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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
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.

FINAL BRIEF OF APPELLANT

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INTRODUCTION

This appeal concerns a matter of first impression in South Carolina: whether the assignment of a legal malpractice claim is void as against public policy and if so, what is the proper remedy?

Appellants contend first that the underlying settlement agreement at issue does not constitute an assignment of the Appellants' legal malpractice claim, but rather, an assignment of a portion of the proceeds of Appellants' legal malpractice suit.

Second, Appellants argue that even if the settlement agreement does constitute an assignment of Appellants' legal malpractice claim against Nexsen Pruet, LLP ("Nexsen Pruet"), the assignment is valid as assigning a legal malpractice claim does not violate the public policy of the state of South Carolina.

Third, Appellants claim that even if the assignment of a legal malpractice claim is deemed void as against South Carolina public policy, the remedy is to set aside the assignment and to allow the malpractice claim to proceed in the regular course as between lawyer and client.

STATEMENT OF ISSUES ON APPEAL

a) Whether the lower court erred in holding that the settlement at issue constitutes an assignment of Appellants' legal malpractice claim to DC & Sons?

b) Whether the lower court erred in holding that assignments of legal malpractice claims are void as against public policy pursuant to South Carolina Law?

c) Whether the lower court erred in dismissing Appellants' legal malpractice case with prejudice and holding the assignment of a legal malpractice claim constitutes a waiver of a client's malpractice claim against his lawyer?

d) Whether the lower court erred in granting Nexsen Pruet's Motion for Summary Judgment in a case in which discovery had not been commenced and the Respondent refused to participate in depositions?

STATEMENT OF THE FACTS

1. The Underlying Litigation (Case No. 2007-CP-10-1457)

On August 11, 2006, Pavilion Development Corp. ("Pavilion"), represented by Nexsen Pruet, entered into a contract with DC & Sons to purchase real property on Shem Creek for $5,000,000.00. Pavilion deposited $50,000.00 with its escrow agent as an earnest money deposit. The contract contained the customary language that required DC & Sons to deliver good and marketable title. Prior to the closing, Nexsen Pruet raised a question about DC & Sons' ability to deliver good and marketable title because Nexsen Pruet argued a claim asserted by a third party created an encumbrance.

DC & Sons explained that the supposed claim was utterly without merit, there was no encumbrance on the property, and that DC & Sons was capable of delivering good and marketable title. DC & Sons even offered to provide title insurance. Pavilion (acting under Nexsen Pruet's direction) refused to close until the supposed encumbrance was cleared. DC & Sons insisted that the third party who raised the claim had absolutely no interest in the property and demanded that Pavilion either close or release DC & Sons from the contract so that DC & Sons could sell it to an alternate buyer. Pavilion refused to either close or release DC & Sons from the contract; instead Pavilion responded by filing suit for specific performance.

On April 9, 2007, Nexsen Pruet, on behalf of Pavilion, sued DC & Sons for specific performance and to quiet title and filed a *lis pendens* (the "underlying litigation"). Filing and maintaining the improper *lis pendens* formed the basis of the abuse of process judgment that ultimately gave rise to the malpractice action.

The *lis pendens* was improper from the time of its filing because, despite claiming that the third party claim on the property created a cloud on title, Nexsen Pruet failed to join and

serve the third party to resolve the claim. Without joining the third party who ostensibly created the cloud on title, Pavilion would never be able to resolve the title issue. Filing the *lis pendens* under these circumstances accomplished nothing. It only prevented DC & Sons from selling the property to another and was patently wrongful.

This wrong was compounded when Nexsen Pruet failed to remove the *lis pendens* even after Nexsen Pruet signed a stipulation that no entity other than DC & Sons, (including specifically the third party that had previously raised the claim), had any claim to the property. Because Pavilion wrongfully filed and maintained the *lis pendens*, DC & Sons filed a counterclaim[1] against for abuse of process as well as breach of the real estate contract.

Insult was added to the injury after Nexsen Pruet was forced to concede Pavilion would not specifically perform the August 11, 2006 contract and still refused to lift the lis pendens. Instead, Nexsen Pruet filed an amended pleading for breach of contract and sought to impose an equitable lien on the real property in order to force a return of the earnest money and secure a lower purchase price for the property. After being repeatedly asked by DC & Sons to remove the *lis pendens* to allow a new prospective buyer to close on the property, Nexsen Pruet refused to remove it. Knowing that the earnest money was in a real estate trust account and there that was no need to secure the funds with a *lis pendens* on the property, Nexsen Pruet kept the *lis pendens* in place in an effort to negotiate a lower purchase price of the property and to force a release of the $50,000.00 escrow deposit. The *lis pendens* was removed only after being ordered to do so by Judge Young. In his March 23, 2009 order, Judge Young directed the removal of the *lis pendens* from the property, holding:

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1 DC & Sons filed a separate lawsuit against Pavilion and others (case no 2008-CP-10-4675) which was consolidated into Pavilion's original lawsuit (case no. 2007-CP-10-1457) as a counterclaim.

> 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.*
> (R. p. 84).
>
> Pavilion's claim for a release of its earnest money does not affect title to real property.
> (R. p. 85).

Judge Young's order effectively ended Pavilion's claim against DC & Sons, but as a result of Nexsen Pruet's refusal to remove the *lis pendens* from DC & Sons property (for approximately 2 ½ years), DC & Sons lost its second buyer and a $5,000,000.00 sale. DC & Sons' counterclaim continued against Pavilion for the loss of the sale. By the time the case came to trial before Judge Young,[2] Nexsen Pruet had been relieved as counsel for Pavilion.

The trial of the counterclaim of DC & Sons against Pavilion was to commence on January 18, 2011. On January 14, 2011, DC & Sons submitted its 47 page pre-trial brief to Judge Young, complete with binders of DC & Sons' 147 trial exhibits, including all of the documentation for DC & Sons' actual damages.[3] Before the trial commenced, DC & Sons had asked, and Judge Young allowed, DC & Sons to renew its motion for summary judgment as to Pavilion's liability for abuse of process and breach of contract. Judge Young allowed rehearing and granted DC & Sons motion. (See R. pp. 45-59). In his January 18, 2011 order, 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

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2 Judge Young had exclusive jurisdiction over the case as it was referred to the Business Court by order of Chief Justice Toal.

3 Plaintiff's Exhibit 95, was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, 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, was the contract with Pavilion showing the earnest money deposit of $50,000. (See R. pp. 109-113).

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.
(R. p. 120).

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.
(R. p. 123).

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.
(R. p. 124).

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.
(R. p. 124).

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.
(R. p. 124).

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.
(R. p. 124).

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.

(R. p. 125).

> 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.
> (R. p.125).
>
> 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.
> (R. p.126)

2. The Underlying Settlement

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. (R. p. 59). A recess was taken and the parties returned, asking to put the settlement on the record. The agreement reached was that Mr. McNair and Mr. Frazier (the principals of Pavilion) would be released individually and DC & Sons would waive its right to punitive damages against Pavilion if Pavilion would confess judgment to DC & Sons for actual damages and agree to assign certain of the proceeds of any suit against Nexsen Pruet for legal malpractice to DC & Sons (R. p. 60). 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. (R. pp. 60-64). 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.

(R. p. 64). DC & Sons' pretrial brief submitted to Judge Young contained the proof of DC & Sons' actual damages.

Judge Young entered a form Order concluding the case and attached the handwritten settlement to his Order. (R. p. 115).

STATEMENT OF THE CASE

Pavilion Development Corporation ("Pavilion") & Larry 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 refused to participate in depositions and instead filed a motion for 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 void as against public policy and, if it is, what is the proper remedy?

Oral argument on Nexsen Pruet's was heard on March 13, 2013. By Order dated October 9, 2013, Judge Nicholson held: (1) the settlement of the underlying litigation constitutes an assignment of Appellants' legal malpractice claim against Nexsen Pruet; (2) the assignment is void as against public policy; and (3) due to the opportunity for collusion, the remedy is dismissal with prejudice of the legal malpractice suit. (R. pp. 3-29). Pavilion and McNair filed a motion to reconsider on October 23, 2013. Judge Nicholson denied the motion without hearing by Order filed November 25, 2013. (R. p. 30). Pavilion and McNair received written notice of entry of the Order on December 2, 2013 and noticed their appeal on December 20, 2013. (See R. p. 1).

ARGUMENT

1. Standard of Review

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c) SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App.2005) (*citing Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Summary judgment should be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* "Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390-91, 631 S.E.2d 915, 916 (Ct. App. 2006) (*citing Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct.App.1991)). Summary judgment must not be granted until opposing party has had full and fair opportunity to complete discovery. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001).

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

Appellants maintain they are the real parties in interest in this action and have not assigned their claims against Nexsen Pruet to DC & Sons. Rather, as part of the agreement to avoid the exposure of a trial in the underlying case of actual and punitive damages, Plaintiffs agreed to assign the bulk of the proceeds of this litigation to DC & Sons. Though the agreement does give control of the litigation to DC & Sons, the Agreement states:

> Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties.

> DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons.

(R. p. 117-118).

No South Carolina Court has held an assignment of the proceeds of a legal malpractice suit 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."

3. The Assignment of a Legal Malpractice Claim does not Violate the Public Policy of the State of South Carolina

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

One view holds that legal malpractice claims are not assignable because they are void as against public policy. *See 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'[Servicing Corp.,* 969 So.2d 962 (Fla. 2007); Kentucky, *Davis* v. *Scott,* 320 S.W.3d 87 (Ky. 2010); Michigan, *Joos* v. *Drillock, 338* N.W.2d 736 (Mich. Ct. App. 1983); Minnesota, *Wagener* v. *McDonald,* 509 N.W.2d 188 (Minn. Ct. App. 1993);

Nevada, *Chaffee* v. *Smith,* 645 P.2d 966 (Nev. 1982); New Jersey, *Aleman Servs. Corp. v. Samuel H Bullock, p.e,* 925 F. Supp. 252 (D.N.J. 1996); Tennessee, *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865 (Tenn. 1996); West Virginia, *Delaware CWC Liquidation Corp. v. Martin,* 584 S.E.2d 473 (W. Va. 2003).

The public policy for prohibiting such assignments is often stated as follows: "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v. Martin,* 584 S.E.2d 473 (W. Va. 2003). Assignments of legal malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of the relationship between an attorney and a client and the need to preserve the sanctity of that relationship" counsel against permitting such assignments. *Gurski* v. *Rosenblum & Filan,* LLC, 885 A.2d 163 (Conn. 2005).

Other jurisdictions, including Pennsylvania, New York, Massachusetts, Maine, Oregon, Georgia, Idaho, and the District of Columbia, allow the assignment of legal malpractice claims. *See Richter v. Analex Corp.,* 940 F.Supp. 353 (D.D.C.1996); *Thurston v. Continental Cas. Co.,* 567 A.2d 922 (Me.1989); *Vitale v. City of New York,* 183 A.D.2d 502, 583 N.Y.S.2d 445 (1992); *Collins v. Fitzwater,* 277 Or. 401, 560 P.2d 1074 (1977), rev'd on other grounds, *Gregory v. Lovlien,* 174 Or. App. 483, 489, 26 P.3d 180, 183 (2001); *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); *Villanueva v. First American Title Ins. Co.,* 313 Ga. App. 164, 721 S.E.2d 150 (2011); *St. Luke's Magic Valley Regional Medical Center v. Luciani,* 293 P.3d 661 (Idaho 2013).

These jurisdictions have rejected the public policy concerns stated above, reasoning:

> We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected.

Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526.4 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.

Despite the lower court's finding otherwise, several jurisdictions permit the assignment of legal malpractice claims to adverse parties. 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) (In a legal malpractice action resulting from the purported inadequate legal representation of a corporation in a products liability action, after which the corporation assigned its cause of action against its attorney for malpractice to the

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

plaintiff in the products-liability action to settle that action, the trial court properly denied the attorney's motion to dismiss where the argument that the legal services were personal and involved confidential attorney-client relationships did not justify preventing the attorney's client from assigning the malpractice claim to someone with a clear interest in the claim and who had the time, energy, and resources to bring the suit).

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. This case is unique as counsel does not need to perform a role reversal or argue an opposing position to pursue 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).

South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009) citing *Slater Corp. v. S.C. Tax Comm'n*, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct.App.1984) (*quoting Forrest v. Warrington*, 2 S.C.Eq. (2 Des.) 254 (1804)); see also S.C. Jur. Assignments § 19 (2006) ("A chose in action is the right of proceeding in a court to procure the payment of a sum of money, or the right to recover a personal chattel or a sum of money by action.... In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable.").

Pursuant to South Carolina law, if a cause of action in tort would survive to a personal representative on the death of the party entitled to sue, such cause of action may, under South Carolina law, be assigned by that party during his lifetime. *Jolly v. General Acci. Group*, 382 F. Supp. 265 (D. S. C. 1974); *Doremus v. Atlantic C. L. R. Co.*, 242 S. C. 123, 130 S. E. 2d 370 (1963); see also S.C. Jur. Assignments § 20 (2014). S.C. Code Ann. § 15-5-90 governs which causes of action survive to a personal representative and states:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

Accordingly, a legal malpractice action may be assigned under South Carolina law.

4. The lower court erred in granting Nexsen Pruet's Motion for Summary Judgment

Summary judgment as to whether the assignment of a legal malpractice claim is void as against public policy is not appropriate considering no discovery has been done. This is especially so considering the lower court's dismissal with prejudice is based on the finding that "the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form." *See Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326, 331 (Ct. App. 2003) in which the court stated: "We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case." *Id.* at 318, 331. There are no facts in the record to support a finding of collusion and the question of collusion would be a question of fact for the jury. Yet, the lower court 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.** (R. p. 21)(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.**" (R. p. 9 and p. 20)(emphasis added).

The lower court goes on to find that Plaintiffs and their counsel have "**brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship.**" (R. pp. 15-16)(emphasis added).

However, the underlying settlement was put on the record and approved as reasonable by Judge Young? As there is **no discovery** in this case, collusion can be inferred only from the

agreement approved by Judge Young. Yet, the lower court 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." (R. p. 23). The "circumstances" the lower court describes are summarized and refuted here:

> **a. 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." (R. p. 24 ¶ 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: (1) a lost real estate contract which would have realized a profit of $2,852,000; (2) sums actually paid by DC & Sons in interest on the mortgage it had to keep in place because of the inability to close and the cost of refinancing; (3) the $50,000 earnest money deposit; and (4) prejudgment interest at the statutory rate. Judge Young had already granted summary judgment as to Pavilion's liability, and the damages were hard figures. Further, the parties had exchanged and Judge Young had received trial briefs as well as binders of 147 trial exhibits and 12 depositions, including: Plaintiff's Exhibit 95, which was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, which was the closing statement on the refinance of the mortgage showing interest and the closing costs paid by DC & Sons; and Plaintiff's Exhibit 72, which was the contract with Pavilion showing the earnest money deposit of $50,000. (See R. 67-113).

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.

(R. pp. 60-62).

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.

(R. p. 64).

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."

b. 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." (R. p. 24 ¶ 3,4)

The lower court held Appellants kept the terms of the assignment from Judge Young and did not put them on the record and further that Appellants hid the assignment from the court. These findings are in error. Appellants did not try to conceal the existence of the assignment as the assignment was handed up to Judge Young, was filed with the Clerk of Court in January of 2011, and is public record. Further, the Appellants 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.

(R. p. 63)(emphasis added). Judge Young prepared a Form 4 Order and attached the hand written assignment to his order. (R. p. 115).

c. CIRCUMSTANCE 5: Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and...have now switched sides"(R. p. 24 ¶ 5)

It is true that Mr. Epting and Mr. Kefalos represented DC & Sons and now represent Appellants. 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**." (R. p. 124). 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**." (R. p. 125)(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).

d. 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." (R. p.25 ¶ 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. (R. p. 115). 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, Nexsen Pruet argued at the hearing on their motion for summary judgment that the assignment could not be altered or even voided by another court without Judge Young's approval. (See R. p. 168: "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**.")(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, I'm not

going to rule you in.

(R. p. 241). Holding the assignment void as against public policy and allowing the legal malpractice suit to continue is the correct course.

e. 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" (R. p. 26 ¶ 9).

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." (R. p. 223, ¶ 5). This is the only evidence in the record with regard to Pavilion's payment of DC & Sons' judgment.

The lower court 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." (R. p. 26). If discovery was allowed, it would be obvious that there was absolutely no collusion in the settlement between DC & Sons and Pavilion and its principals.

Forgetting for the moment that Judge Young found the settlement reasonable[5] and that Nexsen Pruet has refused to allow depositions or engage in discovery, there are no facts before the court that would allow it to reach this conclusion.

5. Dismissal with Prejudice is not the Appropriate Remedy - the Lower Court's Reasoning at the March 13, 2013 Hearing

At the hearing on Nexsen Pruet's motion for summary judgment the lower court articulated that, although South Carolina courts have not ruled on the assignability of legal

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5 See R. p. 64: "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."

malpractice claims, Judge Nicholson was inclined to adopt the reasoning articulated by those states that hold an assignment of legal malpractice claim is void as against public policy. With regard to the remedy for a voided assignment, Judge Nicholson reasoned:

> **THE COURT: If the Court just sets -- partially agrees with you on a partial summary judgment against public policy, just strike that assignment, it's gone, and let y'all proceed on the legal malpractice issue, see if there is liability, appeal the whole thing at that time.**
>
> MS. GRAY: Here is the problem with that --
>
> THE COURT: Why? How would that be any different than what you want to do? You're telling me that Pavilion could sue Nexsen Pruet straight up. The problem is the assignment. If I just wanted to make the assignment, that problem is gone. I mean --
>
> MS. GRAY: First of all, that's not necessarily the remedy. There are several other remedies that the Courts have found.
>
> THE COURT: So eliminate that assignment and let y'all proceed with the legal malpractice case, win, lose, or draw?
>
> MS. GRAY: Because you can't just set aside the assignment. It is part of an overall settlement that included confession of judgment.
>
> **THE COURT: If I agree with your argument, and I do a partial summary judgment, public policy strike that, they can't proceed on that and make the legal malpractice case proceed, and y'all will have to argue about all the other issues during that trial, or – the prosecution of that case.**
>
> MS. GRAY: And the control of the litigation is gone, the attorneys are gone.
>
> THE COURT: If Pavilion had sued Nexsen Pruet you wouldn't be standing here. Correct?
>
> MS. GRAY: Depends on who brought the suit and what the underlying private agreement was.
>
> **THE COURT: Pavilion was the party that was wronged, theoretically, by their attorney. If they sued Nexsen Pruet, we wouldn't be standing here --**
>
> **MS. GRAY: I think that is correct. If they were the real party in interest and had not signed away --**
>
> **THE COURT: But if I eliminate that assignment and it's gone, they are the real party in interest, and -- what's the name of the other company? DC & Sons and Pavilion would have to work that out down the R.d, 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.

(R. pp. 167-170) (emphasis added). Despite the lower court's analysis at the hearing, the lower held 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.

For example, the lower Court relies on Texas authority in support of the dismissal with

prejudice of Appellants' legal malpractice claim. Texas Courts hold that a client's right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim. *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000). The Court in *Tate* held:

> **Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO.** Tate emphasizes **he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim**.
> **In this respect, Tate is correct**. In *Mallios,* the Texas Supreme Court held that **when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment**. *Mallios,* 11 S.W.3d at 159. While expressing no opinion on the validity of the underlying "arrangement" between the plaintiff and a third party, **the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm**. *Id.*

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

Here, as in *Tate*, the action is already in the name of the client as the cause of action remains in the clients as only the proceeds were assigned. However, even if the assignment is deemed one of claims and not proceeds and even if the assignment of a legal malpractice claim is void under South Carolina law, the remedy is to void the assignment and allow Plaintiffs to continue their lawsuit against their former attorneys. 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. The invalidity of the assignment does not undermine the validity of the malpractice claim, and this comports with 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) ("Once an assignment is made, all interests and rights of the assignor are transferred to the assignee. However, if the assignment is invalid or incomplete, the assignor may maintain a suit in his own name.")

Someone should have the right to bring the claim as the law abhors a wrong without a remedy. *See State ex rel. Daniel v. Strong*, 185 S. C. 27, 43, 192 S. E. 671, 678 (1937). If the lower court's order is affirmed, no party has the ability to sue Nexsen Pruet for its malpractice.

CONCLUSION

The assignment at issue was one of proceeds and not claims, and in any event does not violate the public policy of this state. Appellants respectfully request that if this Court finds fault with the assignment, that it be voided, but the case otherwise be allowed to proceed as even a dismissal without prejudice will result in Nexsen Pruet claiming the statute of limitations has run even though the new suit without the assignment would be filed in the names of the now Plaintiffs.

[signatures on following page]

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