THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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.

APPELLANT'S MOTION TO CERTIFY AND TO CONSOLIDATE FOR ARGUMENT

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SC Court of Appeals

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

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

Pavilion and McNair move this Honorable Court for the following relief pursuant to Rules 204(b) and 214 SCRAP:

a) to certify this appeal for resolution by this Court because (1) the issue is a matter of first impression in South Carolina, (2) there is a split among the circuit courts in this state as to whether the assignment of a legal malpractice claims violates South Carolina public policy, and (3) a Federal District Court has certified to this Court the question of whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose (*George Skipper, et al v. ACE Property and Casualty Insurance Company, et al*; Appellate Case No. 2014-001979 hereinafter referred to as the "Skipper Appeal"); and

b) to consolidate this appeal with the Skipper Appeal as both concern the issue of whether a legal malpractice claim can be assigned between adversaries in litigation; further, should this Court hold that an assignment is void this case presents the further issues of whether the cases is ended with prejudice or whether the assignment is stricken and the case proceeds in the name of the client against its lawyer.

BACKGROUND

The Underlying Litigation in Which the Alleged Legal Malpractice Occurred

1. 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.

2. 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 insisted that the third party who raised the claim had 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 and filed suit for specific performance, placing a *lis pendens* on the property. Nexsen Pruet later withdrew its specific performance action, but refused to dismiss the *lis pendens*. DC & Sons filed a counterclaim against the buyer for its refusal to close.

3. The case was transferred to the Business Court and the Honorable Roger M. Young.

4. On March 23, 2009 Judge Young entered an order directing the removal of the *lis pendens* from the property, holding a breach of contract action and claim to recover earnest money does not affect title to real property. Judge Young's order effectively ended Pavilion's claim against DC & Sons, and the trial of the counterclaim of DC & Sons was to commence on January 18, 2011.

5. Before the trial commenced, DC & Sons renewed its motion for summary judgment. Judge Young allowed a hearing and granted DC & Sons motion. (See R. pp. 45-59).

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. (R. p. 59). A recess was taken and the parties returned, asking to put the settlement on the record. The agreement reached, in part, required Pavilion to 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).

7. The settlement was put on the record before Judge Young, and Judge Young approved it. (R. pp. 60-64).

8. The elements of DC & Sons damages which comprise the $4.5 million confession of judgment are as follows: (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.[1]

9. 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.

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1 Several days before the trial was to begin, 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, 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. pp. 67-114).

(R. pp. 60-62).

10. 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).

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

The Instant Malpractice Action & Appeal

12. 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

13. Oral argument on Nexsen Pruet's was heard on March 13, 2013.

14. 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).

15. After Pavilion and McNair received written notice of entry of the Order denying their motion to reconsider, they noticed their appeal.

16. Pavilion and McNair 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 proceeds of this litigation to DC & Sons.

17. Final briefs and the Record on Appeal have been submitted to the Court of Appeals.

The Skipper Appeal

18. On September 19, 2014, the District Court certified the question of whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose in the Skipper Appeal. This Court subsequently accepted the question for review.

MOTION TO CERTIFY APPEAL FOR SUPREME COURT REVIEW

19. Rule 204(b) provides that, in any case pending before the Court of Appeals, this Court may, in its discretion, certify the case for review before it has been determined by the Court of Appeals. Rule 204(b) explains that "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." This appeal implicates both considerations.

20. The legal question at issue involves the attorney/client relationship, a matter of significant public interest, and requires a determination of the public policy of this state. Further a chose in action is deemed personal property in South Carolina. See S.C. Jur. Assignments § 19 (2006). This appeal concerns the assignability of property, which is a matter of significant public interest.

21. Not only does this appeal involve a matter of significant public interest, but it involves an important legal principal that has not been addressed by South Carolina appellate courts. 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)). The decision by the lower court makes a special exception for legal malpractice claims, deeming them unassignable and disregarding over 200 years of South Carolina jurisprudence. Pavilion and McNair believe that carving an exception in the law is a task only this Court can undertake.

22. Yet another indication of the significance of the legal question at issue in this case is the split in authority in the circuit courts. For example, 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., when faced with the argument that Robertson assigned his legal malpractice claim against Nexsen Pruet and that the assignment was void as against public policy, denied Nexsen Pruet's motion for summary judgment, recognizing there is no South Carolina authority on point. Judge Breeden held: "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." However, in the instant case the Honorable J.C. Nicholson, Jr. found that the assignment at issue is one of the legal malpractice claim and not one of proceeds and that the assignment is void as against public policy. Judge Nicholson went on to dismiss Pavilion and McNair's legal malpractice case *with prejudice*, holding that attempted assignment by Pavilion and McNair of their malpractice claim to their adversary in the underlying case operates as a waiver of the right to bring the claim. As the split in the circuit courts demonstrates, the legal question at issue in this appeal is one of significant importance requiring a decision by this Court.

MOTION TO CONSOLIDATE

23. Rule 214 provides that the Court may consolidate appeals when there is more than one appeal from the same order or where the same question is involved in two or more appeals, which is the case here.

24. In the interest of judicial economy, Pavilion and McNair's appeal in the instant case and Skipper's appeal in Appellate Case No. 2014-001979 should be consolidated for decision by this Court. This case presents the further question, in the event this Court determines that the assignment of a legal malpractice claim between adversaries violates the public policy of this state, what is the remedy? Is it to dismiss the case with prejudice or to strike the assignment and allow the case to proceed by the client against its counsel?[2]

25. Further, Appellants in the Skipper Appeal advocate for a case-by-case analysis of whether legal malpractice claims can be assigned among adversaries in litigation (see Skipper Appellate Brief section "c"). Should this Court find the assignment at issue in *Skipper* void as against public policy, or should this Court determine a case-by-case analysis is appropriate and remand the case to Judge Childs, Judge Childs is left with determining how the case is to proceed. For example, if the assignment is deemed void, should the case continue between the assignor and the law firm, or does the attempt at assignment waive or otherwise terminate the assignor's right to sue his former attorney resulting in a dismissal with prejudice? (which was the ruling of the lower court in the instant appeal)

26. The issue of the remedy for the improper assignment of a legal malpractice is of vital importance among those jurisdictions that have decided it. For example, Texas Courts hold that a

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2 In this case, proceeds and not the claim were assigned so that the effect of striking the assignment of the claim would practically be to require the client to pay over the proceeds of any recovery.

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). The Arizona Court of Appelas in *Monthofer Invs. Ltd. Pshp. v. Allen,* 189 Ariz. 422, 426 n.3, 943 P.2d 782, 786 (Ct. App. 1997) held:

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

(emphasis added). Further, many other jurisdictions recognize an invalid assignment has no effect on the validity of the underlying action. *See Weiss v. Leatherberry,* 863 So. 2d 368, 372-73 (Fla. Dist. Ct. App. 2003) ("The invalidity of the agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by

proper person."); *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007)("Balancing the advantages and disadvantages of such assignments, we barred assignment of legal malpractice claims, noting clients may still make these claims directly against their attorneys, but they cannot assign their choses in action."); *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987)("We note that, even if there had been an invalid assignment, this would not warrant dismissal of the lawsuit. Instead, the assignment would be void, but the underlying action would survive."); *Kommavongsa v. Haskell,* 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003) (Holding the proper remedy for an invalid assignment of a legal malpractice claims is to void the assignment and allow the legal malpractice lawsuit to "proceed in the normal course, as between the proper parties thereto." See also *Joos v. Drillock*, 127 Mich. App. 99, 100, 338 N.W.2d 736, 737 (1983).

27. To decide the issue of the assignability of a legal malpractice claim without also deciding the remedy should the assignment be deemed void or the case-by-case approach adopted is to decide only a fraction of the legal question presented. The issue of the remedy for the improper assignment of a legal malpractice claim has been fully briefed in the instant appeal by both sides and for this reason the instant appeal should be consolidated with the Skipper Appeal.

WHEREFORE, Pavilion and McNair pray this Honorable Court certify this appeal and consolidate it with the Skipper Appeal currently pending before this Court.

[signatures on following page]

Respectfully Submitted By:

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By

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Attorneys for Appellants

Dated this 22 day of February, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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.

PROOF OF SERVICE

I certify that I have served the Appellants' MOTION TO CERTIFY TO CONSOLIDATE FOR ORAL ARGUMENT on Respondents by depositing a copy in the United States Mail, Postage prepaid, on February 23, 2015, addressed to Respondent's attorneys of record as follows:

Elizabeth Van Doren Gray, Esquire
Tina M. Cundari, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
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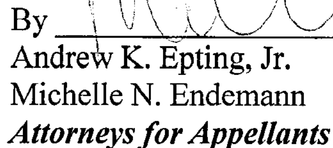

By ______________________
Andrew K. Epting, Jr.
Michelle N. Endemann
Attorneys for Appellants

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

February 23, 2015

VIA FIRST CLASS MAIL

The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Pavilion Development Corp. &Larry McNair, Appellants v. Nexsen Pruet, LLC, Respondent
Appellate Case No: 2013-002796

Dear Ms. Allen,

In response to your letter regarding proposed dates for oral argument, counsel for appellants are available on all dates other than May 14, 2015. However, Appellants have filed a motion for certification to the Supreme Court pursuant to Rule 204(b) SCRAP and a motion to consolidate this appeal, pursuant to Rule 214 SCRAP, with the case currently before the Supreme Court by way of certified question from the District Court styled, *George Skipper, et al v. ACE Property and Casualty Insurance Company, et al*; Appellate Case No. 2014-001979, as at issue in both cases, inter alia, is whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose. Enclosed is a copy of the motions. Therefore, counsel for Appellants respectfully request that this case not be scheduled for oral argument until the motion is decided.

ANDREW K. EPTING, JR., LLC

With kindest regards,

Andrew K. Epting, Jr.

Enclosures – as stated

cc: Tina Cundari, Esquire
Elizabeth V. Gray, Esquire

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