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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

Thomas A. 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.

FINAL BRIEF OF RESPONDENT

Elizabeth Van Doren Gray (S.C. Bar No. 2434)
Tina Cundari (S.C. Bar No. 71951)
Benjamin R. Gooding (S.C. Bar No. 100620)
SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@sowellgray.com
tcundari@sowellgray.com
bgooding@sowellgray.com

Attorneys for Respondent

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II. Should the circuit court's order be affirmed for other reasons, including that the motion was not a true motion to amend the complaint but rather an attempt to circumvent this Court's opinion?

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to amend the complaint and/or to substitute parties pursuant Rules 15 and 17 of the South Carolina Rules of Civil Procedure. (R. pp. 1-5). Appellants Pavilion Development Corp. ("Pavilion") and Larry McNair ("McNair") (together, "Appellants") filed the motion in the circuit court after this Court issued an opinion on August 12, 2015, affirming summary judgment in favor of Nexsen Pruet on the ground that this case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy. (R. pp. 80-81). In addition to affirming summary judgment, this Court modified the dismissal of the case to be without prejudice. (R. p. 81).

This case began on August 16, 2011, when Appellants filed a complaint against Nexsen Pruet for legal malpractice. (R. pp. 284-92). Although not apparent from the face of the complaint, the case was filed by Appellants in name only. (R. p. 21). Nexsen Pruet later discovered that Appellants had assigned the legal malpractice claim and the control over the case to their adversary in the underlying litigation, DC & Sons, LLC, in exchange for a confession of judgment. (R. pp. 305, 326-28). After discovering the assignment, Nexsen Pruet filed a motion for summary judgment seeking a determination that the assignment was void as against public policy and that the entire case should be dismissed with prejudice. (R. pp. 299-328).

On October 9, 2013, the circuit court granted summary judgment in favor of Nexsen Pruet and dismissed the case with prejudice. (R. pp. 273-98). Among other things, the circuit court found and concluded as follows:

- Although brought in the name of Appellants, the case was proceeding pursuant to an assignment from Appellants to DC & Sons, LLC.
- As part of the settlement between Appellants and DC & Sons, Appellants confessed judgment in favor of DC & Sons and

gave DC & Sons all rights to bring and control this case, including the right to determine whether to file the case in the first instance.[1]

- In exchange for the confession of judgment and assignment, Appellants received a release of personal liability for Larry McNair and his business partner Lowell Frazier.
- Appellants "used the court system to litigate a claim they do not own, without revealing this important fact to the Court or to the defendant."
- This case was "brought by [Appellants] in name only and under circumstances that suggest collusion, or the opportunity for collusion . . . ."
- This case was not a genuine legal malpractice case but instead an action to collect a judgment confessed.
- This case could not proceed as filed because it was never filed by Appellants in the first instance.

(R. pp. 273, 291, 293-97).

The Appeal

On appeal, Appellants argued that the assignment was not an assignment of the legal malpractice claim but an assignment of the proceeds only. (R. pp. 163-64). Appellants also argued, both in their opening brief and on reply, that if the Court found fault with the assignment, that the assignment be voided, and that "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 . . . ." (R. pp. 178, 230). Appellants made this same argument again during oral argument. *See* Video of May 6, 2015 oral argument, http://media.sccourts.org/videos/2013-002796.mp4, beginning at 35:32 ("One thing that I'm hoping the Court is sensitive to, is in this case, a

[1] In the legal malpractice case, Appellants alleged that the amount of the confession should serve as the measure of damages. (R. pp. 232-240).

dismissal without prejudice is a dismissal with prejudice because then we'll go back to be met with the statute of limitations has run.").

Nexsen Pruet, on the other hand, argued that the case should be dismissed with prejudice because the entire case was based on a contrived and elaborate scheme that included a confession of judgment in exchange for an assignment of a legal malpractice claim. (R. p. 213). Nexsen Pruet argued that Appellants and DC & Sons have used the court system to collect a made-up judgment rather than to remedy a wrong. *Id.*

Given these circumstances, Nexsen Pruet argued that the circuit court could not simply strike the assignment and allow the case to proceed as filed. *Id.* Nexsen Pruet argued that even if the case is dismissed without prejudice, Appellants should be required to file a new action, upon advice of new and independent counsel, and demonstrate that they are the real parties in interest. *Id.* Nexsen Pruet argued that the case cannot simply proceed as filed because the case was never filed by Appellants in the first instance, and to allow the case to proceed as filed would be to "wink at the rule against assignment of legal malpractice claims." (R. p. 214) (quoting *Davis v. Scott*, 320 S.W.2d 87, 92 (Ky. 2010)).

While the case was pending in the Court of Appeals, this Court accepted a certified question in *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 775 S.E.2d 37 (2015), which raised the same question of whether assignments of legal malpractice claims between adversaries in litigation are void as against public policy. Upon learning of the *Skipper* case, Appellants moved, and Nexsen Pruet later consented, to transfer this case to this Court pursuant to Rule 204, SCACR. (R. pp. 132-42, 144-51). The motion was granted. (R. pp. 130-31).

The case was argued on May 6, 2015, and on August 12, 2015, this Court affirmed summary judgment in favor of Nexsen Pruet but modified the dismissal to be without prejudice. (R. pp. 80-81).

Post-Opinion

On August 28, 2015, sixteen days after this Court issued its opinion, and after the time to file a petition for rehearing had expired, Appellants filed a motion in this Court seeking "a reasonable time to amend their complaint after remand," even though the Court did *not* remand this case for further proceedings. (R. pp. 71-73). The Court construed the motion as a petition for rehearing, and on September 3, 2015, denied the motion as untimely. (R. pp.82-83). The last sentence of the order states: "In any event, Appellants' motion should be addressed by the trial court in the first instance." (R. p. 82).

On September 3, 2015, this Court remitted the case to the lower court, enclosing a copy of the August 12, 2015 opinion. (R. pp. 122-25). The Court did not include the September 3, 2015 order denying the motion for leave to amend. *Id.* The remittitur was filed with the circuit court on September 9, 2015. (R. p. 122). On October 21, 2015, this Court awarded Nexsen Pruet costs in the amount of $1,120.09, and directed the Clerk of Court for the circuit court to add this award to the remittitur. (R. pp. 126-27).

Post-Appeal

On September 18, 2015, fifteen days after the remittitur was sent down, Appellants filed a "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d), and 17(a), SCRCP" in the circuit court, under the same case number and caption, while represented by the same counsel. (R. pp. 77-79).

Upon being served with the motion, Nexsen Pruet sent a letter to the Clerk of Court asking the court not to accept the motion for filing because the present case was over. (R. pp. 120-25). Nonetheless, the clerk's office filed the motion, and the motion was placed on the motions roster.

Nexsen Pruet opposed the motion, primarily on the ground that the Supreme Court's opinion ended the case. (R. pp. 108-19). Nexsen Pruet argued that a dismissal is a dismissal, whether with or without prejudice, and that Appellants needed to file a new complaint in a new case. (R. p. 111). Nexsen Pruet argued that the Supreme Court did not remand the case for further proceedings, nor did the Court grant leave to amend the complaint. (R. p. 112). Nexsen Pruet argued that the motion was not a true motion to amend the complaint because the proposed amended complaint was virtually identical to the initial complaint. (R. pp. 113-14). Nexsen Pruet further argued that Rules 15 and 17 do not permit the relief requested because those rules apply during the course of litigation and not post-appeal, after summary judgment has been affirmed and the case has been dismissed, albeit without prejudice. (R. pp. 114-19).

Initially, the motion was heard on March 30, 2016, by the Honorable J.C. Nicholson, the same judge who granted summary judgment in favor of Nexsen Pruet the first time around. (R. pp. 46-69). As the hearing progressed, however, Judge Nicholson determined that he needed to recuse himself. (R. pp. 68-69).

The motion was then heard on June 2, 2016, before the Honorable Thomas Russo. (R. pp. 8-44). On July 13, 2016, Judge Russo issued an order denying the motion. (R. pp. 1-5). The circuit court ruled that the motion should be denied because the present case is over. (R. p. 4). The circuit court found that the Supreme Court could have granted the relief requested in the

motion, but chose not to do so. *Id.* The circuit court found that the Supreme Court's decision ended the case, and that the circuit court was bound to follow the Court's decision. *Id.*

This appeal followed.

STANDARD OF REVIEW

"Courts have wide latitude in amending pleadings." *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012) (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)). "[T]he decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." *Id.* "The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id.*

ARGUMENT

The circuit court order denying the motion to amend the complaint or to substitute parties should be affirmed. The circuit court correctly determined that this Court's August 12, 2015 opinion ended the case, and that to allow Appellants to amend the complaint would be contrary to this Court's opinion dismissing the case without prejudice.

The circuit court's order should be affirmed for additional reasons, including that the motion to amend the complaint was not a true motion to amend but rather an attempt to circumvent this Court's opinion. Moreover, the South Carolina Rules of Civil Procedure do not permit parties to continue cases post-appeal by filing a motion in the circuit court seeking the same relief sought and denied on appeal.

For these reasons, the circuit court's order denying the motion to amend the complaint or to substitute parties should be affirmed.

I. The circuit court correctly denied the motion to amend the complaint and/or substitute parties given this Court's opinion affirming summary judgment and modifying the dismissal to be without prejudice.

The circuit court's order should be affirmed because the circuit court correctly determined that the Supreme Court's opinion affirming summary judgment and modifying the dismissal to be without prejudice ended the case.

By definition, a dismissal is the "[t]ermination of an action or claim *without further hearing*, esp[ecially] before the trial of the issue involved." *Dismissal*, BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added). A dismissal without prejudice is "[a] dismissal that does not bar the plaintiff from *refiling the lawsuit* within the applicable limitations period." *Id.* (emphasis added). According to case law, a dismissal without prejudice is "when . . . the plaintiff is given the opportunity to *file and serve* an amended complaint." *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006) (emphasis added). When a complaint has been dismissed without prejudice, a plaintiff "may *reassert* her complaint by curing defects that led to the dismissal." *Id.* at 128, 628 S.E.2d at 880-81 (emphasis added).

When an appellate court affirms the dismissal of a case but modifies the ruling to be without prejudice and the statute of limitations has subsequently expired, "the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint." *Id.* at 130, 628 S.E.2d at 881. "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." *Id.* at 130, 628 S.E.2d at 881-82.

Here, the Supreme Court did not grant Appellants a reasonable period of time to amend their complaint, nor did the Court remand the case for further proceedings. Instead, the Supreme Court affirmed summary judgment and modified the dismissal to be without prejudice. A

dismissal without prejudice is a dismissal. It means that the case as filed is over. It does not mean that the case may be continued by simply filing a motion to amend the complaint.

The issue of whether the case should be dismissed with or without prejudice, or remanded for further proceedings was squarely before this Court on appeal. In their opening brief and on reply, Appellants argued they were concerned about the impact of a dismissal without prejudice because it would "result in Nexsen Pruet claiming the statute of limitations has run . . . ." (R. pp. 178, 230). These same concerns were reiterated at oral argument. *See* Video of May 6, 2015 oral argument, *available at* http://media.sccourts.org/videos/2013-002796.mp4, beginning at 35:32 ("One thing that I'm hoping the Court is sensitive to, is in this case, a dismissal without prejudice is a dismissal with prejudice because then we'll go back to be met with the statute of limitations has run.").

After hearing these concerns, the Court held that the proper remedy was dismissal without prejudice. The Court did not remand the case for further proceedings, nor did the Court grant leave to amend the complaint, even though it was within the Court's discretion to do so.

Contrary to what Appellants contend, *Spence* does not contemplate the procedure Appellants are advocating for here, of allowing a party to file a motion to amend a complaint in the *circuit court* after the case has been decided on appeal. Under *Spence*, the *appellate court* grants the relief requested as part of the appeal. Here, Appellants raised the issue regarding the impact of a dismissal without prejudice, but this Court did not impose a reasonable period of time for Appellants to amend the complaint.

On appeal, Appellants simply wanted the Court to permit the case to proceed as filed. The problem with this, as explained during the first appeal, is that Nexsen Pruet (and the court) has no way of knowing that Appellants are proceeding as the real parties in interest. Appellants

are still represented by the same counsel that represented DC & Sons and have not done anything (such as file an affidavit) showing they have suffered damages and want to proceed with this case as a genuine legal malpractice action.[2]

This is why courts in other jurisdictions have required parties who re-file a case after an assignment has been stricken to show that the assignment is no longer in place and that they are the real parties in interest, and they must do so represented by new counsel who is not associated with the assignee. *See, e.g., Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009) (finding that if the client re-files the malpractice claim, the case must not be controlled in any way by the assignee and that the client *must not be represented by attorneys associated with the assignee*); *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (finding that the client could reassert his claim against the attorney "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest"). The rationale behind this requirement is that the malpractice action cannot simply proceed as pled because it is "tainted in some respect." *Davis*, 320 S.W.2d at 92.

Appellants are not like the plaintiffs in *Spence* whose hands were tied because of the dismissal. Appellants have had several opportunities throughout the course of this case to avoid the situation in which they now find themselves. At any point during this case, Appellants could have chosen to proceed independent of the assignment. Appellants have been on notice since

[2] It is difficult to understand why Appellants would even pursue this case as the real parties in interest, given that Larry McNair obtained a full release as part of the settlement in the case below, and Pavilion Development Corp., an entity that was created for the purpose of purchasing a piece of property that was never purchased, is "probably insolvent" and is therefore judgment proof. *See* video of May 6, 2015 oral argument, http://media.sccourts.org/videos/2013-002796.mp4, beginning at 9:33 (in which counsel for Appellants states "because you're right judge, Pavilion is probably insolvent").

Nexsen Pruet filed its answer to the complaint that Nexsen Pruet challenged the legality of the assignment. (R. p. 265).

Instead of filing a new case independent of the assignment, Appellants allowed their adversary, DC & Sons, to pursue this case all the way up to the South Carolina Supreme Court, when not a single court in the country permitted the assignment of a legal malpractice claim between adversaries in litigation in exchange for a confession of judgment.[3]

Here, the circuit court did what it was required to do, which was to abide by this Court's opinion. It is well-settled that circuit courts must abide by the decisions of this Court. *See Milton P. Demetre Family Ltd. P'ship v. Beckmann*, 413 S.C. 38, 52, 773 S.E.2d 596, 604 (Ct. App. 2014) ("The mandate of the appellate court is jurisdictional. The trial court has a duty to follow the appellate court's directions."); *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250-51, 551 S.E.2d 274, 279 (Ct. App. 2001) (noting "[o]nce a mandate is issued from an appellate court to a trial court, the trial court 'is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate'" (quoting 5 Am. Jur. 2d *Appellate Review* § 784, at 453 (1995))). The decision of this Court was that the case be dismissed without prejudice. The circuit court could not override that decision by granting leave to amend the complaint, particularly when that very issue was before this Court and this Court did not grant the relief requested.

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[3] Contrary to what Appellants state in their brief, there is no evidence in the record that Judge Young had the handwritten assignment and the confession of judgment in front of him or examined these documents before he said the settlement in the underlying case was a "fair resolution of the dispute." (R. p. 373). Instead, the transcript reflects that Judge Young relied on counsel for DC & Sons (and now counsel for Appellants) to explain the terms of the settlement to him. (R. pp. 369-370). Counsel did so "from memory," and did not tell the court that the legal malpractice claim and proceeds had been assigned to DC & Sons, and that the assignment gave DC & Sons complete control over the litigation, including the right to elect to own the very claims themselves. (R. p. 369).

Further, the circuit court correctly determined that the last sentence in this Court's September 3, 2015 order stating that the motion "should be addressed by the trial court in the first instance," did not give Appellants leave to amend *in this case*. The circuit court correctly determined that the sentence was not intended to keep this case open because that would be inconsistent with the Court's opinion. The circuit court correctly found that the only way to interpret the sentence so that it is consistent with this Court's opinion is that the issues raised in the motion, such as the expiration of the statute of limitations, should be taken up after the filing of a new case.

In any event, this Court's post-opinion order was not part of the judgment in the case and was not sent down with the remittitur. It was simply a ruling on a post-opinion motion that was late and that raised the same issues that were raised on appeal. The order did not override the Court's August 12, 2015 opinion.

Appellants' contention that they waited until the time to petition for rehearing had expired before filing the motion in the Supreme Court because they "assum[ed] that Nexsen Pruet would petition the Court for rehearing" does not make sense. (Br. of App. p. 4.) Nexsen Pruet had no reason to file a petition for rehearing. Summary judgment had been affirmed, and the case had been dismissed. The Supreme Court awarded Nexsen Pruet costs as the prevailing party. (R. pp. 126-27). Appellants' failure to timely file a petition for rehearing should bar them from getting yet another opportunity to argue the Court should grant leave to amend.

Contrary to what Appellants contend, there is nothing "implicit" in the Supreme Court's modification of the dismissal to without prejudice that gives Appellants the right to amend their complaint. (Br. of App. p. 7.) If that were true, Appellants did not need to file a motion for leave to amend in the Supreme Court after the Supreme Court issued its opinion. Moreover, on

appeal, Appellants urged the Court to be "sensitive to" the impact of a dismissal without prejudice, because Appellants said that "in this case, a dismissal without prejudice is a dismissal with prejudice . . . ." Video of May 6, 2015 oral argument at 35:32.

Because this case is over and has been over since August 12, 2015, when this Court issued its opinion affirming summary judgment and modifying the dismissal, the circuit court's order denying the motion to amend or substitute parties should be affirmed. Appellants should not be permitted to keep a case going that the Supreme Court held should be dismissed. To rule otherwise would be to give new meaning to "dismissal without prejudice."

For these reasons, the circuit court's order denying the motion to amend the complaint should be affirmed.

II. Additional reasons exist for affirming the circuit court's order.

In addition to the reasons stated above, the circuit court's order should be affirmed because (1) the motion to amend was not a true motion to amend the complaint but rather an attempt to circumvent this Court's opinion, (2) the procedural rules pursuant to which the motion was filed do not permit the relief requested, and (3) the circuit court's decision was the just result given the procedural history and posture of this case.[4]

[4] "[A] respondent . . . may raise . . . any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The basis for respondent's additional sustaining grounds must appear in the record on appeal." *Id.* at 420, 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* Here, the additional reasons for dismissing the motion were presented to the circuit court, but the circuit court chose to dismiss the motion based on this Court's holding in the first appeal.

A. The motion was not a true motion to amend the complaint.

The circuit court's order should be affirmed because the proposed amended complaint was virtually identical to the initial complaint and was an attempt to circumvent this Court's opinion.

Although styled as a motion to amend the complaint, the motion did not seek to make any substantive changes to the original complaint. The proposed amended complaint is virtually identical to the complaint filed in 2011. (R. pp. 84-92, 232-240). The only substantive difference between the two complaints is that the amended complaint does not expressly acknowledge that Larry McNair obtained a full release as part of the settlement in the underlying case. This begs the question as to whether Larry McNair has given up that full release (since the release was given in exchange for the assignment of the malpractice claim), or whether he continues to be without harm.

More importantly, the proposed amended complaint does nothing to cure the taint that has plagued this case since its inception. The proposed amended complaint does not show this is a genuine legal malpractice case brought by Appellants as the real parties in interest. Appellants continue to be represented by the same counsel who filed the initial complaint and who represented Appellants' adversary (DC & Sons) in the case below. Additionally, according to the proposed amended complaint, the confession of judgment is still in place even though the assignment, which was given in exchange for the confession, has been found to be void as against public policy.

By filing this motion, Appellants were trying to keep a case alive that this Court held should be dismissed without prejudice. This is an improper use of Rule 15 and should not be permitted.

Because the motion was not a true motion to amend the complaint and the proposed amended complaint does nothing to cure the taint that has infected this case, the circuit court's order should be affirmed.

B. The procedural rules cited in the motion do not permit the relief requested.

Rule 15

Rule 15 regarding the amendment of pleadings does not permit a party to amend a pleading after summary judgment has been entered and the case has been dismissed without prejudice.

Rule 15 states that a party may amend a pleading by leave of court "when justice so requires and [it] does not prejudice any other party." Rule 15(a), SCRCP. *See also Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (2005) ("Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party."). "The party opposing the amendment has the burden of establishing prejudice." *Id.*

Here, the circuit court correctly recognized that this case did not present the typical Rule 15 scenario. In this case, Appellants were trying to use Rule 15 to continue a case that had been decided on appeal and that had been dismissed without prejudice. Appellants were trying to use the rule to continue a case that they never filed in the first instance. Appellants were trying to take advantage of the liberal standard of Rule 15 to circumvent this Court's holding and to allow the case to continue even though it has been tainted since its inception and the proposed amendments did nothing to cure that taint.

The circuit court did not, as Appellants contend, rule that Appellants were "absolutely entitled" to amend their complaint following remittitur. Instead, the circuit court simply pointed out that while ordinarily a litigant is entitled to leave to amend, this is not the ordinary case. The

complete discussion 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**.

(R. p. 41, line 9-p. 42, line 2) (emphasis added). The circuit court correctly recognized that this was not the ordinary Rule 15 scenario; that the state's highest court had affirmed summary judgment and dismissed the case without prejudice; and that the circuit court was bound to follow the Court's decision. This and all the "other stuff" surrounding this case compelled the circuit court to do what was right, which was to deny the motion.

Moreover, Appellants should not be permitted to use Rule 15(c) [5] to file an amended complaint piggybacking off the filing date of the original complaint when Appellants were not the ones who brought the case in the first instance. As the circuit court found and this Court affirmed, Appellants allowed their adversary, DC & Sons, to bring and control this case.

For these additional reasons, the circuit court's order should be affirmed.

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[5] Rule 15(c) provides that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the original pleading."

Rule 17(a)

Additionally, Rule 17(a) governing real parties in interest does not allow for the substitution of parties after summary judgment has been granted and the case has been dismissed.

Rule 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest." Rule 17(a), SCRCP. The rule further provides that:

> [n]o action shall be dismissed on the ground that it is not prosecuted in the names of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Id.

As an initial matter, Rule 17(a) does not provide a procedural mechanism for substitution. Substitution of parties is governed by Rule 25(e), and under that rule, substitution must take place either before or after judgment, or pending appeal, by the appellate court.[6] In the present case, the time for substitution of parties has passed. The case as filed has been decided.

In any event, the present case was not dismissed pursuant to Rule 17. The case was dismissed because this case was brought pursuant to an assignment of a legal malpractice claim that was void as against public policy and that was entered into under circumstances that suggest collusion or the opportunity for collusion. (R. pp. 178, 230). Since then, nothing has happened to indicate anything has changed. Nowhere in the brief to this Court do Appellants state that they are the real parties in interest and that the assignment has been voided, nor do they say what

[6] Rule 25(e), SCRCP provides: "Substitution of parties under the provision of this rule may be made by the trial court either before or after judgment, or pending appeal, by the appellate court."

happened to the confession of judgment that was given in exchange for the assignment. Appellants continue to be represented by the same counsel that represented DC & Sons in the case below.

Because Rule 17(a) does not apply to the facts of this case, the circuit court's order should be affirmed for this additional reason.

C. The circuit court's decision was the just result.

Even if the rules provided the procedural mechanism for the relief sought here, the circuit court's order should be affirmed because it was the just result.

As this Court affirmed, this case arose out of circumstances which strongly suggested collusion or the opportunity for collusion. (R. pp. 82-83, 293, 297). Appellants confessed judgment for an unsupported amount. (R. p. 297). Appellants then turned around and gave their adversary the right to sue Nexsen Pruet for legal malpractice. (R. p. 294). The complaint was filed without revealing the existence of the assignment to Nexsen Pruet or to the court. *Id.* Appellants allowed DC & Sons to prosecute this case all the way up to the highest court in this state. (R. pp. 82-83).

Nexsen Pruet has been prejudiced. Since 2011, Nexsen Pruet has defended a case that was not brought by the client and was not a genuine legal malpractice case. Nexsen Pruet has been to this Court and back twice, now defending a post-appeal motion that never should have been permitted. By all accounts, it appears this case continues to be controlled by DC & Sons, an entity that is not and never has been a client of the firm, and from whom Nexsen Pruet is immune from suit. *See Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (stating that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client").

Contrary to what Appellants contend, affirming the circuit court's order does not abrogate Appellants' right to bring a "valid legal malpractice claim." (Br. of App. p. 8.) Appellants are free to file a new case, under a new case number and caption, as the real parties in interest, and with new counsel. Once a genuine case is filed, Nexsen Pruet should have the opportunity to raise any and all available defenses, including the statute of limitations defense. Nexsen Pruet should not lose defenses because of the way in which Appellants have proceeded with this case.

Nexsen Pruet has successfully defended this case for several years now, obtaining an order granting summary judgment that was subsequently upheld by the Supreme Court and a dismissal with prejudice, which this Court modified to be without. To allow the complaint to be amended and the case to proceed under these circumstances will render those dismissals meaningless, after years of lengthy and costly litigation, and will contradict this Court's August 12, 2015 opinion.

For these additional reasons, the circuit court's order should be affirmed.

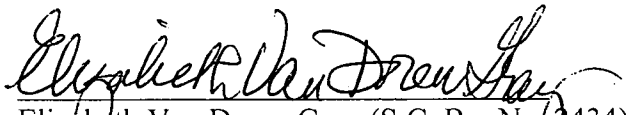
CONCLUSION

The circuit court's order should be affirmed. The circuit court properly denied the motion to amend the complaint and/or substitute parties. The circuit court was bound to follow this Court's opinion affirming summary judgment and modifying the dismissal to be without prejudice. Further, the Rules of Civil Procedure and our system of justice do not permit the relief sought here, where a party is attempting to continue a case that was ended by this Court on appeal.

For these reasons and those set forth more fully above, the circuit court's order denying the motion to amend the complaint and/or to substitute parties should be affirmed.

Respectfully submitted,

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By: 

Elizabeth Van Doren Gray (S.C. Bar No. 2434)
Tina Cundari (S.C. Bar No. 71951)
Benjamin R. Gooding (S.C. Bar No. 100620)
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@sowellgray.com
tcundari@sowellgray.com
bgooding@sowellgray.com

Attorneys for Respondent

Columbia, South Carolina
August 16, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
AUG 17 2017
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas A. 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that Final Brief of Respondent complies with Rule 211(b), SCACR.

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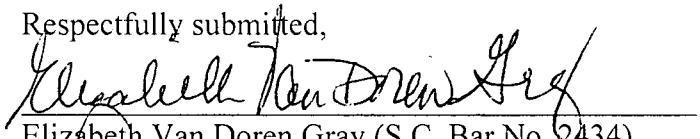
Respectfully submitted,



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SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
egray@sowellgray.com
tcundari@sowellgray.com
bgooding@sowellgray.com

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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 Final Brief of Respondent by placing copies of same by U.S. Mail and electronic mail, on August 17, 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

Elizabeth Van Doren Gray
(S.C. Bar No. 2434)
SOWELL GRAY ROBINSON STEPP &
LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400
egray@sowellgray.com