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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

v.

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

AND

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

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court erred in interpreting 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"?

STATEMENT OF THE CASE

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 the lower court held that Appellants are "absolutely entitled" to amend their complaint pursuant to the rules of civil procedure, but the court stated 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). In other words, the lower court would have allowed the amendment but for its interpretation that this Court's order prevented it from doing so.

STATEMENT OF THE FACTS

This is a legal malpractice action filed on August 16, 2011. (Complaint). 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 litigation.

1. The Underlying Litigation (Case No. 2007-CP-10-1457)

On August 11, 2006, Pavilion Development Corp. ("Pavilion"), represented by Nexsen Pruet, entered into a contract with DC & Sons to purchase real property on Shem Creek for $5,000,000.00. Pavilion deposited $50,000.00 with its escrow agent as an earnest money deposit. Prior to the closing, Nexsen Pruet raised a question about DC & Sons' ability to deliver good and marketable title because Nexsen Pruet argued a claim asserted by a third party created an encumbrance. DC & Sons explained that the supposed claim was utterly without merit, there was no encumbrance on the property, and that DC & Sons was capable of delivering good and marketable title and offered to provide title insurance. DC & Sons insisted that Pavilion either close or release DC & Sons from the contract so that DC & Sons could sell it to an alternate buyer. Pavilion refused. Instead, Nexsen Pruet, on behalf of Pavilion, sued DC & Sons for specific performance and to quiet title and filed a maintained a *lis pendens* on the property (the "underlying litigation"). These actions formed the basis of the abuse of process judgment that ultimately gave rise to this legal malpractice action.

The *lis pendens* was removed by order of Judge Young. (March 23, 2009 order). Judge Young's order effectively ended Pavilion's claim against DC & Sons, but not DC & Sons' counterclaim as DC & Sons lost its alternate buyer and a $5,000,000.00 sale.

The trial of the counterclaim of DC & Sons against Pavilion was to commence on January 18, 2011. Before the trial commenced, DC & Sons had asked, and Judge Young allowed, DC & Sons to renew its motion for summary judgment as to. Judge Young allowed rehearing and granted DC & Sons motion. (See R. pp. 45-59). In his January 18, 2011 order Judge Young, in part, held:

> 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.
> (R. p. 120).
> ...
>
> As cited above, the Court finds McNair and his previous counsel 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.
> (R. p.125).

2. *The Underlying Settlement*

After Judge Young entered the order granting DC & Sons summary judgment as to liability, a recess was taken and the parties negotiated a settlement. The parties returned to put the settlement on the record. The agreement reached was that Mr. McNair and Mr. Frazier (the principals of Pavilion) would be released individually and DC & Sons would waive its right to punitive damages against Pavilion if Pavilion would confess judgment to DC & Sons for actual damages and agree to assign certain of the proceeds of any suit against Nexsen Pruet for legal malpractice to DC & Sons (R. p. 60). [1] The settlement documents, including the handwritten assignment and confession of judgment, were handed up to Judge Young, and the Judge asked counsel for DC & Sons to explain how the settlement figure was reached. (R. pp. 60-64). Judge Young then stated:

> 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

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

it out.

Judge Young entered a form Order concluding the case and attached the handwritten settlement to his Order. (R. p. 115).

3. The Case Sub Judice – The Legal Malpractice Action Against Nexsen Pruet

As contemplated by the underlying settlement agreement, a legal malpractice action was filed against Nexsen Pruet by its former clients Larry McNair and Pavilion. However, 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 agreed and granted summary judgment 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.

4. The First Appeal as to the Legality of the Assignment

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 Judge Nicholson's order to be a dismissal without prejudice. (See August 12, 2015 Order). Assuming that Nexsen Pruet would petition the Court for rehearing, 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 statute

of limitations ran during the appeal. (Motion to Amend in Supreme Court). 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).

5. The Motion to Amend the Legal Malpractice Complaint

Pursuant to the Supreme Court's instruction, Pavilion and McNair refiled their motion to amend in the lower court. (Motion to Amend in Circuit Court). Nexsen Pruet opposed the motion, claiming no amendment could be allowed because the case was dismissed without prejudice. (Memo in Opposition to Motion to Amend). 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. (Transcript of March 30, 2016 Hearing). 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. (June 2, 2016 Transcript, p. 34 line 14 - p. 35 line 2).

6. The Current Appeal

Pavilion and McNair timely appealed. Nexsen Pruet moved to dismiss the appeal, and the motion to dismiss was denied by the Court of Appeals on January 27, 2017. (Order Denying Motion to Dismiss). Nexsen Pruet also moved to transfer this appeal to the Supreme Court pursuant to Rule 204(b) SCACR. Appellants Pavilion and McNair consented to the motion, and it was granted by this Court on February 9, 2017. (Order granting motion to Transfer).

ARGUMENT

1. Standard of Review

The lower court's interpretation of the Supreme Court's order presents a legal question The Supreme Court may make its own ruling on a question of law without deferring to the circuit court. *Henderson v. Summerville Ford-Mercury Inc.*, 748 S.E.2d 221 (S.C. 2013). Questions of law are reviewed *de novo. Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC*, 745 S.E.2d 105 (S.C. 2013).

2. The Lower Court Erred in its Interpretation of this Court's Orders

The lower court'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 of civil procedure. (June 2, 2016 Transcript, p. 34 line 14 - p. 35 line 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. In its September 3, 2015 order, the Supreme Court held "the motion [to amend] should be addressed by the trial court in the first instance." (September 3, 2015 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. The lower court reasoned:

> **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).

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 (Supreme Court Order dated August 12, 2015) 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. (Supreme Court Order dated August 12, 2015). Pursuant to *Spence*, Pavilion and McNair moved before the Supreme Court to be allowed a reasonable time to amend their complaint. The Supreme Court 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 before Judge Nicholson, the lower court agreed with Appellants' interpretation of the September 3, 2015.[2] 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. The law favors construction that does not render language meaningless. *See, e.g. Tempel v. S.C. State Election Commn.*, 735 S.E.2d 453, 455 (S.C. 2012), *Hays v. Adair*, 227 S.E.2d 665, 667 (S.C. 1976), *Habersham A., LLC v. Firstar Homes, Inc.*, 2012-UP-459, 2012 WL 10862469, at *1 (S.C. App. July 25, 2012).

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:

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

(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;[3]

(2) The lower court held that absent its interpretation of the Supreme Court's orders, Appellants' motion to amend would be granted under the Rules of Civil Procedure;

(3) 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 Nexsen Pruet (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);

(4) 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.

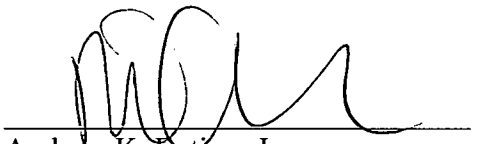
For the reasons stated above, Larry McNair and Pavilion respectfully request that the lower court's order as to its interpretation of the Supreme Court's orders be reversed, and Pavilion and McNair's motion to amend their complaint granted.

[signatures on following page]

[3] While this Court dismissed the action without prejudice, the action was in fact brought by Larry McNair and Pavilion who had a claim separate and apart from what was assigned to DC & Sons. The relief to be afforded if an assignment was deemed invalid was a subject of briefing in the first appeal.

Respectfully submitted by:

ANDREW K. EPTING, JR., LLC



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On this 27 day of February, 2017
Charleston, SC

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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 Renwed 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:

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