

# **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

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SC Court of Appeals

2016 JUL 13 PM 2:46  
JULIE J. ARMSTRONG  
CLERK OF COURT

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This matter is before the Court on Plaintiffs' "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP." Plaintiffs seek an order permitting them to file an amended complaint against Defendant Nexsen Pruet, LLC, following an appeal in the Supreme Court of South Carolina in which the Supreme Court affirmed the circuit court's grant of summary judgment but modified the dismissal to be without prejudice.

The motion was heard on June 2, 2016. Elizabeth Van Doren Gray, Tina Cundari, and Benjamin Gooding of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Defendant Nexsen Pruet, LLC. Andrew K. Epting, Jr., George J. Kefalos, and Michelle Endemann appeared on behalf of Plaintiffs Pavilion Development Corporation and Larry McNair ("Plaintiffs"). After considering the motion, memorandum in opposition and exhibits, documents and arguments presented at the hearing, and the law of this State, the Court denies Plaintiffs' motion to amend the complaint or substitute parties.

## **BACKGROUND**

This motion is before the Court following an appeal in which the Supreme Court of South Carolina affirmed summary judgment in favor of Nexsen Pruet and modified the dismissal of the case to be without prejudice.

On October 9, 2013, the circuit court granted summary judgment in favor of Nexsen Pruet on the ground that this case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy. The circuit court determined that the proper remedy was dismissal with prejudice.

Plaintiffs appealed the circuit court's order, arguing in part that even if the assignment of the legal malpractice claim was void, the case should be permitted to proceed. In their briefs to the Supreme Court, Plaintiffs specifically argued that a dismissal without prejudice was not appropriate because it would result in Nexsen Pruet claiming that the statute of limitations has expired.

On August 12, 2015, the Supreme Court issued its opinion affirming summary judgment but modifying the dismissal to be without prejudice. On August 28, 2015, Plaintiffs filed a "Motion for Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint After Remand" in the Supreme Court. Plaintiffs argued that they should be given a reasonable period of time "after remand" to amend their complaint. The Supreme Court construed the motion as a petition for rehearing and denied it as untimely filed. In the order denying the motion, the Supreme Court concluded by stating, "[i]n any event, [Plaintiffs'] motion should be addressed by the trial court in the first instance."

On September 3, 2015, the Supreme Court issued the remittitur, which enclosed a copy of the Supreme Court's opinion in the case. The opinion does not grant leave to amend the complaint or contemplate any further proceedings in the present case.

### LAW/ANALYSIS

The Court denies the motion to amend the complaint because the Supreme Court's opinion plainly states that summary judgment is affirmed and the dismissal of the case is modified to without prejudice.

By definition, a dismissal is the "[t]ermination of an action or claim *without further hearing . . . .*" Black's Law Dictionary 537 (9th ed. 2009) (emphasis added). A dismissal without prejudice is "[a] dismissal that does not bar the plaintiff from *refiling the lawsuit* within the applicable limitations period." *Id.* (emphasis added). According to case law, a dismissal without prejudice is when "the plaintiff is given the opportunity to *file and serve* an amended complaint." *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006) (emphasis added). When a complaint has been dismissed without prejudice, a plaintiff "may *reassert* her complaint by curing defects that led to the dismissal." *Id.* at 128, 628 S.E.2d at 880-81 (emphasis added).

Plaintiffs contend that the Supreme Court's modification of the dismissal to one without prejudice is instructive to this Court of the Supreme Court's intent to allow the Plaintiffs to amend their complaint after the conclusion of the appeal. Plaintiffs further contend that the last sentence in the Supreme Court's order denying the motion for leave to amend filed by Plaintiffs after the Supreme Court issued its opinion gives this Court the authority to hear the motion.

In response, Nexsen Pruet argues that the Supreme Court's opinion affirming the grant of summary judgment and modifying the dismissal to without prejudice ends the case. Nexsen Pruet argues that dismissal means dismissal; that the Supreme Court could have remanded the

case with leave to amend but chose not to do so; and that to allow the present case to proceed would be contrary to the Supreme Court's opinion affirming summary judgment and dismissal the case without prejudice. Nexsen Pruet further contends that Plaintiffs' motion to amend is not a true motion to amend because it does not actually seek to make any substantive amendments to the allegations of the original complaint. Finally, Nexsen Pruet argues that procedural rules relied upon by Plaintiffs do not permit the relief requested. Nexsen Pruet contend that the rules cited apply pre-judgment, and not post-judgment.

After considering these arguments, the Supreme Court's opinion and order, and the documents filed in this case, the Court finds and concludes that the present case is over. The Supreme Court has determined that the proper remedy is dismissal without prejudice. The Supreme Court could have granted the relief sought in the present motion during the appeal but chose not to do so. The issue regarding whether the case should be permitted to proceed as filed or be dismissed without prejudice was squarely before the Supreme Court. In affirming summary judgment and modifying the dismissal to be without prejudice, the Supreme Court ended the present case. The Supreme Court did not remand the case for further proceedings, even though it could easily have done so. This Court is bound to follow the Supreme Court's opinion.

The Court finds that the Supreme Court's statement that the issues raised in the late-filed motion for leave to amend "should be addressed by the trial court in the first instance," does not, as Plaintiffs contend, grant Plaintiffs permission to seek leave to amend *in this case*. The only interpretation of this statement that is consistent with the Supreme Court's ruling that the case was dismissed without prejudice is that the issues raised in the motion, such as the expiration of the applicable statute of limitations, should be taken up *after the filing of a new case* by another

trial court. Otherwise, the Supreme Court would be contradicting its holding that case was dismissed without prejudice.

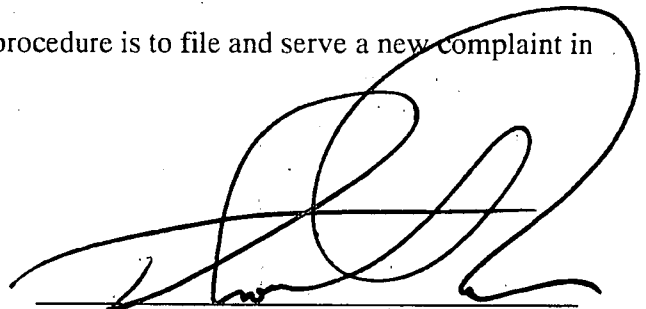
Moreover, the Court finds that the Supreme Court's decision to modify the decision to "without prejudice" was merely an instruction to the lower court and was not intended to keep the case open because that would be contrary to the granting of summary judgment.

Accordingly, the motion to amend the complaint or to substitute parties is denied.

**CONCLUSION**

For the reasons set forth above, Plaintiffs' "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRPC" is denied. Should Plaintiffs wish to pursue their claims, the proper procedure is to file and serve a new complaint in a new case.

**IT IS SO ORDERED.**



The Honorable Thomas A. Russo  
Circuit Court Judge

Florence, South Carolina  
June 29, 2016

11-5774

**CERTIFICATE OF SERVICE**

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Nexsen Pruet, LLC, do hereby certify that I have served a copy of the document specified below by electronic mail, to the following addresses:

Document: **ORDER DENYING MOTION TO AMEND COMPLAINT**

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