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**S.C. SUPREME COURT**

**THE STATE OF SOUTH CAROLINA**  
In the Supreme Court

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

The Honorable Thomas Russo, Circuit Court Judge

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

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

v.

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

AND

DC & SONS, LLC .....Counterclaim Defendant.

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

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**A. INTRODUCTION**

Nexsen Pruet's "renewed motion to dismiss" is an improper successive motion to dismiss that is made on the same grounds as the motion to dismiss that was considered and denied after "careful consideration" by the Court of Appeals on January 27, 2017. (See Court of Appeals Order denying motion to dismiss). Nexsen Pruet should not be allowed to refile the same motion simply because this Court has agreed to take jurisdiction of the appeal. As the Court of Appeals held, this

appeal should be decided on the merits after full briefing, completion on of the Record on Appeal, and oral argument.

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 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).

This renewed motion to dismiss 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.<sup>1</sup> 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. 106, 628 S.E.2d 869 (2006) as the

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

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. Nexsen Pruet’s Motion to Dismiss has been considered and Denied by the Court of Appeals**

Nexsen Pruet filed an identical motion to dismiss before the Court of Appeals. The motion to dismiss was denied by the Court of Appeals on January 27, 2017. (Order Denying Motion to Dismiss). Nexsen Pruet has filed its “renewed” motion to dismiss on the same grounds as were already considered and rejected by the Court of Appeals. This order was not appealed to this Court nor did Nexsen Pruet seek certification to this Court with regard to the order. The Court of Appeals’ order is final and binding until after full briefing. This Court should not entertain this successive motion to dismiss and should deny it in favor of decision after full briefing and submission of the Record on Appeal. Appellants are simultaneously filing their initial brief.

## 2. 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 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 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.<sup>2</sup> 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.

**3. 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

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<sup>2</sup>**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)

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.

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,<sup>3</sup> 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**

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

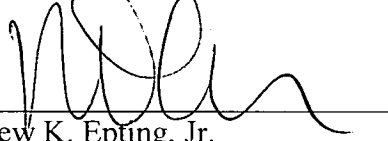
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<sup>3</sup> THE COURT: I think Mr. Epting is right as far as his interpretation, okay? (March 30, 2016 Transcript, p. 12 lines 2-3)

appeal, it should be decided only after full briefing, completion of the record, and oral argument as per the rules of appellate procedure. This motion has already been concluded by way of the final and binding ruling of the Court of Appeals which states: "After careful consideration, the motion is denied."

Respectfully submitted by:

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On this 21 day of February 2017  
Charleston, SC

In the Supreme Court

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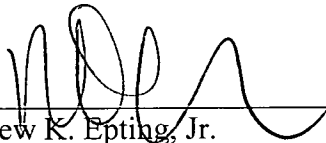
AND

DC & SONS, LLC .....Counterclaim Defendant.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal AND Appellants' Response in Opposition to Respondent's Renewed Motion to Dismiss the Appeal by depositing a copy in the United States Mail, Postage prepaid, on February 27, 2017, addressed to Respondent's attorneys of record as follows:

Elizabeth Van Doren Gray, Esquire  
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By   
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