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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

SC Court of Appeals

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 Which

Nexsen Pruet, LLC is the Respondent.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774

RECEIVED

DEC 6 7 2013

SC Court of Appeals

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

v.

Nexsen Pruet, LLC Defendant/ Respondent,

v.

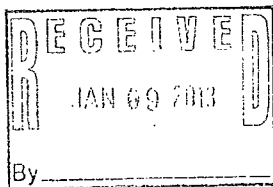
DC & Sons, LLC.....Counterclaim Defendant.

NOTICE OF APPEAL

Plaintiffs Pavilion Development Corp. ("Pavilion") and Larry McNair appeal the order of the Honorable J.C. Nicholson, Jr. filed October 9, 2013 (Exhibit A) and the order filed November 25, 2013 denying, without hearing, Appellants' motion to reconsider (Exhibit B). Appellants received written notice of entry of Judge Nicholson's order denying their motion to reconsider on December 2, 2013. Appellants are in receipt of the transcript of record.

December 20, 2013

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EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

v.

NEXSEN PRUET, LLC,

Defendant,

v.

DC & SONS, LLC,

Counterclaim Defendant.

) IN THE COURT OF COMMON PLEAS

) IN THE NINTH JUDICIAL CIRCUIT

) Civil Action No.: 2011-CP-10-05774

ORDER

FILED
2013 OCT -9 AM 10:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY

 This matter is before the Court on Defendant Nexsen Pruet LLC's motion for summary judgment. Nexsen Pruet seeks an order granting summary judgment in its favor as to all causes of action in the complaint and counterclaim on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

The motion was heard on March 13, 2013. Elizabeth Van Doren Gray and Tina Cundari of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Nexsen Pruet. Andrew K. Epting, Jr., and George Kefalos appeared on behalf of Pavilion Development Corporation and Larry McNair (Plaintiffs) and on behalf of Counterclaim Defendant DC & Sons, LLC (DC & Sons). After considering the arguments presented by counsel and the written memoranda filed, the Court grants Nexsen Pruet's motion for summary judgment. The Court finds that this case, although brought in the name of Plaintiffs, is proceeding pursuant to an assignment of a legal malpractice claim from Plaintiffs to DC & Sons. The Court concludes the assignment in this

case is void as against public policy because it is an assignment between adversaries in litigation. Judgment is entered in favor of Nexsen Pruet.

BACKGROUND

This is a legal malpractice case. Pavilion Development Corporation and Larry McNair have sued Nexsen Pruet, LLC for legal malpractice that allegedly arose in litigation between Plaintiffs and DC & Sons. The litigation between Plaintiffs and DC & Sons began in 2007, when Plaintiffs sued DC & Sons for specific performance of a contract to purchase a piece of property at Shem Creek. [Compl. ¶ 13.] At the same time that they filed the complaint, Plaintiffs filed a notice of lis pendens. *Id.* Plaintiffs subsequently amended the complaint, dropping the cause of action for specific performance and pursuing claims for breach of contract and an equitable lien only. [Compl. ¶ 22.] Plaintiffs maintained the lis pendens, however, which DC & Sons alleged constituted an abuse of process. [Compl. ¶¶ 15, 23, 25.]

 Plaintiffs were represented by Nexsen Pruet from the beginning of the case until April 2009, when Nexsen Pruet was permitted to withdraw as counsel by order of the court. [Wallace Aff., Jan. 14, 2013, ¶¶ 3, 6, 7.] The court permitted Nexsen Pruet to withdraw as counsel because Nexsen Pruet's lawyers had become witnesses to the facts of the case due to the allegations of abuse of process. [*Id.* ¶¶ 6, 7.] Attorney Dan David was substituted as counsel for Plaintiffs. [Wallace Aff., Oct. 19, 2011, ¶¶ 7, 8.] DC & Sons was represented throughout the case by Andrew K. Epting, Jr., and George Kefalos, who represent DC & Sons in this action as well. [Wallace Aff., Jan. 14, 2013, ¶ 4.]

On January 18, 2011, nearly twenty-one months after Nexsen Pruet withdrew as counsel, Plaintiffs and DC & Sons settled the case. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] The settlement was reached during a court recess on what was to be the first day of

trial. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Jan. 18, 2011, Hr'g Tr. p. 14.] The recess was taken after DC & Sons argued its motion for summary judgment. *Id.* at pp. 13, 14. The trial judge stated that he intended to enter judgment in favor of DC & Sons. *Id.* The parties asked for time to see if they could reach an agreement. *Id.*

The Settlement

gm
The terms of the settlement reached between Plaintiffs and DC & Sons are as follows. First, Pavilion Development Corporation (Pavilion) confessed judgment in favor of DC & Sons for \$4,580,015.93. [Ex. A, Nexsen Pruet's Mot. for Summ. J.] In exchange, Plaintiffs received a release of personal liability of Larry McNair and Lowell Frazier, the principals of Pavilion, and a waiver of trial against Pavilion on punitive damages. *Id.* Second, the parties entered into an agreement in which Plaintiffs assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect to own the claims themselves. *Id.* Plaintiffs also gave DC & Sons the right to control the litigation, including trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with Nexsen Pruet. *Id.*

The pertinent terms of the agreement are as follows:

- "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 an agreement, the parties went back on the record. [Ex. B, Nexsen Pruet’s Mem. in Supp. of Summ. J., Hr’g Tr., Jan. 18, 2011, p. 14.] Counsel for DC & Sons announced to the court that the case had been settled. *Id.* Counsel for DC & Sons summarized the terms of the settlement by stating 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 according to counsel for DC & Sons, represented the actual damages to DC & Sons. *Id.* When the court asked how the amount was determined, counsel for DC & Sons provided an explanation “from memory,” without submitting any evidence or testimony. *Id.* at pp. 15-16. Although counsel for DC & Sons told the court that claims and proceeds had been assigned to DC & Sons, he did not say

which claims or which proceeds, and did not tell the court that the assignment was an assignment to DC & Sons of all proceeds from a legal malpractice case to be brought against Nexsen Pruet, and that it gave DC & Sons full control over the litigation, including the right to elect to own the very claims themselves. *Id.* at p. 14.

When the trial judge asked counsel for DC & Sons 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. 17. The court then suggested that the Form 4 Order state merely that the case has been settled and the amount of damages was put on the record. *Id.* at pp. 17-18. Counsel for DC & Sons agreed. *Id.* at p. 18.



The Present Case

As contemplated in the agreement between Plaintiffs and DC & Sons, Nexsen Pruet has now been sued for legal malpractice and breach of fiduciary duty. [Compl.] The case was filed on August 16, 2011, and has been 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.* Plaintiffs are now represented by Andrew K. Epling, Jr., and George J. Kefalos, the very same lawyers who represented DC & Sons in the litigation between Plaintiffs and DC & Sons, and who represent DC & Sons in this action. *Id.*

Nexsen Pruet answered the complaint and asserted a counterclaim for declaratory judgment against Plaintiffs and a new party, DC & Sons, which was added to the case by Nexsen Pruet as a counterclaim defendant. [Ans. & Countercl.] Among other things, the counterclaim seeks an order declaring the assignment void as against public policy. Plaintiffs and DC & Sons moved to dismiss the counterclaim. [Mots. to Dismiss, Nov. 2, 2011, and Nov. 21, 2011.]

Following a hearing, the court denied the motions to dismiss, allowing the counterclaim against Plaintiffs and DC & Sons to proceed. [Order, Apr. 26, 2012.]

On January 14, 2013, Nexsen Pruet filed a motion for summary judgment arguing, among other things, that judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

STANDARD

gm
“The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder.” *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP.

“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). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203. “The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.* at 198, 659 S.E.2d at 203.

An assignment is a contract, and the question of whether it is void as against public policy is a question of law. (“The interpretation of a contract is an action at law.”). *See also*

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.”); *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.”).

LAW / ANALYSIS

gcn
Nexsen Pruet contends that summary judgment should be granted in its favor as to all causes of action in the complaint and counterclaim because this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Nexsen Pruet further contends that the circumstances under which this case arose are tainted with collusion, and the taint cannot be cured by simply striking the assignment and allowing the case to proceed as filed. The Court agrees.

I. Assignment of Legal Malpractice Claims

A. Law

South Carolina appellate courts have not addressed the question of whether a legal malpractice claim is assignable. Courts in other jurisdictions have.

1. The majority view

The majority view is that legal malpractice claims are not assignable because they are void as against public policy. The following states have adopted the majority view: **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. 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) 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 County Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988); **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**, *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); **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). *See also* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable."). **North Carolina** recently adopted the majority view. *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, __ S.E.2d __, 2013 WL 1876777 (N.C. Ct. App. May 7, 2013).

Several public policy reasons have been recognized for prohibiting such assignments. "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003). Assignments of legal malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of

the relationship between an attorney and a client and the need to preserve the sanctity of that relationship” counsel against permitting such assignments. *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005). 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 v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

Additional reasons cited for prohibiting the assignment of legal malpractice claims are that they “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 legal malpractice claims to be assigned “would encourage the commercialization of such claims and in turn spawn increased and unwarranted malpractice actions.” *Gurski*, 885 A.2d at 170. Finally, 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. The minority view

A minority of jurisdictions have declined to adopt a *per se* bar against the assignment of legal malpractice claims but have instead taken a case-by-case approach in evaluating whether a particular assignment is void. These 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, 111 (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, 1078 (Wash. 2003). *See also St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661 (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. Assignments between adversaries in litigation.

gm Although there is division among courts as to whether to adopt an absolute bar against the assignment of legal malpractice claims or to take a case-by-case approach, courts uniformly hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. *See, e.g., Kim v. O'Sullivan*, 137 P.3d 61 (Ct. App. Wash. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (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 (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 (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”). This is true even in states that have adopted the minority, case-by-case approach. *See 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.”).

There are several reasons for prohibiting assignments between adversaries in litigation in which the alleged legal malpractice arose. To begin, the “counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when 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). Additionally, 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).

As one court has 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.

...

If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.

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

Further, "[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." *Komnavongsa*, 67 P.3d at 1078. Additionally, "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.* Moreover, 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, courts have expressly denounced the scenario where a party confesses judgment in favor of his adversary and then assigns to his adversary the right to sue the party's lawyer for legal malpractice. See *Wagner v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (describing the assignment and confession scenario as a "contrived and elaborate scheme" that has been denounced by other courts); *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (referring to 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").

B. Analysis

gcn
The present case involves a confession of judgment and an assignment of a legal malpractice claim between adversaries in litigation in which the alleged legal malpractice arose. To settle the litigation with DC & Sons, Pavilion confessed judgment in the amount \$4,580,015.93 in exchange for a release of personal liability as to Pavilion's principals, Larry McNair and Lowell Frazier. Pavilion did so without challenging the amount or requiring DC & Sons to present evidence to support it. Plaintiffs then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, and assigned the right to elect to own the claims themselves. Plaintiffs gave DC & Sons complete control over the malpractice case, including the trial, appeal, and settlement, and the power to waive the attorney-client privilege and work-product protection. Plaintiffs agreed to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. Plaintiffs acknowledged that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone.

This scenario has been expressly denounced by other courts, and the Court denounces it here. Plaintiffs and DC & Sons have converted the legal malpractice action into a commodity to be exploited and transferred to an economic bidder (DC & Sons) that Nexsen Pruet has never represented or owed any legal duties to. By placing full control of the litigation against Nexsen Pruet in the hands of DC & Sons and their counsel, including the right to waive the attorney-client privilege between Plaintiffs and Nexsen Pruet, Plaintiffs have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and

fiduciary nature of the relationship. The assignment spawned this litigation, which appears to have been brought for the purpose of collecting a judgment confessed rather than remedying a wrong. Accordingly, the Court concludes that the assignment is void as against public policy.

In their opposition to Nexsen Pruet's motion for summary judgment, Plaintiffs do not defend the validity of the assignment or argue that it is not void as against public policy. Instead, Plaintiffs argue that they have not assigned the claims to DC & Sons, but rather have assigned only a portion of the proceeds, and argue that they remain the real parties in interest. This is contrary to the plain language of the assignment.

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According to the plain language of the assignment, the proceeds have been assigned to DC & Sons. The assignment 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." [Ex. A, Nexsen Pruet's Mot for Summ. J.] The assignment also states: "[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.*" *Id.* There is nothing unclear or ambiguous about the language in the assignment. Additionally, the assignment states: "At DC & Sons election, Pavilion and McNair assign all claims to include [breach] of contract, breach of fiduciary duty, professional negligence, etc." *Id.* This "right to elect" reinforces the fact that DC & Sons is in control and has the right at any time and without any notice to own the very claims themselves. DC & Sons simply has to say when.

The fact that DC & Sons agreed to give half of the first \$250,000 received in its pursuit of this action to Plaintiffs does not change the fact that DC & Sons owns the right to the proceeds. DC & Sons has simply agreed to allocate the proceeds in a way that gives Plaintiffs some nominal interest in the case, in an attempt to avoid the conclusion that an assignment of a

legal malpractice claim has occurred. At most, Plaintiffs stand to receive \$125,000 – \$50,000 of which represents the money they have already directed to be paid to DC & Sons in settlement of the prior case – when there is allegedly \$4,580,015.93 at stake. Plaintiffs' interest represents 2.7% of the total damages alleged. When the \$50,000 in earnest money is taken into account, Plaintiffs' interest diminishes to 1.637%. This is far less than the interest held by assignors in other cases, and yet the courts in those cases have held that an illegal assignment had occurred. See *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) (holding that an illegal assignment had occurred even though the assignor retained a 20% interest in the proceeds); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred even though the assignor retained a 10% interest in any net recovery). Accordingly, the Court concludes that DC & Sons is the party that has the real, actual, material, and substantial interest in this case.

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Moreover, the control that DC & Sons has over this case overcomes Plaintiffs' argument that only a portion of the proceeds has been assigned. Similar arguments have been made in other courts and rejected. For example, in one case the plaintiffs, conceding that Arizona law would not permit the assignment of the claim itself and in an effort to circumvent the prohibition, argued that only the proceeds of the action had been assigned, and not the cause of action itself. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). In rejecting this argument, the court stated:

Whatever the form, whatever the label, whatever the theory, the result is the same. The policies create an interest in any recovery against a third party for bodily injury. Such an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable.

Id. at 542.

Similarly, in another case, the plaintiff argued that only the proceeds had been assigned and that an assignment of the malpractice claim itself had not occurred. *Davis v. Scott*, 320

S.W.3d 87 (Ky. 2010). But after examining the substance of the agreement, the court disagreed.

In holding that the legal malpractice claim had been assigned, the 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.

Id. at 91 (internal citations omitted).



Applying this same principle of looking to the substance of the agreement, courts in other jurisdictions have reached similar conclusions. See *Kim v. O'Sullivan*, 137 P.3d 61 (Wash. App. 2006) (holding that an assignment of a legal malpractice claim had occurred because the assignee and his attorney were in complete control of the malpractice suit and only they would benefit from a settlement or judgment); *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005) (stating "we agree with those courts that have identified the 'meaningless distinction' between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments"); *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Dist. Ct. App. 2003) (recognizing that the rule prohibiting the assignment of legal malpractice claims "has been applied even in the absence of a formal assignment of the claim"); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred despite the fact that the assignor retained a ten percent interest in any net recovery because the assignor gave his former adversary "absolute control over the litigation, including the unfettered right to settle the malpractice suit on such terms as [the adversary] determines").



Finally, Plaintiffs have all but admitted that an illegal assignment has occurred. On March 21, 2013, eight days after the hearing before this Court on Nexsen Pruet's motion for summary judgment, Plaintiffs and DC & Sons arranged a hearing before The Honorable Roger Young for the purpose of presenting an amended settlement agreement. [Tr. dated Mar. 21, 2013.] In the proposed amended settlement agreement, titled "Amended Agreement re: Assignment," Plaintiffs state: "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.] By stating that the parties wish to remove the right of assignment of proceeds or claims, Plaintiffs appear to have conceded that the claims and proceeds have been assigned. Further, counsel's conduct of attempting to have another judge approve an amended settlement agreement after the hearing on the motion for summary judgment is a concession that the settlement agreement in its current form is illegal.

Plaintiffs also contend that summary judgment is not appropriate because they have not had a full and fair opportunity to complete discovery. But there are no facts to be discovered that will impact the analysis of whether the assignment is void as against public policy. The assignment is a contract, and the question of whether it is void as against public policy is a question of law. *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."). *See also 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."); *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.").

No facts or testimony can change the Court's conclusion that the agreement between Plaintiffs and DC & Sons is an assignment of a legal malpractice claim that is void as against public policy. The assignment says what it says. There is no genuine issue of material fact regarding the terms of the assignment or the circumstances under which it was entered. Plaintiffs have not presented any evidence to dispute the existence of the assignment or the circumstances under which it was entered.



Accordingly, the Court finds that Plaintiffs have assigned the legal malpractice claim against Nexsen Pruet to their adversary in the litigation in which the alleged legal malpractice arose. The Court concludes as a matter of law that the assignment is void as against public policy. The Court reaches this conclusion without deciding whether South Carolina courts should adopt the majority or minority rule. That is for the appellate courts to decide. Instead, the Court is guided by decisions in other jurisdictions – some of which have adopted the majority view, and some of which have adopted the minority view – that hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. The Court is further persuaded by those courts that have expressly denounced scenarios like the one in the present case, involving a confession of judgment and an assignment.

The Court concludes that the assignment in this case is void as against public policy. Nexsen Pruet's motion for summary judgment is granted.

II. The Remedy

Plaintiffs argue that even if the assignment is void as against public policy, the proper remedy is to strike the assignment and to allow the case to proceed as pled and filed. Nexsen Pruet argues that the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form.

The Court finds that this case cannot simply proceed as filed because it was never filed by Plaintiffs in the first instance. Plaintiffs ceded all rights and control of the case to DC & Sons, including the right to determine whether to file the case in the first instance. The entire case has been controlled by DC & Sons and their counsel, who also represent Plaintiffs. Further, the facts and circumstances under which the assignment was entered created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment. Accordingly, the Court concludes that the appropriate remedy is to dismiss the case with prejudice.

A. Law

1. Dismissal with prejudice / Judgment in favor of law firm

Most courts that have addressed the question of whether an assignment of a legal malpractice claim is void as against public policy do not discuss the remedy. The courts either dismiss the case outright or enter summary judgment in favor of the law firm. *See, e.g., Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) (dismissing the case outright and entering judgment in favor of the law firm); *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996) (affirming dismissal of case brought pursuant to the illegal assignment); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (affirming summary judgment in favor of the attorney or the law firm without addressing whether the client has the right to re-file the case), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson County Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (same).

2. Dismissal without prejudice



At least three courts that have addressed the remedy question have concluded that the case should be dismissed without prejudice. This is because cases born out of an illegal assignment are "tainted in some respect," and to allow them to proceed as filed would be "to wink at the rule against assignment of legal malpractice claims." *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (quoting *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. 2002)). In *Davis*, the court held that the proper remedy was dismissal without prejudice and stated that although the client did not forfeit the malpractice claim, "the current suit, born of the improper assignment, cannot be permitted to continue." 320 S.W.2d at 92. Accordingly, if the client decided to reassert his claim against the attorney, the client could do so "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest." *Id.* In *Botma*, the court ruled that the case could not continue in the client's name because the client retained no interest in the lawsuit. 39 P.3d at 543. Any benefit that the client received in simply continuing the case would be used to pay the \$12 million judgment confessed in favor of the client's adversary. *Id.*

Similarly, another court held that a case brought pursuant to illegal assignment should be dismissed without prejudice and that if the client wanted to re-file a malpractice claim against the law firm, the new case could not be controlled in any way by the party to whom the claims were initially assigned and the client could not be represented by attorneys associated with that party. *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009). The court recognized that a dismissal without prejudice "does not eliminate the risk of collusion in future cases completely, but it does provide the client with more of an incentive to 'seriously litigate the amount of damages' in the underlying suit because now the

client bears the risk of not recovering in the legal malpractice action.” *Id.* “Furthermore, it eliminates the public and disreputable role reversals that have concerned many courts.” *Id.*

B. Analysis

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The Court finds that the circumstances under which the present case arose and has proceeded require the Court to dismiss the case with prejudice. The present case was filed by Plaintiffs in name only and without notice to the Court or to Nexsen Pruet that Plaintiffs assigned the proceeds and the claims to their adversary in the litigation in which the alleged legal malpractice arose. [Compl.] Although brought in Plaintiffs’ name, the Court finds that the case has belonged to DC & Sons since its inception. As the owner of the claims and proceeds, and as the party with full control over the case, the Court finds that DC & Sons is responsible for every decision made in this case on behalf of Plaintiffs, including the choice of counsel, the filing and service of the complaint, the serving of discovery, and the filing of motions opposing all motions filed by Nexsen Pruet in the case, including the motion to disqualify counsel¹ and the present motion for summary judgment. The Court concludes that the case cannot proceed as pleaded because it was not brought by the client, Pavilion and McNair, in the first instance.

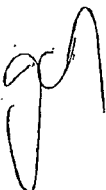
Moreover, the circumstances under which the assignment arose and the conduct of counsel for Plaintiffs and DC & Sons, indicate that the opportunity for collusion was present. The circumstances are as follows:

1. The settlement of the case between Plaintiffs and DC & Sons was reached during a court recess on what was to be the first day of trial after Plaintiffs learned that the trial court

¹ Nexsen Pruet filed a motion to disqualify Andrew Epting and George Kefalos as counsel for Plaintiffs on the basis that they are witnesses to the facts of the case in which the alleged legal malpractice arose because they represented Plaintiffs’ adversary, DC & Sons, in the underlying litigation. Plaintiffs opposed the motion, and following a hearing, the court ruled that the motion be held in abeyance pending discovery and any necessary evidentiary hearing. [Order, Apr. 26, 2012.]

intended to grant DC & Sons's motion for summary judgment. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.]

2. During the court recess, Pavilion confessed judgment in favor of DC & Sons for \$4.5 million without challenging the amount of damages or requiring DC & Sons to present evidence to support the amount confessed. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] In exchange, Plaintiffs obtained a full release of personal liability as to its principals, Larry McNair and Lowell Frazier. *Id.* At the same time, Plaintiffs assigned all proceeds in a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty to DC & Sons and gave DC & Sons full control over the litigation, including the right to elect to own the claims themselves. *Id.* The assignment was drafted by counsel for DC & Sons. [Tr. 6:14-23, Mar. 13, 2013.]



3. Counsel for DC & Sons did not put all terms of the assignment on the record. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.] Counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair. *Id.*

4. Plaintiffs filed the present case against Nexsen Pruet without revealing the existence of the assignment. [Compl.] The existence of the assignment came to the Court's attention through the filing of the counterclaim by Nexsen Pruet. [Answer & Countercl.]

5. Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and also represent DC & Sons in the present case. [Wallace Aff., Jan. 14, 2013, ¶ 4.] This means that the lawyers who represented the adverse party in the case in which the alleged legal malpractice arose have now switched sides and represent the plaintiffs who were

once adverse to their client. At the same time, the lawyers continue to represent DC & Sons, in whose favor the judgment was confessed.

6. Eight days after the hearing on Nexsen Pruet's motion for summary judgment regarding whether the assignment is void as against public policy, Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its counsel) asking Judge Young to approve a proposed amended settlement agreement striking the assignment but keeping the confession of judgment in place. [Hr'g Tr., Mar. 21, 2013.]

7. After the hearing, Judge Young issued a Form 4 order and entered it in the present case, Case No. 2011-CP-10-05774. [Order, Mar. 21, 2013.] The order states: "The proposed Amended Settlement Agreement has been DISMISSED." *Id.* Thereafter, Nexsen Pruet filed the transcript from the hearing before Judge Young. [Not. of Filing Tr. of H'rg..]



8. According to the transcript, the attorneys present were Andrew K. Epting, Jr., George J. Kefalos, who represented DC & Sons in the litigation between Plaintiffs and DC & Sons and who represent both Plaintiffs and DC & Sons in the present case, and Dan David, who represented Plaintiffs in the prior litigation. [Hr'g Tr., Mar. 21, 2013.] The only attorneys who spoke on the record were Epting and Kefalos. *Id.* Dan David was silent. *Id.* Mr. Epting asked Judge Young to approve an amended agreement regarding the assignment of the legal malpractice claim to "put the control in the [malpractice suit] in McNair and Pavilion and to void the assignment." [Hr'g Tr. 4:6-8.] Mr. Kefalos stated:

I didn't want to have Judge Nicholson issue an order about the validity of this one way or another because then it would create some precedent in South Carolina about this thing, and my feeling was the best thing to do is just take it off the table and void the assignment so he doesn't have to decide and we'll give up - return the right to control back to Pavilion and we can move forward.

[Hr'g Tr. 5:20 – 6:6.] Judge Young declined to approve the amended 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 that has an interest in what we do here in that it affects their case." [Hr'g Tr. 6:8-12.] Further, Judge Young repeatedly stated that he was "uncomfortable" with what he was being asking to do and that his "inner alarms" were going off. [Hr'g Tr. 6:15-16, 21; 7:1, 13-14, 20-21; 8:14.]

9. In response to Requests for Admission served by Nexsen Pruet, Plaintiffs admit that Pavilion has not paid anything to satisfy the \$4.5 million judgment. [Ex. C, Nexsen Pruet's Mem. in Supp. of Mot. for Summ. J.] Moreover, it does not appear that Pavilion is at risk of having to pay the judgment, given that its counsel has asked the Court to keep the confession of judgment in place. [Hr'g Tr. 34:3-7, Mar. 13, 2013.] In addition, counsel submitted a proposed amended agreement to Judge Young stating that Pavilion agrees that DC & Sons retains the judgment and all rights as judgment creditor. [Ex. D, Pls' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.].

These circumstances lend further support to the Court's conclusion that the proper remedy is dismissal with prejudice. Plaintiffs have used the court system to litigate a claim they do not own, without revealing this important fact to the Court or to the defendant. By assigning the proceeds, control, and the right to own all claims to DC & Sons, Plaintiffs completely and voluntarily relinquished their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. Further, after the hearing on the motion for summary judgment, Plaintiffs and DC & Sons went to another judge to try to have the assignment voided while the motion was still pending.

Additionally, the confession of judgment for an unsupported, multi-million dollar amount, coupled with the assignment of the legal malpractice claims, strongly suggest that collusion has occurred. The fact that counsel for Plaintiffs and DC & Sons seek to have the confession of judgment remain in place further supports the conclusion that Plaintiffs do not have any intention of paying the judgment and DC & Sons does not have any intention of executing on it, and therefore the confession was never intended to have any purpose other than to be used in a case against Nexsen Pruet as purported evidence of damages. At the very least, the Court finds that the opportunity for collusion was present.

Given these facts and circumstances, the Court concludes that this case is not a genuine legal malpractice case. It is an action to collect a judgment confessed. The Court concludes that the only proper remedy under the circumstances is dismissal with prejudice. By dismissing the case with prejudice, the Court is not ruling on the merits of the legal malpractice or breach of fiduciary duty claims, especially given that the claims have been brought by an entity that has never been a client of Nexsen Pruet.

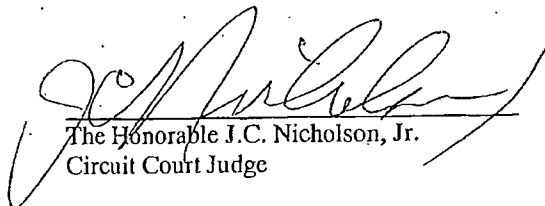
Because this case was brought by Plaintiffs in name only and under circumstances that suggest collusion, or the opportunity for collusion, the Court declines to simply strike the assignment and allow the case to proceed as pled. The conduct of Plaintiffs and DC & Sons with respect to the courts and with respect to Nexsen Pruet cannot be undone with the stroke of a pen. The case is dismissed with prejudice.

CONCLUSION

Nexsen Pruet's Motion for Summary Judgment is granted on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public

policy. Accordingly, judgment is entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim, and this case is dismissed with prejudice.

IT IS SO ORDERED.


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

Charleston, South Carolina

10/16, 2013

EXHIBIT B

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011- CP-10-5774

Pavilion Development Corp. &
Larry McNair

PLAINTIFF(S)

Nexsen Pruet, LLC

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: The Court reviewed Plaintiffs', Pavilion Development Corp. & Larry McNair, Motion to Reconsider, Alter, or Amend, filed on October 28, 2013, and does not find that a rehearing is necessary. Upon consideration of the Plaintiffs' Motion and the Court's previous Order, Plaintiffs' Motion to Reconsider is **DENIED.**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2117
Judge Code

11/22/13
Date

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 27 2013

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

SC Court of Appeals

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774

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

v.

Nexsen Pruet, LLC Defendant/ Respondent,

v.

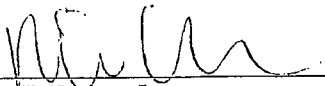
DC & Sons, LLC.....Counterclaim Defendant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy in the United States Mail, Postage prepaid, on December 20, 2013, addressed to Respondent's attorneys of record as follows:

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Tina M. Cundari, Esquire
Sowell Gray Stepp & Laffitte, LLC
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Columbia, SC 29211

ANDREW K. EPTING, JR., LLC

By 
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Attorneys for Appellants

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

vs.

NEXSEN PRUET, LLC,

Defendant,

vs.

DC & SONS, LLC,

Counterclaim Defendant.

PLAINTIFFS' MOTION TO
RECONSIDER, ALTER OR AMEND

FILED
2013 OCT 28 PM 2:11
JULIE J. STRONG
CLERK OF COURT
BY

YOU WILL PLEASE TAKE NOTICE that the undersigned, as counsel for the Plaintiffs Pavilion Development Corp. ("Pavilion") and Larry McNair hereby move this Honorable Court, pursuant to rules 52 and 59(c) SCRCF for an order altering or amending the Court's order filed October 9, 2013. Counsel for the Plaintiff received written notice of entry of the order on October 17, 2013. The grounds for this motion are as follows:

A. DISMISSAL WITH PREJUDICE IS NOT THE APPROPRIATE REMEDY

As an initial matter, Plaintiffs do not agree that summary judgment as to whether the assignment of a legal malpractice claim is void as against public policy is appropriate considering no discovery has been done and this is a novel issue in South Carolina. In fact, Plaintiffs do not agree that their malpractice claims were ever assigned. However, Plaintiffs true argument is with the Court's finding that there was collusion in the settlement of the underlying case such that the case must be dismissed with prejudice and the malpractice suit forever barred.

This Court has held:

The facts and circumstances under which the assignment was entered **created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment.** Accordingly, the Court concludes that the **appropriate remedy is to dismiss the case with prejudice.** (Exh A, Order pg 19)(emphasis added).

Nexsen Pruet further contends that the **circumstances under which this case arose are tainted with collusion, and the taint cannot be cured by simply striking the assignment and allowing the case to proceed as filed. The Court agrees.**" (Exh A, Order pgs 7 and 18)(emphasis added).

The Order finds that Plaintiffs and their counsel have **"brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship."** (Exh A, Order pgs 13-14)(emphasis added).

How can this be true when the underlying settlement was put on the record and approved as reasonable by Judge Young? There is **no discovery** so collusion can be inferred only from the agreement approved by Judge Young. Yet, Your Honor held, "the circumstances under which the assignment arose and the conduct of counsel for Plaintiff and DC & Sons, indicate that the opportunity for collusion, was present." (Exh A, Order pg 21). The "circumstances" Your Honor describes are summarized and refuted here:

1. **CIRCUMSTANCE 1 & 2: "During the Court recess, Pavilion confessed judgment in favor of DC & Sons for \$4.5 million without challenging the amount of damages or requiring DC & Sons to present evidence to support the amount confessed."** (Exh A, Order pg 22 ¶ 1, 2).

The settlement between DC & Sons and Pavilion was entered into the morning trial was to commence. The elements of DC & Sons damages which comprise \$4.5 million confession of judgment are all real figures: (1) a lost real estate contract which would have realized a profit of \$2,852,000; (2) sums actually paid by DC & Sons 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 Exh C, 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.

(Exh B, 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.

(Exh B, 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."

2. CIRCUMSTANCES 3 & 4: "Counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim...Plaintiffs filed the present case against Nexsen Pruet without revealing the existence of the assignment." (Exh A, Order pg 22 ¶ 3,4)

Your Honor holds Plaintiffs kept the terms of the assignment from Judge Young and did not put them on the record and further that Plaintiffs hid the assignment from this Court. These findings are in error. Plaintiffs did not try to conceal the existence of the assignment as the assignment was filed with the Clerk of Court in January of 2011 and is public record. Second, the Plaintiffs certainly did not keep the assignment or its terms from Judge Young, who approved the settlement. In fact, the assignment was handed up to Judge Young at the hearing:

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

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

(Exh B, January 18, 2011 Transcript of Hearing before Judge Young, pg 20)(emphasis added).

Judge Young prepared a Form 4 Order and attached the hand written assignment to his order. (Exh D, Form Four Order).

3. CIRCUMSTANCE 5: Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and...have now switched sides”(Exh A, Order pg 22 ¶ 5)

It is true that Mr. Epting and Mr. Kefalos represented DC & Sons and now represent Pavilion. 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 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.”**

(Exh E, 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.”(Exh E, Judge Young Order granting summary judgment, pg 6)(internal citations

omitted). This case is unique as 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).

4. CIRCUMSTANCES 6, 7, & 8: “Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its counsel) asking Judge Young to approve a proposed amended settlement agreement striking the assignment but keeping the confession of judgment in place.” (Exh A, Order pg 22 ¶ 6,7,8)

As is stated above, Judge Young prepared a Form 4 Order and attached the hand written assignment document at issue to his order. (Exh D, Form Four Order). It was for this reason that counsel went to Judge Young on March 21, 2013 and asked to be allowed to amend the assignment. As it was part of Judge Young's Order, Plaintiffs did not want Nexsen Pruet to claim the assignment could not be altered or even voided by this Court without Judge Young's approval (a likely prospect considering Ms. Gray's comment at the hearing on Nexsen Pruet's motion for summary judgment before Your Honor: "THE COURT: So eliminate that assignment and let y'all proceed with the legal malpractice case, win, lose, or draw? MS. GRAY: Because you can't just set aside the assignment. It is part of an overall settlement that included a confession of judgment.") (Exh F, Transcript of March 13, 2013 Hearing Before Judge Nicholson, pg 40, emphasis added). Judge Young declined to amend the assignment, but stated:

THE COURT: It doesn't bother me if y'all want to nullify this. Okay? I'm not going to hold you in contempt...But if you think that between the two parties you can nullify the assignment, im not going to rule you in.

(Transcript of March 21, 2013 Hearing Before Judge Young pg 8). Holding the assignment void as against public policy and allowing the legal malpractice suit to continue is the correct course.

5. CIRCUMSTANCE 9: "...it does not appear that Pavilion is at risk of having to pay the judgment, given that its counsel has asked the Court to keep the confession of judgment in place"

In 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).

Your Honor went on to find that the "circumstances" described above lend further support to the Court's conclusion that the proper remedy is dismissal with prejudice." (Exh A,

Order pg 24). Plaintiffs argue that, in the very least, there exists a material question of fact with regard to the whether the "circumstances" of this case indicate there was collusion such that dismissal is warranted. If discovery was done in the malpractice case, it would be even more obvious that there was absolutely no collusion in the settlement between DC & Sons and Pavilion and its principals. If the Court wants to continue to find the law in South Carolina is that assignments of legal malpractice claims are void against public policy, then Plaintiffs' respectfully request the Court amend its order to the extent that it holds a dismissal of the complaint is warranted and allow the malpractice case to proceed in the regular course.

B. This Court's Reasoning at the March 13, 2013 Hearing:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. GRAY: I think that's correct.

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

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

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

MS. GRAY: Yes, sir. Your Honor, I would point out one thing, which is that the South Carolina Supreme Court at 2008 in

the case of Linog versus Yampolsky, Justice Toal stated in that opinion that the mere fact a case involves a novel issue does not render summary judgment inappropriate. I just thought I would -- in terms of developing --

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

(See Exh F, Transcript of March 13, 2013 Hearing Before Judge Nicholson, pgs 40-43)

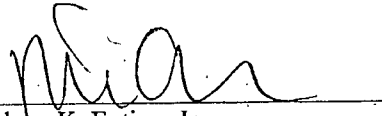
(emphasis added).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court alter or amend its judgment to the extent that the October 9, 2013 Order dismisses the Complaint; rather Plaintiffs contend the assignment can be voided and the legal malpractice can continue in the regular course.

Respectfully Submitted:

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 25 day of OCTOBER, 2013
Charleston, South Carolina

On this 25 day of October 2013
Charleston, SC

EXHIBIT A

October 9, 2013 Order of the Honorable J.C. Nicholson, Jr. granting Nexsen
Pruet's Motion for Summary Judgment

See Record on Appeal page 3

EXHIBIT B

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

DC & SONS, LLC,
Plaintiffs,

-vs-

RICHARD H. COEN, LOWCOUNTRY
CAPITAL, OCEAN I REALTY,
JAMES R. MAULL, JR., LARRY
McNAIR, COENCO, LLC &
PAVILION DEVELOPMENT

Defendants.

* * * * *

PAVILION DEVELOPMENT
CORPORATION,

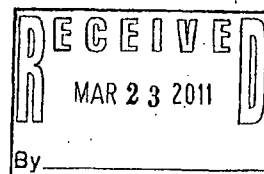
Plaintiff,

-vs-

DC & SONS, LLC,

Defendant.

) TRANSCRIPT OF RECORD
)
) January 18, 2010
)
) Charleston, South Carolina
)
) 08-CP-10-4675



)
)
) 07-CP-10-1475
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B E F O R E:

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

(Court's Exhibit Nos. 1 and 2 were for identification.)

THE COURT: All right. Are you ready? We are here on DC & Sons versus Richard Coen and others, 2008-CP-10-4675 and Pavilion Development Corporation versus DC & Sons 2007 CP-10-1475. This is defendant -- or, excuse me, it's DC & Sons summary judgment as to the liability for Pavilion for abuse of process and breach of contract, so, Mr. Epting, it's your motion. It looks like Mr. -- which are you going --

MR. KEFALOS: I'm going to argue it.

MR. EPTING: Let me just say, I thought it appropriate that you have file copies of everything. It wasn't clear. A lot of this was coming through on e-mail, so I put the exhibits, and I have clocked versions of the summary judgment.

THE COURT: I have multiple notebooks set up and I'm sure Office Depot is glad to see you.

MR. EPTING: And also in here, Judge, is a proposed order.

THE COURT: Okay. Is that the same thing y'all e-mailed me yesterday? Somebody from your office e-mailed me.

MR. EPTING: There might be a few changes. Let me just grab that and I'll bring it up.

THE COURT: All right. Well, it looks like Mr. Kefalos is requesting to handle the argument then, so if you're ready, go ahead.

MR. KEFALOS: The plaintiff would renew its motion for summary judgment or, in the alternative, a motion in limine for certain limiting instructions as to opening statements and evidence, and the motion for summary judgment renewal motion of summary judgment, is on liability for abuse of process.

The facts are not in dispute, and the basis is very simple. There are a variety of bases. Each one seems to get worse as it goes on, but at its heart, an action for a specific performance is in equity and will only lie when the buyer has demonstrated that he is ready, willing, and able to perform and has tendered the purchase price.

In this case, the time for closing passed. The sellers -- a lawyer wrote to the buyer, imposed a new time for closings with -- the due diligence is way past, it's time to set a closing, and we're going to do it in five days if you give us notice or not, and it is undisputed that the defendant failed to appear and the defendant failed to tender the purchase price.

So at its heart, the defendant had no justification for bringing the specific performance

action. If that weren't enough, an action for specific performance will only lie when the defendant, that is, the buyer, is not himself in default because it's in equity and has to be enhanced.

The filing of the specific performance and lis pendens in this case was improper because the defendant was in default. The contract had required the defendant to give certain time notices during the due diligence period of application for loan and approval of loan and those sorts of things, and the contract provided that the failure to give those notices constituted an event of default, and it's undisputed that the defendant failed to give those notices, and it is undisputed that the seller caused a default in March for the defendant's failure to comply with the contract.

Now, it is true that the individual defendant, Mr. McNair, says he never -- his lawyers never told him that the contracts had been called in default, and he allows that he don't know whether he would have gone forward had he known that or not, but, nevertheless, he's charged with what his lawyers knew, so he brings -- they respond to the notice of default by bringing the specific performance action and filing a lis pendens.

Now, here is where it starts to get dicey. He filed a statement that the defendant wouldn't attend

the closing because he claimed there was a cloud on title. It claimed that it was relieved of making a tender because this third person, Richard Coen, had a cloud on title, created a cloud on title, by nature of a lease agreement.

Well, the law is in South Carolina, it's a very old case, but it's right on point, that a specific performance action will not lie when the supposed cloud on title is due to and caused by somebody other than the seller. In other words, where the problem with the title is caused by somebody else, specific performance is not the remedy. Lis pendens is not the remedy.

This case, not only did the defendant, Pavilion, admit in testimony and letter that the cloud was created by this third person, but they pled it in the action, saying that the third person was the one that created a cloud on title and you had to talk to specific performance. That is an abuse of process.

Now, the defendant responds to that by saying, Well, Look, we also join that third person as the defendant in the case and ask the Court to quiet title, and, of course, a lis pendens is appropriate in a suit to quiet title. What the defendant says is we ask the Court to declare the rights of the parties to the contract, say that Coen has no interest in the property, and then

direct the Crowleys to sell us the property.

Well, the problem is that Pavilion never sued, or served, Coen, so Pavilion never had jurisdiction over Coen, but Pavilion tied this property up with a lis pendens and a suit to quiet title, knowing that it could never achieve that end because it had to have Coen as a party that didn't join Coen. Eventually, it amend its caption and dropped Coen altogether, but the pretext of adding Coen has a justification is abusive because they added a party just to justify the lis pendens and never served the party, never pursued them, never required them to answer, and then dropped them.

Now, the thing about Coen is an interesting issue itself because a lis pendens and action for specific performance will not lie absent a bona fide cloud on title. In this case, there was never a bona fide cloud on title because several months after Pavilion filed its suit seeking specific performance and tying this thing up, Pavilion signed a stipulation that Coen had no interest in the property.

So, filed suit, plaintiff Coen has an interest, and this is why we're trying the property up. We want you to sell it to us. Several months later, Pavilion filed a stipulation saying Coen doesn't have an issue, but they won't close. Pavilion has filed a suit

for specific performance, filed a lis pendens, stipulated Coen has no interest and they still refuse to close, so even after they claimed there was no cloud on title, they kept the lis pendens, and he maintained the pretext of the specific performance action.

Now, the problem is that they were using, at this point, the lis pendens and the specific performance action to accomplish things that they weren't supposed to be able to accomplish. The lis pendens is not designed as a mechanism to aid parties to recover money damages. This is exactly what the record shows that the defendant did.

Months after it stipulated that that Coen has no interest, months after it failed to join Coen, months after it stipulated Coen had no interest, Pavilion dropped the claim for specific performance, and you would think, well, that could solve the problem with lis pendens. Refused to lift the lis pendens.

So now Pavilion has a suit for damages only, yet refuses to lift the lis pendens and allow my clients to sell it, sell the property to the alternate buyer that they had.

To complicate things, to make it worse, once Coen or once Pavilion has dropped the suit for specific performance and agreed that Coen has no -- nobody else

has interest in the property, the defendant tried to get the -- wouldn't lift the lis pendens unless Crowleys agreed to sell for a lower price, and we have the correspondence where they kept the lis pendens in place in order to try to compel the Crowleys to sell for about \$1.5 million less than what had been originally contracted for.

Finally, when that didn't work, the defendants, Pavilion, wrote and offered to drop the lis pendens if the Crowleys agreed to return the \$50,000. So long after the specific performance claim had been -- long after it stipulated there was no interest by the third party and long after Pavilion stipulated that there was no action for specific performance, it still refused to drop the lis pendens until the Crowleys agreed to return the \$50,000 escrow, which they wouldn't do because the 50,000 it's undisputed had become hard at that time. The time for due diligence had passed. They weren't entitled to the return of it, and even the defendant McNair testified as much in his deposition.

Well, the bottom line is ultimately several months after all this takes place, we managed to get before the Court, and the Court ordered that the lis pendens be removed. So what the Court has done in effect has ruled at that point the lis pendens was clearly

improper. What we're saying is that the lis pendens has been abusive from the beginning because there was no justification for filing it, given the undisputed circumstances of the case.

Thank you.

THE COURT: All right.

MR. KEFALOS: The other thing I would say is if the case goes to trial, I would ask that the defendant be prevented from asserting judicial estoppel from asserting that there was a lease. In other words --

THE COURT: Asserting that Coen or any of Coen's entities had a lease?

MR. KEFALOS: Yeah, and that was the justification for not closing because having stipulated --

THE COURT: They would be estopped to assert that.

MR. KEFALOS: Yes. Thank you.

THE COURT: All right. Mr. David, you want to argue?

MR. DAVID: Well, I do, Your Honor. I guess for some clarification from you, I -- it's always interesting to come into a case that most of it was done before you got there, and I differ in some of the issues that George has brought to light; however, my client in

his deposition is a truthful man, and he admitted about filing of the lis pendens and why he thought it was filed and that he felt he was entitled to have his money back for whatever damages there were and whether he got proper advice about that, I'm not sure.

It appears that there are some little issues about that under the abuse of process cases, and there seems to be a case that is close on point, so I've explained to him that there are -- that if the judge rules and charges to the jury that if any agent or any person that participates in the quote, end quote, abuse of process in this instance, the filing of a lis pendens that that person is liable and there would be some personal liability on his part, which he was unaware of, of course, at the time all that took place.

I cannot argue with most of what George has said. Certainly there is a stipulation of agreement. It has always been my opinion from what information I was able to obtain that there was, in fact, a lease and there was, in fact, a cloud on title and there was a lawsuit that was brought for what appeared to be the purposes of resolving that issue.

During the course of that, there is a stipulation that is prepared and is filed with the Court that seems to resolve all of that. It says, there is, in

fact, no lease and nobody appealed from that, so as I understand the law, I am stuck with that stipulation and the order of the Court and cannot go beyond that to present testimony that I had -- would have liked to have presented.

There is a letter that certainly falls within falls within the purview of the cases that after a lis pendens is filed and you demand a lower price because you have a lis pendens file, and that was a letter that was dated February 21, 2008, and that was from Bruce Wallace to Drew Epting, and it sets out the purchase price is much less and a cause for in operant compromise.

I had initially objected to that letter, but the more I look at it, the more I'm sure the Court will allow it in because it was sent to Mr. Epting and, I believe, that Mrs. Crowley testified to that in her deposition that she had received that along with some other -- we spent all day talking about the events surrounding this with Mrs. Crowley.

So she had testified about receiving this letter, and so under the circumstances, even though I think that it is a negotiations between attorneys, I think that His Honor will let it in since it seems to go to the heart and the crux of the issue of the abuse of process.

In light of the depositions that I reviewed over the weekend in preparation for this trial and discussing with my client the possibility and perhaps the probability that if the jury finds an award, awards the damages to the plaintiff, those damages would flow to him personally. And as I understand the brief conversation that we had with the Court, it is the Court's feeling that some of the cases indicate that if you carry something to its logical conclusion that there is no liability on that person that carried the lawsuit to its logical conclusion.

I think quite contrary. The Court feels that that may even go further to show ill will on the part of the person who refuses to remove the lis pendens, and so based on that information and based on what His Honor has told us that he felt the law was in this case, I would ask that you give us a little bit of time to see if we can't reach some type of agreement that would relieve my client from any personal liability in this matter.

THE COURT: All right.

MR. DAVID: I hope that I have not misstated anything you have shared with us on your feelings on the case --

THE COURT: I don't think so.

MR. DAVID: And based on that, I think it

would be prudent for me to try to have my client removed, if at all possible.

THE COURT: Okay. Mr. Kefalos, you want to say anything more?

MR. KEFALOS: Yes, Your Honor, I would.

We've handed up the exhibits that support the arguments, and we passed up the facts that demonstrate it's not in dispute, and I would ask the Court to issue a ruling at this time to make a decision about the abuse of process as a matter of liability.

THE COURT: All right. Well, you know, I've lived with this case, I guess, now for on and off two, three, years, and at various times it crystallizes and other times it becomes more obscure. It depends on the parties and what issues you're dealing with, but as you get down to, you know, the events of the end of last week where DC & Sons and those related parties and the Coens and those related parties all agreed to go to binding arbitration, what then we're left with is the DC and affiliated parties versus Pavilion and affiliated parties and facts that really make what we tried this week a lot easier to focus in on, and, you know, I know at various times the parties have asked me to grant summary judgment, and on a case -- it's always difficult to grant summary judgment just because you can take a fact and

look at it two different ways, and that is what our appellate Courts have said.

If there is a scintilla of evidence that a fact finder could see it another way, then you have to let the fact finder decide it, but as the events over the last several days have relieved some of that from us, the issues that are left in the case to be tried, the facts are very much in dispute, and as I had thought about this more, the fact that Mr. McNair and Pavilion might have had an opportunity to argue that some of their actions were based on advice of attorneys that -- and you could say, well, you know, maybe a jury would buy in to that, that really doesn't lessen whether or not that was good advice or bad advice. It was the -- in fact acted the way they did and took the actions that they did in filing a lawsuit and more importantly filing a lis pendens, and then what probably moves us into the aspect of some serious exposure is ultimately not removing the lis pendens because I strongly feel that the law didn't allow them to file it in the first place on a breach of contract claim.

They did have originally a specific performance claim, and if you're asking for specific performance, that is, you ultimately want title to the property, a lis pendens, of course, is then the mechanism

by which you alert the world that somebody else is claiming title to that property and they should act accordingly, and it basically stops the ability of any person that owns it to do anything to the property, but once they ultimately conceded that there were no, in fact, clouds on the title caused by third parties, either Mr. Coen or any of his affiliated corporations or entities, there really was no reason at that point to leave the lis pendens in place.

And when you couple that with the fact that there is a very strong factual basis for concluding that it might have been done for the purpose of trying to negotiate a more favorable sales price, then I think you move into the area of not only having liability for the abuse of process claim, but you, in fact, expose yourself to punitive damages, and there is really simply no way of getting around the fact that there doesn't appear, especially in light of the stipulation that would prevent me from allowing Pavilion from arguing the oh, yes, Mr. Coen did have an interest in that property, they would not be allowed to do that because they had stipulated earlier in the lawsuit that he didn't have any cloud on that title, or any claim on that title, legitimate claim, so you can't have it both ways.

That ultimately erases any factual dispute

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

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

MR. EPTING: Thank you, sir.

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

THE COURT: Absolutely.

(Recess taken.)

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

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

THE COURT: All right.

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

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

THE COURT: What amount is that?

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

THE COURT: Okay.

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

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

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

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

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

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

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

The other component, Judge, of damages of the

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

THE COURT: All right.

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

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

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

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

MR. McNAIR: Yes, sir.

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

THE COURT: All right.

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

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

THE COURT: Sure.

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

THE COURT: This is which order?

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

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

MR. EPTING: Fine.

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

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

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

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

MR. EPTING: That would work, Judge.

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

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

(Whereupon, the proceedings were concluded.)

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 18th of January 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 9, 2011

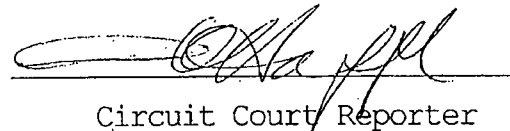

Circuit Court Reporter

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

DC & SONS, LLC
Plaintiff,

CASE NO.: 2008-CP-10-4675

vs.

PRE-TRIAL BRIEF OF DC & SONS

RICHARD H. COEN, LOWCOUNTRY
CAPITAL, LARRY MCNAIR,
COENCO, LLC, & PAVILION
DEVELOPMENT CORP.
Defendants.

PAVILION DEVELOPMENT
CORPORATION,
Plaintiff,

CONSOLIDATED UNDER
CASE NO. 2007-CP-10-1457

vs.

DC & SONS, LLC,
Defendants.

I. Name of each attorney, court identification number, full name of each firm:

On behalf of the Plaintiff:

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II. FACTS

A. THE CLAIM

1. The contract between Plaintiff and Defendant Pavilion

In 2006, DC & Sons, LLC (referred to as "DC & Sons" or "the Crowleys"), owned a piece of property on the waterfront of Shem Creek, in Mt. Pleasant known as the Cottage on the Creek. In August 2006, the Defendant Pavilion offered to buy the property for \$5 million, closing in 4 months. The Defendant Pavilion put up \$50,000 as earnest money. The only requirement on the part of the Crowleys was to deliver title. Pavilion failed to honor the contract because of the claims to the Cottage on the Creek property made by the Coen Defendants (Richard Coen, Lowcountry Capital and CoenCo).

2. Interference by the Coen Defendants

The Coen Defendants contacted Pavilion and told Pavilion that DC & Sons could not deliver title because the Coen Defendants had the right to buy and/or lease the Cottage on the Creek property. The Coen Defendants told Pavilion that if it bought the property, it would not be able to develop the property because the Coen Defendants had a claim to the property.

This caused Pavilion concern, and it asked DC & Sons if there was any truth to the claim.

The Coen Defendants' claim came as a surprise to DC & Sons. It was true that a year or so earlier, the Crowleys had a dispute with the Coen Defendants about what rights the Coen Defendants might have to the Cottage on the Creek property. But, DC & Sons settled that old dispute when they bought the property from the previous owner and paid the Coen entities over \$280,000 for them to give up any claim they might have or would ever have in the property.

The Defendant Pavilion had concern about a possible cloud on title and asked DC & Sons for assurance that the Coen Defendants had no lease. DC & Sons insisted there was no lease on

the property and even provided Defendant Pavilion with a copy of the release documents previously signed by the Coen Defendants. Despite these assurances, the Defendant Pavilion, who had yet to get its property zoned as it wanted, found it convenient to accept the Coen Defendants' explanation.

Defendant Pavilion insisted that it was prepared to close if only DC & Sons would clear up the Coen Defendants' claim. DC & Sons maintained that the Coen Defendants had no interest in the property and offered Defendant Pavilion title insurance against the Coen Defendants' claim. Beyond that, DC & Sons pointed out they had no control over the Coen Defendants and were unable to resolve his claim. Under these circumstances, DC & Sons insisted that Defendant Pavilion either accept the title insurance and close on the property or release them from the contract. DC & Sons had a back up buyer prepared to pay \$5-5.5 million for the Cottage on the Creek property. Pavilion would neither close nor release the property.

3. Defendant Pavilion's wrongful conduct

Defendant Pavilion's response to DC & Sons' demand to close or grant a release from the contract was evasive. When DC & Sons asked Defendant Pavilion to either close on the contract or release DC & Sons from the contract, Pavilion filed a lis pendens and sued DC & Sons for specific performance.

In its suit, Pavilion alleged it was ready willing and able to close and filed three claims; one to quiet title, one for specific performance, and one for declaratory relief. The Defendant Pavilion named the Coen Defendants but never served them. Without the Coen Defendants' joinder, no court could ever resolve the Coen Defendants' claim. DC & Sons did not have the ability to clear the title issue. Under these circumstances, a suit for specific performance will not

lie¹. Further, Defendant Pavilion was itself in breach of the contract for failing to give proof of financing or that it was financially capable of closing, and was therefore barred from bringing a claim for specific performance.

Defendant McNair, knowing Pavilion was in breach, knowing Pavilion would not close, knowing specific performance would not lie, and knowing quiet title could not be obtained without serving the Coen Defendants, authorized the lis pendens to get his \$50,000 earnest money back and force a cheaper price for the property. An agent is always personally liable for his own torts. *See Long v. Norris & Associates, Ltd.*, 538 S.E.2d 5 (S.C.App. 2000). Eventually, the Pavilion Defendants (Pavilion and McNair) stipulated that the Coen Defendants had no interest, (leasehold or otherwise) in the property and dropped the claims for specific performance, quiet title, and declaratory judgment. (Exhibit 1). Still the Pavilion Defendants refused to drop the lis pendens until DC & Sons agreed to a return of their earnest money – a clear abuse of process, and a request that DC & Sons refused. This Court dissolved the lis pendens as wrongful on March 23, 2009. (Exhibit 2).

B. THE DEFENSES

1. The Pavilion Defendants claim a cloud on title

The Pavilion Defendants claim they were justified in refusing to close as the claim by the Coen Defendants created the reasonable probability of litigation.

DC & Sons responds that a reasonable person, informed of all the facts would not consider the claim of the Coen Defendants to be a cloud on title. This is evidenced by the fact

¹ All this created the anomalous situation whereby Defendant Pavilion claimed it wanted to purchase the property, and would not allow the Crowleys to sell the property to another, but refused to buy the property because it insisted that the Coen claim be resolved. However, DC & Sons had no power to force the Coen Defendants to relinquish the claim, and since Defendant Pavilion did not serve the Coen Defendants in the case, the litigation would never resolve the Coen Defendants' claim. This is addressed in the legal issues section below.

that Defendant Pavilion has since filed a stipulation with the court that the Coen Defendants had no leasehold interest in the property and that a title insurer was prepared to write title insurance.

But even this is not the point as DC & Sons does not sue for failure to close, but for abuse of process for improperly filing a lis pendens in order to force the return of the earnest money.

2. The Pavilion Defendants Claim They Did Not Abuse Process

The Pavilion Defendants claim that they did not abuse process by filing a lis pendens. The Pavilion Defendants claim they were merely trying to enforce their rights under the contract and relied on their attorneys' advice.

However, regardless of the Pavilion Defendants' claims of good faith today, a buyer may not bring a specific performance suit if the seller is unable to convey the title desired. *See Finley v. Burgoyne, Dud*, Eq. 133, 1838 WL 1653 (SC App. Eq. 1838). Moreover, it is improper to maintain an action for specific performance when a seller is not ready willing and able to close, and Pavilion concedes in deposition that it was not ready, willing and able to close given the Coen Defendants' claim. (Exhibit 3, Depo. of Larry McNair, pgs 66-68) Further, Pavilion concedes it was using the lis pendens to get its earnest money back and to get a reduced price for the property. (Exhibit 4, Depo. of Larry McNair, pg 70, line 19 through pg 71 line 8, pg 72, line 4-25).

3. The Pavilion Defendants Claim They Did Not Breach The Contract

The contract and the testimony are undisputed. The contract required Defendant Pavilion to provide the Crowleys with financing information within 30 days. The failure to do so constitutes a default under the contract. Defendant Pavilion does not dispute that it failed to provide the financing documents necessary and the Crowleys called a default because of it. (Exhibit 5, Depo. of Larry McNair, pgs 42-44).

4. Conclusion as to Facts:

Exhibit 6 is the proposed order submitted by DC & Sons and not signed by this Court. It is attached as the issue as to Pavilion is not whether the lis pendens was proper as this Court has ruled as of March 23, 2009 it was improper. The issue as to Pavilion that remains is how soon in the filing of the lis pendens was it improper. This is going to be a legal ruling, as set forth in the proposed order, as Pavilion concedes the lis pendens was filed to collect the earnest money, was to negotiate a lower price, was not to obtain specific performance as they would not close, knew that a third party obstructed the closing, and were in breach of contract themselves.

III. LEGAL AUTHORITIES

A. Abuse of Process

1. "There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. [citation omitted] As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse. [citation omitted] Those who advise or consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors."

Broadmoor Apartments of Charleston v. Horwitz 306 S.C. 482, 486, 413 S.E.2d 9, 11 (S.C.1991).

2. The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. *See Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) ("[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect-the improper use of a regularly issued process."); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 121 at 897 (5th ed. 1984) ("[T]he gist of the tort

is ... misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.”). The purpose itself, though ulterior, need not be illegitimate; rather, the abuse occurs when the purpose is accomplished by using the process in a manner in which it was not intended to be used. See Fowler W. Harper et al., *The Law of Torts* § 4.9 (3d ed.1996).” *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union* 351 S.C. 65, 69-70, 567 S.E.2d 251, 253 (S.C.App. 2002).

3. Filing a Lis Pendens in order to obtain a money judgment is Abuse of Process. “A notice of lis pendens is improper in an action against a property owner where a constructive trust is sought only to satisfy a judgment against the owner, and the interest in the property is thus no more than collateral *** The doctrine of lis pendens may not be predicated on an action or suit seeking merely to recover a money judgment. An action for money only, even if it relates in some way to specific real property, will not support a lis pendens. Accordingly, where the primary purpose of a lawsuit is to recover damages and the action does not directly affect title to or right of possession of real property, the filing of a notice of lis pendens is inappropriate.” CJS Lis Pendens § 11, *Actions to which Lis Pendens may not be applied*; *Broadmoor Apartments of Charleston v. Horwitz* 306 S.C. 482, 413 S.E.2d 9 (S.C. 1991) (Evidence was sufficient from which jury could infer that defendant corporation and its president willfully abused process by filing lis pendens and specific performance action with respect to contract of sale for real property with ulterior purpose of preventing sale of property to third parties in hopes of obtaining financial backing with which to purchase property at advantageous price).

4. Filing a suit for Specific Performance where it is impossible for seller to convey marketable title is Abuse of Process. If the seller cannot convey marketable title

despite its best efforts, a purchaser is limited to its remedies at law, and specific performance will not lie. *Finley v. Burgoyne*, Dud.Eq. 133, 1838 WL 1653 (SCApp.Eq. 1838), see also *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Idaho App. 2006).

5. Filing a suit for Specific Performance where the contract is breached is an Abuse of Process. A purchaser cannot bring an action for specific performance when he is in breach. See *D'Amico v. Brightfelt*, 924 So.2d 872 (Fla.App. 2006) (Seller exercised its right to cancel the contract for failure to give written notice of the loan approval).

IV. DAMAGES

A. As to Breach of Contract (Pavilion): Pavilion alone is liable for \$50,000, the amount of the earnest money securing Pavilion's performance of the contract.

B. As to Abuse of Process (Pavilion & McNair): DC & Sons paid \$2,158,000 for this property, and when Pavilion and McNair refused to lift the lis pendens, DC & Sons could not resell the property for \$5-5.5 million to another purchaser. DC & Sons still has the debt on the property and has paid \$675,000 in interest and had to reclose the loan at a cost in excess of \$43,000. DC & Sons' loss is the difference in what it paid, plus the interest on the debt that has continued, and the refinancing cost as stated above.

C. Interest: Since, had the sale gone through, DC & Sons would have wound-up with cash after payment of its mortgage, this Court will be asked to add interest on the liquidated sum at eight and three-quarters percent (8 $\frac{3}{4}$ %).

V. WITNESSES AND EXHIBITS

- a) **Dianne Crowley:** Co-owner of DC & Sons, LLC. Mrs. Crowley will testify concerning her knowledge of conversations and negotiations between DC and Pavilion.

Mrs. Crowley will also testify concerning the damages and losses suffered by DC on account of the actions of Pavilion.

- b) **Cecil Crowley:** Co-owner of DC & Sons, LLC Mr. Crowley will testify concerning his knowledge of conversations and negotiations between DC and Pavilion. Mr. Crowley may also testify concerning the damages and losses suffered by DC on account of the actions of Pavilion.
- c) **Rick Brownyard:** Mr. Brownyard will testify concerning his knowledge of the Coen Defendants claims to the property which is the subject of this litigation and his knowledge of conversations and negotiations between DC and the Defendants in this case.
- d) **Richard Coen:** Owner of Lowcountry Capital and CoenCo. Mr. Coen is expected to testify concerning his communications with Mr. Maull and Mr. McNair concerning the property which is the subject of this litigation and his claimed interest in the property.
- e) **Larry McNair:** Officer of Pavilion who negotiated with DC & Sons, LLC. Mr. McNair is expected to testify concerning his knowledge of the dealings between the parties to these actions concerning the property which is the subject of this litigation and his decision to file a lis pendens.
- f) **Rick Maul:** Owner of Ocean 1 Realty, the Broker/agent for Pavilion. Mr. Maull is expected to testify concerning his knowledge of the dealings between DC and Pavilion as well as Pavilion and Richard Coen.
- g) **Jeff Vinzani:** Mr. Vinzani represented Pavilion in its efforts to purchase the Cottage on the Creek property. He is expected to testify concerning Pavilion's failure to close and Richard Coen's claim to the property which is the subject of this litigation.

- h) **Bruce Wallace:** Mr. Wallace represented Pavilion and is expected to testify concerning the filing of Pavilion's lis pendens in this matter.
- i) **Matthew Norton:** Mr. Norton represented the Coen Defendants in related underlying real estate transactions. He is expected to testify concerning his knowledge of Richard Coen's claims to the property which is the subject of this litigation.
- j) **Wendy McPhail:** Ms. McPhail was formerly the chief financial officer for the Crowleys and may testify concerning her knowledge of Richard Coen's claims to the property which is the subject of this litigation as well as her knowledge of the books and records of DC & Sons, LLC.
- k) **David Dzurisin:** Mr. Dzurisin is the accountant and tax professional for the Crowleys and may testify concerning his knowledge of the books and records of DC & Sons, LLC.
- l) **Joel Ford:** Mr. Ford is an official of the Town of Mount Pleasant Zoning Department. He is expected to testify concerning his knowledge of the current and historic zoning and parking requirements and enforcement actions for the subject property.
- m) **Christiane Farrell:** Ms. Farrell is an official of the Town of Mount Pleasant Zoning Department. She is expected to testify concerning her knowledge of the current and historic zoning and parking requirements and enforcement actions for the subject property.

See attached Exhibit List

VI. EVIDENTIARY PROBLEMS

See below.

VII. UNUSUAL QUESTION OR MATTER FOR THE ATTENTION OF THE COURT

The Defendants will be limited in its case by this Court's ruling that the lis pendens was improper as well as by the January 17, 2008 stipulation filed with this Court.

VIII. SETTLEMENT NEGOTIATIONS

Prior negotiations were unsuccessful.

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On this 14 day of January 2011
Charleston, SC

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PAVILION DEVELOPMENT
CORPORATION,

Plaintiff,

vs.

DIANNE CROWLEY, CECIL CROWLEY,
COENCO, LLC, LOWCOUNTRY CAPITAL,
LLC, WINGS OVER AMERICA, LLC,
REDWING, LLC, DC & SONS, LLC, UP
THE CREEK, INC., and RICHARD H. COEN,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-10-1457

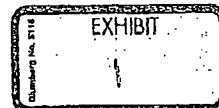
STIPULATION

This stipulation is binding on the following parties:

Plaintiff Pavilion Development Corporation, Defendant Dianne Crowley, Defendant Cecil Crowley, Defendant Wings Over America, LLC, Defendant RedWing, LLC, Defendant DC & Sons, LLC (collectively, "Crowley Defendants").

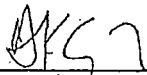
Plaintiff and Crowley Defendants agree and stipulate as follows:

1. Defendant Dianne Crowley and Defendant Cecil Crowley are members or owners of one or more of the following companies: Defendant Wings Over America, LLC, Defendant RedWing, LLC, and Defendant DC & Sons, LLC.
2. Defendant DC & Sons, LLC is the owner of record of all that certain real property which is the subject of this action, as more particularly described in the Lis Pendens filed herein as well as the Lis Pendens filed with the Clerk of Court of Common Pleas under case no. 2007-LP-10-0057 ("the subject property").
3. Defendant Wings Over America has no current, future, or contingent property interests in the subject property except as provider of funds for the purchase by DC & Sons, LLC.

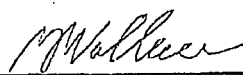


4. Defendant RedWing, LLC has no current, future, or contingent interests in the subject property except for parking which agreement is oral and terminable by DC & Sons, LLC on 30 days notice.
5. Defendant Lowcountry Capital, LLC has no current, future, or contingent interests in the subject property.
6. Defendant Richard H. Coen has no current, future, or contingent property interests in the subject property.
7. Defendant Coenco, LLC has no current, future, or contingent interests in the subject property.
8. Defendant Up the Creek, Inc. has no current, future, or contingent property interests in the subject property.
9. Dianne & Cecil Crowley executed the contract of sale the subject of this litigation in their capacity as owners of DC & Sons, LLC. The contract of sale is with DC & Sons, LLC and the parties hereto acknowledge that this was effective on the date the agreement was signed by Dianne Crowley and Cecil Crowley.
10. Plaintiff and the Crowley Defendants will execute a Stipulation of Settlement pursuant to Rule 43(k) of the South Carolina Rules of Civil Procedure.
11. Plaintiff and Defendants Dianne Crowley, Cecil Crowley, and Wings Over America, LLC will execute a Stipulation of Dismissal as to Defendants Dianne Crowley, Cecil Crowley, and Wings Over America, LLC.
12. Plaintiff will file a Notice of Dismissal as to Defendant Up the Creek, Inc.

AND IT IS SO STIPULATED THIS 17th DAY OF January 2008.


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Attorneys for Plaintiff
PAVILION DEVELOPMENT
CORPORATION

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PAVILION DEVELOPMENT
CORPORATION,
Plaintiff,

vs.

COENCO, LLC, LOWCOUNTRY
CAPITAL, LLC, DC & SONS, LLC,
and RICHARD H. COEN,
Defendants.

DC & SONS, LLC,
Third-Party Plaintiff,

vs.

OCEAN I REALTY, and JAMES R.
MAULL, JR.,
Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2007-CP-10-1457

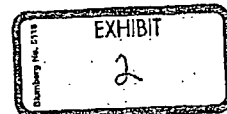
ORDER

Background

On September 4, 2008, DC & Sons, LLC ("DC & Sons") moved pursuant to § 15-11-40 of the South Carolina Code of Laws to dismiss the *lis pendens* filed by Pavilion Development Corporation ("Pavilion"); § 15-11-40 grants this Court the authority to remove a *lis pendens* on motion of an aggrieved party.

On August 11, 2006, Pavilion entered into a contract to purchase real property on Shem Creek owned by DC & Sons. Pavilion deposited \$50,000 with its escrow agent as an earnest money deposit. For reasons the subject of many pleadings, the closing did not occur and on April 9, 2007, Pavilion sued DC & Sons for specific performance and filed its *lis pendens*. Pavilion ultimately determined it did not want specific performance and filed an amended pleading seeking damages for breach of contract and seeking to impose an equitable lien on the real property for the return of the earnest money. Pavilion has refused to remove the *lis pendens*

B



that it filed with respect to its original complaint for specific performance, and now claims its *lis pendens* is proper so as to secure the return of the \$50,000 earnest money deposit.

Question Presented

Is it proper for Pavilion to file a *lis pendens* against real property to secure the return of an earnest money deposit when the earnest money is in Pavilion's realtor's escrow account?

Discussion

A. Pavilion's Original Complaint for Specific Performance

As Pavilion is no longer ready and willing to buy DC & Sons' property as conceded by Pavilion, the complaint no longer supports a cause of action for specific performance. See Shay v. Austin, 466 F.Supp.2d 664 (D.S.C. 2006) (asserting that under South Carolina law, for specific performance to be an appropriate remedy, a court of equity must find the following: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been *and remains able and willing* to perform his or her part of the contract) (emphasis added). As such, the complaint has been amended to a claim for breach of contract.

B. Pavilion's Amended Complaint for Breach of Contract & Equitable Lien

1. Breach of Contract

It is well settled that under South Carolina law, a breach of contract cause of action does not "affect title to real property", and therefore will not support the filing of a *lis pendens*. See 54 C.J.S. *Lis Pendens* § 11 (2005) quoting Armstrong v. Carwile, 56 S.C. 463, 476, 35 S.E. 196, 203(1900). "An action for money only, even if it relates in some way to specific real property,

will not support a *lis pendens*".¹ Even Pavilion does not claim that the *lis pendens* is supported by its breach of contract claims. (Amended Complaint ¶¶ 9-22).

2. Equitable Lien

As appears from Pavilion's Complaint at paragraph 16, Pavilion claims as "a direct and proximate result of the Defendant's refusal to release the escrow funds, Plaintiff has an equitable lien on the subject real property" in the amount of said escrow funds. Pavilion is wrong in this assertion. It is secured by the escrow funds and not the real property, as Pavilion's claims do not affect title to real property and the disputed funds are distinguishable from the real property.

a. Affecting the Title to Real Property

Pavilion's claim for a release of its earnest money does not affect title to real property. In 2002, the South Carolina Court of Appeals in its Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (S.C.App. 2002) decision surveyed claims that "affect title to real property". An action to establish an equitable lien is not one of them, especially when the money claimed is held in escrow.²

¹ "A mere breach of contract does not give rise to an equitable lien." Carolina Attractions, Inc. v. Courtney, 287 S.C. 140, 145 337 S.E.2d 244, 247 (Ct. App. 1985) citing U.S. v. Adamant Co., 197 F.2d 1, 10 (9th Cir.) ("there must be something more than the mere fact that a contract has been breached before a lien is impressed upon a specific fund."), cert. denied sub nom. Bullen v. Scoville, 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952); Hallmark Manufacturing, Inc. v. Lujack Construction Co., 372 So.2d 520, 521 (Fla.App.1979) (complaint alleging no more than breach of contract failed to state a claim for equitable lien); McKenna v. Turpin, 128 Ind.App. 696, 151 N.E.2d 303, 305 (1958) (where there has been nothing more than a breach of agreement to pay a commission to a broker, he is not entitled to equitable lien on property); Hipps v. McKenzie, 201 Tenn. 26, 296 S.W.2d 838, 839 (1956) (action for damages is remedy for breach of contract, not action for equitable lien on land); Keyworth v. Israelson, 240 Md. 289, 214 A.2d 168 (1965) ("A mere promise to pay a debt or obligation does not of itself, however, create a lien unless the intention to create it is apparent from the instrument and circumstances leading to it.").

² The Pond Place Court stated that an action "affecting the title to real property" allows the filing of a *lis pendens* by an interested party in order to protect their ownership interest in the property subject to the litigation. *Id.* The Court stated, "Such actions include actions attempting to set aside a fraudulent conveyance of real property, see Lebovitz v. Mudd, 293 S.C. 49, 358 S.E.2d 698 (1987); Dickerson v. Oliphant, 160 S.C. 288, 158 S.E. 546 (1931); Berger v. Shea, 150 Ga.App. 812, 258 S.E.2d 621 (1979); and actions to establish a constructive trust over real estate, see Finley v. Hughes, 106 F.Supp. 355 (E.D.S.C.1952); Kelly v. Perry, 111 Ariz. 382, 531 P.2d 139 (1975). They also include actions to quiet title, see *18 Stewart v. Fahey, 14 Ariz.App. 149, 481 P.2d 519 (1971); actions to establish the existence of an easement, see Procacci v. Zacco, 402 So.2d 425 (Fla.Dist.Ct.App.1981); actions to reform deeds to resolve a boundary dispute, see Houska v. Frederick, 447 S.W.2d 514 (Mo.1969); actions for

While not to overly complicate the obvious – that Pavilion cannot secure itself twice for the same claim, once in the escrow and once in the land – the case of *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 337 S.E.2d 244 (Ct. App. 1985) is instructive. The *Carolina Attractions* Court reasoned,

An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be proceeded against in equity for payment of a claim.

Id. at 145. The “thing” in this case is the escrow account, not the real property. Further, “Whenever, in law or in equity, a lien is created or declared there are two things prominently concerned, namely, an obligation and a *res* or *rem* to which or upon which that obligation fastens itself.” *Id.* Here, the *res* is the escrow account. Finally, “An equitable lien must rest on an expressed or implied contract.” *Id.* In this case, the real estate sales contract expressly states Pavilion is secured in the escrow fund. (Contract ¶ 5).

b. Funds Indistinguishable from the Real Property

Had Pavilion’s \$50,000 been used by DC & Sons to develop the property and no longer existed as a separate fund, then a lien may attach to the real property. In *Finley v. Hughes*, 106 F. Supp. 355 (D.S.C. 1952) the funds that were to be held in trust for the Plaintiff were used by the Defendant to purchase and build on the property. Because the funds had been put into the property such that they were indistinguishable from it, the Plaintiff was given an equitable lien in the property. In *South Carolina Federal Savings Bank v. San-A-Bel Corp.*, 307 S.C. 76, 413

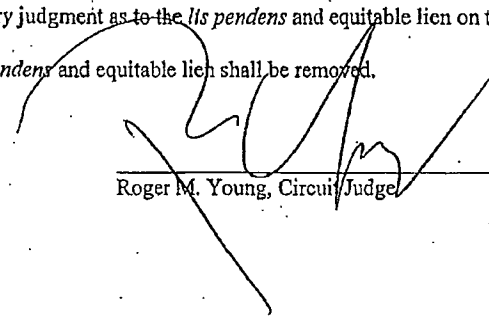
specific performance, see *Panfel v. Boyd*, 187 Ga.App. 639, 371 S.E.2d 222 (1988); *Hauptman v. Edwards, Inc.*, 170 Mont. 310, 553 P.2d 975 (1976); *Wendy’s of South Jersey v. Blanchard Mgmt. Corp. of N.J.*, 170 N.J. Super. 491, 406 A.2d 1337 (Ch.Div. 1979); and actions for mortgage foreclosures, see *Palmer v. Shelby Plaza Motel, Inc.*, 443 So.2d 285 (Fla. Dist. Ct. App. 1983).” *Id.* at 16-18, 89-90.

S.E.2d 852 (Ct. App. 1992) the funds of the Plaintiff were paid directly to the Defendant, the Defendant used the funds to build condominiums on the property, and therefore, the Court imposed an equitable lien on the real property. As these cases make clear, when the fund still exists and has not been merged into the real property, a lien cannot attach to the property. By analogy, in Shelby Construction v. Sea Garden, the South Carolina Court of Appeals held where a mechanic's lien had been "bonded off" a *lis pendens* was not required as the lien is against the substitute security. Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985).

Conclusion

Defendant's motion for summary judgment as to the *lis pendens* and equitable lien on the real property is GRANTED. The *lis pendens* and equitable lien shall be removed.

IT IS SO ORDERED!



Roger M. Young, Circuit Judge

Charleston, South Carolina.

March 20, 2009

EXHIBIT 3

1 A I guess that would be one reason. Yeah, I
2 would say that would be one reason that you would file
3 it.

4 Q There came a time when you decided you were
5 not going to buy the property for \$5 million?

6 A I think so, yeah. I mean --

7 Q When --

8 A -- the economy started kind of going down
9 hill pretty quick there.

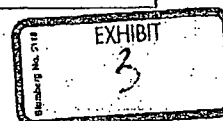
10 Q Can you tell me when you first considered not
11 going through with the purchase of the property?

12 A I don't remember the dates, I don't remember
13 the exact date, but I think we did have some
14 discussions about maybe them selling it to us at a
15 lesser price or something. I can't remember the exact
16 date on it, though.

17 Q Would you have any records about when you
18 came to -- when you first considered not buying the
19 property for the \$5 million?

20 A No, I wouldn't have any records on it, I
21 don't think. I think that our lawyer probably had some
22 communication with their lawyer about it, but I
23 don't -- I've -- I've never communicated anything
24 directly with them.

25 Q If Mr. Maull testified that you stopped --



1 that he stopped pursuing any zoning on the property in
2 June of '07, would that have been the time that you had
3 decided that you weren't going to --

4 A I don't know. I really don't.

5 Q Let's look at this next exhibit.

6 (Plaintiff's Exhibit 4 marked.)

7 BY MR. KEFALOS:

8 Q This will be Exhibit 4 to your --

9 A Okay.

10 Q You mentioned a minute ago that you remember
11 there came a time when you offered a reduced price?

12 A I think so. Okay, I see it.

13 Q Do you see this? This is a letter of
14 February 21, 2008 from Bruce Wallace to Drew Epting.

15 A Okay.

16 Q Would this represent the time that you
17 decided you were not going to buy the property for --

18 A Yes, sir.

19 Q -- \$5 million?

20 A Yes, sir. I would think so. This looks like
21 to me that he was trying to work out some kind of
22 compromise or something with -- with your client.

23 Q You know the -- so you were proposing to buy
24 the property for three and a half million instead of
25 five million?

1 A That's what this says.

2 Q I mean, is that what your recollection was?

3 A Yes. I mean, I remember that there was some
4 discussion about, you know, them selling it to us at a
5 reduced price.

6 Q Sure. I mean, that was your proposal?

7 A Yes.

8 Q Okay. Now, you knew the problem with the
9 title still existed?

10 A Uh-huh (affirmative).

11 Q That's a yes?

12 A Yes. I'm sorry.

13 Q So you were willing to take the -- the
14 property with the title problem if you could get it for
15 3.5 million?

16 MR. DAVID: Object to the form.

17 A (Continuing) I would think that -- I would
18 still think we would have to do something with the
19 title. I don't know, I don't know. I would still
20 think we would have to do something about that.

21 Q So you -- this reduced price was not a
22 proposal to buy the property with the condition of the
23 title as it was?

24 A Ask me that one more time.

25 Q Well, what I want to know is, you knew that

EXHIBIT 4

1 complaint in August 2007?

2 A No, sir, I don't.

3 Q Do you know that in August of 2007, you
4 dropped your claim for specific performance?

5 A No, I don't.

6 Q Well --

7 A If that's what this says, I mean --

8 Q Yeah, take a look at that and tell me if
9 there's -- if it omits a claim for specific
10 performance.

11 A If it specifically omits it or it just ain't
12 in here?

13 Q It just is not in there.

14 A Okay. I don't see that in here. I don't
15 see --

16 Q So in --

17 A -- anything that says specific performance in
18 here.

19 Q Sure. So in February of '08, you had decided
20 that you were not willing to purchase the property for
21 the \$5 million?

22 A That was an offer that we had made, I guess
23 to settle a -- a dispute that we were having.

24 Q Sure. And in August of '08, you formally
25 dropped your claim to force the Crowleys to sell you

1 the property for \$5 million?

2 A This amended complaint does not ask for
3 specific performance.

4 Q Okay. Now, were you still willing to buy the
5 property for a lesser amount --

6 A At --

7 Q -- in August of '08?

8 A I don't know.

9 Q Now, you did not dismiss the Lis Pendens
10 after you decided not to buy the property for the \$5
11 million contract price?

12 A We did not do what now?

13 Q You did not dismiss the Lis Pendens --

14 A Okay.

15 Q -- on the property?

16 A Okay.

17 Q You're aware of that?

18 A No, I'm not.

19 Q Now, you know that keeping a Lis Pendens in
20 place created a cloud on the title?

21 A We're in a lawsuit. Like I said, I -- I've
22 always been told you had to file a Lis Pendens on a
23 piece of property when you had an argument over land.
24 What I was told, I don't know.

25 Q Sure. But at this point in August of '08,

1 you had decided that you weren't interested in buying
2 the property any longer?

3 A Well, that may be true.

4 Q Okay. You knew that keeping the Lis Pendens
5 on the property would prevent the Crowleys from being
6 able to sell it to anybody else?

7 A I think that it does.

8 Q Yeah. Now, why would you seek to prevent the
9 Crowleys from selling the property to someone else
10 after August of '08 if you had decided that you no
11 longer wanted to buy it?

12 MR. DAVID: Object to the form.

13 A (Continuing) Because I felt like they
14 defaulted on their contract with me and they're still
15 holding my earnest money. We asked for our earnest
16 money back, they wouldn't give it back to us, and they
17 -- they couldn't close. They didn't show up on the
18 closing date. They said they can't close. They
19 defaulted. That's what I feel like.

20 Q Well, the realtor was holding your earnest
21 money?

22 A Well, they -- they have to sign something for
23 him to release it, too, as you know.

24 Q You wanted it back?

25 A Absolutely.

EXHIBIT 5

1 A Yes, sir.

2 Q Did you make application for a loan?

3 A I'm sure that Mike talked to the bank. I

4 don't know if he -- I don't know what his arrangement

5 is with that bank, how he does business with them as

6 far as --

7 Q Uh-huh (affirmative).

8 A -- filling out any kind of a formal whatever,

9 I don't know.

10 Q Okay.

11 A I really don't.

12 Q Did you give proof of the application to the

13 seller?

14 A I don't know.

15 (Jay Davis is now present.)

16 A (Continuing). I don't think so.

17 Q Okay.

18 A I don't think so.

19 Q Now, the -- the paragraph requires proof of

20 the application of the loan to go to the seller.

21 A Uh-huh (affirmative).

22 Q And without doing that, it says that the

23 buyer goes in default.

24 A Uh-huh (affirmative).

25 Q Did it ever occur to you that you might be in

1 default?

2 A No, sir.

3 Q You didn't --

4 A No. I mean, I knew we were going to come up

5 with the money. We had the money.

6 Q All right. Well --

7 A I mean, you know...

8 Q Let's see, it also says that -- that

9 paragraph 6 --

10 A We were never notified of it being in default

11 either.

12 Q Well, I don't read this -- is there something

13 in the paragraph that says that you have to be

14 notified?

15 A No, sir.

16 Q It just says that you have to notify?

17 A You're right.

18 Q Okay.

19 A Yes, sir.

20 Q It says also that you have to -- you've got

21 to give seller, that is the Crowleys --

22 A Uh-huh (affirmative).

23 Q -- written proof of loan approval within 90

24 days.

25 A Uh-huh (affirmative).

NOVEMBER 20, 2009

LARRY MCNAIR

Page 44

1 Q It does say that?

2 A It says that, okay.

3 Q Yeah. Did -- did you get formal loan
4 approval?

5 A Not to my knowledge.

6 Q Did you provide the Crowleys with written
7 notice of loan approval?

8 A No, sir, not to my knowledge.

9 Q Now, it says that if the buyer doesn't
10 provide written notice of a loan approval, the seller
11 has the right to cancel the contract.

12 A In that same paragraph?

13 Q Yes.

14 A Okay. I don't see that, but I'll take your
15 word for it.

16 Q Let's see if we can find it.

17 A Okay. Yeah, I see it, okay, I got it.

18 Q Okay.

19 A Yeah, yeah.

20 Q I'm missing a letter here that I -- that I
21 want to look at, so let's -- let's take a break for a
22 second while I get the --

23 A Sure.

24 VIDEOGRAPHER: And we're off the record at

25 9:53 a.m.

CAROLINA REPORTING (843) 832-0801

EXHIBIT 6

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DC & Sons, LLC,

Plaintiff,

vs

Richard H. Coen, Lowcountry Capital, LLC, Larry
McNair, Coenco, LLC & Pavilion Development
Corp.,

Defendants.

Pavilion Development Corporation,

Plaintiff,

vs

DC & Sons, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 08-CP-10-4675

) **ORDER DENYING DC & SONS'**
) **MOTION FOR SUMMARY JUDGMENT**
) **AS TO MCNAIR & PAVILION**

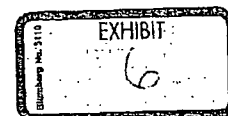
) C/A No. 07-CP-10-1457

This matter came before me on Plaintiff, DC & Sons' motion for summary judgment as to Defendants Larry McNair ("McNair") and Pavilion Development Corp.'s ("Pavilion") liability for abuse of process. McNair is sued individually as he is the principal of Pavilion and was personally involved in the transaction the subject of Plaintiff's tort claims. *See Hunt v. Rabon*, 275 S.C. 475, 478, 272 S.E.2d 643, 644 (S.C. 1980). I have considered the arguments of counsel and reviewed the record filed with this Court. As the defenses claimed by McNair and Pavilion create material questions of fact, I deny DC & Sons' motion for summary judgment.

FINDINGS OF FACT

The following facts are undisputed:

1. Defendant Larry McNair is Vice President of the Defendant Pavilion (Exhibit 1, McNair deposition, page 27) and as such, on August 18, 2006 signed a contract for



the purchase of lots 18, 19 & 22 ("the Cottage on the Creek") from DC & Sons for \$5 million, closing to be had by December 31, 2006. (Exhibit 2, Contract).

2. By the terms of the contract, Pavilion was to make a \$50,000 earnest money deposit, which was made and kept in an escrow account with real estate agent Ocean One Realty. The contract stipulates that the escrow money would be non-refundable at the end of the due diligence period.
3. By the terms of the contract, Pavilion was to provide DC & Sons "with written satisfactory loan approval within 90 consecutive days" and if DC & Sons was not provided with such information, it had the option of canceling the contract. (See contract at paragraph 6). Pavilion & McNair concede loan approval was never achieved:

Q Yeah. Did -- did you get formal loan approval?

A Not to my knowledge.

Q Did you provide the Crowleys with written notice of loan approval?

A No, sir, not to my knowledge.

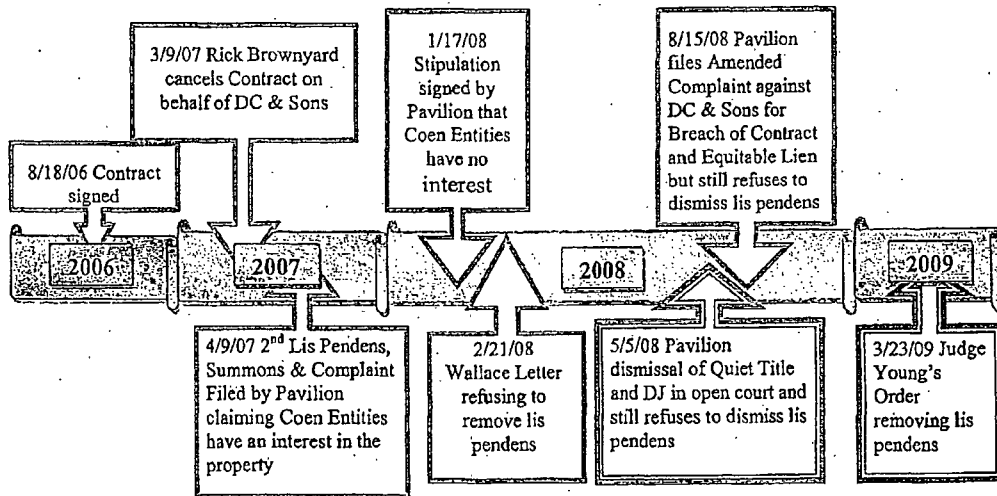
(Exhibit 1, Deposition of Larry McNair, pg 45, lines 4-9)

4. Richard Coen claimed that he had a leasehold in interest in the property, which Pavilion considered a cloud on title. (Exhibit 1, McNair deposition pg 60; Exhibit 3, Wallace letter of 2/21/08).
5. Despite DC & Sons' assurances that the Coen Defendants had no interest in the Cottage on the Creek property, even to the point of offering to provide title insurance (Exhibit 4, offer of title insurance), Pavilion refused to close.
6. On March 9, 2007, Rick Brownyard, counsel for DC & Sons, canceled the contract (Exhibit 5).

7. On April 9, 2007, Pavilion filed a lawsuit for specific performance, quiet title and declaratory judgment and filed a lis pendens on the Cottage on the Creek property. (Exhibit 6, Original Pavilion complaint).
8. Pavilion's complaint named Richard Coen and his entities Lowcountry Capital, LLC and Coenco, LLC, (collectively the "Coen Defendants") but Pavilion never served the Coen Defendants, they never answered, and no attorney made an appearance on their behalf. (Exhibit 7, Docket report and attachments).
9. On January 17, 2008, Pavilion entered into a stipulation wherein Pavilion stipulated that none of the Coen Defendants had any "current, future, or contingent property interests in the subject property" (Exhibit 8, Stipulation).
10. As a result, inter alia, of the stipulation, Counsel for DC & Sons asked that the lis pendens be removed from the property.
11. Counsel for Pavilion and McNair refused, claiming the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent. (Exhibit 9, Wallace email of 8/15/08).
12. On February 29, 2008, DC & Sons filed a motion to dismiss the specific performance claim. The motion to dismiss was heard on May 20, 2008, and at the hearing Pavilion agreed in open court to dismiss its actions for declaratory relief and quiet title. Judge Goode denied the motion to dismiss as the SCRCP 12 motion went beyond the pleadings. (Exhibit 10, Order of Goode)
13. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and

seeking to impose an equitable lien on the Cottage on the Creek property. (Exhibit 11, Pavilion amended complaint).

14. On March 23, 2009, this Court held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was improper, as an action for money damages will not support a lis pendens. (Exhibit 12, Order)



FINDINGS OF LAW

The South Carolina Supreme Court has defined abuse of process as "the employment of legal process for some purpose other than that for which it was intended by the law to effect – the improper use of a regularly issued process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (S.C. 1967). In *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914, the Court of Appeals articulated the elements of an abuse of process claim: (a) "an ulterior purpose" and (b) "the improper use of process after it has been issued". While DC & Sons can establish the later element as a matter of law, the ulterior purpose requirement creates a factual issue in this case.

A. Pavilion's Improper Acts

1. Pavilion's filing of an action for specific performance was a use of process not proper

An action for specific performance will lie only when the supposed cloud on title is due to and caused and controlled by the seller. *See Finley v. Burgoyne, Dud*, Eq. 133, 1838 WL 1653 (SC App. Eq. 1838) (If a seller cannot convey marketable title through no fault of its own, the purchaser has the option of rescinding the contract, or taking whatever title the seller could convey, and his failure to make any election constitutes a default by him under the terms of the contract); *See also Calligar v. Fradkoff* 154 A.D.2d 495, 498, 546 N.Y.S.2d 121, 124 (N.Y.A.D. 2 Dept., 1989) (Specific performance was not warranted where the seller was unable to convey the property in accordance with the terms of the contract due to the intervention of third-party litigation entirely outside of the seller's control). Defendants', then (see Exhibit 3, Wallace letter of 2/21/08) and now (See, Exhibit 1, Deposition of Larry McNair, pg. 60 line 10-20), claim they did not close because of the Coen Defendants' claims. Pavilion could either have closed or walked away from the contract, but filing a lis pendens based upon a specific performance count was not an option and was wrongful.

2. Pavilion concedes it was in breach

An action for specific performance will lie only when the buyer can demonstrate that it was ready willing and able to perform by a tender of the purchase price and is not itself in breach.¹ *See See King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (S.C.App. 1984) (An action for specific performance (being an action in equity) will lie only when the buyer can prove

¹ Failure to rescind or to take title was also a default under the contract. *Calligar*, supra.

it was not itself in breach of the contract); *Shay v. Austin*, 466 F.Supp.2d 664 (D.S.C. 2006) (The party who comes to compel performance must show he has performed his part, or has been and remains ready, able and willing to perform his part of the contract). In the present case, Defendants' filing an action and a *lis pendens* was not proper because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons.

3. Filing and maintaining actions for declaratory judgment as to what parties had an interest in the Cottage on the Creek property and quiet title was improper

An action to quiet title coupled with a *lis pendens* will lie only when all persons known to claim an interest in the property have been joined in the action. *See 74 C.J.S. Quieting Title* § 60 (2010). Because Defendants failed to join and serve the Coen Defendants, the filing of a *lis pendens* based upon the quiet title cause of action was improper *ab initio*. (Exhibit 7, Docket report).

4. The Stipulation

An action for specific performance will not lie absent a bona fide cloud on title. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C.App. 2002). Pavilion stipulated there was no cloud on title on January 17, 2008. However, it waited almost eight months before amending its complaint to drop its cause of action for specific performance and refused to remove the *lis pendens* from the property until this Court ordered it to do so. The continued maintenance of a *lis pendens* was improper after Pavilion stipulated there was no cloud on title. (See, Exhibit 8, Stipulation).

5. Refusing to remove the *lis pendens* constitutes an improper act in the use of process

A *lis pendens* will not lie unless coupled with an action affecting the title to real property. See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C.App. 2002) (Only an action "affecting the title to real property" allows the filing of a *lis pendens*). A claim for damages or declaratory relief will not support a *lis pendens*. See *Armstrong v. Carwile*, 56 S.C. 463, 476, 35 S.E. 196, 203 (SC 1900) ("An action for money only, even if it relates in some way to specific real property, will not support a *lis pendens*"). As this Court has previously ordered, Pavilion's continued use of the *lis pendens* based upon its amended complaint was improper.

For all of the reasons above, the use of the *lis pendens* against the property was improper.²

B. Ulterior Purpose

Without an ulterior purpose, there can be no abuse of process. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983). The ulterior purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. *Davis v. Epting*, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994). "The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties." *Horry County v. Ray*, 382 S.C. 76, 81, 674 S.E.2d 519, 522 (S.C. App. 2009).

While there is evidence that McNair and Pavilion were using the lawsuit and the *lis pendens* to compel a better purchase price from DC & Sons and a return of the earnest money

² It does not matter that Pavilion and McNair's actions were through the conduct of their lawyers. See *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (S.C.App. 2007) (Acts of an attorney are directly attributable to and binding upon the client).

deposit (See, Exhibit 3, Exhibit 9, and Exhibit 1 at page 65 line 8 through page 66 line 16 and pages 72-75) this appears to be disputed.³

It is therefore ORDERED, that DC & Sons' motion for summary judgment is denied.

The Honorable Roger M. Young, Sr.

On this ____ day of _____ 2010
Charleston, South Carolina

³ Though Wallace's email of August 15, 2008 (Exhibit 3) states "*As I have told you in the past, if your client will release the escrow money, my client will lift the lis pendens;*" and McNair in his deposition states:

Q Yeah. Now, why would you seek to prevent the Crowleys from selling the property to someone else after August of '08 if you had decided that you no longer wanted to buy it? MR. DAVID: Object to the form.

A (Continuing) Because I felt like they defaulted on their contract with me and they're still holding my earnest money. We asked for our earnest money back, they wouldn't give it back to us, and they -- they couldn't close. They didn't show up on the closing date. They said they can't close. They defaulted. That's what I feel like. (Page 72, lines 8-19).

DC & SONS
TRIAL
EXHIBIT
LIST

Trial #	DATE	Memo	Bates or other ID
1	3/30/1995	03-30-1995 Magwood Lease	09412
2	11/1/2001	11-01-2001 Lowcountry Capital, LLC Master Lease	PLT-0501
3	6/26/2003	06-26-03 Parking Exhibit for Shem Creek Property	10565
4	10/3/2003	10-03-03 RedWing, LLC Operating Agreement	RWDC 1969
5	10/3/2003	10-03-03 Commercial Lease between Lowcountry Capital and RedWing, LLC	19975
6	10/3/2003	10-03-03 HUD Settlement Statement	PLT-0745
7	10/3/2003	10-03-03 Management Agreement	PLT-0755
8	1/1/2004	Tax Receipts & Plat - 2007, 2006, 2005, 2004	RWSupp3 028; RWSupp3 129
9	1/30/2004	01-30-04 E-mail Memo from Coen to RedWing, LLC;	PLT-0001
10	3/9/2004	3-9-04 Red Wing Profit & Loss October 2003 to March 2004	
11	3/15/2004	3-15-04 RedWing Transactions by Account	
12	3/15/2004	3-15-04 RedWing Transactions by Account Crowley Capital Account	
13	3/15/2004	3-15-04 Red Wing Transactions by Account Due from Coen	
14	3/26/2004	03-26-04 E-mail memo from Coen to Crowley	PLT-0004
15	5/12/2004	05-12-04 Term Sheet from Coen	NMRS-0144
16	5/24/2004	05-24-04 Copy of Memo from Dianne Crowley to Coen	19736
17	6/4/2004	06-04-04 E-mail memo Yantis to Crowley; Crowley response; Grant to Crowley	NMRS-0150; NMRS-0152 20000
18	6/4/2004	06-04-04 E-mail memo from Grant to Dianne Crowley	00180
19	6/6/2004	06-06-04 E-mail from Grant	7943
20	6/9/2004	06-09-04 Coen ltr to Christ Episcopal Church with note to hold	28105
21	6/10/2004	06-10-04 Membership Interests Purchase and Sale Agreement	PLT-0442
22	6/10/2004	06-10-04 Commercial Lease between Lowcountry Capital, LLC and RedWing, LLC	RWDC 1788
23	6/10/2004	06-10-04 Sublease Agreement between COENCO & RedWing, LLC for SUTC	PLT-0415
24	6/10/2004	06-10-04 Fax from Coen to Futrell	PLT-0007
25	6/10/2004	06-10-04 Closing Documents Provided to RedWing, LLC	RWDC 1746
26	6/14/2004	06-14-04 Letter from Hedegor to Cecil Crowley	9489
27	7/28/2004	07-28-04 SCDHEC OCRM Permit for 130 Mill Street	9355
28	9/14/2004	09-14-04 E-mail memo from Coen to Hedegor & Crowley	PLT -1835
29	9/21/2004	09-21-04 E-mail memo from Hedegor to Cecil Crowley	9508
30	10/22/2004	10-22-04 Coen ltr to Brownyard	9297
31	12/7/2004	12-07-04 E-mail memo from Coen to Brownyard	09155
32	2/8/2005	02-08-05 Sidbury Coen EM Re Magwood	
33	2/9/2005	02-09-05 Brownyard Coen EM Re Magwood-2	
34	3/3/2005	03-03-05 E-mail memo string from Coen to McPhail	RWDC 0016
35	3/11/2005	03-11-05 Letter from Norton to Brownyard	09295
36	3/14/2005	03-14-05 E-mail String between Brownyard and Norton	90-168
37	3/17/2005	03-17-05 Letter from Brownyard to Coen	09293
38	3/20/2005	03-20-05 Brownyard EM Re SUTC	
39	3/21/2005	03-17-05 Brownyard Letter to Coen (via 03-21-05 Grant e-mail memo to McPhail)	RWDC 0005
40	3/22/2005	03-22-2005 Letter from Ford, TOMP	10805
41	3/23/2005	03-23-05 Coen Crowley EM	
42	3/28/2005	03-28-05 E-mail memo string between Brownyard and Killough	90-183
43	4/1/2005	04-01-05 E-mail memo from Coen to Norton, et al - "Let's Litigate"	90-210
44	4/2/2005	04-02-2005 Agreement for Assignment of Leasehold Interest and Forbearance Agreement among CoenCo, DC & Sons & RedWing	20080
45	4/26/2005	04-26-05 Letter Coen to Ford	PLT-0014
46	5/24/2005	05-24-05 Assignment of Leasehold Interest Signed RB Coen	RWDC 1926
47	5/24/2005	05-24-05 HUD Settlement Statement for 130 Mill Street & Parcel 22	9147
48	7/29/2005	07-29-05 Plat showing SUTC Parcels and proximity to Red's	RWDC 1913
49	1/9/2006	01-09-06 Development Impact Assessment	10571
50	1/24/2006	01-24-06 Meeting with Billy Simmons	26404

Trial #	DATE	Memo	Bates or other ID
51	3/23/2006	03-26-03 Coen EM to Grant	17073
52	4/1/2006	04-01-06 Lowcountry Capital, LLC Ground Lease with Snowmill, LLC	PLT-2343
53	4/26/2006	04-26-06 Letter from Coen	RWDC 2026
54	5/22/2006	05-22-06 E-mail memo from Grant to Dianne Crowley	PLT-0049
55	5/22/2006	05-22-06 Red Wing LLC Balance Sheet as of May 22, 2006	RWDC 00282
56	5/31/2006	05-31-06 E-mail memo from Coen to the Crowleys	PLT-0016
57	6/4/2006	6-04-06 Red's Ice House Transactions by Account	
58	6/12/2006	06-12-06 E-mail memo from Grant to Dianne Crowley	PLT-0047
59	6/12/2006	06-12-06 E-mail memo from Dianne Crowley to Grant	PLT-0024
60	6/14/2006	06-14-06 Coen E-mail	PLT 0021
61	6/16/2006	06-16-06 Dianne's sheet showing \$6.2mm	DC SUPP 003
62	7/12/2006	07-12-06 Due Dillgence questions and follow up Items	PLT-0390
63	7/13/2006	07-13-06 Norton Grant Coen EM Draft of Notice Letter to Dianne Crowley	
64	7/20/2006	07-20-06 Coen E-mail	PLT 0353
65	7/26/2006	07-26-06 Dillon ltr to Coen	PLT-0403
66	7/26/2006	07-26-06 Draft Sublesor's Estoppel Certificate	PLT-0406
67	8/5/2006	08-05-06 Own the Landing Internet Page	RWDC 01916
68	8/7/2006	08-07-06 E-mail memo from Crowley to Coen	PLT-0354
69	8/8/2006	08-08-06 Letter from Norton to Crowley	PLT-0145
70	8/8/2006	08-08-06 Crowley e-mail	Depo Exhibit
71	8/16/2006	08-16-06 E-mail memo from McPhail to Grant	RWDC-1838
72	8/18/2006	08-18-06 Contract with Pavilion	Vinzani Depo Ex 5
73	8/22/2006	08-22-06 E-mail memo string between Grant and McPhail	PLT-0035
74	8/23/2006	08-23-06 Norton Grant Coen EM Assignment of Leasehold Interest - Redwing LLC	
75	8/26/2006	08-28-06 Norton - TOMP EM The Landing - Letter to TOMP	
76	8/31/2006	Listing of Cancellations and refund checks	DCSupp2-00152
77	9/1/2006	09-00-06 Plat TOMP-PD-0207 Testy Ex 1	
78	9/7/2006	09-07-06 Letter from Norton to Crowley	19890
79	9/11/2006	09-11-06 Summary Development Budget	15933
80	9/11/2006	09-11-06 Coen Haborak EM Re Meeting	
81	9/11/2006	09-11-06 Letter from Brownyard	9158
82	9/13/2006	09-13-06 McPhail ltr to Ocean 1	NP 00024
83	9/15/2006	09-15-06 Letter from Rick Brownyard	PLT 0074
84	9/18/2006	09-18-06 Grant Coen EM RE RHC comments to Redraft of Complaint	
85	9/20/2006	09-20-06 Grant E-Mail	0316
86	9/21/2006	09-21-06 TOMP approval if Red's taken private	38810
87	9/21/2006	09-21-06 Coen Norton Grant EM Redwing SUTC	
88	10/4/2006	10-04-06 Letter from Coen to RedWing, LLC - Notice of Default	10700
89	10/4/2006	10-04-06 E-mail memo from Coen to Ford with Attachment	10699
90	10/17/2006	10-17-06 Coen E-mail	17518
91	10/20/2006	10-20-06 October 2006 Equity Investor Summary	16107
92	10/26/2006	10-26-06 Crowley ltr to Coen	DCSUPP2 00004
93	10/26/2006	10-26-06 Crowley ltr to Ocean 1	DCSUPP2 00005
94	10/30/2006	10-30-06 Williams E-mail to Coen	0302
95	11/9/2006	11-09-06 Back up Contract Offer from Tim Rogers	DCSupp2-00137
96	11/10/2006	11-10-06 Coen EM to Norton from Docs Produced by Babcock 1.8.10-12	
97	11/17/2006	11-17-06 Hollingsworth E-mail to Coen	0344
98	11/17/2006	11-17-06 Letter from Ford, TOMP	PLT-0025
99	11/20/2006	11-20-06 Vinzani ltr to Epting	Vinzani Depo Ex 1
100	11/27/2006	Pavilion Owners Title Commitment from NP title company	NP 00211
101	11/30/2006	11-30-06 Brownyard ltr to Vinzani	Vinzani Depo Ex 2
102	12/6/2006	12-06-06 Glick letter to Coen	29654
103	12/8/2006	12-08-06 Coen E-mail with Joel Green	18539
104	12/8/2006	12-08-06 Coen E-mail to Henry and Joel	18540
105	12/8/2006	12-08-06 E-mail exchange Brownyard and Vinzani	Vinzani Depo Ex 3

Trial #	DATE	Memo	Bates or other ID
106	12/8/2006	12-08-06 Vinzani ltr to Brownyard and Epting	Vinzani Depo Ex 4
107	12/12/2006	12-12-06 Epting ltr to Vinzani	Vinzani Depo Ex 6
108	12/15/2006	12-15-06 Transcript of Hearing, pp 17	Trans Excerpt
109	12/21/2006	12-21-06 Vinzani ltr to Epting and Brownyard	Vinzani Depo Ex 7
110	12/21/2006	12-21-06 Payoff Memos from Brownyard	NP 00216
111	12/27/2006	12-27-06 Brownyard EM to Vinzani	RB 0165
112	12/27/2006	12-27-06 Draft NP(Closing Documents	NP 00219
113	1/10/2007	01-10-07 Brownyard E-mail to Vinzani	Vinzani Depo Ex 13
114	1/18/2007	01-18-07 Letter from Sargent, TOMP	10582
115	1/24/2007	01-24-07 E-mail from Coen	19035
116	2/13/2007	02-13-07 Brownyard ltr to Vinzani	Vinzani Depo Ex 8
117	2/28/2007	02-28-07 Atlantic Appraisals	07552
118	3/4/2007	03-04-07 Brownyard ltr to Vinzani	McNair Depo Ex 3, Vinzani Depo Ex 9
119	3/9/2007	03-09-07 Brownyard E-mail to Vinzani	McNair Depo Ex 2; Vinzani Depo Ex 10
120	3/9/2007	03-09-07 Wallace ltr to Brownyard	Vinzani Depo Ex 14
121	3/14/2007	03-14-07 Letter from Coen to Crowley	PLT-0142
122	3/20/2007	03-20-07 Wallace ltr to Epting	Vinzani Depo Ex 15
123	3/23/2007	03-23-07 AKE Response to letters from Coen	44514; 44515
124	3/28/2007	03-28-07 Update to the Development Impact Assessment	10579
125	4/4/2007	04-04-07 Letter from Coen	PLT-0137
126	4/4/2007	04-04-07 Letter from Coen to Dianne Crowley, RedWing, LLC	PLT-0137
127	4/20/2007	04-20-07 Wallace ltr to Epting	Vinzani Depo Ex 16
128	4/25/2007	04-25-07 Letter from Ford, TOMP	10592
129	4/30/2007	4-30-07 Coen EM from Docs Produced by Babcock 1.8.10	
130	5/15/2007	04-15-07 Coen E-mail to Evans Construction	18288
131	5/25/2007	05-25-07 Signed Affidavit of Dianne Crowley - not filed	DCSupp2-00075
132	12/20/2007	12-20-07 Reds Engineering Inspection Letter Arb Ex 55	
133	1/7/2008	01-07-08 EM String leading up to Eviction Letter from Mike Spears Arb Exhibit 57	
134	1/17/2008	01-17-08 Stipulation fully executed	
135	2/21/2008	02-21-08 Motion for Emergency Hearing and Application for ejectment	
136	2/21/2008	02-21-08 Wallace ltr to Epting	McNair Depo Ex 4
137	7/25/2008	07-25-08 Arbitration Order Issued by Tom Willis	
138	7/15/2008	07-15-08 Appraisal of COTC Property	
139	4/30/2009	04-30-2009 Closing Statement on Loan Refinance	
140	3/17/2007	03-17-07 Lis Pendens	
141	4/9/2007	04-09-07 Lis Pendens	
142	4/9/2007	04-09-07 Pavilion Summons and Complaint	
143	8/15/2008	08-15-08 Pavilion Amended Summons and Complaint	
144	5/14/2010	05-14-10 COTC NOTE PAYMENT HISTORY	
145	1/11/2007	01-11-07 Parking Submittal from COEN to TOMP	TOMP-PD 0146
146	1/10/2011	Magwood Lease Chart	
147	1/10/2011	Plat for Trial	
	4/9/2009	Deposition of Ellis Lesemann Parker Poe 30(b)6 and Exhibits thereto	
	4/13/2009	Deposition of Matthew Norton and Exhibits thereto	
	10/29/2009	Deposition of James R. Maul, Jr and Exhibits thereto	
	10/29/2009	Deposition of Richard Coen and Exhibits thereto	
	10/29/2009	Deposition of Ocean One Realty 30(b)6 and Exhibits thereto	
	10/30/2009	Deposition of M. Jeffrey Vinzanni and Exhibits thereto	
	10/30/2009	Deposition of Bruce Wallace Nexsen Pruet 30(b)6 and Exhibits thereto	
	11/20/2009	Deposition of Larry McNair and Exhibits thereto	
	11/20/2009	Deposition of Pavilion 30(b)6 and Exhibits thereto	
	1/13/2010	01-13-10 Documents and e-mail produced by Coen Defendants	
	1/19/2010	Documents Produced RB TOMP on 1-19-10	TOMP-PD-00001 et seq
	1/21/2010	Deposition of Christiane Farrell, TOMP and Exhibits thereto	

Trial #	DATE	Memo	Bates or other ID
	8/12/2010	Deposition of Richard Coen and Exhibits thereto	
	12/2/2010	Deposition of Richard Coen and Exhibits thereto	
	1/11/2011	Deposition of Matthew Norton and Exhibits thereto	
		Documents and Exhibits introduced by any party at the Arbitration hearing before Tom Wills	
		Depositions and Exhibits taken by any party to the Arbitration heard by Tom Wills	
		Additional Depositions and Exhibits taken by any party to this litigation	
		Documents produced by any Party or Third Party in this litigation	
		Discovery Responses provided by any Party in this litigation	
		Affidavits served by any Party in this litigation or produced by any party in this litigation	

EXHIBIT D

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-10-4675

DC & Sons, LLC

v

Pavilion Development Corp

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

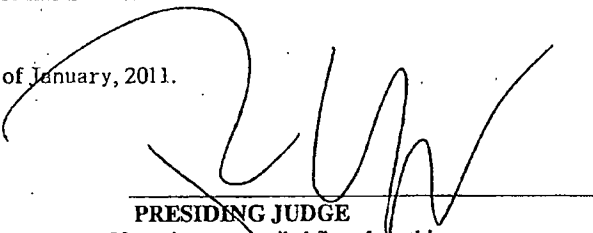
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit) ☐ Rule 43(k), SCRCF (Settled); ☒ Other ☐
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

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

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



PRESIDING JUDGE

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

①

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

Recital:

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

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

a. Parlon ~~was~~ was in breach;

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

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

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

e. a stipulation was entered

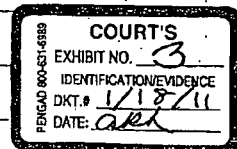
stating Can had no claims and became an

f. Parlon sought a lower price

or a return of the earnest money

before it would remove the Lis Pendens

DF



(2)

Agreement

1. The Recital are part of this agreement
2. In light of the Court's ruling Parbon & M^e Nair have proposed & DC & Sons has agreed as follows:

a. DC & Sons releases M^e Nair from ^{the Lowell Franchise} all claims to subject of this ~~act~~ suit & waives trial against Parbon ~~as~~ on punitive damages. In return Parbon confesses judgment in the amount of DC & Sons claimed actual damages in the amt & form shown on Exh A. M^e Nair & Parbon release DC & Sons from all claims ^{which are} the subject of this action.

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

At Sons
DC & Sons
release
Parbon &
M^e Nair
assign
all claims
to include
Breach of Fid. Duty
Professional Negligence
etc.

(3)

lit. gtr, trial, appeal, settlements
the waiver of the atty client
a writ produced pursuant with the
Nexen Trust firm. Further, P & M
agree to cooperate in the prosecution
of this action & to pursue the lit. gtr
as if they retained the right to
all proceeds. The cost of the litigation
with ~~the~~ ~~and~~ will be borne by
D C & Sons alone. ~~But~~ P & M
acknowledge suit will be brought
in their names

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

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

defense cost & compensation for loss
of business & emotional distress

I witnessed the signature
of all three parties.
John W. Akerman 1/18/2011
JOHN W. AKERMAN
NOTARY EXPIRES 11/7/2016

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

The parties agree to this 1/18/2011
D C & Sons Jay M. P. P. P.
P. P. P.

Harry M. P. P.

EXHIBIT E

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DC & Sons, LLC,

Plaintiff,

vs

Richard H. Coen, Lowcountry Capital, LLC, Larry
McNair, Coenco, LLC & Pavilion Development
Corp.,

Defendants.

Pavilion Development Corporation,

Plaintiff,

vs

DC & Sons, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 08-CP-10-4675

) ORDER GRANTING DC & SONS
) SUMMARY JUDGMENT AS TO THE
) LIABILITY OF PAVILION FOR ABUSE OF
) PROCESS AND BREACH OF CONTRACT

) C/A No. 07-CP-10-1457

FILED
2011 JAN 18 AM 11:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before me on Plaintiff, DC & Sons' renewed motion for summary judgment and motion in limine to exclude testimony and/ or evidence relating to Defendant Pavilion Development Corp.'s ("Pavilion") liability for breach of contract and abuse of process. I have considered the arguments of counsel and reviewed the record filed with this Court.

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

THE UNDISPUTED FACTS

1. On August 18, 2006, Defendant Larry McNair, as vice president of Pavilion, signed a contract for the purchase of lots 18, 19 & 22 ("the Cottage on the Creek") from DC &

R

Sons for \$5 million, closing to be had by December 31, 2006. (See McNair deposition, pg 27).

2. Mr. McNair testified Pavilion was not ready, willing or able to close as long as Richard Coen claimed that he had an in interest in the property. (McNair deposition pgs 60, 66-68; Wallace letter of 2/21/08).
3. Mr. McNair testified Pavilion failed to provide proof of financing as required by the contract (though there is some evidence that he could have funded the closing and would have but for the Coen claims. (Exhibit 5, Depo. of Larry McNair, pgs 42-44).
4. Mr. McNair testified Pavilion was using the lis pendens to get its earnest money back and to get a reduced price for the property. (Exhibit 4, Depo. of Larry McNair, pg 70, line 19 through pg 71 line 8, pg 72, line 4-25).
5. On January 17, 2008, Pavilion entered into a stipulation wherein Pavilion stipulated that none of the Coen Defendants had any "current, future, or contingent property interests in the subject property" (See stipulation).
6. Despite the stipulation, Counsel for Pavilion and McNair refused to remove the lis pendens, claiming the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent. (Wallace email of 8/15/08 & letter of 2/21/08).
7. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and seeking to impose an equitable lien on the Cottage on the Creek property.



8. On March 23, 2009, this Court held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was improper, as an action for money damages will not support a lis pendens.

LIABILITY AS A MATTER OF LAW

The South Carolina Supreme Court defines abuse of process as "the employment of legal process for some purpose other than that for which it was intended by the law to effect – the improper use of a regularly issued process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (S.C. 1967). The elements of abuse of process are: (a) an ulterior purpose; and (b) a willful act in the use of process not proper in the regular conduct of the proceeding. *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562 (Ct. App. 2006). This Court's focus in this order is the use of the lis pendens; it is abundantly clear that Coen and his entities claims delayed and ultimately derailed the sale but Pavilion rather than considering its options filed and continued the lis pendens which is the subject of my review herein.

A. Willful Act

1. Pavilion's filing of an action for specific performance was a willful act in the use of process not proper in the regular conduct of the proceeding.

An action for specific performance will lie only when the supposed cloud on title is due to and caused and controlled by the seller. See *Finley v. Burgoyne, Dud*, Eq. 133, 1838 WL 1653 (SC App. Eq. 1838) (If a seller cannot convey marketable title through no fault of its own, the purchaser has the option of rescinding the contract, or taking whatever title the seller could convey, and his failure to make any election constitutes a default by him under the terms of the contract); See also *Calligar v. Fradkoff* 154 A.D.2d 495, 498, 546 N.Y.S.2d 121, 124 (N.Y.A.D. 2 Dept., 1989) (Specific performance was not warranted where the seller was unable to convey the property in accordance with the terms of the contract due to the intervention of third-party



litigation entirely outside of the seller's control). Defendants' filing of an action for specific performance was willful act in the use of process not proper in the regular conduct of the proceeding because Defendants admittedly knew the supposed title problem was caused by Richard Coen's allegations and was beyond the control of DC & Sons.

Additionally, an action for specific performance will lie only when the buyer can demonstrate that it was ready willing and able to perform by a tender of the purchase price. *See Shay v. Austin*, 466 F.Supp.2d 664 (D.S.C. 2006) (The party who comes to compel performance must show he has performed his part, or has been and remains ready, able and willing to perform his part of the contract). By the terms of the contract, Pavilion was to provide DC & Sons "with written satisfactory loan approval within 90 consecutive days" and if DC & Sons was not provided with such information, it had the option of canceling the contract. (See contract at paragraph 6). Mr. McNair testified loan approval was never achieved. McNair deposition, pg 45, lines 4-9). Defendants' filing an action for specific performance and *lis pendens* was not proper as it failed to prove it was ready, willing, and able to pay the agreed upon purchase price or had arranged its financing, which was required by law and the real estate contract. While this may have been cured but for the Coen claims, it still amounted to a breach.

In the present case, Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons. An action for specific performance (being an action in equity) will lie only when the buyer can prove it was not itself in breach of the contract. *See King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (S.C.App.1984).



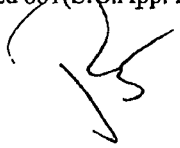
- 2. Filing and maintaining actions for declaratory judgment as to what parties had an interest in the Cottage on the Creek property and quiet title was a willful act in the use of process not proper in the regular conduct of the proceeding.**

An action to quiet title coupled with a *lis pendens* will lie only when all persons known to claim an interest in the property have been joined in the action. *See 74 C.J.S. Quieting Title § 60 (2010)*. Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing. The fact that the Defendants failed to join a serve the very party who allegedly created the cloud on title shows the *lis pendens* was based on pretext.

An action for specific performance will not lie absent a bona fide cloud on title. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881(S.C.App. 2002). While Pavilion refused to close and filed suit in April of 2007 because of Richard Coen's claims, Pavilion stipulated there was no cloud on title on January 17, 2008, and indeed as this Court has ruled there was no CoenCo lease with the Church or sublease between RedWing, CoenCo, and/or DC & Sons; while these claims may have justified not closing the thinness of the merits of these arguments are an artifice. Despite the stipulation, Pavilion waited almost eight months before amending its complaint to drop its cause of action for specific performance and refused to remove the *lis pendens* from the property even after dropping the specific performance claim. 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.

- 3. Refusing to remove the *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding.**

A *lis pendens* will not lie unless coupled with an action affecting the title to real property. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881(S.C.App. 2002)

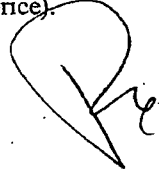


(Only an action "affecting the title to real property" allows the filing of a *lis pendens*). A claim for damages will not support a *lis pendens*. See *Armstrong v. Carwile*, 56 S.C. 463, 476, 35 S.E. 196, 203(SC 1900) ("An action for money only, even if it relates in some way to specific real property, will not support a *lis pendens*"). As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper.

B. Ulterior Purpose

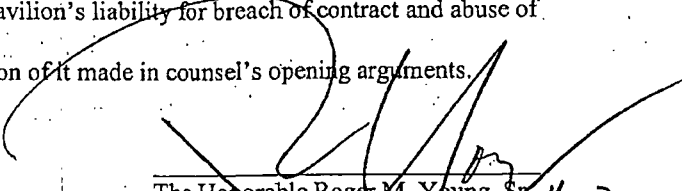
Without an improper purpose, there can be no abuse of process. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club." *Davis v. Epting*, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994). "The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties." *Horry County v. Ray*, 382 S.C. 76, 81, 674 S.E.2d 519, 522 (S.C. App. 2009).

As cited above, ^{The Court Finds by previous Py} McNair and his counsel ~~concede~~ they were using the lawsuit and the *lis pendens* to compel a better purchase price and a return of the earnest money deposit. This is not a legitimate use of a *lis pendens*, but is rather a form of coercion, done in the course of negotiation. See *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 413 S.E.2d 9 (S.C. 1991) (Evidence was sufficient to find that defendant corporation and its president willfully abused process by filing *lis pendens* and specific performance action with respect to contract of sale for real property with ulterior purpose of preventing sale of property to third parties in hopes of obtaining financial backing with which to purchase property at advantageous price).



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

On this 18th day of January 2011
Charleston, South Carolina


The Honorable Roger M. Young, Sr.

Circuit Judge for S.C.

2134

EXHIBIT F

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.

A P P E A R A N C E S:

Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Attorneys for the Plaintiff

Elizabeth Van Doren Gray, Esquire
Tina Cundari, Esquire
Attorneys for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (March 13, 2013.)

2 THE COURT: All right. Defendant's motion;
3 is that correct?

4 MS. GRAY: That's correct, Your Honor, and
5 I'm sitting at this table so counsel can see my board.

6 Your Honor, we had the brief and motions and
7 all delivered to your office on Monday. If you don't
8 have it, we can hand up another copy this morning.

9 THE COURT: Mr. Epting, I've got your motion
10 in opposition to the summary judgment motion.

11 MR. EPTING: Yes, sir.

12 THE COURT: It was filed, it looks like, on
13 February 6th. Have you filed anything else other than
14 this?

15 MR. EPTING: No, sir, Judge, and as Betsy
16 said, we got their brief either yesterday afternoon or
17 Monday afternoon. I forget.

18 MS. GRAY: I think it was Monday afternoon,
19 same day we delivered it to your office, Your Honor.

20 THE COURT: Okay.

21 MS. GRAY: Our motion was filed on January
22 the 18th.

23 THE COURT: Okay.

24 MS. GRAY: Excuse me. I'm sorry. That's not
25 correct. I'm looking at the wrong document. It was

1 filed on January the 14th of this year.

2 THE COURT: All right. You want to give me a
3 little background? I'm looking at their opposition, and
4 it's DC & Sons, LLC versus Pavilion Development
5 Corporation number seven?

6 MS. GRAY: Yes, sir.

7 THE COURT: Give me a little background about
8 what's going on, and I'll hear your motion.

9 MS. GRAY: Yes, sir, I will do that. I've
10 actually had a chart prepared, because it's kind of
11 confusing to know how the parties --

12 THE COURT: You got to bring that closer than
13 that if you want me to see it.

14 MS. GRAY: All right. I'll do that. How --
15 let me show it to them. I don't think they're going to
16 have a problem with it.

17 MR. KEFALOS: Go ahead, yeah, please.

18 THE COURT: Let me finish looking at this
19 confession of judgment real quick, okay?

20 Okay. Go ahead.

21 MS. GRAY: Your Honor, the current action
22 looks like a malpractice action by Pavilion Development
23 Corp. versus Nexsen Pruet. The alleged malpractice arose
24 out of an underlying case that was Pavilion Development
25 Corporation and Larry McNair, the plaintiffs in this

1 case, versus DC & Sons and others. DC & Sons also
2 brought another action against Pavilion and Larry McNair,
3 and they were consolidated and ultimately were heard by
4 Judge Young, went on for a long time.

5 During the period of time that action was
6 pending, at some point in time, it became apparent to the
7 lawyer at Nexsen Pruet, who was representing Pavilion,
8 that he was going to be a witness based upon allegations
9 in the underlying case. He withdrew. Judge Young let
10 him out. Another lawyer came in and represented Pavilion
11 through the end of the case.

12 Twenty-two months later -- twenty-two months
13 after Nexsen Pruet no longer represented Pavilion, the
14 matter was settled. A confession of judgment, as you've
15 got before you, of \$4.5 million was entered, and the
16 causes of action -- the claims and the proceeds of any
17 malpractice case were assigned to DC & Sons, and I'll go
18 through the terms of all that later. DC & Sons received
19 through assignment all of the control of the underlying
20 litigation.

21 So when the case was brought, now what you've
22 got is the lawyers who represented DC & Sons in the first
23 litigation are now representing Nexsen Pruet's former
24 client, Pavilion, in the malpractice case against Nexsen
25 Pruet.

1 When Nexsen Pruet answered the complaint,
2 they brought in DC & Sons, who was the party in the
3 underlying case --

4 THE COURT: That confessed to judgment,
5 right?

6 MS. GRAY: No. The confessor was here..

7 THE COURT: All right.

8 MS. GRAY: DC & Sons was the party that
9 benefitted from the confession, and I'm going to show you
10 the assignment in a minute, but brought them into the
11 present case, and the lawyers who represented them in the
12 first case also represent them in this case as do they
13 represent Pavilion.

14 Now, that's the lineup, if you will, of the
15 parties and the two lawsuits. What we're talking about
16 today, Your Honor, is the settlement of the first case,
17 up here, resulted in two things: A confession of
18 judgment for \$4.5 million by Pavilion Development Corp.,
19 and an assignment of the proceeds, the control, the
20 causes of action, the claims against DC & Sons wants them
21 assigned of the action against the law firm that withdrew
22 from the representation 22 months previously.

23 Now, I want you to look at the -- do you have
24 the assignment in front of you, the settlement document,
25 Your Honor? They're attached to our motion, but I'll --

1 I have another --

2 THE COURT: I got it here on the
3 plaintiff's --

4 MS. GRAY: It wouldn't be in the plaintiffs,
5 also --

6 THE COURT: The assignment? No, the only
7 thing I got in here is the agreement is handwritten.

8 MS. GRAY: That's it, but that's another
9 copy. That's the confession -- that's the form four --

10 THE COURT: I've got it right here.

11 MS. GRAY: And you've got the confession
12 behind it. It's highlighted. I didn't mean -- it's not
13 like it's in my handwriting.

14 THE COURT: Can you read all this?
15 Mr. Epting, did you write this?

16 MR. EPTING: I did, Judge, but under some
17 pressure from judge --

18 THE COURT: So if you wrote it, you can
19 interpret it for me? Can you read it for me?

20 MR. EPTING: I can do that, Judge. I could
21 have done better, but Judge Young was interested in
22 starting a case and said, If you guys are going to
23 resolve it, get on it.

24 MS. GRAY: I did better than that for you,
25 Judge.

1 THE COURT: You did better than that?

2 MS. GRAY: Yes, sir. I tried.

3 THE COURT: So you can read it, huh?

4 MS. GRAY: Yes, sir. Well, I've had a lot of
5 time.

6 THE COURT: All right.

7 MS. GRAY: But the operative provisions are
8 on page two, Your Honor. It's the recitals on page one,
9 which says at the top, The recitals are part of the
10 agreement, and the second part says, In light of the
11 Court's ruling, Pavilion and McNair have proposed and DC
12 & Sons have agreed as follows: The first paragraph,
13 which is not on this, DC & Sons releases McNair and
14 Lowell Frasier, they were the individuals involved, from
15 all claims, the subject of this suit, and waives trial
16 against Pavilion on punitive damages. In return,
17 Pavilion confesses judgment in the amount of -- in the
18 amount of DC & Sons's claim to actual damages in the
19 amount and form shown on Exhibit A.

20 McNair and Pavilion release DC & Sons from
21 all claims, which are the subject of the action. Now,
22 here's where I printed it out here if you want to not
23 read the handwriting, but Pavilion and McNair assigned to
24 DC & Sons all proceeds from a suit or suits to be filed
25 by Pavilion and McNair against its counsel, Nexsen Pruet,

1 and all other responsible parties, that's number one, and
2 the same paragraph goes on. At DC & Sons's election,
3 Pavilion and McNair assign all claims to include breach
4 of contract, breach of fiduciary duty, and professional
5 negligence, et cetera.

6 THE COURT: That's just written out here on
7 the side?

8 MS. GRAY: Yes, sir. That was the inserted
9 language. You want it again?

10 THE COURT: Yes. Read it again.

11 MS. GRAY: At DC & Sons's election, Pavilion
12 and McNair assign all claims to include, you've got the
13 BK --

14 THE COURT: BK --

15 MS. GRAY: Breach of contract, breach of
16 fiduciary duty, professional negligence, et cetera.

17 THE COURT: All right.

18 MS. GRAY: Then it goes on to say, further,
19 Pavilion and McNair place full control of the said
20 litigation --

21 THE COURT: So that's where it goes in. Go
22 ahead.

23 MS. GRAY: Then, further, Pavilion and McNair
24 place full control of the said litigation in the hands of
25 DC & Sons to include the handling of the litigation,

1 trial, appeal, settlement, and the waiver of the
2 attorney-client privilege -- excuse me, attorney-client
3 and work product privilege with the Nexsen Pruet firm.

4 Okay? Keeps going. Further, Pavilion and
5 McNair, P and M, agree to cooperate in the prosecution of
6 this action and to pursue the litigation as if they
7 retained the right to all proceeds.

8 Keeps going. The cost of the litigation will
9 be borne by DC & Sons alone. Next sentence: Pavilion
10 and McNair direct that the earnest money, which was
11 \$50,000 --

12 THE COURT: P and M acknowledge suit would be
13 brought.

14 MS. GRAY: Yes, sir, okay.

15 THE COURT: In their what?

16 MS. GRAY: In their names, yes, sir.

17 THE COURT: That looks like, aims but I see
18 it.

19 MS. GRAY: In their names. Okay. I'm sorry.
20 Then the next, C, is P and M, Pavilion and McNair, direct
21 that the earnest money, which was part of what the
22 lawsuit was about, plus interest should be turned over to
23 DC & Sons and their counsel. Okay?

24 And then the last, D, says DC & Sons agree
25 that in the event of a settlement or judgment in the

1 first -- that the first \$250,000 will be split equally
2 between DC & Sons and Pavilion so as to defray their
3 defense cost and further compensation for loss of
4 business and emotional distress. All further funds shall
5 be for the benefit of DC & Sons.

6 And then the document is signed, and then, of
7 course, the confession of judgment that follows, Your
8 Honor, is in the name of Pavilion Development Corp., LLC,
9 and is signed in the amount of \$4,580,015.93, together
10 with interest. So that is, in essence, what happened on
11 the day of settlement of the underlying case in which DC
12 & Sons settled this case. Doesn't matter which one was
13 the plaintiff and which was the defendant because there
14 were multiple claims.

15 THE COURT: Got it. Go ahead.

16 MS. GRAY: So, in essence, what we have, in
17 this case, the case that's currently pending, is
18 basically a collection action of the \$4.5 million
19 confession of judgment that was entered in the other
20 case, but this time the person who's supposed to pay it
21 is the lawyer in the other case.

22 Now, in essence, what it is, is an
23 assignment -- it isn't in essence, it is an assignment of
24 any right that Pavilion had to bring a case against
25 Nexsen Pruet, and for the purposes of today, Your Honor,

1 I'm not going to talk about whether there is or is not
2 liability. That's not the argument here today. If we
3 have to try that, we do, but today the issue is much more
4 integral to the existence of this case, and that is
5 whether or not it can be prosecuted when it is being
6 controlled by, directed by, not the client, but by the
7 adverse party in the earlier litigation.

8 And, Your Honor, when we first got this case
9 I thought, you know, something strikes me. That just
10 can't be right. I'm not sure what it is, but it can't be
11 right. The research that we did revealed that this is
12 not the first time this issue has come up across the
13 country. It is the first time that I could find that it
14 has ever been dealt with in South Carolina in terms of
15 these facts and this type of scenario.

16 South Carolina Supreme Court has not
17 addressed this issue. Other Courts in the country have,
18 though, and the vast majority of jurisdictions who have
19 addressed this have found that this very arrangement is
20 void as against public policy, void, and there is a
21 reason for that. Eighteen states, eighteen states -- and
22 that's a lot to have all come down on the same issue in
23 such a very strong way, but eighteen states say that
24 it -- first of all, a malpractice action is not
25 assignable because it is personal, and if you think about

1 it, the relationship, the attorney-client relationship,
2 is one of the most personal relationships that can exist.
3 It is founded in trust, it is founded on confidential
4 communications, it is founded on loyalty, and if you
5 commoditize, or make it merchantable, the malpractice
6 action the client has against the lawyer, you can imagine
7 the consequences that flow from them, and the Courts have
8 addressed those consequences.

9 The Courts say -- and let me say, even in --

10 THE COURT: Let me just ask you one question.

11 MS. GRAY: Yes, sir.

12 THE COURT: Before I forget it, okay? In
13 this case, they basically gave up their attorney-client
14 privilege, gave up everything.

15 MS. GRAY: Yes, sir.

16 THE COURT: Are those cases you're referring
17 to state that Pavilion could not assign any rights they
18 had against the attorney, DC & Sons, period, without
19 going into the graphic details of waiving the
20 attorney-client privilege or is there a line there, is my
21 question?

22 MS. GRAY: No. They say, as a matter of
23 law --

24 THE COURT: These cases you can't assign at
25 all. Pavilion would have had to bring the lawsuit.

1 MS. GRAY: That's right. Now, what they say
2 is that it is so against public policy that we're not
3 going to even address the individual nuances of the case
4 that we're just not going to allow it.

5 THE COURT: What if they just said, Okay.
6 We're going to nonsuit the case and let Pavilion go
7 against Nexsen Pruet, and then we'll talk about share of
8 proceeds down the road?

9 MS. GRAY: That is okay. Not down the road.
10 The case that I recall reading one --

11 THE COURT: There ought to be some way that
12 they could assign that -- are you saying they can't
13 assign a professional negligence, period?

14 MS. GRAY: They can assign the case. If they
15 bring the case and they receive a judgment, what they do
16 with their proceeds is their business, but they can't
17 assign the proceeds, the control, the decisions, the
18 waiver of attorney-client privilege. In essence, they
19 are allowing DC & Sons to be the plaintiff.

20 THE COURT: Right.

21 MS. GRAY: As opposed to them being -- even
22 though they're in name only.

23 THE COURT: Under your theory, having read
24 the cases, what do you think they could have done?

25 MS. GRAY: They could have gotten a

1 confession of judgment.

2 THE COURT: Right.

3 MS. GRAY: And encouraged Pavilion to bring a
4 lawsuit.

5 THE COURT: You don't think there could have
6 been any agreement of shared proceeds if they obtained
7 them?

8 MS. GRAY: I think, Your Honor, that had they
9 not --

10 THE COURT: A signed agreement, not
11 necessarily an assignment, a signed agreement?

12 MS. GRAY: I think that is questionable. One
13 of the cases that I read said that assignment before the
14 end of the case was too much of an interest in the
15 litigation, but if you get a judgment and you have -- I
16 mean, if you have a judgment against you and you obtain a
17 judgment, those proceeds are subject to supplemental
18 proceedings, payment over, you know, to satisfy their
19 earlier judgment. You all of a sudden have the money to
20 pay the judgment against you.

21 But in this situation, it went way beyond
22 that, and that's what violates the public policy, is they
23 kept control, and that's -- what bigger evidence of that
24 than the lawyers in the first case representing the
25 client in the second case? They admit they are paying

1 all the expenses. The assignment says all proceeds are
2 assigned, all proceeds.

3 Now, they argue, and they said -- I assume
4 they're going to say, well, we get -- if we get --

5 THE COURT: 250,000.

6 MS. GRAY: No, we get 50 percent of the first
7 250. We share half and half on that -- now, remember
8 that 50 of it is money they already paid, so it's really
9 only 75 more that they're getting. Case law -- other
10 people have tried that, to get around this flat
11 prohibition by saying, well, they still have an
12 interested in the proceeds. It might not be a lot, but
13 they have an interest.

14 In our situation, the amount they said, the
15 \$125,000 that they said they would make available is 2.7
16 percent of the judgment. In cases that I've read, 10
17 percent, the Court said, that's not a significant
18 interest; 20 percent of the proceeds, not significant,
19 and they said this is form over substance. You assign
20 all of the control, and just because you maintain a
21 little bit of the money doesn't mean that you own the
22 cause anymore.

23 So the case law is so clear that it says as a
24 matter of law, it's not a question of fact, as a matter
25 of law, this kind of assignment, this void is against

1 public policy.

2 THE COURT: Did you put your cases in the
3 brief?

4 MS. GRAY: Yes, sir. Put all the law I could
5 find.

6 THE COURT: You got the cases themselves in
7 the brief?

8 MS. GRAY: No, sir, but I'll leave them with
9 you. I've got them.

10 THE COURT: Okay.

11 MS. GRAY: The -- let me add one other thing:
12 There are a couple of states that have said we're going
13 to look at it on a case by case basis, but even those
14 states say -- and when I say a couple, I think like two
15 or three. They say in a situation like this that the
16 assignment to an adverse party in the underlying
17 malpractice litigation -- or underlying litigation where
18 the malpractice allegedly took place is not permissible
19 because it is against -- it encourages collusion, throw
20 the lawyer under the bus, and I confess judgment. It
21 encourages what they call a shameless change of
22 position --

23 THE COURT: I don't know how a lawyer could
24 ever represent his client with that hanging over his
25 head.

1 MS. GRAY: That's exactly what some of the
2 case law says. Some of the case law says that you then
3 put the client -- the lawyer who is representing a client
4 who is just a little bit insolvent isn't going to take
5 the case because they're afraid they're going to get
6 thrown under the bus, and so even the cases that say
7 we're not going to say it's void is against public policy
8 say that.

9 There are occasions, and I'll tell you quite
10 candidly, Your Honor, because we have looked at every
11 case in the country that has dealt with this issue, that
12 says that if, for example, a company goes out of business
13 and somebody takes all the assets and all the liabilities
14 of the company that maybe that would allow that assignee
15 who stands in the shoes of the insolvent company to bring
16 the case, but that's not this case. In this case -- and
17 they said in their responses to our request for
18 admissions, that Pavilion is still, you know, a for
19 profit corporation in business.

20 They also said it wasn't an assignment in
21 their response, but I submit to you, Your Honor, that the
22 language could not be clearer. They assign all proceeds,
23 they assign all claims at the election of DC & Sons,
24 which means that Pavilion can't decide whether to assign
25 the case. DC & Sons at any point in time can say find

1 this today, we want these claims, and we don't even need
2 to know about it.

3 They assign full control of the litigation,
4 and they required Pavilion and McNair to agree to
5 cooperate in the litigation as if they retained the right
6 to proceeds. So it's even more interesting, Your
7 Honor --

8 THE COURT: Well, if there was no assignment,
9 they wouldn't have a right to even bring this lawsuit. I
10 don't see --

11 MS. GRAY: Say that again, sir?

12 THE COURT: If it wasn't an assignment, they
13 wouldn't have a right to be bringing this lawsuit.

14 MS. GRAY: Now, here is the interesting
15 thing: Pavilion, if it truly were Pavilion represented
16 by Pavilion's independent counsel who had not assigned
17 anything, could bring the case. DC & Sons could not.

18 THE COURT: Right.

19 MS. GRAY: Not only that, but there is a lot
20 of case law that says that, as you know, lawyers are not
21 liable. They're immune from suit against the adverse
22 party in litigation, so had DC & Sons sued Nexsen Pruet,
23 that would have gone out by motion to dismiss.

24 THE COURT: Right. Okay. Anything else?

25 MS. GRAY: Give me one second -- well, we

1 also have raised alternative arguments, Your Honor, that
2 Pavilion is not the real party in interest, but it all
3 stems back to this fundamental problem with this case and
4 I submit, Your Honor, I do want to say one thing. We
5 don't want to have to spend the next year and a half
6 dealing with defending a case that is void in its
7 formation, and I don't think, frankly, Pavilion wants to
8 either, or DC & Sons wants to invest the time and energy
9 into something in which the Supreme Court of South
10 Carolina is likely to find it too along with the 18 other
11 states that have expressly addressed this issue, that it
12 is void and was void from the beginning.

13 And so we would request that Your Honor issue
14 an order that frames this issue and let the Supreme Court
15 decide the public policy issue once and for all in the
16 case. Thank you.

17 THE COURT: Okay. Mr. Epting?

18 MR. EPTING: Good morning, Judge.

19 THE COURT: Good morning. Let me just ask
20 you one question: Do you agree that there's the 12
21 states that -- I haven't looked at the briefs or
22 anything, and haven't looked at the cases, but do you
23 agree it's 12 states --

24 MR. EPTING: Judge, I don't know how many
25 states, but I don't think really, Judge, that's so much

1 the issue --

2 THE COURT: I'm sorry, what?

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

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

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

10 THE COURT: Okay.

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

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

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

1 MR. EPTING: Yes, sir.

2 THE COURT: To buy?

3 MR. EPTING: Right.

4 THE COURT: Okay.

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

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

19 So that's the posture of the case.

20 THE COURT: Okay.

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

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

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

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

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

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

1 that the same results should attach because he's already
2 said he's not dismissing the case because of an
3 assignment of claims.

4 Then he says, once again, there's no South
5 Carolina authority on point. The defendants cite,
6 however, a Florida and Texas case, neither of which
7 constitute legal precedent in this jurisdiction. Then he
8 says, In analyzing further the defendant's position, I do
9 not believe that the facts and circumstances presented
10 here implicate the public policy concerns for the general
11 rule so as to rule -- so as to render the settlement
12 invalid as an element of damage.

13 Now, I see, Judge, that they do know of this
14 opinion because it looks like maybe they have handed it
15 up to you. So what I would like to do, Judge --

16 THE COURT: I believe your cohort just handed
17 it to me.

18 MR. EPTING: I'm sorry?

19 THE COURT: Do you want me to look at it?

20 MR. EPTING: I think I read you the germane
21 pieces, Your Honor. So, Judge, here is what I think the
22 state of the law is in South Carolina, and I'm referring
23 to just general law, but this is contained in five South
24 Carolina jurisprudence. It says, If a cause of action in
25 court would survive to a personal representative on the

1 death of a party, such cause of action may be assigned
2 during his lifetime. So I'm just treating this, Judge,
3 in the first instance if it's an assignment of a cause of
4 action, and in South Carolina, if it survives the debt, a
5 cause of action is assignable.

6 All right? In South Carolina, the only
7 causes of action, Judge, that are not assignable are
8 libel, slander, and fraud and deceit. Everything else is
9 assignable. Let me give you an example, Judge.

10 Let's just say -- because that's what it
11 boils down to. If a cause of action is assignable, it's
12 assignable because it survives. So here --

13 THE COURT: Is a medical mal assignable?

14 MR. EPTING: Absolutely. Virtually any tort
15 case is assignable. So let's take this example, Judge.
16 Suppose I am the attorney for George Kefalos. I'm his
17 tax lawyer. He's dying. He wants me to draw up a trust
18 for him to protect his assets. I do that. I do that,
19 but it's legal malpractice.

20 I make a mistake. George dies. So George is
21 dead. The cause of action can't be assigned because it
22 doesn't survive his death, according to Nexsen Pruet, and
23 so because of his death, the claim can't be brought.
24 That's wrong.

25 THE COURT: But you're talking about a

1 different situation there.

2 MR. EPTING: Absolutely, Judge.

3 THE COURT: Absolutely different situation
4 than what we're talking about here.

5 MR. EPTING: There is no question about that,
6 but the point I'm making --

7 THE COURT: I mean, the public policy
8 argument is that there's no way an attorney could
9 effectively represent anybody in any lawsuit if you got
10 this hanging over their head. That's the public policy.

11 MR. EPTING: Well, let me --

12 THE COURT: And I fully understand that, and
13 I'm not so sure you couldn't assign the right to someone
14 else, but I think you're going way beyond assignments in
15 this written assignment, or whatever you want to call it.

16 MR. EPTING: All right.

17 THE COURT: You even waive attorney-client
18 privileges. And I understand it was their right and they
19 could have done that, but to do that up front, it just --
20 I guess it doesn't pass the smell test. It stinks.

21 The collusion involved between the plaintiff
22 and the defendant, I'm just telling you my thoughts. I
23 haven't read any of the cases, and you may be absolutely
24 right, okay? I will read the cases. I'm just telling
25 you my initial gut reaction to it.

1 MR. EPTING: Right, sir. So, Judge, here is
2 one of the states, though. And you have --

3 THE COURT: And I don't know -- I'll read
4 Judge Breeden's case. I have no problem. I'll read it
5 all, but I don't know the answer. Is there a technical
6 issue?

7 MR. EPTING: I had the fortune of appearing
8 in front of you many times. I believe you're going to
9 read everything. You're a conscientious fellow, and
10 you'll do everything --

11 THE COURT: I'm just telling you my gut
12 reaction to it. It stinks. The collusion and how far
13 you went? Can you address that for me? Because I would
14 like to hear what you have to say.

15 MR. EPTING: Judge, no further than you would
16 go in any case because what you have to --

17 THE COURT: I don't blame you. You represent
18 your client and do the best thing for your client, and no
19 disrespect to you what you did in drawing the agreement.
20 I don't mean that, okay, at all.

21 MR. EPTING: So here, Judge, New York,
22 Massachusetts, New Hampshire, Pennsylvania, Oregon, a
23 bunch of states say absolutely this is allowed, but
24 you're raising the issue of waiving the attorney-client
25 privilege.

1 I'm reading from a case, New Hampshire versus
2 McCann. It could be argued just as forcefully that
3 providing shelter for attorneys by prohibiting the
4 voluntary assignment of malpractice claims would actually
5 diminish public confidence in the profession by creating
6 the perception that the system provides attorneys with
7 unjustified special protection.

8 Rather than helping the image of the legal
9 profession, a rule of non-assignability would give the
10 impression that the profession has something to hide,
11 that the Courts are taking care of its own. A more
12 favorable impression would be projected by the
13 acknowledgement that this profession, like any other,
14 must face its own problems and accusers.

15 This case, Judge, addresses the issue of the
16 attorney-client privilege.

17 THE COURT: Okay.

18 MR. EPTING: And I think it really does say
19 it all. We will not allow the concept of the
20 attorney-client relationship to be used as a shield by
21 the attorney to protect him or her from the consequences
22 of legal malpractice. Where the attorney has caused harm
23 to his or her client, there is no relationship that
24 remains to be protected.

25 So, in other words, Judge, I understand what

1 you're saying, but the reality is, in any malpractice
2 case, the first thing that happens is the attorney-client
3 privilege is gone.

4 THE COURT: I understand that.

5 MR. EPTING: Right.

6 THE COURT: And I don't question it. I would
7 probably agree with the case were you reading to me, but
8 go ahead.

9 MR. EPTING: All right. So my point is that
10 there is an acknowledgement that what is inevitably going
11 to happen is going to be done is of no consequence
12 because that's what happens. There is no attorney-client
13 relationship in a -- privilege in a malpractice case.

14 THE COURT: Right.

15 MR. EPTING: And that's why these cases,
16 Judge, that are on the other side that say absolutely
17 they are assignable fall where they do, because they want
18 to make sure that attorneys don't find themselves in a
19 special category. And my point, Judge, is --

20 THE COURT: Well, attorney-client privilege
21 does put them in a special category. I disagree with
22 that. It does. It's excluded from subpoena. So it is a
23 special category, that relationship.

24 MR. EPTING: I agree --

25 THE COURT: I disagree with the fact that it

1 doesn't put him in -- it's a purpose for putting it in a
2 special relationship.

3 MR. EPTING: Well, that's all --

4 THE COURT: There is a lot of exceptions to
5 that, and you know that, as far as what if. A lot of
6 people think anything you say to a lawyer is privileged,
7 and it's not.

8 MR. EPTING: Right. Well, Judge, in this
9 context, the attorney-client privilege really is a
10 nonissue.

11 THE COURT: It's a nonissue in the
12 professional negligent case, I'll agree with you. Where
13 I see it's an issue is how far you went in the
14 assignment.

15 MR. EPTING: All right, sir.

16 THE COURT: Okay? That's my point, and that
17 was just one issue, and it came to my head. I was trying
18 to read it, but I am having difficulty -- what else did
19 you say in the agreement? Let me see.

20 That's not just one issue. There are some
21 other issues about the proceeds and breaking down how
22 much money, et cetera, et cetera, but go ahead. But that
23 is what y'all agreed to, and I understand that.

24 MR. EPTING: So, Judge, what is not said by
25 Nexsen Pruet here is if you find that the assignment

1 overreaches, the remedy is to strike the assignment, and
2 that's what the Courts in the cases that she cites do.
3 And here there are two situation in which they arise,
4 Judge. Sometimes the cases brought in this context in
5 the name of DC & Sons.

6 In that case, and referring to the Washington
7 state case which is a case they cite --

8 THE COURT: Let me ask you that question.
9 Why didn't DC go ahead and file a lawsuit?

10 MR. EPTING: Because, Judge, the
11 attorney-client relationship exists between Pavilion, and
12 there's an assignment of proceeds, not an assignment of
13 claims.

14 THE COURT: Okay.

15 MR. EPTING: In other words, the lawsuit
16 proceeds, and then whatever proceeds come out of it,
17 that's what gets assigned here. There's an election to
18 take the cause of action, but that's never occurred, so
19 what we have is an assignment of proceeds so it would
20 have to be brought in the name of Pavilion.

21 But here --

22 THE COURT: But your position is assignment
23 of proceeds, not assignment of cause of action;
24 therefore, Pavilion brought it.

25 MR. EPTING: Right, yes, sir.

1 THE COURT: Rather than DC.

2 MR. EPTING: Right. Yes, sir.

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

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

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

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

23 THE COURT: Disqualify --

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

25 THE COURT: Because y'all had represented one

1 party and now you represent the other party?

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

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

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

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

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

1 between the proper parties. In a case -- and so that's
2 the case, one of their cases, in a situation --

3 THE COURT: I mean, I think that's something
4 we can address. They've been filed in this case and it
5 goes to appeal, and they reverse and say can you do it, I
6 still think a statute of limitations would rule back. I
7 think that's a nonissue, and I think I could deal with
8 that by order.

9 MR. EPTING: All right.

10 The other part, Judge, is -- this is a case,
11 brought like this, by the actual client, and the Court
12 rules that -- the Texas Supreme Court held that when
13 there is a purported partial assignment of a legal
14 malpractice claim, the plaintiff's right to bring this
15 cause of action is not vitiated by the invalid
16 assignment.

17 While expressing no position on the validity
18 of the underlying arrangement between the plaintiff and
19 the third party, the Court found summary judgment was
20 improper and that the plaintiff could continue the
21 malpractice case against his attorney, and essentially
22 they vitiated the assignment.

23 And, Judge, if you believe that there's
24 something that is wrong here, we don't want years of
25 litigation. I mean, it doesn't matter to us if this is

1 brought in the name of Pavilion or DC & Sons, and it
2 doesn't matter to us if there is an assignment or not,
3 because there is an outstanding judgment, and we would
4 ask that if you find there is something wrong with the
5 assignment that you simply strike the assignment, leave
6 the judgment in place, and Pavilion will -- obviously,
7 the judgment is in place, and Pavilion will continue on
8 with the case as it is and there won't be any necessity
9 for an appeal.

10 And if Ms. Gray thinks that there's something
11 that is wrong with that -- but as I say, Judge, in the
12 cases that they rely on, with the exception of one state,
13 California, every other state says that the remedy is to
14 essentially undo the assignment, not to take away a
15 legitimate right.

16 THE COURT: All right. Can you hand up those
17 cases?

18 MR. EPTING: Yes, sir, I will.

19 THE COURT: I do want to read them, all
20 right?

21 MR. EPTING: Yes, sir. Judge, one last
22 thing. What I wanted to tell you, Judge, is that --
23 well, I think you understand, and what we would like to
24 do, Judge, is present a short memorandum with the cases
25 that are contrary to the --

1 THE COURT: That's fine. I'll be happy for
2 you to do that.

3 MR. EPTING: And we'll also submit the cases
4 about how to adjust the assignment issues so that the
5 case can proceed.

6 THE COURT: Okay. All right.

7 MR. EPTING: Is there any question that you
8 have of me?

9 THE COURT: No. I asked whatever I want to
10 ask you at this point in time. When I start reading
11 this, I'll probably have half a dozen, but that's neither
12 here or there.

13 MR. EPTING: All right, sir.

14 MR. KEFALOS: May I offer an observation,
15 Your Honor?

16 THE COURT: Yes, sir.

17 MR. KEFALOS: I'm George Kefalos for the
18 plaintiff. Your Honor said we could strike the
19 assignment and change the structure of the case. In
20 fact, the case is brought by Pavilion, who was Nexsen
21 Pruet's client against Pavilion, already. Against Nexsen
22 Pruet, so you don't have to change the structured case.
23 That's the way it is.

24 What's happened is that Nexsen Pruet says,
25 Wait a minute. They're not the real party in interest.

1 There's an assignment. In fact, Pavilion is the that is
2 suing. The case is in their name.

3 THE COURT: I understand. Let me just ask
4 you one question. You said this, which I think
5 Mr. Epting agrees in South Carolina, but this is sort of
6 a novel issue.

7 MS. GRAY: Yes, sir.

8 THE COURT: So as a whole string of cases
9 that pretty well say on novel issues, it needs to be
10 fully developed. Now, from what Mr. Epting tells me,
11 nothing has been developed because y'all stonewalled the
12 discovery.

13 So my question is, why should this Court on,
14 this limited factual evidence before this Court grant
15 summary judgment until the parties at least have had an
16 opportunity to review -- take depositions and engage in
17 discovery so there's a full record for this Court as well
18 as the appellate Court to look at?

19 MS. GRAY: I'll tell you exactly why. First
20 of all, let me just go on record, you said we
21 stonewalled. We answered written discovery, Your Honor.
22 What we haven't done is depositions pending -- and the
23 motion to disqualify, as Your Honor knows, needs to be
24 made right out of block or it's too late.

25 That motion is still pending based on a

1 ruling by Judge McDonald. But in any event, in going
2 forward on this matter, we don't need discovery on this
3 issue. The facts are fully developed on what happened as
4 far as the assignment is concerned.

5 The discovery that they have noticed is of
6 Nexsen Pruet lawyers who, by the way, Your Honor, were
7 nowhere around when this happened.

8 This happened 22 months after Nexsen Pruet
9 withdrew from the case when it was apparent they were
10 going to be a witness. They were deposed in that case,
11 so it's not a fact that they can be developed in this
12 case --

13 THE COURT: You don't think it would be
14 appropriate to take Pavilion and DC, some of these
15 depositions, would involve that negotiation to more fully
16 develop that?

17 MS. GRAY: No, sir, because it's there. It's
18 in black and white. There is not a question of fact left
19 about what happened in this settlement. I mean, it's
20 just all there in black and white.

21 THE COURT: Okay.

22 MS. GRAY: And based on what they did at the
23 time of that settlement --

24 THE COURT: Let me ask you this: The cases
25 that you referred to in various states, apparently you

1 and Mr. Epting have read them and gone to great lengths
2 in researching this issue and reading these cases. At
3 what stage in the proceeding have these cases gone from
4 the trial level to the appellate level? I guess that's
5 my question.

6 MS. GRAY: Some went as early as a motion to
7 dismiss. Most all the rest went at summary judgment. I
8 don't think many, if any -- I frankly do not remember a
9 single one that went all the way through trial.

10 THE COURT: Okay.

11 MS. GRAY: So I might be wrong about that,
12 but I don't remember.

13 THE COURT: Was the underlying legal
14 malpractice issue addressed at all in those cases?

15 MS. GRAY: No, sir. I mean, other than just,
16 Oh, by the way this is what happened.

17 THE COURT: Okay.

18 MS. GRAY: As a matter of fact, Mr. Epting
19 went on at length about what -- and I told Your Honor for
20 the purposes of this argument today, you could assume it
21 was negligence.

22 THE COURT: But from an appellate standpoint,
23 should it be developed or should it not be developed?

24 MS. GRAY: No, sir, because it goes to the
25 issue of public policy about whether you even have this

1 issue. Now, had Pavilion, with its own counsel, sued
2 Nexsen Pruet, we would not be here on this argument, and
3 that underlying malpractice case rises and falls on its
4 own merits.

5 THE COURT: Right.

6 MS. GRAY: This has to do with the structure
7 of who's running the litigation, which is what makes it
8 void us against public policy, and I'm glad Mr. Epting
9 brought up Judge Breeden's opinion, because he did not
10 read what I think is the operative paragraph in Judge
11 Breeden's opinion, which is paragraph numbered six, in
12 which he's talking about -- it's on the second page of
13 the opinion, and what he's saying is Robertson, who was
14 the client, remains the real party in interest, remains
15 the prosecuting party in this litigation, and has not
16 divested himself of any right to control the prosecution
17 and/or settlement of his claims against the defendants.

18 In fact, Robertson has not in this
19 arrangement given away even so much as the right to be
20 informed as to the progress of the litigation. So they
21 like to make a big show that there was another opinion.
22 This isn't these facts. I mean, in this case they gave
23 away everything.

24 THE COURT: What about Mr. Epting's argument,
25 just for the Court to strike the assignment and set it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. GRAY: But in this situation --

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

16 MS. GRAY: Yes, sir.

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

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

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

24 MS. GRAY: May I brief that?

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

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

1 alone.

2 Well, I sit down, and, of course, you say
3 shouldn't we have a more developed record? Well, that's
4 what I was going to say to you, Judge, because a lot of
5 this is legal, but, you know, the one thing, the motion
6 that there's some sort of collusion in this case could
7 look very bad in the Supreme Court.

8 We have absolutely nothing to hide, how this
9 settlement came down, how it all worked, and so the
10 notion that everything get into this record because
11 oftentimes, Judge, ambience is important in what judges
12 feel --

13 THE COURT: David -- who was the other
14 attorney?

15 MR. EPTING: Dan David.

16 THE COURT: I would assume that it would be
17 pertinent to have his deposition.

18 MR. EPTING: And he's a deposition we want to
19 take, absolutely, so I just wanted to say I think in the
20 larger scheme of things, this issue has not been decided
21 by the Supreme Court. It would be better that whatever
22 they want to argue we would like the opportunity to have
23 a record in which we can say that's not true.

24 THE COURT: Okay.

25 MR. EPTING: Thanks, Judge..

1 THE COURT: I don't want to prejudice your
2 rights against what I was talking about a partial summary
3 judgment motion. If I ultimately do that -- and I'm not
4 saying I am, I just thinking out loud to you, okay? I
5 would still give you the opportunity during discovery to
6 develop those facts more fully for appellate purposes.
7 Okay?

8 MR. EPTING: Thank you, Judge.

9 MS. GRAY: Yes, sir. Your Honor, if I might
10 in terms of efficiency in the briefing, if they could
11 file their response to our brief before we -- so we don't
12 end up talking over each other.

13 THE COURT: That's fine.

14 MS. GRAY: If we could do that, and then
15 we'll file our response to their brief and also include
16 the issue about the partial summary judgment, and then
17 they can reply to that if they --

18 THE COURT: Is that fine?

19 MR. EPTING: We would be happy to.

20 THE COURT: Did you work out a time frame?

21 MS. GRAY: Yes, we can do that.

22 THE COURT: Because, quite frankly, until
23 sometime the second week in April, I'm not going to be
24 looking at it. I got next week a full week just getting
25 ready for this four-week trial.

1 MS. GRAY: All right, sir. We'll have it for
2 you by the time you finish that trial.

3 THE COURT: Do you want to say by tax time,
4 April the 15th?

5 MR. EPTING: All right, sir.

6 THE COURT: Thank y'all so very much. It's
7 an interesting issue, and thank you for making good
8 arguments and providing the Court with memorandums.

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- - -

10 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 13th of March 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 23, 2013

Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
PAVILION DEVELOPMENT CORP. &	)	Civil Action No.: 2011-CP-10-05774
LARRY McNAIR,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
NEXSEN PRUET, LLC,	)	NEXSEN PRUET'S RESPONSE TO
	)	PLAINTIFFS' MOTON TO
Defendant,	)	RECONSIDER, ALTER OR AMEND
	)	
v.	)	
	)	
DC & SONS, LLC,	)	
	)	
Counterclaim Defendant.	)	

FILED
 2013 NOV 12 PM 4:34
 JULIE J. ARMSTRONG
 CLERK OF COURT

Defendant Nexsen Pruet, LLC, hereby responds to Plaintiffs' Motion to Reconsider, Alter or Amend. The Court's order granting summary judgment in favor of Nexsen Pruet should not be altered or amended in any way. The ruling is supported by legal authority from across the country holding that legal malpractice claims are not assignable between adversaries in litigation and that the proper remedy is dismissal with prejudice. Additionally, the specific arguments raised in Plaintiffs' motion are without merit.

First, the Court's finding that there was an opportunity for collusion is supported by the record. Nowhere does the record reflect that Judge Young was told that the settlement of the case between Pavilion and DC & Sons included a deal in which Plaintiffs assigned to DC & Sons the right to sue Nexsen Pruet for legal malpractice in exchange for the \$4.5 million confession of judgment. Although the handwritten agreement containing the assignment may have been handed up to Judge Young at the

hearing, there is no indication in the record that Judge Young took the time to read it. Instead, the record reflects that counsel for DC & Sons explained the terms of the settlement to the court, stating that he had only one copy of the agreement, and did so without any reference to the assignment of the legal malpractice claim or lawsuit to be brought against Nexsen Pruet. (Hr'g Tr., Jan. 1, 2011, pp. 16-20.) Although it is true that the assignment was ultimately attached to the Form 4 order and made a part of the public record, Plaintiffs did not make the assignment a part of the record in this case. The assignment was a made a part of the record in this case by Nexsen Pruet when Nexsen Pruet attached the assignment to the answer and counterclaim. (Ans. & Countercl.)

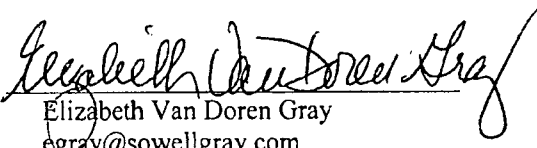
Further, the Court's ruling regarding collusion concerns the parties, not counsel. The motion to alter or amend misstates the Court's ruling on this point. At pages 13-14 of the order, the Court finds that "*Plaintiffs* have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship," not that *Plaintiffs and their counsel* have, as stated on page 2 of the motion.

Second, portions of the transcript from the hearing on the motion for summary judgment cited by Plaintiffs in the motion to alter or amend do not reflect the ruling in this case, and the Court is not bound by any statements made in the discourse with counsel. As the transcript reflects, the Court took the matter under advisement, permitted the parties to submit additional briefing, and after considering the materials presented, issued a ruling. (Hr'g Tr., Mar. 13, 2013, 47:1 – 48:8.)

Because the order granting summary judgment is based on solid legal ground and is supported by the record, Nexsen Pruet submits that the order should not be altered or amended in any way. Plaintiffs' motion should be denied.

SOWELL GRAY STEPP & LAFFITTE LLC

By:


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Attorneys for Defendant

Columbia, South Carolina
November 8, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

v.

NEXSEN PRUET, LLC,

Defendant,

v.

DC & SONS, LLC,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

IN THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-10-05774

CERTIFICATE OF SERVICE

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JULIE ARMSTRONG
CLERK OF COURT

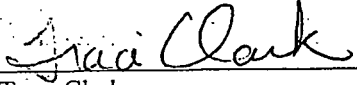
I, the undersigned paralegal of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Nexsen Pruet, LLC, do hereby certify that I have served all counsel in this action with a copy of the document specified below by U.S. and electronic mail to the following addresses:

Document: Nexsen Pruet's Response to Plaintiffs' Motion to Reconsider, Alter or Amend

Counsel Served: Andrew K. Epting, Jr., Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, South Carolina 29401
ake@epting-law.com

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Attorneys for Plaintiff and Counterclaim Defendant


Traci Clark

November 8, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEXSEN PRUET, LLC,	)	MOTION FOR SUMMARY JUDGMENT
	)	
	)	
Defendant,	)	
	)	
	)	
v.	)	
	)	
DC & SONS, LLC,	)	
	)	
Counterclaim Defendant.	)	

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 JULIE J. ARMSTRONG
 CLERK OF COURT

Defendant Nexsen Pruet, LLC moves for summary judgment pursuant to Rule 56(a) and (b) of the South Carolina Rules of Civil Procedure for the following reasons:

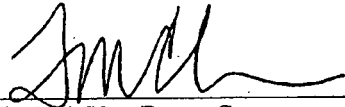
1. Summary judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim because this entire case arises out of an illegal assignment of a legal malpractice claim from Pavilion Development Corp. and Larry McNair (Plaintiffs) to their adversary, DC & Sons, as part of a settlement in the case below. **Exhibit A.** Such assignments are void as against public policy, and this case should not be permitted to proceed given these circumstances.

2. Summary judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim because Plaintiffs have waived their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty because they assigned those claims and the proceeds resulting from such claims to their adversary in the case below, DC & Sons, as part of a settlement reached between the parties.

3. Summary judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim because Plaintiffs are not the real parties in interest and the real party in interest, DC & Sons, cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet because DC & Sons is not and has never been a client of Nexsen Pruet.

This motion is based upon the pleadings, the responses to written discovery, the record in the case below, the affidavit of Bruce Wallace, and any other material that may be served upon Plaintiffs and DC & Sons prior to a hearing.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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(803) 929-1400

Attorneys for Defendant

Columbia, South Carolina
January 11, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

v.

NEXSEN PRUET, LLC,

Defendant,

v.

DC & SONS, LLC,

Counterclaim Defendant.

) IN THE COURT OF COMMON PLEAS

) IN THE NINTH JUDICIAL CIRCUIT

) Civil Action No.: 2011-CP-10-05774

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT

BY

2013 MAR 11 PM 2:49
JULIE J. ARMSTRONG
CLERK OF COURT

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INTRODUCTION

Defendant Nexsen Pruet LLC seeks an order granting summary judgment in its favor as to all causes of action on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Pavilion Development Corporation and Larry McNair (Plaintiffs) and DC & Sons, LLC, were adversaries in another case in which the alleged legal malpractice arose, and as part of the settlement of that case, Pavilion confessed judgment in favor of DC & Sons for \$4,580,015.93 and then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty and the right to elect to own the claims themselves. Assignments of legal malpractice claims are void as against public policy and this case should not be permitted to proceed any further.

Even if the assignment of the legal malpractice claim were valid, summary judgment should be entered in favor of Nexsen Pruet because Plaintiffs are not the real parties in interest and have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

Further, as the real party in interest, DC & Sons cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet because DC & Sons has never been a client of Nexsen Pruet and Nexsen Pruet did not owe any duties to DC & Sons.

This motion presents a question of law as to whether the assignment of a legal malpractice claim is void as against public policy, and whether this case can be maintained under the terms of the agreement between Plaintiffs and DC & Sons. There are no genuine issues of material fact to be decided. The assignment is either void as against public policy or valid. If it is void, the case should be dismissed with prejudice. If it is valid, then it should be enforced against the parties.

FACTS

On its face this case appears to be an action for legal malpractice and breach of fiduciary duty. But in reality it is an action to collect a judgment confessed by Pavilion Development Corporation in favor of DC & Sons, LLC, in the case in which the alleged legal malpractice occurred.

The Case Between Plaintiffs and DC & Sons

On April 9, 2007, Pavilion Development Corporation and Larry McNair sued DC & Sons, LLC, for specific performance of a contract to purchase a piece of property at Shem Creek. More than a year after the litigation commenced, DC & Sons asserted a counterclaim, filed a third-party complaint, and brought an independent action against Pavilion and McNair. Nexsen Pruet represented Pavilion and McNair in all pending matters until April 2009, when Nexsen Pruet was permitted to withdraw as counsel by order of the court.

On January 18, 2011, nearly twenty-one months after Nexsen Pruet withdrew as counsel, the parties settled the case. The settlement was reached during a court recess on what was to be

the first day of trial. The recess was taken after the trial judge stated that he was going to enter judgment in favor of DC & Sons as to liability and that trial would proceed on damages only.

The Terms of the Settlement

There are two parts to the settlement. First, Pavilion confessed judgment in favor of DC & Sons, for \$4,580,015.93, in exchange for a release of personal liability of Larry McNair and a waiver of trial against Pavilion for punitive damages. Second, the parties entered into an agreement in which Plaintiffs, among other things, assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty.

Exhibit A.

The terms of the assignment are as follows:

- "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.”

Ex. A.

After settling the case during the court recess, the parties went back on the record. Counsel for DC & Sons announced to the court that the case had been settled. **Exhibit B.** But counsel did not put all of the terms of the settlement on the record. Instead, he told the court that “the effective deal is that Larry McNair is relieved from liability,” and that the confession of judgment is by Pavilion in the amount of \$4,580,015.93, which according to counsel for DC & Sons, represented the actual damages to DC & Sons. *Id.* When the court asked how the amount was determined, counsel for DC & Sons provided an explanation “from memory,” without submitting any evidence or testimony. *Id.* Counsel for DC & Sons told the court that “the claims and the proceeds” had been assigned to DC & Sons, but he did not say which claims or which proceeds. *Id.* He did not tell the court that the assignment was an assignment to DC & Sons of all proceeds from a legal malpractice case to be brought against Nexsen Pruet, or that the assignment gave DC & Sons the option to elect to own the claims themselves, or that the assignment gave DC & Sons full control over the malpractice case.

When the trial judge asked counsel for DC & Sons 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.* The court then suggested that the Form 4 state merely that the case had been settled and the amount of damages had been put on the record. *Id.* Counsel for DC & Sons agreed. *Id.*

The Present Case

True to the agreement reached between Plaintiffs and DC & Sons, Nexsen Pruet has now been sued for legal malpractice and breach of fiduciary duty. The case was filed on August 16, 2011, and has been brought in the names of Pavilion Development Corporation and Larry McNair.¹ The assignment was not attached to or otherwise referenced in the complaint. Counsel for Nexsen Pruet discovered the assignment when searching the public index after the present case was filed.

Plaintiffs are represented by Andrew K. Epting, Jr., and George J. Kefalos, the same lawyers who represented DC & Sons in the litigation against Pavilion and McNair. Epting and Kefalos also represent their former client, DC & Sons, in the present case.

Nexsen Pruet answered the complaint and brought a counterclaim for declaratory judgment against Plaintiffs and DC & Sons to expose the fact that this case is proceeding pursuant to an assignment of a legal malpractice claim from Plaintiffs to DC & Sons. The counterclaim seeks an order declaring the assignment void as against public policy. The counterclaim also seeks an order declaring that Plaintiffs have waived the right to sue Nexsen

¹ Part of the reason that the case has been pending for so long is that there were early motions to disqualify counsel and to dismiss the counterclaim that were filed in October and November 2011. The court issued a Form 4 Order on April 26, 2012, indicating the court's ruling and stating "[f]ormal orders to follow." But no such formal orders have been issued, and the case has been stagnant for some time.

Pruet for legal malpractice and breach of fiduciary duty by assigning that right to DC & Sons. Additionally, the counterclaim seeks an order declaring that DC & Sons, as the owner of the claims and proceeds in this case, is the real party in interest, and as the real party in interest, cannot state a claim against Nexsen Pruet for legal malpractice and breach of fiduciary duty because DC & Sons has never been a client of Nexsen Pruet and Nexsen Pruet owed no duties to DC & Sons.

STANDARD

“The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder.” *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “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).

“Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203. “The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.* at 198, 659 S.E.2d at 203.

There are no questions of fact presented here. The pending motion presents only a discrete question of law that requires judgment to be entered in favor of Nexsen Pruet.

ARGUMENT

Summary judgment should be entered in favor of Nexsen Pruet because this case arises out of an assignment of a legal malpractice claim that is void as against public policy. Even if the assignment is not void as against public policy, judgment should still be entered in favor of Nexsen Pruet because Plaintiffs have given an entity that has never been a client of Nexsen Pruet complete control over this litigation, including the right to elect to own the very claims themselves. The terms of the assignment should be enforced against Plaintiffs and DC & Sons. Plaintiffs are not the real parties in interest, and the entity that is, DC & Sons, cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet.

For these reasons, judgment should be entered in favor of Nexsen Pruet as to all causes of action.

A. This case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

This case arises out of a settlement agreement reached between Plaintiffs and DC & Sons in other litigation in which Pavilion Development Corporation confessed judgment in favor of DC & Sons for \$4,580,015.93, and then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty as a way to collect the judgment. Assignments of legal malpractice claims between adversaries in litigation are void as against public policy. For this reason alone, this case should be terminated and judgment entered in favor of Nexsen Pruet.

1. A majority of states hold that legal malpractice claims are not assignable.

Eighteen states that have addressed the issue of whether a legal malpractice claim is assignable have held that it is not, no matter what the facts and circumstances surrounding the assignment. States adopting such a per se bar against the assignment of legal malpractice claims

include **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. 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) 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 County Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988); **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**, *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); **Tennessee**, *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996); **Texas**, *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); **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). *See also* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable.").

2. There are strong policy reasons for prohibiting assignments of legal malpractice claims.

Courts have recognized several reasons for prohibiting assignments of legal malpractice claims. In the seminal case of *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976), the court summarized the public policy reasons for prohibiting such assignments as follows:

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. The assignment of such claims could 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. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would 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.

133 Cal. Rptr. at 87.

The *Goodley* case and the public policy reasons stated therein have been quoted and relied upon by numerous courts across the country in holding that legal malpractice claims are not assignable as a matter of law. See, e.g., *Law Office of David J. Stern v. Sec. Nat'l Servicing Corp.*, 969 So.2d 962 (Fla. 2007); *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473, 478 (W. Va. 2003); *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331 (Va. 1998); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991).

3. Assignments between adversaries in litigation are void as against public policy.

Although a minority of courts have adopted a case-by-case approach in deciding whether legal malpractice claims are assignable and have permitted assignments in commercial transactions involving the purchase and sale of assets and liabilities of a company, virtually all courts have held that assignments between adversaries in litigation are void as against public policy. *See, e.g., Kim v. O'Sullivan*, 137 P.3d 61 (Ct. App. Wash. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (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 giving them a financial interest in switching."); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (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 (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").

a. Assignments between adversaries encourage collusion.

One of the reasons that assignments between adversaries are prohibited is that they 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 v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003). "[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 v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155, 156-57 (Ky. Ct. App. 1988)).

As one court has 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.

...

If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.

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

Moreover, “[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. Additionally, “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.*

b. Assignments between adversaries result in an abrupt and shameless shift of positions.

Further, because legal malpractice actions 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.”

Kommavongsa v. Haskell, 67 P.3d 1068, 1078 (Wash. 2003).

4. The assignment in this case is void as against public policy.

Although the question of whether assignments of legal malpractice claims are void as against public policy has not been addressed in South Carolina, the assignment in this case is exactly the type of assignment that has been held void as against public policy in courts across the country. The assignment is between adversaries in litigation and was entered into as part of the settlement of the case between Plaintiffs and DC & Sons. Pavilion confessed judgment in favor of DC & Sons in the amount of \$4,580,015.93 and at the same time assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect at any time to own the claims themselves. Further, Plaintiffs gave DC & Sons complete control over the malpractice case, including the trial, appeal, and settlement, and the power to waive the attorney-client privilege and work-product protection. Plaintiffs agreed to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. Plaintiffs acknowledged that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone.

An assignment of this nature and under these circumstances is void as against public policy. Plaintiffs and DC & Sons were adversaries in the case in which the alleged legal malpractice occurred and have now aligned themselves in this case for the purpose of suing Nexsen Pruet and collecting whatever can be collected to satisfy the \$4.5 million judgment confessed in favor of DC & Sons. By confessing judgment and then turning around and assigning all proceeds from a case to be brought against Nexsen Pruet for legal malpractice to

their adversary, Plaintiffs have converted the legal malpractice action into a commodity to be exploited and transferred to an economic bidder that Nexsen Pruet has never had a relationship with and to whom Nexsen Pruet has never owed any legal duties. By placing full control of the litigation in the hands of DC & Sons, including the right to waive the attorney client privilege between Plaintiffs and Nexsen Pruet, Plaintiffs have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship. The assignment has spawned litigation in the form of this case, even though it is questionable whether Plaintiffs have suffered any harm at the hands of Nexsen Pruet given that Plaintiffs settled the case 22 months after Nexsen Pruet withdrew as counsel and the settlement included a release of personal liability as to Larry McNair. Indeed, Plaintiffs admit that they have not paid any money damages to DC & Sons. **Exhibit C.**

Moreover, the circumstances under which the settlement was entered presented an opportunity and incentive for collusion. The settlement was reached during a court recess on what was to be the first day of trial. The parties took a break after the trial judge stated that he intended to grant summary judgment in favor of DC & Sons. The settlement included both a confession of judgment and the assignment. No evidence was presented to support the \$4.5 million judgment confessed. When the trial judge asked counsel for DC & Sons how the amount was determined, counsel for DC & Sons recited the formula from memory, without presenting a single document or introducing any testimony. Neither counsel for DC & Sons nor counsel for Pavilion and McNair explained to the court that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair. On top

of all of this, Plaintiffs are represented in this case by the very same lawyers who represented DC & Sons in the litigation below, and who continue to represent DC & Sons in this case.

In their opposition to the motion for summary judgment, Plaintiffs do not argue that the assignment is valid or somehow not void as against public policy. Instead, Plaintiffs argue that they are the real parties interest and that they have not assigned their claims against Nexsen Pruet to DC & Sons. They argue that they assigned only a portion of the proceeds of the litigation to DC & Sons as a part of the agreement to avoid personal liability. This is contrary to the plain language of the agreement.

The agreement does not state that only a portion of the proceeds have been assigned 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." Exhibit A (emphasis added). The agreement also states: "[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.*" *Id.* There is nothing unclear or ambiguous about the language in the agreement. Plaintiffs assigned *all* proceeds to DC & Sons, and not just a portion.

Additionally, the agreement states: "At DC & Sons election, Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc." Ex. A. This "right to elect" reinforces the fact that DC & Sons is in control and has the right at any time and without any notice to own the very claims themselves. DC & Sons simply has to say when.

In any event, the argument that Plaintiffs are making—that the claims have not been assigned and that only a portion of the proceeds have—has been rejected by courts in other jurisdictions. For example, in one case, the plaintiffs, conceding that Arizona law would not

permit the assignment of the claim itself and in an effort to circumvent the prohibition, argued that only the proceeds of the action had been assigned, and not the cause of action itself. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). In rejecting this argument, the court stated:

Whatever the form, whatever the label, whatever the theory, the result is the same. The policies create an interest in any recovery against a third party for bodily injury. Such an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable.

Id. at 542.

Similarly, in another case, the plaintiff argued that only the proceeds had been assigned and that an assignment of the malpractice claim itself had not occurred. *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010). But after examining the substance of the agreement, the court disagreed. The terms of the agreement were as follows: (1) the assignee selected and retained the assignor's counsel in the malpractice case, (2) the assignee bore the financial responsibility for the case, (3) the assignee agreed that the suit was to be brought in the name of the assignor, (4) the assignor agreed to share privileged, attorney-client information with the assignee, (5) the assignor was not permitted to settle the malpractice claim without the assignee's express written consent, and (6) the assignee retained control over the initiation, continuation, and/or dismissal of the malpractice claim. *Id.* at 91.

In holding that the legal malpractice claim had been assigned, the 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.

Id. In so holding, the court was guided by the principle that courts "look to substance, not form, to determine whether an assignment has occurred." *Id.*

Applying this same principle of looking to the substance of the agreement, courts in other jurisdictions have reached similar conclusions. See *Kim v. O'Sullivan*, 137 P.3d 61 (Wash. App. 2006) (holding that an assignment of a legal malpractice claim had occurred because the assignee and his attorney were in complete control of the malpractice suit and only they would benefit from a settlement or judgment); *Gurski v. Rosenblum and Filan, LLC*, 885 A.2d 163 (Conn. 2005) (stating “we agree with those courts that have identified the ‘meaningless distinction’ between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments”); *Weiss v. Leatherberry*, 863 So.2d 368, 371-72 (Fla. Dist. Ct. App. 2003) (recognizing that the rule prohibiting the assignment of legal malpractice claims “has been applied even in the absence of a formal assignment of the claim”); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred despite the fact that the assignor retained a ten percent interest in any net recovery because the assignor gave his former adversary “absolute control over the litigation, including the unfettered right to settle the malpractice suit on such terms as [the adversary] determines”).

To further support the conclusion that the present case belongs to DC & Sons, the assignment states: “Pavilion and McNair place full control of the litigation in the hands of DC & Sons, this to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney client and work product privilege with Nexsen Pruet.” Exhibit A. The assignment also states that “[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.” *Id.* A party does not need to agree to cooperate in an action that the party owns and controls. If the case belongs to the party,

the party is in control and does not need to agree to cooperate. Moreover, the agreement provides that “[t]he cost of the litigation will be borne by DC & Sons alone.” *Id.*

Finally, if successful, Plaintiffs stand to receive a nominal amount of money under the terms of the assignment. With \$4,580,015.93 million allegedly at stake, the assignment provides that Plaintiffs are permitted to share in the first half of the first \$250,000 received in the event of a settlement or a judgment. Plaintiffs do not even get the first dollar. They get half of the first \$250,000 recovered, which means that at most, Plaintiffs will receive \$125,000, while DC & Sons stands to recover \$4.375 million. Plaintiffs’ stake represents 2.7% of the total damages alleged. This is far less than the stake held by assignors in other cases, and yet the courts in those cases have held that an illegal assignment had occurred. *See Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) (holding that an illegal assignment had occurred even though the assignor retained a 20% interest in the proceeds); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred even though the assignor retained a 10% interest in any net recovery). Moreover, as part of the agreement, Plaintiffs directed that the \$50,000 in earnest money from the other litigation be turned over to DC & Sons. When this amount is taken into consideration, Plaintiffs’ interest in the proceeds diminishes to 1.637%.

Given that DC & Sons stands to receive the lion’s share of proceeds and has complete and total control over this case, including the right at any time to elect to own the claims themselves, the Court should reject the argument that Plaintiffs have not assigned the claims against Nexsen Pruet to DC & Sons. The assignment in this case is void as against public policy and the circumstances under which it was entered are so tainted with collusion that judgment should be entered in favor of Nexsen Pruet.

5. No facts from discovery can change the legal conclusion that the assignment is void.

Plaintiffs also contend that summary judgment is not appropriate because they have not had a full and fair opportunity to complete discovery. They contend that they have noticed several depositions, including a Rule 30(b)(6) deposition of Nexsen Pruet, and Nexsen Pruet has refused to produce any of these witnesses for deposition. But there are no facts to be discovered that will impact the analysis of whether the assignment is void as against public policy. The assignment is a contract and the question of whether it is void as against public policy is a question of law. See *Gurski v. Rosenblum and 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.”); *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.”); *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.”).

Here, no facts or testimony will change the conclusion that the agreement is an assignment of a legal malpractice claim that is void as against public policy. Nothing a representative of Nexsen Pruet or any other witness has to say will change this conclusion. The agreement says what it says. Additionally, Nexsen Pruet has not refused to produce witnesses for deposition. Counsel for the parties agreed to postpone the depositions until the motion for summary judgment is decided.² Nexsen Pruet should not have to incur the cost and expense of defending a case that is born out of an illegal assignment and controlled by a party that Nexsen Pruet has never represented.

² Incidentally, Nexsen Pruet has responded to written discovery and produced documents to Plaintiffs even though Plaintiffs have refused to produce a single document until after witnesses from Nexsen Pruet have been deposed.

Because additional discovery will have no impact on the analysis of whether the assignment is void as against public policy, this case should end now. Summary judgment should be entered in favor of Nexsen Pruet.

B. Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

In the event the Court concludes that the assignment is not void as against public policy, the assignment should be enforced against Plaintiffs and DC & Sons and judgment should be entered in favor of Nexsen Pruet because according to the agreement, Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

“Waiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). “Stated differently, waiver requires a party to have known of a right and known he was abandoning that right.” *Id.* “In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned.” *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010). “The determination of whether one’s actions constitute waiver is a question of fact.” *Id.*

Here, Plaintiffs voluntarily and intentionally abandoned the right to prosecute the claims in this case. This abandonment is spelled out in the agreement signed by Plaintiffs and DC & Sons and filed with the court as a reflection of the settlement between the parties. In answering requests for admission, Plaintiffs admit that they signed the agreement. **Exhibit C.** Plaintiffs admit that the agreement reflects negotiations between them and DC & Sons. *Id.* Plaintiffs admit that the litigation is being conducted pursuant to the terms of the agreement. *Id.* Plaintiffs admit that DC & Sons is paying for or is responsible for paying for the costs of the litigation. *Id.* Plaintiffs repeatedly admit that they intend to honor the agreement. *Id.*

Although they admit that they intend to honor the agreement, and the agreement plainly provides that Plaintiffs “assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet,” Plaintiffs deny in their answers to the requests for admission that they have assigned any proceeds to DC & Sons. *Id.* Plaintiffs cannot create an issue of fact by simply denying a request for admission, particularly when the denial runs contrary to the very language in the agreement that they admit to signing. *Cf. Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding that the plaintiffs’ answers to interrogatories and deposition testimony did not create a genuine issue of material fact for trial because they constituted “bald allegations” having no support in the evidence).

Based on the terms of the agreement, Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. As explained above, Plaintiffs assigned to DC & Sons the right to all proceeds from this case, all control, and the right at any time to elect to own the claims themselves. Plaintiffs and DC & Sons signed the agreement and filed it with the court as a reflection of the settlement between the parties. At the time that they signed the agreement, Plaintiffs were represented by counsel and chose to voluntarily and intentionally abandon their right to own the claims in this case. Although the question of waiver is ordinarily a question of fact, there is no question of fact present here. The terms of the agreement are unambiguous and the interpretation and effect of the agreement is a question of law.

Summary judgment should be granted in favor of Nexsen Pruet as to all causes of action.

C. DC & Sons is the real party in interest and cannot state a claim for legal malpractice and breach of fiduciary duty against Nexsen Pruet.

Additionally, summary judgment should be entered in favor of Nexsen Pruet because under the terms of the agreement, DC & Sons is the real party in interest, and as the real party in

interest, DC & Sons cannot state a claim for legal malpractice and breach of fiduciary duty against Nexsen Pruet.

“Every action shall be prosecuted in the name of the real party in interest.” Rule 17(a), SCRCP. “A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” *Ex Parte Govt. Employees Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007). “The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once.” *Bardoon Props. v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997).

“In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client’s damages by the breach.” *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). “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). Moreover, “an attorney owes no duty to a non-client unless he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.” *Id.* (internal quotations and citations omitted).

Here, DC & Sons is the real party in interest because as explained above, DC & Sons has been assigned all proceeds in this case and owns the right at any time to elect to own the claims themselves. DC & Sons has complete control of this litigation, including the right to handle the

litigation, trial, appeal, and settlement, and the right to waive the attorney-client privilege and work product doctrine that Plaintiffs had with the Nexsen Pruet law firm, even though DC & Sons has never been a client of Nexsen Pruet. Plaintiffs have agreed to cooperate “as if they retained the right to all proceeds,” because DC & Sons is the party that has that right. Plaintiffs are allowing DC & Sons to use their names, but DC & Sons is funding the litigation.

The fact that DC & Sons has agreed to give the first half of the first \$250,000 received in its pursuit of this action to Plaintiffs does not change the fact that DC & Sons owns the right to the proceeds. DC & Sons has simply agreed to allocate the proceeds in a way that gives Plaintiffs some nominal interest in the case, in an attempt to avoid the conclusion that an assignment of a legal malpractice claim has occurred. This maneuver has been rejected by courts in other jurisdictions, which have held that the right to a portion of the proceeds does not make one the real party in interest. *E.g., Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010); *Gurski v. Rosenblum and Filan, LLC*, 885 A.2d 163 (Conn. 2005); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000). Further, at most Plaintiffs stand to receive \$125,000, \$50,000 of which they have already turned over to DC & Sons, when there is allegedly \$4,580,015.93 at stake. DC & Sons is the party that has the real, actual, material, and substantial interest in this case.

As the real party in interest, DC & Sons cannot state a claim against Nexsen Pruet for legal malpractice and breach of fiduciary duty. DC & Sons cannot satisfy the first element of a cause of action for legal malpractice, which is the existence of an attorney-client relationship. DC & Sons is not and never has been a client of Nexsen Pruet. **Exhibit D.** Nexsen Pruet represented DC & Sons’s adversary (Plaintiffs) in the action that is the subject of the complaint. Not only can DC & Sons not state a claim against Nexsen Pruet, but Nexsen Pruet is immune

from suit as to DC & Sons. Nexsen Pruet is not liable to DC & Sons for the performance of its professional activities on behalf of Plaintiffs in the litigation against DC & Sons. *See Argoe*, 388 S.C. at 400, 697 S.E.2d at 554 (holding 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”).

Thus, the claims for legal malpractice and breach of fiduciary duty fail as a matter of law, and judgment should be entered in favor of Nexsen Pruet.

CONCLUSION

Judgment should be entered in favor of Nexsen Pruet as to all causes of action in this case. This case is based on an assignment of a legal malpractice claim that is void as against public policy. Even if the assignment were enforceable, the end result would be the same. Based on the assignment, Plaintiffs are not the real parties in interest and have waived their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. The real party in interest is DC & Sons, an entity that Nexsen Pruet never represented and that cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet. This case should end now.

Nexsen Pruet’s motion for summary judgment should be granted.

[Signature on following page.]

SOWELL GRAY STEPP & LAFFITTE LLC

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Tina Cundari
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tcundari@sowellgray.com

Attorneys for Nexsen Pruet LLC

Columbia, South Carolina
March 11, 2013

FORM 4

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

JUDGMENT IN A CIVIL CASE

2007-CP-10-1457
CASE NO. 2008-CP-10-4675

DC & Sons, LLC

v

Pavilion Development Corp

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit) ☐ Rule 43(k), SCRPC (Settled); ☒ Other ☐
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

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

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

PRESIDING JUDGE

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

SCCA SCRPC Form 4 Revised 06/2008

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., C.S. & F.C.

By _____
DEPUTY CLERK

EXHIBIT

A

①

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

Recital:

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

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

a. Parlon ~~was~~ was in breach;

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

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

d. Parlon failed to ~~sever~~ needed
parties.

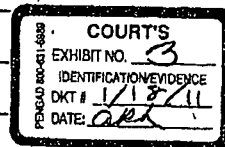
e. a stipulation was entered

stating Son had no claims and became an

f. Parlon sought a lower price

or a return of the earnest money

before it would remove the lis pendens



(2)

Agreement

1. The Recitals are part of this agreement
2. In light of the Court's ruling, Parlon & McVain have proposed & D.C. & Sons has agreed as follows:

a. D.C. & Sons releases McVain ^{from the Lowell Fringes} from all claims to which this ~~is~~ ^{is} subject & waives trial against Parlon ~~as~~ on punitive damages. In return, Parlon confesses judgment in the amount of D.C. & Sons claimed actual damages in the amt & form shown on Exh A. McVain & Parlon release D.C. & Sons from all claims ^{which are} ~~the~~ subject of this action.

b. Parlon & McVain assign to D.C. & Sons all proceeds from a suit or suits to be filed by Parlon & McVain against its counsel (Neyen Funt & all other responsible parties). Further, Parlon & McVain place full control of the said litigation in the hands of D.C. & Sons, this to include the handling of the

DK

AT Sons
D.C. & Sons
Parlon &
McVain
assign
all claims
to include
Breed
Professors
etc.

(3)

lit. given, trial, appeal, settlement &
the waiver of the other client
a writ pushed forward with the
Nexen Trust firm. Further, P & M
agree to cooperate in the prosecution
of this action & to pursue the lit. given
as if they retained the right to
all proceeds. The cost of the litigation
~~with~~ ~~and~~ will be borne by
D & Sons alone. ~~But~~ P & M
acknowledge suit will be brought
in their names

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

d. D & Sons agree that in the
event of a settlement or judgment
that the first \$250,000 will be split
equally between D & Sons &
P & M so as to defray their

lit. witnessed the signature defense cost & compensation for loss
of all three parties. of business & emotional distress

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

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

The parties agree to this 1/18/2011
D & Sons P & M
v.p. if any M = van

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON
) PLEAS
) FOR THE NINTH JUDICIAL
CIRCUIT

DC & SONS, LLC
Plaintiff,

vs.

RICHARD H. COEN, LOWCOUNTRY
CAPITAL, LARRY MCNAIR,
COENCO, LLC, & PAVILION
DEVELOPMENT CORP.
Defendants.

PAVILION DEVELOPMENT
CORPORATION,
Plaintiff,
vs.

DC & SONS, LLC,
Defendants.

CASE NO.: 2008-CP-10-4675

CONFESSON OF JUDGMENT

CONSOLIDATED UNDER
CASE NO. 2007-CP-10-1457

FILED
2011 JAN 18 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PERSONALLY APPEARED BEFORE ME, Larry McNair, on behalf of Pavilion, LLC, who
first being duly sworn confesses and states as follows:

1. I am the ^{Vice} President of Defendant Paviliton, LLC ("Pavilion") in the above captioned
action and have firsthand knowledge of the facts and circumstances relating to this action
and to this Confession of Judgment and am authorized to execute this Confession of
Judgment on behalf of Pavilion.
2. The Court granted Plaintiff DC & Sons' Motion for Summary Judgment.
3. There is due and owing and unpaid upon Plaintiff DC & Sons, LLC, the sum of
\$4,580,015.93.
4. I ^{acknowledge} ~~agree~~ that Plaintiff DC & Sons, LLC ^{claims} ~~is justly owed~~ the sum of \$4,580,015.93 from

Defendant Pavilion, and Pavilion has no defense to these claims based on the Court's ruling for the Plaintiff for its Sum. Jud

5. Accordingly, Larry McNair, on behalf of Pavilion, confesses judgment to Plaintiff DC &

Sons, LLC in the sum of \$4,580,015.93, together with interest, and hereby authorizes the

Clerk of Court of Charleston County Court of Common Pleas to enter judgment in that amount against Defendant Pavilion in said amount.

Pavilion Development Corp, LLC
By: Larry McNair, Vice President

Sworn and subscribed by me this
18th day of January, 2010

John W. Chermant
Notary Public for the State of South Carolina
My Commission Expires: 11/7/2016

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

DC & SONS, LLC,	)	TRANSCRIPT OF RECORD
Plaintiffs,	)	January 18, 2010
-vs-	)	Charleston, South Carolina
RICHARD H. COEN, LOWCOUNTRY	)	08-CP-10-4675
CAPITAL, OCEAN I REALTY,	)	
JAMES R. MAULL, JR., LARRY	)	
MCNAIR, COENCO, LLC &	)	
PAVILION DEVELOPMENT	)	
Defendants.	)	
* * * * *		
PAVILION DEVELOPMENT	)	
CORPORATION,	)	
Plaintiff,	)	07-CP-10-1475
-vs-	)	
DC & SONS, LLC,	)	
Defendant.	)	

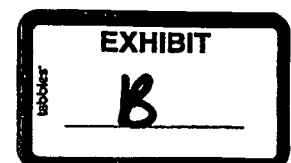
B E F O R E:

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

(Court's Exhibit Nos. 1 and 2 were for
identification.)

THE COURT: All right. Are you ready? We
are here on DC & Sons versus Richard Coen and others,
2008-CP-10-4675 and Pavilion Development Corporation
versus DC & Sons 2007 CP-10-1475. This is defendant --
or, excuse me, it's DC & Sons summary judgment as to the
liability for Pavilion for abuse of process and breach of
contract, so, Mr. Epting, it's your motion. It looks

Page 1





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

Page 13

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MR. EPTING: Thank you, sir.

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

THE COURT: Absolutely.

(Recess taken.)

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

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

THE COURT: All right.

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

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

THE COURT: What amount is that?

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

THE COURT: Okay.

MR. EPTING: And, Judge, I only have one copy, but I would like to enter this settlement into the court record because it has a confession, and I would

Page 14

ask, given your familiarity with the case, that the Court, for the parties' benefit here, find that it is a fair settlement for all the parties in light of the circumstances and facts as the Court has come to understand it, so with that, I would like to offer this up, Your Honor.

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

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

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

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

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

franchise.

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

The other component, Judge, of damages of the

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

THE COURT: All right.

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

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

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

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

MR. MCNAIR: Yes, sir.

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

THE COURT: All right.

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

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

THE COURT: Sure.

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

THE COURT: This is which order?

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

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

MR. EPTING: Fine.

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

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

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

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

MR. EPTING: That would work, Judge.

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

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

- - -

(Whereupon, the proceedings were concluded.)

- - -

♀

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 18th of January 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 9, 2011

A0409259.TXT

Circuit Court Reporter

23

AMANDA K. HAFFENDEN, RPR, CRR
Circuit Court Reporter
P.O. Box 424
Summerville, SC 29484
(843) 771-3755

March 9, 2011

TO: George J. Kefalos
3 State Street
Charleston, SC 29401

IN RE: DC & Sons, LLC v. Richard Coen, et al.
DATE: January 18, 2011
TRANSCRIPT OF PROCEEDINGS
BEFORE: Honorable Roger M. Young

22 pages at \$3.25 per page: \$71.50

POSTAGE: \$4.95 = \$76.45

TRANSCRIPT WILL BE FORWARDED UPON RECEIPT OF PAYMENT

Thank you!

24

AMANDA K. HAFFENDEN, RPR, CRR
Circuit Court Reporter
P.O. Box 424
Summerville, SC 29484
(843) 771-3755

March 9, 2011

TO: R. Bruce Wallace
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

IN RE: DC & Sons, LLC v. Richard Coen, et al.
DATE: January 18, 2011

Page 19

A0409259.TXT
TRANSCRIPT OF PROCEEDINGS
BEFORE: Honorable Roger M. Young

22 pages at .75 per page: \$16.50

POSTAGE: \$4.95 = \$21.45

TRANSCRIPT WILL BE FORWARDED UPON RECEIPT OF PAYMENT

Thank you!

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

vs.

NEXSEN PRUET, LLC,

Defendant,

vs.

DC & SONS, LLC,

Counterclaim Defendant.

**ANSWERS TO THE FIRST REQUESTS
FOR ADMISSION OF NEXSEN PRUET,
LLC DIRECTED TO PLAINTIFFS**

Plaintiffs Pavilion Development Corp. ("Pavilion") and Larry McNair hereby answer the First Requests for Admission propounded by Defendant Nexsen Pruet, LLC ("Nexsen Pruet") in accord with the South Carolina Rules of Civil Procedure as follows:

REQUESTS FOR ADMISSION

1. Admit that you confessed judgment in amount of \$4,580,015.93 in the underling litigation by having Larry McNair, on behalf of Pavilion Development Corporation, sign the confession of judgment.

ANSWER: Admitted.

2. Admit that the amount of \$4,580,015.93 was determined by DC & Sons or by counsel for DC & Sons.

ANSWER: Denied.

3. Admit that neither you nor your counsel, Dan M. David, challenged the amount of damages confessed.

ANSWER: Denied.



4. Admit that Pavilion has not paid any money in partial or full satisfaction of the judgment confessed in the underlying litigation.

ANSWER: Admitted.

5. Admit that Pavilion is not at risk of having to pay the full amount of the judgment confessed in the underlying litigation.

ANSWER: Denied.

6. Admit that you have not paid any money damages to DC & Sons in connection with the underlying litigation.

ANSWER: Admitted.

7. Admit that you signed the agreement dated January 18, 2011, attached as Exhibit A.

ANSWER: Admitted.

8. Admit that counsel for DC & Sons, Andrew Epting and/or George Kefalos, drafted the agreement attached as Exhibit A.

ANSWER: Denied. Exhibit A reflects negotiations between Plaintiffs and DC & Sons.

9. Admit that DC & Sons is controlling this litigation.

ANSWER: Plaintiffs admit the conduct of the litigation is as agreed in the attached Exhibit A.

10. Admit that DC & Sons is paying for or is responsible for paying the costs and fees associated with this litigation.

ANSWER: Admitted.

11. Admit that you are cooperating with DC & Sons in the prosecution of this case.

ANSWER: Plaintiffs admit that as part of the agreement to avoid personal liability they entered into the agreement attached as Exhibit A, which they intend to honor.

12. Admit that you have given DC & Sons the right to bring this case in your names.

ANSWER: Plaintiffs admit that as part of the agreement to avoid personal liability they entered into the agreement attached as Exhibit A, which they intend to honor. Plaintiffs Larry McNair and Pavilion Development have brought this action.

13. Admit that you have assigned all claims asserted in this case to DC & Sons.

ANSWER: Denied.

14. Admit that you have assigned any proceeds received from this case to DC & Sons.

ANSWER: Denied.

15. Admit that DC & Sons has control over whether to waive the attorney-client privilege and work-product protection between Plaintiffs and Nexsen Pruct.

ANSWER: Plaintiffs have agreed to waive the attorney-client privilege in order to bring this action and claimed as a defense in the underlying action, advice of counsel. Plaintiffs further respond that as part of the agreement to avoid personal liability, they entered into the agreement attached as Exhibit A, which they intend to honor.

16. Admit that you are not entitled to receive any proceeds in this case other than half of the first \$250,000 in proceeds received either through settlement or trial.

ANSWER: Admitted.

17. Admit that in the event of a settlement or judgment in this case in your favor, the first \$250,000 received will be split equally between you and DC & Sons.

ANSWER: Admitted.

18. Admit that DC & Sons is entitled to receive all proceeds beyond the first \$250,000 received either through settlement or judgment in this case.

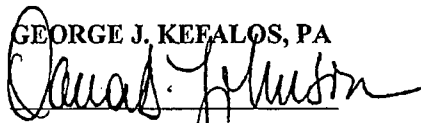
ANSWER: Admitted.

19. Admit that Pavilion no longer conducts any business.

ANSWER: Denied. Pavilion remains a "for profit" corporation in good standing with the South Carolina Secretary of State. Due to the downturn in the economy, in particular in the real estate development industry, Pavilion's business has slowed considerably, and last year Pavilion did virtually no development business

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 2nd day of October 2012 at
Charleston, South Carolina

GEORGE J. KEFALOS, PA


George J. Kefalos, Esq.
Oana D. Johnson, Esq.
George J. Kefalos, PA
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Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
ANDREW K. EPTING, JR., LLC
46a State Street, Charleston, SC 29401
P: 843.377.1871 F: 843.377.1310
ake@epting-law.com; mne@epting-law.com

ATTORNEYS FOR PLAINTIFFS

This 22 day of October, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
	)	
	)	
	)	
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	AFFIDAVIT OF BRUCE WALLACE
	)	
	)	
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
	)	
Counterclaim Defendant.	)	

FILED
2013 JAN 14 PM 2:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Personally appeared before me Bruce Wallace, who being first duly
deposes, and says as follows:

1. I am Bruce Wallace. I am over the age of 18 years and I submit this affidavit based upon my personal knowledge.
2. I am member of the law firm of Nexsen Pruet, LLC, and I have been admitted to practice law in the State of South Carolina since 1996.
3. I represented Pavilion Development Corporation (Pavilion) and Larry McNair (McNair) in the matters of *Pavilion Development Corporation v. DC & Sons, LLC*, Case No. 07-CP-10-1457, and *DC & Sons v. Richard H. Coen, Lowcountry Capital, Ocean I Realty, James R. Maull, Jr., Larry McNair, Coenco, LLC, and Pavilion Development*, Case No. 08-CP-10-4675, which form the basis of the allegations in the above-captioned case. These two cases were consolidated into one case, Case No. 07-CP-10-1457, by order of the court.



4. Andrew K. Epting and George J. Kefalos represented DC & Sons, LLC, in the litigation referenced in paragraph 3.

5. Nexsen Pruet and I have never represented DC & Sons, LLC. DC & Sons was our clients' adversary in the litigation referenced in paragraph 3.

6. When DC & Sons sued Pavilion and McNair for abuse of process, I determined that I had become a witness to the facts of the case and that Nexsen Pruet and I needed to withdraw as counsel. Judge Roger Young, who presided over the case for its duration, agreed.

7. The withdrawal was granted after the court entered summary judgment in favor of DC & Sons on March 23, 2009. After the withdrawal, but before the time to appeal the order granting summary judgment had expired, Pavilion and McNair retained new counsel. Once new counsel was retained, Nexsen Pruet and I ceased all legal representation of Pavilion and McNair.

FURTHER AFFIANT SAYETH NOT.

Sworn to before me this 9 day
of January, 2013

Cupal Seifert
Notary Public for South Carolina
My Commission Expires: 8-4-16



Bruce Wallace

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-05774

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

**OPPOSITION TO DEFENDANT
NEXSEN PRUET'S MOTION
FOR SUMMARY JUDGMENT**

BY
[Signature]

JULIE J. ARMSTRONG
CLERK OF COURT

2013 APR -3 PM 12:02

FILED

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

This is a lawful assignment of proceeds:

Plaintiffs maintain they are the real parties in interest as they have not assigned their claims against Nexsen Pruet to DC & Sons. Rather, as part of the agreement to avoid the exposure of a trial in the underlying case of actual and punitive damages, Plaintiffs agreed to assign a portion of the proceeds of this litigation to DC & Sons.

No South Carolina Court has held an assignment of a legal malpractice claim is invalid or void as against public policy. Nexsen Pruet raised this issue in a case styled *Frank Robertson and Cayvon, Inc. v. Nexsen Pruet Jacobs & Pollard, LLP*; case no 2004-CP-40-5531 (2006) filed in Richland County. The Honorable John L. Breeden, Jr. denied Nexsen Pruet's motion for summary judgment, recognizing there is no South Carolina authority on point and holding: "I am again not persuaded that equity and public policy would dictate that by having granted a partial lien against

this case should dictate that Robertson's right or ability to recover for the Defendants' misconduct is diminished or negated."

While there are jurisdictions that have held that assignments of legal malpractice claims are void as against public policy, several jurisdictions, including Pennsylvania, New York, Massachusetts, Maine, Oregon, and the District of Columbia, do not prohibit enforcement of the assignment of legal malpractice claims. See *Richter v. Analex Corp.*, 940 F.Supp. 353 (D.D.C.1996); *Thurston v. Continental Cas. Co.*, 567 A.2d 922 (Me.1989); *Vitale v. City of New York*, 183 A.D.2d 502, 583 N.Y.S.2d 445 (1992); *Collins v. Fitzwater*, 277 Or. 401, 560 P.2d 1074 (1977), rev'd on other grounds, *Lancaster v. Royal Ins. Co.*, 302 Or. 62, 726 P.2d 371 (1986); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 539 A.2d 357 (1987); *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 209, 707 N.E.2d 332, 336 (Mass.,1999). These jurisdictions have rejected the public policy concerns of the majority, reasoning:

We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected.

Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526. The Supreme Court of Pennsylvania stated:

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

Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526. The Supreme Court of Massachusetts has held that the duty of confidentiality is also not threatened by the assignment of a legal malpractice claim as a client assigns his malpractice claim with the full awareness that he is

waiving his attorney-client privilege, which is a privilege intended to protect the client. *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 210. The Supreme Court of Maine has held that voluntary assignment of a legal malpractice claim to a party with an interest in the claim who has “the time, energy and resources to bring the suit” may be the most efficient way, in some instances, to prosecute such a claim. *Thurston v. Continental Cas. Co.*, 567 A.2d 922, 923.

Pavillon retains the right to bring the action:

Nexsen Pruet asks this Court to hold that the purported assignment by Pavilion and McNair of their malpractice claim operates as a waiver of the right to bring the claim, and thus neither DC & Sons nor Pavilion and McNair have the right to sue Nexsen Pruet. However, even those jurisdictions that hold the assignment of a legal malpractice claim is void as a matter of law do not disallow the claim, rather the assignment is simply voided and the action continues in the name of the client.¹

For example, Nexsen Pruet cites case law from Texas in support of its motion. Texas Courts hold that a client’s right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim. *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000). The Court in *Tate* held:

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

In this respect, Tate is correct. In *Mallios*, the Texas Supreme Court held that when there is a purported partial assignment of a legal malpractice claim, the plaintiff’s right to bring his own cause of action for malpractice is not vitiated by the invalid assignment. *Mallios*, 11 S.W.3d

¹ Here 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.

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).

Most jurisdictions, including those cited by Nexsen Pruet, simply void the assignment and allow the legal malpractice lawsuit to “proceed in the normal course, as between the proper parties thereto.” *Kommavongsa v. Haskell*, 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003).

Even if the assignment is improper, the remedy is to void the assignment:

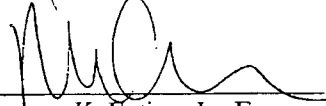
However, should this Court find fault with the assignment document, this Court should void the assignment and allow Plaintiff to continue their lawsuit against their former attorneys. Indeed, counsel for Nexsen Pruet agreed at the March 13, 2013 hearing that if the assignment was void, the case filed by Pavilion and Larry McNair, both former clients of Nexsen Pruet could proceed as pled.²

If this Court does not adopt the rationale of Pennsylvania, New York, Massachusetts, Maine, Oregon, and the District of Columbia, then this Court should void the assignment and allow the case to continue as pled, or, if the Court prefers, the parties to the assignment are amenable to simply amending their agreement to remove the assignment.

[signatures on following page]

² Plaintiffs have requested a transcript of the March 13, 2013 hearing, but it has not yet been received.

ANDREW K. EPTING, JR., LLC



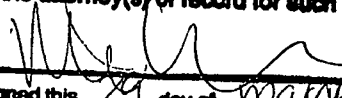
Andrew K. Epting, Jr., Esq.
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ake@epting-law.com; mne@epting-law.com

George J. Kefalos, Esq.
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George@kefaloslaw.com; Oana@kefaloslaw.com

On this 29 day of March 2013
Charleston, SC

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 29 day of March, 2013 at
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

v.

NEXSEN PRUET, LLC,

Defendant,

v.

DC & SONS, LLC,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

IN THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-10-05774

**NOTICE OF FILING
TRANSCRIPT**

BY *[Signature]*
JULIE J. ARMSTRONG
CLERK OF COURT
2013 JUN 24 PM 1:21
CLERK OF COURT

Defendant Nexsen Pruet, LLC, by and through the undersigned counsel, hereby gives notice of the filing of the transcript of the hearing that took place on March 21, 2013, before The Honorable Roger Young. A copy of the transcript is attached as **Exhibit A**.

SOWELL GRAY STEPP & LAFFITTE, LLC

By:

[Signature of Elizabeth Van Doren Gray]

Elizabeth Van Doren Gray
Tina Cundari

1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@sowellgray.com
tcundari@sowellgray.com

Attorneys for Nexsen Pruet LLC

Columbia, South Carolina
June 21, 2013

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 21, 2013
	)	
-vs-	)	Charleston, South Carolina
	)	
DC & SONS, LLC,	)	
	)	
Defendant.	)	

B E F O R E:

The Honorable Roger Young, Judge.

A P P E A R A N C E S:

Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Dan David, Esquire



1 (March 21, 2013.)

2 THE COURT: What do y'all have?

3 MR. EPTING: Judge Young, we're are here to
4 seek this Court's permission and this may not be -- a
5 little bit of history.

6 I have marked as Court's Exhibit 1 several
7 ordinances the Court signed and a settlement agreement
8 this Court signed about two years ago in a case in which
9 Mr. David represented Pavilion and a fellow by the name
10 of Larry McNair and George Kefalos represented a
11 corporation by the name of DC & Sons.

12 It arose out of a filing of a lis pendens the
13 client lost a \$5 million sale, DC & Sons did, and we
14 allege that the lis pendens was improperly filed. The
15 Court agreed with us and actually entered summary
16 judgment finding that lis pendens was improper. As a
17 result of that, Mr. David, George Kefalos, and I were
18 able to dissolve the case, and, in fact, the jury was
19 here that morning and we were getting ready to strike a
20 jury when the case got settled.

21 So that's part one. Part two is Mr. Kefalos
22 and I then brought a lawsuit on behalf of Mr. McNair and
23 Pavilion against Nexsen Pruet for having erroneously
24 filed the lis pendens, and that lawsuit has been pending
25 for 18 months, something like that. What then happened

1 is Nexsen Pruet's counsel moved to strike the lawsuit on
2 the basis that part of the settlement included an
3 assignment of proceeds, and a right for DC & Sons to
4 control the litigation. And there is no case in South
5 Carolina, Judge, that deals with the issue, and the cases
6 around the country are mixed on whether you can or cannot
7 do that.

8 And the issue, if it were that the assignment
9 was improper, then the remedy would be to strike the
10 assignment. So George and I appeared in front of Judge
11 Nicholson and argued the issue. Judge Nicholson asked
12 for more briefing on it, expressed the idea that he would
13 likely strike the assignment, and George and I, being the
14 agreeable lawyers that we are, had this concern that,
15 well, if that happened, are we going to wind up in some
16 sort of appeal? And if there is no reason for the
17 assignment or the control, why don't we just, as parties,
18 simply amend the settlement agreement?

19 And so we spoke with Mr. David, the counsel
20 in the underlying action, and decided that's a pretty
21 good idea. We'll just take the assignment and control,
22 end it, and put it back in Mr. McNair and Pavilion. The
23 lawsuit is already filed in the name of Pavilion and
24 McNair because what were assigned was proceeds.

25 And so after having the grand idea that we

1 should essentially amend the settlement, we realized that
2 the settlement was attached to a form four signed by the
3 Honorable Roger Young, and so we thought caution here
4 would be the better part of wisdom, and so we thought we
5 would simply come here and ask you if you would allow us
6 to amend the settlement so as to put the control in the
7 lawsuit in McNair and Pavilion and to void the
8 assignment.

9 THE COURT: Why do you need to do that if
10 Judge Nicholson is going to strike the assignment? Don't
11 you in either way have the assignment go away?

12 MR. EPTING: Well, I think that's where we're
13 headed, Judge, but it seems to me -- or seems to
14 Mr. Kefalos and I that there might be -- and I can tell
15 you this, Judge: I don't know the answer to this, but I
16 worry that there may be some appeal taken from Judge
17 Nicholson's order.

18 THE COURT: Well, it would be y'all appealing
19 it, wouldn't it?

20 MR. EPTING: No, sir, because we really are
21 just fine without the assignment. We don't care. We
22 worry --

23 THE COURT: Well, the other side is moving to
24 strike the assignment; is that right?

25 MR. EPTING: Right.

1 THE COURT: So if Judge Nicholson granted
2 their motion, why would they appeal it?

3 MR. EPTING: I think what they would say is
4 the case should be dismissed in its entirety, meaning
5 ended, because of the assignment in the first instance,
6 and because of that, we have -- I don't have any legal
7 authority for this, Judge, but I know lawyers are very
8 clever, and it's my concern that somehow there be
9 something or some reason for them to appeal, and we'll be
10 in litigation for another two years before the case ever
11 comes up for trial.

12 And so we thought, well, why not just amend
13 it, and then there is nothing to be decided. Obviously,
14 we're doing this on the record, disclosing everything to
15 you, and disclosing everything to Judge Nicholson. So
16 that's why we're doing it -- or, no, that's why we're
17 requesting permission to do it.

18 THE COURT: Did you want to say something?

19 MR. KEFALOS: I was going to add, my feeling
20 was a little bit different than Mr. Epting. I didn't
21 want to have Judge Nicholson issue an order about the
22 validity of this one way or another because then it would
23 create some precedent in South Carolina about this thing,
24 and my feeling was the best thing to do is just take it
25 off the table and void the assignment so he doesn't have

1 to decide and we'll give up -- return the right to
2 control back to Pavilion and we can move forward.

3 Then Drew mentioned, well, this is part of an
4 order so we can't just agree between the two of us. We
5 probably need Judge Young's blessing, but my feeling was
6 I didn't want an order saying one way or the other.

7 THE COURT: Well, you know, I'm always glad
8 to help. I'm a little concerned that you're asking the
9 Court to do something to help you out in the position in
10 another case and there is another party out there that
11 has an interest in what we do here in that it affects
12 their case. But you obviously want to now have an order
13 in which you present and say, You're done with and we had
14 this hearing and so go away. We win. We can move on, or
15 whatever your posture is, and that causes me a little bit
16 of discomfort.

17 It's a two year-old settlement, and to come
18 back and to take some action for the sole purpose of sort
19 of going on the end around another judge who has a matter
20 under advisement, you know, causes me to pause and say,
21 I'm not sure this is a good thing for me to do.

22 MR. EPTING: Judge, I respect that. What I
23 would say, though, is if Nexsen Pruet were here, what
24 standing would they have?

25 THE COURT: Well, I don't know that they

1 would have any standing. I'm just uncomfortable with
2 this without, you know, some precedent, I suppose, to
3 say, you know, take -- I'm taking an action two years
4 after the fact to cause the outcome in another lawsuit to
5 be changed, and I just -- I don't know what authority the
6 Court has, first of all, to do anything on a two year-old
7 settlement; and, second, that just causes me to pause and
8 go, I wonder how I could explain this to those that grade
9 my paper up the road.

10 MR. EPTING: Right.

11 THE COURT: You know, why gratuitously take
12 this action -- it sounds like a perfectly reasonable
13 thing. I just am not comfortable with it, and I try to
14 listen to my inner alarms going off.

15 MR. EPTING: Well, I think that's the answer
16 to it, Judge. If you're not comfortable with it --

17 THE COURT: I'm just not.

18 MR. EPTING: All right, sir.

19 THE COURT: I'm not suggesting that you're
20 doing anything wrong, I'm just suggesting that I have an
21 alarm going off, going this is a two year-old case.
22 We're doing something another judge has under advisement.
23 It bothers me.

24 MR. EPTING: But let me ask this question,
25 Judge: Let's approach it just slightly differently. Our

1 feeling was we could just amend the settlement because
2 it's a settlement among these three parties, and it was
3 an afterthought of, well, it says it's attached to a form
4 four.

5 Would it offend your sensibilities -- and let
6 me just pass you, Judge -- this is your form four, and
7 that's what the reference to the settlement is just --

8 THE COURT: It doesn't bother me if y'all
9 want to nullify this. Okay? I'm not going to hold you
10 in contempt. Whether or not you can actually do it and
11 it has the effect that you want, I suppose the other side
12 is going to claim that you probably didn't have the
13 authority to do it. But you brought it to my attention,
14 and I'm just saying, I'm not comfortable with amending
15 this settlement two years down the road when there is
16 this action going on.

17 But if you think that between the two parties
18 you can nullify the assignment, I'm not going to rule you
19 in.

20 MR. EPTING: And I guess, Judge, we just want
21 to make sure we're not offending you, that we're
22 violating what --

23 THE COURT: No offense is taken.

24 MR. EPTING: Or violating something that's in
25 the rule four, and if you're satisfied that we aren't

1 violating some Court order, then we'll simply amend it.

2 THE COURT: It does not offend me. It does
3 not bother me, so you guys go and good luck. I hope you
4 get what you want.

5 MR. EPTING: All right, Judge. Thank you.
6 Thank you, sir.

7

8 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 21st of March 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 2, 2013

Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
PAVILION DEVELOPMENT CORP. &	)	Civil Action No.: 2011-CP-10-05774
LARRY McNAIR,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
NEXSEN PRUET, LLC,	)	
	)	
Defendant,	)	
	)	
v.	)	
	)	
DC & SONS, LLC,	)	
	)	
Counterclaim Defendant.	)	

**NEXSEN PRUET'S REPLY BRIEF
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

2013 APR 12 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Summary judgment should be entered in favor of Nexsen Pruet LLC and this entire case dismissed because this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy, and the case is so tainted with collusion that it cannot be cured by simply striking the assignment and allowing the case to proceed in its current form.

1. The assignment is void as against public policy.

a. Plaintiffs have assigned all claims, proceeds, and control in this case.

Plaintiffs' contention that they are the real parties in interest and that they have not assigned the claims against Nexsen Pruet to DC & Sons is directly contradicted by the plain language of the settlement agreement. 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."

- “[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.*”
- “*At DC & Sons election*, Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc.”
- “Pavilion and McNair place *full control of the litigation in the hands of DC & Sons*, this to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney client and work product privilege with Nexsen Pruet.”
- “[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.*”

Exhibit A (emphasis added).

Based on a plain reading of the settlement agreement, Plaintiffs assigned *all proceeds* to DC & Sons, placed *full control* of the litigation in the hands of DC & Sons, and gave DC & Sons the *right to elect* whether Plaintiffs assigned the very claims themselves. Plaintiffs did not just assign a portion of the proceeds. Plaintiffs assigned *all* proceeds. Plaintiffs did not just assign the claims. Plaintiffs assigned the right to elect to own the claims. Plaintiffs did not just give DC & Sons some control over the case. Plaintiffs gave DC & Sons *full* control over the case, including the trial, appeal, settlement, and the waiver of the attorney-client privilege and work product protection.

In addition to the assignment, the settlement agreement included a release of all personal liability of Plaintiff Larry McNair and his business partner, Lowell Frazier, in exchange for Pavilion Development Corporation confessing judgment in favor of DC & Sons for \$4.5 million.

This is the very type of agreement that courts across the country, including those that have adopted a case-by-case approach in analyzing assignments of legal malpractice claims, deem void as against public policy.

b. Assignments between adversaries are uniformly disfavored.

Although there is a division among courts as to whether assignments of legal malpractice claims are void per se (the majority view) or whether they should be evaluated on a case-by-case basis (the minority view), *there is no division* as to whether assignments of legal malpractice claims to one's adversary in litigation as part of the settlement of the case are void as against public policy.¹ Courts consistently hold that assignments of legal malpractice claims to one's adversary in litigation are void as against public policy. *E.g., Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (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).

This is true even in states that have adopted the minority, case-by-case approach. *See 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."); *Kim v. O'Sullivan*, 137 P.3d 61 (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."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1994) ("It is one thing for lawyers in our adversary system to represent clients with whom they

¹ As explained more fully in Nexsen Pruet's memo in support of the motion for summary judgment, approximately 18 states bar the assignment of legal malpractice claims regardless of the facts and circumstances surrounding the assignment. A minority of jurisdictions take a case-by-case approach.

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.”).

Plaintiffs have not cited a single case in which a court permitted the assignment of a legal malpractice claim between adversaries in litigation as part of the settlement of the case and that also included a confession of judgment. That is because no such case exists. Indeed, courts have expressly denounced such “contrived and elaborate scheme[s].” *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (describing the assignment and confession scenario as a “contrived and elaborate scheme” that has been denounced by other courts). *See also Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (referring to 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”).

The reason why courts have uniformly prohibited assignments between adversaries is because assignments between adversaries create an “opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation.” *Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003). “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.” *Id.* Additionally, “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.* Further, because legal malpractice actions 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.*

So even if this Court were to adopt the minority approach of evaluating assignments of legal malpractice claims on a case-by-case basis, the Court should rule that the assignment in this case is void as against public policy. It is an assignment between adversaries in the case in which the alleged legal malpractice arose that was entered into as part of settlement that included a \$4.5 million confession of judgment and a release of personal liability. An assignment of this type and under these circumstances implicates all of the public policy concerns set forth above.

c. The fact that this case presents novel question of law does not mean that the Court cannot decide it.

Plaintiffs contend that the Court should find the assignment valid because no South Carolina court has ruled on the issue. The fact that no South Carolina court has determined that assignments of legal malpractice claims are void as against public policy is not a basis for upholding the assignment in this case. Just because the issue is novel does not mean that the circuit court cannot decide it or should automatically decide in favor of Plaintiffs, as Plaintiffs suggest. When presented with novel questions of law, courts look to other jurisdictions for guidance. *See Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005) (“When there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority.”) Here, the law from other jurisdictions compels the conclusion that the assignment in this case is void as against public policy. The Court would be on solid legal ground in reaching this conclusion.

Plaintiffs cite the circuit court case of *Robertson v. Nexsen Pruet Jacobs & Pollard, LLP*, Case No. 2004-CP-40-5531 (Mar. 6, 2006), for the proposition that this Court should deny the motion for summary judgment. But *Robertson* did not involve the assignment of a legal malpractice claim. Instead, the case involved a settlement agreement in which one party (Robertson) agreed to pay the other (MDI) \$90,000 from the proceeds of the legal malpractice action to be brought by Robertson against Nexsen Pruet, and stated that the amount was subordinate to the amount that Robertson owed his attorneys. Judge Breeden ruled that the agreement did not in any way constitute an assignment of a legal malpractice claim. He found that “Robertson remains the real party in interest, remains the prosecuting party in this litigation and has not divested himself of any right to control the prosecution and/or settlement of his claims against the Defendants. In fact, Robertson has not in this arrangement given away even so much as the right to be informed as to the progress of the litigation.”

The same cannot be said of the case at hand, in which the settlement agreement plainly states that Plaintiffs assign all proceeds and control of the case to DC & Sons, that Plaintiffs agree to fully cooperate, including allowing DC & Sons to use their name, and that DC & Sons has the right to elect to own the very claims themselves. Unlike *Roberston*, which involved merely a recitation of how proceeds would be distributed, the present case directly implicates the public policy concerns that have been recognized by courts across the country. Because *Robertson* did not involve an assignment of a legal malpractice claim, it is not surprising that Judge Breeden ruled that the facts and circumstances do not “implicate the public policy concerns of the general rule so as to render the settlement invalid”

d. Plaintiffs have acknowledged the illegality of the assignment.

Plaintiffs and DC & Sons have acknowledged the illegality of the assignment by seeking to have the settlement agreement amended while the motion for summary judgment filed by Nexsen Pruet remains pending before this Court. On March 21, 2013, eight days after the hearing before this Court on Nexsen Pruet's motion for summary judgment, Plaintiffs and DC & Sons arranged a hearing before The Honorable Roger Young for the purpose of presenting an amended settlement agreement. This was done without notice to Nexsen Pruet and without notice to this Court. Nexsen Pruet discovered that the hearing had taken place when Nexsen Pruet received a Notice of Entry of Judgment from the Charleston County Clerk of Court indicating that an order had been entered regarding a proposed amended settlement agreement. **Exhibit B.** Upon receipt of the Notice from the Clerk's office, Nexsen Pruet searched the circuit 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." **Exhibit C.** Nexsen Pruet has requested a copy of the transcript from the hearing and will provide it to this Court upon receipt. **Exhibit D.** In addition to failing to notify Nexsen Pruet of the hearing, Plaintiffs and DC & Sons have not provided Nexsen Pruet with a copy of the proposed amended settlement agreement.

Without knowing what the proposed amended settlement agreement says, Nexsen Pruet submits that Plaintiffs' and DC & Sons's conduct of attempting to have another judge approve an amended settlement agreement after the hearing on the motion for summary judgment constitutes an admission that the settlement agreement in its current form is problematic. The conduct also reinforces the collusive nature of this case.

Summary judgment should be entered in favor of Nexsen Pruet on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

2. The proper remedy is to dismiss the case.

If the Court determines that the assignment is void as against public policy, the proper remedy is to dismiss the case with prejudice. This case has been tainted with collusion from its inception and the taint cannot be cured. In the alternative, the case should be dismissed without prejudice and Plaintiffs should be permitted to file a new action only with new and independent counsel and only upon showing that (1) Plaintiffs are the real parties in interest, (2) Plaintiffs are not proceeding pursuant to the assignment, (3) Plaintiffs have full control over the litigation and are bearing the fees and costs, and (4) Plaintiffs own the claims and proceeds in this case.

a. The general rule

Most courts that have addressed the question of whether an assignment of a legal malpractice claim is void as against public policy do not discuss the remedy. The courts either grant dismissal or enter summary judgment in favor of the law firm. *See, e.g., Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) (dismissing the case outright and entering judgment in favor of the law firm); *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996) (affirming dismissal of case brought pursuant to the illegal assignment); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (affirming summary judgment in favor of the attorney or the law firm without addressing whether the client has the right to re-file the case), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson County Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (same).

Some courts, however, have discussed the remedy and in doing so recognize that an invalid assignment has no effect on the validity of the malpractice claim itself. *Davis v. Scott*, 320 S.W.2d 87, 91 (Ky. 2010). In other words, “[i]f an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name.” *Id.* at 92 (citing 6 Am. Jur. 2d *Assignments* § 122 (2010)). See also *Botma v. Huser*, 39 P.3d 538, 542 (Ariz. 2002) (recognizing that a malpractice claim survives an invalid assignment).

b. Dismissal without prejudice

At least three courts that have addressed the question of the proper remedy have concluded that the case should be dismissed without prejudice. This is because cases born out of an illegal assignment are “tainted in some respect,” and to allow them to proceed as filed would be “to wink at the rule against assignment of legal malpractice claims.” *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (quoting *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. 2002)). In *Davis*, the court held that the proper remedy was dismissal without prejudice and stated that although the client did not forfeit the malpractice claim, “the current suit, born of the improper assignment, cannot be permitted to continue.” 320 S.W.2d at 92. Accordingly, if the client decided to reassert his claim against the attorney, the client could do so “only upon showing that the attempted assignment is no longer in place and that he is the real party in interest.” *Id.*

In *Botma*, the court ruled that the case could not continue in the client’s name because the client retained no interest in the lawsuit. 39 P.3d at 543. Any benefit that the client received in simply continuing the case would be used to pay the \$12 million judgment confessed in favor of the client’s adversary. *Id.* The court stated: “To allow the present lawsuit, which was born out of that assignment agreement, to proceed in [the client’s] name would be to wink at the rule against assignment of legal malpractice claims.” *Id.*

Similarly, another court held that a case brought pursuant to illegal assignment should be dismissed without prejudice and that if the client wanted to re-file a malpractice claim against the law firm, the new case could not be controlled in any way by the party to whom the claims were initially assigned and the client could not be represented by attorneys associated with that party. *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009). In doing so, the court recognized that a dismissal without prejudice “does not eliminate the risk of collusion in future cases completely, but it does provide the client with more of an incentive to ‘seriously litigate the amount of damages’ in the underlying suit because now the client bears the risk of not recovering in the legal malpractice action.” *Id.* “Furthermore, it eliminates the public and disreputable role reversals that have concerned many courts.” *Id.*

Most jurisdictions do not, as Plaintiffs contend, simply void the assignment and allow the case to proceed as filed. Plaintiffs cite only one case for this proposition, *Kommavongsa v. Haskell*, 67 P.3d 1068 (Wash. 2003), and that case is distinguishable from the present case. In *Kommavongsa*, the malpractice suit was brought by the party to whom the legal malpractice suit had been assigned, the real party in interest. It was not brought by the former client in name only, pretending to be the real party in interest. Additionally, in that case the client filed a motion to be substituted as a party to the case, and the issue was whether the motion to substitute was properly denied in light of the illegal assignment.²

Here, the malpractice lawsuit was filed by the client in name only and without notice to the Court or to Nexsen Pruet that the client was not the real party in interest and was not controlling the litigation. There has been no indication whatsoever that Plaintiffs have a genuine

² After *Kommavongsa* was decided, the court of appeals in Washington held that dismissal with prejudice rather than remand was the proper remedy in a case where the client, even if he decided to proceed as the real party in interest, could not produce any evidence of damages. *Kim v. O'Sullivan*, 137 P.3d 61 (Wash. Ct. App. 2006).

interest in pursuing this case. Further, because Plaintiffs are represented by the very same attorneys who represent the entity having the real interest in the outcome of this case, a determination of whether Plaintiffs genuinely want to prosecute this case cannot be made unless and until Plaintiffs are represented by new and independent counsel.

Additionally, Plaintiffs cite two cases from Texas that stand for the unremarkable proposition that the client retains the claim even though the assignment voided: *Mallios v. Baker*, 11 S.W.3d 157, 159 (Tex. 2000), and *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. Ct. App. 2000). The Texas cases do not stand for the proposition that the case should be permitted to proceed as filed. They stand for the proposition that is improper to bar the client's claims altogether after determining that the assignment is void. Further, both cases involve only partial assignments of legal malpractice claims, in which the client retains some interest in the case, rather than an assignment of *all* proceeds and *all* claims as in the present case. These cases do not support Plaintiffs' contention that the present case should continue in its present form.

c. The present case

Summary judgment should be entered in favor of Nexsen Pruet and the case should be dismissed with prejudice. The circumstances under which this case arose are so collusive in nature that the case should not be permitted to proceed and judgment should be entered in favor of Nexsen Pruet. The circumstances are as follows:

1. Plaintiffs and DC & Sons were adversaries in the litigation in which the alleged legal malpractice arose.
2. As part of the settlement of that case, Pavilion Development Corporation confessed judgment in favor of DC & Sons for \$4.5 million without challenging the amount of

damages. In addition, Plaintiffs assigned all proceeds in a case to be brought against Nexsen Pruet to DC & Sons and gave DC & Sons full control over the litigation, including the right to elect to own the claims themselves.

3. Plaintiffs and DC & Sons did not put the terms of the assignment on the record. They did not tell Judge Young that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair.

4. Plaintiffs filed the case against Nexsen Pruet without revealing the existence of the assignment to either Nexsen Pruet or the Court. Nexsen Pruet discovered the assignment only after searching the public index. It was Nexsen Pruet that brought the existence of the assignment to the Court's attention through the filing of a counterclaim.

5. Plaintiffs are represented by the same counsel that represented DC & Sons in the case below and that represent DC & Sons in the present case.

6. After the hearing on the motion for summary judgment regarding whether the assignment is void as against public policy, Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its counsel) attempting to have Judge Young approve a proposed amended settlement agreement.

7. Nexsen Pruet discovered that the hearing took place after receiving a Form 4 order signed by Judge Young stating: "The proposed Amended Settlement Agreement has been DISMISSED."

8. Plaintiffs and DC & Sons have not provided Nexsen Pruet or this Court with a copy of the proposed amended settlement agreement.

Given the circumstances under which this case arose and Plaintiffs' use of the court system to litigate a claim that they do not own, without telling anyone, including the court, that they do not own the claim and that they do not have a real stake in the litigation, this entire case should be dismissed with prejudice. Plaintiffs have allowed an entity that was their adversary in the litigation in which the alleged legal malpractice arose to use their names to bring the present case, without revealing this fact to Nexsen Pruet or to the court. Plaintiffs have allowed the same lawyers who represented their former adversary to represent them here.

In doing so, Plaintiffs have not retained any benefit in this case. Based on the settlement agreement reached between Plaintiffs and DC & Sons, Plaintiff Larry McNair and his business partner, Lowell Frazier, have obtained a full release from all liability. Further, it appears that Pavilion Development Corporation is not at risk of having to satisfy the \$4.5 million confessed given that counsel for Plaintiffs have repeatedly stated that if the Court strikes the assignment, that should keep the confession of judgment in place. Moreover, Pavilion never challenged the amount of the judgment confessed in the first instance, again suggesting there is no risk of ever having to pay it. Any proceeds received by Plaintiffs in a new case will be used to satisfy the judgment confessed in favor of DC & Sons. There is nothing to retain because the lawsuit will serve only to benefit DC & Sons. Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

Counsel for Nexsen Pruet did not, as Plaintiffs contend in their brief, agree that the present case could proceed as pled. At most, counsel for Nexsen Pruet acknowledged that the client may retain the claim in the event the assignment is voided, but counsel did not agree that Plaintiffs in this case should be permitted to proceed with the action in its current form and with the current counsel. Indeed, there is a motion to disqualify counsel that remains pending. In any

event; the Court expressly permitted counsel for Nexsen Pruet additional time to address the proper remedy under the facts of this case, which counsel has done in this reply brief.

In the alternative, the Court should dismiss the case without prejudice, allowing Plaintiffs to pursue a malpractice claim against Nexsen Pruet should they choose to do so upon advice of new and independent counsel and not counsel for the judgment creditor, and only after showing that they are the real parties in interest, that they own the claims and proceeds, and that they are controlling and funding the litigation. Plaintiffs should not be permitted to continue this case in its current form and as pleaded because the case has been tainted since the beginning. Plaintiffs did not make the decision to file the case; DC & Sons did. Plaintiffs did not select the counsel; DC & Sons did. Plaintiffs did not make the allegations in the complaint; DC & Sons did. There is no way to remove the taint from this case other than to dismiss it. The only way to know for certain that the claims are legitimate and that Plaintiffs are serious about litigating this case is to require Plaintiffs to assess, with the advice of new and independent counsel, whether to re-file the case. Only with new and independent counsel agreeing to take the case and signing the complaint will we know for certain that Plaintiffs are the real parties in interest.

Given the circumstances in which this case arose, it would be unjust for this Court to simply strike the assignment and allow the case to proceed in its current form. If Plaintiffs really have an interest in suing Nexsen Pruet, the case must be brought in their name as the real parties in interest and not just in name only. Whether Plaintiffs' claims are barred by the statute of limitations is a question for another day. Nexsen Pruet should not lose the right to assert any and all available defenses just because Plaintiffs decided to allow their former adversary to prosecute this case for the past twenty months. Nexsen Pruet has already been prejudiced by having to

defend a legal malpractice case that has been controlled and funded by an entity that has never been a client of Nexsen Pruet's and to whom Nexsen Pruet has never owed any duties.

CONCLUSION

The Court should grant summary judgment in favor of Nexsen Pruet on the ground that the assignment is void as against public policy and dismiss this case with prejudice. In the alternative, the Court should dismiss the case without prejudice, allowing Plaintiffs to re-file the case only with new and independent counsel and only upon showing that (1) they are not proceeding pursuant to the assignment, (2) they are the real parties in interest, (3) they have full control over the case, and (4) they are funding or are responsible for funding the litigation.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 
Elizabeth Van Doren Gray
Tina Cundari
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@sowellgray.com
tcundari@sowellgray.com

Attorneys for Nexsen Pruet LLC

Columbia, South Carolina
April 10, 2013

EXHIBIT A

January 18, 2011 Form Four Order, handwritten settlement agreement, and
confession of judgment in the underlying case

See Record on Appeal page 207

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & O.S.
100 BROAD STREET, SUITE 100
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



www3.charlestoncounty.org

78



ELIZABETH VAN DOREN GRAY
PO BOX 11449
COLUMBIA SC 29211-1449

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

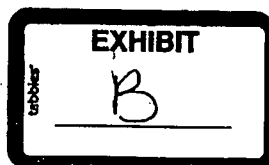
Order/Proposed amended settlement agreement is dismissed

CASE NO: 2011CP1005774

Pavilion Development Corp VS Nexsen Pruet LLC

This judgment was entered on the 27th day of March, 2013, and a copy mailed first class on Thursday, March 28, 2013, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.



1820102.2013031234401.00078

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-10-5774

Pavilion Development Corp.

D.C. & Sons, LLC.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	or
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : The proposed Amended Settlement Agreement has been DISMISSED.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

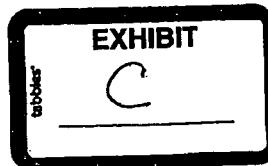
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2134
Judge Code

3/21/13
Date

SCRPC Form 4C (10/2011)



Page 1 of 2



TINA M. CUNDARI
Direct Dial 803 231.7834
Direct Fax 808 231.7863
Email tcundari@sowellgray.com

April 3, 2013

By U.S. Mail

Amanda Kelly Haffenden
Circuit Court Reporter
Post Office Box 424
Summerville, South Carolina 29484

Re: Pavilion Development Corp. and Larry McNair v. Nexsen Pruet, LLC v. DC & Sons LLC
Case No.: 2011-CP-10-05774
SGSL No.: 5347/1509

Dear Ms. Haffenden:

This firm represents Nexsen Pruet LLC in the above-referenced matter. It is my understanding that a hearing was conducted before the Honorable Roger Young on Thursday, March 21, 2013, in the matter of Pavillion Development Corporation v. DC & Sons, a case related to the above-referenced matter. It is also my understanding that the attorneys who appeared for the hearing were Andrew Epting and Dan David.

I am writing to request a copy of the transcript from the March 21 hearing. If you require pre-payment, please contact my legal assistant, Michelle Laliberte, at (803) 231-7804, and she can arrange for payment to be sent to you.

Thank you for your assistance, and if you have any questions, please feel free to call me.

Sincerely,

Tina Cundari

TMC:mdl

cc: By Email
Andrew Epting, Esq.
Dan David, Esq.
James Long, Esq.



1310 Gadsden Street PO Box 11449 Columbia, SC 29211
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SOWELL GRAY STEPP & LAFFITTE, LLC Litigation is our Business.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR,

Plaintiffs,

vs.
NEXSEN PRUET, LLC,

Defendant,

vs.
DC & SONS, LLC,

Counterclaim Defendant.

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

FILED
2013 APR 23 PM 1:41
JAMES J. ARMSTRONG
CLERK OF COURT

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

INTRODUCTION

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

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

BRIEF BACKGROUND ON THE UNDERLYING LITIGATION

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

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

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

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

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

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

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

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

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

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

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

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

cause of action for specific performance and refused to remove the *lis pendens* from the property even after dropping the specific performance claim.

(January 18, 2011 Order p 5).

The continued maintenance of a *lis pendens* and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title.

(January 18, 2011 Order p 5).

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

(January 18, 2011 Order p 6).

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

(January 18, 2011 Order p 6).

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

(January 18, 2011 Order p 6)

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

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

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

(Transcript p 21).

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

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

AMENDMENT OF THE ASSIGNMENT DOCUMENT

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

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

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

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

THE CURRENT LITIGATION & NEXSEN PRUET'S MOTION

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

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

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

compromise the strength of his underlying claim, resulting in some sort of role reversal which diminishes public confidence in the legal profession. In this case, for example, which concerns a pretrial settlement, the merits of the underlying lead paint poisoning action are irrelevant to the issues concerning the defendants' alleged malpractice. It could be argued just as forcefully that, providing shelter for attorneys by prohibiting the voluntary assignment of malpractice claims, would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection.

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

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

THE REMEDY FOR AN INVALID ASSIGNMENT OF A LEGAL MALPRACTICE CLAIM

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

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

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

The Texas Supreme Court framed the issue on review as follows: “[e]ven assuming Mallios is correct that the agreement between Baker and Herron violates Texas public policy, an issue we do not decide today, the question remains whether that invalidity would entitle Mallios to a take-nothing judgment on Baker’s malpractice claim.” In affirming the court of appeals, the

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

Mallios does not dispute that Baker had the right to sue Mallios before Baker's agreement with Herron. And even if we were to reach the issue of the agreement's validity and determine that Mallios is correct that it is an invalid assignment, that would not vitiate Baker's right to sue Mallios. **Thus, either way, summary judgment was improper and Baker may continue with his suit.**

Id. at 159 (emphasis added).

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

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

Id. at 634.

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

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

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

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

CONCLUSION

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

[signatures on following page]

ANDREW K. EPTING, JR., LLC



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GEORGE J. KEFALOS, PA
46a State Street, Charleston, SC 29401
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George@kefaloslaw.com; Oana@kefaloslaw.com

On this 19th day of April 2013
Charleston, SC

ATTORNEYS FOR PLAINTIFFS

CLERK OF COURT
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

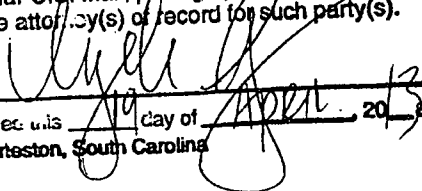

Signed this 19 day of April, 2013
Charleston, South Carolina

EXHIBIT A

March 23, 2009 Order of the Honorable Roger M. Young in underlying case

See Record on Appeal page 83

EXHIBIT B

January 18, 2011 Order of the Honorable Roger M. Young granting DC & Sons'
Renewed Motion for Summary Judgment in the underlying case

See Record on Appeal page 120

EXHIBIT C

January 18, 2011 Transcript of Hearing before Judge Young in
underlying case

See Record on Appeal page 44

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

DC & SONS, LLC

CASE NO.: 2007-CP-10-1457

Plaintiff,

vs.

RICHARD H. COEN, LOWCOUNTRY
CAPITAL, OCEAN 1 REALTY, JAMES R.)
MAULL, JR. LARRY MCNAIR,
COENCO, LLC, & PAVILION
DEVELOPMENT CORP.

AMENDED AGREEMENT RE: ASSIGNMENT

Defendants.

PAVILION DEVELOPMENT
CORPORATION,

Plaintiff,

vs.

COENCO, LLC, LOWCOUNTRY
CAPITAL, LLC, DC & SONS, LLC,
and RICHARD H. COEN,
Defendants.

WHEREAS, 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; and

WHEREAS, the parties agree that DC & Sons retains its judgment and all its rights as a judgment creditor; and

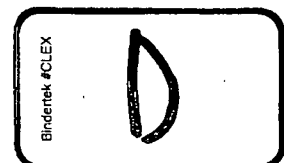
WHEREAS, the parties seek to amend the settlement to reflect the above terms.

IT IS HEREBY agreed on this ____ day of _____ 2013 that the agreement between DC & Sons on the one hand and Pavilion and McNair on the other is so amended. The settlement to remain otherwise in full force and effect and DC & Sons shall retain its full rights as a judgment creditor.

DC & Sons

Pavilion Development Corp.

Larry McNair



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
	)	
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	NEXSEN PRUET'S FINAL REPLY
	)	BRIEF IN SUPPORT OF MOTION FOR
	)	SUMMARY JUDGMENT
Defendant,	)	
	)	
v.	)	
DC & SONS, LLC,	)	
	)	
Counterclaim Defendant.	)	

FILED
 2013 MAY 10 PM 1:52
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY 

As the moving party, Nexsen Pruet submits this final reply brief in support of the motion for summary judgment and for the purpose of responding to arguments made in Plaintiffs' sur-reply brief.¹

1. Plaintiffs' argument that the assignment is not an assignment is contradicted by the language of the assignment, as explained in Nexsen Pruet's prior brief, and now by the proposed amended agreement attached to Plaintiffs' sur-reply brief at Exhibit D. In the proposed amended agreement, titled "Amended Agreement re: Assignment," Plaintiffs state: "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" **Exhibit A.** By stating that the

¹ Plaintiffs introduced a new document into the record at Exhibit D of their sur-reply brief, titled "Amended Agreement Re: Assignment." Nexsen Pruet has never seen this document before, and as the moving party, takes this opportunity to respond to the document and the arguments related thereto. The document is attached here as **Exhibit A** for the Court's convenience.

parties wish to remove from the settlement the right of assignment of proceeds or claims, Plaintiffs now admit that the claims and proceeds have been assigned.

2. The proposed “Amended Agreement re: Assignment” does not cure all the ills in this case. The proposed amended agreement does not address several terms of the original agreement, including that the bulk of the proceeds recovered will go to DC & Sons, and DC & Sons is responsible for funding the litigation. The proposed amended agreement also leaves in place the \$4.5 million confession of judgment, which reinforces the fact that DC & Sons, as the judgment creditor, has the real interest in this case, not Plaintiffs.

3. The two cases cited in Plaintiffs’ sur-reply brief, *Thurston v. Continental Casualty Co.*, 567 A.2d 922 (Me. 1989), and *New Hampshire Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999), for the proposition that a party may assign a legal malpractice claim to an adversary in litigation are not persuasive. Neither case involves a confession of judgment in exchange for an assignment of a legal malpractice claim, a circumstance denounced by other courts as a “contrived and elaborate scheme.” *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993). See also *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”). Additionally, the cases are outliers. They stand alone among a vast majority of cases that prohibit the assignment of legal malpractice claims between adversaries in litigation, and the Court should not follow them.

4. As to the remedy, Plaintiffs are correct that ordinarily the invalidity of an assignment does not impact the validity of the malpractice claim itself. But that does not mean the case should proceed as pled. Indeed, most courts addressing the issue of the remedy dismiss

the case without prejudice and require the former client, upon re-filing the malpractice case, to make a showing that he is the real party in interest. See *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (dismissing the case without prejudice and allowing the client to re-file the case “only upon showing that the attempted assignment is no longer in place and that he is the real party in interest”); *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009) (dismissing the case without prejudice and stating that if the client wanted to re-file a malpractice case, the new case could not be controlled in any way by the party to whom the claims were initially assigned and the client could not be represented by attorneys associated with that party); *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. 2002) (recognizing that cases born out of an illegal assignment are “tainted in some respect,” and to allow them to proceed as filed would be “to wink at the rule against assignment of legal malpractice claims”).

Should the Court decide to dismiss the present case without prejudice, Plaintiffs should be required to show, upon filing a new case, should they decided to do so upon advice of independent counsel, that they are the real parties in interest, and that they, and not the judgment creditor, are controlling the case. This is important because it is difficult to understand why Plaintiffs would sue Nexsen Pruet for legal malpractice given the lack of damages. Larry McNair obtained a full release in the case below, and Pavilion Development Corporation is apparently not at risk of having to pay the \$4.5 million judgment confessed, given that its present counsel is asking the Court to keep the judgment in place.

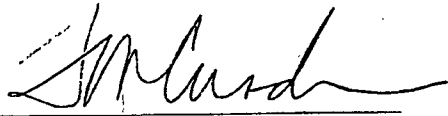
5. Plaintiffs wrongly state that Judge Young made a finding of legal malpractice against Nexsen Pruet in the case below. Nexsen Pruet was not a party to the case below and no such finding was made. The case was between Plaintiffs and DC & Sons. Judge Young entered

summary judgment in favor of DC & Sons and against Plaintiffs, not against Nexsen Pruet. Such statements are simply untrue and should be disregarded.

CONCLUSION

Summary judgment should be entered in favor of Nexsen Pruet.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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Attorneys for Nexsen Pruet LLC

Columbia, South Carolina
May 8, 2013

EXHIBIT A

Proposed Amended Agreement

See Record on Appeal page 277

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-5774

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

Defendants

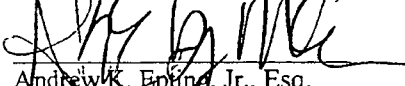
SUMMONS

2011 AUG 16 PM 2:34
JULIE J. ARMSTRONG
CLERK OF COURT

TO THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address show below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr., Esq.
3 State Street, Charleston, SC 29401
P: 843.377.1871 F: 843.377.1310
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George J. Kefalos, Esquire
George J. Kefalos, PA
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George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this 14 day of August 2011
Charleston, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

PAVILION DEVELOPMENT CORP. &)
LARRY McNAIR)

CASE NO. 2011-CP-10-

5774

Plaintiffs)

vs.)

NEXSEN PRUET, LLC)

Defendants)

COMPLAINT

BY

JULIE J. ARMSTRONG
CLERK OF COURT

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FILED

Plaintiffs Pavilion Development Corporation ("Pavilion") and Larry McNair file this action for professional malpractice and breach of fiduciary duty against their former attorneys, Defendant Nexsen Pruet, LLC ("Nexsen Pruet"). In support of this action, Plaintiffs would show the Court the following:

1. Plaintiff Pavilion Development Corporation ("Pavilion") is a corporation organized and existing under the laws of the State of South Carolina, doing business in Charleston County, South Carolina.
2. Plaintiff Larry McNair is an individual residing in the State of South Carolina.
3. The Defendant, Nexsen Pruet, is a law firm organized and existing under the laws of the State of South Carolina with an office in Charleston County, South Carolina, holding itself out as "The Carolinas' Leading Real Estate Law Firm." (Nexsen Pruet Website <http://www.nexsenpruet.com/practices-area-59.html>).
4. In 2006, Pavilion retained Nexsen Pruet to advise it regarding the purchase of three parcels of real property with the address of 100 Mill Street located on Shem Creek and known as the "Cottage on the Creek" property.

5. As part of the undertaking, Nexsen Pruet was retained to advise Pavilion regarding the condition of the title to the Cottage on the Creek property and the filing of a litigation and a lis pendens.
6. On August 18, 2006, Pavilion entered into a contract to purchase the Cottage on the Creek property from DC & Sons, LLC for Five Million Dollars (\$5,000,000.00) to close on or before December 31, 2006.
7. By the terms of the contract, Pavilion was to make a Fifty Thousand Dollar (\$50,000.00) earnest money deposit, which was made and kept in an escrow account with real estate agent Ocean One Realty.
8. The real estate contract further provided that Pavilion was to provide proof of financing to the Seller within 30 days of signing the contract. Pavilion never provided proof of financing, a fact of which Nexsen Pruet was fully aware.
9. In the fall of 2006, Richard Coen contacted Pavilion and told Pavilion that the Seller could not deliver title because Richard Coen and/or his entities had the right to buy and/or lease the Cottage on the Creek property.
10. Nexsen Pruet wrote to counsel for the Seller, DC & Sons demanding that DC & Sons remedy the alleged cloud on title created by Mr. Coen's claims and requesting assurances from the Seller that Mr. Coen's claims were without merit. DC & Sons advised the claims were without merit.
11. DC & Sons wrote Nexsen Pruet and insisted that Pavilion either accept title insurance and close on the property or release DC & Sons from the contract.
12. Nexsen Pruet advised Pavilion not to close on the Cottage on the Creek property or release the property from the contract.

13. On March 19, 2007, despite Pavilion's unwillingness to close, Nexsen Pruet filed a lis pendens on the Cottage on the Creek property, together with a lawsuit for specific performance, declaratory judgment, and quiet title styled, *Pavilion Development Corp. v. DC & Sons, LLC, Dianne Crowley, Cecil Crowley, Coenco, LLC, Lowcountry Capital, LLC, Wings Over America, LLC, Redwing, LLC, Up The Creek, Inc., and Richard H. Coen*, case no. 2007-CP-10-1457.

14. Although Nexsen Pruet named Richard Coen and his entities in the complaint, neither Richard Coen nor any of his entities were served with the complaint.

15. DC & Sons counterclaimed against Pavilion claiming breach of contract and abuse of process, and filed a separate action to include claims against Larry McNair, Ocean 1 Realty and Rick Maull (the escrow agent), case no. 2008-CP-10-4675.

16. Nexsen Pruet appeared on behalf of Larry McNair and Pavilion and agreed to consolidate the cases and refer them to the Business Court and the Honorable Roger M. Young.

17. On January 17, 2008, Pavilion entered into a stipulation wherein Pavilion stipulated that neither Richard Coen nor any of his entities, or anyone other than the Seller, DC & Sons, had any "current, future, or contingent property interests in the subject property."

18. In or around February of 2008, Pavilion determined that it was no longer willing to purchase the Cottage on the Creek property at the contract price of Five Million Dollars (\$5,000,000.00).

19. On February 28, 2008, Nexsen Pruet wrote counsel for DC & Sons, stating that Pavilion desired to purchase the Cottage on the Creek property at the reduced price of Three Million Five Hundred Thousand Dollars (\$3,500,000.00).

20. As a result, Counsel for DC & Sons asked that the lis pendens be removed from the property. Nexsen Pruet advised Plaintiff to refuse to cancel the lis pendens.

21. At a May 20, 2008 hearing, Nexsen Pruet agreed to dismiss Pavilion's actions for declaratory relief and quiet title.
22. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and seeking to impose an equitable lien on the Cottage on the Creek property.
23. DC & Sons asked that the lis pendens be removed from the property. Nexsen Pruet advised Plaintiffs to refuse. Nexsen Pruet advised the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent.
24. On March 23, 2009, the Honorable Roger M. Young held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was wrongful, as an action for money damages will not support a lis pendens.
25. The case was set to be tried on January 18, 2011; however before trial, DC & Sons renewed its motion for summary judgment as to Pavilion and Larry McNair's liability for abuse of process and breach of contract.
26. After a hearing on the Motion for Summary Judgment, the Honorable Roger M. Young found in favor of DC & Sons and granted it summary judgment as to Pavilion and Larry McNair's liability holding that:
 - a. "Pavilion's filing of an action for specific performance was a willful act in the use of process not proper in the regular conduct of the proceeding"... as "An action for specific performance will lie only when the supposed cloud on title is caused and controlled by the seller."

- b. "Defendants' filing an action for specific performance and *lis pendens* was not proper as it failed to prove it was ready, willing, and able to pay the agreed upon purchase price or had arranged its financing, which was required by law and the real estate contract."
 - c. "Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons."
 - d. "Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing."
 - e. "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."
 - f. "As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper."
 - g. "As cited above, the Court finds McNair and his previous counsel were using the lawsuit and the *lis pendens* to compel a better purchase price and a return of the earnest money deposit. This is not a legitimate use of a *lis pendens*, but is rather a form of coercion, done in the course of negotiation."
27. Left with no defenses, Pavilion confessed judgement in the amount of Four Million Five Hundred Eighty Thousand Fifteen Dollars and Ninety Three Cents (\$4,580,015.93) in exchange for a release of Mr. McNair's personal liability.

**FOR A FIRST CAUSE OF ACTION
LEGAL MALPRACTICE**

28. The foregoing allegations are incorporated herein by reference.
29. Plaintiffs hired Nexsen Pruet as their attorneys with the full faith and expectation that Nexsen Pruet would competently and professionally advise and represent Plaintiffs. Nexsen Pruet accepted this duty, thus creating an attorney-client relationship between Plaintiffs and Nexsen Pruet.
30. Nexsen Pruet holds itself out as "The Carolinas' Leading Real Estate Law Firm" and advertises that "Unlike many firms whose real estate practice focuses only on transactional work, Nexsen Pruet's team also includes attorneys who are highly skilled in litigation of real property disputes. "(Nexsen Pruet Website <http://www.nexsenpruet.com/practices-area-59.html>).
31. In agreeing and undertaking to represent and advise Plaintiffs, Nexsen Pruet undertook the following duties:
- a. to conform to generally recognized and accepted practices among the legal profession;
 - b. to perform its tasks with reasonable care and diligence;
 - c. to act in the best interest of Plaintiffs;
 - d. to exercise that degree of skill, knowledge, as possessed and exercised by the ordinary attorney in similar circumstances;
 - e. to provide competent representation, including possessing the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of Plaintiffs;
 - f. to exercise independent professional judgment and render candid advice to Plaintiffs.

32. Nexsen Pruet was negligent in its representation of Plaintiffs, failing to exercise reasonable care, skill and diligence in the following ways:

- a. In advising Plaintiffs to file a lis pendens and suit for specific performance when Pavilion was in breach of the real estate contract;
- b. In advising Plaintiffs to file a lis pendens and suit for specific performance when the alleged cloud on title was created by third parties outside of the Seller's control;
- c. In advising Plaintiffs to file a lis pendens and suit for specific performance when Pavilion was no longer ready, willing, and able to close on the terms of the contract;
- d. In advising Plaintiffs to file a lis pendens and suit for quiet title and failing to serve or join those necessary parties whose claims created the cloud on title;
- e. In advising Plaintiffs to maintain a lis pendens on the Cottage on the Creek Property and suit for specific performance and quiet title even after stipulating that no party other than the Seller, DC & Sons had any "current, future, or contingent property interests in the subject property";
- f. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property even after Pavilion amended its complaint to sue only for money damages;
- g. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property in order to obtain a return of the escrow funds; and
- h. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property in order to obtain the property at a lower purchase price.

33. Nexsen Pruet's conduct as described above constitutes negligence as well as a breach of the contractual obligations owed to the Plaintiffs.

34. As a direct and proximate result of Nexsen Pruet's failure to exercise reasonable care, skill, and diligence in representing Plaintiffs, Plaintiffs were forced to confess judgment in the amount of Four Million Five Hundred Eighty Thousand Fifteen Dollars and Ninety Three Cents (\$4,580,015.93) or risk trying the case without any defense as to Plaintiffs' liability as well risk a significant judgment being entered against Mr. McNair personally. Plaintiffs are entitled to damages both actual and punitive.

**FOR A SECOND CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY**

35. The foregoing allegations are incorporated herein by reference.

36. Nexsen Pruet entered into a fiduciary relationship with the Plaintiffs.

37. By entering into a fiduciary relationship with the Plaintiffs, Nexsen Pruets obligated itself to act only in the best interests of the Plaintiffs.

38. Nexsen Pruet's conduct, especially as more particularly described above, constitutes a breach of this duty.

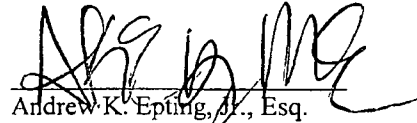
39. As a direct and proximate result of Nexsen Pruet's actions, inactions, and breach of fiduciary duty, the Plaintiffs have been injured and suffered damage.

40. Plaintiffs are entitled to judgment against Nexsen Pruet for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by this Defendant and others, in an amount determined by this Court.

WHEREFORE, Plaintiffs pray for judgment against Nexsen Pruet for damages in the amount of the outstanding judgment against Pavilion Development Corp., plus punitive damages, post-judgment interest, costs and attorneys' fees associated with this lawsuit, and such other and further relief the Court may deem appropriate.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



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3 State Street, Charleston, SC 29401
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ATTORNEYS FOR PLAINTIFFS

On this 10 day of August 2011
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Pavilion Development Corp. &
Larry McNair,
Plaintiffs,
vs.
Nexsen Pruet, LLC,
Defendant.

CA# 2011-CP-10-5774

AFFIDAVIT OF
EXPERT OPINION OF
DR. GREGORY B. ADAMS

BY JULIE J. ARMSTRONG
CLERK OF COURT
2011 AUG 16 PM 2:37

FILED

PERSONALLY APPEARED before me Gregory B. Adams who, being duly sworn, deposes and says that:

1. It is my expert opinion, held to a reasonable degree of professional certainty, that the Complaint in this matter alleges facts establishing that the defendant law firm (and its participating lawyers) committed acts of professional negligence proximately damaging the plaintiffs; that the defendant law firm and its participating lawyers breached their fiduciary duties to the plaintiffs, proximately damaging them; and that the defendant law firm breached its contract with plaintiffs, proximately damaging them, as more particularly set forth below:
 - A. attorney-client relationships existed between plaintiffs and the defendant law firm and its lawyers who were advising and representing plaintiffs in connection with the contract to purchase the Cottage on the Creek property and the related disputes and litigation [NP's participating lawyers];
 - B. these attorney-client relationships created professional, ethical, contractual, and fiduciary duties from the law firm and each of its participating lawyers to plaintiffs;

- C. the defendant law firm (and its participating lawyers) violated their duties to plaintiffs in numerous ways, including
 - i. by failing to provide their clients with competent advice and representation:
 - a. by failing to use the legal knowledge, skill, thoroughness, and preparation reasonably necessary in the circumstances; and
 - b. by violating the standard of care, which required them to render their services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession;
 - ii. by failing to provide their clients with candid advice based on their exercise of independent professional judgment on their clients' behalf; and
 - iii. by failing to explain the matter to their clients to the extent reasonably necessary to permit them to make informed decisions regarding the representation;
- D. these negligent failings included:
 - i. failing to serve Richard Coen and his entities as defendants in the lawsuit, thereby eliminating the ability to use the litigation to adjudicate the validity of Mr. Coen's claim that he (individually or through one of his entities) had the right to buy or lease the Cottage on the Creek property and thus to determine judicially whether DC & Sons could deliver marketable title to the property;

- ii. continuing the specific-performance action against DC & Sons and maintaining the *lis pendens* against the Cottage on the Creek property after Pavilion decided that it did not want to purchase the property pursuant to the contract;
- iii. continuing the action against DC & Sons for specific performance and maintaining the *lis pendens* after Pavilion had stipulated that neither Richard Coen nor any of his entities had any “current, future, or contingent property interests” in the Cottage on the Creek property;
- iv. continuing the action against DC & Sons for specific performance and maintaining the *lis pendens* while knowing that their client, Pavilion, had materially breached the contract and failed to satisfy its express proof-of-financing condition, and thus was clearly not entitled to specific performance of that contract to purchase the Cottage on the Creek property;
- v. amending the complaint against DC & Sons on August 15, 2008, transforming it from an action for specific performance to one for damages, while maintaining the *lis pendens* and seeking to impose an equitable lien on the Cottage on the Creek property, although Pavilion was entitled to neither a *lis pendens* nor an equitable lien in an action for damages and although Pavilion was no longer seeking to purchase the property and was still in material breach of the contract,

- having failed to cure its breach and being unable to satisfy its express proof-of-financing condition;
- vi. filing and maintaining the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the earnest money, although doing so constituted an improper, ulterior purpose, subjecting their clients to liability for abuse of process;
 - vii. advising their clients to file and maintain the specific performance action against DC & Sons and the *lis pendens* against the Cottage on the Creek property although doing so constituted a willful act improperly using legal process for an ulterior purpose, subjecting their clients to liability for abuse of process;
 - viii. failing to advise their clients that filing and maintaining the specific performance action against DC & Sons and the *lis pendens* against the Cottage on the Creek property constituted a willful act improperly using legal process for an ulterior purpose, subjecting them to liability for abuse of process;
 - ix. advising their clients to file and maintain the declaratory judgment action to quiet title against DC & Sons without effectively joining Richard Coen and his entities as defendants, although doing so constituted a willful act

- improperly using legal process for an ulterior purpose,
subjecting their clients to liability for abuse of process;
- x. failing to advise their clients that filing and maintaining the declaratory judgment action to quiet title against DC & Sons without effectively joining Richard Coen and his entities as defendants constituted a willful act improperly using legal process for an ulterior purpose, subjecting them to liability for abuse of process;
 - xi. advising their clients to file and maintain the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the earnest money, although this constituted an improper, ulterior purpose, subjecting their clients to liability for abuse of process;
 - xii. failing to advise their clients that filing and maintaining the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the earnest money constituted an improper, ulterior purpose, subjecting them to liability for abuse of process;
- E. these failings also constituted breaches of the attorney-client contract between the defendant law firm and the plaintiffs as well as breaches of the fiduciary duties owed by the defendant law firm and its participating lawyers to the plaintiffs;

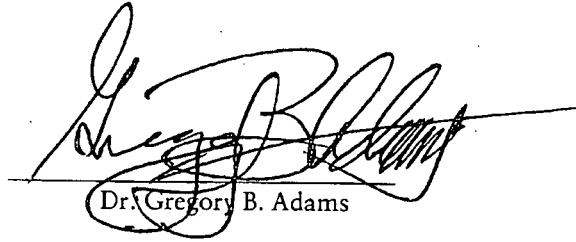
- F. these breaches proximately caused damage to plaintiffs, including
 - i. the entry of Summary Judgment holding Pavilion liable for abuse of process; and
 - ii. the resulting Confession of Judgment for \$4,580,015.93.
- 2. My resumé, attached as Exhibit A, demonstrates why federal and state courts, including the South Carolina Supreme Court and Court of Appeals, have held that I am qualified as an expert witness and thus am qualified to conduct the review required by S.C. Code Ann. §15-36-100(B).
 - A. I am a tenured law professor at the University of South Carolina School of Law, where I have been teaching since 1978. My subjects of expertise include lawyers' ethics and professional responsibility, corporate law, fiduciary duties, and contract law, as well as judicial ethics, agency, and partnership law.
 - B. I have earned a J.S.D. (Doctor of Juridical Science) and an LL.M. from Columbia University School of Law, as well as my J.D. from Louisiana State University.
 - C. Federal and state courts in South Carolina have recognized my expertise, including the South Carolina Supreme Court in *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding that I am qualified as an expert witness and that my expert testimony was accurate and proper) and *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding it was reversible error to fail to conclude that I was qualified as an expert

witness on issues of lawyers' duties), and the Court of Appeals in *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (holding it was reversible error to discount my expert opinion in a legal malpractice case and to fail to give it efficacy). Additionally, three South Carolina Attorneys General, the South Carolina Secretary of State, and the United States Attorney for the District of South Carolina have relied upon my expertise to guide and assist them in significant criminal investigations and prosecutions, many of which targeted wrongdoing by lawyers or wrongdoing by corporate officers and directors.

3. Documentary evidence I have reviewed supports the allegations of the Complaint and proves negligent acts of defendant law firm and its participating lawyers, as detailed above. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, such as
 - A. Judge Roger M. Young, Sr.'s 1/18/2011 Order Granting DC & Sons Summary Judgment as to the Liability of Pavilion for Abuse of Process and Breach of Contract in DC & Sons, LLC. v. Richard H. Coen, et al., C/A No. 08-CP-10-4675;
 - B. Judge Roger M. Young, Sr.'s 1/18/2011 Judgment in a Civil Case (Form 4 and attached settlement agreement) in DC & Sons, LLC. v. Pavilion Development Corp., C/A No. 08-CP-10-4675;
 - C. Pavilion Development Corp.'s 1/18/2011 Confession of Judgment in DC & Sons, LLC. v. Richard H. Coen, C/A No. 08-CP-10-4675.

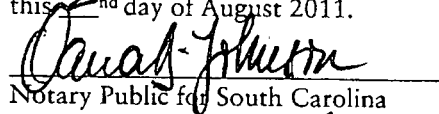
4. I have been retained as an expert witness by counsel for plaintiffs. My expert opinions are based upon the allegations of the Complaint and the evidence available to me at this time; these opinions are, therefore, subject to expansion and modification as further evidence or issues develop.

Further the affiant sayeth not.



Dr. Gregory B. Adams

Sworn to and subscribed before me
this 2nd day of August 2011.



Notary Public for South Carolina

My Commission Expires: Jan 29, 2020

DR. GREGORY B. ADAMS

*University of South Carolina School of Law
Columbia, South Carolina 29208*

Professional Experience

Law Professor (tenured), University of South Carolina, 1978–present.

SUBJECTS TAUGHT: Professional Responsibility; Judicial Ethics; Legal Profession; Contracts; Corporate Law; Business Planning; Agency, Partnership & Limited Liability Companies; Antitrust; International Business Law; European Union (Common Market) Law.

Founding Director, Program on Judicial Ethics, Selection, Accountability, and Independence, University of South Carolina School of Law (2003–present).

Visiting Professor of Law, Pskov Volny University, Pskov, Russia, Spring 2001.

Visiting Professor of Law, University of Southampton, Southampton, England, Fall 1989.

Visiting Professor of Law, Rutgers University, Newark, NJ, 1983–1984.

Stagiaire, Commission of the European Communities (European Union), Brussels, Belgium, 1979.

Research Associate, Institute of European Studies, University of Brussels (U.L.B.), 1979.

Visiting Scholar, Faculté de Droit, Université Catholique de Louvain, Louvain-la-Neuve, Belgium, 1978.

Jervy Fellow in Foreign Law, Parker School, Columbia University, 1977–1979.

Assistant Professor, Southern University School of Law, 1975–1977.

Consultant, Louisiana Legislative Council, 1976–1977.

Attorney with Breazeale, Sachse & Wilson, Baton Rouge, LA, 1973–1975.

Education

J.S.D. 1986

Columbia University School of Law New York, New York

Dissertation: Control of Monopoly Power in Europe and the United States

LL.M. 1979

Columbia University School of Law New York, New York

Thesis: E.E.C. and U.S. Antitrust Regulation of Monopolists' Refusals to Deal

J.D. 1973

Louisiana State University Law Center Baton Rouge, LA

Order of the Coif; Louisiana Law Review; Moot Court Board; Winner, Robert Lee Tullis

Moot Court Competition before the Louisiana Supreme Court.

B.S. 1977

Louisiana State University Baton Rouge, LA

Phi Kappa Phi

College of Arts & Science, Vanderbilt University Nashville, TN 1966–1968

Honors and Recognition

Outstanding Faculty Publications Award, University of South Carolina School of Law (April 2006, Book, Runner Up)
Louisiana State University Law Center Hall of Fame
Who's Who in the World
Who's Who in America
Who's Who in American Law
Who's Who in American Education
Who's Who in the South and Southwest
Who's Who of Emerging Leaders in America
Who's Who in Law Education
Dictionary of Int'l Biography (Cambridge, U.K.)
Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding GBA qualified as an expert witness; reversible error to rule otherwise)
State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding GBA qualified as an expert witness and that GBA's expert testimony was accurate and proper)
Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App., 2004) (holding it was reversible error to discount GBA's expert opinion and fail to give it efficacy)
Davis v. Hamm, 300 S.C. 284, 387 S.E.2d 676 (Ct. App., 1989) ("excellent discussion of the ramifications of these statutes" by GBA in "Litigation of Corporate Law Disputes After the Recent Amendments of the Corporate Code," in Current Issues in Civil Litigation, a South Carolina Bar Continuing Judicial Legal Education Seminar 4/14/89)

Publications

South Carolina Corporate Practice Manual (2nd ed. 2005, S.C. Bar) (lead author, coauthors: Burkhard, Cleveland, Clark, Hellwig, Merline).
"Reflections on the Reactions to Proposed Rule 8.5: Consensus of Failure," 36 S. Texas Law Review 1101 (1995).
"Introductory Remarks to the Conference on the Commercialization of the Legal Profession," 45 S.C. L. Rev. 883 (1994) (with Nathan M. Crystal).
Report of the Proceedings, Conference on the Commercialization of the Legal Profession (with Nathan M. Crystal): "Summary of Discussion of Frankel Paper," 45 S.C.L. Rev. 901; "Summary of Discussion of Palay/Galanter Paper," 45 S.C.L. Rev. 929; "Summary of Discussion of Martyn Paper," 45 S.C.L. Rev. 961; "Summary of Discussion of Dimitriou Paper," 45 S.C.L. Rev. 999 (1994).
"The Ethical Lawyer," occasional column in the S.C. Trial Lawyer Bulletin since 1994.
"Suing Corporations and Those Behind Them," 1992 S.C. Trial Lawyer Bulletin 17.
South Carolina Corporate Practice Manual (S.C. Bar, 1989) (with Cleveland, Burkhard, McWilliams).
"European and American Antitrust Regulation of Pricing by Monopolists," 18 Vanderbilt Journal of Trans. Law 1 (1985).
"Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States," 20 Texas Int'l L. J. 1 (1985).
"The 1981 Revision of the South Carolina Business Corporation Act," 33 S.C. L. Rev. 405 (1982).
"Inheritance Taxation of Trusts," in 11 L. Oppenheim & S. Ingram, Louisiana Civil Law Treatise, Trusts (1977).

Amicus Curiae Briefs

Ex Parte Strom, in re Collins Entertainment Corp. v. Columbia "20" Truck Stop, 343 S.C. 257, 539 S.E.2d 699 (2000) (establishing that attorney's duties to client continued until court granted motion relieving attorney as counsel of record).
Linder v. Insurance Claims Consultants, 348 S.C. 477, 560 S.E.2d 612 (2002) (on behalf of the S.C. Bar, clarifying scope of activities constituting the practice of law).
Brown v. Bi-Lo, 354 S.C. 436, 581 S.E.2d 836 (2003) (on behalf of the S.C. Trial Lawyers Association, protecting the confidentiality of physician-patient relationship).

Public Service

Invited Expert Witness, Judicial Merit Selection Study Committee, SC Senate (9/17/07)
Member, S.C. Bar, Professional Responsibility Committee, 1993-present (chair or member of numerous subcommittees, including Ethics 2000 Subcommittee; presented Ethics 2000 recommendations to S.C. Bar House of Delegates).
Member, S.C. Bar, Unauthorized Practice Committee, 1994, 2000-2003.
Member, S.C. Bar, Technology Committee, 1996-1998.
Ethics Consultant, South Carolina Association for Justice, 1994-present.
Founder and Vice-President, South Carolina Association of Ethics Counsel, 2000-present.
Expert Witness and advisor to the South Carolina Attorney General in the criminal investigation and prosecutions for securities fraud in connection with the failure of Carolina Investors and HomeGold Financial, 2003-2008.
Expert Consultant for the South Carolina Department of Health and Environmental Control, re: piercing the corporate veil to impose environmental liability under CERCLA, 1997-1999.
Reporter, South Carolina Uniform Commercial Code Article 2A (South Carolina Law Institute for the South Carolina General Assembly; 1996-2001).
Expert Witness and advisor to the South Carolina Attorney General in criminal prosecution of John O'Quinn, Esq. for unauthorized practice of law and illegal solicitation, 1996-1997.
Co-Reporter, Conference on the Commercialization of the Legal Profession, Charleston, S.C., May 1993.
Expert Witness for the United States before the Federal Grand Jury investigating securities fraud, May 1993.
Member, Governing Board, Center for Law, the Legal Profession, and Public Policy, 1991-93, 1998-2000.
Member, Blue Ribbon Committee on Corporate Law, South Carolina Secretary of State, 1991-1995.
Securities Law Expert for the South Carolina Attorney General in connection with the bankruptcy of Patriots Point Associates, 1989-91.
Advisor to the S.C. Deputy Securities Commissioner and the S.C. Senate Judiciary Committee on Corporate Law issues.
Co-Reporter, South Carolina Business Corporation Act of 1988 (South Carolina Law Institute for the South Carolina General Assembly, 1986-88).
Member, Louisiana State Law Institute, Civil Code Revision Committee, 1975-1977.

Presentations

"Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/16/10)
"Current Ethical Issues and Trends," York County Bar Association Ethics CLE, Panel with S.C. Supreme Court Justice Costa M. Pleicones and S.C. Disciplinary Counsel Lesley M. Coggiola, Esq., Rock Hill, SC (3/12/10)
"Lawyers in the Crosshairs: Recent South Carolina Cases of Concern to Estate Planning and Probate Lawyers," Fourteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/15/09)
"Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/17/09)
"Regulating Lawyer Behavior Through Recent South Carolina Tort Cases: Issues of Lawyer Ethics, Professionalism, and Liability," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (11/13/09)
"Lawyers' Ethical Responsibilities and the Torture Memoranda," Amnesty International Panel Discussion, University of South Carolina, Columbia, SC (4/15/09)
"The 'Of Counsel' Agreement," S.C. Bar Annual Convention, Myrtle Beach, SC (1/24/09)
"Ethical Duties in Family Estate Planning," Thirteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/11/08)
"Teaching Professional Responsibility in U.S. Law Schools," Southeastern Ass'n of Law Schools, Ritz Carlton, Palm Beach, FL (7/31/08)

- "Judicial Selection in the United States," S.C. Supreme Court Teachers Institute, Columbia, SC (6/23/08)
- "Corporate Lawyers as Fiduciaries," S.C. Bar Annual Convention, Charleston, SC (1/25/08)
- "My Heroes Have Always Been Lawyers and They Still Are, It Seems," Twelfth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/07)
- "Prosecutorial Ethics: Was the Duke Lacrosse Case an Aberration or the Tip of the Iceberg?," SCTL Annual Convention, Hilton Head Island (8/3/07).
- "Malpractice Liability of Estate-Planning Lawyers," Eleventh Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/7/06).
- "Ethics for Trial Lawyers: How to Avoid Those Hidden Land Mines," S.C.T.L.A. Auto Torts Seminar XXIX, Ritz-Carlton, Buckhead, Atlanta, GA (12/2/06).
- "Ethical Issues for the Sports Attorney-Agent: Lessons from *Vortex v. Ware*," International Sport and Entertainment Management Conference, Metropolitan Convention Center, Columbia, SC (11/9/06).
- "Ethics in Workers Comp Practice: Negotiation," ASCCAWC Annual Convention, Grove Park Inn, Asheville, NC (11/4/06).
- "Probate Judges and Lawyers: Prohibition of *Ex Parte* Communications," Fourteenth Annual Probate Bench/Bar Conference, Columbia, SC (9/15/06).
- "The Future Regulation of Lawyer Advertising Under the Proposed S.C. Rules of Professional Conduct," SCTL Annual Convention, Hilton Head Island (8/4/06).
- "Free Speech and Judicial Selection: Implications of *White v. Republican Party*," Southeastern Association of Law Schools, The Breakers Hotel, Palm Beach, FL (7/20/06).
- "The New South Carolina Rules of Professional Conduct," Tenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/15/05).
- "Ethical Use of Discovery Under the Workers' Compensation Act; Contact with Employer Witnesses; Use of Subpoenas in a Workers' Compensation Case; Frivolous Defenses: What to do About Them," ASCCAWC Annual Meeting, Grove Park Inn, Asheville, N.C. (11/4/05).
- "Applying the SC Code of Judicial Conduct to Workers' Compensation Commissioners: Lessons for Lawyers Practicing Before the Commission," SCWCEA Educational Conference CLE, Marriott Myrtle Beach Resort (10/24/05).
- "The New SC Rules of Professional Conduct: You Really Can't Do THAT Anymore!," SCWCEA Educational Conference, Marriott Myrtle Beach Resort (10/24/05).
- "Newly Revised Frivolous Procedures Act & Other Ethical Issues," SCTL Tort Reform Seminar, Columbia, S.C. (10/14/05).
- Moderator and Coordinator, S.C. Corporate Practice Seminar, S.C. Bar CLE, U.S.C. Law School (9/30/05). Speaker: "Ethical Issues in S.C. Corporate Law for the General Practitioner and the Corporate Lawyer:
 - Ethical Issues Presented by Choices of Control Devices
 - Ethical Issues Arising from Threats of Owner Liability
 - The Big Ethical Question: Who Is The Client?"
- "The Code of Judicial Conduct: Does It Effect How We Practice Workers' Comp?," S.C. Bar CLE, U.S.C. Law School (8/26/05).
- "Ethics Seminar: The New Rules of Professional Conduct," SCTL Annual Convention, Hilton Head Island (8/5/05).
- "Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, Richland County Bar Association (11/5/04).
- "Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Charleston, S.C. (8/18/04).
- "The New S.C. Lawyers' Oath," C.L.E. Seminar, S.C. Bar, Charleston, S.C. (6/25/04).
- "Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Columbia, S.C. (4/23/04).
- "Ethics 2000 and Lawyers' Fees," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel, Columbia, S.C. (11/15/03).
- "The Ethical Implications of *Brown v. Bi-Lo*," S.C. Workers Comp. Educational Ass'n Educational Conference, Kingston Plantation, Myrtle Beach, S.C. (10/20/03).
- "Ethics 2000: The New Rules of Professional Conduct & Multi-Jurisdictional Practice of Law," C.L.E. Ethics Seminar, Investors Title Insurance Co. Seminars (9/17/03 Rock Hill, 9/12/03 Hilton Head).

- "Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/8/03).
- "Political & Legal Ethics: The Pitfalls to Avoid," C.L.E. Ethics Seminar, S.C. Bar Annual Convention (Young Lawyers Division) (1/24/03).
- "Recent Developments in Legal Ethics," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel (12/14/02).
- "Current Ethical Issues in Real Estate Practice," C.L.E. Ethics Seminar, Security Title Insurance Company (11/8/02).
- "Ethics of Attorney's Fees for Domestic Law Attorneys," C.L.E. Ethics Seminar, S.C. Bar (9/20/02).
- "Discovery Abuse and Litigation Ethics," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/3/02).
- "Discovery Abuse, Litigation Ethics, Supervision and Other Horrors," C.L.E. Ethics Seminar, S.C.T.L.A. Conv. (8/2/02).
- "Ethical Issues in Attorney Marketing Under the Amended Rules," C.L.E. Ethics Seminar, S.C. Bar (7/26/02).
- "Ethics in the Practice of Criminal Law," C.L.E. Ethics Seminar, S.C. Bar (5/10/02).
- "Professional Ethics in the Real World: Communication with Witnesses," C.L.E. Ethics Seminar, Ass'n S.C. Claimants' Attorneys for Workers Comp. (5/3/02).
- "Lawyers and Paralegals Practicing Law When and Where They Shouldn't," C.L.E. Ethics Seminar, S.C. Bar and South Carolina Ass'n of Ethics Counsel (12/15/01).
- "Proposed Disclosure Rule and Goods Funds Statute in South Carolina," C.L.E. Ethics Seminar, S.C. Bar (8/17/01).
- "Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/3/01).
- "Ethical Perils for Family Practitioners: Keeping Your License and Keeping Your Practice," C.L.E. Ethics Seminar, S.C. Bar (12/2/00).
- "Ethical Issues in Workers Compensation Practice," C.L.E. Ethics Seminar, S.C. Workers' Comp. Educational Ass'n, Kingston Plantation, Myrtle Beach, S.C. (10/23/00).
- "The Things That Make Paralegals Indispensable: Technology and the Future of the Practice of Law," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/5/00).
- "Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/4/00).
- "The Internet — Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," SC Defense Trial Attorney's Association & SC Claim Manager's Association CLE at Grove Park Inn, Asheville, N.C. (7/29/00).
- "The Internet — Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (4/28/00).
- "The Responsibility of Administrative Law Judges to Control Unethical and Unprofessional Conduct by Lawyers: Ethical Prohibitions, Remedies and Sanctions," ALJ CLE Seminar, Southern States Association of Administrative Law Judges (3/17/00).
- "S.C. Appellate Procedure: The New Relationship Between the Supreme Court and the Court of Appeals," Paralegal Continuing Education Seminar, Ass'n S.C. Claimant Attorneys for Workers Comp., Asheville, N.C. (1/22/00).
- "Professionalism: Advertising Ethically Under the Amended S.C. Rules of Professional Conduct," C.L.E. Ethics Seminar, S.C. Bar (1/14/00).
- "Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/11/99).
- "Hot Issues in Ethics: Marketing Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (10/29/99).
- "Ethical and Professional Responsibility Issues in Litigation: Discovery Abuse," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (12/12/98).
- "Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/8/98).

- "Discovery Abuse: Bane of Professionalism? Ethical Prohibitions & Court-Ordered Sanctions," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/14/98).
- "Hedgepath & McCormick and the Ethics of Ex-Parte Communication with Treating Physicians," Workers Comp. C.L.E. Seminar, S.C.T.L.A. Convention (8/14/98).
- "Legal Ethics for a Multi-State Law Firm," C.L.E. for a Major S.C. Law Firm (8/8/98).
- "Prudent Ethical Conduct after *Hedgepath*," Medical Staff, McLeod Hospital, Florence, S.C. (4/6/98).
- "What is the Effect of *Hedgepath* on Doctors' Duties to Workers' Comp Patients?" S.C. Workers Comp. Educational Ass'n Annual Meeting, Charleston, S.C. (2/22/98).
- "Confidentiality, Privilege, and the Attorney as Witness, Gossip, or Snitch," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (1/10/98).
- "Law Firm Breakups and Departing Lawyers," C.L.E. Ethics Seminar, S.C. Bar and University of South Carolina School of Law (12/13/97).
- "Hedgepath & Lawyers' Professional Conduct: Implications in Workers' Compensation Proceedings," C.L.E. Seminar, The Association of South Carolina Claimant Attorneys for Workers' Compensation, Asheville, N.C. (11/14/97).
- "Ethics: Judicial Immunity for Administrative Law Judges," J.C.L.E. Seminar, Chief Administrative Law Judges Conference, Charleston, SC (11/6/97).
- "Hedgepath and the Rules of Professional Conduct: Who Can We (and They) Talk to Now?" C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/15/97).
- "Ways to Get in Trouble: Old and New," C.L.E. Ethics Seminar, University of South Carolina School of Law (12/7/96).
- "Ethics for the Modern Lawyer on the Information Superhighway," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/9/96).
- "Mobile Lawyers and Mobile Clients," C.L.E. Ethics Seminar, University of South Carolina School of Law (12/95).
- "Constitutional Restrictions on Regulation of Lawyer Advertising," House of Delegates, S.C. Bar (1/21/94).
- "Ethical Issues Facing Law Firms," C.L.E. Seminar, University of South Carolina School of Law (1/9/93).
- "Ethical Issues in Office Practice," C.L.E. Seminar, University of South Carolina School of Law (12/5/92).
- "Lawyer Television Advertising: A Video Presentation," U.S.C. Law School Faculty Ethics C.L.E. Seminar (10/22/92).
- "The Ethical Dilemma of Corporate Counsel," C.L.E. Seminar, Farm Credit Sys. General Counsels Conference (10/7/92).
- "Lawyer Advertising – The Great Debate," Moderator, C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/14/92).
- "Civil Litigation," in Ethical Issues in Litigation, C.L.E. Seminar, University of South Carolina School of Law (1/11/92).
- "Shareholders' Rights in Disputes with a Corporation and those in Control," in Planning for Business Corporations: A Guide for General Practitioners, C.L.E. Seminar (1/3/92).
- "Ethical Issues in Civil Litigation," in Legal Ethics and Professional Responsibility, a Video/C.L.E. Seminar (12/6/91).
- "A Walk Through the New South Carolina Rules of Professional Conduct," C.L.E., U.S.C. School of Law (1/12/91).
- "Corporate Litigation and Liabilities of Corporations, Directors, Officers, and Shareholders after the 1988 Revision of the South Carolina Business Corporation Act," in Current Issues in Civil Litigation, a C.J.E. Seminar (4/14/89).
- "Fundamental Corporate Changes and Dissenters' Rights under the South Carolina Business Corporation Act of 1988," in The New South Carolina Corporation Act, a Video/C.L.E. Seminar (12/16/88).

University and Community Service

Parliamentarian, University of South Carolina School of Law Faculty, 2004-2007, 2008-2011.
Member, Dean Review Committee for the Dean of the College of Criminal Justice, 2003.
Member, Faculty Manual Revision Committee, Faculty Senate, University of South Carolina, 1998-1999.
Parliamentarian, University of South Carolina Faculty, 1997-2004.
Member, Steering Committee, University of South Carolina Faculty Senate, 1997-2004.
Faculty Senator, University of South Carolina, 1983-1985, 1995-1998, 2000-2003.
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1995-1996.
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1982-1983 (winner Regional Competition).
Faculty Advisor, National Moot Court Competition Team, University of South Carolina School of Law, 1980-1981.
Committee Chairman, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1996-2003.
Scoutmaster & Founder, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1992-1996.
Assistant Scoutmaster, Committee Chairman, Committee Member, BSA Troop 388, Windsor United Methodist Church, Columbia, SC 1986-1992.
Junior Warden, Vestry, St. David's Episcopal Church, Columbia, SC 1984-1987.
Chorister, Good Shepherd Episcopal Church, Columbia, SC 1999-2004.
Chorister, St. David's Episcopal Church, Columbia, SC 1984-1998.
Chairman, Christian Education Committee, St. Michael and All Angels Episcopal Church, Columbia, SC 1981-1983.
President, Richland Northeast High School Parents, Teachers, Students Organization, Columbia, SC 1992-1997.
Member, Richland School District Two Strategic Planning Committee, Columbia, SC 1995-96.
Member, Richland School District Two New High School (Ridge View) Planning Committee, Columbia, SC 1993-1994.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs,

REQUESTS FOR ADMISSIONS
TO DEFENDANT

vs.

NEXSEN PRUET, LLC

Defendant.

TO: COUNSEL FOR DEFENDANT NEXSEN PRUET, LLC

The Plaintiffs, Larry McNair and Pavilion Development Corp. ("Pavilion"), hereby require the Defendant in the above entitled action, within thirty (30) days from the service hereof, to admit or deny the allegations hereinafter set forth, pursuant to the South Carolina Rules of Civil Procedure 36.

1. Admit that Nexsen Pruet, LLC undertook to represent Larry McNair and Pavilion in a case *Pavilion Development Corp. v. DC & Sons, LLC, Dianne Crowley, Cecil Crowley, Coenco, LLC, Lowcountry Capital, LLC, Wings Over America, LLC, Redwing, LLC, Up The Creek, Inc., and Richard H. Coen*, case no. 2007-CP-10-1457 as consolidated with *DC & Sons v. Pavilion Development Corp., Larry McNair, Coenco, LLC, Lowcountry Capital, LLC, Ocean One Realty, James R. Maull, Jr., and Richard H. Coen*, case no. 2008-CP-10-4675.

ANSWER:

2. Admit that Nexsen Pruet entered into an attorney-client relationship with Larry McNair and Pavilion.

ANSWER:

3. Admit that Nexsen Pruet owed Larry McNair and Pavilion a duty to conform to generally recognized and accepted practices among the legal profession and to perform its tasks with reasonable care and diligence.

ANSWER:

4. Admit that Nexsen Pruet owed Larry McNair and Pavilion a duty to exercise that degree of skill, knowledge, as possessed and exercised by the ordinary attorney in similar circumstances.

ANSWER:

5. Admit that Nexsen Pruet owed Larry McNair and Pavilion a duty to provide competent representation, including possessing the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of Plaintiffs.

ANSWER:

6. Admit that Nexsen Pruet owed Larry McNair and Pavilion a duty to exercise independent professional judgment and render candid advice to Plaintiffs.

ANSWER:

7. Admit that Nexsen Pruet owed a fiduciary duty to Larry McNair and Pavilion.

ANSWER:

8. Admit that, on or about January 17, 2008, Nexsen Pruet advised Pavilion to enter into a stipulation wherein Pavilion stipulated that neither Richard Coen nor any of his entities, or anyone other than the Seller, DC & Sons, had any "current, future, or contingent property interests in the subject property."

ANSWER:

9. Admit that on February 28, 2008, R. Bruce Wallace, Esquire of Nexsen Pruet wrote counsel for DC & Sons, stating that Pavilion desired to purchase the Cottage on the Creek property at the reduced price of Three Million Five Hundred Thousand Dollars (\$3,500,000.00).

ANSWER:

10. Admit that on August 15, 2008, R. Bruce Wallace, Esquire of Nexsen Pruet wrote counsel for DC & Sons and stated that the lis pendens on the Cottage on the Creek property would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent.

ANSWER:

11. Admit that on or about March 23, 2009, the Honorable Roger M. Young ordered the lis pendens be removed from the Cottage on the Creek property.

ANSWER:

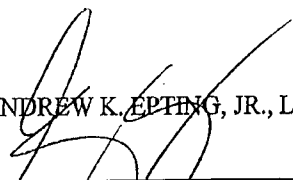
12. Admit that on or about January 18, 2011, the Honorable Roger M. Young granted DC & Sons motion for summary judgment as to Pavilion and Larry McNair's liability for abuse of process and breach of contract.

ANSWER:

13. Admit that Nexsen Pruet holds itself out as "The Carolinas' Leading Real Estate Law Firm" and advertises that "Unlike many firms whose real estate practice focuses only on transactional work, Nexsen Pruet's team also includes attorneys who are highly skilled in litigation of real property disputes."

ANSWER:

[signatures on following page]


ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
3 State Street, Charleston, SC 29401
P: 843.377.1871 F: 843.377.1310
ake@epting-law.com

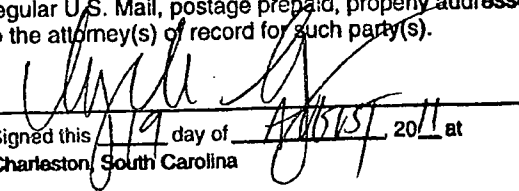
George J. Kefalos, Esquire
George J. Kefalos, PA
3 State Street, Charleston, SC 29401
P: 843.722.6612; F: 843.377.1310
George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this 9 day of August 2011
Charleston, SC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 19 day of August, 2011 at
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs,

INTERROGATORIES TO DEFENDANT

vs.

NEXSEN PRUET, LLC

Defendant.

TO: COUNSEL FOR DEFENDANT NEXSEN PRUET, LLC

The Plaintiffs, Larry McNair and Pavilion Development Corp. ("Pavilion"), hereby require the Defendant in the above entitled action, within thirty (30) days from the service hereof, to answer under oath the Interrogatories hereinafter set forth, pursuant to the South Carolina Rules of Civil Procedure 33(b). These Interrogatories are continuing should the party or Defendant's counsel obtain information sought thereby that would supplement the Defendant's original answers thereto.

1. Identify any and all persons known to you or your counsel to have knowledge concerning any of the facts or allegations of this case, and for each such person provide the following:

(a) State whether or not written or recorded statements have been taken from the witnesses, and give the name of the person or organization having possession of such statements; and

(b) For each person known to you or your counsel to have knowledge concerning the facts of the case, set forth either a summary of the important facts known to or observed by such witness or provide a copy of any written or recorded statements taken from such witness.

ANSWER:

2. List all documents in your possession, custody and control that refer or relate to claims or defenses in this action.

ANSWER:

3. List the names and addresses of any expert witnesses you propose to use as a witness at the trial of this case and for each and every individual whom you have listed as an expert witness in this case, state the following in detail and with particularity:

(a) The specific area of expertise in which you contend the person identified is competent to testify;

(b) Each and every fact which qualifies the person identified as an expert;

(c) Each and every specific opinion(s) such person holds in each area of expertise which is relevant to this matter;

(d) Each and every fact upon which the person identified bases each of his Opinions;

(e) Each and every theory, premise, contention, or thing, other than a fact that will be established in testimony, upon which such witness bases his opinion.

ANSWER:

4. Identify any witnesses you intend to call at the trial of this case.

ANSWER:

5. Set forth the names and addresses of all insurance companies which have liability coverage relating to Plaintiffs claims and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER:

6. Describe the professional services that you performed for the Plaintiffs and state the dates that such services were performed.

ANSWER:

7. Describe all meetings that you have had with the Plaintiffs and/or representatives of Pavilion. For each meeting, identify:

- (a) The date;
- (b) All persons in attendance;
- (c) The exact location of the meeting;
- (d) The topics discussed at the meeting; and
- (d) All documents discussed or referred to.

ANSWER:

8. List all other civil lawsuits in which you were alleged to have been negligent in providing legal services, and please state:

- (a) The court, case number, and style of the suit;
- (b) The result of the lawsuit, i.e. whether settled or tried; and
- (c) If the lawsuit(s) was (were) settled, provide the settlement amount.

ANSWER:

9. For each and every Request for Admission that is denied by the Defendant, set forth a detailed explanation of the reason for the denial.

ANSWER:

[signatures on following page]

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
3 State Street, Charleston, SC 29401
P: 843.377.1871 F: 843.377.1310
ake@epting-law.com

George J. Kefalos, Esquire
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P: 843.722.6612; F: 843.377.1310
George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this 17 day of August 2011
Charleston, SC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 17 day of August, 2011 at
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs,

REQUESTS FOR PRODUCTION
TO DEFENDANT

vs.

NEXSEN PRUET, LLC

Defendant.

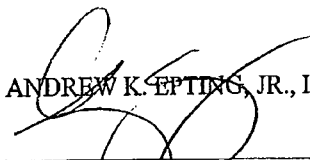
TO: COUNSEL FOR DEFENDANT NEXSEN PRUET, LLC

The Plaintiffs, Larry McNair and Pavilion Development Corp. ("Pavilion"), hereby require the Defendant, pursuant to the South Carolina Rules of Civil Procedure 34, within thirty (30) days from the service hereof, to produce for inspection and/or copying the documents listed below to the undersigned

1. Any and all statements, whether written, recorded, or otherwise, having any bearing upon the present litigation.
2. Any and all reports of any investigations having to do with the present and underlying litigation.
3. Copies of any and all documents identified in response to all interrogatories served on the Defendants.
4. With regard to any expert witnesses identified in Answers to Interrogatories:
 - a) All documents prepared by the expert;
 - b) All documents sent to the expert by the Defendants' counsel;
 - c) All documents relied upon by the expert;

- d) All documents used, consulted, or reviewed by the expert;
 - e) All documents setting forth the compensation agreement between the Defendants and the expert;
 - f) All documents, used, relied upon, consulted, or reviewed by the expert in answering expert witness interrogatories;
 - g) All documents that have been or will be shown to the expert prior to trial testimony; and
 - h) All documents, including a current curriculum vitae, used to establish the expert's qualifications for trial purposes.
5. Any other documents and/or exhibits intended to be utilized by Defendant at the trial of this case.
6. A certified copy of the insurance policy or policies in effect and providing coverage for the Defendant for the allegations covered in the Complaint.
7. A complete copy of Defendant's file from the underlying action, including, but not limited to, correspondence, billing entries, pleadings, discovery, motions, orders, notes, research, document production, consultations, depositions, and E-mail communications.
8. A copy of the fee agreement between Plaintiffs and Defendant from the underlying action.

[signatures on following page]


ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
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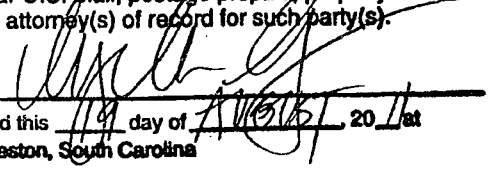
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George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this 17 day of August 2011
Charleston, SC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 17 day of August, 2011 at
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

Defendants

NOTICE OF VIDEOTAPED DEPOSITION
OF JONATHAN YATES

TO: COUNSEL FOR DEFENDANT

PLEASE TAKE NOTICE that the PLAINTIFFS, Pavilion Development Corp. & Larry McNair, through their undersigned attorneys, will take the videotaped deposition of **Jonathan Yates** in the offices of ANDREW K. EPTING, JR, LLC, located at 3 State Street, Charleston, SC, at 9:00 AM, on September 16, 2011 before a Notary Public; such deposition to be taken pursuant to SCRCivP Rule 30.

ANDREW K. EPTING, JR., LLC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 19 day of August, 2011 at
Charleston, South Carolina

Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
3 State Street, Charleston, SC 29401
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Georgec@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this 19 day of August, 2011
Charleston, SC

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

Defendants

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-

NOTICE OF VIDEOTAPED DEPOSITION
OF JEFFREY VINZANI

TO: COUNSEL FOR DEFENDANT

PLEASE TAKE NOTICE that the PLAINTIFFS, Pavilion Development Corp. & Larry McNair, through their undersigned attorneys, will take the videotaped deposition of Jeffrey Vinzani in the offices of ANDREW K. EPTING, JR, LLC, located at 3 State Street, Charleston, SC, at 1:00 PM, on September 16, 2011 before a Notary Public; such deposition to be taken pursuant to SCRCivP Rule 30.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 19 day of August, 2011 at
Charleston, South Carolina

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
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George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this 19 day of August, 2011
Charleston, SC

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

Defendants

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-

NOTICE OF VIDEOTAPED DEPOSITION
OF DAN DAVID

TO: COUNSEL FOR DEFENDANT

PLEASE TAKE NOTICE that the PLAINTIFFS, Pavilion Development Corp. & Larry McNair, through their undersigned attorneys, will take the videotaped deposition of **Dan David** in the offices of ANDREW K. EPTING, JR, LLC, located at 3 State Street, Charleston, SC, at 9:00 AM, on September 15, 2011 before a Notary Public; such deposition to be taken pursuant to SCRCivP Rule 30.

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
3 State Street, Charleston, SC 29401
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 19 day of August, 2011 at
Charleston, South Carolina

On this 19 day of August, 2011
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

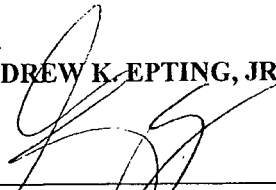
Defendants

NOTICE OF VIDEOTAPED 30(b)(6)
DEPOSITION OF NEXSEN PRUET, LLC

TO: COUNSEL FOR DEFENDANT

PLEASE TAKE NOTICE that the PLAINTIFFS, Pavilion Development Corp. & Larry McNair, through their undersigned attorneys, will take the videotaped deposition duces tecum of that representative or representatives of Nexsen Pruet, LLC in the offices of ANDREW K. EPTING, JR, LLC, located at 3 State Street, Charleston, SC, at 9:00 AM, on September 15, 2011 before a Notary Public; such deposition to be taken pursuant to SCRCivP Rule 30(b)(6). The designee(s) of Nexsen Pruet, LLC must bring to the deposition, be knowledgeable about and able to testify regarding the following:

1. The files kept arising out of the representation of Larry McNair and Pavilion Development Corp. with regard to RedWing, LLC & DC & Sons as it pertains to the "Cottage on the Creek" property, more particularly identified as TMS numbers 517-15-00-018, 517-15-00-019, 517-15-00-022, or parcels that have a street address of 130 Mill Street, Mt. Pleasant, SC 29464, in particular all communications, correspondence, memos, emails to, by, among, and between Parker Poe, Nexsen Pruet, Richard H. Coen, Lowcountry Capital, LLC, Coenco, LLC, Ocean 1 Realty, Larry McNair, and James Maull and all accounting or financial documents, plans, zoning documents, drawings, plats, or any other documents pertaining to Cottage on the Creek property. The deponent should also provide a privilege log.


ANDREW K. EPTING, JR., LLC

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Michelle N. Endemann, Esq.
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ake@epting-law.com; mne@epting-law.com

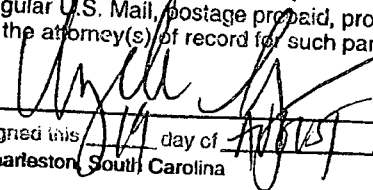
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George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

On this__ day of August, 2011
Charleston, SC

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 14 day of August, 2011 at
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PAVILION DEVELOPMENT CORP. &
LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

Defendants

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 2011-CP-10-

NOTICE OF VIDEOTAPED DEPOSITION
OF BRUCE WALLACE

TO: COUNSEL FOR DEFENDANT

PLEASE TAKE NOTICE that the PLAINTIFFS, Pavilion Development Corp. & Larry McNair, through their undersigned attorneys, will take the videotaped deposition of **Bruce Wallace** in the offices of ANDREW K. EPTING, JR, LLC, located at 3 State Street, Charleston, SC, at 1:00 PM, on September 15, 2011 before a Notary Public; such deposition to be taken pursuant to SCRCivP Rule 30.

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
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George@kefaloslaw.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 19 day of August, 2011 at
Charleston, South Carolina

On this 19 day of August, 2011
Charleston, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) IN THE NINTH JUDICIAL CIRCUIT

PAVILION DEVELOPMENT CORP. &) Civil Action No.: 2011-CP-10-05774

LARRY McNAIR,

Plaintiffs,

v.

NEXSEN PRUET, LLC,

Defendant,

v.

DC & Sons, LLC,

Counterclaim Defendant.

**ANSWER TO COMPLAINT AND
COUNTERCLAIM AGAINST
PLAINTIFFS AND DC & SONS, LLC**

FILED
2011 OCT 21 PM 1:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Nexsen Pruet, LLC, specifically reserving its rights under the Motion to Disqualify Counsel pending in this case, and answering the Complaint of Pavilion Development Corporation and Larry McNair (Plaintiffs), and counterclaiming against the Plaintiffs and Counterclaim Defendant DC & Sons, LLC ("DC & Sons"), denies each and every allegation not specifically admitted, qualified, or explained below, and further alleges and states a counterclaim against Plaintiffs and DC & Sons as follows:

FOR A FIRST DEFENSE

1. Nexsen Pruet admits that portion of paragraph 1 of the Complaint which alleges that Plaintiff Pavilion Development Corporation is a South Carolina corporation. Nexsen Pruet lacks knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 1 of the Complaint and therefore denies them.

2. Nexsen Pruet admits the allegations of paragraph 2 of the Complaint based on information and belief.

3. Nexsen Pruet admits that portion of paragraph 3 of the Complaint which alleges that Nexsen Pruet is a law firm organized and existing under the laws of the State of South Carolina and that the phrase quoted in paragraph 3 either now appears or has appeared on the Nexsen Pruet website, but Nexsen Pruet craves reference to the entire firm website for a complete statement of its content. The remaining allegations in paragraph 3 of the Complaint are denied.

4. Nexsen Pruet denies the allegations of paragraph 4 of the Complaint.

5. Nexsen Pruet denies the allegations of paragraph 5 of the Complaint as stated and in connection therewith alleges that Nexsen Pruet was retained by Pavilion to provide legal advice in conjunction with a real estate transaction involving real property located at Shem Creek, and that such representation commenced after Pavilion signed the Agreement to Buy and Sell Real Estate ("purchase agreement") agreeing to purchase the property. The representation included matters relating to zoning issues and the closing of the purchase. Nexsen Pruet continued its representation of Pavilion in the matter, which eventually resulted in the filing of a lis pendens and a lawsuit.

6. Nexsen Pruet admits on information and belief that portion of paragraph 6 of the Complaint which states that Pavilion entered into the purchase agreement with Diane and Cecil Crowley who are the owners of DC & Sons, LLC, but further alleges that such purchase agreement was executed before Nexsen Pruet's representation of Pavilion commenced. Nexsen Pruet was never asked for, nor ever gave advice to Pavilion with respect to the execution of the

purchase agreement by Pavilion. The remaining allegations of paragraph 6 of the Complaint are denied.

7. Nexsen Pruet admits the allegations of paragraph 7 of the Complaint and in connection therewith craves reference to the purchase agreement for a complete statement of its terms.

8. Nexsen Pruet denies the allegations of paragraph 8 of the Complaint and in connection therewith craves reference to the purchase agreement for a complete statement of its terms.

9. Nexsen Pruet lacks information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint and therefore denies them. In connection therewith, Nexsen Pruet states that Richard Coen filed a lawsuit on September 19, 2006, against DC & Sons and others asserting parking and leasehold rights on the Cottage on the Creek property.

10. Nexsen Pruet denies the allegations of paragraph 10 of the Complaint and in connection therewith alleges that Nexsen Pruet wrote multiple letters and emails to counsel for DC & Sons concerning the cloud on the title created by the claims asserted by Richard Coen and his entities but counsel for DC & Sons could not assure Nexsen Pruet that the sellers would be able to deliver good title, suggesting instead that Pavilion should close on the property and rely upon title insurance for protection. Nexsen Pruet craves reference to the written correspondence and emails exchanged between lawyers at Nexsen Pruet and counsel for DC & Sons related to the cloud on title for a complete statement of their terms.

11. Nexsen Pruet denies the allegations of paragraph 11 of the Complaint and in connection therewith alleges that counsel for DC & Sons wrote a letter to Nexsen Pruet acknowledging that the sellers were obligated to deliver good title and that if it failed to do so,

Pavilion would be entitled to a return of the earnest money. The letter further states that if Pavilion was "uncomfortable with moving forward under those circumstances," then the purchase agreement could be terminated and the earnest money forfeited to the sellers. Nexsen

Pruet craves reference to the November 30, 2006 letter from Richard J. Brownyard to M. Jeffery Vinzani for a complete statement of its terms.

12. Nexsen Pruet denies the allegations of paragraph 12 of the Complaint, and in connection therewith states that there were conflicting representations concerning the status of the title of the property from DC & Sons on the one hand and Richard Coen and his entities on the other.

13. Nexsen Pruet denies so much of paragraph 13 of the Complaint as alleges that Pavilion was unwilling to close on the property. Nexsen Pruet admits that after the sellers failed to provide good title, Nexsen Pruet filed a notice of lis pendens and a lawsuit on behalf of Pavilion against DC & Sons and others seeking a declaratory judgment and specific performance as well as an action to quiet title and in connection therewith states that the action was styled *Pavilion Development Corporation v. Diane Crowley, Cecil Crowley, Coenco, LLC, Lowcountry Capital, LLC, Wings Over America LLC, Redwing, LLC, DC & Sons, LLC, Up the Creek, Inc., and Richard H. Coen*, Case No. 2007-CP-10-1451.

14. Nexsen Pruet admits the allegations of paragraph 14 of the Complaint but in connection therewith alleges that Nexsen Pruet contacted Drew Epting, counsel for DC & Sons, and told him that Nexsen Pruet intended to hold off on serving Coen and his entities until Nexsen Pruet and Epting resolved by stipulation who the proper parties were. Epting agreed with this course of action and DC & Sons never moved to dismiss the lawsuit for failure to serve Coen or his entities.

15. Nexsen Pruet admits the allegations of paragraph 15 of the Complaint.

16. Nexsen Pruet admits the allegations of paragraph 16 of the Complaint.

17. Nexsen Pruet denies the allegations of paragraph 17 of the Complaint as stated

and in connection therewith craves reference to the Stipulation between Pavilion and DC & Sons dated January 17, 2008, for a complete statement of its terms.

18. Nexsen Pruet lacks information sufficient to form a belief as to the truth of the allegations of paragraph 18 of the Complaint and therefore denies them

19. Nexsen Pruet denies the allegations of paragraph 19 of the Complaint as stated and in connection therewith states that on February 21, 2008, Nexsen Pruet wrote to counsel for DC & Sons in an effort to settle all claims asserted by Pavilion and DC & Sons in litigation, and as part of that effort communicated an offer from Pavilion in compromise to purchase the property for \$3.5 million. Nexsen Pruet craves reference to the February 21, 2008 letter for a complete statement of its terms.

20. Nexsen Pruet denies the allegations of paragraph 20 of the Complaint as stated and in connection therewith alleges that counsel for DC & Sons asked that the lis pendens be removed and Nexsen Pruet advised Pavilion and McNair that there was a reasonable basis for not removing the lis pendens from the property until the litigation regarding the property concluded and the \$50,000 paid by Pavilion as earnest money was returned to Pavilion.

21. Nexsen Pruet lacks information sufficient to form a belief as to the truth of so much the allegations in paragraph 21 of the Complaint as allege that a hearing occurred on May 20, 2008, and therefore denies the same. Nexsen Pruet denies the remaining allegations of paragraph 21.

22. Nexsen Pruet admits the allegations of paragraph 22 of the Complaint.

23. Nexsen Pruet denies the allegations of paragraph 23 of the Complaint as stated and in connection therewith alleges that counsel for DC & Sons asked that the lis pendens be removed, and Nexsen Pruet advised Pavilion and McNair that there was a reasonable basis for not removing the lis pendens from the property until the litigation regarding the property concluded and the \$50,000 paid by Pavilion as earnest money was returned to Pavilion.

24. Nexsen Pruet denies the allegations of paragraph 24 of the Complaint as stated and craves reference to the March 23, 2009 order for a complete statement of its terms.

25. Nexsen Pruet lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25 of the Complaint and therefore denies them.

26. Nexsen Pruet admits based on information and belief the portion of paragraph 26 of the Complaint stating that Judge Young granted summary judgment in favor of DC & Sons but denies the remaining allegations of paragraph 26 and its subparts as stated and craves reference to Judge Young's order for a complete statement of its terms.

27. Nexsen Pruet admits based on information and belief the portion of paragraph 27 of the Complaint which alleges that Pavilion purported to confess judgment in the amount of \$4,580,015.93 but denies the remaining allegations in paragraph 27 of the Complaint. Nexsen Pruet admits that there is a document titled "Confession of Judgment" signed by Pavilion in the amount of \$4,580,015.93. Nexsen Pruet was not counsel to Pavilion at the time and therefore it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 27 and denies the same.

28. Nexsen Pruet incorporates paragraphs 1 – 27 above in response to the allegations of paragraph 28 of the Complaint.

29. Answering the allegations of paragraph 29 of the Complaint, Nexsen Pruet admits that it had an attorney-client relationship with Pavilion and Larry McNair up until the time that Nexsen Pruet withdrew as counsel of record with approval from the Court. Nexsen Pruet lacks information sufficient to form a belief as to the expectations of Plaintiffs and therefore denies those allegations and the remaining allegations of paragraph 29 of the Complaint.

30. Nexsen Pruet admits that the phrase quoted in paragraph 30 of the Complaint either now appears or has appeared on the Nexsen Pruet website, but Nexsen Pruet craves reference to the entire firm website for a complete statement of its content. The remaining allegations in paragraph 30 of the Complaint are denied.

31. The allegations of paragraph 31 of the Complaint constitute conclusions of law and therefore Nexsen Pruet can neither admit nor deny them, but to the extent such allegations relate to facts, Nexsen Pruet denies the same.

32. Nexsen Pruet denies the allegations of paragraph 32 of the Complaint, including the allegations set forth in subparagraphs a - h.

33. Nexsen Pruet denies the allegations of paragraph 33 of the Complaint.

34. Nexsen Pruet denies the allegations of paragraph 34 of the Complaint.

35. Nexsen Pruet incorporates paragraphs 1 - 34 above in response to the allegations of paragraph 35 of the Complaint.

36. The allegations of paragraph 36 of the Complaint constitute conclusions of law and therefore Nexsen Pruet can neither admit nor deny them, but to the extent such allegations relate to facts, Nexsen Pruet denies the same.

37. The allegations of paragraph 37 of the Complaint constitute conclusions of law and therefore Nexsen Pruet can neither admit nor deny them, but to the extent such allegations relate to facts, Nexsen Pruet denies the same.

38. Nexsen Pruet denies the allegations of paragraph 38 of the Complaint.

39. Nexsen Pruet denies the allegations of paragraph 39 of the Complaint.

40. Nexsen Pruet denies the allegations of paragraph 40 of the Complaint.

FOR A SECOND DEFENSE

41. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE

42. The claims in the Complaint are barred by the equitable defense of waiver because Plaintiffs have expressly assigned the right to bring and control these claims to their adversary in the underlying litigation, DC & Sons, and have assigned all proceeds flowing from such claims to DC & Sons. As a result, Plaintiffs have voluntarily waived their right to assert the claims set forth in the Complaint against Nexsen Pruet.

FOR A FOURTH DEFENSE

43. Plaintiffs lack standing to bring the causes of action alleged in the Complaint because Plaintiffs have not retained any independent right to pursue this action and control this litigation.

FOR A FIFTH DEFENSE

44. To the extent Plaintiffs have incurred damages, which is denied, such damage was not proximately caused by the actions of Nexsen Pruet and therefore Nexsen Pruet is not liable.

FOR A SIXTH DEFENSE

45. Plaintiffs' claims are barred by the doctrines of comparative and contributory negligence because any harm suffered by Plaintiffs was caused by Plaintiffs own conduct and not by the conduct of Nexsen Pruet.

FOR A SEVENTH DEFENSE

46. The claims are barred because any harm suffered by Plaintiffs was caused by the superseding and intervening negligence of third parties other than Nexsen Pruet for which Nexsen Pruet is not liable.

FOR AN EIGHTH DEFENSE

47. The claims are barred by the doctrine of assumption of the risk because Plaintiffs assumed the risk of injury by the decisions made by them and their counsel in the litigation after Nexsen Pruet withdrew as counsel.

FOR A NINTH DEFENSE

48. The claims are barred by the doctrine of release because Plaintiffs have assigned their rights to bring these claims to another party.

FOR A TENTH DEFENSE

49. Plaintiffs' claims for punitive damages are barred by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and related sections of the South Carolina Constitution. In addition, a claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 8, of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR AN ELEVENTH DEFENSE

50. Plaintiffs' claims are barred by the applicable statute of limitations.

FOR A TWELFTH DEFENSE

51. Plaintiffs have failed to join all parties needed for a complete resolution of this matter in that Plaintiffs have not named the entity (DC & Sons) that owns the right to the proceeds of this claim and that has unfettered control of the litigation and all of the privileges attendant thereto.

FOR A THIRTEENTH DEFENSE

52. Plaintiffs' claims are barred by the doctrine of estoppel due to Plaintiffs' conduct in the previous litigation.

FOR A FOURTEENTH DEFENSE

53. Any harm suffered by Plaintiffs was caused by intervening events that took place after Nexsen Pruet withdrew as counsel for Plaintiffs and therefore Nexsen Pruet is not liable for the harm alleged.

FOR A FIFTEENTH DEFENSE

54. The claims are barred because they result from an illegal assignment of a legal malpractice claim from Plaintiffs to their adversary in the underlying litigation.

FOR A SIXTEENTH DEFENSE

55. Plaintiffs have failed to mitigate their damages, if any.

FOR A SEVENTEENTH DEFENSE

56. This case is barred by the doctrine of unclean hands.

FOR AN EIGHTEENTH DEFENSE

57. Defendant will rely on all defenses lawfully available to it at the time of trial, and reserves the right to amend this answer to include additional defenses or withdraw others after _____ completion of discovery.

**FOR A NINETEENTH DEFENSE AND BY WAY OF
COUNTERCLAIM AGAINST PLAINTIFFS AND DC & SONS**

58. Paragraphs 1 through 57 above are incorporated here.

59. Upon information and belief, DC & Sons, LLC, is an entity existing under the laws of the State of South Carolina.

60. DC & Sons was Plaintiffs' adversary in the case below which forms the basis of the allegations in the Complaint.

61. DC & Sons was represented by Andrew Epting and George Kefalos. Epting and Kefalos now represent Plaintiffs in the present case.

62. DC & Sons should be made a party to this case pursuant to S.C. Code Ann. § 15-53-80 and Rule 13, SCRCP, because according to a document on file with the Clerk of Court of Charleston County, DC & Sons has an interest in this case that will be affected by a declaratory judgment. The document purports to give DC & Sons the right to assert the claims alleged in the Complaint and to control this litigation. It also purports to give DC & Sons the right to any and all proceeds from this case.

63. DC & Sons purportedly obtained these rights pursuant to a supposed agreement signed by Pavilion, Larry McNair, and DC & Sons prior to the commencement of the first day of trial in the case below, when the parties took a recess and settled the case. Nexsen Pruet was not counsel for Pavilion at this time, nor had it been counsel for Pavilion for almost two years.

64. The agreement purporting to assign the claims and proceeds to DC & Sons (the Assignment) is attached to the Form 4 Order that the trial court issued when the case settled. Also attached to the Form 4 Order is a Confession of Judgment crafted by DC & Sons and Pavilion in which Pavilion confessed judgment for \$4,580,015.93 in exchange for a release of personal liability for Larry McNair and a waiver of trial against Pavilion for punitive damages. The entire Form 4 Order, which includes the Assignment and the Confession of Judgment, is attached as Exhibit A.

65. January 18, 2011, was also the day the trial was to commence on the claims asserted by DC & Sons against Pavilion and McNair for breach of contract and abuse of process. The Honorable Roger M. Young, Sr., presided.

66. Based on information and belief, the first day of trial began with the court hearing arguments from counsel on DC & Sons's motion for summary judgment. After the arguments concluded, Judge Young stated from the bench that he intended to grant the motion for summary judgment in favor of DC & Sons. Following the court's pronouncement, Dan David, who became counsel for Pavilion and McNair after Nexsen Pruet withdrew as counsel almost two years before, and who continued to represent Pavilion over the course of the litigation until its conclusion, requested "just a few minutes" to see if an agreement could be reached between the parties. The court granted the request and a recess was taken. A copy of the transcript of the January 18, 2011 hearing is attached as Exhibit B.

67. Based on information and belief, the parties signed a purported Assignment and Confession of Judgment during the court recess.

68. Also during the court recess, Judge Young signed the order granting summary judgment in favor of DC & Sons. A copy of the order had been sent to the judge by email the day before. (Ex. B, pp. 2, 16.)

69. When the parties were back on the record, counsel for DC & Sons announced that the parties had reached an agreement and that Pavilion had confessed judgment for \$4,580,015.93. (Ex. B, pp. 16 - 17.)

70. Drew Epting, counsel for DC & Sons, made a general statement about the assignment of claims and proceeds from Pavilion and McNair to DC & Sons, but Mr. Epting did not explain that Pavilion and McNair had waived any right they might have to file a legal malpractice claim against Nexsen Pruet and had purported to assign any such right to DC & Sons. The terms of the Assignment were not discussed with the court on the record. (Ex. B, p. 17.)

71. According to the language of the Assignment, its terms were as follows:

- a. Pavilion and McNair assigned to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against Nexsen Pruet.
- b. At the election of DC & Sons, Pavilion and McNair assigned all claims to be asserted against Nexsen Pruet to include breach of contract, breach of fiduciary duty, professional negligence, etc.
- c. Pavilion and McNair placed full control of the litigation in the hands of DC & Sons, including the handling of the litigation, trial, appeal, settlement, and waiver of the attorney-client privilege and work-product protection.

d. Pavilion and McNair agreed to cooperate in the prosecution of the action against Nexsen Pruet and to pursue the litigation as if they retained a right to the proceeds.

e. DC & Sons agreed to bear the cost of the litigation.

f. Pavilion and McNair acknowledged that the suit will be brought in their names.

g. Pavilion and McNair directed the earnest money plus interest to be turned over to DC & Sons and their counsel.

h. The parties agreed that the first \$250,000 received in a settlement or judgment will be split equally between DC & Sons on the one hand and Pavilion and McNair on the other. All additional funds shall be for the benefit of DC & Sons.

72. Counsel for DC & Sons proffered the Confession of Judgment to the trial court and explained how the amount of \$4,580,015.93 was determined. No evidence was presented to support the amount and no hearing was conducted to test the amount. (Ex. B, pp. 17 - 19.)

73. The trial court then asked counsel for DC & Sons how the assignment should be reflected, and counsel for DC & Sons said that the assignment was handwritten and would be provided to the court and did not need to be reflected in the Form 4 Order. The court then suggested that the Form 4 state merely that the case had been settled and the amount of damages had been put on the record. Counsel for DC & Sons agreed. (Ex. B, pp. 20 - 21.)

74. Nexsen Pruet was not counsel for Pavilion and McNair at this time and had not been counsel for Pavilion and McNair since March 2009. After Nexsen Pruet's withdrawal from the case, Pavilion and McNair were represented by Attorney Dan David.

75. Based on information and belief, the present case is proceeding pursuant to the Assignment, and Pavilion and McNair are not the real parties in interest. The real party in

interest is DC & Sons because the claims and proceeds from this case have been assigned to DC & Sons.

76. Although DC & Sons has never been a client of Nexsen Pruet, DC & Sons controls this case and Pavilion and McNair have allowed DC & Sons to use their names as former clients of Nexsen Pruet to bring this litigation. By purporting to be a case brought by Pavilion and McNair, this action conceals from the Court and the factfinder the real party in interest.

77. DC & Sons and Pavilion and McNair have colluded to harm Nexsen Pruet by entering into an agreement permitting an entity that is not and has never been a client of Nexsen Pruet (DC & Sons) to control litigation filed against Nexsen Pruet for legal malpractice and breach of fiduciary. Additionally, the parties have colluded to obtain a confession of judgment from Pavilion for an amount that is excessively high and unsupported, allowing a windfall to DC & Sons who was never a client of Nexsen Pruet with no risk to Pavilion and McNair who confessed the judgment. The parties have also colluded to conceal these facts from the Court and the factfinder in the present case.

78. As a result of the actions of Plaintiffs and DC & Sons, Nexsen Pruet has suffered damages by having to defend a case that is based on an illegal assignment and that is so tainted by the conduct of Plaintiffs and DC & Sons that it should be dismissed.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

79. Paragraphs 1 through 78 above are incorporated here.

80. Pavilion and McNair have waived their right to assert the claims alleged in the Complaint because they have assigned the claims and the proceeds to DC & Sons as well as the right to control the litigation.

81. Upon information and belief, the present case is proceeding pursuant to the Assignment and DC & Sons is the real party in interest.

82. DC & Sons is not and has never been a client of Nexsen Pruet and therefore cannot state a claim against Nexsen Pruet for legal malpractice and breach of fiduciary duty.

83. Additionally, the circumstances under which the Assignment and Confession of Judgment were crafted and executed are of such a collusive nature that these entire proceeds are tainted and should be dismissed.

84. Accordingly, Nexsen Pruet seeks a declaration pursuant to Rule 57, SCRCP, and S.C. Code Ann. § 15-53-10 *et seq.*, that (1) the Assignment is illegal because it violates the public policy of this State; (2) Plaintiffs have waived their right to assert the causes of action alleged here because they have assigned those claims and the proceeds from such claims to DC & Sons; (3) DC & Sons is the real party in interest because the claims and proceeds have been assigned to DC & Sons and Plaintiffs have given DC & Sons full control of the litigation; and (4) the Complaint should be dismissed with prejudice because DC & Sons has never been a client of Nexsen Pruet and therefore cannot state a claim against Nexsen Pruet.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Complaint and stated a Counterclaim against Pavilion and McNair (Plaintiffs) and DC & Sons, Nexsen Pruet prays that the Court:

1. Deny the relief sought by Plaintiffs in the Complaint and dismiss the Complaint with prejudice;
2. Declare the agreement between Plaintiffs and DC & Sons assigning the claims and proceeds of this case to DC & Sons void as against public policy;

3. Enter judgment in favor of Nexsen Pruet as to the Counterclaim asserted against Plaintiffs and DC & Sons;

4. Award Nexsen Pruet all other relief that the Court deems just and proper _____
under the circumstances, including attorneys' fees and costs associated
with having to defend the allegations in the Complaint and to assert the
Counterclaim.

SOWELL GRAY STEPP & LAFFITTE LLC

By: Elizabeth Van Doren Gray
Elizabeth Van Doren Gray
Tina M. Cundari
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Defendant

Columbia, South Carolina
October 20, 2011

EXHIBIT A

January 18, 2011 Form Four Order, handwritten settlement agreement, and
confession of judgment in the underlying case

See Record on Appeal page 207

EXHIBIT B

January 18, 2011 Transcript of Hearing before Judge Young in
underlying case

See Record on Appeal page 44

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
	)	
Plaintiffs,	)	
	)	
vs.	)	AFFIDAVIT OF BRUCE WALLACE
	)	
NEXSEN PRUET, LLC,	)	
	)	
Defendant.	)	

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2011 JUN 19 AM 11:48
JULIE J. KESTER
CLERK OF COURT

Personally appeared before me Bruce Wallace, who being first duly sworn,
deposes, and says as follows:

1. I am Bruce Wallace. I am over the age of 18 years and I submit this affidavit based upon my personal knowledge.
2. I am member of the law firm of Nexsen Pruet LLC and I have been admitted to practice law in the State of South Carolina since 1996.
3. I represented Pavilion Development Corporation and Larry McNair in the matters of *Pavilion Development Corporation v. DC & Sons, LLC*, Case No. 07-CP-10-1475, and *DC & Sons v. Richard H. Coen, Lowcountry Capital, Ocean I Realty, James R. Maull, Jr., Larry McNair, Coenco, LLC, and Pavilion Development*, Case No. 08-CP-10-4675, which form the basis of the allegations in the above-captioned case for legal malpractice and breach of fiduciary duty. I deny such allegations.
4. Andrew K. Epting and George J. Kefalos represented DC & Sons, LLC in the matters referenced in paragraph 3. DC & Sons was initially represented by Epting

only and was later represented by Epting and Kefalos when DC & Sons filed a separate action against Pavilion and McNair for breach of contract and abuse of process.

5. During my representation of Pavilion and McNair, I regularly spoke to and corresponded with Epting and Kefalos. We corresponded by letter and email and spoke on the telephone and in-person. I also spoke to Epting and Kefalos at court hearings and conferences. After I withdrew as counsel in the cases, Kefalos and Epting took my deposition

6. When the cause of action for abuse of process was filed, I determined that I would be a witness in the case and that I, along with Nexsen Pruet, should withdraw as counsel. I had a meeting at my office with George Kefalos and another lawyer at my firm to discuss this. Kefalos did not believe that I needed to withdraw, but my law firm and I concluded otherwise. I raised the issue with Judge Young in a meeting in his chambers with all counsel present and Judge Young agreed that Nexsen Pruet and I should withdraw because I was a witness.

7. The withdrawal was granted after the court entered summary judgment in favor of DC & Sons on March 23, 2009. Following the withdrawal, but before the time to appeal the order granting summary judgment expired, Pavilion and McNair retained new counsel. The new counsel was Dan M. David. Pavilion and McNair did not appeal the March 23, 2009 order.

8. Dan David represented Pavilion and McNair for the duration of the case, including for the signing of the confession of judgment and the agreement assigning all claims and proceeds for an action to be brought against Nexsen Pruet to DC & Sons.

FURTHER AFFIANT SAYETH NOT.

2011-CP-10-5774

Sworn to before me this 11 day
of October, 2011

Kemellie Jenkins
Notary Public for South Carolina
My Commission Expires: 06-13-15

Bruce Wallace
Bruce Wallace

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JULIE J. BOSTROM
CLERK OF COURT

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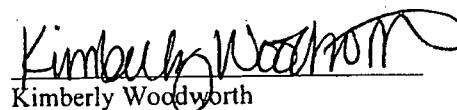
SC Court of Appeals

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. &) Civil Action No.: 2011-CP-10-05774
LARRY McNAIR,)
Plaintiffs,)
vs.) **CERTIFICATE OF SERVICE**
NEXSEN PRUET, LLC,)
Defendant.)

I, the undersigned paralegal of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the document specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Affidavit of Bruce Wallace
Counsel Served: Andrew K. Epting, Jr., Esquire
Andrew K. Epting, Jr., LLC
3 State Street
Charleston, South Carolina 29401
George J. Kefalos, Esquire
George J. Kefalos, PA
3 State Street
Charleston, South Carolina 29401

FILED
2011 OCT 19 AM 11:49
JUDGE J. J. FROILIG
CLERK OF COURT


Kimberly Woodworth

October 17, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774
Appellate Case No.: 2013-002796

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SC Court of Appeals

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant

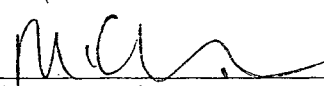
v.

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

CERTIFICATE OF COUNSEL PURSUANT TO RULE 210(g) SCRAP

The undersigned certifies that the Record on Appeal contains all material proposed to be
included by any of the parties and not any other material.

ANDREW K. EPTING, JR., LLC

By 

Andrew K. Epting, Jr.

Michelle N. Endemann

46A State Street, Charleston, SC 29401

Attorneys for Appellants

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

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.

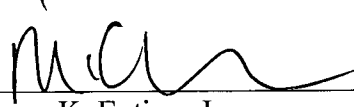
DC & Sons, LLC, Counterclaim Defendant,

Of Whom Nexsen Pruet, LLC is the Respondent.

CERTIFICATE OF COUNSEL PURSUANT TO RULE 210(g) SCRAP

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

ANDREW K. EPTING, JR., LLC

By 
Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401

Attorneys for Appellants

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774
Appellate Case No.: 2013-002796

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OCT 24 2014

SC Court of Appeals

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.

PROOF OF SERVICE

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

Elizabeth Van Doren Gray, Esquire
Tina M. Cundari
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Attorneys for Respondent Nexsen Pruet

ANDREW K. EPTING, JR., LLC

By



Andrew K. Epting, Jr.

Michelle N. Endemann

46A State Street, Charleston, SC 29401

843-377-1871; Fax: 843-377-1310

Attorneys for Appellants