

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The Honorable Thomas Russo, Circuit Court Judge

CASE NO. 2011-CP-10-05774
APPELLATE CASE NO. 2016-001632

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SC Court of Appeals

PAVILION DEVELOPMENT CORP. & LARRY MCNAIR,.....Plaintiff/
Appellant,

v.

NEXSEN PRUET, LLC.....Defendant/ Respondent,

AND

DC & SONS, LLC Counterclaim Defendant.

APPELLANTS' RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS THE APPEAL

A. INTRODUCTION

This appeal arises out of the lower court's order dated June 29, 2016 denying Appellants' motion to amend their complaint and or substitute parties pursuant to Rules 15 and 17 SCRCP. However, the order and the circumstances in which it was entered are not typical as: (1) the order denying the motion to amend the complaint is a final order as it ends the case, determines the action, and prevents a judgment from which an appeal might later be taken. Indeed, Respondent Nexsen Pruet, LLC, ("Nexsen Pruet") argues in its motion that the case is

ended: “First and foremost, the appeal should be dismissed because this case is over.” (Respondent’s Motion to Dismiss, p. 4); and (2) the lower court held that Appellants are “absolutely entitled” to amend their complaint pursuant to the rules of civil procedure, but the court felt it was unable to grant the amendment because of its interpretation of the Supreme Court’s order dated September 3, 2015. (June 2, 2016 Transcript, p. 34 line 14 - p. 35 line 2). Accordingly, the sole issue on appeal concerns the interpretation of the Supreme Court’s order dated September 3, 2015 in which the Supreme Court states that Appellants’ motion to amend their complaint “should be addressed by the trial court in the first instance.” (September 3, 2015 Order).

Nexsen Pruet has moved for a transfer of this case to the Supreme Court; this highlights that the appeal is proper as the sole issue on appeal is the lower court’s interpretation of the Supreme Court’s order.

Should this Court decide Respondent’s motion to dismiss the appeal, the motion must be denied as Nexsen Pruet improperly seeks to have the merits of the appeal decided by motion and concedes in its motion that the order appealed from prevents a judgment from which an appeal might later be taken and is therefore appealable.

B. BACKGROUND

This is a legal malpractice action filed on August 16, 2011. The action was filed after the settlement of the underlying case brought against Pavilion Development Corp. (“Pavilion”) and Larry McNair by DC & Sons, LLC. Pavilion and McNair were represented by Nexsen Pruet in the underlying case. The underlying settlement included an assignment by Pavilion and

McNair of the proceeds of their claim against their attorney, Nexsen Pruet.¹ The underlying settlement and assignment took place after summary judgment was entered against Pavilion and McNair by the Honorable Roger M. Young, Sr. and Pavilion and McNair were facing a trial on damages with multimillion dollar exposure. (Summary Judgment Order). The underlying settlement was approved on the record by Judge Young as a “fair resolution of the dispute.” (R. p. 64).

Nexsen Pruet moved for summary judgment on the ground that the malpractice action was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy. On October 9, 2013, the lower court granted summary judgment on this issue in favor of Nexsen Pruet. In addition to granting Nexsen Pruet’s motion, the lower court dismissed the case with prejudice. Pavilion and McNair appealed.

On appeal, the case was transferred to the Supreme Court of South Carolina pursuant to Rule 204(b) SCACR as the issue of the validity of the assignment of legal malpractice actions was a novel issue in South Carolina and the Supreme Court was already considering the issue in the case of *Skipper v. ACE Prop. & Cos. Ins. Co.*, Op. No. 27547 (S.C. Sup. Ct. filed July 15, 2015). Following oral argument, the Supreme Court affirmed on the ground 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. Assuming that Nexsen Pruet would petition the Court for hearing, Pavilion and McNair waited until the time to petition expired, and when no petition was filed, filed its motion in the Supreme Court requesting a reasonable time to amend their complaint pursuant to *Spence v. Spence*, 368 S.C.

¹ The Settlement also included that the legal malpractice claim itself could be assigned to DC & Sons at DC & Sons’ election.

106, 628 S.E.2d 869 (2006) as the statute of limitations ran during the appeal. The Supreme Court did not grant the motion, instead stating “the motion should be addressed by the trial court in the first instance.” (September 3, 2015 Order). Pursuant to the Supreme Court’s instruction, Pavilion and McNair refiled their motion to amend in the lower court. Nexsen Pruet opposed the motion, claiming no amendment could be allowed because the case was dismissed without prejudice. The motion was initially set before the Judge that had granted Nexsen Pruet summary judgment, The Honorable J.C. Nicholson, Jr.; however, Judge Nicholson recused himself before ruling. A second hearing was scheduled before the Honorable Thomas Russo, and Judge Russo found that Pavilion and McNair are “absolutely entitled” to amend their complaint pursuant to the rules of civil procedure, but he was unable to grant the amendment because of his interpretation of the Supreme Court’s order dated September 3, 2015.

Pavilion and McNair timely appealed.

C. ARGUMENT

1. The Order at Issue is Immediately Appealable

After first arguing that this appeal should be dismissed because the case is ended, Nexsen Pruet claims that the appeal should be dismissed because Judge Russo’s order is not immediately appealable. The arguments are incongruous. Appealability is determined by § 14–3–330 which provides in pertinent part:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

...

(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;

S.C. Code § 14-3-330. In the present case, though the order makes no ruling on the merits of the legal malpractice action, it, in effect, bars the action as the statute of limitations prevents a new action from being filed. The lower court recognized this fact at the March 30, 2016 hearing:

MS. CUNDARI: ...They have a remedy. Their remedy is filing a new case.

THE COURT: But they really don't because the statute has run.

(March 30, 2016 Transcript, p. 10 lines 4-19). The ability to bring an action is a substantial right. *See, e.g. Cf. Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) (recognizing a common law right of tort plaintiff to sue and choose her defendant). Moreover, as the order effectively discontinues Pavilion and McNair's suit against Nexsen Pruet, the order falls under subsection 2(a). As the action has been discontinued by the order, there is no ability to obtain a judgment from which an appeal might be taken. *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 566-67, 725 S.E.2d 926, 928-29 (2012). Appellants have "arrived at the end of the road" and the appeal is properly filed. *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147-48 (2004).

Nexsen Pruet cites *Tatnall v. Gardner*, 350 S.C. 135, 138-39, 564 S.E.2d 377, 379 (Ct. App. 2002) for the proposition that an order denying a motion to amend is not immediately appealable. *Tatnall* is easily distinguished. First, *Tatnall* involves a motion to amend the pleadings to assert third party claims. The *Tatnall* Court held that the third party claim was permissive in nature and could be brought in a subsequent action. *Id.* Second, there was no issue with the statute of limitations that would bar a subsequent filing. *Id.* Third, the order in *Tatnall* did not end the case, as the court specifically recognized the order did not prevent a judgment from being rendered in the action. *Id.* Finally, in the case *sub judice*, Judge Russo's order is not simply an order denying a motion to amend a complaint – Judge Russo actually held that

Pavilion and McNair would be entitled to the amendment under the rules.² Rather, the order is one that interprets the Supreme Court's September 3, 2015 order in such a way that concludes the entire case and prevents a judgment from being entered on the legal malpractice claim. Judge Russo's order is immediately appealable, and Nexsen Pruet's motion to dismiss must be denied.

2. The Central Issue On Appeal Must Not Be Decided Summarily by Motion Before Briefing Has Been Completed, The Record Submitted, Or Oral Argument Had

Nexsen Pruet argues that this appeal must be dismissed because the lower court correctly concluded that the Supreme Court's September 3, 2015 order ends this action, despite the Court's instruction that "the motion [to amend] should be addressed by the trial court in the first instance." (September 3, 2015 Order). First, the interpretation of the September 3, 2015 order is the very issue on appeal and asking the court to determine it summarily by motion without the benefit of full briefing, the record being filed, or oral argument heard is improper. Second, the lower court erred in its interpretation of the order. The lower court held that it was constrained by the Supreme Court's dismissal without prejudice, and therefore, could not grant the motion to amend the complaint. (June 2, 2016 Transcript, p. 34 line 14 - p. 35 line 2). However, the lower court's interpretation fails to take into consideration the significance of the Supreme Court's modification of the dismissal of the complaint from one with prejudice to one without prejudice as well as the significance of the Court's instruction that the motion to amend should be addressed by the trial court.

²**THE COURT:** Let me stop you there. If it wasn't a situation that I've got to deal with where I've got a court who affirmed a summary judgement, which, as we all know, ends the case, and I'm being asked to ignore that and to allow the case to go forward and grant the amendment, but for that, you're absolutely right. I don't even think we're here. I don't think they're going to oppose your Rule 15 motion. You're absolutely entitled to it. That's not it's not that simple. It's not that easy, as you know. So you are entitled to Rule 15, but for all this other stuff you have here. (June 2, 2016 Transcript, p. 34 line 14 - p. 35 line 2)

Implicit in the Supreme Court's modification to a dismissal without prejudice is that Plaintiffs/Appellants would have a reasonable time to amend their complaint. *See, e.g., Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal without prejudice); *Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) (Dismissal of a case "without prejudice" means a plaintiff may reassert her complaint by curing defects that led to the dismissal. In contrast, dismissal of a complaint "with prejudice" is intended to bar relitigation of the same claim). The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 880 (2006) (citations omitted). In *Spence*, the Supreme Court contemplated a scenario very similar to the one present in this case. The *Spence* Court held:

When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. 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. 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.

Spence v. Spence, 368 S.C. 106, 131. In the case *sub judice*, the Supreme Court affirmed the lower court with regard to the issue of the assignability of legal malpractice claims, but modified the dismissal to one without prejudice. Pursuant to *Spence*, Pavilion and McNair moved before the Supreme Court to be allowed a reasonable time to amend their complaint. The Supreme Court did not grant the motion, but instead instructed that "the motion should be addressed by the trial court in the first instance." (September 3, 2015 Order). At the March 30, 2016 hearing, the lower court agreed with Appellants' interpretation of the September 3, 2015 before recusing

itself,³ and correctly so as this is the only interpretation in line with the Supreme Court's modification to a dismissal without prejudice, the September 3, 2015 order, and existing case law regarding dismissals without prejudice. Nexsen Pruet claims that the only way to read the September 3, 2015 order is that the Court intended that a new action be filed. However, a motion to amend would not need to be addressed to the lower court before a new action could be filed, a new action would simply be filed. Thus, Nexsen Pruet's interpretation renders the Supreme Court's instruction meaningless.

D. CONCLUSION

This case, above many others, is an example of the wisdom and fairness of the precedent allowing the amendment of a complaint to correct deficiencies that resulted in a dismissal without prejudice. Failing to grant the amendment under the circumstances present in this case abrogates Pavilion and McNair's right to bring their valid legal malpractice claim, constitutes manifest injustice, and is contrary to the holding in *Spence* for the following reasons:

- (1) Independent of the assignment, Pavilion and McNair's legal malpractice claim, taken as true in a well-plead complaint, states a claim upon which relief may be granted;
- (2) The settlement and assignment in the underlying case took place after a summary judgment order was entered against Pavilion and McNair in which the trial court found misconduct by these parties and their counsel (see summary judgment order) and the settlement was approved on the record by the trial court as a "fair resolution of the dispute." (R. p. 64);

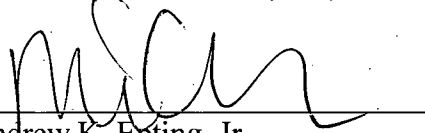
³ THE COURT: I think Mr. Epting is right as far as his interpretation, okay? (March 30, 2016 Transcript, p. 12 lines 2-3)

- (3) The statute of limitations ran during the appeal which turned on a novel issue of South Carolina law decided years after the assignment at issue was drafted – the parties could not have foreseen that the Supreme Court would carve out an exception for legal malpractice claims to the existing black letter law on the assignability of claims.

For the reasons stated above, Nexsen Pruet's motion to dismiss must be denied. The lower court's order determines the action and is immediately appealable. Further, the lower court erred in its interpretation of the Supreme Court's order, and as this is the central issue on appeal, it should be decided by the Supreme Court and only after full briefing, completion of the record, and oral argument as per the rules of appellate procedure.

Respectfully submitted by:

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On this 12 day of December, 2016
Charleston, SC

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) Case No(s) : 2011CP1005774
Pavilion Development Corp.,)
Plaintiff,)
-VS-) TRANSCRIPT OF RECORD
Nexsen Pruet, LLC,)
Defendant.)

June 02, 2016
Charleston, South Carolina

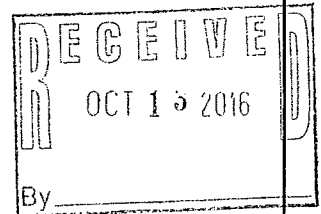
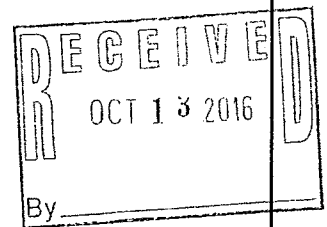
B E F O R E:

HONORABLE THOMAS A. RUSSO, Judge.

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

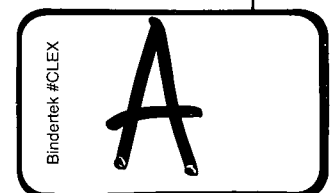
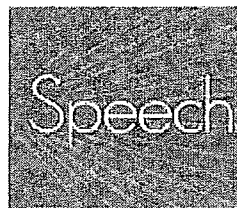
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EXHIBITS PAGE

NO.

DESCRIPTION

ID EV

PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 2nd day of June, 2016 at approximately 10:08 a.m.)

MR. EPTING: Good morning, Judge.

THE COURT: Good morning.

MR. EPTING: My name is Drew Epting. Michelle Endemann is with me, as is George Kefalos. We represent the moving party, the plaintiffs in this case.

Judge, I want to start with an example to sort of frame this issue for you because this is a legal malpractice case. We've been to the Supreme Court one time and it has been remanded back to you. But I think by way of an example, I can put this in the context of as I'm describing what happened when in the underlying case, you'll always know what is the issue here.

So imagine that I have a case before you that is a legal malpractice case. Imagine that there's been an assignment of the legal malpractice claim by the client of the lawyer to the person who sued. While that case is pending before you, the State Supreme Court enters an order that says assignments of legal

1 malpractice claims are not allowed. I then
2 appear in front of you to say, Judge Russo, I
3 need to amend my pleading in order to change
4 plaintiff from the assignor -- assignee back to
5 the assignor so it is being brought in the name
6 of the actual client rather than to whom it is
7 being assigned.

8 That's the issue here. Except, in this
9 case, the ruling actually happened in the case.
10 The Supreme Court said when it got to the
11 Supreme Court that the assignment was invalid
12 and this motion to amend is to essentially put
13 the claim in the client's name as opposed to it
14 being a claim of the assignee. And so if it
15 were a different case, it would simply be a
16 matter of appearing before you and saying we
17 need to amend because of what the Supreme Court
18 is telling you.

19 In this case, the Supreme Court, we filed a
20 motion to amend to put the claim in the right
21 party's name. The Supreme Court said the proper
22 place to do that is back in the lower court. So
23 that's how we find ourselves here. I hope that
24 example is of some help as I go forward.

25 So first, Judge, let me hand you the actual

1 opinion that was issued. This is the opinion
2 that was handed down by the Supreme Court.
3 (WHEREUPON, a document is handed to the Court.)

4 MR. EPTING: So what I am attempting to
5 do, Judge, is to lay the procedure of this out
6 before I get into the merits of the underlying
7 case. The Supreme Court, on the basis of a
8 previous decision, *Skipper* said you can't
9 assign legal malpractice claims. But where
10 Judge Nicholson dismissed this case with
11 prejudice, we are changing that part of his
12 ruling. We're changing it to a dismissal
13 without prejudice.

14 So when our case was in the Supreme Court,
15 it was argued along with the companion case
16 called *Skipper*. In both cases, the Supreme
17 Court ruled you can't assign a legal
18 malpractice case. In our case, because Judge
19 Nicholson had dismissed the case with
20 prejudice, the Supreme Court said we're
21 changing that. The case is dismissed without
22 prejudice.

23 I would like, Judge, to hand you just a
24 copy of the *Skipper* case which I have marked as
25 Exhibit 2.

1 (WHEREUPON, a document is handed to the Court.)

2 MR. EPTING: And the only reason I do
3 this, Judge, is, if you turn to what is the
4 second page, you'll see in brackets that the
5 Supreme Court says the question of whether you
6 can assign a malpractice case is a novel
7 question in South Carolina. That may have some
8 bearing, Judge, in how you view this. Of
9 course, when we brought the original case
10 against Nexsen Pruet, virtually every kind of
11 claim in South Carolina is assignable.

12 So we believe that a legal malpractice
13 claim would be assignable as well. It wasn't
14 like we did this in the face of clear and
15 existing law to the contrary. We thought the
16 general law was that you could assign claims. I
17 hand you this case only to say that *Skipper*
18 says it was a novel issue and this was the
19 first time that we've addressed it.

20 And what subsequently happened, Judge,
21 *Skipper* was argued 30 days or so before our
22 case. It was decided before our case. That's
23 why you get such a short memorandum opinion in
24 our case. They just say, see *Skipper*, the case
25 we decided on this issue before.

1 What we did, Judge, at that point in time,
2 is we filed -- there is a case that instructs
3 what to do in these circumstances. I would ask,
4 Judge, that you refer to page 13 of this case.
5 It's called *Spence versus Spence*. And on page
6 13, Judge, I'm referring to, uh, the Headnote
7 26. I'm reading, when a plaintiff is not given
8 the opportunity to file and serve an amended
9 complaint, but is left with no choice but to
10 appeal after dismissal of her case with
11 prejudice, an appellate court, which affirms
12 the dismissal, may modify the lower court's
13 order to find the dismissal is without
14 prejudice. That happened here.

15 When the statute of limitations has
16 expired, the appellate court may, in its
17 discretion, impose a reasonable period of time
18 in which to amend the complaint. An appellate
19 court should follow this procedure when the
20 plaintiff presents additional factual
21 allegations or a different theory of recovery,
22 which taken as true in a well-pleaded
23 complaint, may state a claim upon which relief
24 may be granted.

25 So in this case, Judge, we have the ability

1 to plead a well-pleaded case. Because all that
2 has happened is they say you have brought it in
3 the name of the wrong party. It's not like
4 we're moving to dismiss and we don't have a
5 basis to go forward. We do. We just need it to
6 go forward in the client's name, rather than an
7 assignee.

8 So pursuant to that case, Judge, what we
9 did is we filed a motion in the Supreme Court.
10 So, in essence, Judge, knowing what the law
11 was, we waited 15 days, which was the time for
12 petitioning for rehearing, because we thought
13 that perhaps Nexsen Pruet would petition for
14 rehearing, uh, because the dismissal was
15 changed to go from prejudice to without
16 prejudice. And we filed a motion to amend the
17 complaint to say, basically, okay, you've told
18 us that we can't proceed in the name of the
19 assignee so we're going to bring it in the name
20 of the client.

21 The Supreme Court, in that motion, Judge,
22 issued the enclosed order. There's some notion
23 here, Judge Russo, that we needed to file
24 another case and file another motion in this
25 other case in order to have this motion heard.

1 And the reason is, is what Nexsen Pruet wants
2 us to do is to file another lawsuit and then
3 come in and argue and they would be successful
4 if they were able to argue the passage of the
5 statute of limitations as running from some
6 previous state, which I won't go off on.

7 So we're not trying to file an additional
8 complaint and file a motion. The reason is we
9 don't have to. Because while the Supreme Court
10 may have misunderstood that we weren't trying
11 to petition for rehearing, they clearly
12 understood that our motion, which is fairly
13 detailed about what we wanted to do, was we
14 wanted to amend in this case, the original
15 case, the one that was decided in the Supreme
16 Court, just so there would be no statute of
17 limitations issue.

18 And what the court says, in any event,
19 appellant's motion should be addressed by the
20 trial judge in the first instance. So the
21 motion that we filed, if you will, Judge, in
22 the Supreme Court, has basically been sent down
23 to you to decide. It is true, Judge, that in
24 the *Spence* case, the appellate court suggested
25 it could itself grant leave.

1 Of course -- and why don't I stop right
2 there for a moment, Judge, because I'm getting
3 ready to get off into little bit of a tangent.
4 The Supreme Court certainly understood when we
5 argued this case, Judge, -- and I want to say
6 they gave us ultimately almost two hours to
7 argue this. It went on for a long period of
8 time. Some of the discussion in the case was,
9 well, if this case is dismissed and we have to
10 refile, we've a potential statute problem.

11 So those issues were all discussed. But as
12 you saw from their original opinion, they
13 didn't decide anything except just saying we
14 just decided in *Skipper* case that that's not an
15 assignable claim. You can't assign it and we're
16 reversing the dismissal with prejudice. When we
17 asked to file the motion, they say you go back
18 to the lower court.

19 So that's how we got here. And that's why I
20 say, but for this being the case, if this were
21 a separate case, I'd be standing in front of
22 you saying, Judge Russo, the Supreme Court just
23 decided an opinion, just decided a case in
24 which they say that my client, the assignee,
25 can't bring this claim, I need to bring it in

1 the name of the assignor and I'm asking you to
2 allow me to do that. That's essentially where
3 we are, but through an entirely different set
4 of circumstances.

5 So what I have attempted to do, Judge, is
6 to describe the procedural posture. We did, in
7 an abundance of caution, Judge, thinking, okay,
8 there will be some objection to the motion in
9 Supreme Court. So we filed a similar
10 supplemental motion asking for the same relief
11 before this court.

12 So what is the case that brought us here?
13 I'd like to take a few moments, Judge, and
14 describe, uh, to you how this lawsuit, this
15 malpractice case, arose. Many years ago, a
16 company by the name of DC & Sons, who were Mr.
17 Kefalos and I's clients, were sued by the
18 plaintiffs in this case, Pavilion and McNair,
19 for specific performance on the sale of a \$5
20 million piece of property. DC & Sons moved to
21 dismiss the lis pendens on the property because
22 they believed that McNair and Pavilion would
23 not close the property.

24 Ultimately, that came to be heard in front
25 of Judge Young. And Judge Young -- bear with me

1 just one second, Judge. (Pause.)

2 Judge Young, uh, entered an order in that
3 case, in the DC & Sons/McNair case. And what
4 had happened, Judge, is Nexsen Pruet had
5 accepted service of a counterclaim brought by
6 DC & Sons for abuse of process for continuing
7 to maintain the lis pendens, even though they
8 wouldn't buy the property. And so the Nexsen
9 Pruet clients did not understand that, but that
10 case went forward in any event.

11 Judge Young entered the following order: DC
12 & Sons' motion is granted as Larry McNair and
13 its counsel concede the lis pendens was filed
14 for the ulterior purpose of obtaining a lower
15 purchase price and a return of the escrow
16 funds. And I find as a matter of law that the
17 filing of the lis pendens was an act in the use
18 of process not proper in the regular conduct of
19 the proceedings. The continued maintenance of
20 the lis pendens in an action for specific
21 performance is an abuse of process because
22 Pavilion stipulated there was no cloud on the
23 title. So in the underlying case, Judge Young
24 essentially ruled that McNair and Pavilion and
25 its counsel had misused this lis pendens in

1 order to try to exhort a different view. At
2 that point in time, Judge, Nexsen Pruet
3 withdrew or was asked to withdraw from that
4 case and separate counsel came in.

5 So the case was set for trial, Judge, on
6 January the 18th, 2011. We appeared to start
7 the trial. Judge Young enters an additional
8 order, essentially saying that this was going
9 to be a trial on damages. At some point in
10 here, Judge, a recess is granted for the
11 purposes of allowing the parties to discuss
12 whether or not they could enter into some sort
13 of settlement and avoid the trial. The jury, in
14 the meantime, Judge, is being voir dired.

15 So what did happen, Judge, Judge Young
16 entered a Form 4. I want, Judge, just to take a
17 moment and put this into context. The reason
18 that I'm getting into this detail is the
19 Supreme Court reversed this case as dismissal
20 with prejudice. And the prejudice that was
21 found by Judge Nicholson was not, as I shall
22 get to in a moment, what Judge Nicholson
23 intended in his order. So I'm spending some
24 time to try to explain to you in what we told
25 the Supreme Court. There was not only no

1 collusion between DC & Sons and Pavilion and
2 McNair, every bit of this, the whole discussion
3 did not -- it was all put on the record with
4 Judge Young because everybody in that room
5 realized that the Nexsen Pruet clients would
6 not know what the abuse of process laws were.
7 And we all understood it was going to be a
8 legal malpractice case. So far from trying to
9 hide anything, we put it all on the record.
10 What happens is, we appear. If you will, Judge,
11 go to the second handwritten page. It says
12 Pavilion and McNair assigned to DC & Sons, et
13 cetera, et cetera. Well, the reason I read that
14 to you, Judge, is in Judge Nicholson's order,
15 Judge Nicholson holds that Judge Young didn't
16 know anything about the assignment. I'm going
17 to read that part of the order to you in a
18 moment because I -- I think this is important,
19 Judge, and I'm sorry to be taking so much time.
20 But far from trying to hide anything, it was
21 all on record, every bit of it.

22 Judge Young actually says -- and this is
23 from the transcript, Judge. All of this is in
24 record of this case. The Court: All right. Well
25 then, do you want a Form 4 then entered saying

1 this is assigned or that is it settled. Mr.
2 Rafferty: The assignment is actually, Judge,
3 reflected in the agreement that is handwritten
4 and provided by the court.

5 We also asked, uh, Judge Young to take a
6 look at the amount of the confession, which is
7 likewise a document that was given to Judge
8 Young, because we wanted him to know exactly
9 what was going on. And the Court, in the
10 transcript, Judge, and I'm reading, asked me:
11 What is the breakdown on that number? How did
12 you come up with \$4.58 million? There's then,
13 Judge, a discussion that goes on for a page
14 where I detail each and every element of the
15 damage.

16 Judge Young says: Alright. Well, I have,
17 needless to say, not as much time and energy
18 invested in this case as y'all. Needless to
19 say, this is something that I have lived with
20 the past couple of years, so I am very familiar
21 with the facts and what has given rise to the
22 changes of the damages. And I think it is a
23 fair resolution of this dispute between the
24 parties.

25 Now, what I'm referring to, Judge, is what

1 is contained -- Judge Nicholson entered an
2 order, Judge, in which, uh, -- he enters an
3 order in which he says that the facts and
4 circumstances under which the assignment was
5 entered created the opportunity for collusion
6 as did the conduct by counsel and DC & Sons.
7 The Court goes on to find that we brought
8 embarrassment to the attorney/client
9 relationship.

10 Now, I know, Judge, you may be asking what
11 does this have to do with a simple amendment of
12 the pleading. Well, when this case first came
13 back from the Supreme Court, it went to Judge
14 Nicholson. We've already made these arguments
15 before Judge Nicholson. I provided the Court a
16 copy of the transcript in front of Judge
17 Nicholson. I think Judge Nicholson, on the
18 record, acknowledges I signed it, I'm stuck
19 with it, but that's not what I intended. I had
20 it right the first time. Because when we argued
21 the case, Judge Nicholson said why don't I just
22 write the assignment and y'all can proceed.

23 So Judge Nicholson recused himself. And
24 part of it, too, Judge, was I thought if
25 there's any concern about what was done here,

1 we should be in front of Judge Young. So when
2 we left, that's what everybody's expectation
3 was, we would be in front of Judge Young. Judge
4 Young has a policy he doesn't hear cases
5 involving lawyers within his jurisdiction.
6 Hence, here we are in front of you.

7 What I would say, Judge, is the dismissal
8 with prejudice was reversed by the Supreme
9 Court because I believe the Supreme Court
10 understood, since all this was public record,
11 that it didn't happen the way it was set out in
12 Judge Nicholson's order. I think the transcript
13 by Judge Nicholson makes clear that he didn't
14 intend it that way either.

15 So where does that leave us, Judge? It
16 leaves us with what, I think, is a fairly
17 straightforward Rule 15 motion. We found out
18 that we had sued in the name of the wrong
19 party. The Supreme Court told us in that case
20 you need to bring it in the name of the client,
21 not in the name of the, uh, assignee. So we
22 filed motion with the Supreme Court and they
23 directed that decision to you to be decided.

24 And what I think, Judge, is important is
25 the case *Spence versus Spence*, because *Spence*

1 *versus Spence* just says if there's a basis for
2 the amendment, the amendment should be allowed.
3 So here, we have a case in which the amendment
4 is simply to allow the case to proceed in the
5 name of McNair and Pavilion, but not as an
6 assignment.

7 Judge, I have said a lot. I have given you
8 a lot of documents. Can I answer any questions
9 that you may have?

10 **THE COURT:** I think I'm -- I think I
11 follow you.

12 **MR. EPTING:** All right, sir.

13 **THE COURT:** Yes, ma'am.

14 **MS. CUNDARI:** May it please the Court.
15 Tina Cundari. I represent Nexsen Pruet. With me
16 today is Betsy Gray, my colleague, as well as
17 Ben Gooding, and then Jimmy Long is here as a
18 representative for Nexsen Pruet. Just as a
19 housekeeping matter, first, Your Honor, we
20 filed a memo in opposition to this motion. I
21 wanted to make sure you have a copy of that. If
22 you don't, I'll be happy to hand one up.

23 **THE COURT:** I do. I have a copy of it.

24 **MS. CUNDARI:** Great. Your Honor, this
25 motion should be denied because this case is

1 over. The South Carolina Supreme Court held
2 that this case should be dismissed without
3 prejudice. That is the judgement of the Supreme
4 Court. That's in the remittitur to this court.
5 So this court is bound to do what Supreme Court
6 said, which is this case is dismissed without
7 prejudice. The motion is not proper. You don't
8 get to come in after a dismissal and file a
9 motion to amend the complaint. The dismissal
10 means dismissal. The case is over. So on that
11 basis alone, this case -- this motion should be
12 denied.

13 Supreme Court is familiar with the process
14 of remanding and granting leave to amend. The
15 Supreme Court did not do that in this case. The
16 Supreme Court confirmed every word of Judge
17 Nicholson's order, even the words that they now
18 dispute. The only thing Supreme Court changed
19 about Judge Nicholson's order is it said that
20 proper remedy should be dismissal without
21 prejudice.

22 And the reason the Court did that, we heard
23 a lot today about this assignment of a legal
24 malpractice claim, but this case has been so
25 tainted from its inception that the Supreme

1 Court held the only proper remedy -- we have
2 argued this issue about the remedy about
3 whether it should be dismissal with prejudice,
4 without prejudice or whether the parties should
5 be permitted to amend. The Supreme Court chose
6 dismissal without prejudice. That's what this
7 court is bound to do.

8 The reason the Court did that is the only
9 way to cure the taint in this case is to start
10 over. And that is what they need to do. They
11 need to go file a new case. Nexsen Pruet is
12 entitled to every defense possible for a legal
13 malpractice case including bar by the statute
14 of limitations. So that's for another court on
15 another day. This Court's job is to follow the
16 remittitur. The case is dismissed. This motion
17 should be denied.

18 Supreme Court could have granted this
19 relief in the first instance during the appeal
20 -- we argued about this same stuff -- or it
21 could have done it post-decision had they filed
22 this particular motion within 10 days of that
23 Supreme Court's order. They didn't do that. So
24 the Supreme Court said it's over. So I submit
25 to Your Honor that the case should be

1 dismissed.

2 This case was filed in the names of -- this
3 is what is so tainted about this case. It was
4 filed in the names of the client of Nexsen
5 Pruet, Larry McNair, individual, and a company
6 named Pavilion. Filed in the names of a client,
7 but it turns out there was an assignment that
8 the client had assigned the claims, the legal
9 malpractice claims to somebody else, their
10 adversary in the underlying litigation. So it
11 was adversary who was controlling the entire
12 case, not the client. It wasn't a genuine legal
13 malpractice case.

14 **THE COURT:** That's one of the things I was
15 concerned about. There was the concern that,
16 Mr. Epting, you expressed that -- and I think
17 took some umbrage to, and the Court felt like
18 there was some shiftiness going on. Obviously,
19 your position is there wasn't. Why wasn't --
20 why wasn't, uh, this case ever brought, DC &
21 Sons versus Nexsen Pruet as the assignee to
22 this agreement? Because it is somewhat
23 deceptive the way its captioned.

24 **MR. EPTING:** The reason, Judge, is that if
25 you look at the settlement documents, what was

1 assigned, meaning in the underlying case, what
2 was assigned were the proceeds. So if you
3 understand that, in other words, in the first
4 instance, the way the assignment worked was
5 McNair agreed to bring the lawsuit. What was
6 assigned were the proceeds of --

7 **THE COURT:** I thought the assignment was
8 the assignment of all claims.

9 **MR. EPTING:** No, sir. In that same
10 paragraph I referenced, it said, in essence, at
11 DC & Sons' election, they could --

12 **THE COURT:** Their election.

13 **MR. EPTING:** They could, uh, acquire the
14 claim. It's been some time since I've read it,
15 Judge, but we brought the lawsuit on the theory
16 that, uh, the proceeds were assigned.

17 **THE COURT:** All right.

18 **MS. CUNDARI:** And Your Honor --

19 **MR. EPTING:** Judge, just to add one thing,
20 DC & Sons was added early on in this proceeding
21 as a party. They made a motion to add DC &
22 Sons, so DC & Sons was added, I think ---

23 **THE COURT:** Right.

24 **MR. EPTING:** --- at the pleading stage.

25 **MS. CUNDARI:** And we made that motion

1 because we discovered the assignment on the
2 public index. We knew that DC & Sons was the
3 real party in interest, the one controlling the
4 litigation, the one that owned the claims, the
5 one that was entitled to the proceeds. So we
6 knew that we had to bring them in. That's what
7 we did.

8 Your Honor, this whole issue about whether
9 the claims were assigned or not, this has been
10 litigated. We've been going down this road for
11 several years now, since 2011. Got summary
12 judgement. Then we argued on appeal, and we won
13 the appeal.

14 **THE COURT:** Let me ask about that too.
15 Obviously, I wasn't there. I don't have the
16 scope of everything that was argued before the
17 Court. These issues -- and without trying to
18 open up another whole can of worms and stuff,
19 I'm assuming that the reason this is being so
20 hotly litigated at this point is because there
21 is a statute of limitations issue that will
22 come up if I were to rule that the case, that
23 the Supreme Court case is over pursuant to
24 summary judgement and all that, then if they
25 bring another case, DC & Sons versus Nexsen

1 Pruet, that that possibly is barred by statute
2 of limitations. So I understand that that's a
3 concern. Was that argued in front of the
4 Supreme Court?

5 MS. CUNDARI: Yes, Your Honor. We -- and
6 we've attached this to our brief. Their -- the
7 whole issue about what the proper remedy was
8 turned on the statute of limitations issue.
9 That was their concern.

10 THE COURT: So the court considered that
11 and --

12 MS. CUNDARI: And decided that --

13 THE COURT: Well, at least it was
14 presented to them.

15 MS. CUNDARI: It was presented and the
16 Court said dismissal without prejudice is the
17 proper remedy. When you look at the case law,
18 dismissal without prejudice still means
19 dismissal. You can go file a new complaint, but
20 you don't get to come into -- you don't get to
21 keep your same case alive that's been
22 dismissed. So that's what they're trying to do
23 here. They're trying to circumvent Supreme
24 Court's order, trying to keep this case alive
25 within the same case.

1 Your Honor, they're going to get to argue
2 about statute of limitations another day. We'll
3 -- they'll -- you know, if they want to file --
4 if Larry McNair and Pavilion truly want to file
5 a legal malpractice case, that's the first
6 question, because Mr. McNair got complete
7 release as a part of this deal so I don't know
8 why he would want to sue Nexsen Pruet for legal
9 malpractice when he got a complete release
10 under this handwritten deal that was struck on
11 the first day of trial. And Pavilion is just a
12 shell company, so I don't know why they would
13 either.

14 So the point is, is that if that happens,
15 they can come to court, have their day in court
16 and we get to have our defenses. We -- this is
17 what the whole point of the appeal was is
18 arguing about these very issues. I've attached
19 excerpts from their briefs, Exhibit C to our
20 memo. I also brought the complete set of briefs
21 if you'd like to see those, Your Honor.

22 **THE COURT:** What? I'm sorry.

23 **MS. CUNDARI:** The complete set of briefs
24 on appeal.

25 **THE COURT:** I think I have that.

1 **MS. CUNDARI:** I didn't provide those to
2 you. I've got copies. They are also obviously
3 publicly available.

4 **THE COURT:** If you have --

5 **MS. CUNDARI:** I do.

6 **THE COURT:** If you have copies. (Pause.)
7 I think I have excerpts. I don't have the
8 full.

9 **MS. CUNDARI:** Did you still want these,
10 Your Honor?

11 **THE COURT:** Yeah.

12 **MS. CUNDARI:** Okay.

13 **THE COURT:** Yeah.

14 **MS. CUNDARI:** I just attached their
15 concluding paragraphs and their briefs as
16 exhibits to show that the issue was before the
17 Supreme Court. So, you know, again, Your Honor,
18 the case is over. It's been dismissed. Nothing
19 further for this Court to do. If they want to
20 file a new case, they can do that and we can
21 fight about the statute of limitations then.
22 That's for another day, another court. So if no
23 further questions, I'll take my seat.

24 **THE COURT:** All right. Thank you.

25 **MS. CUNDARI:** Thank you.

1 **MR. EPTING:** Judge, just a couple of
2 observations. Could I ask you to look at what I
3 handed up to you as Exhibit 5?

4 **THE COURT:** Got it.

5 **MR. EPTING:** So I ask this question,
6 Judge, we filed this motion in the Supreme
7 Court and the Supreme Court says, in any event,
8 appellant's motion should be addressed by the
9 trial court in the first instance. If they
10 thought there was nothing to be addressed --
11 and it says, Judge, in the first instance. So
12 if they believed that the subject of our motion
13 had been decided and it was over -- and
14 remember, Judge, this motion is filed in the
15 Supreme Court in this case. And the Supreme
16 Court took that motion from its court and
17 remanded it back to this court with
18 instructions, appellant's motion should be
19 addressed by the trial court in the first
20 instance. Now --

21 **THE COURT:** I know you can't answer for
22 them. None of us can. How simple is it that
23 they heard all the arguments, like you said,
24 over two hours, for them just to simply say
25 we're going to -- we're going to affirm the

1 decision of the court granting summary
2 judgement as to the issue of whether these
3 assignments are allowable. However,
4 understanding the situation, we're going to
5 allow you to amend. We're going to send it back
6 to the lower court with leave to amend. How
7 simple and easy would that have been if that
8 was their intention? I think you're trying to
9 argue that's their intention, Judge. But this
10 is incredibly poorly worded if that's their
11 intention.

12 **MR. EPTING:** Well, what I would say,
13 Judge, is none of us, uh, know. We don't. But
14 I think it might help, Judge, if you looked at
15 the briefs that Ms. Cundari just gave you --

16 **THE COURT:** I'm going to.

17 **MR. EPTING:** --- what you're going to find
18 is that the briefing on the, uh, question of
19 what is the result in a case, in a case in
20 which the assignment is ruled invalid is an
21 entirely separate discussion in the briefs
22 about issues that are not even before this
23 court. I believe the Supreme Court simply
24 didn't want to get into all of the discussions
25 of what the permeations were because it had

1 never, ever been addressed by the lower court
2 because there would have been no reason for the
3 lower court to address it because the lower
4 court struck it with prejudice. So the record
5 was pretty convoluted. When we argued it, the
6 oral arguments were strictly focused because
7 the oral arguments, Judge, were before any
8 opinion was issued in either *Skipper* or this
9 case.

10 **THE COURT:** Right.

11 **MR. EPTING:** So the arguments were
12 strictly limited, uh, to can you or can you
13 not, what is the public policy issues for why
14 you should or should not be able to do this.
15 But, Judge, I have no idea. But I have a
16 similar quandary for you. If that's what they
17 intended, why did they change it from a
18 dismissal with prejudice to one without?

19 **THE COURT:** I mean, my initial -- my
20 initial thought process on that was that their
21 belief was that the lower court erred in doing
22 these without prejudice, I mean, with
23 prejudice. That's a message to those of us in
24 the lower court that in the future, you know,
25 if you're going to dismiss those claims, they

1 need to be done without prejudice, not with
2 prejudice.

3 **MR. EPTING:** Right. And I think, Judge,
4 that is the answer. The only party who is
5 harmed by this, because had you done that, I
6 would have been back in your courtroom the next
7 day and with a motion to give me leave to amend
8 to insert the right party.

9 **THE COURT:** All right. Let me ask then,
10 first of all, when you received that and it was
11 unclear, why did you wait 15 days to file your
12 motion knowing that, at that point, it's out of
13 time?

14 **MR. EPTING:** No, I don't think so.

15 **THE COURT:** What was the reason for
16 waiting?

17 **MR. EPTING:** Because, Judge, you have 15
18 days to petition for a rehearing. We didn't
19 want a rehearing because --

20 **THE COURT:** Right.

21 **MR. EPTING:** --- the case was -- the
22 opinion was changed to without prejudice. So we
23 were never going to attack the opinion. We
24 simply filed a motion under *Spence*, which you
25 can file motions in the Supreme Court until the

1 remittitur is issued. And so it was never our
2 intention to question the opinion because we
3 felt like we understood why it was dismissed
4 without prejudice. We thought, okay, under this
5 case --

6 **THE COURT:** Am I not -- I mean, I asked
7 the question. Maybe I didn't ask it very well.
8 The issue, underlying issue that we're kind of
9 not dealing with at this point but that is very
10 real is that there very well may be a statute
11 of limitations problem if this court just
12 upholds the -- follows the Supreme Court ruling
13 that this case is over.

14 **MR. EPTING:** That's it.

15 **THE COURT:** All right. That was argued to
16 the Supreme Court. So they knew that if they
17 were throwing something back down here that was
18 going to be this when they had the opportunity
19 to clearly state that in this particular --
20 cause they can do that -- in this particular
21 case, because of the statute of limitations
22 issue, we're going -- this court is going to
23 allow the amendment and allow the case to go
24 forward. They could easily have done that
25 because they had the knowledge of that. They

1 knew that we would be here today doing this.

2 **MR. EPTING:** And, Judge, that is why --
3 because not only that, we had the case, *Spence*
4 *versus Spence*, that said you do exactly what we
5 did, which is to file a motion and say to the
6 Supreme Court, okay, because there may be a
7 statute problem, please give us 15 days to
8 amend.

9 **THE COURT:** And they declined that.

10 **MR. EPTING:** They declined it, Judge, for
11 the reason that they said in the first
12 instance, the trial judge needs to rule on
13 that. Because you know, Judge, motion practices
14 become its own set of rules in Supreme Court.
15 For all I know, it's like we don't need to be
16 encouraging people to ask for supplemental
17 relief in the Supreme Court after we've already
18 issued an opinion. We think these matters
19 should be returned to the lower court for
20 decision. It could be a policy matter. None of
21 us knows.

22 **THE COURT:** I mean, who knows. Here's the
23 thing. I'm confident they don't necessarily
24 want to generate more business for themselves,
25 but that's what this essentially does. No

1 matter how I rule, if I rule this way, you're
2 going to appeal this decision.

3 MR. EPTING: Yes.

4 THE COURT: Should.

5 MR. EPTING: Yes.

6 THE COURT: If I rule your way, they're
7 going to appeal this decision. They should. So
8 the Court is going to have to deal with it.

9 MR. EPTING: Well, let me ask this
10 question, Judge. Two cases were tendered to you
11 and I know you are a busy man, but Rule 15 says
12 that if -- an amendment should be allowed
13 because justice requires it.

14 THE COURT: Let me stop you there. If it
15 wasn't a situation that I've got to deal with
16 where I've got a court who affirmed a summary
17 judgement, which, as we all know, ends the
18 case, and I'm being asked to ignore that and to
19 allow the case to go forward and grant the
20 amendment, but for that, you're absolutely
21 right. I don't even think we're here. I don't
22 think they're going to oppose your Rule 15
23 motion. You're absolutely entitled to it.
24 That's not -- it's not that simple. It's not
25 that easy, as you know. So you are entitled to

1 Rule 15, but for all this other stuff you have
2 here.

3 MR. EPTING: Yeah. Well, Judge, I -- as I
4 have said, I have no idea.

5 THE COURT: I don't either.

6 MR. EPTING: I just would say to you if
7 you are reading tea leaves about what did they
8 intend ---

9 THE COURT: I know.

10 MR. EPTING: --- don't have you have to
11 come back to the last tea leaf and they say
12 this motion, the one I gave you, that they
13 filed, should be heard before the trial court.
14 And if they didn't intend that you have any
15 authority to do that, why would they say you
16 have to hear it first? Once we get to you have
17 to hear it first, aren't we really back to just
18 the question isn't this just a simple Rule 15?

19 I mean, I understand, Judge. I've
20 understood it. I believe when we filed what I
21 call the Spence motion, that they would solve
22 all this, but they didn't, and so lucky people
23 like you gets stuck with it. Thanks for your
24 time, Judge.

25 THE COURT: Thank you, sir.

1 Anything further?

2 MS. CUNDARI: Really briefly, Your Honor.
3 Just a couple of things. Your Honor's right.
4 Mr. Epting's right. The appellate court is the
5 court that decides whether there should be
6 leave to amend. That's exactly what *Spence*
7 says. It says when there's an issue where
8 there's been a dismissal with prejudice below
9 and then the court modifies, the court has
10 within its power the ability to, uh, grant
11 leave to amend.

12 Depending on how Your Honor rules, I don't
13 know that there would be an appeal from this
14 particular ruling. I don't know that that would
15 be an immediately appealable order. But
16 certainly, if we go to a new case, as I think
17 is the procedure that needs to happen here and
18 there's a ruling, there would be an appeal and
19 we could find out what the Supreme Court meant
20 by that statement.

21 The only -- what I would say to you is
22 this, Your Honor, it has to be reconciled in a
23 way that's consistent with the remittitur and
24 the dismissal without prejudice. The only way
25 that I can think of, since we're trying to

1 decide what Supreme Court thinks, to reconcile
2 in a way that's consistent is that that motion
3 needs to be filed in the trial court. That's
4 the only way it could be consistent with a
5 dismissal without prejudice. I have nothing
6 further. Thank you, Your Honor.

7 **THE COURT:** All right. Thank you, folks.

8 **MR. EPTING:** Judge, one procedural
9 question. I had delivered over Judge
10 Nicholson's argument. Did you -- I would ask
11 that the Court take the time to review it
12 because --

13 **THE COURT:** I've read it completely.

14 **MR. EPTING:** All right.

15 **THE COURT:** You're talking about the
16 transcript from Judge Nicholson.

17 **MR. EPTING:** Yes, sir.

18 **THE COURT:** Where he recused?

19 **MR. EPTING:** Yes, sir.

20 **THE COURT:** I read it last night.

21 **MR. EPTING:** Thank you, sir.

22 **THE COURT:** All right.

23

24 **(WHEREUPON, the proceedings conclude at**
25 approximately 10:52 a.m.)

CERTIFICATE

38

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston, South Carolina, on this 6th day of October, 2016.

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

Teresa B. Johnson

Official Court Reporter

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

DC & SONS, LLC,
Plaintiffs,

-vs-

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

Defendants.

* * * * *

PAVILION DEVELOPMENT
CORPORATION,

Plaintiff,

-vs-

DC & SONS, LLC,

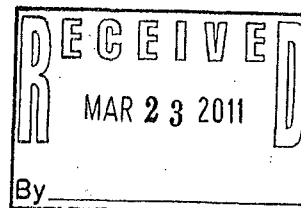
Defendant.

) TRANSCRIPT OF RECORD

) January 18, 2010

) Charleston, South Carolina

) 08-CP-10-4675



) 07-CP-10-1475

B E F O R E:

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

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

MR. EPTING: That would work, Judge.

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

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

(Whereupon, the proceedings were concluded.)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2011-CP-10-05774

PAVILION DEVELOPMENT
CORP. & LARRY MCNAIR,

PLAINTIFFS,

VS.

NEXSEN PRUET,

DEFENDANT.

TRANSCRIPT OF RECORD

MARCH 30, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE J.C. NICHOLSON, JUDGE.

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

ANDREW EPTING, ESQUIRE
Attorney for the Plaintiff

ELIZABETH VAN DOREN GRAY, ESQUIRE
TINA CUNDARI, ESQUIRE
Attorneys for the Defendant

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

1 (The following proceedings were held March
2 30, 2016, Charleston County, South Carolina, @
3 2:50 p.m.)

4 THE COURT: Pavilion Development? For
5 the record, if everybody would say who they are and
6 who they represent for the record, please.

7 MR. EPTING: My name is Drew Epting and
8 we represent the Plaintiffs, Pavilion and McNair.

9 MS. CUNDARI: Tina Cundari on behalf of
10 Nexsen Pruet.

11 MS. GREY: Betsy Gray, Nexsen Pruet.

12 THE COURT: I guess I am sort of
13 familiar with the case, okay? Mr. Epting, I think
14 Ms. Gray was here previously. I have pulled out
15 the opinion that was issued by the Supreme Court in
16 the case on the appeal where I granted the summary
17 judgment motion where I stated that the assignment
18 of the legal malpractice case was prohibited
19 because of public policy. The Supreme Court had
20 heard a previous case, earlier case and upheld my
21 decision. And in that decision, I have looked at
22 it, it says affirmed as modified.

23 In my summary judgment order I had said
24 the action was dismissed with prejudice. The
25 Supreme Court modified that finding as to without

1 prejudice; is that correct?

2 MS. CUNDARI: Correct.

3 THE COURT: I find nothing in the
4 opinion where it was remanded to this court. Now,
5 I don't know if there has been a remitter submitted
6 or not. Has there been a remitter submitted?

7 MS. CUNDARI: There has.

8 THE COURT: There has been a remitter
9 from the Supreme Court back to the circuit court?

10 MS. CUNDARI: Yes, sir. On
11 September 3rd, 2015. I can give you a copy.

12 THE COURT: What did that say?

13 MS. CUNDARI: It attached its opinion
14 to the one you just referenced. I will be happy to
15 provide a copy to the Court.

16 THE COURT: Let me take a look at the
17 remitter.

18 (Brief pause.)

19 I guess my question, to you, Mr.
20 Epting, why didn't that end the case? In other
21 words, you got a summary judgment motion against
22 you. It goes to the Supreme Court. Supreme Court
23 upholds the summary judgment motion. The only
24 thing they changed was it was without prejudice so
25 you can refile or another party could file a legal

1 malpractice case against Nexsen Pruet. Why wasn't
2 that the end of the case?

3 MR. EPTING: Judge, it wasn't the end
4 of the case --

5 THE COURT: Why not? When does it end?

6 MR. EPTING: We filed a motion in the
7 Supreme Court to ask them to grant us leave in this
8 case.

9 THE COURT: And I have got that in
10 front of me. That was my next question.

11 MR. EPTING: All right, sir.

12 THE COURT: So your opinion is it did
13 not end because of the order issued by the Supreme
14 Court looks like on September the 3rd, 2015; is
15 that correct?

16 MR. EPTING: Judge, let me check my
17 dates here.

18 THE COURT: That's the same date that
19 they sent the remitter, okay? Now, looking at the
20 order, Mr. Epting, it basically says we construe
21 appellate's motion as a petition for a rehearing.
22 Now, your motion very clearly said apparently a
23 motion for order allowing Pavilion Development
24 Larry McNair original time to amend their complaint
25 after remand. The Supreme Court said we construe

1 that motion as a petition for rehearing. As such
2 this motion was not timely filed, therefore, it is
3 denied.

4 Now, the next sentence is what is
5 throwing me a loop, okay? Again, I don't
6 understand what they mean. It says in any event,
7 appellate's motion should be addressed by the trial
8 court in the first instance. Now, what does that
9 say to you?

10 MR. EPTING: Judge, I think it does
11 because -- let me ask this question. Have you read
12 the case Spence vs. Spence?

13 THE COURT: No, I have not. I have not
14 read the case. I assume it was the same issue and
15 I didn't read it.

16 MR. EPTING: It is, Judge. In Spence
17 vs. Spence, that's what happened. The Court -- why
18 don't I just read it, Judge.

19 THE COURT: Just tell me about it.

20 MR. EPTING: So in any event, it's a
21 complicated case, but what happens in the Supreme
22 Court is that there has been a grant of a dismissal
23 with prejudice. So the Supreme Court said the
24 people had no choice but to appeal. It wasn't like
25 the trial judge could have granted a motion to

1 amend because the dismissal was with prejudice and
2 so he had to appeal. In Spence vs. Spence the
3 Supreme Court said if it is -- let me just read it.
4 "When a Plaintiff is not given the opportunity to
5 file and serve an amended complaint but is left
6 with no choice but to appeal after dismissal of her
7 case with prejudice, an appellate court which
8 affirms the dismissal may modify the lower court's
9 order to find the dismissal is without prejudice.
10 When the statute of limitations has expired the
11 appellate court may in its discretion impose a
12 reasonable period of time in which to amend the
13 complaint. Appellate court should follow this
14 procedure when the Plaintiff presents additional
15 allegations or a different theory of recovery."

16 Here, Judge, of course the reason it
17 was dismissed is we were supposed to have sued in
18 the name of the client, not the assignee. And so
19 we fit squarely within the exception and what --

20 THE COURT: It says the Supreme Court
21 can issue that order and in this case you filed the
22 order, but it was not timely, therefore, they
23 treated it as a -- I don't know why they treated it
24 as a motion for rehearing, because obviously
25 doesn't say that.

1 MR. EPTING: And, Judge, of course I
2 don't know this matters, we believed we couldn't
3 file the motion until the time for a rehearing had
4 passed. So we filed the motion thinking that we
5 were qualifying under Spence vs. Spence and we
6 expected that the Supreme Court would hear it and
7 would grant relief on the basis of Spence vs.
8 Spence. But what the court clearly said was, and
9 understand this, Judge, there is a motion filed in
10 the Supreme Court. The last line of the Supreme
11 Court order says in any event, appellant's motion
12 should be addressed by the trial court.

13 So the motion that was filed they're
14 saying we aren't going to hear it in any event
15 because it has to be heard first by the lower
16 court. I don't think there is any other way to
17 read it, Judge.

18 Now, you know, Judge, it brings us to
19 this issue. In this case there isn't any question
20 but that a wrong has been comitted. Judge Young
21 held that.

22 THE COURT: Well, I don't question
23 that. I didn't question that when we had the
24 summary judgment hearing. The whole issue was
25 whether you could assign it.

1 MR. EPTING: Right. And this Court's
2 intuition, Judge, for two and-a-half pages was why
3 don't I just strike the assignment. But six months
4 later that was not the order that you entered and
5 the point that I was getting ready to make, Judge,
6 is this should be a remedy for a wrong. This was a
7 novel issue. It wasn't like we didn't understand
8 the problem. It was all put on the record in front
9 of Judge Young. So we go up to the Supreme Court
10 thinking that it can be assigned, why is it any
11 different than the assignment of any other claim to
12 find out that it isn't. So we are back down here
13 and if this court --

14 THE COURT: When did the statute run,
15 do you remember?

16 MR. EPTING: The statute, Judge, and
17 that's the point here.

18 THE COURT: How long ago did it run?

19 MR. EPTING: It would have run, Judge,
20 about nine months after.

21 THE COURT: After what?

22 MR. EPTING: Your order.

23 THE COURT: Nine months after my order.

24 MR. EPTING: If you had dismissed.

25 THE COURT: Why didn't you follow my

1 order and sue in the real name?

2 MR. EPTING: Because, Judge, you
3 dismissed with prejudice. And we didn't have any
4 alternative but to appeal.

5 THE COURT: Okay.

6 MR. EPTING: And that's what Spence vs.
7 Spence says. Because absolutely if you would have
8 dismissed without prejudice it would have made
9 everything so much easier. We just turned around
10 and filed the lawsuit. Now, we probably, Judge,
11 would still have had to appeal.

12 THE COURT: Well, you wanted that issue
13 resolved on the assignment.

14 MR. EPTING: You surely do.

15 THE COURT: I understand that.

16 MR. EPTING: But, Judge, I do
17 understand it's a little unusual. It's an
18 interesting procedural --

19 THE COURT: So basically what you're
20 saying is instead of the Supreme Court hearing the
21 motion to allow you to amend they just dumped it
22 back in my lap.

23 MR. EPTING: That's it, Judge.

24 THE COURT: Okay. Be glad to hear you.

25 MS. CUNDARI: Your Honor, thank you. I

1 don't think that's correct. I don't think the
2 Supreme Court has dumped this issue back in your
3 lap.

4 THE COURT: What does that last
5 sentence mean? That's my question. I'm not sure
6 Mr. Epting is not right in his interpretation of
7 what it means.

8 MS. CUNDARI: That sentence needs to be
9 read consistently with the opinion which dismisses
10 the case without prejudice. So you can do that by
11 saying yes, that motion perhaps is to be heard,
12 those issues, that motion about whether the statute
13 of limitations applies, whether a real party
14 interest is really suing now. But not this court
15 in this case. By another trial court on another
16 day in a new case. They have a remedy. Their
17 remedy is filing a new case.

18 THE COURT: But they really don't
19 because the statute has run.

20 MS. CUNDARI: We haven't even gotten
21 there yet. We haven't even raised that defense
22 yet. We are sort of getting ahead of ourselves.
23 Until they file a new case as the real parties in
24 interest we submit represented by new counsel who
25 are independent. As you know this case, this very

1 issue was argued at the Supreme Court in both
2 briefs. The opening brief that they filed as well
3 as their reply brief. They said court, do not --
4 if you dismiss this case without prejudice it will
5 essentially end the case. You know what the
6 Supreme Court said? Dismissal without prejudice.
7 So that's what you're bound by, Your Honor, is the
8 Supreme Court opinion. The remitter does not
9 attach that order. It only attaches the opinion
10 saying dismissal without prejudice. This case is
11 over.

12 THE COURT: What's your interpretation
13 of that sentence there?

14 MS. CUNDARI: My interpretation of that
15 sentence is that the issues raised in that motion
16 are for the trial court on another day in another
17 case. That's the only way it can be read to be
18 consistent with dismissal without prejudice.

19 THE COURT: Assuming Mr. Epting is
20 right, I think he has got a motion to amend the
21 complaint as well as add substitute parties, I
22 believe it is a substitute parties motion, right?

23 MR. EPTING: Yes, sir.

24 THE COURT: Obviously you want to
25 substitute a real party in interest?

1 MR. EPTING: Yes, sir.

2 THE COURT: I think Mr. Epting is right
3 as far as his interpretation, okay? So I guess we
4 have to move to a request for a motion to amend his
5 complaint which I don't really have any problem
6 with. I do have some real questions and difficulty
7 on substitution of parties under the law. I don't
8 know if y'all -- did y'all address that issue in
9 the memo? I don't think you did.

10 MS. CUNDARI: We addressed -- these
11 rules, Your Honor, Rule 15 and Rule 17 they apply
12 prejudgment. They don't apply after a party has
13 won a case, has to go to the Supreme Court and won
14 it again. So these --

15 THE COURT: I understand that. That's
16 my problem with it, but at the same time I think he
17 probably is entitled to be heard based upon the
18 language the Supreme Court has put in that order,
19 okay? Whether they deny his motion to -- they deny
20 his motion to -- motion to allow Pavilion or Larry
21 McNair a reasonable time to amend their complaint
22 after remand. Okay?

23 So what I'm going to do is give you all
24 an opportunity to fully brief whether or not his
25 motion, he should be entitled to amend and

1 substitute parties, okay, unless you think you have
2 already got it briefed properly.

3 MS. CUNDARI: We think we do have it
4 briefed, Your Honor.

5 THE COURT: You think you do. Mr.
6 Epting, do you think you have it briefed properly?

7 MR. EPTING: Judge --

8 THE COURT: I'm going to give you more
9 time if you want to.

10 MR. EPTING: Judge, I think we filed
11 the appropriate motion.

12 THE COURT: I will hear your arguments
13 on the motions then.

14 MR. EPTING: Judge, it is pretty
15 straightforward. The record -- the Supreme Court
16 has said that the case needs to proceed in the name
17 of the client rather than the assignee. And under
18 Rule 17 it says no case shall be dismissed on
19 account of their being not named the real party in
20 interest. Under Rule 15 if you grant the amendment
21 it relates back so that there is no statute of
22 limitations problem which is why it needs to be
23 done in this case, Judge.

24 THE COURT: Be glad to hear you.

25 MS. CUNDARI: Your Honor, a motion to

1 amend the complaint should be freely granted in the
2 interest of justice when there's no prejudice to
3 the Defendant. And here the prejudice is strong.
4 First of all, Nexsen Pruet won this case and now is
5 sitting in this courtroom having to defend the same
6 case based on a new motion reviving the case that
7 Nexsen Pruet already won. The Supreme Court said
8 dismissal without prejudice.

9 Number two, the reason why it is
10 prejudicial is because we don't even know who is
11 bringing this motion. As far as we know it is
12 still DC and Sons which is not Nexsen Pruet's
13 client, it's a third party that was adversary to
14 Nexsen Pruet's client. They are asking to be
15 substituted as real parties in interest which tells
16 us that DC and Sons is still in control, same
17 counsel. So this whole procedure, this whole taint
18 of the case that Your Honor recognizes and the
19 Supreme Court recognizes is still happening. So
20 that's the prejudice to Nexsen Pruet.

21 Nexsen Pruet is entitled to a genuine
22 legal malpractice case bought by real parties in
23 interest we submit represented by new counsel.
24 That's the procedure contemplated in the case law
25 when these assignments get stricken, when there is

1 an assignment between the adversary. The courts
2 say you got to come back with new counsel and the
3 reason is is that they represented DC and Sons, the
4 judgment creditor. And so we question whether
5 Plaintiffs would even bring this case if they were
6 the real parties in interest because Larry McNair,
7 one of the Plaintiffs, he got a full release. Why
8 in the world would he be in this courtroom suing
9 Nexsen Pruet for legal malpractice? And number
10 two, Pavilion --

11 THE COURT: I don't remember who was
12 the person that originally had the lawsuit.

13 MR. EPTING: Pavilion, Judge.

14 THE COURT: Pavilion.

15 MR. EPTING: Pavilion brought the
16 lawsuit first against DC and Sons. And so the
17 lawsuit was brought in the name.

18 THE COURT: And the settlement of
19 Pavilion assigned it to McNair?

20 MR. EPTING: The settlement assigned
21 the Pavilion McNair suit, Judge, the proceeds to DC
22 and Sons. And this lawsuit is actually brought,
23 Judge, in the name of McNair and Pavilion. And so
24 the real parties in interest are actually named in
25 this pleading but --

1 THE COURT: That's something I don't
2 recollect.

3 MR. EPTING: Sorry?

4 THE COURT: I don't recollect. I
5 thought the real party was not even named in the
6 lawsuit.

7 MR. EPTING: No, sir.

8 THE COURT: And the settlement issue.
9 How did you settle the part where the assignment
10 took place? Who was that party that assigned it to
11 your client?

12 MR. EPTING: The actual Plaintiff
13 Pavilion Development and Larry McNair.

14 MS. CUNDARI: What happened here, they
15 brought the case in the name of Pavilion and Larry
16 McNair, but they really weren't the real parties in
17 interest.

18 THE COURT: No, they weren't. They
19 were the assignees if I remember correctly.

20 MS. CUNDARI: Correct. They assigned
21 the claim.

22 THE COURT: Who was the assignor to
23 these people?

24 MS. CUNDARI: They were assignor.

25 MR. EPTING: The actual assignor of the

1 proceeds, Judge, was Pavilion Development and
2 McNair, the Plaintiffs in this lawsuit.

3 MS. CUNDARI: It was confusing because
4 on its face it looked like a genuine legal
5 malpractice case and it wasn't until we stumbled
6 upon the assignment and brought our answer, brought
7 our counterclaim, brought DC and Sons in, the
8 assignee.

9 THE COURT: I don't remember who are
10 the parties to the assignment off the top of my
11 head.

12 MS. CUNDARI: The parties -- Your
13 Honor, you drafted the assignment, but the parties
14 to the assignment were Pavilion Development Company
15 and Larry McNair assigned claims -- the claims, the
16 legal malpractice claims, which is what this Court
17 found and the Supreme Court found as well as the
18 control of the case, the proceeds, everything, DC
19 and Sons. They are adversaries in the case below.
20 We lost. We are going to confess judgment in your
21 favor. We are not going to challenge the amount
22 for 4.5 million dollars and you go sue our lawyers,
23 we are out of here. We got a full release, got
24 what we wanted, full release, and Pavilion was just
25 a specially created entity for purposes of

1 purchasing the property so what do they care? Here
2 we are, we are still defending this case that is
3 brought and controlled, and I haven't heard
4 otherwise, by a party that's not even been a client
5 of Nexsen Pruet. That's the problem with the case
6 we have.

7 THE COURT: Who was the original client
8 of Nexsen?

9 MS. CUNDARI: Pavilion Development
10 Company and Larry McNair.

11 THE COURT: Was the original client?

12 MS. CUNDARI: Yes, sir.

13 MR. EPTING: Judge, there is one issue
14 here that I will raise. It looks like to me this
15 motion is pretty simple. The Supreme Court has
16 sent this back to you. I think the first question
17 of is this Court to do something about it. Then
18 there's a second question. There are these
19 accusations that are made about Mr. Kefalos and I
20 and what we have done and what we should have done
21 and how is it that we were representing these
22 different interests. And the answer, Judge, is we
23 didn't do anything wrong and where I am headed with
24 this is if there is any question or if it bears in
25 any way in this Court's mind this should go back to

1 Judge Young and the reason I say that, Judge is
2 this: On the morning of trial --

3 THE COURT: Let me say this: I have
4 never thought you did anything wrong. Okay?

5 MR. EPTING: But, Judge,
6 unfortunately --

7 THE COURT: In other words, in my
8 opinion the assignment was perfectly legal. There
9 was nothing wrong with the assignment. But because
10 of public policy and the way lawyers operate, this
11 Court was of the opinion it should not be allowed.
12 It didn't have anything to do with your conduct or
13 anybody's conduct or the assignment. I don't know
14 if that answers your question. Throughout this
15 whole process I have never thought the lawyers did
16 anything wrong. Y'all settled the case, part of
17 this case was assignment. I just took the position
18 that the way attorneys operate with their clients
19 that that couldn't function within the legal
20 community and it should be barred. Didn't have
21 anything to do with conduct, okay? Because I think
22 the assignment was very valid.

23 MR. EPTING: Judge, well --

24 THE COURT: Does that answer your
25 question?

1 MR. EPTING: It does, Judge. With all
2 due respect, you said that on the record when we
3 argued this orally in March of 2013. The order
4 that bears your signature that was six months later
5 says I think some things that are just
6 fundamentally not correct about what Mr. Kefalos
7 and I did and the accusations against us that we
8 bought shame and embarrassment upon the profession.
9 That's one of the things it says. That we hid
10 things from Judge Young, that he didn't know these
11 things, and the answer, of course, Judge, is we
12 understood that there was going to be a legal
13 malpractice case which is why every bit of this,
14 every bit of this settlement --

15 THE COURT: Let me say this: If you
16 want me to send it to Judge Young I will be happy
17 to send it to Judge Young. I will be happy to get
18 out of the mess.

19 MR. EPTING: Well, actually --

20 THE COURT: I don't have any problem
21 doing that.

22 MR. EPTING: Well, Judge, that's
23 exactly --

24 THE COURT: If that's what you want I
25 will be happy to do that.

1 MR. EPTING: I think that is the thing

2 --

3 THE COURT: Because I have heard enough
4 about it.

5 MR. EPTING: Well, Judge, because of
6 what I am hearing that's exactly --

7 THE COURT: It was a proposed order. I
8 probably should have X'd all that out because
9 that's not really what I thought.

10 MR. EPTING: It is not --

11 MS. CUNDARI: That's not what you said,
12 Judge.

13 THE COURT: But I signed it so I got to
14 live with it. I will live with it.

15 MR. EPTING: Well, the unfortunate
16 thing, Judge, is what you said on the record.

17 THE COURT: Is what I said today.

18 MR. EPTING: Is exactly what you said
19 today and you said on the record so why don't I
20 just strike the assignment and then this lawsuit
21 can proceed because it's in the name of Pavilion
22 and McNair and you turned to Ms. Gray and you said
23 what about that? What's the prejudice? Why won't
24 that work? Is there anything wrong with it? And
25 after two pages she finally says yes, Judge, you're

1 right. And yes, I too regret, Judge, that that's
2 not what happened and we wound up with an order
3 that was quite different. But I think the safe
4 thing to do, Judge, because we could wind up back
5 in the Supreme Court. I appreciate everything you
6 said. I believe that. But it isn't what the order
7 said and I worry that we are functioning --

8 THE COURT: I got to live with my
9 order, okay? If I signed it, got the signature on
10 it it's the order. I can't get around that.

11 MR. EPTING: I'm afraid that's right.

12 THE COURT: Sometimes I don't
13 necessarily enter proposed orders properly and I
14 apologize for that, okay?

15 MR. EPTING: But, Judge, what -- here's
16 what I think happened. I still think because we
17 could wind up back in the Supreme Court, I think
18 the safe thing is to let Judge Young decide this.
19 But the Supreme Court essentially took the time off
20 the oral arguments and we argued for some time.
21 One of the biggest issues was what happened in
22 front of Judge Young. And the one thing that I
23 think I convinced the Supreme Court of was we went
24 overboard to reveal everything that had happened
25 and the reason, Judge, that they dismissed the case

1 without prejudice was because all of the things
2 that were in your order about why it was dismissed
3 with prejudice had to do with things that were
4 hidden from Judge Young, the embarrassment,
5 humiliation that Mr. Kefalos and I brought to the
6 profession. Regrettably those are things in the
7 case and the Supreme Court didn't say we are
8 changing this from a dismissal with prejudice to
9 without prejudice because we don't find any truth
10 to any of this. And I respectfully, Judge, request
11 that you send it to Judge Young and that way he
12 will know exactly what he intended and if we wind
13 up back in the Supreme Court --

14 THE COURT: Let me say this: I'm not
15 going to send it to Judge Young. I'm just going to
16 recuse myself, okay? You can talk to Judge Young.
17 If he wants to accept it and hear it that's great.
18 Otherwise the clerk will just assign it to someone.

19 MR. EPTING: All right, sir.

20 THE COURT: I'm not going to lay it on
21 Judge Young unless he wants it laid on him, okay?

22 MR. EPTING: Well, I think he may --

23 THE COURT: All I will do is based upon
24 your request, I will recuse myself.

25 MR. EPTING: All right, sir.

1 THE COURT: Okay? Now, who hears it
2 y'all have to talk to -- who is administrative
3 judge? Judge Young. So I suggest the two of you
4 talk to him and see if he wants to hear it or if he
5 wants to assign it to somebody, okay? It's not
6 going to be me because I just recused myself.

7 MR. EPTING: Thank you, Judge.

8 THE COURT: Thank you all so very much.

9 (These proceedings were concluded at
10 3:45 p.m., March 30, 2016, Charleston County, South
11 Carolina.)
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1 CERTIFICATE OF REPORTER

2
3 I, Ruth C. Weese, Registered Diplomate
4 Reporter for the State of South Carolina at Large,
5 do hereby certify that the foregoing transcript is
6 a true, accurate, and complete record.

7 I further certify that I am neither related
8 to nor counsel for any party to the cause pending
9 or interested in the events thereof.

10 Witness my hand, I have hereunto affixed my
11 official seal this 11th day of April, 2016 at
12 Charleston, Charleston County, South Carolina.

13
14 

15
16 _____
17 Ruth C. Weese

18 Registered Diplomate

19 Reporter
20
21
22
23
24
25

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DC & Sons, LLC,

Plaintiff,

vs

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

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

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

Pavilion Development Corporation,

Plaintiff,

vs

DC & Sons, LLC,

Defendant.

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

BY

JULIE J. ARNSTROM
CLERK OF COURT

2011 JAN 13 AM 11:19

FILED

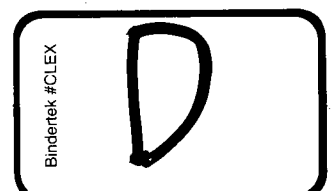
This matter came before me on Plaintiff, DC & Sons' renewed motion for summary judgment and motion in limine to exclude testimony and/ or evidence relating to Defendant Pavilion Development Corp.'s ("Pavilion") liability for breach of contract and abuse of process. I have considered the arguments of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

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

THE UNDISPUTED FACTS

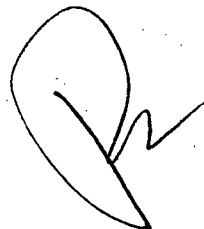
1. On August 18, 2006, Defendant Larry McNair, as vice president of Pavilion, signed a contract for the purchase of lots 18, 19 & 22 ("the Cottage on the Creek") from DC &

R



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

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

A handwritten signature, possibly reading "P", is located at the bottom right of the page.

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

LIABILITY AS A MATTER OF LAW

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

A. Willful Act

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

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



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

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

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

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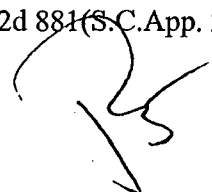
2. Filing and maintaining actions for declaratory judgment as to what parties had an interest in the Cottage on the Creek property and quiet title was a willful act in the use of process not proper in the regular conduct of the proceeding.

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

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

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

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



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

B. Ulterior Purpose

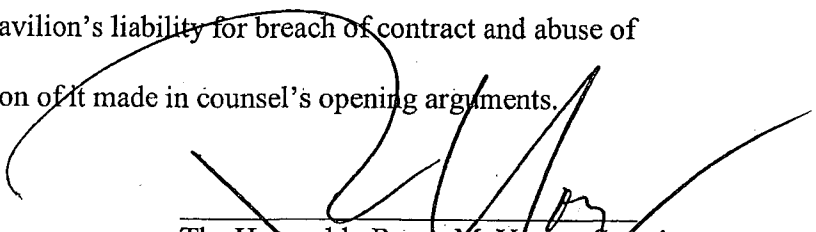
Without an improper purpose, there can be no abuse of process. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or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

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



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

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


The Honorable Roger M. Young, Sr.

Circuit Judge for S.C.

2134

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Thomas A. Russon, Jr. Circuit Court Judge

Trial Court Case No.: 2011-CP-10-5774
Appellate Case No.: 2016-001632

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.

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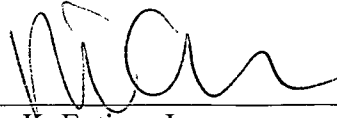
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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Appellants' Response in Opposition to Respondent's Motion to Dismiss the Appeal by depositing a copy in the United States Mail, Postage prepaid, on December 12, 2016, addressed to Respondent's attorneys of record as follows:

Elizabeth Van Doren Gray, Esquire
Tina M. Cundari, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

By 
Andrew K. Epting, Jr.
Michelle N. Endemann

Attorneys for Appellants

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

December 12, 2016

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

RE: Pavilion Development Corp. & Larry McNair v. Nexsen Pruet, LLC, et al
CA No.: 2011-CP-10-5774
Appellate Case No.: 2016-001632

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellants' Response in Opposition to Respondent's Motion to Dismiss the Appeal together with a Proof of Service in the above-referenced matter. I would greatly appreciate your filing the original and returning the file-stamped copy to me in the self-addressed, stamped envelope provided. Thank you.

With kindest regards,

ANDREW K. EPTING, JR., LLC



Michelle N. Endemann

MNE/agg

Enclosures – as stated

cc: Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Tina Cundari, Esquire
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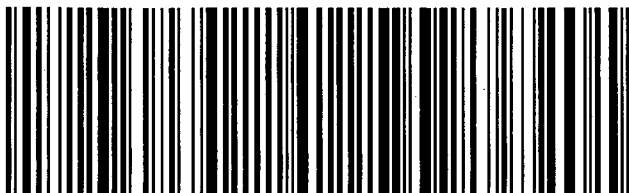
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