.

18 THE COURT: Yes, sir.

19 MR. EPTING: You know, when I was standing
20 here and I was having my senior moment, it did occur to
21 me what I wanted to say.

22 THE COURT: Oh, okay.

23 MR. EPTING: And then I exercised discretion
24 and said no, if I get down that road, we'll be getting
25 down the road that hadn't even come up yet. Leave it

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PROOF OF SERVICE

I certify that I have served Respondent's Reply on June 2, 2014, by email and
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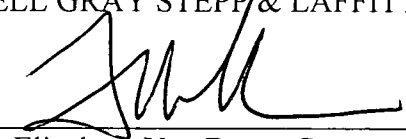
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