THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

RECEIVED
DEC 19 2016
SC Court of Appeals

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

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

v.

Nexsen Pruet, LLC...Respondent,

v.

DC & Sons, LLC.. Counterclaim Defendant.

REPLY

Pursuant to Rule 240(f), SCACR, Respondent Nexsen Pruet, LLC, ("Nexsen Pruet") hereby replies to the response to the motion to dismiss the appeal, which was purportedly filed on behalf of Pavilion Development Corp. & Larry McNair ("Appellants").[1] The motion to dismiss should be granted because this case was ended by

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[1] Nexsen Pruet uses the word "purportedly" because although this case was brought in the names of Pavilion Development Corp. (Pavilion) and Larry McNair (McNair), the circuit court determined, and the Supreme Court of South Carolina affirmed, that the case was brought and controlled by an entity known as DC & Sons, LLC, which was Appellants' adversary in the litigation that led to this case. (Ex. B, Mot. to Dismiss.) Because no substitution of parties has taken place, and no showing has been made to establish that Pavilion and McNair are now in control of the case and are the real parties in interest,

the Supreme Court of South Carolina on August 12, 2015, and the order on appeal is not an immediately appealable order.

First, Appellants fail to provide any legal support for the proposition that a case that has been dismissed without prejudice should be permitted to proceed, particularly when there has been no showing that taint that has infected this case from its inception has been cured. The law is well established that a dismissal without prejudice ends a case as filed. *See Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006) ("When a complaint is dismissed without prejudice[,] the plaintiff is given the opportunity to file and serve an amended complaint . . . ."). When a case has been dismissed without prejudice, the proper procedure is for the plaintiff to correct the deficiencies in the complaint and to re-file it. *See Spence*, 368 S.C. at 128, 628 S.E.2d at 880–81 ("Dismissal of a case 'without prejudice' means a plaintiff may reassert her complaint by curing defects that led to the dismissal."). There is no procedural basis by which Rule 15 can be used to revive a case that has been dismissed.

Here, the Supreme Court ended this case on August 12, 2015, when it ruled that the proper remedy is dismissal without prejudice. Although the Supreme Court could have remanded the case for further proceedings, or specifically "imposed a reasonable period of time in which [the appellants could] amend the complaint," that is not what the Court did. *See Spence*, 368 S.C. at 131, 628 S.E.2d at 881. Instead, the Court dismissed the case without prejudice.

In making this decision, the Court was fully aware of the issue concerning the

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Nexsen Pruet finds itself continuing to defend a case brought by an entity that is not and never has been a client of Nexsen Pruet and to whom Nexsen Pruet owed no duties and is immune from suit.

statute of limitations. During the first appeal, Appellants specifically requested that if the Court "f[ound] fault with the assignment, that it be voided, but the case otherwise be allowed to proceed as even a dismissal without prejudice will result in Nexsen Pruet claiming the statute of limitations has run even though the new suit without the assignment would be filed in the names of the now Plaintiffs." **(Ex. A.)** Despite this argument being presented both in the briefs and at oral argument, the Supreme Court ruled that the proper remedy was dismissal without prejudice rather than remanding the case for further proceedings.

After the opinion was issued, Appellants could have petitioned the Court for rehearing and specifically requested leave to amend the complaint, but Appellants failed to timely do so. Instead, Appellants waited until after the time to petition for rehearing expired and filed a motion in the Supreme Court. (Ex. D, Mot. to Dismiss.) The Supreme Court denied the motion as late, stating that "Appellants' motion should be addressed by the trial court in the first instance." (Ex. E, Mot. to Dismiss.) Although the case should have been over, and no further motions permitted, Appellants relied upon this language in the Supreme Court's order to file, brief, and argue a motion to amend the complaint.

Contrary to what Appellants argue, the circuit court's order denying the motion to amend the complaint does not "effectively discontinue[] Pavilion and McNair's suit against Nexsen Pruet." (Resp. p. 5.) Pavilion and McNair never brought suit against Nexsen Pruet. The suit against Nexsen Pruet was brought by DC & Sons, the entity to whom Pavilion and McNair assigned the legal malpractice claim. Pavilion and McNair were the plaintiffs in name only. This is precisely why the case should be dismissed and a new case filed. Without a clean break, Nexsen Pruet finds itself continuing to defend a legal malpractice

case that was filed and pursued by a party was not Nexsen Pruet's client, who was instead an adversary in litigation (from whom Nexsen Pruet is immune from suit), and who was represented by the same counsel who now represent Appellants.

Moreover, the order on appeal does not "in effect, bar[] the action as the statute of limitations prevents a new action from being filed." (Resp. p. 5.) The order says nothing about the statute of limitations or whether it is a viable defense. Whether the newly filed case would be time barred has not been decided by any court, although it appears Appellants have made their own determination that it has expired. *Id.* Further, no court has abrogated Appellants' right to bring their "valid legal malpractice claim." (Resp. p. 8.) Appellants are free to file a new complaint in a new case, and must do so as the real parties in interest.

Contrary to what Appellants contend, Nexsen Pruet's argument that this case is over and the order on appeal is not immediately appealable is not "incongruous." (Resp. p. 4.) The final order ending this case was the Supreme Court's opinion dated August 15, 2015. The order denying the motion to amend the complaint did not end this case and therefore is not an immediately appealable order. This case was ended long before the trial court issued the order that Appellants now seek to appeal.

Finally, the circuit court did not rule that Appellants are "absolutely entitled" to amend their complaint. (Resp. pp. 2, 4.) Instead, the circuit court simply recognized that under Rule 15, amendments are typically permitted as justice requires. However, the circuit court recognized that this case did not present a typical Rule 15 scenario. Instead, the circuit court was presented with an opinion from the Supreme Court affirming summary judgment, "which, as we all know, ends the case." (6/2/2016 Tr., 34:17-18.) The circuit

court further recognized that the court was "being asked to ignore that and allow the case to go forward and grant the amendment," which the court ultimately decided not to do. *Id.* at 18-20.[2]

CONCLUSION

The motion to dismiss should be granted. To allow Appellants to continue this action is both unjust and procedurally unsound. Additional briefing and argument is not necessary to determine what the Supreme Court meant by "dismissal without prejudice." The Court should uphold its prior ruling and require Appellants to re-file a new action in order to proceed with this suit.

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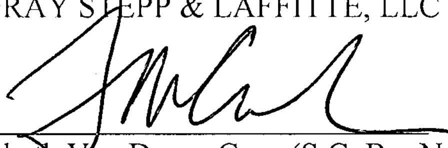
[2] The complete colloquy is as follows:

> **MR. EPTING**: Well, let me ask you this question, Judge. Two cases were tendered to you and I know that you are a busy man, but Rule 15 says that if -- an amendment should be allowed because justice requires it.
>
> **THE COURT**: Let me stop you right there. **If it wasn't a scenario that I've got to deal with where** I've got a court who affirmed summary judgment, which, as we all know, ends the case, and I'm being asked to ignore that and allow the case to go forward and grant the amendment, **but for that**, you are absolutely right. I don't even think we're here. I don't think they are 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**.

(6/2/2016 Tr. 34:9 - 35:2 (emphasis added).)

SOWELL GRAY STEPP & LAFFITTE, LLC



By: ______________________________

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December 19, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774
Appellate Case No.: 2013-002796

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Whom Nexsen Pruet, LLC is the Respondent

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EXHIBIT
A

McNair, both former clients of Nexsen Pruet could proceed as pled. The invalidity of the assignment does not undermine the validity of the malpractice claim, and this comports with the general law of assignment. See 6 AM. JUR. 2D Assignments § 155 (2004).See also *Postal Instant Press v. Jackson*, 658 F. Supp. 739, 741 (D. Colo. 1987) ("Once an assignment is made, all interests and rights of the assignor are transferred to the assignee. However, if the assignment is invalid or incomplete, the assignor may maintain a suit in his own name.")

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

CONCLUSION

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

[signatures on following page]

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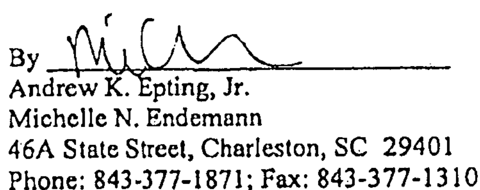
assignment would be void, but the underlying action would survive."); *Kommavongsa v. Haskell,* 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003) (Holding the proper remedy for an invalid assignment of a legal malpractice claims is to void the assignment and allow the legal malpractice lawsuit to "proceed in the normal course, as between the proper parties thereto."; See also *Joos v. Drillock,* 127 Mich. App. 99, 100, 338 N.W.2d 736, 737 (1983).

CONCLUSION

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

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC



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Attorneys for Appellants

Dated this 3 day of November, 2014
Charleston, South Carolina

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DC & Sons, LLC.. Counterclaim Defendant.

PROOF OF SERVICE

I certify that on December 19, 2016, I served the Reply in Support of Motion to Dismiss by electronic mail on the following:

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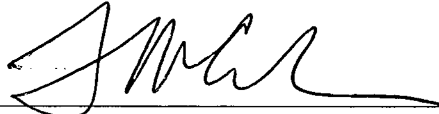
By: 

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December 19, 2016

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Litigation is our Business.

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December 19, 2016

By Hand Delivery
The Honorable Jenny Abbott Kitchings
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Re: Pavilion Development Corp. & Larry McNair v. Nexsen Pruet
Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774
SGSL No.: 5347/1509

Dear Ms. Kitchings:

Enclosed for filing are an original and seven (7) copies of the Reply in Support of Motion to Dismiss Appeal in the above-referenced matter. Please file the Reply and return a clocked-in copy to my office by our courier.

By copy of this letter, and as evidenced by the Proof of Service, I am serving the Reply on opposing counsel.

Thank you for your assistance. Please contact me if you have any questions.

Sincerely,

Tina Cundari
TMC:tc

cc: By Electronic Mail
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George J. Kefalos, Esquire
Michelle N. Endemann, Esquire
James G. Long, Esquire