

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 24 2017

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Thomas Russo, Circuit Court Judge

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

Pavilion Development Corp. & Larry McNair Appellants,

v.

Nexsen Pruet, LLC.....Respondent,

v.

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

RETURN TO MOTION TO AMEND/SUPPLEMENT
DESIGNATION OF MATTER

Appellants' motion to amend/supplement their designation of matter should be denied. The document Appellants seek to add to the record in this case was not presented to the circuit court and is not relevant to the issue on appeal. For these reasons, the motion to amend/supplement the designation of matter should be denied.

BACKGROUND

This is the second appeal in this legal malpractice action brought by Appellants against Nexsen Pruet. In the first appeal, this Court issued an opinion holding that the present case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public

policy. *Pavilion Dev. Corp. v. Nexsen Pruet, LLC*, Op. No. 2015-MO-047 (S.C. Sup. Ct. filed Aug. 12, 2015). The Court affirmed summary judgment in favor of Nexsen Pruet and modified the dismissal of the action to be one without prejudice. *Id.*

Following the remittitur of the case, Appellants filed a motion in circuit court under the same case number and caption seeking to file an amended complaint. The circuit court denied the motion, finding that the Supreme Court dismissed the case (albeit without prejudice) and that the circuit court was bound to follow the Court's decision. This appeal followed.

As part of the appeal, Appellants now seek to add to the record on appeal the pre-trial brief of DC & Sons filed in the case between DC & Sons and Appellants, which gave rise to the legal malpractice case filed against Nexsen Pruet. In addition to being Appellants' adversary, DC & Sons is the party to whom Appellants assigned the legal malpractice claim. The case between DC & Sons and Appellants was settled by Appellants confessing judgment in favor of DC & Sons and then assigning to DC & Sons the right to sue Nexsen Pruet for legal malpractice to collect the amount of the judgment confessed. The settlement was reached during a break, after summary judgment motions were argued, and on what was to be the first day of trial.

LAW

"The Record on Appeal shall include all matter designated to be included by any party under Rule 209," but "shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Additionally, "[a] party shall not include any matter in his Designation which is not relevant to the appeal." Rule 209(b), SCACR.

"[T]he South Carolina Appellate Court rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State."

Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). “It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.” *Id.*

ARGUMENT

Appellants’ motion to amend or supplement the designation of matter should be denied because the document Appellants seek to include in the record on appeal was not presented to the circuit court and is not relevant to the issues on appeal.

First, the document Appellants seek to add to their designation of matter—the pre-trial brief of DC & Sons—was not presented to the circuit court in deciding the motion to amend the complaint that is currently on appeal. The circuit court never saw or considered the pre-trial brief of DC & Sons in ruling on the motion to amend the complaint. This makes sense because DC & Sons is not a party to this appeal, and should no longer be a party to this case given that this Court has found the assignment of the legal malpractice claim to DC & Sons is void as against public policy. Because the pre-trial brief of DC & Sons was not presented to the circuit court, the brief should not be included in the record on appeal.

Second, the pre-trial brief of DC & Sons is not relevant to the issue on appeal. The sole issue on appeal is whether the circuit court properly denied Appellants’ motion to amend the complaint. As explained above, this issue was decided without regard to the pre-trial brief filed by DC & Sons. Moreover, the pre-trial brief of DC & Sons is not evidence. The pre-trial brief simply presents DC & Sons’s version of the facts in the underlying case between Appellants and DC & Sons. Appellants cannot show that the circuit court even reviewed or considered this document prior to the settlement of the underlying action. The underlying action never went to trial, and there is nothing in the record establishing that the circuit court in the underlying case (Judge Roger Young) read or considered any party’s pre-trial brief.

Contrary to what Appellants contend, Nexsen Pruet has not raised the issue of whether the confession of judgment in the case between Appellants and DC & Sons was for a supported amount. In its initial brief in the present appeal, Nexsen Pruet simply pointed out that during the first appeal, the circuit court found, and this Court affirmed, that the confession of judgment between Appellants and DC & Sons was for an unsupported amount. (Br. at 18.) The fact that Nexsen Pruet referenced these findings in arguing that the order denying the motion to amend the complaint was the just result does not open the door to litigate an issue that is unrelated to the issue on appeal.

In any event, this Court has already determined that the confession of judgment in the underlying action was for an unsupported amount. The Court did this when it affirmed summary judgment in favor of Nexsen Pruet. In the order granting summary judgment, the circuit court found that the confession of judgment between Appellants and DC & Sons was for “an unsupported, multi-million dollar amount.” *Pavilion Dev. Corp. v. Nexsen Pruet, LLC*, 2013 WL 5925732 at *13 (S.C. Com. Pl. Oct. 9, 2013). This Court affirmed the order in its entirety, modifying the remedy from a dismissal with prejudice to a dismissal without prejudice. *Pavilion Dev. Corp. v. Nexsen Pruet, LLC*, Op. No. 2015-MO-047 (S.C. Sup. Ct. filed Aug. 12, 2015). Appellants should not be permitted to relitigate an issue that has already been decided by a circuit court and affirmed by this Court.

Moreover, the pre-trial brief of DC & Sons does not establish that the confession of judgment was for a supported amount. The amount of the judgment confessed was never tested. Counsel for DC & Sons (and now for Appellants) explained from memory how the amount of the judgment was determined, and not a single document or word of testimony was admitted into evidence.

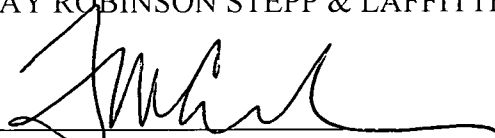
Finally, the fact that Appellants are asking this Court to include in the record on appeal a pre-trial brief filed by their adversary in the case below as evidence that the confession of judgment was for a supported amount strongly suggests that DC & Sons is still controlling and funding this case, and that DC & Sons continues to be the real party in interest. This is precisely why this case needs to be dismissed and not simply continued by means of an amended complaint, and why Appellants should be required to file a new case (should they choose to do so) upon advice of new and independent counsel.

CONCLUSION

Because the document Appellants seek to add to the record on appeal was not presented to the circuit court and does not relate to the issue presented in this case, the motion to amend/supplement the designation of matter should be denied.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By: _____



Elizabeth Van Doren Gray
Tina Cundari
Benjamin R. Gooding
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@sowellgray.com
tcundari@sowellgray.com
bgooding@sowellgray.com

Attorneys for Nexsen Pruet, LLC

Columbia, South Carolina
July 24, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

JUL 24 2017

Thomas Russo, Circuit Court Judge

S.C. SUPREME COURT

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

Pavilion Development Corp. & Larry McNair Appellants,

v.

Nexsen Pruet, LLC.....Respondent,

v.


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

PROOF OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Respondent, certify that I have served all counsel of record in this action with a copy of the Return to Motion to Amend/Supplement Designation of Matter by electronic mail, on July 24, 2017, to:

Andrew Epting, Esq.
Michelle N. Endemann, Esq.
46A State Street
Charleston, SC 29401
ake@epting-law.com
mne@epting-law.com

George J. Kefalos, Esq.
46A State Street
Charleston, SC 29401
george@kefaloslaw.com



Tina M. Cundari
(S.C. Bar No. 71951)
SOWELL GRAY ROBINSON STEPP &
LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400
tcundari@sowellgray.com