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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

Thomas Russo, Circuit Court Judge

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

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

v.

Nexsen Pruet, LLC..... Respondent,

v.

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

MOTION TO DISMISS

Pursuant to Rule 240, SCACR, Respondent Nexsen Pruet LLC ("Nexsen Pruet") seeks an order dismissing this appeal. The appeal should be dismissed because the above-captioned case is over, and has been over since August 12, 2015, when the South Carolina Supreme Court held that the case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy and that the proper remedy was dismissal without prejudice. Pavilion Development Corp. & Larry McNair ("Appellants") should not be permitted to keep a case alive by filing a motion in the circuit court in this same case after the Supreme Court issued its decision, and appealing

from a ruling on that motion. Further, the order being appealed is not an immediately appealable order.

For these reasons, the appeal should be dismissed.

BACKGROUND

This is an appeal from an order denying a motion to amend the complaint or to substitute parties. Ex. A. The circuit court denied the motion because (1) the present case is over, (2) the Supreme Court determined that the proper remedy is dismissal without prejudice, (3), the Supreme Court could have granted the relief sought in the motion but chose not to do so, (4) the Supreme Court could have easily remanded the case for further proceedings but did not do so, and (5) the circuit court is bound to follow the Supreme Court's opinion. *Id.*

This is a legal malpractice case that was filed on August 16, 2011. On October 9, 2013, the circuit court granted summary judgment in favor of Nexsen Pruet on the ground that the case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy. Ex. B. As part of the settlement in the underlying case, Appellants assigned their right to sue Nexsen Pruet for legal malpractice to their adversary in the litigation, DC & Sons. *Id.* For a variety of reasons, the circuit court ruled that the assignment was void as against public policy. *Id.* In addition to granting summary judgment in favor of Nexsen Pruet, the circuit court dismissed the case with prejudice. *Id.*

On appeal, the case was transferred to the Supreme Court of South Carolina pursuant to Rule 204(b), SCACR. Following oral argument, the Supreme Court affirmed

as modified. Ex. C. The Supreme Court affirmed the grant of summary judgment but modified the dismissal to be without prejudice. *Id.*

On August 28, 2015, sixteen days after the Supreme Court issued its opinion, and after the time to file a petition for rehearing expired, Appellants filed a motion in the Supreme Court requesting "a reasonable time to amend their complaint after remand," even though there had been no remand. Ex. D. The Supreme Court construed the motion as a petition for rehearing and denied it as untimely filed. Ex. E. The Supreme Court then stated that "the motion should be addressed by the trial court in the first instance." *Id.*

Seizing upon this sentence in the Supreme Court's order, Appellants filed a similar motion in the circuit court following the remittitur. Ex. F. The motion was entitled, "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d), and 17(a), SCRCP." *Id.* Nexsen Pruet opposed the motion on multiple grounds, the primary one of which is that Supreme Court dismissed the case. Ex. G. Nexsen Pruet further explained that Appellants were free to file a new case, but they could not keep the present case going given the Supreme Court's decision. *Id.* Nexsen Pruet also argued that the motion was not a true motion to amend the complaint because the proposed amended complaint was virtually identical to the initial complaint, and was instead an attempt to circumvent the Supreme Court's opinion dismissing the case. *Id.*

Following a hearing, the circuit court denied the motion. Appellants are now appealing this order, attempting once again to keep this case alive even though the Supreme Court ruled that the proper remedy was dismissal without prejudice.

ARGUMENT

The appeal should be dismissed because this case was ended by the Supreme Court when it held that the proper remedy was dismissal without prejudice. Additionally, the order on appeal is not an immediately appealable order. For these reasons, the motion to dismiss the appeal should be granted.

A. This case has ended.

First and foremost, the appeal should be dismissed because this case is over. The Supreme Court of South Carolina ruled that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy and that the proper remedy is dismissal without prejudice. Accordingly, the case has ended and no further motions may be filed. Appellants are free to file a new case, this time as the real parties in interest, but they should not be permitted to file motions trying to keep the present case alive when this case has been dismissed.

By definition, a dismissal is the "[t]ermination of an action or claim *without further hearing*, esp[ecially] before the trial of the issue involved." 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).

Here, the Supreme Court ruled that the proper remedy was dismissal without prejudice. This means the case is dismissed. It is over. Rather than abide by this ruling, Appellants proceeded as through the present case was still pending. Following the remittitur, Appellants filed a motion to amend the complaint or substitute parties. When the circuit court denied the motion, Appellants appealed the ruling, attempting to keep a case alive that was ended by the Supreme Court.

Because this case is over and has been over since August 12, 2015, when the Supreme Court issued its opinion affirming the grant of summary judgment and modifying the dismissal to one without prejudice, the appeal should be dismissed. Appellants should not be permitted to keep a case going that the Supreme Court ruled should be dismissed by filing a post-opinion motion. Further, Nexsen Pruet should not have to continue defending a case that it won. To rule otherwise would be to give new meaning to "dismissal without prejudice."

Accordingly, the appeal should be dismissed.

B. The order is not immediately appealable.

In addition to this case being over, the order being appealed is not immediately appealable.

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). "Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330 (1976 & Supp. [2016])." *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

Section 14-3-330 lists four types of orders from which an appeal may be taken:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the [C]ourt of [C]ommon [P]leas . . .
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. These provisions "have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. It is well settled that an interlocutory order, such as an order denying a motion to amend pleadings, is not immediately appealable unless it involved the merits of the case or affects a substantial right. *See, e.g.*, *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (order denying motion to amend pleadings to assert third party claims was not immediately appealable because it neither involved the merits of the case nor affected a substantial right of the party).

Here, the order on appeal does not fit into any of these categories. First, the order does not involve the merits. The order simply denies a motion to amend a complaint or substitute parties. It does not address any of the factual allegations or causes of action in Appellants' proposed amended complaint. The order merely confirms that the present

case is over, and that the Supreme Court could have remanded the case for further proceedings or even granted the relief requested in the motion, but chose not to do so.

Second, the order does not affect a substantial right. The order does not end Appellants' ability to pursue the allegations and causes of action in the proposed amended complaint. Instead, it merely rules that Appellants are not permitted to do so in the present case. In other words, Appellants have retained the substantial right to pursue the claims, but not in this case.

Moreover, the order does not end this action. This action was ended by the Supreme Court on August 12, 2015, when the Court held that the proper remedy was dismissal without prejudice. This was confirmed on September 3, 2015, when the Supreme Court declined to grant the relief requested in the motion. The circuit court's ruling on the motion to amend the complaint did not end the action.

Third, the order does not fit into the remaining two categories. The order was not "made in any special proceeding" and does not concern "granting, continuing, modifying, or refusing an injunction [or] appointment of a receiver." S.C. Code Ann. § 14-3-330 (3) & (4). Accordingly, there is no statutory basis for permitting the appeal.

Because the circuit court's order does not fall into any of the four categories from which an appeal may be taken, the order is not immediately appealable and the appeal should be dismissed.

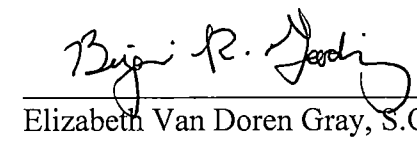
CONCLUSION

The appeal should be dismissed. This case ended on August 15, 2015, when the Supreme Court of South Carolina affirmed summary judgment in favor of Nexsen Pruet and held that the proper remedy was dismissal without prejudice. Appellants should not

be permitted to keep a case alive by filing a post-opinion motion and appealing the order denying it. Nexsen Pruet has already defended this case once on appeal and should not have to do so again, particularly when the Supreme Court has determined that this case should be dismissed. Moreover, the order is not an immediately appealable order.

For these reasons, the motion to dismiss the appeal should be granted.

SOWELL GRAY STEPP & LAFFITTE, LLC



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November 21, 2016
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Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT A

Order denying Plaintiff's Motion to Amend/Supplement Complaint and/or Substitute, filed July 13, 2016

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,	)	**ORDER**
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

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) SCRCP" 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

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT B

Order granting Defendant Nexsen Pruet LLC's Motion for Summary Judgment, filed October 9, 2013

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,	)	**ORDER**
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

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

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. Epting, 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

"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

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)l

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.

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." *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.* 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 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); *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

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.

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 fid[uciary] 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.

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

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 counsel[1] 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

10/8, 2013

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT C

Supreme Court Opinion Affirming as Modified, filed on August 12, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

Appellate Case No. 2013-002796

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-MO-047
Heard May 6, 2015 – Filed August 12, 2015

AFFIRMED AS MODIFIED

Andrew K. Epting, Jr. and Michelle N. Endemann, both of Andrew K. Epting, Jr., LLC, of Charleston; George J. Kefalos and Oana D. Johnson, both of George J. Kefalos, PA, of Charleston, for Appellants.

Elizabeth Van Doren Gray, Tina Cundari, and Benjamin R. Gooding, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Respondent.

PER CURIAM: We affirm the trial court's grant of summary judgment. *See Skipper v. ACE Prop. & Cas. Ins. Co.*, Op. No. 27547 (S.C. Sup. Ct. filed July 15, 2015). ("[I]n South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited."). However, we modify the dismissal to be without prejudice.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT D

Plaintiff's Motion for Order Allowing Reasonable time to Amend Complaint After Remand, dated August 28, 2015

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 Whom Nexsen Pruet, LLC is the Respondent.

MOTION FOR ORDER ALLOWING PAVILION DEVELOPMENT AND LARRY MCNAIR A REASONABLE TIME TO AMEND THEIR COMPLAINT AFTER REMAND

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ATTORNEYS FOR APPELLANTS

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

On August 12, 2015, this Court affirmed the lower court's holding that the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited, but modified the dismissal to be without prejudice. Implicit in this Court's ruling is that Plaintiffs would have a reasonable time to amend their complaint after the dismissal without prejudice.[1] However, in light of the Court's holding in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) and the fact that the Respondent will likely argue that the statute of limitations has run, Appellants Pavilion Development Corporation ("Pavilion") and Larry McNair move this Honorable Court, pursuant to SCRAP 240, for an Order allowing Pavilion and McNair to amend their complaint in the lower court to assert their legal malpractice claim independent of the assignment to DC & Sons, LLC. The deadline for filing a petition for rehearing expired yesterday, and as no petition has been filed, the issue of amendment of the complaint after remand is ripe for this Court's review.

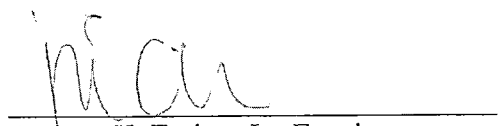
Independent of the assignment, Pavilion and McNair's legal malpractice claims, taken as true in a well-pleaded complaint, state a claim upon which relief may be granted. Thus, the amendment should be allowed. *See Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 882 (2006)(internal citations omitted). This case, above many others, is an example of the wisdom and

[1]*See, e.g., Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal without prejudice); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice).

fairness of allowing the amendment of a complaint to correct deficiencies which resulted in a dismissal without prejudice. For example, this case turned on a novel issue of South Carolina law decided less than two months ago in the case of *Skipper v. ACE Prop. & Cas. Ins. Co.*, Op. No. 27547. Further, the settlement and assignment at issue took place after a summary judgment order was entered in favor of Pavilion and McNair by the Honorable Roger M. Young, Sr., and the settlement was approved on the record by Judge Young as a "fair resolution of the dispute." (R. p. 64). Allowing the statute of limitations to run under these circumstances abrogates Pavilion and McNair's right to bring their valid legal malpractice claim against Respondents and would constitute manifest injustice.

Accordingly, Appellants respectfully request that they be given a reasonable amount of time after remand to amend their complaint to assert their legal malpractice claim against Respondent, independent of the assignment.

Respectfully Submitted By:



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ATTORNEYS FOR APPELLANTS

On this 28th day of August, 2015
Charleston, SC

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT E

Supreme Court Order Denying Motion for Order Allowing Reasonable Time, filed September 3, 2015

The Supreme Court of South Carolina

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant,

v.

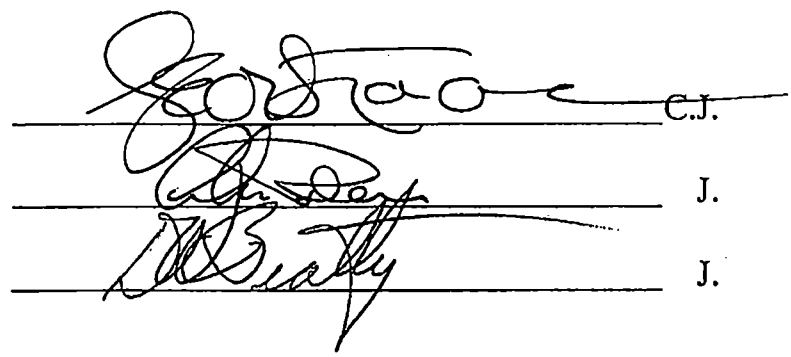
DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

Appellate Case No. 2013-002796

ORDER

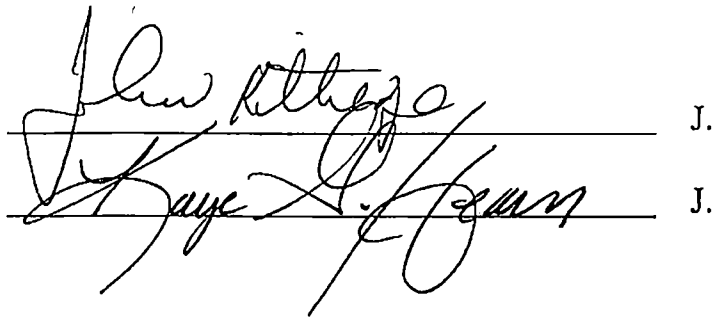
Following this Court's decision in *Pavilion Development Corp. v. Nexsen Pruet*, Mem. Op. No. 2015-MO-047 (S.C. Sup. Ct. filed Aug. 12, 2015), Appellants Pavilion Development Corp. and Larry McNair filed, on August 28, 2015, a "Motion for Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint After Remand." We construe Appellants' motion as a petition for rehearing. As such, this motion was not timely filed, and it is therefore denied. In any event, Appellants' motion should be addressed by the trial court in the first instance.



C.J.

J.

J.



J.

J.

Columbia, South Carolina

September 3, 2015

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
Elizabeth Van Doren Gray, Esquire
Tina Marie Cundari, Esquire
Benjamin Rogers Gooding, Esquire
Julie J. Armstrong
The Honorable J. C. Nicholson, Jr.

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT F

Plaintiff's Motion to Amend Complaint, dated September 18, 2015

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR Plaintiffs, vs. NEXSEN PRUET, LLC Defendants.	CASE NO. 2011-CP-10-5774 MOTION TO AMEND/SUPPLEMENT COMPLAINT AND/OR SUBSTITUTE PURSUANT TO RULES 15(a), 15(c), 15(d) AND 17(a) SCRCP

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiffs, hereby move this honorable Court, pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP for an order allowing Plaintiffs to amend their complaint in order to assert their legal malpractice action against Defendant Nexsen Pruet independent of the void assignment of the claim. (See Exh. A, S.Ct. Order voiding assignment and modifying the dismissal to one without prejudice). "Dismissal of a case 'without prejudice' means a plaintiff may reassert her complaint by curing defects that led to the dismissal. *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 880-81 (2006). When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. *Id* at 130. However, in this case, Plaintiffs moved before the Supreme Court seeking a reasonable period of time in which to amend their complaint and the Supreme Court specifically held that the motion to amend was to be addressed to the lower court. (See Exh. B, Order of S.Ct. directing question to lower court).

Rule 15(a), SCRCP, provides that leave to amend "shall be freely given." *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App.2005). Motions to amend are to be liberally granted absent a showing by the party opposing the amendment that it would be prejudiced by that amendment. *Id.* The prejudice Rule 15 envisions is

a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). No prejudice to Nexsen Pruet will result from the amendment as Nexsen Pruet had notice of this legal malpractice suit in 2011. The argument that Nexsen Pruet is prejudiced by an amendment because the statute of limitations has passed is without merit. *See Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298-99 (2004)("The City's argument the amendment prejudices it because the statute of limitations has passed is likewise without merit. Rule 15(c), SCRCP, states: 'whenever the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.'") Plaintiffs' legal malpractice claim arose out of the conduct previously set forth in the original complaint. The factual circumstances of the claim have already been set out in the original complaint. Therefore, under Rule 15(c), the amendment relates back to the date of the original pleading that was filed within the statute of limitations. *See also Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (holding purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations).

Accordingly, Plaintiffs respectfully request that they be allowed to amend their complaint to assert their legal malpractice claims against Nexsen Pruet, independent of the void assignment, and that the amendment relate back to the date of the original filing. In the alternative or in combination with the above request, Plaintiffs ask that they (1) be allowed to file a supplemental proceeding pursuant to Rule 15(d), which relates back to the original filing date or (2) that Plaintiffs be substituted as the real parties in interest, which substitution would also relate back to the date of the original filing (see Rule 17(a) SCRCP).

Respectfully submitted:

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ATTORNEYS FOR PLAINTIFFS

On this 17 day of September 2015
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 18 day of SEPTEMBER 20 15 at Charleston, South Carolina

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

MOTION TO DISMISS

EXHIBIT G

Memorandum In Opposition to Motion to Amend Complaint or Substitute Parties, filed May 31, 2016

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,	)	**MEMORANDUM IN OPPOSITION TO MOTION TO AMEND COMPLAINT OR SUBSTITUTE PARTIES**
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

Defendant Nexsen Pruet, LLC submits this memorandum in opposition to Plaintiffs' "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP." The motion should be denied because this case has been dismissed. On appeal, Plaintiffs sought the same relief they seek here, and the Supreme Court of South Carolina ruled that dismissal without prejudice was the proper remedy. Moreover, Plaintiffs are not seeking to make any substantive amendments to the allegations of their original complaint. Although styled as a motion to amend, the instant motion is an attempt to circumvent the Supreme Court's opinion dismissing this action.

Because this case is over, the Plaintiffs' motion should be denied.

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. [Ex. A.] On October 9, 2013, this 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. [Ex. B.] In doing so, this Court joined courts across the country in denouncing the circumstances under which this case arose, which is that Plaintiff Pavilion Corporation confessed judgment in favor of its adversary in litigation, DC & Sons, for $4.5 million in exchange for a release of personal liability for Plaintiff Larry McNair, and then assigned to DC & Sons the right to sue Nexsen Pruet for legal malpractice as a way to collect the judgment confessed. *Id.*

This Court made a number of findings in the order granting summary judgment that were affirmed by the Supreme Court on appeal. For example, this Court found:

- Plaintiffs ceded all rights and control of this case to DC & Sons, including the right to determine whether to file the case in the first instance;
- Plaintiffs "used the court system to litigate a claim they do not own, without revealing this important fact to the Court or to the defendant";
- this case was "brought by Plaintiffs in name only and under circumstances that suggest collusion, or the opportunity for collusion . . . ";
- this case was not a genuine legal malpractice case but instead an action to collect a judgment confessed; and
- this case could not proceed as filed because it was never filed by Plaintiffs in the first instance.

Id.

As a result of these findings, this Court was unwilling to simply strike the assignment and allow the case to proceed as filed, concluding that "[t]he 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." *Id.*

Plaintiffs appealed this Court's order, and on August 12, 2015, the Supreme Court affirmed as modified. [Ex. A.] On appeal, Plaintiffs made the same arguments they make here, which is that if the assignment was voided, the case should be permitted to proceed. Plaintiffs specifically argued that a dismissal without prejudice was not appropriate as it would result in Nexsen Pruet claiming the statute of limitations has expired. [Ex. C.] Rather than grant the relief requested, the Supreme Court affirmed summary judgment, and modified the dismissal to be without prejudice. [Ex. A.]

Sixteen days after the Supreme Court issued its opinion and after the expiration of the deadline to file a petition for rehearing, Plaintiffs filed a "Motion for Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint After Remand." [Ex. D.] Plaintiffs argued that they should be given a reasonable period of time "after remand" to amend their complaint. *Id.* The Supreme Court construed the motion as a petition for rehearing and denied it as untimely filed. [Ex. E.]

ARGUMENT

Plaintiffs' motion to amend the complaint or to substitute parties should be denied because this case is over. This case was dismissed with prejudice by this Court and without prejudice by the Supreme Court. Plaintiffs sought the same relief they seek here in the Supreme Court, and the Supreme Court determined that dismissal without prejudice was the proper remedy.

Because this case has been dismissed, and Plaintiffs failed to obtain the relief they seek here on appeal, the instant motion should be denied.

I. The motion should be denied because this case has been dismissed.

The primary reason the motion should be denied is because this case has been dismissed.

By definition, a dismissal is the "[t]ermination of an action or claim *without further hearing*, esp[ecially] before the trial of the issue involved." 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).

When an appellate court affirms the dismissal of a case but modifies the ruling to be without prejudice and the statute of limitations has subsequently expired, "the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint." *Id.* at 130, 628 S.E.2d at 881. "An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." *Id.* at 130, 628 S.E.2d at 881-82.

Here, both this Court and the South Carolina Supreme Court dismissed this case. Although the Supreme Court modified the dismissal to be without prejudice, a dismissal without prejudice is still a dismissal. Accordingly, the above-captioned case is over. By definition, there should be no further motions or hearings in this action. There is no procedural rule or case that permits Plaintiffs to revive a case that has been dismissed. The rules cited by Plaintiffs apply when a case is pending, not when it is over.

The Supreme Court could have remanded the case with leave to amend but chose not to do so. Plaintiffs made the same arguments in the Supreme Court that they make here, that is, that the current action should be permitted to proceed and that a dismissal without prejudice would be fatal because of the statute of limitations defense. Rather than grant such relief, the Supreme Court held that the case should be dismissed without prejudice. Now that the remittitur has been issued, this Court must enforce the ruling found in the Supreme Court's opinion. *See Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414-15, 438 S.E.2d 248, 250 (1993) ("Once the remittitur is sent down from [the Supreme] Court, [the] Circuit Court acquires jurisdiction to enforce the judgment and *take any action consistent with the Supreme Court ruling*.") (emphasis added).

Plaintiffs' late-filed motion following the appeal, which asked the Supreme Court to remand the case with leave to amend, does not change the Supreme Court's prior ruling. The Supreme Court construed this motion as a petition for rehearing and denied it as untimely. The Supreme Court's statement that the issues raised in the motion "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 by the trial court *after the filing of a new case*. Otherwise, the Supreme Court would be contradicting its holding that case was dismissed without prejudice.

Plaintiffs have had numerous opportunities throughout the course of this case to avoid the situation in which they now find themselves. At any point during this case, Plaintiffs could have chosen to proceed independent of the assignment. Plaintiffs have been on notice since Nexsen

Pruet filed its answer to the complaint and counterclaim against Plaintiffs and DC & Sons that Nexsen Pruet challenged the legality of the assignment. Instead of filing a new case independent of the assignment, or at the very least filing a placeholder case, Plaintiffs allowed their adversary, DC & Sons, to continue controlling and pursuing the case all the way up to the South Carolina Supreme Court. Plaintiffs did so in the face of overwhelming case law that assignments between adversaries are void as against public policy.

Accordingly, under the current procedural posture, Plaintiffs' only recourse is to file a new complaint. If and when Plaintiffs choose to file a new complaint, Nexsen Pruet is entitled to raise any and all available defenses, and Plaintiffs are entitled to refute them. To rule otherwise would be to give new meaning to "dismissal without prejudice" and would override the Supreme Court's decision.

Because the present case has been dismissed, and the Supreme Court declined to grant the relief sought here, the motion to amend the complaint should be denied.

II. This is not a true motion to amend.

Plaintiffs' motion, while styled as a motion to amend, does not actually seek to make any substantive amendments to the allegations of the original complaint filed in this lawsuit. Instead, this motion is merely an attempt to circumvent the Supreme Court's order dismissing the case without prejudice.

The new proposed amended complaint is virtually identical to the one that was initially filed in this case. [Ex. F & G.] There are minor changes to the wording of various allegations in the complaint. The causes of action are the same, and there are no additional paragraphs of added allegations. The only substantive difference between the two complaints is that the amended complaint does not expressly acknowledge that Plaintiff Larry McNair obtained a full

release as part of the settlement in the underlying case. Plaintiff presumably omitted this allegation because otherwise the claims alleged by Larry McNair would be dismissed for lack of harm.

Accordingly, even if this motion were procedurally permissible by the circuit court or if the Plaintiffs had timely filed their motion following the Supreme Court's opinion, Plaintiffs have failed to present any additional factual allegations or different theories of recovery that would allow for the relief they now seek. *See Spence*, 368 S.C. at 130, 628 S.E.2d at 881-82 ("An appellate court should [impose a reasonable period of time for amendment of the complaint] when the plaintiff presents *additional factual allegations or a different theory of recovery* which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.").

III. The procedural rules cited do not permit the relief requested.

A. Rules 15(a) and 15(c).

Plaintiffs' motion to amend the complaint pursuant to Rule 15(a) and to have those amendments relate back to the original complaint pursuant to Rule 15(c) should be denied.

Under Rule 15, a party may amend a pleading by leave of court "when justice so requires and [it] does not prejudice any other party." Rule 15(a), SCRCP. Typically, "[l]eave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (2005). "The prejudice Rule 15 envisions is lack of notice that this new issue is going to be tried, and a lack of opportunity to refute it." *Id.* "The party opposing the amendment has the burden of establishing prejudice." *Id.*

Numerous jurisdictions, both state and federal, have recognized that the rule of liberality with respect to motions to amend is analyzed differently when it is made after dismissal. *See, e.g., Russell v. GTE Gov't Sys. Corp.,* 141 Fed. Appx. 429, 436 (6th Cir. 2005) ("Although leave to amend a complaint should be granted liberally when the motion is made pretrial, different considerations apply to motions filed after dismissal."); *Humphreys v. Roche Biomedical Lab., Inc.,* 990 F.2d 1078, 1882 (8th Cir. 1993) (noting that while a pretrial motion to amend is liberally granted, "different considerations apply to motions [to amend] filed after dismissal.").

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the original pleading." Rule 15(c), SCRCP.

As explained above, the primary reason the motion to amend the complaint should be denied is because this case has been dismissed. Rule 15 allows for the amendment of pleadings during the course of litigation, not after the conclusion of a case.

Additionally, it is not in the interest of justice to grant Plaintiffs leave to amend the complaint given the history of this case. This is not a case where a plaintiff has failed to properly allege the elements of a cause of action or has failed to plead facts sufficient to state a claim. This is a case where the plaintiffs allowed another party to use their names to prosecute a case all the way to the Supreme Court, in the face of overwhelming legal authority that assignments between adversaries are void as against public policy.

Further, it is not in the interest of justice to permit Plaintiffs to file an amended complaint that does nothing to cure the taint that has plagued this case from the beginning. The proposed amended complaint does nothing to show this is a genuine legal malpractice case brought by Plaintiffs as the real parties in interest. Indeed, Plaintiffs are still represented by the same

counsel who filed the initial complaint and who represented Plaintiffs' adversary in the case below, and according to the proposed amended complaint, the $4.5 million confession of judgment remains in place even though the assignment has been stricken.

Moreover, it is not in the interest of justice for Plaintiffs to use Rule 15(c) to file an amended complaint piggybacking off the filing date of the original complaint when Plaintiffs were not the ones who brought the case in the first instance. As this Court found, Plaintiffs allowed their adversary, DC & Sons, to bring and control this case. [Ex. B.] It is not in the interest of justice to allow a case to proceed that arose out of circumstances which strongly suggested collusion or the opportunity for collusion. It is not in the interest of justice to allow this case to proceed when this Court previously ruled that the defects here could not be cured by the stroke of a pen.

Nexsen Pruet will be prejudiced if the amendment is allowed. To begin, Nexsen Pruet should not have to continue defending motions and claims brought by an entity that is not and never has been a client of the firm. Plaintiffs should be required to file a new complaint, based on advice from new, independent counsel, who are not the same counsel who represent the judgment creditor, DC & Sons. This is the same procedure followed by courts in other jurisdictions when an assignment of a legal malpractice claim has been stricken. *See Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009) (finding that if the client re-files the malpractice claim, the case must not be controlled in any way by the assignee and that the client must not be represented by attorneys associated with the assignee); *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (finding that the client could reassert his claim against the attorney "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest").

Once a genuine case is filed, Nexsen Pruet should have the opportunity to raise any and all available defenses, and Plaintiffs should have the burden of refuting them. Nexsen Pruet should not lose defenses because of the way in which Plaintiffs have chosen to proceed with this case. Nexsen Pruet has successfully defended this case since 2011, obtaining an order granting summary judgment and a dismissal from both this Court and the Supreme Court. To allow the complaint to be amended and the case to proceed will render those dismissals meaningless, after years of lengthy and costly litigation, and will directly contradict the Supreme Court's opinion.

For these reasons, the motion to amend the complaint pursuant to Rules 15(a) and 15(c) should be denied.

B. Rule 15(d)

Likewise, the motion to file supplemental pleadings pursuant to Rule 15(d) should be denied.

According to Rule 15(d), SCRCP, "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense."

Here, there are no transactions or occurrences or events that have taken place since the filing of the initial complaint that would alter the allegations in the complaint. As previously noted, the allegations in the proposed amended complaint are virtually identical to those in the initial complaint. Moreover, the defects in the original pleading do not relate to the allegations themselves. The defects have to do with the genuineness of the claims and the circumstances

under which the litigation arose. Such defects cannot be cured by the filing of an amended complaint that is virtually identical to the original pleading.

Accordingly, Plaintiffs are not entitled to relief under Rule 15(d) and the motion should be denied.

C. Rule 17(a)

Finally, Plaintiffs' motion to substitute parties pursuant to Rule 17(a) should be denied.

Rule 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest," and that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest." The notes to this rule state that the rule "is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake."

The present case was not dismissed pursuant to Rule 17, nor was there an "honest mistake" regarding the real party in interest. Plaintiffs allowed DC & Sons to file and control this case, giving up all rights associated with the prosecution and settlement of this case. Plaintiffs allowed DC & Sons to use their name without revealing this fact to Nexsen Pruet or this Court.

Moreover, the fact that Plaintiffs now seek to be substituted as the real parties in interest under Rule 17(a) supports a finding that the motion pending before this Court was filed by and on behalf of DC & Sons and DC & Sons are still the real parties in interest. This is yet another reason the motion should be denied. Nexsen Pruet should not have to continue defending motions and claims brought by a party to whom Nexsen Pruet has owed no duties and is immune from suit.

Finally, Rule 17(a) does not provide a procedural mechanism for substitution. Substitution of parties is governed by Rule 25(e), and under that rule, substitution must take place either before or after judgment, or pending appeal, by the appellate court. The time for substitution in the present case has passed.

CONCLUSION

Plaintiffs' motion to amend the complaint should be denied. This action has been dismissed. Further, the current motion is not truly a motion to amend, and the procedural rules relied upon Plaintiffs do not afford the relief requested. Moreover, Plaintiffs sought this same relief in the Supreme Court, and the Supreme Court determined that the proper remedy was dismissal without prejudice.

For these reasons, the motion should be denied.

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Columbia, South Carolina
May 27, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

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

v.

Nexsen Pruet, LLC..... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have caused to be served the Motion to Dismiss on November 21, 2016, by U.S. mail and electronic mail to:

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November 21, 2016

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November 21, 2016

By Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
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Columbia, South Carolina 29201

Re: Pavilion Development Corp. & Larry McNair vs. Nexsen Pruet
Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774
SGSL No.: 5347/1509

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of the Motion to Dismiss Appeal in the above referenced matter. Please return the clocked in copies to my office by our courier.

By copy of this letter, and as evidenced by the Proof of Service, I am serving these documents on counsel for Appellants.

Sincerely,

Benjamin R. Gooding
BRG:tc

cc: By U.S. Mail and Electronic Mail:
Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Michelle N. Endemann, Esquire
James G. Long, Esquire (via e-mail only)