THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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
Appellate Case No.: 2013-002796

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.

INITIAL REPLY BRIEF OF APPELLANT

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Appellants Pavilion Development Corp. ("Pavilion") & Larry McNair reply to respondents' brief as follows:

1. The Assignment at Issue is a Lawful Assignment of Proceeds

Appellants maintain they are the real parties in interest in this action and 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 the bulk of the proceeds of this litigation to DC & Sons. Though the agreement does give control of the litigation to DC & Sons, the Agreement states:

> 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.
>
> 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.

(Handwritten settlement Agreement). The "creation and existence of an assignment is to be determined according to the intention of the parties, and that intention is a question of fact to be derived not only from the instruments executed by them, but from the surrounding circumstances." *Brandon Apparel Grp. v. Kirkland & Ellis*, 382 Ill. App. 3d 273, 284, 320 Ill. Dec. 604, 612-13, 887 N.E.2d 748, 756-57 (2008) (internal citations omitted). "Whether an assignment has occurred 'is dependent upon proof of intent to make an assignment and that intent must be manifested.'" *Northwest Diversified, Inc. v. Desai*, 353 Ill. App. 3d 378, 387, 818 N.E.2d 753, 288 Ill. Dec. 818 (2004).

Appellants do not dispute the language of the settlement agreement; however, the parties to the agreement itself reject that an assignment occurred. Appellants did not assign the claim or

cause of action to DC & Sons. Appellants agreed to give DC & Sons the majority of any proceeds recovered from the legal malpractice claim as well as the election to take an assignment of the claim; though this election never occurred.

An assignment is defined as "[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." Black's Law Dictionary (4th ed), p. 153. To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987) citing Calamari & Perillo, Contracts (2d ed), § 18-3, pp 633-634: "[A] promise to pay money when the promisor receives it from a specified source is not an assignment. There is no present transfer. So also a promise to assign or to pay out of a specified existing fund in the hands of the promisor does not result in an assignment." Here as in *Weston*, no present transfer was made.

Nexsen Pruet argues that even an assignment of the proceeds makes DC & Sons and not Appellants the real party in interest. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Stephenson v. Golden*, 279 Mich. 710, 766, 276 N.W. 849 (1937). In the present case, Appellants, not DC & Sons, are the real parties in interest. Appellants contracted for Nexsen Pruet's services, and suffered the loss. Any duty owed by Nexsen Pruet was to plaintiffs. "It is irrelevant to the determination of the real party in interest that plaintiffs attempted to reduce their damages through entering a consent judgment." *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987). Appellants are the real parties in interest although, under the terms of the settlement agreement, DC & Sons obtained a beneficial interest in the lawsuit against Nexsen Pruet. *Id.*

2. *The 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. Appellants present a more thorough discussion of the law concerning the assignment of legal malpractice claims in their main brief, but take this opportunity to respond to some of Nexsen Pruet's allegations.

Nexsen Pruet attempts to distinguish those cases that permit the assignment of legal malpractice claims to adverse parties from the present case. For example, Appellants cite *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 205, 707 N.E.2d 332, 334 (1999), which allowed, as a part of the terms of a settlement, the parties to: 'sell, assign, and transfer... any and all of our rights, claims, demands and causes of action of any kind whatsoever ... which [they] have had, or may have against ... attorney John W. McCann and the law firm of Madan & Madan ...". Appellants also cite *Thurston v. Continental Casualty Co.*, 567 A.2d 922 (Me. 1989), which affirmed the trial court's denial of a motion to dismiss on the grounds that an assignment to an adversary in a legal malpractice action resulting from the purported inadequate legal representation of a corporation in a products liability action, after which the corporation assigned its cause of action against its attorney for malpractice to the plaintiff in the products-liability action to settle that action, was void as against public policy. The *Thurston* Court went on to hold that the argument that the legal services were personal and involved confidential attorney-client relationships did not justify preventing the attorney's client from assigning the malpractice claim to someone with a clear interest in the claim and who had the time, energy, and resources to bring the suit. *Id.*

Nexsen Pruet argues "these cases are limited to their facts" and goes on to attempt to

distinguish the fact in *Thurston* and *McCann* from the present case. (Respondent's Brief, p. 18). Nexsen Pruet states:

> 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.

Id.[1]

However, Nexsen Pruet's argument offers even more support for Appellants' position. Here, just as in *Thurston,* no "distasteful role reversal" is necessary as counsel maintain the same positions in the malpractice action as in the underlying case. Counsel does not need to switch sides to argue the malpractice case; counsel is simply arguing the same case against a different defendant (then Pavilion and McNair now Pavilion and McNair's former counsel, Nexsen Pruet). Further, in this case Nexsen Pruet's malpractice has been established by Judge Young and is clear from the record below. For example, Nexsen Pruet filed and maintained a lis pendens on

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1Nexsen Pruet also argues "[t]here are not, as Appellants contend, 'several jurisdictions' that have permitted the assignment of legal malpractice claims between adversaries." (Respondent's Brief, p. 18). Setting aside Massachusetts and Maine, New York Court also allow assignments of legal malpractice claims between adversaries In *Greevy by Greevy v. Becker, Isserlis, Sullivan & Kurtz*, 240 A.D.2d 539, 540, 658 N.Y.S.2d 693, 694 (App. Div. 1997), the Defendant in a negligence claim arising out of an automobile wreck assigned, in exchange for a covenant not to execute, the Defendant's claim for legal malpractice to the Plaintiff. Suit was filed, and the law firm filed a motion for summary judgment, arguing the assignment of the legal malpractice claim was prohibited because it was against public policy, and it was an assignment of a claim for personal injuries. The New York Supreme Court noted that all claims were assignable except those expressly prohibited by statute, and that those claims expressly prohibited did not include a claim for legal malpractice. The court further held the assignment was not a violation of public policy.

the property of DC & Sons claiming a cloud on title despite stipulating that there was no cloud on title, and did so in order to extort a lower purchase price for the property and a return of the escrow funds. Judge Young held: "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." (Judge Young Order granting summary judgment, pg 5-6). Judge Young further held: "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 it is rather a form of coercion, done in the course of negotiation." (Judge Young Order granting summary judgment, pg 6)(internal citations omitted). The same case is being asserted in the malpractice action as was asserted in the underlying case.

Though Judge Young's summary judgment order did not include a finding of damages as the trial court's order in *Thurston* does, Judge Young was presented with all of the documentary evidence of DC & Sons' damages against Pavilion and McNair and the settlement was approved by the Judge as "fair and reasonable."

The elements of DC & Sons damages which comprise $4.5 million confession of judgment are all real: (1) a lost real estate contract which would have realized a profit of $2,852,000; (2) sums actually paid by DC & Sons in interest on the mortgage it had to keep in place because of the inability to close and the cost of refinancing; (3) the $50,000 earnest money deposit; and (4) prejudgment interest at the statutory rate. Judge Young had already granted summary judgment as to Pavilion's liability, and the damages were hard figures. Further, the parties had exchanged and Judge Young had received trial briefs as well as binders of 147 trial exhibits and 12 depositions, including: Plaintiff's Exhibit 95, which was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, which was the closing statement on the refinance of the

mortgage showing interest and the closing costs paid by DC & Sons; and Plaintiff's Exhibit 72, which was the contract with Pavilion showing the earnest money deposit of $50,000. (See Trial brief submitted to Judge Young and served on Mr. David).

DC & Sons damages were put on the record as well:

> THE COURT: What is the breakdown on that number? How did you come up with 4,580,000?
>
> 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...we added [prejudgment] interest at 8 and three-quarters, and those numbers are added together. It comes to $4,580,015.93.

(January 18, 2011 Transcript of Hearing Before Judge Young, pgs 19-20).

Judge Young went on to state:

> 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 of January 18, 2011 Hearing Before Judge Young, pg 21).

There was ample evidence to support the amount confessed and Judge Young, who had "lived with" the case for several years as it was before him in the Business Court, found the settlement to be "a fair resolution."

Nexsen Pruet continues to imply that Pavilion has been released of its obligation to pay DC & Sons' judgment and that the policy arguments against assignment are applicable for this reason. (See Respondents' Brief, p. 23). This is simply not the case, and, as no discovery has been done, the only evidence in the record with regard to Pavilion's payment of DC & Sons' judgment is found in Pavilion's answers to Nexsen Pruet's requests to admit. Nexsen Pruet asked Pavilion to "Admit that Pavilion is not at risk of having to pay the full amount of the judgment confessed in the underlying litigation." Pavilion responded "Denied." (Answers to Requests to Admit, ¶ 5).

Finally, Nexsen Pruet's attempt to distinguish *McCann* from the present case on policy grounds fails considering the reasoning of the *McCann* Court with regard to the public policy arguments raised by Nexsen Pruet. 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.

3. Dismissal with Prejudice is not the Appropriate Remedy

Even those jurisdictions that hold the assignment of a legal malpractice claim is void as a matter of law do not support the dismissal of Appellants' claim with prejudice. In most cases the assignment is simply voided and the action continues in the name of the client.

For example, the lower Court relies on Texas authority in support of the dismissal with prejudice of Appellants' legal malpractice claim. 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**. *Id.*

Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 634 (2000)(emphasis added).

Here, as in *Tate*, the action is already in the name of the client as the cause of action remains in the clients as only the proceeds were assigned. However, even if the assignment is deemed one of claims and not proceeds and even if the assignment of a legal malpractice claim is void under South Carolina law, the remedy is to void the assignment and allow Plaintiffs to continue their lawsuit against their former attorneys.

Even those jurisdictions that Nexsen Pruet argues support the lower court's dismissal with prejudice do not stand for this proposition. For example, Nexsen Pruet cites *Botma v. Huser*, 39 P.3d 538 (Ariz. 2002) to support their argument for dismissal with prejudice. However, the *Botma* Court actually held:

> Although neither Botma's malpractice claim nor its proceeds are assignable, **his malpractice claim does survive the invalid assignment.** *See Monthofer Invs. Ltd. P'ship v. Allen*, 189 Ariz. 422, 425, 943 P.2d 782, 785 (App. 1997) (explaining that in Damron agreement cases, Arizona courts "have rejected the assertion that a covenant not to execute nullifies the judgment as a recoverable element of damages"). **Thus, the fact that Botma entered into a settlement agreement that is in part contrary to Arizona law and unenforceable does not prevent him from suing Appellees for legal malpractice**.

Botma v. Huser, 202 Ariz. 14, 18-19, 39 P.3d 538, 542-43 (Ct. App. 2002) (emphasis added). The Arizona Court of Appelas in *Monthofer Invs. Ltd. Pshp. v. Allen,* 189 Ariz. 422, 426 n.3, 943 P.2d 782, 786 (Ct. App. 1997) held:

> It is one thing to assert that an invalidly assigned claim is an unassigned claim in the eyes of the law and that the assignee

> cannot pursue the action against a third party or require performance by a reluctant assignor. See Schroeder v. Hudgins, 142 Ariz. 395, 399, 690 P.2d 114, 118 (App. 1984); Karp v. Speizer, 132 Ariz. 599, 600-01, 647 P.2d 1197, 1198-99 (App. 1982). **It is another thing to assert that the assignor forfeits the claim by attempting to assign it.**

(emphasis added). Nexsen Pruet cites Kentucky law for the proposition that dismissal with prejudice is the appropriate remedy. However, Kentucky too holds that an invalid assignment has no effect on the validity of the underlying action, and does not support the remedy of dismissal with prejudice. *See John Mokhtarei & Kaelins, Inc. v. Sohan*, 2013 Ky. App. Unpub. LEXIS 585, 2013 WL 3480309 (Ky. Ct. App.July 12, 2013).

Nexsen Pruet further cites to *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257, 885 A.2d 163, 167-68 (Conn. 2005), which has been superseded by statute[2] as recognized by *Hyde & Hyde, Inc. v. Mount Franklin Food, LLC*, 2012 U.S. Dist. LEXIS 188453 (W.D. Tex.Apr. 30, 2012). Nexsen Pruet does not find support for its position in the authority that it cites. Further, many other jurisdictions recognize an invalid assignment has no effect on the validity of the underlying action. *See Weiss v. Leatherberry,* 863 So. 2d 368, 372-73 (Fla. Dist. Ct. App. 2003) ("The invalidity of the agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by proper person."); *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007)("Balancing the advantages and disadvantages of such assignments, we barred assignment of legal malpractice claims, noting clients may still make these claims

2 See Conn. Gen. Stat. § 52-118 ("The assignee and equitable and bona fide owner of any chose in action, not negotiable, may sue thereon in his own name. Such a plaintiff shall allege in his complaint that he is the actual bona fide owner of the chose in action, and set forth when and how he acquired title.").

directly against their attorneys, but they cannot assign their choses in action."); *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987)("We note that, 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."); *Kommavongsa v. Haskell,* 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003) (Holding the proper remedy for an invalid assignment of a legal malpractice claims is to void the assignment and allow the legal malpractice lawsuit to "proceed in the normal course, as between the proper parties thereto."; See also *Joos v. Drillock*, 127 Mich. App. 99, 100, 338 N.W.2d 736, 737 (1983).

CONCLUSION

The assignment at issue was one of proceeds and not claims, and in any event does not violate the public policy of this state. Appellants respectfully request that if this Court finds fault with the assignment, that it be voided, but the case otherwise be allowed to proceed as even a dismissal without prejudice will result in Nexsen Pruet 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.

[signatures on following gpage]

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Dated this 22 day of September, 2014
Charleston, South Carolina

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Of Whom Nexsen Pruet, LLC is the Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondent by delivering a copy via regular U.S. Mail on September 22, 2014, addressed to their attorneys of record as follows:

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September 22, 2014

VIA FACSIMILE AND FEDEX

The Honorable Jenny Abbott Kitchings
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Re: Pavilion Development Corp. & Larry McNair, Appellants v. Nexsen Pruet, LLC v. DC & Sons, LLC, of whom Nexsen Pruet, LLC is the Respondent
Appellate Case No.: 2013-002796

Dear Diane:

Enclosed please find the original and one copy of Appellants' Initial Brief together with the Proof of Service in the above-referenced matter. I would greatly appreciate your filing the original and returning the file-stamped copy to me in the self-addressed, stamped envelope provided.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Michelle N. Endemann

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Enclosures – as stated

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