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
Circuit Court Case No. 2011-CP-10-05774

Pavilion Development Corp. & Larry McNair, ...Appellants,

v.

Nexsen Pruet, LLC, ...Respondent,

v.

DC & Sons, LLC, ...Counterclaim Defendant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Should this Court join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy? (Appellants' Issue b)

2. Did the circuit court properly find that the settlement agreement between Appellants and DC & Sons included an assignment of a legal malpractice claim? (Appellants' Issue a)

3. Did the circuit court properly determine that additional discovery was not needed to conclude that the assignment was void as against public policy? (Appellants' Issue d)

4. Did the circuit court properly dismiss the case with prejudice after determining that the assignment was void as against public policy? (Appellants' Issue c)

STATEMENT OF THE CASE

This action commenced on August 16, 2011, when Pavilion Development Corporation ("Pavilion") and Larry McNair ("McNair") (collectively, "Appellants") filed a complaint against Nexsen Pruet, LLC, alleging legal malpractice and breach of fiduciary duty arising out of Nexsen Pruet's representation of Appellants in litigation against counterclaim defendant DC & Sons. (Compl.) Nexsen Pruet answered the complaint and asserted a counterclaim seeking a declaratory judgment that the case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy. (Ans. & Countercl.)

On January 14, 2013, Nexsen Pruet moved for summary judgment as to all causes of action in the complaint based on the illegality of the assignment. (Mot. Summ. J.) The circuit court heard the motion on March 13, 2013. (Hr'g Tr., Mar. 13, 2013.) On October 9, 2013, the circuit court issued an order granting summary judgment and dismissing the case with prejudice, finding that the assignment of the legal malpractice claim from Appellants to DC & Sons was void as against public policy. (Order.) Appellants moved for reconsideration, but the motion was denied. (Form 4 Order.) The notice of appeal was served on December 20, 2013.

STATEMENT OF FACTS

This appeal raises the question of whether legal malpractice claims are assignable in South Carolina. On its face, this case appears to be an ordinary legal malpractice action. But an examination of the settlement agreement in the underlying case reveals that this action was brought pursuant to an assignment of a legal malpractice claim from Appellants to DC & Sons, and that although styled as a case brought by Appellants, DC

& Sons is the party controlling the litigation and is using this case to collect the $4,580,015.93 judgment confessed by Pavilion Development Corporation in the underlying litigation.

After learning of the assignment, Nexsen Pruet moved for summary judgment, contending that this case arises out of an assignment of a legal malpractice claim that is void as against public policy. Following a hearing and consideration of written briefs submitted by the parties, the circuit court granted Nexsen Pruet's motion for summary judgment and dismissed the case with prejudice.

Underlying Action

Nexsen Pruet represented Appellants in litigation concerning a contract to purchase real property at Shem Creek. Pavilion and DC & Sons entered into a contract on August 18, 2006, in which Pavilion agreed to buy real property from DC & Sons for $5 million. (Compl. ¶ 6.) Prior to closing, Pavilion learned that DC & Sons could not deliver good title. (Compl. ¶ 9.) Nexsen Pruet advised Pavilion not to close on the property and not to release the property from the contract. (Compl. ¶ 12.)

On March 19, 2007, Pavilion sued DC & Sons for specific performance and at the same time filed a notice of lis pendens. (Compl. ¶ 13.) Pavilion later amended the complaint, dropping the cause of action for specific performance and alleging breach of contract and a cause of action for an equitable lien. (Compl. ¶ 22.) DC & Sons filed a separate action against Pavilion, McNair, and others alleging breach of contract and

abuse of process with regard to the maintenance of the lis pendens. (Compl. ¶ 15.) The cases were consolidated and referred to the business court in Charleston.[1] (Compl. ¶ 16.)

On March 23, 2009, Judge Young granted summary judgment in favor of DC & Sons as to the equitable lien cause of action and ruled that the lis pendens should be removed.[2] (Order.) After the ruling but before the time to appeal expired, the circuit court permitted Nexsen Pruet to withdraw as counsel based on the determination that the lawyers from Nexsen Pruet had become witnesses to the allegations of abuse of process. (Wallace Affs., Oct. 19, 2011, and Jan. 14, 2013.) Appellants retained Dan David as their new counsel, and Mr. David represented Appellants for the remainder of the case. (Wallace Aff., Oct. 19, 2011.)

With new counsel in charge, Pavilion decided not to appeal the March 23, 2009 order granting partial summary judgment. The litigation proceeded, and the case was scheduled to be tried on January 18, 2011. (Compl. ¶ 25.) Prior to trial, DC & Sons moved for summary judgment on the breach of contract and abuse of process causes of action. *Id.* The motion was heard on what was to be the first day of trial. (Hr'g Tr., Jan. 18, 2011.) After hearing the arguments of counsel, the court granted summary judgment in favor of DC & Sons. *Id.* The parties asked for a recess to see if they could settle the case rather than proceed to a trial on damages. *Id.*

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[1] This recitation of the facts of the underlying case is based on the allegations in the complaint. Appellants, on the other hand, have provided the Court with a recitation of facts that goes beyond the allegations in their complaint and that contains argumentative statements that are not supported by the record.

[2] The underlying case did not, as Appellants argue, establish that Nexsen Pruet committed legal malpractice. No such finding appears in the March 23, 2009 order or anywhere else in the underlying case. The underlying case was not a legal malpractice action, Nexsen Pruet was not a party to the case, and no findings of legal malpractice were made at any time throughout the course of the litigation.

Settlement

During the court recess, Appellants and DC & Sons reached an agreement in which Pavilion confessed judgment in favor of DC & Sons for $4,580,015.93. (Mot. for Summ. J., Ex. A.) In exchange for the confession, DC & Sons released Pavilion's principals, Larry McNair and Lowell Frazier, from all liability, and waived the right to proceed against Pavilion for punitive damages. *Id.*

In addition, Appellants agreed to assign to DC & Sons all proceeds from a legal malpractice case to be brought against Nexsen Pruet. *Id.* The agreement set forth the following terms relating to the malpractice action:

- "Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties."
- "At DC & Sons election Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc."
- "Further, Pavilion and McNair place full control of the said litigation in the hands of DC & Sons, to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with the Nexsen Pruet firm."
- "Further, Pavilion and McNair agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds."
- "The cost of the litigation will be borne by DC & Sons alone."
- "Pavilion and McNair acknowledge [that the] suit will be brought in their names."
- "Pavilion and McNair direct that the earnest money [$50,000] plus interest shall be turned over to DC & Sons and their counsel."
- "DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and

> compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons."

Id.

After reaching this agreement, the parties went back on the record. (Hr'g Tr., Jan. 18, 2011, p. 16.) Counsel for DC & Sons announced that the parties had reached an agreement and asked that the settlement be entered into the court record because it contained a confession of judgment. *Id.* at p. 17. Counsel also asked the court to find that the settlement was fair. *Id.*

Counsel for DC & Sons stated that "the effective deal is Mr. McNair is relieved from liability," and that Pavilion confessed judgment in the amount of $4,580,015.93, which counsel for DC & Sons described as the amount of actual damages claimed by DC & Sons. *Id.* at pp. 16-17. As for the assignment, counsel for DC & Sons stated that "the claims that Mr. McNair or Pavilion have . . . are assigned or the proceeds are assigned at DC & Sons election to DC & Sons." *Id.* at p. 17. Although counsel told the trial court that the claims and proceeds had been assigned to DC & Sons, counsel did not specify which claims or which proceeds had been assigned. Counsel did not tell the court that Appellants had assigned all proceeds from a legal malpractice case to be brought against Nexsen Pruet, and that the assignment gave DC & Sons complete control over the litigation, including the right to elect to own the very claims themselves. *Id.*

When the trial judge asked how the amount of the confession of judgment was determined, counsel for DC & Sons provided an explanation "from memory," without presenting any evidence. *Id.* at p. 17. When the trial judge asked how the assignment should be reflected in the Form 4 order, counsel for DC & Sons stated that the assignment was handwritten and did not need to be reflected in the Form 4 Order. *Id.* at

p. 20. The trial judge suggested that the Form 4 Order state that the parties advised the court that the case was settled and that the settlement was put on the record. *Id.* at pp. 20 - 21. Counsel for DC & Sons agreed. *Id.* at p. 21.

Present Action

As contemplated by the assignment between Appellants and DC & Sons, Appellants filed an action against Nexsen Pruet for legal malpractice and breach of fiduciary duty. (Compl.) Appellants allege that Nexsen Pruet advised Appellants to file and maintain a lis pendens, and that the maintenance of the lis pendens led to summary judgment being entered against Appellants for abuse of process. (Compl. ¶¶ 25, 26.) Appellants allege that because of the ruling on summary judgment, they were forced to settle the case with DC & Sons and to confess judgment in favor of DC & Sons for $4,580,015.93, or risk a trial on damages with no defenses and potential personal liability for Pavilion's principal, Larry McNair. (Compl. ¶ 34.)

The legal malpractice case was filed on August 16, 2011, and was brought in the names of Pavilion Development Corporation and Larry McNair. *Id.* The assignment was not attached to or otherwise referenced in the complaint. *Id.* Andrew K. Epting, Jr., and George J. Kefalos, the same lawyers who represented DC & Sons in the underlying litigation between Appellants and DC & Sons, appeared as counsel for Appellants in the malpractice action. *Id.*

Nexsen Pruet answered the complaint and asserted a counterclaim seeking a declaratory judgment that the case was proceeding pursuant to an assignment that was void as against public policy and that Appellants waived their right to assert the causes of

action in the complaint because they had assigned all claims and proceeds to DC & Sons. (Ans. & Countercl.)

On January 14, 2013, Nexsen Pruet moved for summary judgment as to all causes of action in the complaint and counterclaim based on the illegality of the assignment. (Mot. Summ. J.) On March 13, 2013, a hearing was held before the circuit court regarding the motion for summary judgment. (3/13/13 Tr.) The circuit court took the motion under advisement and allowed the parties to submit additional briefing, which they did. (Tr. 3/13/13; Reply Brief, 4/12/13; Final Reply Brief, 5/10/13.)

Conduct After Hearing on Motion for Summary Judgment

On March 21, 2013, eight days after the hearing on Nexsen Pruet's motion for summary judgment, unbeknownst to Nexsen Pruet or the court, Appellants and DC & Sons obtained a hearing before Judge Young, who presided over the underlying case between Appellants and DC & Sons. (Hr'g Tr., Mar. 21, 2013.) The purpose of the hearing was to present Judge Young with an amended agreement regarding the assignment. *Id.* The amended agreement stated that the parties wished "to remove from the settlement the right of control by DC & Sons and to remove the right of assignment of proceeds or claims." (Amend. Agm.)

Judge Young was unwilling to amend the agreement, stating:

> I'm a little concerned that you're asking the Court to do something to help you out in the position in another case and there is another party out there [Nexsen Pruet] that has an interest in what we do here in that it affects their case.
>
> ***
>
> It's a two year-old settlement, and to come back and to take some action for the sole purpose of sort of going on

> the end around another judge who has a matter under advisement, you know, causes me to pause and say, I'm not sure this is a good thing for me to do.
>
> ***
>
> I'm just not comfortable with it, and I try to listen to my inner alarms going off.

(Tr. 3/21/13).

As Judge Young acknowledged, Nexsen Pruet was not given notice of the hearing. Nexsen Pruet found out about the hearing when the Charleston County Clerk of Court sent Nexsen Pruet a Notice of Entry of Judgment stating that an order had been entered regarding the proposed amended settlement agreement. (Notice.) Upon receiving the Notice from the Clerk's office, counsel for Nexsen Pruet searched the court website and discovered a Form 4 order signed by Judge Young on March 21, 2013, stating: "The proposed Amended Settlement Agreement has been DISMISSED." (Form 4 order.) Nexsen Pruet notified the circuit court of the hearing that Appellants and DC & Sons obtained before Judge Young, and provided the court with a copy of the proposed amended agreement, and later the transcript from the hearing. (Final reply brief; Not. of Filing Tr.)

Circuit Court's Ruling

On October 9, 2013, the circuit court granted summary judgment in favor of Nexsen Pruet and dismissed the case with prejudice. (Order.) The circuit court found that the case, although brought in the name of Appellants, was proceeding pursuant to the assignment of the legal malpractice claim from Appellants to DC & Sons. *Id.* The court concluded that the assignment was void as against public policy because it was an assignment between adversaries in litigation. *Id.* The court found that because the case

had been brought by Appellants in name only and under circumstances suggesting collusion, the proper remedy was dismissal with prejudice. *Id.* In reaching this conclusion, the court considered, among other things, the fact that Appellants and DC & Sons went to another judge after the hearing on the motion for summary judgment to try to having the assignment voided while the motion for summary judgment was still pending. *Id.*

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Austin v. Beaufort Cnty. Sheriff's Office*, 377 S.C. 31, 34, 659 S.E.2d 122, 123 (2008). Appellate courts "review[] the grant of a summary judgment motion under the same standard as the trial court, pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

ARGUMENT

The circuit court's order should be affirmed. The circuit court properly found that the assignment of the legal malpractice claim from Appellants to DC & Sons was void as against public policy and that the proper remedy was dismissal with prejudice. The court's ruling is supported by the majority rule that legal malpractice claims are not assignable under any circumstances and the rule that assignments of legal malpractice

claims between adversaries in litigation are void as against public policy. Moreover, courts have expressly denounced the scenario like the one in this case, where a party confesses judgment in favor of an adversary and then assigns to the adversary the right to sue the party's lawyer as a way to collect the judgment confessed.

Given the facts and circumstances presented, and the overwhelming case law supporting the circuit court's decision, the circuit court properly granted summary judgment and dismissed the case with prejudice.

A. This Court should join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy.

This Court should join courts across the country that hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy. This holding is well supported by case law in other jurisdictions and is consistent with the law and public policy of this state.

1. Most jurisdictions have a blanket prohibition against the assignment of legal malpractice claims.

The majority view is that assignments of legal malpractice claims are void as against public policy *in all circumstances*. *See* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable."). States adopting the majority view are: **Arizona**, *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002); **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); **Illinois**, *Wilson v. Cornet Ins. Co.*, 689 N.E.2d 1157 (Ill. 1997), *but see Learning Curve Intern., Inc. v. Seyfarth Shaw LLP*, 911 N.E.2d 1073 (Ill. App. Ct. 2009) (allowing

an assignment as part of a transfer of assets in a merger); **Indiana**, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); and *State Farm Fire Mut. Auto Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007); **Kansas**, *Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson,* 827 P.2d 758 (Kan. 1992); **Kentucky**, *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) and *Coffey v. Jefferson Cnty. Bd. of Educ.,* 756 S.W.2d 155 (Ky. Ct. App. 1988); **Louisiana**, *Taylor v. Babin*, 13 So.3d 633 (La. Ct. App. 2009); **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); **Missouri**, *VinStickers, LLC v. Stinson Morrison Hecker*, 369 S.W.3d 764 (Mo. Ct. App. 2012) and *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. 2004); **Nebraska**, *Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C.*, 523 N.W.2d 254 (Neb. 1994); **Nevada**, *Chaffee v. Smith,* 645 P.2d 966 (Nev. 1982); **New Jersey**, *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.,* 925 F. Supp. 252 (D.N.J. 1996) *aff'd,* 124 F.3d 185 (3d Cir. 1997); **North Carolina**, *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 744 S.E.2d 130 (N.C. Ct. App. 2013); **Tennessee**, *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996); **Virginia**, *MNC Credit Corp. v. Sickels,* 497 S.E.2d 331 (Va. 1998); **West Virginia**, *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003).

Courts have cited numerous public policy reasons in support of the majority view. "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). This concern was expressed in the seminal case of *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976), in which the court stated:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.

Id.; *see also Gurski v. Rosenblum & Filan,* LLC, 885 A.2d 163, 169 (Conn. 2005) (stating that "the unique and personal nature of the relationship between attorney and client and the need to preserve the sanctity of that relationship" are reasons for prohibiting the assignment of malpractice claims).

Further, the assignment of legal malpractice claims is incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients. *Gurski*, 885 A.2d at 169-70; *see also Picadilly, Inc. v. Raikos,* 582 N.E.2d 338, 343 (Ind. 1991), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007) (stating that assignments of legal malpractice claims "would weaken at least two standards that define the lawyer's duty to the client: the duty to act loyally and the duty to maintain client confidentiality"). "An attorney's loyalty is likely to be weakened by the knowledge that a client can sell off a malpractice claim, particularly if an adversary can buy it." *Picadilly*, 582 N.E.2d at 343. For example,

> [i]f assignments were permitted, . . . they would become an important bargaining chip in the negotiation of settlements-particularly for clients without a deep pocket. An adversary might well make a favorable settlement offer to a judgment-proof or financially strapped client in exchange for the assignment of that client's right to bring a malpractice claim against his attorney. Lawyers involved in such negotiations would quickly realize that the interests of their clients were incompatible with their own self-interest.

Id.

As for the duty of confidentiality, once the case is assigned, the client loses control over the disclosure of confidential information, which the attorney may reveal as reasonably necessary to establish a defense. *Id.*; *see also* Rule 1.6(b)(6), RPC, Rule 407, SCACR (allowing attorneys to reveal confidential information reasonably necessary to establish a defense). "The client is relegated to observing from the sidelines as the assignee pursues the attorney," which "erodes the principles fostered by the duty of confidentiality." *Picadilly,* 582 N.E.2d at 343.

In addition to the loyalty and confidentiality concerns, assignments of legal malpractice claims "relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights." *Goodley*, 133 Cal. Rptr. at 87.

Finally, such assignments "place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* Allowing such assignments "would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender." *Id.*

2. Some jurisdictions take a case-by-case approach.

A minority of jurisdictions take a case-by-case approach. These jurisdictions include: **Connecticut**, *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005); **District of Columbia**, *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996); **Georgia**, *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108 (Ga. 2013); **Maine**, *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989); **Massachusetts**, *New Hampshire Ins. Co., Inc. v. McCann,* 707 N.E.2d 332 (Mass. 1999); **New York**, *Vitale v. City of New York,* 183 A.D.2d 502 (N.Y. App. Div. 1992); **Oregon**, *Gregory v. Lovlien,* 26 P.3d 180 (Or. Ct. App. 2001); **Pennsylvania**, *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988); **Rhode Island**, *Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057 (R.I. 1999); **Texas**, *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); and **Washington**, *Kommavongsa v. Haskell,* 67 P.3d 1068 (Wash. 2003); *see also St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661, 667 (Idaho 2013) (holding that "while legal malpractice claims are generally not assignable, where the legal malpractice claim is transferred to an assignee in a commercial transaction, along with other business assets and liability, such a claim is assignable").

3. The vast majority of courts, even those adopting a case-by-case approach, prohibit assignments between adversaries in litigation.

The vast majority of courts prohibit assignments between adversaries in litigation. *See, e.g., Magill v. Watson*, 409 S.W.3d 673, 677 (Tex. Ct. App. 2013) ("The assignment of client's legal malpractice claim arising out of litigation is void."); *Kenco Enters. Northwest, LLC v. Wiese*, 291 P.3d 261, 262 (Wash. Ct. App. 2013) ("A claim for legal malpractice is not assignable, directly or indirectly, to one's adversary in a proceeding from which that legal malpractice is alleged to have arisen."); *Kim v. O'Sullivan*, 137

P.3d 61, 62 (Wash. Ct. App. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) ("In sum, we can see no advantage flowing to the legal system or the public that it serves from permitting assignments of malpractice claims to adversaries in the same litigation that gave rise to the alleged malpractice."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. Ct. App. 1994) ("It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause given them a financial interest in switching."); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991) (citing the "disreputable public role reversal that would result during the trial" if assignments between adversaries were permitted), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy").

Courts cite several reasons for prohibiting assignments between adversaries. First, the "counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when [he or she] was the very party who benefited from that malpractice in the underlying litigation, would engender a perversion that would erode public confidence in the legal system." *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005). Second, assignments between adversaries provide an

"opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa,* 67 P.3d at 1078. "[S]uch a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the legal malpractice." *Id.* (citing *Coffey*, 756 S.W.2d at 156-57).

Third, as one court explained:

> A party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action "is one peculiarly vested in the client." There is, in addition, a high risk that the plaintiff and defendant in the underlying litigation will collude to the detriment of the defendant's lawyer. Permitting this sort of alchemy would lead to baseless and excessive legal malpractice claims and would undermine the personal confidence that must exist between lawyers and clients.

Alcman Servs. Corp. v. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) (internal citations omitted).

Fourth, "[a] defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence." *Kommavongsa*, 67 P.3d at 1078. Fifth, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.* Sixth, because legal malpractice cases present a "trial within a trial," an assignment to an adversary "arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and

shameless shift of positions that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession." *Id.* Finally, turning over a legal malpractice claim to one's adversary in litigation creates a situation "generally recognized as the worst excess to be avoided." *Greene v. Leasing Assocs., Inc.*, 935 So.2d 21, 25 (Fla. Ct. App. 2006).

There are not, as Appellants contend, "several jurisdictions" that have permitted the assignment of legal malpractice claims between adversaries. (Br. p. 11.) Appellants cite only two cases to support this proposition: *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989), and *New Hampshire Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999). These cases are limited to their facts, and neither case involves a confession of judgment. In both cases, the court addressed the public policy concerns outlined above, and determined that the concerns were not implicated under the facts. For instance, in *Thurston*, the court determined that there was no risk of collusion because the amount of damages had been set by the court's order on summary judgment. 567 A.2d at 923. The court also found that a distasteful role reversal would not occur because the plaintiff could maintain the same positions in the malpractice suit as she did in the underlying case. *Id.* Similarly, in *McCann*, the court found that there was "no suggestion of improper collusion," and that the assignee had a "direct interest" in the malpractice case. 707 N.E.2d at 337-38. The court also found that a distasteful role reversal would not occur because the merits of the underlying case were irrelevant to the issues concerning the attorneys' alleged malpractice. *Id.* at 337.

Here, all of the public policy concerns underpinning the prohibition of assignments between adversaries are implicated. The amount of damages was set by Appellants and DC & Sons, not the court, and when Judge Young asked how the parties had arrived at the figure, the parties stated it was "from memory." Furthermore, the possibility of collusion was borne out when the parties went back to Judge Young two years later (and in the midst of this litigation) to amend the settlement without notifying Nexsen Pruet or Judge Nicholson.

4. Courts examining facts like the ones in this case have uniformly prohibited such arrangements.

Courts addressing facts like the ones in this case, where a party confesses judgment and then assigns his adversary the right to sue the party's lawyer for legal malpractice in exchange for a covenant not to enforce the judgment, have uniformly prohibited such arrangements. *See, e.g.*, *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (characterizing a settlement involving an assignment of a legal malpractice claim to an adversary and a confession of judgment as a "contrived and elaborate scheme" that is "so collusive that same should be held to be against public policy"); *see also Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (quoting *Coffey*).

Such scenarios "create the opportunity and incentive for collusion as to the stipulated damages in exchange for the agreement not to execute on the judgment in the underlying litigation and the transfer of the malpractice claim." *Kenco Enters. Northwest, LLC v. Wiese*, 291 P.3d 261, 263 (Wash. Ct. App. 2013). It does not matter whether the collusion is real: "It is the *opportunity* for collusion and the transformation of legal malpractice to a commodity that is problematic . . . ." *Id.* (emphasis added).

5. Existing South Carolina law supports adoption of the majority view that legal malpractice claims are not assignable.

Existing South Carolina law, both statutory and case law, supports the adoption of the majority view. In Chapter 17 of Title 16 of the South Carolina Code, the South Carolina General Assembly sets forth prohibited acts which constitute "offenses against public policy." *See* S.C. Code Ann. §§ 16-17-10 through - 50 (2003). Included in this chapter is the offense of barratry. *Id.* Barratry is a misdemeanor offense, and has been described by this Court as "the offense of frequently exciting and stirring up quarrels and suits between other individuals." *Osprey, Inc. v. Cabana Ltd. P'ship*, 340 S.C. 367, 373, 532 S.E.2d 269, 273 (2000).

Because South Carolina statutes have already established the public policy in this area, this Court should join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy. Assignments of legal malpractice claims stir up litigation between lawyers and third parties with whom the lawyer never had an attorney-client relationship and to whom the lawyer never owed a legal duty. They allow the party who benefitted from the alleged malpractice to turn around and sue the lawyer for malpractice, seeking to benefit once again from the lawyer's conduct. As courts in other jurisdictions recognize, this counterintuitive claim and role reversal engenders a perversion that is harmful to the profession and erodes public confidence in the legal system.

Additionally, the majority view is consistent with existing case law, such as the principle that "[t]he relationship of an attorney with his or her client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith." *Spence v. Wingate*, 395 S.C. 148, 158-59, 716 S.E.2d

920, 926 (2011). Additionally, adoption of the majority view is consistent with the law that "[b]efore a claim for malpractice may be asserted, there must exist an attorney-client relationship." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Allowing a party who has never been the lawyer's client to sue the lawyer for legal malpractice is contrary to the principle that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).[3]

B. The circuit court properly found that the settlement agreement included an assignment of a legal malpractice claim.

The parties in this case do not dispute the existence of the settlement agreement or its language. The dispute centers on the legal effect of the agreement. Because the agreement assigned all proceeds to DC & Sons and gave DC & Sons complete control over the malpractice action, including the right to elect to own the claims themselves, the circuit court properly found that the settlement agreement contained an assignment of a legal malpractice claim, and that the assignment was void as against public policy.

The settlement agreement states that Appellants assign to DC & Sons *all proceeds* from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty. (Agm.) The agreement further states that Appellants place *full control* of the case in the hands of DC & Sons, to include the trial, appeal, and settlement, and the

[3] The circuit court order in *Robertson v. Nexsen Pruet Jacobs & Pollard, LLP*, Case No. 2004-CP-40-5531 (Mar. 6, 2006), to which Appellants cite, is irrelevant to the case at hand. The order has no precedential value and the facts in that case are nothing like the facts in this case. The only thing of note in that case is that the court acknowledged the majority rule that legal malpractice claims are not assignable based on public policy concerns and that the attorney-client relationship is personal in nature.

power to waive the attorney-client privilege and work-product protection. *Id.* The agreement also states that at the election of DC & Sons, Appellants assign *all claims* to DC & Sons. *Id.*

In addition, the agreement states that Appellants agree to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. *Id.* Appellants acknowledge that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone. *Id.*

Appellants' argument that the agreement is merely an assignment of proceeds and not of the claims themselves is contrary to the plain language of the agreement. The agreement plainly states that DC & Sons has the right to elect to own the very claims themselves. *Id.* By giving DC & Sons the right to elect to own the claims, Appellants have assigned the claims themselves. As one court stated:

> This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. The terms of this settlement agreement essentially placed the control of the malpractice suit in [the assignee's] hands and rendered [the assignor's] interest merely nominal. Though [the parties to the agreement] assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against [the lawyer], but of the entire claim itself.

Davis v. Scott, 320 S.W.3d 87, 91 (Ky. 2010) (internal citations omitted).

Finally, Appellants took extraordinary measures after the hearing on the motion for summary judgment to have the agreement amended to strike the assignment of the claims. Eight days after the hearing, Appellants asked a different judge to amend the assignment to read: "the parties to the settlement wish to remove from the settlement the right of control by DC & Sons *and to remove the right of assignment of proceeds or*

claims . . . ." (Ex. D, Pls.' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.) The agreement would not have needed to be amended in this way had the claims not been assigned in the first instance.

Accordingly, the circuit court properly determined that Appellants assigned all claims, proceeds, and control to DC & Sons.

C. Additional discovery would not have changed the circuit court's ruling that the assignment was void as against public policy.

The circuit court's determination that the assignment in this case was void as against public policy answered a question of law. Additional discovery would not have changed the outcome.

"Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (quoting 17B C.J.S. *Contracts* § 1030)). Further, the legal effect of an assignment is a question of law. *See Alexander's Land Co., LLC v. M & M & K Corp.*, 390 S.C. 582, 592, 703 S.E.2d 207, 212 (2010) ("The interpretation of a contract is an action at law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

Likewise, "[t]he determination of what constitutes public policy is a question of law for the courts to decide." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 617, 713 S.E.2d 634, 638 (2011); *see also Citizens' Bank v. Heyward,* 135 S.C. 190, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."); *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005)

("The question of whether an assignment is barred as a matter of public policy is an issue of law.").

Finally, "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." *Linog v. Yampolsky*, 376 S.C. 182, 185-86, 656 S.E.2d 355, 357 (2008). Indeed, novel issues may be decided on a motion to dismiss. *See Brown v. Theos*, 338 S.C. 305, 313, 526 S.E.2d 232, 237 (Ct. App. 1999) (stating "while our courts have held important questions of novel impression generally should not be decided on demurrer, this is not always true"). "Where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a 12(b)(6) motion." *Id.*

Here, no facts or testimony would have changed the circuit court's determination that the assignment was void as against public policy and that summary judgment should be entered in favor of Nexsen Pruet. The circuit court's decision was based on the plain language of the assignment and the law from courts across the country. No amount of discovery would have changed the plain language of the assignment or the court's determination regarding its legal effect. The assignment says what it says. Appellants did not dispute the existence of the assignment or the language contained therein. The dispute centered on the legal effect of the assignment, which the circuit court found to be void as against public policy based on law from other jurisdictions.

Appellants' contention that the circuit court found collusion and that collusion is a question of fact is not correct. The circuit court did not find collusion that collusion had occurred. The circuit court found that "*the opportunity* for collusion was present," that

the assignment together with the confession of judgment "*strongly suggest[ed]* that collusion has occurred," and that "[a]t the very least, . . . the *opportunity for collusion* was present." (Order pp. 21, 25.) (Emphasis added.) The circuit court did not implicate counsel in its finding. The court found that "[*Appellants*] have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship," not that *Appellants and their counsel* have.[4] (Order pp. 13-14.)

Further, the circuit court's finding that the opportunity for collusion existed is supported by the record. According to the transcript from the underlying case, Appellants and DC & Sons did not tell the trial judge that the settlement included an agreement to assign all proceeds, control, and claims in legal malpractice action to be filed against Nexsen Pruet. There is no evidence in the record that the judge read the handwritten agreement at the conclusion of the hearing. Instead, it appears he relied on counsel to inform him about the terms of the agreement. (Hr'g Tr., Jan. 1, 2011, pp. 16-20.)

The confession of judgment without a hearing on damages is further evidence that an opportunity for collusion existed. There is no evidence in the record to support the

[4] Similarly, the record does not support Appellants' contention that Nexsen Pruet refused to participate in depositions or engage in discovery. Prior to answering the complaint, Nexsen Pruet filed a motion to disqualify Appellants' counsel on the basis that they were witnesses to the facts of the underlying case. Because a ruling on the motion to disqualify could have resulted in a change in counsel, Nexsen Pruet moved for a protective order asking the court to stay the time to answer written discovery and participate in depositions pending a decision on the motion to disqualify. After the hearing on the motion to disqualify, which the court held in abeyance pending an evidentiary hearing, Nexsen Pruet answered written discovery—responding to requests for production, interrogatories, and requests for admission—and produced Appellants' file. In any event, discovery on the merits has nothing to do with the issues raised in Nexsen Pruet's motion for summary judgment.

amount confessed. When asked to explain the amount of the judgment confessed, counsel for DC & Sons did so "from memory" without offering a single document into evidence. DC & Sons's pre-trial brief and list of exhibits are not evidence. In addition, the exhibits cited on page 4, footnote 3, of Appellants' brief were never admitted into evidence and are not part of the record in this case.

Moreover, the fact that Appellants' own counsel argued that the multi-million dollar confession of judgment should remain in place lends further support to the circuit court's finding that the opportunity for collusion existed. At the hearing on the motion for summary judgment, Appellants' counsel stated:

> **Mr. Epting:** And, Judge, if you believe that there's something that is wrong here, we don't want years of litigation. I mean, it doesn't matter to us if this is brought in the name of Pavilion or DC & Sons, and it doesn't matter to us if there is an assignment or not, because there is an outstanding judgment, and we would ask that if you find there is something wrong with the assignment that you simply strike the assignment, leave the judgment in place, and Pavilion will – obviously the judgment is in place, and Pavilion will continue with the case as it is and there won't be any necessity for an appeal.

(Hr'g Tr., Mar. 13, 2013, pp. 33:23 – 34:9.)

Later, at the hearing before Judge Young (which followed the hearing on the motion for summary judgment), counsel for Appellants presented a proposed amended agreement that states: "the parties agree that DC & Sons retains its judgment and all its rights as judgment creditor." (Am. Agm.) This request is directly contrary to Appellants' interest, and shows that Appellants have no interest in the malpractice case.

Even if further discovery would have revealed that the parties did not collude and the amount of the judgment confessed was real, the circuit court still could have granted

summary judgment in favor of Nexsen Pruet as to the illegality of the assignment given the overwhelming authority from other jurisdictions prohibiting assignments between adversaries in litigation. The circuit court's finding regarding the opportunity for collusion was not essential to the court's decision to grant summary judgment.

Accordingly, the circuit court order granting summary judgment in favor of Nexsen Pruet should be affirmed.

D. The circuit court properly dismissed the case with prejudice.

The circuit court's decision to dismiss the case with prejudice is supported by authority from other jurisdictions and was justified based on the facts of this case.

Courts in other jurisdictions have affirmed the dismissal with prejudice of cases involving assignments of legal malpractice claims that are void as against public policy. *See VinStickers, LLC v. Stinson Morrison Hecker*, 369 S.W.3d 764 (Mo. Ct. App. 2012) (affirming dismissal with prejudice where a law firm's former clients assigned their legal malpractice claim to adversaries as part of a settlement agreement in the underlying case); *Botma v. Huser*, 39 P.3d 538 (Ariz. 2002) (affirming dismissal of the complaint where a malpractice claim was assigned to an adversary as part of settlement agreement).

Other courts have simply affirmed summary judgment. *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005) (remanding case for entry of judgment in favor of the law firm); *Coffey v. Jeffferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (affirming summary judgment in favor of the attorney).

The case most factually similar to the case at hand is *Coffey v. Jeffferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988). In that case, the plaintiff confessed judgment in favor of his adversary on the first day of trial for $1,000,000 and at the same

time assigned the claims against his lawyer for legal malpractice. When the malpractice case was filed, the trial court granted summary judgment in favor of the attorney. The appellate court affirmed, finding that the transaction was "so collusive" and "the type of contrived and elaborate scheme" that has been denounced by other courts. *Coffey*, 756 S.W.2d at 157.

These cases support the circuit court's dismissal of this case with prejudice. The present case is based on a contrived and elaborate scheme. From the multi-million dollar confession of judgment, to the assignment of all claims and proceeds, to the filing of this lawsuit by Appellants in name only (without revealing the existence of the assignment), to the motion to amend the settlement two years later, Appellants and DC & Sons have used the court system to collect a made-up judgment rather than to remedy a wrong. Appellants have allowed their adversary's lawyers to represent them here and to take the position that the confession of judgment should remain in place even if the assignment is stricken.

Under these circumstances, the circuit court could not simply strike the assignment and allow the case to proceed as filed. Even when courts dismiss a case without prejudice, courts require the plaintiff to make a showing upon filing a new action that he is the real party in interest and that the assignee no longer controls the case. *See Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009) (finding that if the client re-files the malpractice claim, the case must not be controlled in any way by the assignee and that the client must not be represented by attorneys associated with the assignee); *Davis v. Scott*, 320 S.W.2d 87, 91, 92 (Ky. 2010) (finding that the client could reassert his claim against the attorney "only upon

showing that the attempted assignment is no longer in place and that he is the real party in interest"). The rationale behind this requirement is that the malpractice action cannot simply proceed as pled because it is "tainted in some respect." *Davis*, 320 S.W.2d at 92. To allow the case to proceed as pled would be "to wink at the rule against assignment of legal malpractice claims." *Id.* (quoting *Botma*, 39 P.3d at 543).

The same is true here. This case has been tainted since its inception. Appellants filed this case without revealing the existence of the assignment to the court or to Nexsen Pruet. By doing so, Appellants represented to the court and to Nexsen Pruet that this was a genuine legal malpractice case brought by Appellants as the real parties in interest, rather than an action brought and controlled by a third party seeking to collect a judgment confessed. Appellants allowed DC & Sons to use their name to bring the action, even though Appellants had already assigned all claims, proceeds, and control. Appellants led the court and Nexsen Pruet to believe that this was a genuine legal malpractice action when in fact it was not. Nexsen Pruet, not Appellants, made the assignment a part of the record in this case. (Ans. & Countercl.)

Dismissal with prejudice was also the appropriate remedy because Appellants did not present any evidence of damages. An essential element to a cause of action for legal malpractice is damages. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (outlining the elements of a cause of action for legal malpractice). Here, Pavilion's principals obtained a release of liability in the settlement with DC & Sons. Any award that Larry McNair receives in this case would be a windfall since he is not in danger of having the confession of judgment enforced against him. Further, the fact that Appellants' own counsel argued that the confession of judgment should remain in place

indicates that Pavilion is also not at risk of having to satisfy the judgment. Accordingly, the circuit court was justified in dismissing this case with prejudice. *See Kim v. O'Sullivan*, 137 P.3d 61, 65 (Wash. Ct. App. 2006) (dismissing an assigned legal malpractice claim that was brought in the former client's name for lack of damages where the client "will never have to pay the unsatisfied amount of the agreed judgment, as [the opposing party] has promised not to execute on it [and the award of] damages measured by that judgment would give [the client] an unjustified windfall.").

Given the authority from other jurisdictions and the facts and circumstances in this case, dismissal with prejudice was the proper remedy and should be affirmed.

CONCLUSION

The circuit court's ruling should be affirmed. This case was brought pursuant to assignment of a legal malpractice claim that is void as against public policy and dismissal with prejudice was the proper remedy.

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August 20, 2014

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
Circuit Court Case No. 2011-CP-10-05774

Pavilion Development Corp. & Larry McNair, ...Appellants,

v.

Nexsen Pruet, LLC, ...Respondent,

v.

DC & Sons, LLC, ...Counterclaim Defendant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and the Designation of Matter to be Included in the Record on Appeal on August 20, 2014, by U.S. mail and electronic mail to:

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August 20, 2014

BY HAND DELIVERY
The Honorable Jenny Abbott Kitchings
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Re: Pavilion Development Corp. & Larry McNair, Appellants v. Nexsen Pruet, LLC, Respondent
Appellate Case No: 2013-002796
SGSL No.: 5347/1509

Dear Ms. Kitchings:

Enclosed are the original and one copy of the Initial Brief of Respondent, Designation of Matter, and Proof of Service. Please file the originals and return the filed-stamped copies to my office by our courier.

By copy of this letter, and as evidenced by the Proof of Service, I am serving these documents on counsel for Appellants.

Sincerely,

Tina Cundari

TMC:tc

Enclosures
cc: By U.S. Mail and Electronic Mail :
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Michelle N. Endemann, Esq.
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