THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.....Appellants,

v.

NEXSEN PRUET, LLC..... Respondent,

AND

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

RECORD ON APPEAL

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PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	**ORDER**
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

This matter is before the Court on Plaintiffs' "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP." Plaintiffs seek an order permitting them to file an amended complaint against Defendant Nexsen Pruet, LLC, following an appeal in the Supreme Court of South Carolina in which the Supreme Court affirmed the circuit court's grant of summary judgment but modified the dismissal to be without prejudice.

The motion was heard on June 2, 2016. Elizabeth Van Doren Gray, Tina Cundari, and Benjamin Gooding of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Defendant Nexsen Pruet, LLC. Andrew K. Epting, Jr., George J. Kefalos, and Michelle Endemann appeared on behalf of Plaintiffs Pavilion Development Corporation and Larry McNair ("Plaintiffs"). After considering the motion, memorandum in opposition and exhibits, documents and arguments presented at the hearing, and the law of this State, the Court denies Plaintiffs' motion to amend the complaint or substitute parties.

BACKGROUND

This motion is before the Court following an appeal in which the Supreme Court of South Carolina affirmed summary judgment in favor of Nexsen Pruet and modified the dismissal of the case to be without prejudice.

On October 9, 2013, the circuit court granted 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. The circuit court determined that the proper remedy was dismissal with prejudice.

Plaintiffs appealed the circuit court's order, arguing in part that even if the assignment of the legal malpractice claim was void, the case should be permitted to proceed. In their briefs to the Supreme Court, Plaintiffs specifically argued that a dismissal without prejudice was not appropriate because it would result in Nexsen Pruet claiming that the statute of limitations has expired.

On August 12, 2015, the Supreme Court issued its opinion affirming summary judgment but modifying the dismissal to be without prejudice. On August 28, 2015, Plaintiffs filed a "Motion for Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint After Remand" in the Supreme Court. Plaintiffs argued that they should be given a reasonable period of time "after remand" to amend their complaint. The Supreme Court construed the motion as a petition for rehearing and denied it as untimely filed. In the order denying the motion, the Supreme Court concluded by stating, "[i]n any event, [Plaintiffs'] motion should be addressed by the trial court in the first instance."

On September 3, 2015, the Supreme Court issued the remittitur, which enclosed a copy of the Supreme Court's opinion in the case The opinion does not grant leave to amend the complaint or contemplate any further proceedings in the present case.

LAW/ANALYSIS

The Court denies the motion to amend the complaint because the Supreme Court's opinion plainly states that summary judgment is affirmed and the dismissal of the case is modified to without prejudice.

By definition, a dismissal is the "[t]ermination of an action or claim *without further hearing* . . ." Black's Law Dictionary 537 (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).

Plaintiffs contend that the Supreme Court's modification of the dismissal to one without prejudice is instructive to this Court of the Supreme Court's intent to allow the Plaintiffs to amend their complaint after the conclusion of the appeal. Plaintiffs further contend that the last sentence in the Supreme Court's order denying the motion for leave to amend filed by Plaintiffs after the Supreme Court issued its opinion gives this Court the authority to hear the motion.

In response, Nexsen Pruet argues that the Supreme Court's opinion affirming the grant of summary judgment and modifying the dismissal to without prejudice ends the case. Nexsen Pruet argues that dismissal means dismissal; that the Supreme Court could have remanded the

case with leave to amend but chose not to do so; and that to allow the present case to proceed would be contrary to the Supreme Court's opinion affirming summary judgment and dismissal the case without prejudice Nexsen Pruet further contends that Plaintiffs' motion to amend is not a true motion to amend because it does not actually seek to make any substantive amendments to the allegations of the original complaint. Finally, Nexsen Pruet argues that procedural rules relied upon by Plaintiffs do not permit the relief requested. Nexsen Pruet contend that the rules cited apply pre-judgment, and not post-judgment.

After considering these arguments, the Supreme Court's opinion and order, and the documents filed in this case, the Court finds and concludes that the present case is over. The Supreme Court has determined that the proper remedy is dismissal without prejudice. The Supreme Court could have granted the relief sought in the present motion during the appeal but chose not to do so. The issue regarding whether the case should be permitted to proceed as filed or be dismissed without prejudice was squarely before the Supreme Court. In affirming summary judgment and modifying the dismissal to be without prejudice, the Supreme Court ended the present case. The Supreme Court did not remand the case for further proceedings, even though it could easily have done so. This Court is bound to follow the Supreme Court's opinion.

The Court finds that the Supreme Court's statement that the issues raised in the late-filed motion for leave to amend "should be addressed by the trial court in the first instance," does not, as Plaintiffs contend, grant Plaintiffs permission to seek leave to amend *in this case*. The only interpretation of this statement that is consistent with the Supreme Court's ruling that the case was dismissed without prejudice is that the issues raised in the motion, such as the expiration of the applicable statute of limitations, should be taken up *after the filing of a new case* by another

trial court. Otherwise, the Supreme Court would be contradicting its holding that case was dismissed without prejudice.

Moreover, the Court finds that the Supreme Court's decision to modify the decision to "without prejudice" was merely an instruction to the lower court and was not intended to keep the case open because that would be contrary to the granting of summary judgment

Accordingly, the motion to amend the complaint or to substitute parties is denied.

CONCLUSION

For the reasons set forth above, Plaintiffs' "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP" is denied. Should Plaintiffs wish to pursue their claims, the proper procedure is to file and serve a new complaint in a new case.

IT IS SO ORDERED.

The Honorable Thomas A. Russo
Circuit Court Judge

Florence, South Carolina
June 29, 2016

11-5774

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Nexsen Pruet, LLC, do hereby certify that I have served a copy of the document specified below by electronic mail, to the following addresses:

Document: **ORDER DENYING MOTION TO AMEND COMPLAINT**

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FILED
2016 JUL 13 PM 2:47
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CLERK OF COURT

Graci Clark

Columbia, South Carolina
July 11, 2016

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July 11, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street Suite 106
Charleston, South Carolina 29401-2258

Re: Pavilion Development Corp. & Larry McNair v. Nexsen Pruet v DC & Sons, LLC
Case No: 2011-CP-10-05777
SGSL No 5347/1509 5774

Dear Ms Armstrong

Enclosed please find the original and one copy an Order signed by The Honorable Thomas A Russo in the above referenced matter Please file the original and return the filed-stamped copy to our office in the self-addressed, stamped envelope enclosed for your convenience

As evidenced by the Certificate of Service, I am serving opposing counsel with the same

Sincerely,

Traci Clark

Traci Clark

Enclosures

cc Andrew K. Epting, Jr , Esquire (via e-mail)
George J. Kefalos, Esquire (via e-mail)
Michelle Endemann, Esquire (via e-mail)
James G. Long, Esquire (via e-mail)

STATE OF SOUTH CAROLINA	) COURT OF COMMON PLEAS
	)
COUNTY OF CHARLESTON	) Case No(s).:2011CP1005774
	)
Pavilion Development Corp.,	)
	)
Plaintiff,	)
	)
-VS-	) TRANSCRIPT OF RECORD
	)
Nexsen Pruet, LLC,	)
	)
Defendant.	)

June 02, 2016
Charleston, South Carolina

B E F O R E:

HONORABLE THOMAS A. RUSSO, Judge.

A P P E A R A N C E S:

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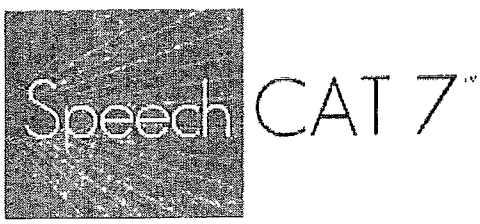

I N D E X

EXHIBITS PAGE

NO.	DESCRIPTION	ID	EV

PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 2nd day of June, 2016 at approximately 10:08 a.m.)

MR. EPTING: Good morning, Judge.

THE COURT: Good morning.

MR. EPTING: My name is Drew Epting. Michelle Endemann is with me, as is George Kefalos. We represent the moving party, the plaintiffs in this case.

Judge, I want to start with an example to sort of frame this issue for you because this is a legal malpractice case. We've been to the Supreme Court one time and it has been remanded back to you. But I think by way of an example, I can put this in the context of as I'm describing what happened when in the underlying case, you'll always know what is the issue here.

So imagine that I have a case before you that is a legal malpractice case. Imagine that there's been an assignment of the legal malpractice claim by the client of the lawyer to the person who sued. While that case is pending before you, the State Supreme Court enters an order that says assignments of legal

malpractice claims are not allowed. I then appear in front of you to say, Judge Russo, I need to amend my pleading in order to change plaintiff from the assignor -- assignee back to the assignor so it is being brought in the name of the actual client rather than to whom it is being assigned.

That's the issue here. Except, in this case, the ruling actually happened in the case. The Supreme Court said when it got to the Supreme Court that the assignment was invalid and this motion to amend is to essentially put the claim in the client's name as opposed to it being a claim of the assignee. And so if it were a different case, it would simply be a matter of appearing before you and saying we need to amend because of what the Supreme Court is telling you.

In this case, the Supreme Court, we filed a motion to amend to put the claim in the right party's name. The Supreme Court said the proper place to do that is back in the lower court. So that's how we find ourselves here. I hope that example is of some help as I go forward.

So first, Judge, let me hand you the actual

opinion that was issued. This is the opinion that was handed down by the Supreme Court.

(WHEREUPON, a document is handed to the Court.)

MR. EPTING: So what I am attempting to do, Judge, is to lay the procedure of this out before I get into the merits of the underlying case. The Supreme Court, on the basis of a previous decision, *Skipper* said you can't assign legal malpractice claims. But where Judge Nicholson dismissed this case with prejudice, we are changing that part of his ruling. We're changing it to a dismissal without prejudice.

So when our case was in the Supreme Court, it was argued along with the companion case called *Skipper*. In both cases, the Supreme Court ruled you can't assign a legal malpractice case. In our case, because Judge Nicholson had dismissed the case with prejudice, the Supreme Court said we're changing that. The case is dismissed without prejudice.

I would like, Judge, to hand you just a copy of the *Skipper* case which I have marked as Exhibit 2.

(WHEREUPON, a document is handed to the Court.)

MR. EPTING: And the only reason I do this, Judge, is, if you turn to what is the second page, you'll see in brackets that the Supreme Court says the question of whether you can assign a malpractice case is a novel question in South Carolina. That may have some bearing, Judge, in how you view this. Of course, when we brought the original case against Nexsen Pruet, virtually every kind of claim in South Carolina is assignable.

So we believe that a legal malpractice claim would be assignable as well. It wasn't like we did this in the face of clear and existing law to the contrary. We thought the general law was that you could assign claims. I hand you this case only to say that *Skipper* says it was a novel issue and this was the first time that we've addressed it.

And what subsequently happened, Judge, *Skipper* was argued 30 days or so before our case. It was decided before our case. That's why you get such a short memorandum opinion in our case. They just say, see *Skipper*, the case we decided on this issue before.

What we did, Judge, at that point in time, is we filed -- there is a case that instructs what to do in these circumstances. I would ask, Judge, that you refer to page 13 of this case. It's called *Spence versus Spence*. And on page 13, Judge, I'm referring to, uh, the Headnote 26. I'm reading, 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. That happened here.

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.

So in this case, Judge, we have the ability

to plead a well-pleaded case. Because all that has happened is they say you have brought it in the name of the wrong party. It's not like we're moving to dismiss and we don't have a basis to go forward. We do. We just need it to go forward in the client's name, rather than an assignee.

So pursuant to that case, Judge, what we did is we filed a motion in the Supreme Court. So, in essence, Judge, knowing what the law was, we waited 15 days, which was the time for petitioning for rehearing, because we thought that perhaps Nexsen Pruet would petition for rehearing, uh, because the dismissal was changed to go from prejudice to without prejudice. And we filed a motion to amend the complaint to say, basically, okay, you've told us that we can't proceed in the name of the assignee so we're going to bring it in the name of the client.

The Supreme Court, in that motion, Judge, issued the enclosed order. There's some notion here, Judge Russo, that we needed to file another case and file another motion in this other case in order to have this motion heard.

And the reason is, is what Nexsen Pruet wants us to do is to file another lawsuit and then come in and argue and they would be successful if they were able to argue the passage of the statute of limitations as running from some previous state, which I won't go off on.

So we're not trying to file an additional complaint and file a motion. The reason is we don't have to. Because while the Supreme Court may have misunderstood that we weren't trying to petition for rehearing, they clearly understood that our motion, which is fairly detailed about what we wanted to do, was we wanted to amend in this case, the original case, the one that was decided in the Supreme Court, just so there would be no statute of limitations issue.

And what the court says, in any event, appellant's motion should be addressed by the trial judge in the first instance. So the motion that we filed, if you will, Judge, in the Supreme Court, has basically been sent down to you to decide. It is true, Judge, that in the *Spence* case, the appellate court suggested it could itself grant leave.

Of course -- and why don't I stop right there for a moment, Judge, because I'm getting ready to get off into little bit of a tangent. The Supreme Court certainly understood when we argued this case, Judge, -- and I want to say they gave us ultimately almost two hours to argue this. It went on for a long period of time. Some of the discussion in the case was, well, if this case is dismissed and we have to refile, we've a potential statute problem.

So those issues were all discussed. But as you saw from their original opinion, they didn't decide anything except just saying we just decided in *Skipper* case that that's not an assignable claim. You can't assign it and we're reversing the dismissal with prejudice. When we asked to file the motion, they say you go back to the lower court.

So that's how we got here. And that's why I say, but for this being the case, if this were a separate case, I'd be standing in front of you saying, Judge Russo, the Supreme Court just decided an opinion, just decided a case in which they say that my client, the assignee, can't bring this claim, I need to bring it in

the name of the assignor and I'm asking you to allow me to do that. That's essentially where we are, but through an entirely different set of circumstances.

So what I have attempted to do, Judge, is to describe the procedural posture. We did, in an abundance of caution, Judge, thinking, okay, there will be some objection to the motion in Supreme Court. So we filed a similar supplemental motion asking for the same relief before this court.

So what is the case that brought us here? I'd like to take a few moments, Judge, and describe, uh, to you how this lawsuit, this malpractice case, arose. Many years ago, a company by the name of DC & Sons, who were Mr. Kefalos and I's clients, were sued by the plaintiffs in this case, Pavilion and McNair, for specific performance on the sale of a $5 million piece of property. DC & Sons moved to dismiss the lis pendens on the property because they believed that McNair and Pavilion would not close the property.

Ultimately, that came to be heard in front of Judge Young. And Judge Young -- bear with me

just one second, Judge. (Pause.)

Judge Young, uh, entered an order in that case, in the DC & Sons/McNair case. And what had happened, Judge, is Nexsen Pruet had accepted service of a counterclaim brought by DC & Sons for abuse of process for continuing to maintain the lis pendens, even though they wouldn't buy the property. And so the Nexsen Pruet clients did not understand that, but that case went forward in any event.

Judge Young entered the following order: DC & Sons' motion is granted as Larry McNair and its 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 I find as a matter of law that the filing of the lis pendens was an act in the use of process not proper in the regular conduct of the proceedings. The continued maintenance of the lis pendens in an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on the title. So in the underlying case, Judge Young essentially ruled that McNair and Pavilion and its counsel had misused this lis pendens in

order to try to exhort a different view. At that point in time, Judge, Nexsen Pruet withdrew or was asked to withdraw from that case and separate counsel came in.

So the case was set for trial, Judge, on January the 18th, 2011. We appeared to start the trial. Judge Young enters an additional order, essentially saying that this was going to be a trial on damages. At some point in here, Judge, a recess is granted for the purposes of allowing the parties to discuss whether or not they could enter into some sort of settlement and avoid the trial. The jury, in the meantime, Judge, is being voir dired.

So what did happen, Judge, Judge Young entered a Form 4. I want, Judge, just to take a moment and put this into context. The reason that I'm getting into this detail is the Supreme Court reversed this case as dismissal with prejudice. And the prejudice that was found by Judge Nicholson was not, as I shall get to in a moment, what Judge Nicholson intended in his order. So I'm spending some time to try to explain to you in what we told the Supreme Court. There was not only no

collusion between DC & Sons and Pavilion and McNair, every bit of this, the whole discussion did not -- it was all put on the record with Judge Young because everybody in that room realized that the Nexsen Pruet clients would not know what the abuse of process laws were. And we all understood it was going to be a legal malpractice case. So far from trying to hide anything, we put it all on the record. What happens is, we appear. If you will, Judge, go to the second handwritten page. It says Pavilion and McNair assigned to DC & Sons, et cetera, et cetera. Well, the reason I read that to you, Judge, is in Judge Nicholson's order, Judge Nicholson holds that Judge Young didn't know anything about the assignment. I'm going to read that part of the order to you in a moment because I -- I think this is important, Judge, and I'm sorry to be taking so much time. But far from trying to hide anything, it was all on record, every bit of it.

Judge Young actually says -- and this is from the transcript, Judge. All of this is in record of this case. The Court: All right. Well then, do you want a Form 4 then entered saying

this is assigned or that is it settled. Mr. Rafferty: The assignment is actually, Judge, reflected in the agreement that is handwritten and provided by the court.

We also asked, uh, Judge Young to take a look at the amount of the confession, which is likewise a document that was given to Judge Young, because we wanted him to know exactly what was going on. And the Court, in the transcript, Judge, and I'm reading, asked me: What is the breakdown on that number? How did you come up with $4.58 million? There's then, Judge, a discussion that goes on for a page where I detail each and every element of the damage.

Judge Young says: Alright. 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 that I have lived with the past couple of years, so I am very familiar with the facts and what has given rise to the changes of the damages. And I think it is a fair resolution of this dispute between the parties.

Now, what I'm referring to, Judge, is what

is contained -- Judge Nicholson entered an order, Judge, in which, uh, -- he enters an order in which he says that the facts and circumstances under which the assignment was entered created the opportunity for collusion as did the conduct by counsel and DC & Sons. The Court goes on to find that we brought embarrassment to the attorney/client relationship.

Now, I know, Judge, you may be asking what does this have to do with a simple amendment of the pleading. Well, when this case first came back from the Supreme Court, it went to Judge Nicholson. We've already made these arguments before Judge Nicholson. I provided the Court a copy of the transcript in front of Judge Nicholson. I think Judge Nicholson, on the record, acknowledges I signed it, I'm stuck with it, but that's not what I intended. I had it right the first time. Because when we argued the case, Judge Nicholson said why don't I just write the assignment and y'all can proceed.

So Judge Nicholson recused himself. And part of it, too, Judge, was I thought if there's any concern about what was done here,

we should be in front of Judge Young. So when we left, that's what everybody's expectation was, we would be in front of Judge Young. Judge Young has a policy he doesn't hear cases involving lawyers within his jurisdiction. Hence, here we are in front of you.

What I would say, Judge, is the dismissal with prejudice was reversed by the Supreme Court because I believe the Supreme Court understood, since all this was public record, that it didn't happen the way it was set out in Judge Nicholson's order. I think the transcript by Judge Nicholson makes clear that he didn't intend it that way either.

So where does that leave us, Judge? It leaves us with what, I think, is a fairly straightforward Rule 15 motion. We found out that we had sued in the name of the wrong party. The Supreme Court told us in that case you need to bring it in the name of the client, not in the name of the, uh, assignee. So we filed motion with the Supreme Court and they directed that decision to you to be decided.

And what I think, Judge, is important is the case *Spence versus Spence*, because *Spence*

versus Spence just says if there's a basis for the amendment, the amendment should be allowed. So here, we have a case in which the amendment is simply to allow the case to proceed in the name of McNair and Pavilion, but not as an assignment.

Judge, I have said a lot. I have given you a lot of documents. Can I answer any questions that you may have?

THE COURT: I think I'm -- I think I follow you.

MR. EPTING: All right, sir.

THE COURT: Yes, ma'am.

MS. CUNDARI: May it please the Court. Tina Cundari. I represent Nexsen Pruet. With me today is Betsy Gray, my colleague, as well as Ben Gooding, and then Jimmy Long is here as a representative for Nexsen Pruet. Just as a housekeeping matter, first, Your Honor, we filed a memo in opposition to this motion. I wanted to make sure you have a copy of that. If you don't, I'll be happy to hand one up.

THE COURT: I do. I have a copy of it.

MS. CUNDARI: Great. Your Honor, this motion should be denied because this case is

over. The South Carolina Supreme Court held that this case should be dismissed without prejudice. That is the judgement of the Supreme Court. That's in the remittitur to this court. So this court is bound to do what Supreme Court said, which is this case is dismissed without prejudice. The motion is not proper. You don't get to come in after a dismissal and file a motion to amend the complaint. The dismissal means dismissal. The case is over. So on that basis alone, this case -- this motion should be denied.

Supreme Court is familiar with the process of remanding and granting leave to amend. The Supreme Court did not do that in this case. The Supreme Court confirmed every word of Judge Nicholson's order, even the words that they now dispute. The only thing Supreme Court changed about Judge Nicholson's order is it said that proper remedy should be dismissal without prejudice.

And the reason the Court did that, we heard a lot today about this assignment of a legal malpractice claim, but this case has been so tainted from its inception that the Supreme

Court held the only proper remedy -- we have argued this issue about the remedy about whether it should be dismissal with prejudice, without prejudice or whether the parties should be permitted to amend. The Supreme Court chose dismissal without prejudice. That's what this court is bound to do.

The reason the Court did that is the only way to cure the taint in this case is to start over. And that is what they need to do. They need to go file a new case. Nexsen Pruet is entitled to every defense possible for a legal malpractice case including bar by the statute of limitations. So that's for another court on another day. This Court's job is to follow the remittitur. The case is dismissed. This motion should be denied.

Supreme Court could have granted this relief in the first instance during the appeal -- we argued about this same stuff -- or it could have done it post-decision had they filed this particular motion within 10 days of that Supreme Court's order. They didn't do that. So the Supreme Court said it's over. So I submit to Your Honor that the case should be

dismissed.

This case was filed in the names of -- this is what is so tainted about this case. It was filed in the names of the client of Nexsen Pruet, Larry McNair, individual, and a company named Pavilion. Filed in the names of a client, but it turns out there was an assignment that the client had assigned the claims, the legal malpractice claims to somebody else, their adversary in the underlying litigation. So it was adversary who was controlling the entire case, not the client. It wasn't a genuine legal malpractice case.

THE COURT: That's one of the things I was concerned about. There was the concern that, Mr. Epting, you expressed that -- and I think took some umbrage to, and the Court felt like there was some shiftiness going on. Obviously, your position is there wasn't. Why wasn't -- why wasn't, uh, this case ever brought, DC & Sons versus Nexsen Pruet as the assignee to this agreement? Because it is somewhat deceptive the way its captioned.

MR. EPTING: The reason, Judge, is that if you look at the settlement documents, what was

assigned, meaning in the underlying case, what was assigned were the proceeds. So if you understand that, in other words, in the first instance, the way the assignment worked was McNair agreed to bring the lawsuit. What was assigned were the proceeds of --

THE COURT: I thought the assignment was the assignment of all claims.

MR. EPTING: No, sir. In that same paragraph I referenced, it said, in essence, at DC & Sons' election, they could --

THE COURT: Their election.

MR. EPTING: They could, uh, acquire the claim. It's been some time since I've read it, Judge, but we brought the lawsuit on the theory that, uh, the proceeds were assigned.

THE COURT: All right.

MS. CUNDARI: And Your Honor --

MR. EPTING: Judge, just to add one thing, DC & Sons was added early on in this proceeding as a party. They made a motion to add DC & Sons, so DC & Sons was added, I think ---

THE COURT: Right.

MR. EPTING: --- at the pleading stage.

MS. CUNDARI: And we made that motion

because we discovered the assignment on the public index. We knew that DC & Sons was the real party in interest, the one controlling the litigation, the one that owned the claims, the one that was entitled to the proceeds. So we knew that we had to bring them in. That's what we did.

Your Honor, this whole issue about whether the claims were assigned or not, this has been litigated. We've been going down this road for several years now, since 2011. Got summary judgement. Then we argued on appeal, and we won the appeal.

THE COURT: Let me ask about that too. Obviously, I wasn't there. I don't have the scope of everything that was argued before the Court. These issues -- and without trying to open up another whole can of worms and stuff, I'm assuming that the reason this is being so hotly litigated at this point is because there is a statute of limitations issue that will come up if I were to rule that the case, that the Supreme Court case is over pursuant to summary judgement and all that, then if they bring another case, DC & Sons versus Nexsen

Pruet, that that possibly is barred by statute of limitations. So I understand that that's a concern. Was that argued in front of the Supreme Court?

MS. CUNDARI: Yes, Your Honor. We -- and we've attached this to our brief. Their -- the whole issue about what the proper remedy was turned on the statute of limitations issue. That was their concern.

THE COURT: So the court considered that and --

MS. CUNDARI: And decided that --

THE COURT: Well, at least it was presented to them.

MS. CUNDARI: It was presented and the Court said dismissal without prejudice is the proper remedy. When you look at the case law, dismissal without prejudice still means dismissal. You can go file a new complaint, but you don't get to come into -- you don't get to keep your same case alive that's been dismissed. So that's what they're trying to do here. They're trying to circumvent Supreme Court's order, trying to keep this case alive within the same case.

Your Honor, they're going to get to argue about statute of limitations another day. We'll -- they'll -- you know, if they want to file -- if Larry McNair and Pavilion truly want to file a legal malpractice case, that's the first question, because Mr. McNair got complete release as a part of this deal so I don't know why he would want to sue Nexsen Pruet for legal malpractice when he got a complete release under this handwritten deal that was struck on the first day of trial. And Pavilion is just a shell company, so I don't know why they would either.

So the point is, is that if that happens, they can come to court, have their day in court and we get to have our defenses. We -- this is what the whole point of the appeal was is arguing about these very issues. I've attached excerpts from their briefs, Exhibit C to our memo. I also brought the complete set of briefs if you'd like to see those, Your Honor.

THE COURT: What? I'm sorry.

MS. CUNDARI: The complete set of briefs on appeal.

THE COURT: I think I have that.

MS. CUNDARI: I didn't provide those to you. I've got copies. They are also obviously publicly available.

THE COURT: If you have --

MS. CUNDARI: I do.

THE COURT: If you have copies. (Pause.) I think I have excerpts. I don't have the full.

MS. CUNDARI: Did you still want these, Your Honor?

THE COURT: Yeah.

MS. CUNDARI: Okay.

THE COURT: Yeah.

MS. CUNDARI: I just attached their concluding paragraphs and their briefs as exhibits to show that the issue was before the Supreme Court. So, you know, again, Your Honor, the case is over. It's been dismissed. Nothing further for this Court to do. If they want to file a new case, they can do that and we can fight about the statute of limitations then. That's for another day, another court. So if no further questions, I'll take my seat.

THE COURT: All right. Thank you.

MS. CUNDARI: Thank you.

MR. EPTING: Judge, just a couple of observations. Could I ask you to look at what I handed up to you as Exhibit 5?

THE COURT: Got it.

MR. EPTING: So I ask this question, Judge, we filed this motion in the Supreme Court and the Supreme Court says, in any event, appellant's motion should be addressed by the trial court in the first instance. If they thought there was nothing to be addressed -- and it says, Judge, in the first instance. So if they believed that the subject of our motion had been decided and it was over -- and remember, Judge, this motion is filed in the Supreme Court in this case. And the Supreme Court took that motion from its court and remanded it back to this court with instructions, appellant's motion should be addressed by the trial court in the first instance. Now --

THE COURT: I know you can't answer for them. None of us can. How simple is it that they heard all the arguments, like you said, over two hours, for them just to simply say we're going to -- we're going to affirm the

decision of the court granting summary judgement as to the issue of whether these assignments are allowable. However, understanding the situation, we're going to allow you to amend. We're going to send it back to the lower court with leave to amend. How simple and easy would that have been if that was their intention? I think you're trying to argue that's their intention, Judge. But this is incredibly poorly worded if that's their intention.

MR. EPTING: Well, what I would say, Judge, is none of us, uh, know. We don't. But I think it might help, Judge, if you looked at the briefs that Ms. Cundari just gave you --

THE COURT: I'm going to.

MR. EPTING: --- what you're going to find is that the briefing on the, uh, question of what is the result in a case, in a case in which the assignment is ruled invalid is an entirely separate discussion in the briefs about issues that are not even before this court. I believe the Supreme Court simply didn't want to get into all of the discussions of what the permeations were because it had

never, ever been addressed by the lower court because there would have been no reason for the lower court to address it because the lower court struck it with prejudice. So the record was pretty convoluted. When we argued it, the oral arguments were strictly focused because the oral arguments, Judge, were before any opinion was issued in either *Skipper* or this case.

THE COURT: Right.

MR. EPTING: So the arguments were strictly limited, uh, to can you or can you not, what is the public policy issues for why you should or should not be able to do this. But, Judge, I have no idea. But I have a similar quandary for you. If that's what they intended, why did they change it from a dismissal with prejudice to one without?

THE COURT: I mean, my initial -- my initial thought process on that was that their belief was that the lower court erred in doing these without prejudice, I mean, with prejudice. That's a message to those of us in the lower court that in the future, you know, if you're going to dismiss those claims, they

need to be done without prejudice, not with prejudice.

MR. EPTING: Right. And I think, Judge, that is the answer. The only party who is harmed by this, because had you done that, I would have been back in your courtroom the next day and with a motion to give me leave to amend to insert the right party.

THE COURT: All right. Let me ask then, first of all, when you received that and it was unclear, why did you wait 15 days to file your motion knowing that, at that point, it's out of time?

MR. EPTING: No, I don't think so.

THE COURT: What was the reason for waiting?

MR. EPTING: Because, Judge, you have 15 days to petition for a rehearing. We didn't want a rehearing because --

THE COURT: Right.

MR. EPTING: --- the case was -- the opinion was changed to without prejudice. So we were never going to attack the opinion. We simply filed a motion under *Spence*, which you can file motions in the Supreme Court until the

remittitur is issued. And so it was never our intention to question the opinion because we felt like we understood why it was dismissed without prejudice. We thought, okay, under this case --

THE COURT: Am I not -- I mean, I asked the question. Maybe I didn't ask it very well. The issue, underlying issue that we're kind of not dealing with at this point but that is very real is that there very well may be a statute of limitations problem if this court just upholds the -- follows the Supreme Court ruling that this case is over.

MR. EPTING: That's it.

THE COURT: All right. That was argued to the Supreme Court. So they knew that if they were throwing something back down here that was going to be this when they had the opportunity to clearly state that in this particular -- cause they can do that -- in this particular case, because of the statute of limitations issue, we're going -- this court is going to allow the amendment and allow the case to go forward. They could easily have done that because they had the knowledge of that. They

knew that we would be here today doing this.

MR. EPTING: And, Judge, that is why -- because not only that, we had the case, *Spence versus Spence*, that said you do exactly what we did, which is to file a motion and say to the Supreme Court, okay, because there may be a statute problem, please give us 15 days to amend.

THE COURT: And they declined that.

MR. EPTING: They declined it, Judge, for the reason that they said in the first instance, the trial judge needs to rule on that. Because you know, Judge, motion practices become its own set of rules in Supreme Court. For all I know, it's like we don't need to be encouraging people to ask for supplemental relief in the Supreme Court after we've already issued an opinion. We think these matters should be returned to the lower court for decision. It could be a policy matter. None of us knows.

THE COURT: I mean, who knows. Here's the thing. I'm confident they don't necessarily want to generate more business for themselves, but that's what this essentially does. No

matter how I rule, if I rule this way, you're going to appeal this decision.

MR. EPTING: Yes.

THE COURT: Should.

MR. EPTING: Yes.

THE COURT: If I rule your way, they're going to appeal this decision. They should. So the Court is going to have to deal with it.

MR. EPTING: Well, let me ask this question, Judge. Two cases were tendered to you and I know 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 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.

MR. EPTING: Yeah. Well, Judge, I -- as I have said, I have no idea.

THE COURT: I don't either.

MR. EPTING: I just would say to you if you are reading tea leaves about what did they intend ---

THE COURT: I know.

MR. EPTING: --- don't have you have to come back to the last tea leaf and they say this motion, the one I gave you, that they filed, should be heard before the trial court. And if they didn't intend that you have any authority to do that, why would they say you have to hear it first? Once we get to you have to hear it first, aren't we really back to just the question isn't this just a simple Rule 15?

I mean, I understand, Judge. I've understood it. I believe when we filed what I call the *Spence* motion, that they would solve all this, but they didn't, and so lucky people like you gets stuck with it. Thanks for your time, Judge.

THE COURT: Thank you, sir.

Anything further?

MS. CUNDARI: Really briefly, Your Honor. Just a couple of things. Your Honor's right. Mr. Epting's right. The appellate court is the court that decides whether there should be leave to amend. That's exactly what *Spence* says. It says when there's an issue where there's been a dismissal with prejudice below and then the court modifies, the court has within its power the ability to, uh, grant leave to amend.

Depending on how Your Honor rules, I don't know that there would be an appeal from this particular ruling. I don't know that that would be an immediately appealable order. But certainly, if we go to a new case, as I think is the procedure that needs to happen here and there's a ruling, there would be an appeal and we could find out what the Supreme Court meant by that statement.

The only -- what I would say to you is this, Your Honor, it has to be reconciled in a way that's consistent with the remittitur and the dismissal without prejudice. The only way that I can think of, since we're trying to

decide what Supreme Court thinks, to reconcile in a way that's consistent is that that motion needs to be filed in the trial court. That's the only way it could be consistent with a dismissal without prejudice. I have nothing further. Thank you, Your Honor.

THE COURT: All right. Thank you, folks.

MR. EPTING: Judge, one procedural question. I had delivered over Judge Nicholson's argument. Did you -- I would ask that the Court take the time to review it because --

THE COURT: I've read it completely.

MR. EPTING: All right.

THE COURT: You're talking about the transcript from Judge Nicholson.

MR. EPTING: Yes, sir.

THE COURT: Where he recused?

MR. EPTING: Yes, sir.

THE COURT: I read it last night.

MR. EPTING: Thank you, sir.

THE COURT: All right.

(WHEREUPON, the proceedings conclude at approximately 10:52 a.m.)

CERTIFICATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston, South Carolina, on this 6th day of October, 2016.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

Teresa B. Johnson

Official Court Reporter

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. & LARRY MCNAIR,

PLAINTIFFS,

VS.

NEXSEN PRUET,

DEFENDANT.

TRANSCRIPT OF RECORD

MARCH 30, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE J.C. NICHOLSON, JUDGE.

A P P E A R A N C E S:

ANDREW EPTING, ESQUIRE
Attorney for the Plaintiff

ELIZABETH VAN DOREN GRAY, ESQUIRE
TINA CUNDARI, ESQUIRE
Attorneys for the Defendant

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

(The following proceedings were held March 30, 2016, Charleston County, South Carolina, @ 2:50 p.m.)

THE COURT: Pavilion Development? For the record, if everybody would say who they are and who they represent for the record, please.

MR. EPTING: My name is Drew Epting and we represent the Plaintiffs, Pavilion and McNair.

MS. CUNDARI: Tina Cundari on behalf of Nexsen Pruet.

MS. GREY: Betsy Gray, Nexsen Pruet.

THE COURT: I guess I am sort of familiar with the case, okay? Mr. Epting, I think Ms. Gray was here previously. I have pulled out the opinion that was issued by the Supreme Court in the case on the appeal where I granted the summary judgment motion where I stated that the assignment of the legal malpractice case was prohibited because of public policy. The Supreme Court had heard a previous case, earlier case and upheld my decision. And in that decision, I have looked at it, it says affirmed as modified.

In my summary judgment order I had said the action was dismissed with prejudice. The Supreme Court modified that finding as to without

prejudice; is that correct?

MS. CUNDARI: Correct.

THE COURT: I find nothing in the opinion where it was remanded to this court. Now, I don't know if there has been a remitter submitted or not. Has there been a remitter submitted?

MS. CUNDARI: There has.

THE COURT: There has been a remitter from the Supreme Court back to the circuit court?

MS. CUNDARI: Yes, sir. On September 3rd, 2015. I can give you a copy.

THE COURT: What did that say?

MS. CUNDARI: It attached its opinion to the one you just referenced. I will be happy to provide a copy to the Court.

THE COURT: Let me take a look at the remitter.

(Brief pause.)

I guess my question, to you, Mr. Epting, why didn't that end the case? In other words, you got a summary judgment motion against you. It goes to the Supreme Court. Supreme Court upholds the summary judgment motion. The only thing they changed was it was without prejudice so you can refile or another party could file a legal

malpractice case against Nexsen Pruet. Why wasn't that the end of the case?

MR. EPTING: Judge, it wasn't the end of the case --

THE COURT: Why not? When does it end?

MR. EPTING: We filed a motion in the Supreme Court to ask them to grant us leave in this case.

THE COURT: And I have got that in front of me. That was my next question.

MR. EPTING: All right, sir.

THE COURT: So your opinion is it did not end because of the order issued by the Supreme Court looks like on September the 3rd, 2015; is that correct?

MR. EPTING: Judge, let me check my dates here.

THE COURT: That's the same date that they sent the remitter, okay? Now, looking at the order, Mr. Epting, it basically says we construe appellate's motion as a petition for a rehearing. Now, your motion very clearly said apparently a motion for order allowing Pavilion Development Larry McNair original time to amend their complaint after remand. The Supreme Court said we construe

that motion as a petition for rehearing. As such this motion was not timely filed, therefore, it is denied.

Now, the next sentence is what is throwing me a loop, okay? Again, I don't understand what they mean. It says in any event, appellate's motion should be addressed by the trial court in the first instance. Now, what does that say to you?

MR. EPTING: Judge, I think it does because -- let me ask this question. Have you read the case Spence vs. Spence?

THE COURT: No, I have not. I have not read the case. I assume it was the same issue and I didn't read it.

MR. EPTING: It is, Judge. In Spence vs. Spence, that's what happened. The Court -- why don't I just read it, Judge.

THE COURT: Just tell me about it.

MR. EPTING: So in any event, it's a complicated case, but what happens in the Supreme Court is that there has been a grant of a dismissal with prejudice. So the Supreme Court said the people had no choice but to appeal. It wasn't like the trial judge could have granted a motion to

amend because the dismissal was with prejudice and so he had to appeal. In Spence vs. Spence the Supreme Court said if it is -- let me just read it. "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. Appellate court should follow this procedure when the Plaintiff presents additional allegations or a different theory of recovery."

Here, Judge, of course the reason it was dismissed is we were supposed to have sued in the name of the client, not the assignee. And so we fit squarely within the exception and what --

THE COURT: It says the Supreme Court can issue that order and in this case you filed the order, but it was not timely, therefore, they treated it as a -- I don't know why they treated it as a motion for rehearing, because obviously doesn't say that.

MR. EPTING: And, Judge, of course I don't know this matters, we believed we couldn't file the motion until the time for a rehearing had passed. So we filed the motion thinking that we were qualifying under Spence vs. Spence and we expected that the Supreme Court would hear it and would grant relief on the basis of Spence vs. Spence. But what the court clearly said was, and understand this, Judge, there is a motion filed in the Supreme Court. The last line of the Supreme Court order says in any event, appellant's motion should be addressed by the trial court.

So the motion that was filed they're saying we aren't going to hear it in any event because it has to be heard first by the lower court. I don't think there is any other way to read it, Judge.

Now, you know, Judge, it brings us to this issue. In this case there isn't any question but that a wrong has been comitted. Judge Young held that.

THE COURT: Well, I don't question that. I didn't question that when we had the summary judgment hearing. The whole issue was whether you could assign it.

MR. EPTING: Right. And this Court's intuition, Judge, for two and-a-half pages was why don't I just strike the assignment. But six months later that was not the order that you entered and the point that I was getting ready to make, Judge, is this should be a remedy for a wrong. This was a novel issue. It wasn't like we didn't understand the problem. It was all put on the record in front of Judge Young. So we go up to the Supreme Court thinking that it can be assigned, why is it any different than the assignment of any other claim to find out that it isn't. So we are back down here and if this court --

THE COURT: When did the statute run, do you remember?

MR. EPTING: The statute, Judge, and that's the point here.

THE COURT: How long ago did it run?

MR. EPTING: It would have run, Judge, about nine months after.

THE COURT: After what?

MR. EPTING: Your order.

THE COURT: Nine months after my order.

MR. EPTING: If you had dismissed.

THE COURT: Why didn't you follow my

order and sue in the real name?

MR. EPTING: Because, Judge, you dismissed with prejudice. And we didn't have any alternative but to appeal.

THE COURT: Okay.

MR. EPTING: And that's what Spence vs. Spence says. Because absolutely if you would have dismissed without prejudice it would have made everything so much easier. We just turned around and filed the lawsuit. Now, we probably, Judge, would still have had to appeal.

THE COURT: Well, you wanted that issue resolved on the assignment.

MR. EPTING: You surely do.

THE COURT: I understand that.

MR. EPTING: But, Judge, I do understand it's a little unusual. It's an interesting procedural --

THE COURT: So basically what you're saying is instead of the Supreme Court hearing the motion to allow you to amend they just dumped it back in my lap.

MR. EPTING: That's it, Judge.

THE COURT: Okay. Be glad to hear you.

MS. CUNDARI: Your Honor, thank you. I

don't think that's correct. I don't think the Supreme Court has dumped this issue back in your lap.

THE COURT: What does that last sentence mean? That's my question. I'm not sure Mr. Epting is not right in his interpretation of what it means.

MS. CUNDARI: That sentence needs to be read consistently with the opinion which dismisses the case without prejudice. So you can do that by saying yes, that motion perhaps is to be heard, those issues, that motion about whether the statute of limitations applies, whether a real party interest is really suing now. But not this court in this case. By another trial court on another day in a new case. They have a remedy. Their remedy is filing a new case.

THE COURT: But they really don't because the statute has run.

MS. CUNDARI: We haven't even gotten there yet. We haven't even raised that defense yet. We are sort of getting ahead of ourselves. Until they file a new case as the real parties in interest we submit represented by new counsel who are independent. As you know this case, this very

issue was argued at the Supreme Court in both briefs. The opening brief that they filed as well as their reply brief. They said court, do not -- if you dismiss this case without prejudice it will essentially end the case. You know what the Supreme Court said? Dismissal without prejudice. So that's what you're bound by, Your Honor, is the Supreme Court opinion. The remitter does not attach that order. It only attaches the opinion saying dismissal without prejudice. This case is over.

THE COURT: What's your interpretation of that sentence there?

MS. CUNDARI: My interpretation of that sentence is that the issues raised in that motion are for the trial court on another day in another case. That's the only way it can be read to be consistent with dismissal without prejudice.

THE COURT: Assuming Mr. Epting is right, I think he has got a motion to amend the complaint as well as add substitute parties, I believe it is a substitute parties motion, right?

MR. EPTING: Yes, sir.

THE COURT: Obviously you want to substitute a real party in interest?

MR. EPTING: Yes, sir.

THE COURT: I think Mr. Epting is right as far as his interpretation, okay? So I guess we have to move to a request for a motion to amend his complaint which I don't really have any problem with. I do have some real questions and difficulty on substitution of parties under the law. I don't know if y'all -- did y'all address that issue in the memo? I don't think you did.

MS. CUNDARI: We addressed -- these rules, Your Honor, Rule 15 and Rule 17 they apply prejudgment. They don't apply after a party has won a case, has to go to the Supreme Court and won it again. So these --

THE COURT: I understand that. That's my problem with it, but at the same time I think he probably is entitled to be heard based upon the language the Supreme Court has put in that order, okay? Whether they deny his motion to -- they deny his motion to -- motion to allow Pavilion or Larry McNair a reasonable time to amend their complaint after remand. Okay?

So what I'm going to do is give you all an opportunity to fully brief whether or not his motion, he should be entitled to amend and

substitute parties, okay, unless you think you have already got it briefed properly.

MS. CUNDARI: We think we do have it briefed, Your Honor.

THE COURT: You think you do. Mr. Epting, do you think you have it briefed properly?

MR. EPTING: Judge --

THE COURT: I'm going to give you more time if you want to.

MR. EPTING: Judge, I think we filed the appropriate motion.

THE COURT: I will hear your arguments on the motions then.

MR. EPTING: Judge, it is pretty straightforward. The record -- the Supreme Court has said that the case needs to proceed in the name of the client rather than the assignee. And under Rule 17 it says no case shall be dismissed on account of their being not named the real party in interest. Under Rule 15 if you grant the amendment it relates back so that there is no statute of limitations problem which is why it needs to be done in this case, Judge.

THE COURT: Be glad to hear you.

MS. CUNDARI: Your Honor, a motion to

amend the complaint should be freely granted in the interest of justice when there's no prejudice to the Defendant. And here the prejudice is strong. First of all, Nexsen Pruet won this case and now is sitting in this courtroom having to defend the same case based on a new motion reviving the case that Nexsen Pruet already won. The Supreme Court said dismissal without prejudice.

Number two, the reason why it is prejudicial is because we don't even know who is bringing this motion. As far as we know it is still DC and Sons which is not Nexsen Pruet's client, it's a third party that was adversary to Nexsen Pruet's client. They are asking to be substituted as real parties in interest which tells us that DC and Sons is still in control, same counsel. So this whole procedure, this whole taint of the case that Your Honor recognizes and the Supreme Court recognizes is still happening. So that's the prejudice to Nexsen Pruet.

Nexsen Pruet is entitled to a genuine legal malpractice case bought by real parties in interest we submit represented by new counsel. That's the procedure contemplated in the case law when these assignments get stricken, when there is

an assignment between the adversary. The courts say you got to come back with new counsel and the reason is is that they represented DC and Sons, the judgment creditor. And so we question whether Plaintiffs would even bring this case if they were the real parties in interest because Larry McNair, one of the Plaintiffs, he got a full release. Why in the world would he be in this courtroom suing Nexsen Pruet for legal malpractice? And number two, Pavilion --

THE COURT: I don't remember who was the person that originally had the lawsuit.

MR. EPTING: Pavilion, Judge.

THE COURT: Pavilion.

MR. EPTING: Pavilion brought the lawsuit first against DC and Sons. And so the lawsuit was brought in the name.

THE COURT: And the settlement of Pavilion assigned it to McNair?

MR. EPTING: The settlement assigned the Pavilion McNair suit, Judge, the proceeds to DC and Sons. And this lawsuit is actually brought, Judge, in the name of McNair and Pavilion. And so the real parties in interest are actually named in this pleading but --

THE COURT: That's something I don't recollect.

MR. EPTING: Sorry?

THE COURT: I don't recollect. I thought the real party was not even named in the lawsuit.

MR. EPTING: No, sir.

THE COURT: And the settlement issue. How did you settle the part where the assignment took place? Who was that party that assigned it to your client?

MR. EPTING: The actual Plaintiff Pavilion Development and Larry McNair.

MS. CUNDARI: What happened here, they brought the case in the name of Pavilion and Larry McNair, but they really weren't the real parties in interest.

THE COURT: No, they weren't. They were the assignees if I remember correctly.

MS. CUNDARI: Correct. They assigned the claim.

THE COURT: Who was the assignor to these people?

MS. CUNDARI: They were assignor.

MR. EPTING: The actual assignor of the

proceeds, Judge, was Pavilion Development and McNair, the Plaintiffs in this lawsuit.

MS. CUNDARI: It was confusing because on its face it looked like a genuine legal malpractice case and it wasn't until we stumbled upon the assignment and brought our answer, brought our counterclaim, brought DC and Sons in, the assignee.

THE COURT: I don't remember who are the parties to the assignment off the top of my head.

MS. CUNDARI: The parties -- Your Honor, you drafted the assignment, but the parties to the assignment were Pavilion Development Company and Larry McNair assigned claims -- the claims, the legal malpractice claims, which is what this Court found and the Supreme Court found as well as the control of the case, the proceeds, everything, DC and Sons. They are adversaries in the case below. We lost. We are going to confess judgment in your favor. We are not going to challenge the amount for 4.5 million dollars and you go sue our lawyers, we are out of here. We got a full release, got what we wanted, full release, and Pavilion was just a specially created entity for purposes of

purchasing the property so what do they care? Here we are, we are still defending this case that is brought and controlled, and I haven't heard otherwise, by a party that's not even been a client of Nexsen Pruet. That's the problem with the case we have.

THE COURT: Who was the original client of Nexsen?

MS. CUNDARI: Pavilion Development Company and Larry McNair.

THE COURT: Was the original client?

MS. CUNDARI: Yes, sir.

MR. EPTING: Judge, there is one issue here that I will raise. It looks like to me this motion is pretty simple. The Supreme Court has sent this back to you. I think the first question of is this Court to do something about it. Then there's a second question. There are these accusations that are made about Mr. Kefalos and I and what we have done and what we should have done and how is it that we were representing these different interests. And the answer, Judge, is we didn't do anything wrong and where I am headed with this is if there is any question or if it bears in any way in this Court's mind this should go back to

Judge Young and the reason I say that, Judge is this: On the morning of trial --

THE COURT: Let me say this: I have never thought you did anything wrong. Okay?

MR. EPTING: But, Judge, unfortunately --

THE COURT: In other words, in my opinion the assignment was perfectly legal. There was nothing wrong with the assignment. But because of public policy and the way lawyers operate, this Court was of the opinion it should not be allowed. It didn't have anything to do with your conduct or anybody's conduct or the assignment. I don't know if that answers your question. Throughout this whole process I have never thought the lawyers did anything wrong. Y'all settled the case, part of this case was assignment. I just took the position that the way attorneys operate with their clients that that couldn't function within the legal community and it should be barred. Didn't have anything to do with conduct, okay? Because I think the assignment was very valid.

MR. EPTING: Judge, well --

THE COURT: Does that answer your question?

MR. EPTING: It does, Judge. With all due respect, you said that on the record when we argued this orally in March of 2013. The order that bears your signature that was six months later says I think some things that are just fundamentally not correct about what Mr. Kefalos and I did and the accusations against us that we bought shame and embarrassment upon the profession. That's one of the things it says. That we hid things from Judge Young, that he didn't know these things, and the answer, of course, Judge, is we understood that there was going to be a legal malpractice case which is why every bit of this, every bit of this settlement --

THE COURT: Let me say this: If you want me to send it to Judge Young I will be happy to send it to Judge Young. I will be happy to get out of the mess.

MR. EPTING: Well, actually --

THE COURT: I don't have any problem doing that.

MR. EPTING: Well, Judge, that's exactly --

THE COURT: If that's what you want I will be happy to do that.

MR. EPTING: I think that is the thing --

THE COURT: Because I have heard enough about it.

MR. EPTING: Well, Judge, because of what I am hearing that's exactly --

THE COURT: It was a proposed order. I probably should have X'd all that out because that's not really what I thought.

MR. EPTING: It is not --

MS. CUNDARI: That's not what you said, Judge.

THE COURT: But I signed it so I got to live with it. I will live with it.

MR. EPTING: Well, the unfortunate thing, Judge, is what you said on the record.

THE COURT: Is what I said today.

MR. EPTING: Is exactly what you said today and you said on the record so why don't I just strike the assignment and then this lawsuit can proceed because it's in the name of Pavilion and McNair and you turned to Ms. Gray and you said what about that? What's the prejudice? Why won't that work? Is there anything wrong with it? And after two pages she finally says yes, Judge, you're

right. And yes, I too regret, Judge, that that's not what happened and we wound up with an order that was quite different. But I think the safe thing to do, Judge, because we could wind up back in the Supreme Court. I appreciate everything you said. I believe that. But it isn't what the order said and I worry that we are functioning --

THE COURT: I got to live with my order, okay? If I signed it, got the signature on it it's the order. I can't get around that.

MR. EPTING: I'm afraid that's right.

THE COURT: Sometimes I don't necessarily enter proposed orders properly and I apologize for that, okay?

MR. EPTING: But, Judge, what -- here's what I think happened. I still think because we could wind up back in the Supreme Court, I think the safe thing is to let Judge Young decide this. But the Supreme Court essentially took the time off the oral arguments and we argued for some time. One of the biggest issues was what happened in front of Judge Young. And the one thing that I think I convinced the Supreme Court of was we went overboard to reveal everything that had happened and the reason, Judge, that they dismissed the case

without prejudice was because all of the things that were in your order about why it was dismissed with prejudice had to do with things that were hidden from Judge Young, the embarrassment, humiliation that Mr. Kefalos and I brought to the profession. Regrettably those are things in the case and the Supreme Court didn't say we are changing this from a dismissal with prejudice to without prejudice because we don't find any truth to any of this. And I respectfully, Judge, request that you send it to Judge Young and that way he will know exactly what he intended and if we wind up back in the Supreme Court --

THE COURT: Let me say this: I'm not going to send it to Judge Young. I'm just going to recuse myself, okay? You can talk to Judge Young. If he wants to accept it and hear it that's great. Otherwise the clerk will just assign it to someone.

MR. EPTING: All right, sir.

THE COURT: I'm not going to lay it on Judge Young unless he wants it laid on him, okay?

MR. EPTING: Well, I think he may --

THE COURT: All I will do is based upon your request, I will recuse myself.

MR. EPTING: All right, sir.

THE COURT: Okay? Now, who hears it y'all have to talk to -- who is administrative judge? Judge Young. So I suggest the two of you talk to him and see if he wants to hear it or if he wants to assign it to somebody, okay? It's not going to be me because I just recused myself.

MR. EPTING: Thank you, Judge.

THE COURT: Thank you all so very much.

(These proceedings were concluded at 3:45 p.m., March 30, 2016, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 11th day of April, 2016 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Registered Diplomate Reporter

RECEIVED

AUG 28 2015

S.C. Supreme Court

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.

MOTION FOR ORDER ALLOWING PAVILION DEVELOPMENT AND LARRY MCNAIR A REASONABLE TIME TO AMEND THEIR COMPLAINT AFTER REMAND

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ATTORNEYS FOR APPELLANTS

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

On August 12, 2015, this Court affirmed the lower court's holding 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. Implicit in this Court's ruling is that Plaintiffs would have a reasonable time to amend their complaint after the dismissal without prejudice.[1] However, in light of the Court's holding in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) and the fact that the Respondent will likely argue that the statute of limitations has run, Appellants Pavilion Development Corporation ("Pavilion") and Larry McNair move this Honorable Court, pursuant to SCRAP 240, for an Order allowing Pavilion and McNair to amend their complaint in the lower court to assert their legal malpractice claim independent of the assignment to DC & Sons, LLC. The deadline for filing a petition for rehearing expired yesterday, and as no petition has been filed, the issue of amendment of the complaint after remand is ripe for this Court's review.

Independent of the assignment, Pavilion and McNair's legal malpractice claims, taken as true in a well-pleaded complaint, state a claim upon which relief may be granted. Thus, the amendment should be allowed. *See Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 882 (2006)(internal citations omitted). This case, above many others, is an example of the wisdom and

[1]*See, e.g., Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal without prejudice); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice).

fairness of allowing the amendment of a complaint to correct deficiencies which resulted in a dismissal without prejudice. For example, this case turned on a novel issue of South Carolina law decided less than two months ago in the case of *Skipper v. ACE Prop. & Cas. Ins. Co.*, Op. No. 27547. Further, the settlement and assignment at issue took place after a summary judgment order was entered in favor of Pavilion and McNair by the Honorable Roger M. Young, Sr., and the settlement was approved on the record by Judge Young as a "fair resolution of the dispute." (R. p. 64). Allowing the statute of limitations to run under these circumstances abrogates Pavilion and McNair's right to bring their valid legal malpractice claim against Respondents and would constitute manifest injustice.

Accordingly, Appellants respectfully request that they be given a reasonable amount of time after remand to amend their complaint to assert their legal malpractice claim against Respondent, independent of the assignment.

Respectfully Submitted By:

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ATTORNEYS FOR APPELLANTS

On this 28th day of August, 2015
Charleston, SC

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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.

PROOF OF SERVICE

I certify that I have served the Appellants' Motion for An Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint after Remand on Respondents by depositing a copy in the United States Mail, Postage prepaid, on August 28, 2015, addressed to Respondent's attorneys of record as follows:

Elizabeth Van Doren Gray, Esquire
Tina M. Cundari, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

By _____
Andrew K. Epting, Jr.
Michelle N. Endemann
Attorneys for Appellants

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

September 18, 2015

The Honorable Julie Armstrong
Clerk of Court
100 Broad Street
Charleston, SC 29401

RE. *Pavilion Development Corp & Larry McNair, Appellants v Nexsen Pruet, LLC v. DC & Sons, LLC, of whom Nexsen Pruet, LLC is the Respondent*
Case No.: 2011-CP-10-5774

Dear Ms. Armstrong:

Enclosed please find the original and one copy of the Motion to Amend/Supplement Complaint and/or Substitute Pursuant to Rules 15(a), 15(c), 15(d) and 17(a) of the SCRCP together with the $25.00 motion fee. I would greatly appreciate your filing the original motion and returning the file-stamped copy to me in the self-addressed, stamped envelope provided. Thank you.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Andrew K. Epting, Jr.
and Michelle N. Endemann

/agg

Enclosure – as stated

cc. Elizabeth Gray, Esquire
Tina Cundari, Esquire
George J. Kefalos, Esquire

Andrew K. Epting, Jr. ake@epting-law.com
Michelle N. Endemann · mne@epting-law.com
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
)	CASE NO.. 2011_-CP-10_5774
)	
PAVILION DEVELOPMENT CORP. AND)	**MOTION AND ORDER INFORMATION**
LARRY MCNAIR,	
Plaintiff,)	**FORM AND COVERSHEET**
vs.)	
)	
NEXSEN PRUET, LLC)	
Defendant.)	

Plaintiff's Attorney. Andrew K. Epting, Jr., Bar No. 1908 Address: 46A State Street, Charleston, SC 29401 Phone: 8433771871Fax 8433771310 E-mail: ake@epting-law.comOther: _____	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Amend/Supplement Complaint
Estimated Time Needed: 15 min Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☐ EXEMPT·
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed· _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE· $ _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR Plaintiffs, vs. NEXSEN PRUET, LLC Defendants.	)	CASE NO. 2011-CP-10-5774 MOTION TO AMEND/SUPPLEMENT COMPLAINT AND/OR SUBSTITUTE PURSUANT TO RULES 15(a), 15(c), 15(d) AND 17(a) SCRCP

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiffs, hereby move this honorable Court, pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP for an order allowing Plaintiffs to amend their complaint in order to assert their legal malpractice action against Defendant Nexsen Pruet independent of the void assignment of the claim. (See Exh. A, S.Ct. Order voiding assignment and modifying the dismissal to one without prejudice). "Dismissal of a case 'without prejudice' means a plaintiff may reassert her complaint by curing defects that led to the dismissal. *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 880-81 (2006). 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. *Id* at 130. However, in this case, Plaintiffs moved before the Supreme Court seeking a reasonable period of time in which to amend their complaint and the Supreme Court specifically held that the motion to amend was to be addressed to the lower court. (See Exh. B, Order of S.Ct. directing question to lower court).

Rule 15(a), SCRCP, provides that leave to amend "shall be freely given." *Parker v Spartanburg Sanitary Sewer District*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App 2005) Motions to amend are to be liberally granted absent a showing by the party opposing the amendment that it would be prejudiced by that amendment. *Id.* The prejudice Rule 15 envisions is

a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). No prejudice to Nexsen Pruet will result from the amendment as Nexsen Pruet had notice of this legal malpractice suit in 2011. The argument that Nexsen Pruet is prejudiced by an amendment because the statute of limitations has passed is without merit. *See Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298-99 (2004)("The City's argument the amendment prejudices it because the statute of limitations has passed is likewise without merit. Rule 15(c), SCRCP, states: 'whenever the claim . . . 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 date of the original pleading.'") Plaintiffs' legal malpractice claim arose out of the conduct previously set forth in the original complaint. The factual circumstances of the claim have already been set out in the original complaint. Therefore, under Rule 15(c), the amendment relates back to the date of the original pleading that was filed within the statute of limitations. *See also Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (holding purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations).

Accordingly, Plaintiffs respectfully request that they be allowed to amend their complaint to assert their legal malpractice claims against Nexsen Pruet, independent of the void assignment, and that the amendment relate back to the date of the original filing. In the alternative or in combination with the above request, Plaintiffs ask that they (1) be allowed to file a supplemental proceeding pursuant to Rule 15(d), which relates back to the original filing date or (2) that Plaintiffs be substituted as the real parties in interest, which substitution would also relate back to the date of the original filing (see Rule 17(a) SCRCP).

Respectfully submitted:

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ATTORNEYS FOR PLAINTIFFS

On this 17 day of September 2015
Charleston, SC

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 17 day of SEPTEMBER 20 15 at
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant,

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

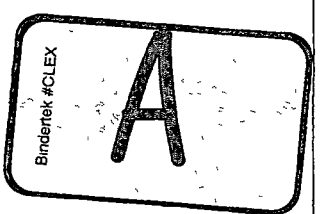
Appellate Case No. 2013-002796

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-MO-047
Heard May 6, 2015 – Filed August 12, 2015

AFFIRMED AS MODIFIED

Andrew K. Epting, Jr. and Michelle N. Endemann, both of Andrew K. Epting, Jr., LLC, of Charleston; George J. Kefalos and Oana D. Johnson, both of George J. Kefalos, PA, of Charleston, for Appellants.



Elizabeth Van Doren Gray, Tina Cundari, and Benjamin R. Gooding, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Respondent.

PER CURIAM: We affirm the trial court's grant of summary judgment. *See Skipper v. ACE Prop. & Cas. Ins. Co.*, Op. No. 27547 (S.C. Sup. Ct. filed July 15, 2015). ("[I]n South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited."). However, we modify the dismissal to be without prejudice.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant,

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

Appellate Case No. 2013-002796

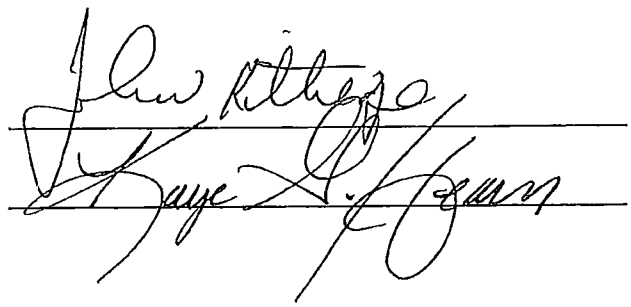
ORDER

Following this Court's decision in *Pavilion Development Corp. v. Nexsen Pruet*, Mem. Op. No. 2015-MO-047 (S.C. Sup. Ct. filed Aug. 12, 2015), Appellants Pavilion Development Corp. and Larry McNair filed, on August 28, 2015, a "Motion for Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint After Remand." We construe Appellants' motion as a petition for rehearing. As such, this motion was not timely filed, and it is therefore denied. In any event, Appellants' motion should be addressed by the trial court in the first instance.

C.J.

J.

J.



J.

J.

Columbia, South Carolina

September 3, 2015

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
Elizabeth Van Doren Gray, Esquire
Tina Marie Cundari, Esquire
Benjamin Rogers Gooding, Esquire
Julie J. Armstrong
The Honorable J. C. Nicholson, Jr.

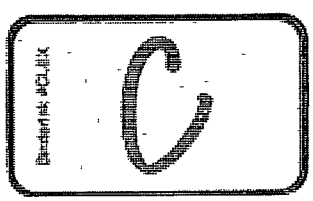
STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR Plaintiffs, vs. NEXSEN PRUET, LLC Defendants.	CASE NO. 2011-CP-10-5774 AMENDED COMPLAINT

Plaintiffs Pavilion Development Corporation ("Pavilion") and Larry McNair file this amended action for professional malpractice against their former attorneys, Defendant Nexsen Pruet, LLC ("Nexsen Pruet). In support of this action, Plaintiffs would show the Court the following:

1. Plaintiff Pavilion Development Corporation ("Pavilion") is a corporation organized and existing under the laws of the State of South Carolina doing business in Charleston County, South Carolina.

2. Plaintiff Larry McNair is an individual residing in the State of South Carolina doing business in Charleston County, South Carolina.

3. The Defendant, Nexsen Pruet, is a law firm organized and existing under the laws of the State of South Carolina with an office in Charleston County, South Carolina, holding itself out as "The Carolinas' Leading Real Estate Law Firm." (Nexsen Preut Website http://www.nexsenpruet com/practices-area-59.html).



4. In 2006, Pavilion retained Nexsen Pruet to advise it regarding the purchase of three parcels of real property with the addess of 100 Mill Street located on Shem Creek and known as the "Cottage on the Creek" property.

5. As part of the undertaking, Nexsen Pruet was retained to advise Plaintiffs regarding the condition of the title to the Cottage on the Creek property and the filing of a litigation and a lis pendens.

6. On August 18, 2006, Pavilion entered into a contract to purchase the Cottage on the Creek property from DC & Sons, LLC for Five Million Dollars ($5,000,000.00) to close on or before December 31, 2006.

7. By the terms of the contract, Pavilion was to make a Fifty Thousand Dollars ($50,000.00) earnest money deposit, which was made and kept in an escrow account with real estate agent Ocean One Realty.

8. In the fall of 2006, Richard Coen contacted Pavilion and told Pavilion that the Seller could not deliver title because Richard Coen and/or his entities had the right to buy and/or lease the Cottage on the Creek property.

9. Nexsen Pruet wrote to counsel for the Seller, DC & Sons demanding that DC & Sons remedy the alleged cloud on title created by Mr. Coen's claims and requesting assurances from the Seller that Mr. Coen's claims were without merit. DC & Sons advised the claims were without merit.

10. DC & Sons wrote Nexsen Pruet and insisted that Pavilion either accept the title insurance and close on the property or release DC & Sons from the contract.

11. Nexsen Pruet advised Pavilion not to close on the Cottage on the Creek property or release the property from the contract.

12. On March 19, 2007, despite Pavilion's unwillingness to close, Nexsen Preut filed a lis pendens on the Cottage on the Creek property, together with a lawsuit for specific performance, declaratory judgment, and quiet title styled, *Pavilion Development Corp. v. DC & Sons, LLC, Dianne Crowley, Cecil Crowley, Coenco, LLC, Lowcountry Capital, LLC, Wings Over America, LLC, Redwing, LLC, Up The Creek, Inc., and Richard H Coen*, case no. 2007-CP-10-1457.

13 Although Nexsen Pruet named Richard Coen and his entities in the complaint, neither Richard Coen nor any of his entities were served with the complaint.

14. DC & Sons counterclaimed against Pavilion claiming breach of contract and abuse of process, and filed a separate action to include claims against Larry McNair, Ocean 1 Realty and Rick Maull (the escrow agent), case no. 2008-CP-10-4675.

15. Nexsen Pruet appeared on behalf of Larry McNair and Pavilion and agreed to consolidated the cases and refer them to the Business Court and the Honorable Roger M. Young.

16. On January 17, 2008, Nexsen Preut entered into a stipulation on behalf of Pavilion wherein Pavilion stipulated that neither Richard Coen nor any of his entities, or anyone other than the Seller, DC & Sons, had any "current, future, or contingent property interests in the subject property."

17. In or around February of 2008, Pavilion determined that it was no longer willing to purchase the Cottage on the Creek property at the contract price of Five Million Dollars ($5,000,000.00).

18. On February 28, 2008, Nexsen Pruet wrote counsel for DC & Sons, stating that Pavilion desired to purchase the Cottage on the Creek property at the reduced price of ($3,500,000.00).

19. As a result, Counsel for DC & Sons asked that the lis pendens be removed from the property. Nexsen Pruet advised Plaintiff to refuse to cancel the lis pendens.

20. At a May 20, 2008 hearing, Nexsen Pruet agreed to dismiss Pavilion's actions for declaratory relief and quiet title.

21. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and seeking to impose an equitable lien on the Cottage on the Creek property.

22. Counsel for DC & Sons again asked that the lis pendens be removed from the property. Nexsen Pruet advised Plaintiffs to refuse. Nexsen Pruet advised the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent.

23. On March 23, 2009, the Honorable Roger M. Young held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was wrongful, as an action for money damages will not support a lis pendens.

24. The case was tried to be tried on January 18, 2011; however before trial, DC & Sons renewed its motion for summary judgment as to Pavilion and Larry McNair's liability for abuse of process and breach of contract.

25. After a hearing on the Motion for Summary Judgment, the Honorable Roger M. Young found in favor of DC & Sons and granted it summary judgment as to Pavilion and Larry McNair's liability holding that:

a. "Pavilion's filing of an action for specific performance was a willful act in the use of process not proper in the regular conduct of the proceeding"... as "An action for specific performance will lie only when the supposed cloud on title is caused and controlled by the seller."

b. "Defendants' filing an action for specific performance and *lis pendens* was not proper as it failed to prove it was ready, willing, and able to pay the agreed upon purchase price or had arranged its financing, which was required by law and the real estate contract."

c. "Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons."

d. "Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing."

e. "The continued maintenance of a *lis pendens* and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title."

f. "As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper."

g. "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."

FOR A FIRST CAUSE OF ACTION
LEGAL MALPRACTICE

26. The foregoing allegeations are incorporated herein by reference.

27. Plaintiffs hired Nexsen Pruet as their attorneys with the full faith and expectation that

Nexsen Pruet would competently and professionally advise and represent Plaintiffs in the connection with the purchase of the Cottage on the Creek property. Nexsen Pruet accepted this duty, thus creating an attorney-client relationship between Plaintiff and Nexsen Pruet.

28. Nexsen Pruet holds itself out as "The Carolinas' Leading Real Estate Law Firm" and advertises that "Unlike many firms whose real estate practice focuses only on transactional work, Nexsen Pruet's team also includes attorneys who are highly skilled in litigation of real property disputes. "(Nexsen Preut Website http://www.nexsenpruet com/practices-area-59 html).

29. In agreeing and undertaking to represent and advise Plaintiffs, Nexsen Pruet undertook the following duties:

a to conform to generally recognized and accepted practices among the legal profession;

b. to perform its tasks with reasonable care and diligence;

c. to act in the bests interest of Plaintiffs;

d. to exercise that degree skill, knowledge, and possessed and exercised by the ordinary attorney in similar circumstances

e. to provide competent representation, including possessing the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of Plaintiffs;

f. to exercise indcpendent professional judgment and render candid advice to Plaintiffs;

g. to keep Plainitffs advised of developments in the litigation, including that Plaintiffs had been sued by DC & Sons.

30. Nexsen Pruet was negligent and grossly negligent in their representation of Plaintiffs, failing to exercise reasonable care, skill and diligence in the following ways:

a. In advising Plaintiffs to file a lis pendens and suit for specific performance when Pavilion was in breach of the real estate contract;

b. In advising Plaintiffs to file a lis pendens and suit for specific performance when the alleged cloud on title was created by third parties outside of the Seller's control;

c. In advising Plaintiffs to file a lis pendens and suit for specific performance when Pavilion was no longer ready willing and able to close on the terms of the contract;

d. In advising Plaintiffs to file a lis pendens and suit for quiet title and failing to serve or join those necessary parties whose claims created the cloud on title;

e. In advising Plaintiffs to maintain a lis pendens on the Cottage on the Creek Property and suit for specific performance and quiet title even after stipulating that no party other than the Seller, DC & Sons had any "current, future, or contingent property interests in the subject property."

f. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property even after Pavilion amended its complaint to sue only for money damages;

g. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property in order to obtain a return of the escrow funds;

h. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property in order to obtain the property at a lower purchase price;

31. Nexsen Pruet's conduct as described above constitutes negligence and gross negligence as well as a breach of the contractual obligations owed to the Plaintiffs.

32. As a direct and proximate result of Nexsen Pruet's failure to exercise reasonable care, skill, and diligence in representing Plaintiffs, Plaintiffs were forced to confess judgment in the

amount $4,580,015.93 or risk trying the case without any defense as to Plaintiffs' liability as well risk a significant judgment being entered against Mr McNair personally. Plaintiffs are entitled to damages both actual and punitive.

FOR A SECOND CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY

33. The foregoing allegeations are incorporated herein by ıeference.

34. Nexsen Pruet entered into a fiduciary relatıonship with the Plaintiffs.

35. By entering into a fiduciary relationship with the Plaintiffs, Nexsen Pruets obligated itselfs to act only in the best interests of the Plaintiffs.

36. Nexsen Pruet's conduct, more particularly described above, constitutes a breach of this duty.

37. As a direct and proximate ıesult of Nexsen Pruet's actions, inactions, and breach of fiduciary duty, the Plaintiffs have been injuıed and suffered damage.

38 Plaintiffs are entitled to judgment against Nexsen Pruet for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by this Defendant and others, in an amount deteımined by this Court.

WHEREFORE, Plaintiffs pray for judgment against Nexsen Pruet for damages in the amount of the outstanding judgment against Pavilion Development Corp., plus post-judgment interest, costs and attorneys' fees associated with this lawsuit, together with such other and further relief the Court deems appropriate.

[signitıuıes on following page]

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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Michelle N. Endemann, Esq.
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ATTORNEYS FOR PLAINTIFFS

On this 14 day of September 2015
Charleston, SC

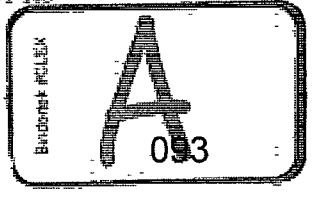
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
PavilionDevelopment Corp. & Larry McNair, Plaintiffs, vs. Nexsen Pruet, LLC, Defendant.	CA# 2011-CP-10-5774 AFFIDAVIT OF EXPERT OPINION OF DR. GREGORY B. ADAMS

PERSONALLY APPEARED before me Gregory B. Adams who, being duly sworn, deposes and says that:

1. It is my expert opinion, held to a reasonable degree of professional certainty, that the Amended Complaint in this matter alleges facts establishing that the defendant law firm (and its participating lawyers) committed acts of professional negligence proximately damaging the plaintiffs; that the defendant law firm and its participating lawyers breached their fiduciary duties to the plaintiffs, proximately damaging them; and that the defendant law firm breached its contract with plaintiffs, proximately damaging them, as more particularly set forth below:

   A. attorney-client relationships existed between plaintiffs and the defendant law firm and its lawyers who were advising and representing plaintiffs in connection with the contract to purchase the Cottage on the Creek property and the related disputes and litigation [NP's participating lawyers];

   B. these attorney-client relationships created professional, ethical, contractual, and fiduciary duties from the law firm and each of its



participating lawyers to plaintiffs;

C. the defendant law firm (and its participating lawyers) violated their duties to plaintiffs in numerous ways, including

i. by failing to provide their clients with competent advice and representation:

a. by failing to use the legal knowledge, skill, thoroughness, and preparation reasonably necessary in the circumstances; and

b. by violating the standard of care, which required them to render their services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession;

ii. by failing to provide their clients with candid advice based on their exercise of independent professional judgment on their clients' behalf; and

iii. by failing to explain the matter to their clients to the extent reasonably necessary to permit them to make informed decisions regarding the representation;

D. these negligent failings included:

i. failing to serve Richard Coen and his entities as defendants in the lawsuit, thereby eliminating the ability to use the litigation to adjudicate the validity of Mr. Coen's claim that he (individually or through one of his entities) had the right to buy or lease the Cottage on the Creek property and thus to determine judicially whether DC & Sons could deliver

marketable title to the property;

ii. continuing the specific-performance action against DC & Sons and maintaining the *lis pendens* against the Cottage on the Creek property after Pavilion decided that it did not want to purchase the property pursuant to the contract;

iii. continuing the action against DC & Sons for specific performance and maintaining the *lis pendens* after Pavilion had stipulated that neither Richard Coen nor any of his entities had any "current, future, or contingent property interests" in the Cottage on the Creek property;

iv. continuing the action against DC & Sons for specific performance and maintaining the *lis pendens* while knowing that their client, Pavilion, had materially breached the contract and failed to satisfy its express proof-of-financing condition, and thus was clearly not entitled to specific performance of that contract to purchase the Cottage on the Creek property;

v. amending the complaint against DC & Sons on August 15, 2008, transforming it from an action for specific performance to one for damages, while maintaining the *lis pendens* and seeking to impose an equitable lien on the Cottage on the Creek property, although Pavilion was entitled to neither a *lis pendens* nor an equitable lien in an action for damages and although Pavilion was no longer seeking to purchase the property and was still in material breach of the contract,

having failed to cure its breach and being unable to satisfy its express proof-of-financing condition;

vi. filing and maintaining the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the ernest money, although doing so constituted an improper, ulterior purpose, subjecting their clients to liability for abuse of process;

vii. advising their clients to file and maintain the specific performance action against DC & Sons and the *lis pendens* against the Cottage on the Creek property although doing so constituted a willful act improperly using legal process for an ulterior purpose, subjecting their clients to liability for abuse of process;

viii. failing to advise their clients that filing and maintaining the specific performance action against DC & Sons and the *lis pendens* against the Cottage on the Creek property constituted a willful act improperly using legal process for an ulterior purpose, subjecting them to liability for abuse of process;

ix. advising their clients to file and maintain the declaratory judgment action to quiet title against DC & Sons without effectively joining Richard Coen and his entities as defendants, although doing so constituted a willful act improperly using

legal process for an ulterior purpose, subjecting their clients to liability for abuse of process;

x. failing to advise their clients that filing and maintaining the declaratory judgment action to quiet title against DC & Sons without effectively joining Richard Coen and his entities as defendants constituted a willful act improperly using legal process for an ulterior purpose, subjecting them to liability for abuse of process;

xi. advising their clients to file and maintain the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the ernest money, although this constituted an improper, ulterior purpose, subjecting their clients to liability for abuse of process;

xii. failing to advise their clients that filing and maintaining the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the ernest money constituted an improper, ulterior purpose, subjecting them to liability for abuse of process;

E. these failings also constituted breaches of the attorney-client contract between the defendant law firm and the plaintiffs as well as breaches of the fiduciary duties owed by the defendant law firm and its participating lawyers to the plaintiffs;

F. these breaches proximately caused damage to plaintiffs, including

i. the entry of Summary Judgment holding Pavilion liable for abuse of process; and

ii. the resulting Confession of Judgment for $4,580,015.93.

2. My resumé, attached as Exhibit A, demonstrates why federal and state courts, including the South Carolina Supreme Court and Court of Appeals, have held that I am qualified as an expert witness and thus am qualified to conduct the review required by S.C. Code Ann. §15-36-100(B).

A. I am a tenured law professor at the University of South Carolina School of Law, where I have been teaching since 1978. My subjects of expertise include lawyers' ethics and professional responsibility, corporate law, fiduciary duties, and contract law, as well as judicial ethics, agency, and partnership law.

B. I have earned a J.S.D. (Doctor of Juridical Science) and an LL.M. from Columbia University School of Law, as well as my J.D. from Louisiana State University.

C. Federal and state courts in South Carolina have recognized my expertise, including the South Carolina Supreme Court in *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding that I am qualified as an expert witness and that my expert testimony was accurate and proper) and *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding it was reversible error to fail to conclude that I was qualified as an expert

witness on issues of lawyers' duties), and the Court of Appeals in *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (holding it was reversible error to discount my expert opinion in a legal malpractice case and to fail to give it efficacy). Additionally, three South Carolina Attorneys General, the South Carolina Secretary of State, and the United States Attorney for the District of South Carolina have relied upon my expertise to guide and assist them in significant criminal investigations and prosecutions, many of which targeted wrongdoing by lawyers or wrongdoing by corporate officers and directors.

3. Documentary evidence I have reviewed supports the allegations of the Complaint and proves negligent acts of defendant law firm and its participating lawyers, as detailed above. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, such as

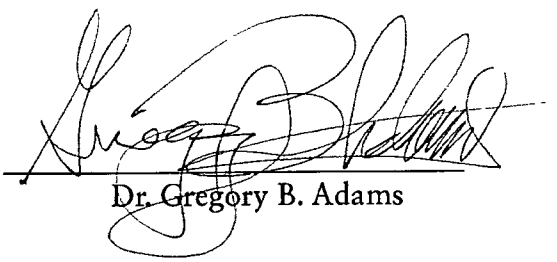
A. Judge Roger M. Young, Sr.'s 1/18/2011 Order Granting DC & Sons Summary Judgment as to the Liability of Pavilion for Abuse of Process and Breach of Contract in DC & Sons, LLC. v. Richard H. Coen, et al., C/A No. 08-CP-10-4675;

B. Judge Roger M. Young, Sr.'s 1/18/2011 Judgment in a Civil Case (Form 4 and attached settlement agreement) in DC & Sons, LLC. v. Pavilion Development Corp., C/A No. 08-CP-10-4675;

C. Pavilion Development Corp.'s 1/18/2011 Confession of Judgment in DC & Sons, LLC. v. Richard H. Coen, C/A No. 08-CP-10-4675.

4. I have been retained as an expert witness by counsel for plaintiffs. My expert opinions are based upon the allegations of the Complaint and the evidence available to me at this time; these opinions are, therefore, subject to expansion and modification as further evidence or issues develop.

Further the affiant sayeth not.



Dr. Gregory B. Adams

Sworn to and subscribed before me
this 17th day of September 2015.

Notary Public for South Carolina

My Commission Expires: 11-23-19

EXHIBIT A

DR. GREGORY B. ADAMS

University of South Carolina School of Law
Columbia, South Carolina 29208

Professional Experience

Law Professor (tenured), University of South Carolina, 1978–present.
SUBJECTS TAUGHT: Professional Responsibility; Ethical Issues in Criminal Practice; Judicial Ethics; Legal Profession; Legal Technology; Contracts; Corporate Law; Business Planning; Agency, Partnership & Limited Liability Companies; Antitrust; International Business Law; European Union Law.

Associate, University of South Carolina Rule of Law Consortium (2011-present).

Founding Director, Program on Judicial Ethics, Selection, Accountability, and Independence, University of South Carolina School of Law (2003-12).

Visiting Professor of Law, Pskov Volny University, Pskov, Russia, Spring 2001.

Visiting Professor of Law, University of Southampton, Southampton, England, Fall 1989.

Visiting Professor of Law, Rutgers University, Newark, NJ, 1983-1984.

Stagiaire, Commission of the European Communities (European Union), Brussels, Belgium, 1979.

Research Associate, Institute of European Studies, University of Brussels (U.L.B.), 1979.

Visiting Scholar, Faculté de Droit, Université Catholique de Louvain, Louvain-la-Neuve, Belgium, 1978.

Assistant Professor, Southern University School of Law, 1975-1977.

Consultant, Louisiana Legislative Council, 1976-1977.

Attorney with Breazeale, Sachse & Wilson, Baton Rouge, LA, 1973-1975.
Admitted to Practice by the Louisiana Supreme Court on October 5, 1973.

Education

J.S.D. 1986
Columbia University School of Law *New York, New York*
Dissertation: Control of Monopoly Power in Europe and the United States

LL.M. 1979
Columbia University School of Law *New York, New York*
Thesis: E.E.C. and U.S. Antitrust Regulation of Monopolists' Refusals to Deal
Jervey Fellow in Foreign Law, Parker School, Columbia University, 1977-1979.

J.D. 1973
Louisiana State University Law Center Baton Rouge, LA
Order of the Coif; Louisiana Law Review; Moot Court Board; Winner, Robert Lee Tullis Moot Court Competition before the Louisiana Supreme Court.

B.S. 1977
Louisiana State University *Baton Rouge, LA*
Phi Kappa Phi
College of Arts & Science, Vanderbilt University Nashville, TN 1966-1968

Honors and Recognition

Outstanding Faculty Publications Award, University of South Carolina School of Law (April 2006, Book, Runner Up)
Louisiana State University Law Center Hall of Fame
Twenty Year Who's Who Honoree
Who's Who in the World
Who's Who in America
Who's Who in American Law
Who's Who in American Education
Who's Who in the South and Southwest
Who's Who of Emerging Leaders in America
Who's Who in Law Education
Dictionary of Int'l Biography (Cambridge, U.K.)
State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding GBA qualified as an expert witness and that GBA's expert testimony was accurate and proper)
Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding GBA qualified as an expert witness; reversible error to rule otherwise)
Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App., 2004) (holding it was reversible error to discount GBA's expert opinion and fail to give it efficacy)
Davis v. Hamm, 300 S.C. 284, 387 S.E.2d 676 (Ct. App., 1989) ("excellent discussion of the ramifications of these statutes" in "Litigation of Corporate Law Disputes After the Recent Amendments of the Corporate Code," in Current Issues in Civil Litigation, S.C. Bar Continuing Judicial Legal Education Seminar 1989)

Publications

South Carolina Corporate Practice Manual (2nd ed. 2005, S.C. Bar) (lead author, coauthors: Burkhard, Cleveland, Clark, Hellwig, Merline).
"Reflections on the Reactions to Proposed Rule 8.5: Consensus of Failure," 36 S. Texas Law Review 1101 (1995).
"Introductory Remarks to the Conference on the Commercialization of the Legal Profession," 45 S.C. L. Rev. 883 (1994) (with Nathan M. Crystal).
Report of the Proceedings, Conference on the Commercialization of the Legal Profession (with Nathan M. Crystal): "Summary of Discussion of Frankel Paper," 45 S.C.L. Rev. 901; "Summary of Discussion of Palay/Galanter Paper," 45 S.C.L. Rev. 929; "Summary of Discussion of Martyn Paper," 45 S.C.L. Rev. 961; "Summary of Discussion of Dimitriou Paper," 45 S.C.L. Rev. 999 (1994).
"The Ethical Lawyer," occasional column in the S.C. Trial Lawyer Bulletin since 1994.
"Suing Corporations and Those Behind Them," 1992 S.C. Trial Lawyer Bulletin 17.
South Carolina Corporate Practice Manual (S.C. Bar, 1989) (with Cleveland, Burkhard, McWilliams).
"European and American Antitrust Regulation of Pricing by Monopolists," 18 Vanderbilt Journal of Trans. Law 1 (1985).
"Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States," 20 Texas Int'l L. J. 1 (1985).
"The 1981 Revision of the South Carolina Business Corporation Act," 33 S.C. L. Rev. 405 (1982).
"Inheritance Taxation of Trusts," in 11 L. Oppenheim & S. Ingram, Louisiana Civil Law Treatise, Trusts (1977).

Amicus Curiae Briefs Drafted

Ex Parte Strom, in re Collins Entertainment Corp. v. Columbia "20" Truck Stop, 343 S.C. 257, 539 S.E.2d 699 (2000) (establishing that attorney's duties to client continued until court granted motion relieving attorney as counsel of record).
Linder v. Insurance Claims Consultants, 348 S.C. 477, 560 S.E.2d 612 (2002) (on behalf of the S.C.Bar, clarifying scope of activities constituting the practice of law).
Brown v. Bi-Lo, 354 S.C. 436, 581 S.E.2d 836 (2003) (on behalf of the S.C. Trial Lawyers Association, protecting the confidentiality of physician-patient relationship).

Public Service

Expert Witness, United States Securities and Exchange Commission, *U.S. S.E.C. v. Staples* (2013)
Invited Expert Witness, Judicial Merit Selection Study Committee, SC Senate (9/17/07)
Member, S.C. Bar, Professional Responsibility Committee, 1993-2012 (chair or member of numerous subcommittees, including Ethics 2000 Subcommittee; presented Ethics 2000 recommendations to S C. Bar House of Delegates).
Member, S.C. Bar, Unauthorized Practice Committee, 1994, 2000-2003.
Member, S.C. Bar, Technology Committee, 1996-1998.
Ethics Consultant, South Carolina Association for Justice, 1994-2014.
Co-Founder and Vice-President, South Carolina Association of Ethics Counsel, 2000-present.
Expert Witness and advisor to the South Carolina Attorney General in the criminal investigation and prosecutions for securities fraud in connection with the failure of Carolina Investors and HomeGold Financial, 2003-2008.
Expert Consultant for the South Carolina Department of Natural Resources, re: piercing the corporate veil, 2000
Expert Consultant for the South Carolina Department of Health and Environmental Control, re: piercing the corporate veil to impose environmental liability under CERCLA, 1997-1999.
Reporter, South Carolina Uniform Commercial Code Article 2A (South Carolina Law Institute for the South Carolina General Assembly, 1996-2001).
Expert Witness and advisor to the South Carolina Attorney General in criminal prosecution of John O'Quinn, Esq. for unauthorized practice of law and illegal solicitation, 1996-1997.
Co-Reporter, Conference on the Commercialization of the Legal Profession, Charleston, S.C., May 1993.
Expert Witness for the United States before the Federal Grand Jury investigating securities fraud, May 1993.
Member, Governing Board, Center for Law, the Legal Profession, and Public Policy, 1991-93, 1998-2000.
Member, Blue Ribbon Committee on Corporate Law, South Carolina Secretary of State, 1991-95.
Securities Law Expert for the South Carolina Attorney General in connection with the bankruptcy of Patriots Point Associates, 1989-91.
Advisor to the S.C. Deputy Securities Commissioner and the S.C. Senate Judiciary Committee on Corporate Law issues.
Co-Reporter, South Carolina Business Corporation Act of 1988 (South Carolina Law Institute for the South Carolina General Assembly, 1986-88).
Member, Louisiana State Law Institute, Civil Code Revision Committee, 1975-1977.

Presentations

"Minister of Justice, Guardian of the Constitution," 14th Circuit Solicitor's Office Career Prosecutor Program and Externship, Bluffton, SC (June 1, 2015)
"Ethics for Criminal Defense Counsel in the Age of Social Media and the Internet," Federal Public Defender Seminar for Criminal Justice Act Attorneys (5/8/15)
"Ethics of Lawyers Working for Nonprofits & Serving on Nonprofit Boards," South Carolina Nonprofit Corporate Update, S.C. Bar CLE, Columbia, SC (2/5/15)
"Ethics of Confidentiality Online Cybersecurity & Encryption," Fourth Annual Everything You Need To Know About Ethics, S.C.A.E.C. – S.C. Bar CLE, Columbia, SC (1/16/15)
"*Fabian v. Lindsay*: Lawyers' Liability to Intended Beneficiaries," with Professor S. Alan Medlin, Nineteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/12/14)
"Cyber$ecurity: Lawyers Safely Using Smartphones, Email, and the Cloud in the Age of International Hackers and Government Spies," S.C. Bar CLE, Columbia, SC (8/26/14)
"Ethics for Prosecutors," 14th Circuit Solicitor's Office Career Prosecutor Program and Externship, Bluffton, SC (June 30, 2014)
"Modification of Fees and Other Contract Questions: Rules 1.8 and 1.5," Third Annual Everything You Need To Know About Ethics, S.C.A.E.C.–S.C. Bar CLE, Columbia, SC (1/17/14)
"Modification of Fee Agreements During the Representation: Ethical Duties, Fiduciary Duties, Contract Law," Eighteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/12/13)

"Legal Ethics and Social Media: How to Stay Out of Trouble and Protect Your Lawyer's Law License," Palmetto Paralegal Association Seminar, Columbia, SC (10/16/13)
"Professional Responsibility for Prosecutors," 14th Circuit Solicitor's Office Career Prosecutor Program and Externship, Bluffton, SC (May 29-30, 2013)
"War of the Roses & Roses, LLC: The Sequel – When Partners Leave the Firm," Everything You Need To Know About Ethics, S.C.A.E.C.–S.C. Bar CLE, Columbia, SC (1/18/13)
"Getting Paid, Keeping the Money, and Safeguarding Your License: How to Manage Your Cash Flow, Trust Account,and Bottom Line Under the New Rules Without Inviting a Visit from Disciplinary Authorities," Seventeenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/6/12)
"Getting Paid, Keeping the Money, and Safeguarding Your License: How to Manage Your Cash Flow, Trust Account,and Bottom Line Under the New Rules Without Inviting a Visit from Disciplinary Authorities," S.C. Association for Justice, Auto Torts Seminar, Buckhead Ritz Carlton, Atlanta, GA (12/1/12)
"Mike Nifong – Aberrational Rogue?," U.S.C. Law School Symposium on Prosecutorial Ethics and Duties, Columbia, SC (3/16/12)
"How to Get Paid Now!," Everything You Need To Know About Ethics, S.C.A.E.C.–S.C. Bar CLE, Columbia, SC (1/13/12)
"Current Professional Responsibility Issues for Litigators," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (1/6/12)
"Fiduciary Duties of Estate Planning & Probate Lawyers: General Principles and S.C. Cases," Sixteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC(12/13/11)
"Advanced Ethics for Legislative Attorneys," South Carolina General Assembly, Columbia, SC (10/5/11)
"Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/16/10)
"Ethics for Legislative Attorneys," South Carolina General Assembly, Columbia, SC (10/6/10)
"Current Ethical Issues and Trends," York County Bar Association Ethics CLE, Panel with S.C. Supreme Court Justice Costa M. Pleicones and S.C. Disciplinary Counsel Lesley M. Coggiola, Esq., Rock Hill, SC (3/12/10)
"Lawyers in the Crosshairs: Recent South Carolina Cases of Concern to Estate Planning and Probate Lawyers," Fourteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/15/09)
"Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/17/09)
"Regulating Lawyer Behavior Through Recent South Carolina Tort Cases: Issues of Lawyer Ethics, Professionalism, and Liability," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (11/13/09)
"Lawyers' Ethical Responsibilities and the Torture Memoranda," Amnesty International Panel Discussion, University of South Carolina, Columbia, SC (4/15/09)
"The 'Of Counsel' Agreement," S.C. Bar Annual Convention, Myrtle Beach, SC (1/24/09)
"Ethical Duties in Family Estate Planning," Thirteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/11/08)
"Teaching Professional Responsibility in U.S. Law Schools," Southeastern Ass'n of Law Schools, Ritz Carlton, Palm Beach, FL (7/31/08)
"Judicial Selection in the United States," S.C. Supreme Court Teachers Institute, Columbia, SC (6/23/08)
"Corporate Lawyers as Fiduciaries," S.C Bar Annual Convention, Charleston, SC (1/25/08)
"My Heroes Have Always Been Lawyers and They Still Are, It Seems," Twelfth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/07)
"Prosecutorial Ethics: Was the Duke Lacrosse Case an Aberration or the Tip of the Iceberg?," SCTLA Annual Convention, Hilton Head Island (8/3/07).
"Malpractice Liability of Estate-Planning Lawyers," Eleventh Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/7/06).
"Ethics for Trial Lawyers: How to Avoid Those Hidden Land Mines," S.C.T.L.A. Auto Torts Seminar XXIX, Ritz-Carlton, Buckhead, Atlanta, GA (12/2/06).
"Ethical Issues for the Sports Attorney-Agent: Lessons from *Vortex v. Ware*," International Sport and Entertainment Management Conference, Metropolitan Convention Center, Columbia, SC (11/9/06).

"Ethics in Workers Comp Practice: Negotiation," ASCCAWC Annual Convention, Grove Park Inn, Asheville, NC (11/4/06).
"Probate Judges and Lawyers: Prohibition of *Ex Parte* Communications," Fourteenth Annual Probate Bench/ Bar Conference, Columbia, SC (9/15/06).
"The Future Regulation of Lawyer Advertising Under the Proposed S.C. Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/4/06).
"Free Speech and Judicial Selection: Implications of *White v. Republican Party*," Southeastern Association of Law Schools, The Breakers Hotel, Palm Beach, FL (7/20/06).
"The New South Carolina Rules of Professional Conduct," Tenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/15/05).
"Ethical Use of Discovery Under the Workers' Compensation Act; Contact with Employer Witnesses; Use of Subpoenas in a Workers' Compensation Case; Frivolous Defenses: What to do About Them," ASCCAWC Annual Meeting, Grove Park Inn, Asheville, N.C. (11/4/05).
"Applying the SC Code of Judicial Conduct to Workers' Compensation Commissioners: Lessons for Lawyers Practicing Before the Commission," SCWCEA Educational Conference CLE, Marriott Myrtle Beach Resort (10/24/05).
"The New SC Rules of Professional Conduct: You Really Can't Do THAT Anymore!," SCWCEA Educational Conference, Marriott Myrtle Beach Resort (10/24/05).
"Newly Revised Frivolous Procedures Act & Other Ethical Issues," SCTLA Tort Reform Seminar, Columbia, S.C. (10/14/05).
Moderator and Coordinator, S.C. Corporate Practice Seminar, S.C. Bar CLE, U.S.C. Law School (9/30/05).
Speaker: "Ethical Issues in S.C. Corporate Law for the General Practitioner and the Corporate Lawyer:
Ethical Issues Presented by Choices of Control Devices
Ethical Issues Arising from Threats of Owner Liability
The Big Ethical Question: Who Is The Client?"
"The Code of Judicial Conduct: Does It Effect How We Practice Workers' Comp?," S.C. Bar CLE, U.S.C. Law School (8/26/05).
"Ethics Seminar: The New Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/5/05).
"Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, Richland County Bar Association (11/5/04).
"Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Charleston, S.C. (8/18/04).
"The New S.C. Lawyers' Oath," C.L.E. Seminar, S.C. Bar, Charleston, S.C. (6/25/04).
"Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Columbia, S.C. (4/23/04).
"Ethics 2000 and Lawyers' Fees," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel, Columbia, S.C. (11/15/03).
"The Ethical Implications of *Brown v. Bi-Lo*," S.C. Workers Comp. Educational Ass'n Educational Conference, Kingston Plantation, Myrtle Beach, S C. (10/20/03).
"Ethics 2000: The New Rules of Professional Conduct & Multi-Jurisdictional Practice of Law," C.L.E. Ethics Seminar, Investors Title Insurance Co. Seminars (9/17/03 Rock Hill, 9/12/03 Hilton Head).
"Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/8/03).
"Political & Legal Ethics: The Pitfalls to Avoid," C.L.E. Ethics Seminar, S.C Bar Annual Convention (Young Lawyers Division) (1/24/03).
"Recent Developments in Legal Ethics," C L E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel (12/14/02).
"Current Ethical Issues in Real Estate Practice," C.L.E. Ethics Seminar, Security Title Insurance Company (11/8/02).
"Ethics of Attorney's Fees for Domestic Law Attorneys," C.L.E. Ethics Seminar, S.C. Bar (9/20/02).
"Discovery Abuse and Litigation Ethics," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/3/02).
"Discovery Abuse, Litigation Ethics, Supervision and Other Horrors," C.L.E. Ethics Seminar, S.C.T.L.A. Convention, Hilton Head, S.C. (8/2/02).

"Ethical Issues in Attorney Marketing Under the Amended Rules," C.L.E. Ethics Seminar, S.C. Bar (7/26/02).
"Ethics in the Practice of Criminal Law," C.L.E. Ethics Seminar, S.C. Bar (5/10/02).
"Professional Ethics in the Real World: Communication with Witnesses," C.L.E. Ethics Seminar, Ass'n S.C. Claimants' Attorneys for Workers Comp. (5/3/02).
"Lawyers and Paralegals Practicing Law When and Where They Shouldn't," C.L.E. Ethics Seminar, S.C. Bar and South Carolina Ass'n of Ethics Counsel (12/15/01).
"Proposed Disclosure Rule and Goods Funds Statute in South Carolina,"C.L.E. Ethics Seminar, S.C. Bar (8/17/01).
"Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/3/01).
"Ethical Perils for Family Practitioners: Keeping Your License and Keeping Your Practice," C.L.E. Ethics Seminar, S.C. Bar (12/2/00).
"Ethical Issues in Workers Compensation Practice," C.L.E. Ethics Seminar, S.C. Workers' Comp. Educational Ass'n, Kingston Plantation, Myrtle Beach, S.C. (10/23/00).
"The Things That Make Paralegals Indispensable: Technology and the Future of the Practice of Law," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/5/00).
"Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/4/00).
"The Internet – Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," SC Defense Trial Attorney's Association & SC Claim Manager's Association CLE at Grove Park Inn, Asheville, N.C. (7/29/00).
"The Internet – Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (4/28/00).
"The Responsibility of Administrative Law Judges to Control Unethical and Unprofessional Conduct by Lawyers: Ethical Prohibitions, Remedies and Sanctions," ALJ CLE Seminar, Southern States Association of Administrative Law Judges (3/17/00).
"S.C. Appellate Procedure: The New Relationship Between the Supreme Court and the Court of Appeals," Paralegal Continuing Education Seminar, Ass'n S.C. Claimant Attorneys for Workers Comp., Asheville, N.C. (1/22/00).
"Professionalism: Advertising Ethically Under the Amended S.C. Rules of Professional Conduct," C.L.E. Ethics Seminar, S.C Bar (1/14/00).
"Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/11/99).
"Hot Issues in Ethics· Marketing Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C Bar (10/29/99).
"Ethical and Professional Responsibility Issues in Litigation: Discovery Abuse," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (12/12/98).
"Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/8/98).
"Discovery Abuse: Bane of Professionalism? Ethical Prohibitions & Court-Ordered Sanctions," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/14/98).
"*Hedgepath & McCormick* and the Ethics of Ex-Parte Communication with Treating Physicians," Workers Comp. C.L.E Seminar, S.C.T.L.A. Convention (8/14/98).
"Legal Ethics for a Multi-State Law Firm," C.L.E. for a Major S.C. Law Firm (8/8/98).
"Prudent Ethical Conduct after *Hedgepath*," Medical Staff, McLeod Hospital, Florence, S.C. (4/6/98).
"What is the Effect of *Hedgepath* on Doctors' Duties to Workers' Comp Patients?" S.C. Workers Comp. Educational Ass'n Annual Meeting, Charleston, S.C. (2/22/98).
"Confidentiality, Privilege, and the Attorney as Witness, Gossip, or Snitch," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (1/10/98).
"Law Firm Breakups and Departing Lawyers," C.L.E. Ethics Seminar, S.C. Bar and University of South Carolina School of Law (12/13/97).
"*Hedgepath* & Lawyers' Professional Conduct. Implications in Workers' Compensation Proceedings," C.L.E. Seminar, The Association of South Carolina Claimant Attorneys, Asheville, N.C. (11/14/97).

"Ethics: Judicial Immunity for Administrative Law Judges," J.C.L.E. Seminar, Chief Administrative Law Judges Conference, Charleston, SC (11/6/97).
"*Hedgepath* and the Rules of Professional Conduct: Who Can We (and They) Talk to Now?" C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/15/97).
"Ways to Get in Trouble: Old and New," C.L.E Ethics Seminar, U.S.C. School of Law (12/7/96).
"Ethics for the Modern Lawyer on the Information Superhighway," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/9/96).
"Mobile Lawyers and Mobile Clients," C.L.E Ethics Seminar, U.S.C. School of Law (12/95).
"Constitutional Restrictions on Regulation of Lawyer Advertising," House of Delegates, S.C. Bar(1/21/94).
"Ethical Issues Facing Law Firms," C.L.E. Seminar, University of South Carolina School of Law (1/9/93).
"Ethical Issues in Office Practice," C.L.E. Seminar, University of South Carolina School of Law (12/5/92).
"Lawyer Television Advertising: A Video Presentation," U.S.C. Law School Faculty Ethics C.L.E. (10/22/92).
"The Ethical Dilemma of Corporate Counsel," C.L.E. Seminar, Farm Credit Sys. General Counsels Conference (10/7/92).
"Lawyer Advertising–The Great Debate," Moderator, C.L.E. Ethics Seminar, S.C.T.L.A. Conv. (8/14/92).
"Civil Litigation," in Ethical Issues in Litigation, C.L.E. Seminar, University of South Carolina School of Law (1/11/92).
"Shareholders' Rights in Disputes with a Corporation and those in Control," in Planning for Business Corporations: A Guide for General Practitioners, C.L E. Seminar (1/3/92).
"Ethical Issues in Civil Litigation," Legal Ethics and Professional Responsibility, C.L.E. Seminar (12/6/91).
"A Walk Through the New South Carolina Rules of Professional Conduct," C.L.E., U.S.C. School of Law (1/12/91).
"Corporate Litigation and Liabilities of Corporations, Directors, Officers, and Shareholders after the 1988 Revision of the South Carolina Business Corporation Act," in Current Issues in Civil Litigation, a C.J.E. Seminar (4/14/89).
"Fundamental Corporate Changes and Dissenters' Rights under the South Carolina Business Corporation Act of 1988," in The New South Carolina Corporation Act, a Video/C.L.E. Seminar (12/16/88).

University and Community Service

Parliamentarian, University of South Carolina School of Law Faculty, 2004-2007, 2008-2014.
Member, Dean Review Committee for the Dean of the College of Criminal Justice, 2003.
Member, Faculty Manual Revision Committee, Faculty Senate, University of South Carolina, 1998-1999.
Parliamentarian, University of South Carolina Faculty, 1997-2004.
Member, Steering Committee, University of South Carolina Faculty Senate, 1997-2004.
Faculty Senator, University of South Carolina, 1983-1985, 1995-1998, 2000-2003.
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1995-1996.
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1982-1983 (winner Regional Competition).
Faculty Advisor, National Moot Court Competition Team, University of South Carolina School of Law, 1980-1981.
Committee Chairman, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1996-2003.
Scoutmaster & Founder, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1992-1996.
Assistant Scoutmaster, Committee Chairman, Committee Member, BSA Troop 388, Windsor United Methodist Church, Columbia, SC 1986-1992.
Junior Warden, Vestry, St. David's Episcopal Church, Columbia, SC 1984-1987.
Chorister, Good Shepherd Episcopal Church, Columbia, SC 1999-2004.
Chorister, St. David's Episcopal Church, Columbia, SC 1984-1998.
Chairman, Christian Education Committee, St. Michael and All Angels Episcopal Church, Columbia, SC 1981-1983.
President, Richland Northeast High School P.T.S.O., Columbia, SC 1992-1997.
Member, Richland School District Two Strategic Planning Committee, Columbia, SC 1995-96.
Member, Richland School District Two New High School (Ridge View) Planning Committee, Columbia, SC 1993-1994.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	**MEMORANDUM IN OPPOSITION TO MOTION TO AMEND COMPLAINT OR SUBSTITUTE PARTIES**
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

Defendant Nexsen Pruet, LLC submits this memorandum in opposition to Plaintiffs' "Motion to Amend/Supplement Complaint and/or Substitute pursuant to Rules 15(a), 15(c), 15(d) and 17(a) SCRCP." The motion should be denied because this case has been dismissed. On appeal, Plaintiffs sought the same relief they seek here, and the Supreme Court of South Carolina ruled that dismissal without prejudice was the proper remedy. Moreover, Plaintiffs are not seeking to make any substantive amendments to the allegations of their original complaint. Although styled as a motion to amend, the instant motion is an attempt to circumvent the Supreme Court's opinion dismissing this action.

Because this case is over, the Plaintiffs' motion should be denied.

BACKGROUND

This motion is before the Court following an appeal in which the Supreme Court of South Carolina affirmed summary judgment in favor of Nexsen Pruet and modified the dismissal of the case to be without prejudice. [Ex. A.] On October 9, 2013, this Court granted 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. [Ex. B.] In doing so, this Court joined courts across the country in denouncing the circumstances under which this case arose, which is that Plaintiff Pavilion Corporation confessed judgment in favor of its adversary in litigation, DC & Sons, for $4.5 million in exchange for a release of personal liability for Plaintiff Larry McNair, and then assigned to DC & Sons the right to sue Nexsen Pruet for legal malpractice as a way to collect the judgment confessed. *Id.*

This Court made a number of findings in the order granting summary judgment that were affirmed by the Supreme Court on appeal. For example, this Court found:

- Plaintiffs ceded all rights and control of this case to DC & Sons, including the right to determine whether to file the case in the first instance;
- Plaintiffs "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 Plaintiffs 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; and
- this case could not proceed as filed because it was never filed by Plaintiffs in the first instance.

Id.

As a result of these findings, this Court was unwilling to simply strike the assignment and allow the case to proceed as filed, concluding that "[t]he conduct of Plaintiffs and DC & Sons with respect to the courts and with respect to Nexsen Pruet cannot be undone with the stroke of a pen." *Id.*

Plaintiffs appealed this Court's order, and on August 12, 2015, the Supreme Court affirmed as modified. [Ex. A.] On appeal, Plaintiffs made the same arguments they make here, which is that if the assignment was voided, the case should be permitted to proceed. Plaintiffs specifically argued that a dismissal without prejudice was not appropriate as it would result in Nexsen Pruet claiming the statute of limitations has expired. [Ex. C.] Rather than grant the relief requested, the Supreme Court affirmed summary judgment, and modified the dismissal to be without prejudice. [Ex. A.]

Sixteen days after the Supreme Court issued its opinion and after the expiration of the deadline to file a petition for rehearing, Plaintiffs filed a "Motion for Order Allowing Pavilion Development and Larry McNair a Reasonable Time to Amend their Complaint After Remand." [Ex. D.] Plaintiffs argued that they should be given a reasonable period of time "after remand" to amend their complaint. *Id* The Supreme Court construed the motion as a petition for rehearing and denied it as untimely filed. [Ex. E.]

ARGUMENT

Plaintiffs' motion to amend the complaint or to substitute parties should be denied because this case is over. This case was dismissed with prejudice by this Court and without prejudice by the Supreme Court. Plaintiffs sought the same relief they seek here in the Supreme Court, and the Supreme Court determined that dismissal without prejudice was the proper remedy.

Because this case has been dismissed, and Plaintiffs failed to obtain the relief they seek here on appeal, the instant motion should be denied.

I. The motion should be denied because this case has been dismissed.

The primary reason the motion should be denied is because this case has been dismissed.

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." Black's Law Dictionary 537 (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, both this Court and the South Carolina Supreme Court dismissed this case. Although the Supreme Court modified the dismissal to be without prejudice, a dismissal without prejudice is still a dismissal. Accordingly, the above-captioned case is over. By definition, there should be no further motions or hearings in this action. There is no procedural rule or case that permits Plaintiffs to revive a case that has been dismissed. The rules cited by Plaintiffs apply when a case is pending, not when it is over.

The Supreme Court could have remanded the case with leave to amend but chose not to do so. Plaintiffs made the same arguments in the Supreme Court that they make here, that is, that the current action should be permitted to proceed and that a dismissal without prejudice would be fatal because of the statute of limitations defense. Rather than grant such relief, the Supreme Court held that the case should be dismissed without prejudice. Now that the remittitur has been issued, this Court must enforce the ruling found in the Supreme Court's opinion. *See Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414-15, 438 S.E.2d 248, 250 (1993) ("Once the remittitur is sent down from [the Supreme] Court, [the] Circuit Court acquires jurisdiction to enforce the judgment and *take any action consistent with the Supreme Court ruling.*") (emphasis added).

Plaintiffs' late-filed motion following the appeal, which asked the Supreme Court to remand the case with leave to amend, does not change the Supreme Court's prior ruling. The Supreme Court construed this motion as a petition for rehearing and denied it as untimely. The Supreme Court's statement that the issues raised in the motion "should be addressed by the trial court in the first instance," does not, as Plaintiffs contend, grant Plaintiffs permission to seek leave to amend *in this case*. The only interpretation of this statement that is consistent with the Supreme Court's ruling that the case was dismissed without prejudice is that the issues raised in the motion, such as the expiration of the applicable statute of limitations, should be taken up by the trial court *after the filing of a new case*. Otherwise, the Supreme Court would be contradicting its holding that case was dismissed without prejudice.

Plaintiffs have had numerous opportunities throughout the course of this case to avoid the situation in which they now find themselves. At any point during this case, Plaintiffs could have chosen to proceed independent of the assignment. Plaintiffs have been on notice since Nexsen

Pruet filed its answer to the complaint and counterclaim against Plaintiffs and DC & Sons that Nexsen Pruet challenged the legality of the assignment. Instead of filing a new case independent of the assignment, or at the very least filing a placeholder case, Plaintiffs allowed their adversary, DC & Sons, to continue controlling and pursuing the case all the way up to the South Carolina Supreme Court. Plaintiffs did so in the face of overwhelming case law that assignments between adversaries are void as against public policy.

Accordingly, under the current procedural posture, Plaintiffs' only recourse is to file a new complaint. If and when Plaintiffs choose to file a new complaint, Nexsen Pruet is entitled to raise any and all available defenses, and Plaintiffs are entitled to refute them. To rule otherwise would be to give new meaning to "dismissal without prejudice" and would override the Supreme Court's decision.

Because the present case has been dismissed, and the Supreme Court declined to grant the relief sought here, the motion to amend the complaint should be denied.

II. This is not a true motion to amend.

Plaintiffs' motion, while styled as a motion to amend, does not actually seek to make any substantive amendments to the allegations of the original complaint filed in this lawsuit. Instead, this motion is merely an attempt to circumvent the Supreme Court's order dismissing the case without prejudice.

The new proposed amended complaint is virtually identical to the one that was initially filed in this case. [Ex. F & G.] There are minor changes to the wording of various allegations in the complaint. The causes of action are the same, and there are no additional paragraphs of added allegations. The only substantive difference between the two complaints is that the amended complaint does not expressly acknowledge that Plaintiff Larry McNair obtained a full

release as part of the settlement in the underlying case. Plaintiff presumably omitted this allegation because otherwise the claims alleged by Larry McNair would be dismissed for lack of harm.

Accordingly, even if this motion were procedurally permissible by the circuit court or if the Plaintiffs had timely filed their motion following the Supreme Court's opinion, Plaintiffs have failed to present any additional factual allegations or different theories of recovery that would allow for the relief they now seek. *See Spence*, 368 S.C. at 130, 628 S.E.2d at 881-82 ("An appellate court should [impose a reasonable period of time for amendment of the complaint] 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.").

III. The procedural rules cited do not permit the relief requested.

A. Rules 15(a) and 15(c).

Plaintiffs' motion to amend the complaint pursuant to Rule 15(a) and to have those amendments relate back to the original complaint pursuant to Rule 15(c) should be denied.

Under Rule 15, 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. Typically, "[l]cave 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." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (2005). "The prejudice Rule 15 envisions is lack of notice that this new issue is going to be tried, and a lack of opportunity to refute it." *Id.* "The party opposing the amendment has the burden of establishing prejudice." *Id.*

Numerous jurisdictions, both state and federal, have recognized that the rule of liberality with respect to motions to amend is analyzed differently when it is made after dismissal. *See, e.g.*, *Russell v. GTE Gov't Sys. Corp.*, 141 Fed. Appx. 429, 436 (6th Cir. 2005) ("Although leave to amend a complaint should be granted liberally when the motion is made pretrial, different considerations apply to motions filed after dismissal."); *Humphreys v. Roche Biomedical Lab., Inc.*, 990 F.2d 1078, 1882 (8th Cir. 1993) (noting that while a pretrial motion to amend is liberally granted, "different considerations apply to motions [to amend] filed after dismissal.").

"Whenever 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 15(c), SCRCP.

As explained above, the primary reason the motion to amend the complaint should be denied is because this case has been dismissed. Rule 15 allows for the amendment of pleadings during the course of litigation, not after the conclusion of a case.

Additionally, it is not in the interest of justice to grant Plaintiffs leave to amend the complaint given the history of this case. This is not a case where a plaintiff has failed to properly allege the elements of a cause of action or has failed to plead facts sufficient to state a claim. This is a case where the plaintiffs allowed another party to use their names to prosecute a case all the way to the Supreme Court, in the face of overwhelming legal authority that assignments between adversaries are void as against public policy.

Further, it is not in the interest of justice to permit Plaintiffs to file an amended complaint that does nothing to cure the taint that has plagued this case from the beginning. The proposed amended complaint does nothing to show this is a genuine legal malpractice case brought by Plaintiffs as the real parties in interest. Indeed, Plaintiffs are still represented by the same

counsel who filed the initial complaint and who represented Plaintiffs' adversary in the case below, and according to the proposed amended complaint, the $4.5 million confession of judgment remains in place even though the assignment has been stricken.

Moreover, it is not in the interest of justice for Plaintiffs to use Rule 15(c) to file an amended complaint piggybacking off the filing date of the original complaint when Plaintiffs were not the ones who brought the case in the first instance. As this Court found, Plaintiffs allowed their adversary, DC & Sons, to bring and control this case. [Ex. B.] It is not in the interest of justice to allow a case to proceed that arose out of circumstances which strongly suggested collusion or the opportunity for collusion. It is not in the interest of justice to allow this case to proceed when this Court previously ruled that the defects here could not be cured by the stroke of a pen.

Nexsen Pruet will be prejudiced if the amendment is allowed. To begin, Nexsen Pruet should not have to continue defending motions and claims brought by an entity that is not and never has been a client of the firm. Plaintiffs should be required to file a new complaint, based on advice from new, independent counsel, who are not the same counsel who represent the judgment creditor, DC & Sons. This is the same procedure followed by courts in other jurisdictions when an assignment of a legal malpractice claim has been stricken. *See 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").

Once a genuine case is filed, Nexsen Pruet should have the opportunity to raise any and all available defenses, and Plaintiffs should have the burden of refuting them. Nexsen Pruet should not lose defenses because of the way in which Plaintiffs have chosen to proceed with this case. Nexsen Pruet has successfully defended this case since 2011, obtaining an order granting summary judgment and a dismissal from both this Court and the Supreme Court. To allow the complaint to be amended and the case to proceed will render those dismissals meaningless, after years of lengthy and costly litigation, and will directly contradict the Supreme Court's opinion.

For these reasons, the motion to amend the complaint pursuant to Rules 15(a) and 15(c) should be denied.

B. Rule 15(d)

Likewise, the motion to file supplemental pleadings pursuant to Rule 15(d) should be denied.

According to Rule 15(d), SCRCP, "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense."

Here, there are no transactions or occurrences or events that have taken place since the filing of the initial complaint that would alter the allegations in the complaint. As previously noted, the allegations in the proposed amended complaint are virtually identical to those in the initial complaint. Moreover, the defects in the original pleading do not relate to the allegations themselves. The defects have to do with the genuineness of the claims and the circumstances

under which the litigation arose. Such defects cannot be cured by the filing of an amended complaint that is virtually identical to the original pleading.

Accordingly, Plaintiffs are not entitled to relief under Rule 15(d) and the motion should be denied.

C. Rule 17(a)

Finally, Plaintiffs' motion to substitute parties pursuant to Rule 17(a) should be denied.

Rule 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest," and that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest." The notes to this rule state that the rule "is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake."

The present case was not dismissed pursuant to Rule 17, nor was there an "honest mistake" regarding the real party in interest. Plaintiffs allowed DC & Sons to file and control this case, giving up all rights associated with the prosecution and settlement of this case. Plaintiffs allowed DC & Sons to use their name without revealing this fact to Nexsen Pruet or this Court.

Moreover, the fact that Plaintiffs now seek to be substituted as the real parties in interest under Rule 17(a) supports a finding that the motion pending before this Court was filed by and on behalf of DC & Sons and DC & Sons are still the real parties in interest. This is yet another reason the motion should be denied. Nexsen Pruet should not have to continue defending motions and claims brought by a party to whom Nexsen Pruet has owed no duties and is immune from suit.

Finally, 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. The time for substitution in the present case has passed.

CONCLUSION

Plaintiffs' motion to amend the complaint should be denied. This action has been dismissed. Further, the current motion is not truly a motion to amend, and the procedural rules relied upon Plaintiffs do not afford the relief requested. Moreover, Plaintiffs sought this same relief in the Supreme Court, and the Supreme Court determined that the proper remedy was dismissal without prejudice.

For these reasons, the motion should be denied.

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Attorneys for Nexsen Pruet, LLC

Columbia, South Carolina
May 27, 2016

SOWELL GRAY

TINA M CUNDARI
Direct Dial 803 231 7834
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September 29, 2015

By U.S. Mail
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street Suite 106
Charleston, South Carolina 29401-2258

Re: Pavilion Development Corp. and Larry McNair vs. Nexsen Pruet, LLC v. DC & Sons, LLC
Case No.: 2011-CP-10-05774
SGSL No: 5347/1509

Dear Ms. Armstrong

This firm represents Nexsen Pruet, LLC, in the above referenced case.

We have recently received a copy of Plaintiffs' Motion to Amend/Supplement Complaint, which was sent to the Court for filing on September 18, 2015. The Court should not permit this motion to be filed

In an opinion dated August 12, 2015, the South Carolina Supreme Court held that this case should be dismissed without prejudice. A copy of the opinion and the remittitur sent to your office on September 3, 2015, are enclosed for your convenience A dismissal without prejudice terminates the case. The Supreme Court did not remand any issues to the trial court. Accordingly, the case is over, and no further filings should be permitted.

Accordingly, we ask the Court to decline to file Plaintiffs' Motion to Amend/Supplement Complaint. Plaintiffs must file a new case and a new complaint if they want to proceed with their claims. The above-referenced matter has been dismissed.

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

Sincerely,

Tina Cundari

SOWELL SG GRAY

Litigation is our Business

Enclosures

cc. By Email
Andrew K. Epting, Jr , Esq.
George J. Kefalos, Esq.
James G. Long, Esq

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
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September 3, 2015

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Pavilion Development v. Nexsen Pruet, LLC
Lower Court Case No. 2011-CP-10-05774
Appellate Case No. 2013-002796

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
Elizabeth Van Doren Gray, Esquire
Tina Marie Cundari, Esquire
Benjamin Rogers Gooding, Esquire
The Honorable J. C. Nicholson, Jr.

2011-5774

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant,

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

Appellate Case No. 2013-002796

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-MO-047
Heard May 6, 2015 – Filed August 12, 2015

AFFIRMED AS MODIFIED

Andrew K. Epting, Jr. and Michelle N. Endemann, both of Andrew K. Epting, Jr., LLC, of Charleston; George J. Kefalos and Oana D. Johnson, both of George J. Kefalos, PA, of Charleston, for Appellants.

Elizabeth Van Doren Gray, Tina Cundari, and Benjamin R. Gooding, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Respondent.

PER CURIAM: We affirm the trial court's grant of summary judgment. *See Skipper v. ACE Prop. & Cas. Ins. Co.*, Op. No. 27547 (S.C. Sup. Ct. filed July 15, 2015). ("[I]n South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited."). However, we modify the dismissal to be without prejudice.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant,

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

Appellate Case No. 2013-002796
Lower Court Case No. 2011-CP-10-05774

ORDER

Pursuant to Rule 222 of the South Carolina Appellate Court Rules, the motion for costs filed on behalf of the respondent is granted in the amount of $1,120.09 against the appellants in the above entitled matter. The Clerk of Court for Charleston County is directed to add this award of costs to the remittitur in this matter.

C.J.
FOR THE COURT

Columbia, South Carolina

October 21, 2015

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
Elizabeth Van Doren Gray, Esquire
Tina Marie Cundari, Esquire
Benjamin Rogers Gooding, Esquire
The Honorable Julie J. Armstrong

The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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September 3, 2015

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Pavilion Development v. Nexsen Pruet, LLC
Lower Court Case No. 2011-CP-10-05774
Appellate Case No. 2013-002796

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
Elizabeth Van Doren Gray, Esquire
Tina Marie Cundari, Esquire
Benjamin Rogers Gooding, Esquire
The Honorable J. C. Nicholson, Jr.

The Supreme Court of South Carolina

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.

Appellate Case No. 2015-000360

ORDER

Appellants move to certify this appeal pursuant to Rule 204(b), SCACR, and to consolidate the appeal with the matter of *Skipper v. ACE Property and Casualty Insurance Company*, Appellate Case No. 2014-001979. Respondent consents to certification, but opposes consolidation. Respondent also submits this Court should rescind its acceptance of the request to answer the certified question in *Skipper*. We grant the motion to certify, but deny the motion to consolidate. To the extent respondent requests we rescind acceptance of the request to answer the certified question in *Skipper*, that request is denied.

C.J.
FOR THE COURT

Columbia, South Carolina

March 12, 2015

cc:
Andrew K. Epting, Jr., Esquire
Michelle Nicole Endemann, Esquire
George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
Elizabeth Van Doren Gray, Esquire
Tina Marie Cundari, Esquire
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
FEB 25 2015
S.C. Supreme Court

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.

APPELLANT'S MOTION TO CERTIFY AND TO CONSOLIDATE FOR ARGUMENT

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ATTORNEYS FOR APPELLANT

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

This appeal concerns a matter of first impression in South Carolina: whether the assignment of a legal malpractice claim between adversaries in the litigation in which the alleged malpractice occurred is void as against public policy and if so, what is the proper remedy?

Pavilion and McNair move this Honorable Court for the following relief pursuant to Rules 204(b) and 214 SCRAP:

a) to certify this appeal for resolution by this Court because (1) the issue is a matter of first impression in South Carolina, (2) there is a split among the circuit courts in this state as to whether the assignment of a legal malpractice claims violates South Carolina public policy, and (3) a Federal District Court has certified to this Court the question of whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose (*George Skipper, et al v. ACE Property and Casualty Insurance Company, et al*; Appellate Case No. 2014-001979 hereinafter referred to as the "Skipper Appeal"); and

b) to consolidate this appeal with the Skipper Appeal as both concern the issue of whether a legal malpractice claim can be assigned between adversaries in litigation; further, should this Court hold that an assignment is void this case presents the further issues of whether the cases is ended with prejudice or whether the assignment is stricken and the case proceeds in the name of the client against its lawyer.

BACKGROUND

The Underlying Litigation in Which the Alleged Legal Malpractice Occurred

1. 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.

2. 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 insisted that the third party who raised the claim had no interest in the property and demanded that Pavilion either close or release DC & Sons from the contract so that DC & Sons could sell it to an alternate buyer. Pavilion refused to either close or release DC & Sons from the contract and filed suit for specific performance, placing a *lis pendens* on the property. Nexsen Pruet later withdrew its specific performance action, but refused to dismiss the *lis pendens*. DC & Sons filed a counterclaim against the buyer for its refusal to close.

3. The case was transferred to the Business Court and the Honorable Roger M. Young.

4. On March 23, 2009 Judge Young entered an order directing the removal of the *lis pendens* from the property, holding a breach of contract action and claim to recover earnest money does not affect title to real property. Judge Young's order effectively ended Pavilion's claim against DC & Sons, and the trial of the counterclaim of DC & Sons was to commence on January 18, 2011.

5. Before the trial commenced, DC & Sons renewed its motion for summary judgment. Judge Young allowed a hearing and granted DC & Sons motion. (See R. pp. 45-59).

6. After Judge Young entered the order granting DC & Sons summary judgment, Mr. Dan David, (the attorney Pavilion and McNair hired after Nexsen Pruet was relieved as counsel), asked Judge Young if the parties could have some time to discuss settlement. (R. p. 59). A recess was taken and the parties returned, asking to put the settlement on the record. The agreement reached, in part, required Pavilion to 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).

7. The settlement was put on the record before Judge Young, and Judge Young approved it. (R. pp. 60-64).

8. The elements of DC & Sons damages which comprise the $4.5 million confession of judgment are as follows: (1) a lost real estate contract which would have realized a profit of $2,852,000; (2) sums actually paid by DC & Sons in interest on the mortgage it had to keep in place because of the inability to close and the cost of refinancing; (3) the $50,000 earnest money deposit; and (4) prejudgment interest at the statutory rate.[1]

9. DC & Sons damages were put on the record as well:

> THE COURT: What is the breakdown on that number? How did you come up with 4,580,000?
>
> MR. EPTING: I think I can do it from memory, Judge. The other purchase was at $5 million and the debt on the property was 2,142,000; therefore, the sale alone would have realized a profit of $2,852,000. At that time, Judge, rather than having a sale and paying off the mortgage that existed on the property, my client has continued to bear the interest on that property right up through today's date, and that interest is $675 plus thousand dollars, and as I'm speaking now, Judge, I realize all this is in the booklet that I gave you, but I'm happy to go through this. When the lis pendens was not lifted – and there really is, Judge, a terrifying piece in this, and it has a lot to do with you and Mr. Dan David. My client, because this lis pendens was ultimately lifted, and Mr. David, unlike Nexsen Pruet, refused to appeal the order, my client was able to close the entire transaction the cost of which was $43,000, but had they not been able to close that transaction, Judge, they would have lost this property, they would have lost Red's, and they would have lost the entire Wings Over America and the franchise...we added [prejudgment] interest at 8 and three-quarters, and those numbers are added together. It comes to $4,580,015.93.

---

1 Several days before the trial was to begin, on January 14, 2011, DC & Sons submitted its 47 page pre-trial brief to Judge Young, complete with binders of DC & Sons' 147 trial exhibits, including all of the documentation for DC & Sons' actual damages, including: Plaintiff's Exhibit 95, which was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, which was the closing statement on the refinance of the mortgage showing interest and the closing costs paid by DC & Sons; and Plaintiff's Exhibit 72, which was the contract with Pavilion showing the earnest money deposit of $50,000. (See R. pp. 67-114).

(R. pp. 60-62).

10. Judge Young went on to state:

> 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 it out.

(R. p. 64).

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

The Instant Malpractice Action & Appeal

12. Pavilion & Larry McNair filed their legal malpractice suit against Nexsen Pruet on August 16, 2011, serving written discovery and notices of deposition with the complaint. Nexsen Pruet refused to participate in depositions and instead filed a motion for summary judgment, not on the merits of the legal malpractice suit, but on a novel issue in South Carolina, whether the assignment of a legal malpractice claim is void as against public policy and, if it is, what is the proper remedy

13. Oral argument on Nexsen Pruet's was heard on March 13, 2013.

14. By Order dated October 9, 2013, Judge Nicholson held: (1) the settlement of the underlying litigation constitutes an assignment of Appellants' legal malpractice claim against Nexsen Pruet; (2) the assignment is void as against public policy; and (3) due to the opportunity for collusion, the remedy is dismissal with prejudice of the legal malpractice suit. (R. pp. 3-29).

15. After Pavilion and McNair received written notice of entry of the Order denying their motion to reconsider, they noticed their appeal.

16. Pavilion and McNair maintain they are the real parties in interest in this action and have not assigned their claims against Nexsen Pruet to DC & Sons. Rather, as part of the agreement to avoid the exposure of a trial in the underlying case of actual and punitive damages, Plaintiffs agreed to assign the proceeds of this litigation to DC & Sons.

17. Final briefs and the Record on Appeal have been submitted to the Court of Appeals.

The Skipper Appeal

18. On September 19, 2014, the District Court certified the question of whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose in the Skipper Appeal. This Court subsequently accepted the question for review.

MOTION TO CERTIFY APPEAL FOR SUPREME COURT REVIEW

19. Rule 204(b) provides that, in any case pending before the Court of Appeals, this Court may, in its discretion, certify the case for review before it has been determined by the Court of Appeals. Rule 204(b) explains that "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." This appeal implicates both considerations.

20. The legal question at issue involves the attorney/client relationship, a matter of significant public interest, and requires a determination of the public policy of this state. Further a chose in action is deemed personal property in South Carolina. See S.C. Jur. Assignments § 19 (2006). This appeal concerns the assignability of property, which is a matter of significant public interest.

21. Not only does this appeal involve a matter of significant public interest, but it involves an important legal principal that has not been addressed by South Carolina appellate courts. South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct.

App. 2007) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009) citing *Slater Corp. v. S.C. Tax Comm'n*, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct.App.1984) (*quoting Forrest v. Warrington*, 2 S.C.Eq. (2 Des.) 254 (1804)). The decision by the lower court makes a special exception for legal malpractice claims, deeming them unassignable and disregarding over 200 years of South Carolina jurisprudence. Pavilion and McNair believe that carving an exception in the law is a task only this Court can undertake.

22. Yet another indication of the significance of the legal question at issue in this case is the split in authority in the circuit courts. For example, in a case styled *Frank Robertson and Cayvon, Inc. v Nexsen Pruet Jacobs & Pollard, LLP*; case no 2004-CP-40-5531 (2006) filed in Richland County, the Honorable John L. Breeden, Jr., when faced with the argument that Robertson assigned his legal malpractice claim against Nexsen Pruet and that the assignment was void as against public policy, denied Nexsen Pruet's motion for summary judgment, recognizing there is no South Carolina authority on point. Judge Breeden held: "I am again not persuaded that equity and public policy would dictate that by having granted a partial lien against this case should dictate that Robertson's right or ability to recover for the Defendants' misconduct is diminished or negated." However, in the instant case the Honorable J.C. Nicholson, Jr. found that the assignment at issue is one of the legal malpractice claim and not one of proceeds and that the assignment is void as against public policy. Judge Nicholson went on to dismiss Pavilion and McNair's legal malpractice case *with prejudice*, holding that attempted assignment by Pavilion and McNair of their malpractice claim to their adversary in the underlying case operates as a waiver of the right to bring the claim. As the split in the circuit courts demonstrates, the legal question at issue in this appeal is one of significant importance requiring a decision by this Court.

MOTION TO CONSOLIDATE

23. Rule 214 provides that the Court may consolidate appeals when there is more than one appeal from the same order or where the same question is involved in two or more appeals, which is the case here.

24. In the interest of judicial economy, Pavilion and McNair's appeal in the instant case and Skipper's appeal in Appellate Case No. 2014-001979 should be consolidated for decision by this Court. This case presents the further question, in the event this Court determines that the assignment of a legal malpractice claim between adversaries violates the public policy of this state, what is the remedy? Is it to dismiss the case with prejudice or to strike the assignment and allow the case to proceed by the client against its counsel?[2]

25. Further, Appellants in the Skipper Appeal advocate for a case-by-case analysis of whether legal malpractice claims can be assigned among adversaries in litigation (see Skipper Appellate Brief section "c"). Should this Court find the assignment at issue in *Skipper* void as against public policy, or should this Court determine a case-by-case analysis is appropriate and remand the case to Judge Childs, Judge Childs is left with determining how the case is to proceed. For example, if the assignment is deemed void, should the case continue between the assignor and the law firm, or does the attempt at assignment waive or otherwise terminate the assignor's right to sue his former attorney resulting in a dismissal with prejudice? (which was the ruling of the lower court in the instant appeal)

26. The issue of the remedy for the improper assignment of a legal malpractice is of vital importance among those jurisdictions that have decided it. For example, Texas Courts hold that a

2 In this case, proceeds and not the claim were assigned so that the effect of striking the assignment of the claim would practically be to require the client to pay over the proceeds of any recovery.

client's right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim. *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000). The Court in *Tate* held:

> **Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO.** Tate emphasizes **he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim.** **In this respect, Tate is correct**. In *Mallios,* the Texas Supreme Court held that **when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment.** *Mallios,* 11 S.W.3d at 159. While expressing no opinion on the validity of the underlying "arrangement" between the plaintiff and a third party, **the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm**. *Id.*

Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 634 (2000)(emphasis added). The Arizona Court of Appelas in *Monthofer Invs. Ltd. Pshp. v. Allen,* 189 Ariz. 422, 426 n.3, 943 P.2d 782, 786 (Ct. App. 1997) held:

> It is one thing to assert that an invalidly assigned claim is an unassigned claim in the eyes of the law and that the assignee cannot pursue the action against a third party or require performance by a reluctant assignor. See Schroeder v. Hudgins, 142 Ariz. 395, 399, 690 P.2d 114, 118 (App. 1984); Karp v. Speizer, 132 Ariz. 599, 600-01, 647 P.2d 1197, 1198-99 (App. 1982). **It is another thing to assert that the assignor forfeits the claim by attempting to assign it.**

(emphasis added). Further, many other jurisdictions recognize an invalid assignment has no effect on the validity of the underlying action. *See Weiss v. Leatherberry,* 863 So. 2d 368, 372-73 (Fla. Dist. Ct. App. 2003) ("The invalidity of the agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by

proper person."); *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007)("Balancing the advantages and disadvantages of such assignments, we barred assignment of legal malpractice claims, noting clients may still make these claims directly against their attorneys, but they cannot assign their choses in action."); *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987)("We note that, even if there had been an invalid assignment, this would not warrant dismissal of the lawsuit. Instead, the 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).

27. To decide the issue of the assignability of a legal malpractice claim without also deciding the remedy should the assignment be deemed void or the case-by-case approach adopted is to decide only a fraction of the legal question presented. The issue of the remedy for the improper assignment of a legal malpractice claim has been fully briefed in the instant appeal by both sides and for this reason the instant appeal should be consolidated with the Skipper Appeal.

WHEREFORE, Pavilion and McNair pray this Honorable Court certify this appeal and consolidate it with the Skipper Appeal currently pending before this Court.

[signatures on following page]

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC

By _____

Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310

George J. Kefalos, Esquire
Oana D. Johnson, Esquire
GEORGE J. KEFALOS, PA
46A State Street, Charleston, SC 29401
Phone: 843-722-6612; Fax: 843-377-1310

Attorneys for Appellants

Dated this 23 day of February, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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.

PROOF OF SERVICE

I certify that I have served the Appellants' MOTION TO CERTIFY TO CONSOLIDATE FOR ORAL ARGUMENT on Respondents by depositing a copy in the United States Mail, Postage prepaid, on February 23, 2015, addressed to Respondent's attorneys of record as follows:

Elizabeth Van Doren Gray, Esquire
Tina M. Cundari, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

By _____
Andrew K. Epting, Jr.
Michelle N. Endemann
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-002796
Trial Court Case No. 2011-CP-10-05774

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

v.

Nexsen Pruet, LLC, ...Respondent,

v.

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

RETURN TO MOTION TO CERTIFY AND TO CONSOLIDATE FOR ARGUMENT

Nexsen Pruet, LLC, hereby responds to Appellants' Motion to Certify and to Consolidate for Argument. Nexsen Pruet consents to the transfer of this case (the Pavilion case) to the Supreme Court pursuant to Rule 204(b), SCACR, but opposes its consolidation with the case of *George Skipper et al. v. ACE Property & Casualty Insurance Company et al.*, Case No. 2014-001979 (the Skipper case) because the Skipper case is not an appeal and Rule 214, SCACR, permits consolidation only when two or more appeals are pending.

Additionally, the Court should exercise its discretion under Rule 244(f), SCACR, and rescind its agreement to answer the certified question in the Skipper case. A decision

in the Pavilion case will render the certified question moot. Further, it appears that the district court was not aware of the existence of the appeal in the Pavilion case at the time the order certifying the question was issued, and it is unclear whether the Supreme Court was aware of the appeal when it agreed to answer the question.

For these reasons, which are more fully explained below, Nexsen Pruet requests that the Court (1) grant the motion to transfer the Pavilion case to this Court, (2) deny the motion to consolidate, and (3) rescind its agreement to answer the certified question in the Skipper case.

Transfer of the Pavilion case

The Pavilion case should be transferred to the Supreme Court for review because the case involves an issue of significant public interest and a legal principle of major importance. The first issue on appeal is whether South Carolina should join states across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy. This is a novel question of law in South Carolina and involves a matter of public policy. A decision on this issue will impact litigants, lawyers, and the judicial system in this state.

Courts in other jurisdictions prohibit assignments of legal malpractice claims between adversaries due to the obvious "opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa v. Haskell,* 67 P.3d 1068, 1078 (Wash. 2003). Additionally, such assignments "lead to [an] abrupt and shameless shift of positions that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not

a search for truth, thereby demeaning the legal profession." *Id.* Moreover, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.*

The public policy concerns articulated above are directly implicated in the case at hand where Appellants (1) confessed judgment for $4.5 million without a hearing on damages; (2) assigned to their adversary, DC & Sons, the right to sue Nexsen Pruet for legal malpractice; (3) assigned all proceeds from the legal malpractice case to DC & Sons; (4) gave DC & Sons full control over the legal malpractice case; (5) agreed to cooperate with DC & Sons in the prosecution of the legal malpractice case; (6) agreed that DC & Sons would fund the litigation; (7) allowed DC & Sons to use their names to file the case; (8) did not disclose the existence of the assignment or the confession of judgment in the legal malpractice complaint; (9) allowed the same lawyers who represented DC & Sons in the case below to represent them in the legal malpractice case; and (10) obtained a hearing *after* the hearing on the motion for summary judgment in the legal malpractice case before *a different judge*, *without notice* to Nexsen Pruet or to the judge who heard the summary judgment motion, seeking to have the settlement agreement amended to eliminate the assignment so as to avoid a ruling that the assignment violated public policy.[1]

Among other things, this conduct demeans lawyers and the legal profession, undermines the integrity of the courts, allows judgment-proof litigants to use legal

[1] These facts are described more fully in Respondent's final brief and are supported with citations to the record. Respondent's final brief also addresses the arguments made by Appellants in the Motion to Certify and to Consolidate for Argument, the vast majority of which are not relevant to the question of whether this case should be transferred or consolidated and are not supported by the record.

malpractice claims as a bargaining chip for settlement, and increases the opportunity for collusion. Because of the nature of the issues presented and the impact a decision will have on the legal profession and the courts, this case should be transferred to the Supreme Court for review pursuant to Rule 204(b), SCACR.

Consolidation

Nexsen Pruet is opposed to consolidation of the Pavilion case with the Skipper case because there is no authority to support consolidation. Under Rule 214, SCACR, the Court may, in its discretion, order an appeal to be consolidated "where the same question is involved *in two or more appeals* in different cases." (Emphasis added.) Here, there are not two or more appeals pending. There is only one appeal. The other case involves a certified question. With only one appeal pending, consolidation is not appropriate.

There are other reasons for not consolidating the cases. The Pavilion case is a case or controversy pending in the appellate courts of this state, while the Skipper case presents a certified question from the federal district court. The Court's task in each case is different, as are the applicable standards of review. Further, the Pavilion case raises four issues on appeal from a final order in a South Carolina state court and contains a complete record of the evidence presented. The Skipper case, on the other hand, raises a single certified question to be addressed in an academic setting with a limited set of facts. The Court has limited jurisdiction in the Skipper case, and will have complete jurisdiction in the Pavilion case if the case is transferred.

Moreover, the Skipper case was filed against an insurance company and two Georgia lawyers and then removed to federal court. The Skipper case is in its initial stages—the complaint has not been answered and the motion to dismiss has been denied

without prejudice and with leave to re-file after the adjudication of the certified question. In the Skipper case, the plaintiffs were forthcoming about the existence of the confession of judgment and the assignment of the legal malpractice claim, attaching both documents to the complaint and incorporating them by reference. The case was filed by the parties who assigned the legal malpractice claims and the parties to whom the claims were assigned (who openly referred to themselves as the judgment creditors).

The Pavilion case, on the other hand, was filed against a South Carolina law firm. A South Carolina circuit court judge granted summary judgment in favor of Nexsen Pruet and dismissed the case with prejudice. The case is pending in the South Carolina Court of Appeals and has been fully briefed. The Court of Appeals has sent the parties a letter stating that it intends to schedule oral argument in May. The complaint in the Pavilion case said nothing about the existence of the assignment or the confession of judgment, and did not reveal that a third party, and not the named plaintiffs, owned the claims and controlled the litigation. Nexsen Pruet happened upon the confession of judgment and the assignment when searching the public record, and filed a counterclaim against DC & Sons as the real party in interest.

Given these factual and procedural differences, as well as the lack of authority to permit consolidation, the Court should deny the motion to consolidate.

Rescission of Certification

The Court's agreement to answer the certified question should be rescinded. First, a decision in the Pavilion case will render the certified question moot. In other words, a decision in the Pavilion case will answer the certified question. The issues presented in the Pavilion case are:

1. Should this Court join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy?

2. Did the circuit court properly find that the settlement agreement between Appellants and DC & Sons included an assignment of a legal malpractice claim?

3. Did the circuit court properly determine that additional discovery was not needed to conclude that the assignment was void as against public policy?

4. Did the circuit court properly dismiss the case with prejudice after determining that the assignment was void as against public policy?

Issue No. 1 is identical to the certified question, which reads, "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?" In the interest of judicial economy, the Court should answer this question by deciding the Pavilion case, doing so without the need for two opinions, two oral arguments, and two sets of briefs.

Second, it appears that when the federal district court issued the order certifying the question, the court was not aware that the Pavilion case was on appeal. The district court order certifying the question discusses the circuit court decision in the Pavilion case but then says that the case is "without review by an appellate court." (No. 1:14-cv-00444-JMC, ECF No. 35, p. 8.) This is consistent with the briefing that was provided to the district court. The memorandum in support of the motion to dismiss expressly states that the Pavilion case "was not appealed." (ECF No. 5-1, p. 7.) Subsequent briefs filed in the Skipper case likewise do not acknowledge the existence of the appeal, even though the notice of appeal was filed on December 27, 2013, and the motion to dismiss in the Skipper case was filed on February 21, 2014. The first time the existence of the appeal is

acknowledged in the Skipper case is *after* the Supreme Court agreed to answer the certified question, in the plaintiff's brief to this Court at page 12.

In any event, the Pavilion case provides the better context in which to decide the question presented. The Pavilion case presents a real case or controversy involving South Carolina litigants and a South Carolina law firm. The case vividly illustrates the danger to parties, the legal profession, and the judicial system of allowing adversaries in litigation to assign legal malpractice claims.

Accordingly, the Court should exercise its discretionary authority under Rule 244(f), SCACR, and rescind the agreement to answer the certified question.

CONCLUSION

Because this case involves issues of significant public interest and legal principles of major importance, the case should be transferred to this Court for review pursuant to Rule 204(b), SCACR. This case should not be consolidated with the Skipper case because there are not two or more appeals pending as required under Rule 214, SCACR, and the cases are so factually and procedurally different that it does not make sense to consolidate them.

Moreover, the Court should rescind its agreement to answer the certified question in the Skipper case because a decision in the Pavilion case will eliminate the need to answer the certified question. Further, it appears that the district court was not informed of the existence of the appeal in the Pavilion case at the time the question was certified, and it is unclear whether the Supreme Court was aware of the appeal at the time the Court agreed to answer the question.

In the alternative, the Court may decide to hold the Skipper case in abeyance pending a decision in the Pavilion case. At the very least, the Court should consider the facts and circumstances presented in the Pavilion case before answering the certified question.

Respectfully submitted,

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Columbia, South Carolina
February 27, 2015

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.

FINAL BRIEF OF APPELLANT

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INTRODUCTION

This appeal concerns a matter of first impression in South Carolina: whether the assignment of a legal malpractice claim is void as against public policy and if so, what is the proper remedy?

Appellants contend first that the underlying settlement agreement at issue does not constitute an assignment of the Appellants' legal malpractice claim, but rather, an assignment of a portion of the proceeds of Appellants' legal malpractice suit.

Second, Appellants argue that even if the settlement agreement does constitute an assignment of Appellants' legal malpractice claim against Nexsen Pruet, LLP ("Nexsen Pruet"), the assignment is valid as assigning a legal malpractice claim does not violate the public policy of the state of South Carolina.

Third, Appellants claim that even if the assignment of a legal malpractice claim is deemed void as against South Carolina public policy, the remedy is to set aside the assignment and to allow the malpractice claim to proceed in the regular course as between lawyer and client.

STATEMENT OF ISSUES ON APPEAL

a) Whether the lower court erred in holding that the settlement at issue constitutes an assignment of Appellants' legal malpractice claim to DC & Sons?

b) Whether the lower court erred in holding that assignments of legal malpractice claims are void as against public policy pursuant to South Carolina Law?

c) Whether the lower court erred in dismissing Appellants' legal malpractice case with prejudice and holding the assignment of a legal malpractice claim constitutes a waiver of a client's malpractice claim against his lawyer?

d) Whether the lower court erred in granting Nexsen Pruet's Motion for Summary Judgment in a case in which discovery had not been commenced and the Respondent refused to participate in depositions?

STATEMENT OF THE FACTS

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. The contract contained the customary language that required DC & Sons to deliver good and marketable title. 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. DC & Sons even offered to provide title insurance. Pavilion (acting under Nexsen Pruet's direction) refused to close until the supposed encumbrance was cleared. DC & Sons insisted that the third party who raised the claim had absolutely no interest in the property and demanded that Pavilion either close or release DC & Sons from the contract so that DC & Sons could sell it to an alternate buyer. Pavilion refused to either close or release DC & Sons from the contract; instead Pavilion responded by filing suit for specific performance.

On April 9, 2007, Nexsen Pruet, on behalf of Pavilion, sued DC & Sons for specific performance and to quiet title and filed a *lis pendens* (the "underlying litigation"). Filing and maintaining the improper *lis pendens* formed the basis of the abuse of process judgment that ultimately gave rise to the malpractice action.

The *lis pendens* was improper from the time of its filing because, despite claiming that the third party claim on the property created a cloud on title, Nexsen Pruet failed to join and

serve the third party to resolve the claim. Without joining the third party who ostensibly created the cloud on title, Pavilion would never be able to resolve the title issue. Filing the *lis pendens* under these circumstances accomplished nothing. It only prevented DC & Sons from selling the property to another and was patently wrongful.

This wrong was compounded when Nexsen Pruet failed to remove the *lis pendens* even after Nexsen Pruet signed a stipulation that no entity other than DC & Sons, (including specifically the third party that had previously raised the claim), had any claim to the property. Because Pavilion wrongfully filed and maintained the *lis pendens*, DC & Sons filed a counterclaim[1] against for abuse of process as well as breach of the real estate contract.

Insult was added to the injury after Nexsen Pruet was forced to concede Pavilion would not specifically perform the August 11, 2006 contract and still refused to lift the lis pendens. Instead, Nexsen Pruet filed an amended pleading for breach of contract and sought to impose an equitable lien on the real property in order to force a return of the earnest money and secure a lower purchase price for the property. After being repeatedly asked by DC & Sons to remove the *lis pendens* to allow a new prospective buyer to close on the property, Nexsen Pruet refused to remove it. Knowing that the earnest money was in a real estate trust account and there that was no need to secure the funds with a *lis pendens* on the property, Nexsen Pruet kept the *lis pendens* in place in an effort to negotiate a lower purchase price of the property and to force a release of the $50,000.00 escrow deposit. The *lis pendens* was removed only after being ordered to do so by Judge Young. In his March 23, 2009 order, Judge Young directed the removal of the *lis pendens* from the property, holding:

1 DC & Sons filed a separate lawsuit against Pavilion and others (case no 2008-CP-10-4675) which was consolidated into Pavilion's original lawsuit (case no. 2007-CP-10-1457) as a counterclaim.

> It is well settled that under South Carolina law, a breach of contract cause of action does not "affect title to real property", and therefore will not support the filing of a *lis pendens.*
> (R. p. 84).
>
> Pavilion's claim for a release of its earnest money does not affect title to real property.
> (R. p. 85).

Judge Young's order effectively ended Pavilion's claim against DC & Sons, but as a result of Nexsen Pruet's refusal to remove the *lis pendens* from DC & Sons property (for approximately 2 ½ years), DC & Sons lost its second buyer and a $5,000,000.00 sale. DC & Sons' counterclaim continued against Pavilion for the loss of the sale. By the time the case came to trial before Judge Young,[2] Nexsen Pruet had been relieved as counsel for Pavilion.

The trial of the counterclaim of DC & Sons against Pavilion was to commence on January 18, 2011. On January 14, 2011, DC & Sons submitted its 47 page pre-trial brief to Judge Young, complete with binders of DC & Sons' 147 trial exhibits, including all of the documentation for DC & Sons' actual damages.[3] Before the trial commenced, DC & Sons had asked, and Judge Young allowed, DC & Sons to renew its motion for summary judgment as to Pavilion's liability for abuse of process and breach of contract. Judge Young allowed rehearing and granted DC & Sons motion. (See R. pp. 45-59). In his January 18, 2011 order, Judge Young 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

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2 Judge Young had exclusive jurisdiction over the case as it was referred to the Business Court by order of Chief Justice Toal.

3 Plaintiff's Exhibit 95, was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, was the closing statement on the refinance of the mortgage showing interest and the closing costs paid by DC & Sons; and Plaintiff's Exhibit 72, was the contract with Pavilion showing the earnest money deposit of $50,000. (See R. pp. 109-113).

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).

In the present case, Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons.
(R. p. 123).

Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing.
(R. p. 124).

The fact that the Defendants failed to join a serve the very party who allegedly created the cloud on title shows the lis pendens was based on pretext.
(R. p. 124).

While Pavilion refused to close and filed suit in April of 2007 because of Richard Coen's claims, Pavilion stipulated there was no cloud on title on January 17, 2008...while these claims may have justified not closing, the thinness of the merits of these arguments are an artifice. Despite the stipulation, Pavilion waited almost eight months before amending its complaint to drop its cause of action for specific performance and refused to remove the lis pendens from the property even after dropping the specific performance claim.
(R. p. 124).

The continued maintenance of a *lis pendens* and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title.
(R. p. 124).

As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper.

(R. p. 125).

> 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).
>
> It is therefore ORDERED, that DC & Sons' motion for summary judgment is granted and no evidence or testimony disputing Pavilion's liability for breach of contract and abuse of process will be allowed and no mention of it made in counsel's opening arguments.
> (R. p.126)

2. The Underlying Settlement

After Judge Young entered the order granting DC & Sons summary judgment, Mr Dan David, (the attorney Pavilion and McNair hired after Nexsen Pruet was relieved as counsel), asked Judge Young if the parties could have some time to discuss settlement. (R. p. 59). A recess was taken and the parties returned, asking 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). 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 it out.

(R. p. 64). DC & Sons' pretrial brief submitted to Judge Young contained the proof of DC & Sons' actual damages.

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

STATEMENT OF THE CASE

Pavilion Development Corporation ("Pavilion") & Larry McNair filed their legal malpractice suit against Nexsen Pruet on August 16, 2011, serving written discovery and notices of deposition with the complaint. Nexsen Pruet refused to participate in depositions and instead filed a motion for summary judgment, not on the merits of the legal malpractice suit, but on a novel issue in South Carolina, whether the assignment of a legal malpractice claim is void as against public policy and, if it is, what is the proper remedy?

Oral argument on Nexsen Pruet's was heard on March 13, 2013. By Order dated October 9, 2013, Judge Nicholson held: (1) the settlement of the underlying litigation constitutes an assignment of Appellants' legal malpractice claim against Nexsen Pruet; (2) the assignment is void as against public policy; and (3) due to the opportunity for collusion, the remedy is dismissal with prejudice of the legal malpractice suit. (R. pp. 3-29). Pavilion and McNair filed a motion to reconsider on October 23, 2013. Judge Nicholson denied the motion without hearing by Order filed November 25, 2013. (R. p. 30). Pavilion and McNair received written notice of entry of the Order on December 2, 2013 and noticed their appeal on December 20, 2013. (See R. p. 1).

ARGUMENT

1. Standard of Review

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c) SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App.2005) (*citing Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Summary judgment should be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* "Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390-91, 631 S.E.2d 915, 916 (Ct. App. 2006) (*citing Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct.App.1991)). Summary judgment must not be granted until opposing party has had full and fair opportunity to complete discovery. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001).

2. The Assignment at Issue is a Lawful Assignment of Proceeds

Appellants maintain they are the real parties in interest in this action and have not assigned their claims against Nexsen Pruet to DC & Sons. Rather, as part of the agreement to avoid the exposure of a trial in the underlying case of actual and punitive damages, Plaintiffs agreed to assign the bulk of the proceeds of this litigation to DC & Sons. Though the agreement does give control of the litigation to DC & Sons, the Agreement states:

> Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties.

> DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons.

(R. p. 117-118).

No South Carolina Court has held an assignment of the proceeds of a legal malpractice suit is invalid or void as against public policy. Nexsen Pruet raised this issue in a case styled *Frank Robertson and Cayvon, Inc. v. Nexsen Pruet Jacobs & Pollard, LLP*; case no 2004-CP-40-5531 (2006) filed in Richland County. The Honorable John L. Breeden, Jr. denied Nexsen Pruet's motion for summary judgment, recognizing there is no South Carolina authority on point and holding: "I am again not persuaded that equity and public policy would dictate that by having granted a partial lien against this case should dictate that Robertson's right or ability to recover for the Defendants' misconduct is diminished or negated."

3. *The Assignment of a Legal Malpractice Claim does not Violate the Public Policy of the State of South Carolina*

South Carolina appellate courts have not addressed the question of whether a legal malpractice claim is assignable and there is a split in the jurisdictions that have addressed this issue.

One view holds that legal malpractice claims are not assignable because they are void as against public policy. *See California, Goodley* v. *Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); Colorado, *Roberts* v. *Holland & Hart,* 857 P.2d 492 (Colo. Ct. App. 1993); Florida, *Law Office of David J Stern* v. *Sec Nat'[Servicing Corp.,* 969 So.2d 962 (Fla. 2007); Kentucky, *Davis* v. *Scott,* 320 S.W.3d 87 (Ky. 2010); Michigan, *Joos* v. *Drillock, 338* N.W.2d 736 (Mich. Ct. App. 1983); Minnesota, *Wagener* v. *McDonald,* 509 N.W.2d 188 (Minn. Ct. App. 1993);

Nevada, *Chaffee* v. *Smith,* 645 P.2d 966 (Nev. 1982); New Jersey, *Aleman Servs. Corp. v. Samuel H Bullock, p.e,* 925 F. Supp. 252 (D.N.J. 1996); Tennessee, *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865 (Tenn. 1996); West Virginia, *Delaware CWC Liquidation Corp. v. Martin,* 584 S.E.2d 473 (W. Va. 2003).

The public policy for prohibiting such assignments is often stated as follows: "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v Martin,* 584 S.E.2d 473 (W. Va. 2003). Assignments of legal malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of the relationship between an attorney and a client and the need to preserve the sanctity of that relationship" counsel against permitting such assignments. *Gurski* v. *Rosenblum & Filan,* LLC, 885 A.2d 163 (Conn. 2005).

Other jurisdictions, including Pennsylvania, New York, Massachusetts, Maine, Oregon, Georgia, Idaho, and the District of Columbia, allow the assignment of legal malpractice claims. *See Richter v. Analex Corp.,* 940 F.Supp. 353 (D.D.C.1996); *Thurston v. Continental Cas. Co.,* 567 A.2d 922 (Me.1989); *Vitale v. City of New York,* 183 A.D.2d 502, 583 N.Y.S.2d 445 (1992); *Collins v. Fitzwater,* 277 Or. 401, 560 P.2d 1074 (1977), rev'd on other grounds, *Gregory v Lovlien,* 174 Or. App. 483, 489, 26 P.3d 180, 183 (2001); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 517 Pa. 522, 539 A.2d 357 (1987); *New Hampshire Ins. Co., Inc. v. McCann,* 429 Mass. 202, 209, 707 N.E.2d 332, 336 (Mass.,1999); *Villanueva v. First American Title Ins. Co.,* 313 Ga. App. 164, 721 S.E.2d 150 (2011); *St. Luke's Magic Valley Regional Medical Center v. Luciani,* 293 P.3d 661 (Idaho 2013).

These jurisdictions have rejected the public policy concerns stated above, reasoning:

> We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected.

Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526.4 The Supreme Court of Pennsylvania stated:

> We see no threat, if this assignment is upheld, to the duty of loyalty or the duty of confidentiality owed by a lawyer to his or her client. It is farfetched to imagine that a lawyer will be discouraged from zealously representing a client out of fear that the client may later offer a malpractice action against the lawyer as a part of the resolution of another case.

Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526.

Despite the lower court's finding otherwise, several jurisdictions permit the assignment of legal malpractice claims to adverse parties. See *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 205, 707 N.E.2d 332, 334 (1999)(As a part of the terms of the settlement, New Hampshire and the Crantons agreed to: "sell, assign, and transfer... any and all of our rights, claims, demands and causes of action of any kind whatsoever ... which we have had, or may have against ... attorney John W. McCann and the law firm of Madan & Madan ..."); see also *Thurston v. Continental Casualty Co.*, 567 A.2d 922 (Me. 1989) (In a legal malpractice action resulting from the purported inadequate legal representation of a corporation in a products liability action, after which the corporation assigned its cause of action against its attorney for malpractice to the

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4 The Supreme Court of Massachusetts has held that the duty of confidentiality is also not threatened by the assignment of a legal malpractice claim as a client assigns his malpractice claim with the full awareness that he is waiving his attorney-client privilege, which is a privilege intended to protect ***the client***. *New Hampshire Ins. Co., Inc. v McCann*, 429 Mass. 202, 210. (emphasis added). Further, in any legal malpractice case, the privilege will be necessarily waived.

plaintiff in the products-liability action to settle that action, the trial court properly denied the attorney's motion to dismiss where the argument that the legal services were personal and involved confidential attorney-client relationships did not justify preventing the attorney's client from assigning the malpractice claim to someone with a clear interest in the claim and who had the time, energy, and resources to bring the suit).

The Supreme Court of Massachusetts, when faced with the argument that the assignment of a legal malpractice claim as part of a settlement in the underlying case fosters collusion and creates a "distasteful role reversal which would demean and reduce the public's confidence in the legal process," held:

> There is no logic to this argument. The fact that an attorney might be called on to defend against an assigned malpractice claim does not always mean that the attorney's former adversary will compromise the strength of his underlying claim, resulting in some sort of role reversal which diminishes public confidence in the legal profession. In this case, for example, which concerns a pretrial settlement, the merits of the underlying lead paint poisoning action are irrelevant to the issues concerning the defendants' alleged malpractice. It could be argued just as forcefully that, providing shelter for attorneys by prohibiting the voluntary assignment of malpractice claims, would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection.

New Hampshire Ins. Co., Inc. v McCann, 429 Mass. 202, 211, 707 N.E.2d 332, 337 (1999).

Here, like in *New Hampshire v. McCann*, the assignment does not require Plaintiffs attorneys to perform a "distasteful role reversal" of any sort as there are not one but two orders of the circuit court finding it was wrongful and an abuse of process to take the actions Nexsen Pruet took in the underlying lawsuit. This case is unique as counsel does not need to perform a role reversal or argue an opposing position to pursue the malpractice case; counsel is simply arguing

the same case against a different defendant (then Pavilion and McNair now Pavilion and McNair's former counsel, Nexsen Pruet).

South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009) citing *Slater Corp. v. S.C. Tax Comm'n*, 280 S.C. 584, 587, 314 S.E 2d 31, 33 (Ct.App.1984) (*quoting Forrest v. Warrington*, 2 S.C.Eq. (2 Des.) 254 (1804)); see also S.C. Jur. Assignments § 19 (2006) ("A chose in action is the right of proceeding in a court to procure the payment of a sum of money, or the right to recover a personal chattel or a sum of money by action.... In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable.").

Pursuant to South Carolina law, if a cause of action in tort would survive to a personal representative on the death of the party entitled to sue, such cause of action may, under South Carolina law, be assigned by that party during his lifetime. *Jolly v. General Acci. Group*, 382 F. Supp. 265 (D. S. C. 1974); *Doremus v. Atlantic C. L. R. Co.*, 242 S. C. 123, 130 S. E. 2d 370 (1963); see also S.C. Jur. Assignments § 20 (2014). S.C. Code Ann. § 15-5-90 governs which causes of action survive to a personal representative and states:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

Accordingly, a legal malpractice action may be assigned under South Carolina law.

4. *The lower court erred in granting Nexsen Pruet's Motion for Summary Judgment*

Summary judgment as to whether the assignment of a legal malpractice claim is void as against public policy is not appropriate considering no discovery has been done. This is especially so considering the lower court's dismissal with prejudice is based on the finding that "the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form." *See Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326, 331 (Ct. App. 2003) in which the court stated: "We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case." *Id.* at 318, 331. There are no facts in the record to support a finding of collusion and the question of collusion would be a question of fact for the jury. Yet, the lower court held:

> The facts and circumstances under which the assignment was entered **created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment.** Accordingly, the Court concludes that the **appropriate remedy is to dismiss the case with prejudice.** (R. p. 21)(emphasis added).
>
> Nexsen Pruet further contends that the **circumstances under which this case arose are tainted with collusion, and the taint cannot be cured by simply striking the assignment and allowing the case to proceed as filed. The Court agrees.**" (R. p. 9 and p. 20)(emphasis added).

The lower court goes on to find that Plaintiffs and their counsel have "**brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship.**" (R. pp. 15-16)(emphasis added).

However, the underlying settlement was put on the record and approved as reasonable by Judge Young? As there is **no discovery** in this case, collusion can be inferred only from the

agreement approved by Judge Young. Yet, the lower court held, "the circumstances under which the assignment arose and the conduct of counsel for Plaintiff and DC & Sons, indicate that the opportunity for collusion, was present." (R. p. 23). The "circumstances" the lower court describes are summarized and refuted here:

> a. **CIRCUMSTANCE 1 & 2: "During the Court recess, Pavilion confessed judgment in favor of DC & Sons for $4.5 million without challenging the amount of damages or requiring DC & Sons to present evidence to support the amount confessed." (R. p. 24 ¶ 1, 2).**

The settlement between DC & Sons and Pavilion was entered into the morning trial was to commence. The elements of DC & Sons damages which comprise $4.5 million confession of judgment are all real: (1) a lost real estate contract which would have realized a profit of $2,852,000; (2) sums actually paid by DC & Sons in interest on the mortgage it had to keep in place because of the inability to close and the cost of refinancing; (3) the $50,000 earnest money deposit; and (4) prejudgment interest at the statutory rate. Judge Young had already granted summary judgment as to Pavilion's liability, and the damages were hard figures. Further, the parties had exchanged and Judge Young had received trial briefs as well as binders of 147 trial exhibits and 12 depositions, including: Plaintiff's Exhibit 95, which was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, which was the closing statement on the refinance of the mortgage showing interest and the closing costs paid by DC & Sons; and Plaintiff's Exhibit 72, which was the contract with Pavilion showing the earnest money deposit of $50,000. (See R. 67-113).

DC & Sons damages were put on the record as well:

> THE COURT: What is the breakdown on that number? How did you come up with 4,580,000?
>
> MR. EPTING: I think I can do it from memory, Judge. The other

> purchase was at $5 million and the debt on the property was 2,142,000; therefore, the sale alone would have realized a profit of $2,852,000. At that time, Judge, rather than having a sale and paying off the mortgage that existed on the property, my client has continued to bear the interest on that property right up through today's date, and that interest is $675 plus thousand dollars, and as I'm speaking now, Judge, I realize all this is in the booklet that I gave you, but I'm happy to go through this. When the lis pendens was not lifted – and there really is, Judge, a terrifying piece in this, and it has a lot to do with you and Mr. Dan David. My client, because this lis pendens was ultimately lifted, and Mr. David, unlike Nexsen Pruet, refused to appeal the order, my client was able to close the entire transaction the cost of which was $43,000, but had they not been able to close that transaction, Judge, they would have lost this property, they would have lost Red's, and they would have lost the entire Wings Over America and the franchise...we added [prejudgment] interest at 8 and three-quarters, and those numbers are added together. It comes to $4,580,015.93.

(R. pp. 60-62).

Judge Young went on to state:

> 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 it out.

(R. p. 64).

There was ample evidence to support the amount confessed and Judge Young, who had "lived with" the case for several years as it was before him in the Business Court, found the settlement to be "a fair resolution."

b. CIRCUMSTANCES 3 & 4: "Counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim...Plaintiffs filed the present case against Nexsen Pruet without revealing the existence of the assignment." (R. p. 24 ¶ 3,4)

The lower court held Appellants kept the terms of the assignment from Judge Young and did not put them on the record and further that Appellants hid the assignment from the court. These findings are in error. Appellants did not try to conceal the existence of the assignment as the assignment was handed up to Judge Young, was filed with the Clerk of Court in January of 2011, and is public record. Further, the Appellants certainly did not keep the assignment or its terms from Judge Young, who approved the settlement. In fact, the assignment was handed up to Judge Young at the hearing:

> THE COURT: All right. **Well, then, you want a form four then entered saying this is assigned or that it settled**, judgment is entered against Pavilion In the amount of $4,580,015.93 in actual damages only, and **how do you want the assignment reflected**?
>
> MR. EPTING: **The assignment is actually, Judge, reflected in the agreement that is handwritten and provided to the Court**, so I don't think there needs to be something in form four.

(R. p. 63)(emphasis added). Judge Young prepared a Form 4 Order and attached the hand written assignment to his order. (R. p. 115).

c. CIRCUMSTANCE 5: Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and...have now switched sides"(R. p. 24 ¶ 5)

It is true that Mr. Epting and Mr. Kefalos represented DC & Sons and now represent Appellants. Nexsen Pruet's malpractice has been established by Judge Young and is clear from the record below. For example, Nexsen Pruet filed and maintained a *lis pendens* on the property of DC & Sons claiming a cloud on title despite stipulating that there was no cloud on title, and did so in order to extort a lower purchase price for the property and a return of the escrow funds.

Judge Young held: "**The continued maintenance of a lis pendens and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title**." (R. p. 124). Judge Young further held: "**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 it is rather a form of coercion, done in the course of negotiation**." (R. p. 125)(internal citations omitted). This case is unique as counsel does not need to switch sides to argue the malpractice case; counsel is simply arguing the same case against a different defendant (then Pavilion and McNair now Pavilion and McNair's former counsel, Nexsen Pruet).

d. CIRCUMSTANCES 6, 7, & 8: "Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its counsel) asking Judge Young to approve a proposed amended settlement agreement striking the assignment but keeping the confession of judgment in place." (R. p.25 ¶ 6,7,8)

As is stated above, Judge Young prepared a Form 4 Order and attached the hand written assignment document at issue to his order. (R. p. 115). It was for this reason that counsel went to Judge Young on March 21, 2013 and asked to be allowed to amend the assignment. As it was part of Judge Young's Order, Nexsen Pruet argued at the hearing on their motion for summary judgment that the assignment could not be altered or even voided by another court without Judge Young's approval. (See R. p. 168: "THE COURT: So eliminate that assignment and let y'all proceed with the legal malpractice case, win, lose, or draw? MS. GRAY: **Because you can't just set aside the assignment. It is part of an overall settlement that included a confession of judgment.**")(emphasis added). Judge Young declined to amend the assignment, but stated:

> THE COURT: It doesn't bother me if y'all want to nullify this. Okay? I'm not going to hold you in contempt...But if you think that between the two parties you can nullify the assignment, I'm not

going to rule you in.

(R. p. 241). Holding the assignment void as against public policy and allowing the legal malpractice suit to continue is the correct course.

e. CIRCUMSTANCE 9: "...it does not appear that Pavilion is at risk of having to pay the judgment, given that its counsel has asked the Court to keep the confession of judgment in place" (R. p. 26 ¶ 9).

In Nexsen Pruet's requests to admit, Nexsen Pruet asked Pavilion to "Admit that Pavilion is not at risk of having to pay the full amount of the judgment confessed in the underlying litigation." Pavilion responded "Denied." (R. p. 223, ¶ 5). This is the only evidence in the record with regard to Pavilion's payment of DC & Sons' judgment.

The lower court went on to find that the "circumstances" described above lend further support to the court's conclusion that the proper remedy is dismissal with prejudice." (R. p. 26). If discovery was allowed, it would be obvious that there was absolutely no collusion in the settlement between DC & Sons and Pavilion and its principals.

Forgetting for the moment that Judge Young found the settlement reasonable[5] and that Nexsen Pruet has refused to allow depositions or engage in discovery, there are no facts before the court that would allow it to reach this conclusion.

5. Dismissal with Prejudice is not the Appropriate Remedy - the Lower Court's Reasoning at the March 13, 2013 Hearing

At the hearing on Nexsen Pruet's motion for summary judgment the lower court articulated that, although South Carolina courts have not ruled on the assignability of legal

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5 See R. p. 64: "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 it out."

malpractice claims, Judge Nicholson was inclined to adopt the reasoning articulated by those states that hold an assignment of legal malpractice claim is void as against public policy. With regard to the remedy for a voided assignment, Judge Nicholson reasoned:

> **THE COURT: If the Court just sets -- partially agrees with you on a partial summary judgment against public policy, just strike that assignment, it's gone, and let y'all proceed on the legal malpractice issue, see if there is liability, appeal the whole thing at that time.**
>
> MS. GRAY: Here is the problem with that --
>
> THE COURT: Why? How would that be any different than what you want to do? You're telling me that Pavilion could sue Nexsen Pruet straight up. The problem is the assignment. If I just wanted to make the assignment, that problem is gone. I mean --
>
> MS. GRAY: First of all, that's not necessarily the remedy. There are several other remedies that the Courts have found.
>
> THE COURT: So eliminate that assignment and let y'all proceed with the legal malpractice case, win, lose, or draw?
>
> MS. GRAY: Because you can't just set aside the assignment. It is part of an overall settlement that included confession of judgment.
>
> **THE COURT: If I agree with your argument, and I do a partial summary judgment, public policy strike that, they can't proceed on that and make the legal malpractice case proceed, and y'all will have to argue about all the other issues during that trial, or – the prosecution of that case.**
>
> MS. GRAY: And the control of the litigation is gone, the attorneys are gone.
>
> THE COURT: If Pavilion had sued Nexsen Pruet you wouldn't be standing here. Correct?
>
> MS. GRAY: Depends on who brought the suit and what the underlying private agreement was.
>
> **THE COURT: Pavilion was the party that was wronged, theoretically, by their attorney. If they sued Nexsen Pruet, we wouldn't be standing here --**
>
> **MS. GRAY: I think that is correct. If they were the real party in interest and had not signed away --**
>
> **THE COURT: But if I eliminate that assignment and it's gone, they are the real party in interest, and -- what's the name of the other company? DC & Sons and Pavilion would have to work that out down the R.d, and that would grant you a partial summary judgment.**
>
> MS. GRAY: Invalidating all the controls in litigation so the

litigation then is entirely within control of Pavilion.

THE COURT: If you want to address that by memo, I'll be happy for you to do that. I'm not trying to spring something on you that you weren't prepared for.

MS. GRAY: Well, I really had not thought it through to that degree, Your Honor, but I think that they would have to satisfy the Court that Pavilion was acting as the real party in interest.

THE COURT: That would give a partial summary judgment. That would eliminate the problem. Yes or no?

MS. GRAY: I think that's correct.

THE COURT: Well, if you want to address that issue, I'll be glad for you --

MS. GRAY: No, but I think the concern we have at this point is are they really the real party in interest?

THE COURT: The only thing -- really, the real party at interest should be DC & Sons on the assignment. Now, Mr. Epting gave a good reason why that wasn't done, and I accept that, but the real party in interest, if I eliminate the assignment because against public interest, as you have alleged, partial summary judgment, y'all trying a legal malpractice case. Yes or no?

MS. GRAY: Yes, sir. Your Honor, I would point out one thing, which is that the South Carolina Supreme Court at 2008 in the case of Linog versus Yampolsky, Justice Toal stated in that opinion that the mere fact a case involves a novel issue does not render summary judgment inappropriate. I just thought I would -- in terms of developing –

THE COURT: I think if you read the cases, it's sort of discretionary with the Court on that.

(R. pp. 167-170) (emphasis added). Despite the lower court's analysis at the hearing, the lower held that the purported assignment by Pavilion and McNair of their malpractice claim operates as a waiver of the right to bring the claim, and thus neither DC & Sons nor Pavilion and McNair have the right to sue Nexsen Pruet.

However, even those jurisdictions that hold the assignment of a legal malpractice claim is void as a matter of law do not disallow the claim, rather the assignment is simply voided and the action continues in the name of the client.

For example, the lower Court relies on Texas authority in support of the dismissal with

prejudice of Appellants' legal malpractice claim. Texas Courts hold that a client's right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim. *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000). The Court in *Tate* held:

> **Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO.** Tate emphasizes **he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim**.
> **In this respect, Tate is correct**. In *Mallios,* the Texas Supreme Court held that **when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment**. *Mallios,* 11 S.W.3d at 159. While expressing no opinion on the validity of the underlying "arrangement" between the plaintiff and a third party, **the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm**. *Id.*

Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 634 (2000)(emphasis added). Many jurisdictions simply void the assignment and allow the legal malpractice lawsuit to "proceed in the normal course, as between the proper parties thereto." *Kommavongsa v. Haskell*, 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003).

Here, as in *Tate*, the action is already in the name of the client as the cause of action remains in the clients as only the proceeds were assigned. However, even if the assignment is deemed one of claims and not proceeds and even if the assignment of a legal malpractice claim is void under South Carolina law, the remedy is to void the assignment and allow Plaintiffs to continue their lawsuit against their former attorneys. Indeed, counsel for Nexsen Pruet agreed at the March 13, 2013 hearing that if the assignment was void, the case filed by Pavilion and Larry

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-002796
Circuit Court Case No. 2011-CP-10-05774

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

v.

Nexsen Pruet, LLC, ... Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Should this Court join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy? (Appellants' Issue b)

2. Did the circuit court properly find that the settlement agreement between Appellants and DC & Sons included an assignment of a legal malpractice claim? (Appellants' Issue a)

3. Did the circuit court properly determine that additional discovery was not needed to conclude that the assignment was void as against public policy? (Appellants' Issue d)

4. Did the circuit court properly dismiss the case with prejudice after determining that the assignment was void as against public policy? (Appellants' Issue c)

STATEMENT OF THE CASE

This action commenced on August 16, 2011, when Pavilion Development Corporation ("Pavilion") and Larry McNair ("McNair") (collectively, "Appellants") filed a complaint against Nexsen Pruet, LLC, alleging legal malpractice and breach of fiduciary duty arising out of Nexsen Pruet's representation of Appellants in litigation against counterclaim defendant DC & Sons. (R. pp. 283-307.) Nexsen Pruet answered the complaint and asserted a counterclaim seeking a declaratory judgment that the case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy. (R. pp. 325-343; 207-212; 44-65.)

On January 14, 2013, Nexsen Pruet moved for summary judgment as to all causes of action in the complaint based on the illegality of the assignment. (R. pp. 181-182; 207-212.) The circuit court heard the motion on March 13, 2013. (R. pp. 128-176.) On October 9, 2013, the circuit court issued an order granting summary judgment and dismissing the case with prejudice, finding that the assignment of the legal malpractice claim from Appellants to DC & Sons was void as against public policy. (R. pp. 3-28.) Appellants moved for reconsideration, but the motion was denied. (R. p. 30.) The notice of appeal was served on December 20, 2013. (R. p. 1.)

STATEMENT OF FACTS

This appeal raises the question of whether legal malpractice claims are assignable in South Carolina. On its face, this case appears to be an ordinary legal malpractice action. But an examination of the settlement agreement in the underlying case reveals that this action was brought pursuant to an assignment of a legal malpractice claim from Appellants to DC & Sons, and that although styled as a case brought by Appellants, DC

& Sons is the party controlling the litigation and is using this case to collect the $4,580,015.93 judgment confessed by Pavilion Development Corporation in the underlying litigation.

After learning of the assignment, Nexsen Pruet moved for summary judgment, contending that this case arises out of an assignment of a legal malpractice claim that is void as against public policy. Following a hearing and consideration of written briefs submitted by the parties, the circuit court granted Nexsen Pruet's motion for summary judgment and dismissed the case with prejudice.

Underlying Action

Nexsen Pruet represented Appellants in litigation concerning a contract to purchase real property at Shem Creek. Pavilion and DC & Sons entered into a contract on August 18, 2006, in which Pavilion agreed to buy real property from DC & Sons for $5 million. (R. p. 285, ¶ 6.) Prior to closing, Pavilion learned that DC & Sons could not deliver good title. *Id.* at ¶ 9. Nexsen Pruet advised Pavilion not to close on the property and not to release the property from the contract. *Id.* at ¶ 12.

On March 19, 2007, Pavilion sued DC & Sons for specific performance and at the same time filed a notice of lis pendens. (R. p. 286, ¶ 13.) Pavilion later amended the complaint, dropping the cause of action for specific performance and alleging breach of contract and a cause of action for an equitable lien. (R. p. 287, ¶ 22.) DC & Sons filed a separate action against Pavilion, McNair, and others alleging breach of contract and abuse of process with regard to the maintenance of the lis pendens. (R. p. 286, ¶ 15.)

The cases were consolidated and referred to the business court in Charleston.[1] (R. p. 286, ¶ 16.)

On March 23, 2009, Judge Young granted summary judgment in favor of DC & Sons as to the equitable lien cause of action and ruled that the lis pendens should be removed.[2] (R. pp. 83-87.) After the ruling but before the time to appeal expired, the circuit court permitted Nexsen Pruet to withdraw as counsel based on the determination that the lawyers from Nexsen Pruet had become witnesses to the allegations of abuse of process. (R. pp. 226-227; 344-347.) Appellants retained Dan David as their new counsel, and Mr. David represented Appellants for the remainder of the case. (R. pp. 344-347.)

With new counsel in charge, Pavilion decided not to appeal the March 23, 2009 order granting partial summary judgment. The litigation proceeded, and the case was scheduled to be tried on January 18, 2011. (R. p. 287, ¶ 25.) Prior to trial, DC & Sons moved for summary judgment on the breach of contract and abuse of process causes of action. *Id.* The motion was heard on what was to be the first day of trial. (R. pp. 44-65.) After hearing the arguments of counsel, the court granted summary judgment in favor of DC & Sons. (R. p. 59.) The parties asked for a recess to see if they could settle the case rather than proceed to a trial on damages. *Id.*

---

[1] This recitation of the facts of the underlying case is based on the allegations in the complaint. Appellants, on the other hand, have provided the Court with a recitation of facts that goes beyond the allegations in their complaint and that contains argumentative statements that are not supported by the record.

[2] The underlying case did not, as Appellants argue, establish that Nexsen Pruet committed legal malpractice. No such finding appears in the March 23, 2009 order or anywhere else in the underlying case. The underlying case was not a legal malpractice action, Nexsen Pruet was not a party to the case, and no findings of legal malpractice were made at any time throughout the course of the litigation.

Settlement

During the court recess, Appellants and DC & Sons reached an agreement in which Pavilion confessed judgment in favor of DC & Sons for $4,580,015.93. (R. pp. 211-212.) In exchange for the confession, DC & Sons released Pavilion's principals, Larry McNair and Lowell Frazier, from all liability, and waived the right to proceed against Pavilion for punitive damages. (R. p. 209.)

In addition, Appellants agreed to assign to DC & Sons all proceeds from a legal malpractice case to be brought against Nexsen Pruet. *Id.* The agreement set forth the following terms relating to the malpractice action:

- "Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties."
- "At DC & Sons election Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc."
- "Further, Pavilion and McNair place full control of the said litigation in the hands of DC & Sons, to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with the Nexsen Pruet firm."
- "Further, Pavilion and McNair agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds."
- "The cost of the litigation will be borne by DC & Sons alone."
- "Pavilion and McNair acknowledge [that the] suit will be brought in their names."
- "Pavilion and McNair direct that the earnest money [$50,000] plus interest shall be turned over to DC & Sons and their counsel."
- "DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and

> compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons."

(R. pp. 209-210.)

After reaching this agreement, the parties went back on the record. (R. p. 59.) Counsel for DC & Sons announced that the parties had reached an agreement and asked that the settlement be entered into the court record because it contained a confession of judgment. (R. pp. 59-60.) Counsel also asked the court to find that the settlement was fair. (R. p. 60.)

Counsel for DC & Sons stated that "the effective deal is Mr. McNair is relieved from liability," and that Pavilion confessed judgment in the amount of $4,580,015.93, which counsel for DC & Sons described as the amount of actual damages claimed by DC & Sons. (R. pp. 59-60.) As for the assignment, counsel for DC & Sons stated that "the claims that Mr. McNair or Pavilion have . . . are assigned or the proceeds are assigned at DC & Sons election to DC & Sons." (R. p. 60.) Although counsel told the trial court that the claims and proceeds had been assigned to DC & Sons, counsel did not specify which claims or which proceeds had been assigned. Counsel did not tell the court that Appellants had assigned all proceeds from a legal malpractice case to be brought against Nexsen Pruet, and that the assignment gave DC & Sons complete control over the litigation, including the right to elect to own the very claims themselves. *Id.*

When the trial judge asked how the amount of the confession of judgment was determined, counsel for DC & Sons provided an explanation "from memory," without presenting any evidence. *Id.* When the trial judge asked how the assignment should be reflected in the Form 4 order, counsel for DC & Sons stated that the assignment was handwritten and did not need to be reflected in the Form 4 Order. (R. p. 63.) The trial

judge suggested that the Form 4 Order state that the parties advised the court that the case was settled and that the settlement was put on the record. (R. pp. 63-64.) Counsel for DC & Sons agreed. (R. p. 64.)

Present Action

As contemplated by the assignment between Appellants and DC & Sons, Appellants filed an action against Nexsen Pruet for legal malpractice and breach of fiduciary duty. (R. pp. 283-307.) Appellants allege that Nexsen Pruet advised Appellants to file and maintain a lis pendens, and that the maintenance of the lis pendens led to summary judgment being entered against Appellants for abuse of process. *Id.* Appellants allege that because of the ruling on summary judgment, they were forced to settle the case with DC & Sons and to confess judgment in favor of DC & Sons for $4,580,015.93, or risk a trial on damages with no defenses and potential personal liability for Pavilion's principal, Larry McNair. (R. p. 291, ¶ 34.)

The legal malpractice case was filed on August 16, 2011, and was brought in the names of Pavilion Development Corporation and Larry McNair. (R. p. 284.) The assignment was not attached to or otherwise referenced in the complaint. (R. pp. 283-307.) Andrew K. Epting, Jr., and George J. Kefalos, the same lawyers who represented DC & Sons in the underlying litigation between Appellants and DC & Sons, appeared as counsel for Appellants in the malpractice action. (R. p. 292.)

Nexsen Pruet answered the complaint and asserted a counterclaim seeking a declaratory judgment that the case was proceeding pursuant to an assignment that was void as against public policy and that Appellants waived their right to assert the causes of

action in the complaint because they had assigned all claims and proceeds to DC & Sons. (R. pp. 325-343; 207-212; 44-65.)

On January 14, 2013, Nexsen Pruet moved for summary judgment as to all causes of action in the complaint and counterclaim based on the illegality of the assignment. (R. pp. 181-182; 207-212.) On March 13, 2013, a hearing was held before the circuit court regarding the motion for summary judgment. (R. pp. 128-176.) The circuit court took the motion under advisement and allowed the parties to submit additional briefing, which they did. (R. pp. 128-176; 244-282.)

Conduct After Hearing on Motion for Summary Judgment

On March 21, 2013, eight days after the hearing on Nexsen Pruet's motion for summary judgment, unbeknownst to Nexsen Pruet or the court, Appellants and DC & Sons obtained a hearing before Judge Young, who presided over the underlying case between Appellants and DC & Sons. (R. pp. 233-243.) The purpose of the hearing was to present Judge Young with an amended agreement regarding the assignment. *Id.* The amended agreement stated that the parties wished "to remove from the settlement the right of control by DC & Sons and to remove the right of assignment of proceeds or claims." (R. p. 277.)

Judge Young was unwilling to amend the agreement, stating:

> I'm a little concerned that you're asking the Court to do something to help you out in the position in another case and there is another party out there [Nexsen Pruet] that has an interest in what we do here in that it affects their case.
>
> ***
>
> It's a two year-old settlement, and to come back and to take some action for the sole purpose of sort of going on

> the end around another judge who has a matter under advisement, you know, causes me to pause and say, I'm not sure this is a good thing for me to do.
>
> ***
>
> I'm just not comfortable with it, and I try to listen to my inner alarms going off.

(R. p. 239, lines 8-12; 17-21; p. 240, lines 13-14.)

As Judge Young acknowledged, Nexsen Pruet was not given notice of the hearing. Nexsen Pruet found out about the hearing when the Charleston County Clerk of Court sent Nexsen Pruet a Notice of Entry of Judgment stating that an order had been entered regarding the proposed amended settlement agreement. (R. p. 260.) Upon receiving the Notice from the Clerk's office, counsel for Nexsen Pruet searched the court website and discovered a Form 4 order signed by Judge Young on March 21, 2013, stating: "The proposed Amended Settlement Agreement has been DISMISSED." (R. p. 261.) Nexsen Pruet notified the circuit court of the hearing that Appellants and DC & Sons obtained before Judge Young, and provided the court with a copy of the proposed amended agreement, and later the transcript from the hearing. (R. pp. 277-282; 233-243.)

Circuit Court's Ruling

On October 9, 2013, the circuit court granted summary judgment in favor of Nexsen Pruet and dismissed the case with prejudice. (R. pp. 3-28.) The circuit court found that the case, although brought in the name of Appellants, was proceeding pursuant to the assignment of the legal malpractice claim from Appellants to DC & Sons. *Id.* The court concluded that the assignment was void as against public policy because it was an assignment between adversaries in litigation. *Id.* The court found that because the case had been brought by Appellants in name only and under circumstances suggesting

collusion, the proper remedy was dismissal with prejudice. *Id.* In reaching this conclusion, the court considered, among other things, the fact that Appellants and DC & Sons went to another judge after the hearing on the motion for summary judgment to try to having the assignment voided while the motion for summary judgment was still pending. *Id.*

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Austin v. Beaufort Cnty. Sheriff's Office*, 377 S.C. 31, 34, 659 S.E.2d 122, 123 (2008). Appellate courts "review[] the grant of a summary judgment motion under the same standard as the trial court, pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

ARGUMENT

The circuit court's order should be affirmed. The circuit court properly found that the assignment of the legal malpractice claim from Appellants to DC & Sons was void as against public policy and that the proper remedy was dismissal with prejudice. The court's ruling is supported by the majority rule that legal malpractice claims are not assignable under any circumstances and the rule that assignments of legal malpractice claims between adversaries in litigation are void as against public policy. Moreover,

courts have expressly denounced the scenario like the one in this case, where a party confesses judgment in favor of an adversary and then assigns to the adversary the right to sue the party's lawyer as a way to collect the judgment confessed.

Given the facts and circumstances presented, and the overwhelming case law supporting the circuit court's decision, the circuit court properly granted summary judgment and dismissed the case with prejudice.

A. This Court should join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy.

This Court should join courts across the country that hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy. This holding is well supported by case law in other jurisdictions and is consistent with the law and public policy of this state.

1. Most jurisdictions have a blanket prohibition against the assignment of legal malpractice claims.

The majority view is that assignments of legal malpractice claims are void as against public policy *in all circumstances*. *See* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable."). States adopting the majority view are: **Arizona,** *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002); **California,** *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); **Colorado,** *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); **Florida,** *Law Office of David J. Stern v. Sec. Nat'l Servicing Corp.*, 969 So.2d 962 (Fla. 2007); **Illinois,** *Wilson v. Cornet Ins. Co.*, 689 N.E.2d 1157 (Ill. 1997), *but see Learning Curve Intern., Inc. v. Seyfarth Shaw LLP*, 911 N.E.2d 1073 (Ill. App. Ct. 2009) (allowing an assignment as part of a transfer of assets in a merger); **Indiana,** *Picadilly, Inc. v.*

Raikos, 582 N.E.2d 338 (Ind. 1991), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); and *State Farm Fire Mut. Auto Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007); **Kansas**, *Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758 (Kan. 1992); **Kentucky**, *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) and *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988); **Louisiana**, *Taylor v. Babin*, 13 So.3d 633 (La. Ct. App. 2009); **Michigan**, *Joos v. Drillock*, 338 N.W.2d 736 (Mich. Ct. App. 1983); **Minnesota**, *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993); **Missouri**, *VinStickers, LLC v. Stinson Morrison Hecker*, 369 S.W.3d 764 (Mo. Ct. App. 2012) and *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. 2004); **Nebraska**, *Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C.*, 523 N.W.2d 254 (Neb. 1994); **Nevada**, *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982); **New Jersey**, *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252 (D.N.J. 1996) *aff'd*, 124 F.3d 185 (3d Cir. 1997); **North Carolina**, *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 744 S.E.2d 130 (N.C. Ct. App. 2013); **Tennessee**, *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996); **Virginia**, *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331 (Va. 1998); **West Virginia**, *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003).

Courts have cited numerous public policy reasons in support of the majority view. "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d

473 (W. Va. 2003). This concern was expressed in the seminal case of *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976), in which the court stated:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.

Id.; *see also Gurski v. Rosenblum & Filan*, LLC, 885 A.2d 163, 169 (Conn. 2005) (stating that "the unique and personal nature of the relationship between attorney and client and the need to preserve the sanctity of that relationship" are reasons for prohibiting the assignment of malpractice claims).

Further, the assignment of legal malpractice claims is incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients. *Gurski*, 885 A.2d at 169-70; *see also Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 343 (Ind. 1991), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007) (stating that assignments of legal malpractice claims "would weaken at least two standards that define the lawyer's duty to the client: the duty to act loyally and the duty to maintain client confidentiality"). "An attorney's loyalty is likely to be weakened by the knowledge that a client can sell off a malpractice claim, particularly if an adversary can buy it." *Picadilly*, 582 N.E.2d at 343. For example,

> [i]f assignments were permitted, . . . they would become an important bargaining chip in the negotiation of settlements-particularly for clients without a deep pocket. An adversary might well make a favorable settlement offer to a judgment-proof or financially strapped client in exchange for the assignment of that client's right to bring a malpractice claim against his attorney. Lawyers involved in such negotiations would quickly realize that the interests of their clients were incompatible with their own self-interest.

Id.

As for the duty of confidentiality, once the case is assigned, the client loses control over the disclosure of confidential information, which the attorney may reveal as reasonably necessary to establish a defense. *Id.*; *see also* Rule 1.6(b)(6), RPC, Rule 407, SCACR (allowing attorneys to reveal confidential information reasonably necessary to establish a defense). "The client is relegated to observing from the sidelines as the assignee pursues the attorney," which "erodes the principles fostered by the duty of confidentiality." *Picadilly*, 582 N.E.2d at 343.

In addition to the loyalty and confidentiality concerns, assignments of legal malpractice claims "relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights." *Goodley*, 133 Cal. Rptr. at 87.

Finally, such assignments "place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* Allowing such assignments "would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender." *Id.*

2. Some jurisdictions take a case-by-case approach.

A minority of jurisdictions take a case-by-case approach. These jurisdictions include: **Connecticut,** *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005); **District of Columbia,** *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996); **Georgia,** *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108 (Ga. 2013); **Maine,** *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989); **Massachusetts,** *New Hampshire Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999); **New York,** *Vitale v. City of New York*, 183 A.D.2d 502 (N.Y. App. Div. 1992); **Oregon,** *Gregory v. Lovlien*, 26 P.3d 180 (Or. Ct. App. 2001); **Pennsylvania,** *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988); **Rhode Island,** *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999); **Texas,** *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); and **Washington,** *Kommavongsa v. Haskell*, 67 P.3d 1068 (Wash. 2003); *see also St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661, 667 (Idaho 2013) (holding that "while legal malpractice claims are generally not assignable, where the legal malpractice claim is transferred to an assignee in a commercial transaction, along with other business assets and liability, such a claim is assignable").

3. The vast majority of courts, even those adopting a case-by-case approach, prohibit assignments between adversaries in litigation.

The vast majority of courts prohibit assignments between adversaries in litigation. *See, e.g., Magill v. Watson*, 409 S.W.3d 673, 677 (Tex. Ct. App. 2013) ("The assignment of client's legal malpractice claim arising out of litigation is void."); *Kenco Enters. Northwest, LLC v. Wiese*, 291 P.3d 261, 262 (Wash. Ct. App. 2013) ("A claim for legal malpractice is not assignable, directly or indirectly, to one's adversary in a proceeding from which that legal malpractice is alleged to have arisen."); *Kim v. O'Sullivan*, 137

P.3d 61, 62 (Wash. Ct. App. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) ("In sum, we can see no advantage flowing to the legal system or the public that it serves from permitting assignments of malpractice claims to adversaries in the same litigation that gave rise to the alleged malpractice."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. Ct. App. 1994) ("It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause given them a financial interest in switching."); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991) (citing the "disreputable public role reversal that would result during the trial" if assignments between adversaries were permitted), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy").

Courts cite several reasons for prohibiting assignments between adversaries. First, the "counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when [he or she] was the very party who benefited from that malpractice in the underlying litigation, would engender a perversion that would erode public confidence in the legal system." *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005). Second, assignments between adversaries provide an

"opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa*, 67 P.3d at 1078. "[S]uch a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the legal malpractice." *Id.* (citing *Coffey*, 756 S.W.2d at 156-57).

Third, as one court explained:

> A party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action "is one peculiarly vested in the client." There is, in addition, a high risk that the plaintiff and defendant in the underlying litigation will collude to the detriment of the defendant's lawyer. Permitting this sort of alchemy would lead to baseless and excessive legal malpractice claims and would undermine the personal confidence that must exist between lawyers and clients.

Alcman Servs. Corp. v. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) (internal citations omitted).

Fourth, "[a] defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence." *Kommavongsa*, 67 P.3d at 1078. Fifth, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.* Sixth, because legal malpractice cases present a "trial within a trial," an assignment to an adversary "arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and

shameless shift of positions that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession." *Id.* Finally, turning over a legal malpractice claim to one's adversary in litigation creates a situation "generally recognized as the worst excess to be avoided." *Greene v. Leasing Assocs., Inc.*, 935 So.2d 21, 25 (Fla. Ct. App. 2006).

There are not, as Appellants contend, "several jurisdictions" that have permitted the assignment of legal malpractice claims between adversaries. (Br. p. 11.) Appellants cite only two cases to support this proposition: *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989), and *New Hampshire Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999). These cases are limited to their facts, and neither case involves a confession of judgment. In both cases, the court addressed the public policy concerns outlined above, and determined that the concerns were not implicated under the facts. For instance, in *Thurston*, the court determined that there was no risk of collusion because the amount of damages had been set by the court's order on summary judgment. 567 A.2d at 923. The court also found that a distasteful role reversal would not occur because the plaintiff could maintain the same positions in the malpractice suit as she did in the underlying case. *Id.* Similarly, in *McCann*, the court found that there was "no suggestion of improper collusion," and that the assignee had a "direct interest" in the malpractice case. 707 N.E.2d at 337-38. The court also found that a distasteful role reversal would not occur because the merits of the underlying case were irrelevant to the issues concerning the attorneys' alleged malpractice. *Id.* at 337.

Here, all of the public policy concerns underpinning the prohibition of assignments between adversaries are implicated. The amount of damages was set by Appellants and DC & Sons, not the court, and when Judge Young asked how the parties had arrived at the figure, the parties stated it was "from memory." Furthermore, the possibility of collusion was borne out when the parties went back to Judge Young two years later (and in the midst of this litigation) to amend the settlement without notifying Nexsen Pruet or Judge Nicholson.

4. Courts examining facts like the ones in this case have uniformly prohibited such arrangements.

Courts addressing facts like the ones in this case, where a party confesses judgment and then assigns his adversary the right to sue the party's lawyer for legal malpractice in exchange for a covenant not to enforce the judgment, have uniformly prohibited such arrangements. *See, e.g., Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (characterizing a settlement involving an assignment of a legal malpractice claim to an adversary and a confession of judgment as a "contrived and elaborate scheme" that is "so collusive that same should be held to be against public policy"); *see also Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (quoting *Coffey*).

Such scenarios "create the opportunity and incentive for collusion as to the stipulated damages in exchange for the agreement not to execute on the judgment in the underlying litigation and the transfer of the malpractice claim." *Kenco Enters. Northwest, LLC v. Wiese*, 291 P.3d 261, 263 (Wash. Ct. App. 2013). It does not matter whether the collusion is real: "It is the *opportunity* for collusion and the transformation of legal malpractice to a commodity that is problematic . . . ." *Id.* (emphasis added).

5. Existing South Carolina law supports adoption of the majority view that legal malpractice claims are not assignable.

Existing South Carolina law, both statutory and case law, supports the adoption of the majority view. In Chapter 17 of Title 16 of the South Carolina Code, the South Carolina General Assembly sets forth prohibited acts which constitute "offenses against public policy." *See* S.C. Code Ann. §§ 16-17-10 through - 50 (2003). Included in this chapter is the offense of barratry. *Id.* Barratry is a misdemeanor offense, and has been described by this Court as "the offense of frequently exciting and stirring up quarrels and suits between other individuals." *Osprey, Inc. v. Cabana Ltd. P'ship*, 340 S.C. 367, 373, 532 S.E.2d 269, 273 (2000).

Because South Carolina statutes have already established the public policy in this area, this Court should join courts across the country and hold that assignments of legal malpractice claims between adversaries in litigation are void as against public policy. Assignments of legal malpractice claims stir up litigation between lawyers and third parties with whom the lawyer never had an attorney-client relationship and to whom the lawyer never owed a legal duty. They allow the party who benefitted from the alleged malpractice to turn around and sue the lawyer for malpractice, seeking to benefit once again from the lawyer's conduct. As courts in other jurisdictions recognize, this counterintuitive claim and role reversal engenders a perversion that is harmful to the profession and erodes public confidence in the legal system.

Additionally, the majority view is consistent with existing case law, such as the principle that "[t]he relationship of an attorney with his or her client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith." *Spence v. Wingate*, 395 S.C. 148, 158-59, 716 S.E.2d

920, 926 (2011). Additionally, adoption of the majority view is consistent with the law that "[b]efore a claim for malpractice may be asserted, there must exist an attorney-client relationship." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Allowing a party who has never been the lawyer's client to sue the lawyer for legal malpractice is contrary to the principle 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." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).[3]

B. The circuit court properly found that the settlement agreement included an assignment of a legal malpractice claim.

The parties in this case do not dispute the existence of the settlement agreement or its language. The dispute centers on the legal effect of the agreement. Because the agreement assigned all proceeds to DC & Sons and gave DC & Sons complete control over the malpractice action, including the right to elect to own the claims themselves, the circuit court properly found that the settlement agreement contained an assignment of a legal malpractice claim, and that the assignment was void as against public policy.

The settlement agreement states that Appellants assign to DC & Sons *all proceeds* from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty. (R. p. 117.) The agreement further states that Appellants place *full control* of the case in the hands of DC & Sons, to include the trial, appeal, and settlement,

[3] The circuit court order in *Robertson v. Nexsen Pruet Jacobs & Pollard, LLP*, Case No. 2004-CP-40-5531 (Mar. 6, 2006), to which Appellants cite, is irrelevant to the case at hand. The order has no precedential value and the facts in that case are nothing like the facts in this case. The only thing of note in that case is that the court acknowledged the majority rule that legal malpractice claims are not assignable based on public policy concerns and that the attorney-client relationship is personal in nature.

and the power to waive the attorney-client privilege and work-product protection. (R. pp. 117-118.) The agreement also states that at the election of DC & Sons, Appellants assign *all claims* to DC & Sons. (R. p. 117.)

In addition, the agreement states that Appellants agree to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. (R. p. 118.) Appellants acknowledge that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone. *Id.*

Appellants' argument that the agreement is merely an assignment of proceeds and not of the claims themselves is contrary to the plain language of the agreement. The agreement plainly states that DC & Sons has the right to elect to own the very claims themselves. (R. p. 117.) By giving DC & Sons the right to elect to own the claims, Appellants have assigned the claims themselves. As one court stated:

> This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. The terms of this settlement agreement essentially placed the control of the malpractice suit in [the assignee's] hands and rendered [the assignor's] interest merely nominal. Though [the parties to the agreement] assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against [the lawyer], but of the entire claim itself.

Davis v. Scott, 320 S.W.3d 87, 91 (Ky. 2010) (internal citations omitted).

Finally, Appellants took extraordinary measures after the hearing on the motion for summary judgment to have the agreement amended to strike the assignment of the claims. Eight days after the hearing, Appellants asked a different judge to amend the assignment to read: "the parties to the settlement wish to remove from the settlement the

right of control by DC & Sons *and to remove the right of assignment of proceeds or claims . . . .*" (R. p. 277.) The agreement would not have needed to be amended in this way had the claims not been assigned in the first instance.

Accordingly, the circuit court properly determined that Appellants assigned all claims, proceeds, and control to DC & Sons.

C. Additional discovery would not have changed the circuit court's ruling that the assignment was void as against public policy.

The circuit court's determination that the assignment in this case was void as against public policy answered a question of law. Additional discovery would not have changed the outcome.

"Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (quoting 17B C.J.S. *Contracts* § 1030)). Further, the legal effect of an assignment is a question of law. *See Alexander's Land Co., LLC v. M & M & K Corp.*, 390 S.C. 582, 592, 703 S.E.2d 207, 212 (2010) ("The interpretation of a contract is an action at law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

Likewise, "[t]he determination of what constitutes public policy is a question of law for the courts to decide." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 617, 713 S.E.2d 634, 638 (2011); *see also Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."); *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005)

("The question of whether an assignment is barred as a matter of public policy is an issue of law.").

Finally, "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." *Linog v. Yampolsky*, 376 S.C. 182, 185-86, 656 S.E.2d 355, 357 (2008). Indeed, novel issues may be decided on a motion to dismiss. *See Brown v. Theos*, 338 S.C. 305, 313, 526 S.E.2d 232, 237 (Ct. App. 1999) (stating "while our courts have held important questions of novel impression generally should not be decided on demurrer, this is not always true"). "Where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a 12(b)(6) motion." *Id.*

Here, no facts or testimony would have changed the circuit court's determination that the assignment was void as against public policy and that summary judgment should be entered in favor of Nexsen Pruet. The circuit court's decision was based on the plain language of the assignment and the law from courts across the country. No amount of discovery would have changed the plain language of the assignment or the court's determination regarding its legal effect. The assignment says what it says. Appellants did not dispute the existence of the assignment or the language contained therein. The dispute centered on the legal effect of the assignment, which the circuit court found to be void as against public policy based on law from other jurisdictions.

Appellants' contention that the circuit court found collusion and that collusion is a question of fact is not correct. The circuit court did not find collusion that collusion had occurred. The circuit court found that "*the opportunity* for collusion was present," that

the assignment together with the confession of judgment "*strongly suggest[ed]* that collusion has occurred," and that "[a]t the very least, . . . the *opportunity for collusion* was present." (R. pp. 23, 27.) (Emphasis added.) The circuit court did not implicate counsel in its finding. The court found that "[*Appellants*] have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship," not that *Appellants and their counsel* have.[4] (R. pp. 15-16.)

Further, the circuit court's finding that the opportunity for collusion existed is supported by the record. According to the transcript from the underlying case, Appellants and DC & Sons did not tell the trial judge that the settlement included an agreement to assign all proceeds, control, and claims in legal malpractice action to be filed against Nexsen Pruet. There is no evidence in the record that the judge read the handwritten agreement at the conclusion of the hearing. Instead, it appears he relied on counsel to inform him about the terms of the agreement. (R. pp. 59-64.)

The confession of judgment without a hearing on damages is further evidence that an opportunity for collusion existed. There is no evidence in the record to support the amount confessed. When asked to explain the amount of the judgment confessed,

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[4] Similarly, the record does not support Appellants' contention that Nexsen Pruet refused to participate in depositions or engage in discovery. Prior to answering the complaint, Nexsen Pruet filed a motion to disqualify Appellants' counsel on the basis that they were witnesses to the facts of the underlying case. Because a ruling on the motion to disqualify could have resulted in a change in counsel, Nexsen Pruet moved for a protective order asking the court to stay the time to answer written discovery and participate in depositions pending a decision on the motion to disqualify. After the hearing on the motion to disqualify, which the court held in abeyance pending an evidentiary hearing, Nexsen Pruet answered written discovery—responding to requests for production, interrogatories, and requests for admission—and produced Appellants' file. In any event, discovery on the merits has nothing to do with the issues raised in Nexsen Pruet's motion for summary judgment.

counsel for DC & Sons did so "from memory" without offering a single document into evidence. DC & Sons's pre-trial brief and list of exhibits are not evidence. In addition, the exhibits cited on page 4, footnote 3, of Appellants' brief were never admitted into evidence and are not part of the record in this case.

Moreover, the fact that Appellants' own counsel argued that the multi-million dollar confession of judgment should remain in place lends further support to the circuit court's finding that the opportunity for collusion existed. At the hearing on the motion for summary judgment, Appellants' counsel stated:

> **Mr. Epting:** And, Judge, if you believe that there's something that is wrong here, we don't want years of litigation. I mean, it doesn't matter to us if this is brought in the name of Pavilion or DC & Sons, and it doesn't matter to us if there is an assignment or not, because there is an outstanding judgment, and we would ask that if you find there is something wrong with the assignment that you simply strike the assignment, leave the judgment in place, and Pavilion will – obviously the judgment is in place, and Pavilion will continue with the case as it is and there won't be any necessity for an appeal.

(R. pp. 160-161.)

Later, at the hearing before Judge Young (which followed the hearing on the motion for summary judgment), counsel for Appellants presented a proposed amended agreement that states: "the parties agree that DC & Sons retains its judgment and all its rights as judgment creditor." (R. p. 277.) This request is directly contrary to Appellants' interest, and shows that Appellants have no interest in the malpractice case.

Even if further discovery would have revealed that the parties did not collude and the amount of the judgment confessed was real, the circuit court still could have granted summary judgment in favor of Nexsen Pruet as to the illegality of the assignment given

the overwhelming authority from other jurisdictions prohibiting assignments between adversaries in litigation. The circuit court's finding regarding the opportunity for collusion was not essential to the court's decision to grant summary judgment.

Accordingly, the circuit court order granting summary judgment in favor of Nexsen Pruet should be affirmed.

D. The circuit court properly dismissed the case with prejudice.

The circuit court's decision to dismiss the case with prejudice is supported by authority from other jurisdictions and was justified based on the facts of this case.

Courts in other jurisdictions have affirmed the dismissal with prejudice of cases involving assignments of legal malpractice claims that are void as against public policy. *See VinStickers, LLC v. Stinson Morrison Hecker*, 369 S.W.3d 764 (Mo. Ct. App. 2012) (affirming dismissal with prejudice where a law firm's former clients assigned their legal malpractice claim to adversaries as part of a settlement agreement in the underlying case); *Botma v. Huser*, 39 P.3d 538 (Ariz. 2002) (affirming dismissal of the complaint where a malpractice claim was assigned to an adversary as part of settlement agreement).

Other courts have simply affirmed summary judgment. *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005) (remanding case for entry of judgment in favor of the law firm); *Coffey v. Jeffferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (affirming summary judgment in favor of the attorney).

The case most factually similar to the case at hand is *Coffey v. Jeffferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988). In that case, the plaintiff confessed judgment in favor of his adversary on the first day of trial for $1,000,000 and at the same time assigned the claims against his lawyer for legal malpractice. When the malpractice

case was filed, the trial court granted summary judgment in favor of the attorney. The appellate court affirmed, finding that the transaction was "so collusive" and "the type of contrived and elaborate scheme" that has been denounced by other courts. *Coffey*, 756 S.W.2d at 157.

These cases support the circuit court's dismissal of this case with prejudice. The present case is based on a contrived and elaborate scheme. From the multi-million dollar confession of judgment, to the assignment of all claims and proceeds, to the filing of this lawsuit by Appellants in name only (without revealing the existence of the assignment), to the motion to amend the settlement two years later, Appellants and DC & Sons have used the court system to collect a made-up judgment rather than to remedy a wrong. Appellants have allowed their adversary's lawyers to represent them here and to take the position that the confession of judgment should remain in place even if the assignment is stricken.

Under these circumstances, the circuit court could not simply strike the assignment and allow the case to proceed as filed. Even when courts dismiss a case without prejudice, courts require the plaintiff to make a showing upon filing a new action that he is the real party in interest and that the assignee no longer controls the case. *See 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.2d 87, 91, 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. To allow the case to proceed as pled would be "to wink at the rule against assignment of legal malpractice claims." *Id.* (quoting *Botma*, 39 P.3d at 543).

The same is true here. This case has been tainted since its inception. Appellants filed this case without revealing the existence of the assignment to the court or to Nexsen Pruet. By doing so, Appellants represented to the court and to Nexsen Pruet that this was a genuine legal malpractice case brought by Appellants as the real parties in interest, rather than an action brought and controlled by a third party seeking to collect a judgment confessed. Appellants allowed DC & Sons to use their name to bring the action, even though Appellants had already assigned all claims, proceeds, and control. Appellants led the court and Nexsen Pruet to believe that this was a genuine legal malpractice action when in fact it was not. Nexsen Pruet, not Appellants, made the assignment a part of the record in this case. (R. pp. 325-343; 207-212; 44-65.)

Dismissal with prejudice was also the appropriate remedy because Appellants did not present any evidence of damages. An essential element to a cause of action for legal malpractice is damages. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (outlining the elements of a cause of action for legal malpractice). Here, Pavilion's principals obtained a release of liability in the settlement with DC & Sons. Any award that Larry McNair receives in this case would be a windfall since he is not in danger of having the confession of judgment enforced against him. Further, the fact that Appellants' own counsel argued that the confession of judgment should remain in place indicates that Pavilion is also not at risk of having to satisfy the judgment. Accordingly,

the circuit court was justified in dismissing this case with prejudice. *See Kim v. O'Sullivan*, 137 P.3d 61, 65 (Wash. Ct. App. 2006) (dismissing an assigned legal malpractice claim that was brought in the former client's name for lack of damages where the client "will never have to pay the unsatisfied amount of the agreed judgment, as [the opposing party] has promised not to execute on it [and the award of] damages measured by that judgment would give [the client] an unjustified windfall.").

Given the authority from other jurisdictions and the facts and circumstances in this case, dismissal with prejudice was the proper remedy and should be affirmed.

CONCLUSION

The circuit court's ruling should be affirmed. This case was brought pursuant to assignment of a legal malpractice claim that is void as against public policy and dismissal with prejudice was the proper remedy.

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November 10, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-002796
Circuit Court Case No. 2011-CP-10-05774

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

v.

Nexsen Pruet, LLC, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

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

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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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Appellants Pavilion Development Corp. ("Pavilion") & Larry McNair reply to respondent's brief as follows:

1. The Assignment at Issue is a Lawful Assignment of Proceeds

Appellants maintain they are the real parties in interest in this action and have not assigned their claims against Nexsen Pruet to DC & Sons. Rather, as part of the agreement to avoid the exposure of a trial in the underlying case of actual and punitive damages, Plaintiffs agreed to assign the bulk of the proceeds of this litigation to DC & Sons. Though the agreement does give control of the litigation to DC & Sons, the Agreement states:

> Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties.
>
> DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons.

(R. p. 117-118). The "creation and existence of an assignment is to be determined according to the intention of the parties, and that intention is a question of fact to be derived not only from the instruments executed by them, but from the surrounding circumstances." *Brandon Apparel Grp. v. Kirkland & Ellis*, 382 Ill. App. 3d 273, 284, 320 Ill. Dec. 604, 612-13, 887 N.E.2d 748, 756-57 (2008) (internal citations omitted). "Whether an assignment has occurred 'is dependent upon proof of intent to make an assignment and that intent must be manifested.'" *Northwest Diversified, Inc. v. Desai*, 353 Ill. App. 3d 378, 387, 818 N.E.2d 753, 288 Ill. Dec. 818 (2004).

Appellants do not dispute the language of the settlement agreement; however, the parties to the agreement itself reject that an assignment occurred. Appellants did not assign the claim or cause of action to DC & Sons. Appellants agreed to give DC & Sons the majority of any

proceeds recovered from the legal malpractice claim as well as the election to take an assignment of the claim; though this election never occurred.

An assignment is defined as "[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." Black's Law Dictionary (4th ed), p. 153. To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987) citing Calamari & Perillo, Contracts (2d ed), § 18-3, pp 633-634: "[A] promise to pay money when the promisor receives it from a specified source is not an assignment. There is no present transfer. So also a promise to assign or to pay out of a specified existing fund in the hands of the promisor does not result in an assignment." Here as in *Weston*, no present transfer was made.

Nexsen Pruet argues that even an assignment of the proceeds makes DC & Sons and not Appellants the real party in interest. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Stephenson v. Golden*, 279 Mich. 710, 766, 276 N.W. 849 (1937). In the present case, Appellants, not DC & Sons, are the real parties in interest. Appellants contracted for Nexsen Pruet's services, and suffered the loss. Any duty owed by Nexsen Pruet was to plaintiffs. "It is irrelevant to the determination of the real party in interest that plaintiffs attempted to reduce their damages through entering a consent judgment." *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987). Appellants are the real parties in interest although, under the terms of the settlement agreement, DC & Sons obtained a beneficial interest in the lawsuit against Nexsen Pruet. *Id.*

2. The Assignment of Legal Malpractice Claims

South Carolina appellate courts have not addressed the question of whether a legal

malpractice claim is assignable and there is a split in the jurisdictions that have addressed this issue. Appellants present a more thorough discussion of the law concerning the assignment of legal malpractice claims in their main brief, but take this opportunity to respond to some of Nexsen Pruet's allegations.

Nexsen Pruet attempts to distinguish those cases that permit the assignment of legal malpractice claims to adverse parties from the present case. For example, Appellants cite *New Hampshire Ins. Co., Inc. v. McCann*, 429 Mass. 202, 205, 707 N.E.2d 332, 334 (1999), which allowed, as a part of the terms of a settlement, the parties to: 'sell, assign, and transfer... any and all of our rights, claims, demands and causes of action of any kind whatsoever ... which [they] have had, or may have against ... attorney John W. McCann and the law firm of Madan & Madan ...". Appellants also cite *Thurston v. Continental Casualty Co.*, 567 A.2d 922 (Me. 1989), which affirmed the trial court's denial of a motion to dismiss on the grounds that an assignment to an adversary in a legal malpractice action resulting from the purported inadequate legal representation of a corporation in a products liability action, after which the corporation assigned its cause of action against its attorney for malpractice to the plaintiff in the products-liability action to settle that action, was void as against public policy. The *Thurston* Court went on to hold that the argument that the legal services were personal and involved confidential attorney-client relationships did not justify preventing the attorney's client from assigning the malpractice claim to someone with a clear interest in the claim and who had the time, energy, and resources to bring the suit. *Id.*

Nexsen Pruet argues "these cases are limited to their facts" and goes on to attempt to distinguish the fact in *Thurston* and *McCann* from the present case. (Respondent's Brief, p. 18). Nexsen Pruet states:

> For instance, in *Thurston*, the court determined that there was no risk of collusion because the amount of damages had been set by the court's order on summary judgment. 567 A.2d at 923. The court also found that a distasteful role reversal would not occur because the plaintiff could maintain the same positions in the malpractice suit as she did in the underlying case. *Id.* Similarly, in *McCann*, the court found that there was" no suggestion of improper collusion," and that the assignee had a "direct interest" in the malpractice case. 707 N.E.2d at 337-38. The court also found that a distasteful role reversal would not occur because the merits of the underlying case were irrelevant to the issues concerning the attorneys' alleged malpractice. Id. at 337.

Id.[1]

However, Nexsen Pruet's argument offers even more support for Appellants' position. Here, just as in *Thurston,* no "distasteful role reversal" is necessary as counsel maintain the same positions in the malpractice action as in the underlying case. Counsel does not need to switch sides to argue the malpractice case; counsel is simply arguing the same case against a different defendant (then Pavilion and McNair now Pavilion and McNair's former counsel, Nexsen Pruet). Further, in this case Nexsen Pruet's malpractice has been established by Judge Young and is clear from the record below. For example, Nexsen Pruet filed and maintained a lis pendens on the property of DC & Sons claiming a cloud on title despite stipulating that there was no cloud

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1Nexsen Pruet also argues "[t]here are not, as Appellants contend, 'several jurisdictions' that have permitted the assignment of legal malpractice claims between adversaries." (Respondent's Brief, p. 18). Setting aside Massachusetts and Maine, New York Courts also allow assignments of legal malpractice claims between adversaries. In *Greevy by Greevy v Becker, Isserlis, Sullivan & Kurtz*, 240 A.D.2d 539, 540, 658 N.Y.S.2d 693, 694 (App. Div. 1997), the defendant in a negligence claim arising out of an automobile wreck assigned, in exchange for a covenant not to execute, the defendant's claim for legal malpractice to the plaintiff. Suit was filed, and the law firm filed a motion for summary judgment, arguing the assignment of the legal malpractice claim was prohibited because it was against public policy, and it was an assignment of a claim for personal injuries. The New York Supreme Court noted that all claims were assignable except those expressly prohibited by statute, and that those claims expressly prohibited did not include a claim for legal malpractice. The court further held the assignment was not a violation of public policy.

on title, and did so in order to extort a lower purchase price for the property and a return of the escrow funds. Judge Young held: "The continued maintenance of a lis pendens and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title." (R. p. 124). Judge Young further held: "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 it is rather a form of coercion, done in the course of negotiation." (R. p. 125)(internal citations omitted). The same case is being asserted in the malpractice action as was asserted in the underlying case.

Though Judge Young's summary judgment order did not include a finding of damages as the trial court's order in *Thurston* does, Judge Young was presented with all of the documentary evidence of DC & Sons' damages against Pavilion and McNair and the settlement was approved by the Judge as a "fair resolution." (R. p. 64).

The elements of DC & Sons damages which comprise $4.5 million confession of judgment are all real: (1) a lost real estate contract which would have realized a profit of $2,852,000; (2) sums actually paid by DC & Sons in interest on the mortgage it had to keep in place because of the inability to close and the cost of refinancing; (3) the $50,000 earnest money deposit; and (4) prejudgment interest at the statutory rate. Judge Young had already granted summary judgment as to Pavilion's liability, and the damages were hard figures. Further, the parties had exchanged and Judge Young had received trial briefs as well as binders of 147 trial exhibits and 12 depositions, including: Plaintiff's Exhibit 95, which was the back-up contract DC & Sons lost; Plaintiff's Exhibit 139, which was the closing statement on the refinance of the mortgage showing interest and the closing costs paid by DC & Sons; and Plaintiff's Exhibit 72, which was the contract with Pavilion showing the earnest money deposit of $50,000. (See R. pp.

67-114).

DC & Sons damages were put on the record as well:

> THE COURT: What is the breakdown on that number? How did you come up with 4,580,000?
>
> MR. EPTING: I think I can do it from memory, Judge. The other purchase was at $5 million and the debt on the property was 2,142,000; therefore, the sale alone would have realized a profit of $2,852,000. At that time, Judge, rather than having a sale and paying off the mortgage that existed on the property, my client has continued to bear the interest on that property right up through today's date, and that interest is $675 plus thousand dollars, and as I'm speaking now, Judge, I realize all this is in the booklet that I gave you, but I'm happy to go through this. When the lis pendens was not lifted – and there really is, Judge, a terrifying piece in this, and it has a lot to do with you and Mr. Dan David. My client, because this lis pendens was ultimately lifted, and Mr. David, unlike Nexsen Pruet, refused to appeal the order, my client was able to close the entire transaction the cost of which was $43,000, but had they not been able to close that transaction, Judge, they would have lost this property, they would have lost Red's, and they would have lost the entire Wings Over America and the franchise...we added [prejudgment] interest at 8 and three-quarters, and those numbers are added together. It comes to $4,580,015.93.

(R. pp. 60-62).

Judge Young went on to state:

> 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 it out.

(R. p. 64).

There was ample evidence to support the amount confessed and Judge Young, who had

"lived with" the case for several years as it was before him in the Business Court, found the settlement to be "a fair resolution." *Id.*

Nexsen Pruet continues to imply that Pavilion has been released of its obligation to pay DC & Sons' judgment and that the policy arguments against assignment are applicable for this reason. (See Respondents' Brief, p. 23). This is simply not the case, and, as no discovery has been done, the only evidence in the record with regard to Pavilion's payment of DC & Sons' judgment is found in Pavilion's answers to Nexsen Pruet's requests to admit. Nexsen Pruet asked Pavilion to "Admit that Pavilion is not at risk of having to pay the full amount of the judgment confessed in the underlying litigation." Pavilion responded "Denied." (R. p.223 ¶ 5).

Finally, Nexsen Pruet's attempt to distinguish *McCann* from the present case on policy grounds fails considering the reasoning of the *McCann* Court with regard to the public policy arguments raised by Nexsen Pruet. The Supreme Court of Massachusetts, when faced with the argument that the assignment of a legal malpractice claim as part of a settlement in the underlying case fosters collusion and creates a "distasteful role reversal which would demean and reduce the public's confidence in the legal process," held:

> There is no logic to this argument. The fact that an attorney might be called on to defend against an assigned malpractice claim does not always mean that the attorney's former adversary will compromise the strength of his underlying claim, resulting in some sort of role reversal which diminishes public confidence in the legal profession. In this case, for example, which concerns a pretrial settlement, the merits of the underlying lead paint poisoning action are irrelevant to the issues concerning the defendants' alleged malpractice. It could be argued just as forcefully that, providing shelter for attorneys by prohibiting the voluntary assignment of malpractice claims, would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection.

New Hampshire Ins. Co , Inc. v. McCann, 429 Mass. 202, 211, 707 N.E.2d 332, 337 (1999).

Here, like in *New Hampshire v. McCann*, the assignment does not require Plaintiffs attorneys to perform a "distasteful role reversal" of any sort as there are not one but two orders of the circuit court finding it was wrongful and an abuse of process to take the actions Nexsen Pruet took in the underlying lawsuit.

3. Dismissal with Prejudice is not the Appropriate Remedy

Even those jurisdictions that hold the assignment of a legal malpractice claim is void as a matter of law do not support the dismissal of Appellants' claim with prejudice. In most cases the assignment is simply voided and the action continues in the name of the client.

For example, the lower Court relies on Texas authority in support of the dismissal with prejudice of Appellants' legal malpractice claim. Texas Courts hold that a client's right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim. *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000). The Court in *Tate* held:

> **Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO.** Tate emphasizes **he sued in his own name and, therefore, summary judgment was improper because it completely abrogated his right to bring a malpractice claim**.
> **In this respect, Tate is correct**. In *Mallios,* the Texas Supreme Court held that **when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment**. *Mallios,* 11 S.W.3d at 159. While expressing no opinion on the validity of the underlying "arrangement" between the plaintiff and a third party, **the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm**. *Id.*

Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 634 (2000)(emphasis added).

Here, as in *Tate*, the action is already in the name of the client as the cause of action remains in the clients as only the proceeds were assigned. However, even if the assignment is deemed one of claims and not proceeds and even if the assignment of a legal malpractice claim is void under South Carolina law, the remedy is to void the assignment and allow Plaintiffs to continue their lawsuit against their former attorneys.

Even those jurisdictions that Nexsen Pruet argues support the lower court's dismissal with prejudice do not stand for this proposition. For example, Nexsen Pruet cites *Botma v. Huser*, 39 P.3d 538 (Ariz. 2002) to support their argument for dismissal with prejudice. However, the *Botma* Court actually held:

> Although neither Botma's malpractice claim nor its proceeds are assignable, **his malpractice claim does survive the invalid assignment.** *See Monthofer Invs. Ltd. P'ship v. Allen*, 189 Ariz. 422, 425, 943 P.2d 782, 785 (App. 1997) (explaining that in Damron agreement cases, Arizona courts "have rejected the assertion that a covenant not to execute nullifies the judgment as a recoverable element of damages"). **Thus, the fact that Botma entered into a settlement agreement that is in part contrary to Arizona law and unenforceable does not prevent him from suing Appellees for legal malpractice**.

Botma v. Huser, 202 Ariz. 14, 18-19, 39 P.3d 538, 542-43 (Ct. App. 2002) (emphasis added). The Arizona Court of Appelas in *Monthofer Invs. Ltd. Pshp. v. Allen,* 189 Ariz. 422, 426 n.3, 943 P.2d 782, 786 (Ct. App. 1997) held:

> It is one thing to assert that an invalidly assigned claim is an unassigned claim in the eyes of the law and that the assignee cannot pursue the action against a third party or require performance by a reluctant assignor. See Schroeder v. Hudgins, 142 Ariz. 395, 399, 690 P.2d 114, 118 (App. 1984); Karp v. Speizer, 132 Ariz. 599, 600-01, 647 P.2d 1197, 1198-99 (App. 1982). **It is another thing to assert that the assignor forfeits the claim by attempting to assign it.**

(emphasis added). Nexsen Pruet cites Kentucky law for the proposition that dismissal with prejudice is the appropriate remedy. However, Kentucky too holds that an invalid assignment has no effect on the validity of the underlying action, and does not support the remedy of dismissal with prejudice. *See John Mokhtarei & Kaelins, Inc. v. Sohan*, 2013 Ky. App. Unpub. LEXIS 585, 2013 WL 3480309 (Ky. Ct. App.July 12, 2013).

Nexsen Pruet further cites to *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257, 885 A.2d 163, 167-68 (Conn. 2005), which has been superseded by statute[2] as recognized by *Hyde & Hyde, Inc. v. Mount Franklin Food, LLC*, 2012 U.S. Dist. LEXIS 188453 (W.D. Tex.Apr. 30, 2012). Nexsen Pruet does not find support for its position in the authority that it cites. Further, many other jurisdictions recognize an invalid assignment has no effect on the validity of the underlying action. *See Weiss v. Leatherberry,* 863 So. 2d 368, 372-73 (Fla. Dist. Ct. App. 2003) ("The invalidity of the agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by proper person."); *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007)("Balancing the advantages and disadvantages of such assignments, we barred assignment of legal malpractice claims, noting clients may still make these claims directly against their attorneys, but they cannot assign their choses in action."); *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987)("We note that, even if there had been an invalid assignment, this would not warrant dismissal of the lawsuit. Instead, the

2 See Conn. Gen. Stat. § 52-118 ("The assignee and equitable and bona fide owner of any chose in action, not negotiable, may sue thereon in his own name. Such a plaintiff shall allege in his complaint that he is the actual bona fide owner of the chose in action, and set forth when and how he acquired title.").

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

By _____

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Attorneys for Appellants

Dated this 7 day of November, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10- 5774

PAVILION DEVELOPMENT CORP. & LARRY McNAIR

Plaintiffs

vs.

NEXSEN PRUET, LLC

Defendants

SUMMONS

2011 AUG 16 PM 2:34
JULIE J. ARMSTRONG
CLERK OF COURT

TO THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address show below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

ANDREW K. EPTING, JR., LLC

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ake@epting-law.com

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ATTORNEYS FOR PLAINTIFFS

On this 11 day of August 2011
Charleston, SC

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR Plaintiffs vs. NEXSEN PRUET, LLC Defendants	CASE NO. 2011-CP-10- 5774 COMPLAINT

2011 AUG 16 PM 2:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiffs Pavilion Development Corporation ("Pavilion") and Larry McNair file this action for professional malpractice and breach of fiduciary duty against their former attorneys, Defendant Nexsen Pruet, LLC ("Nexsen Pruet"). In support of this action, Plaintiffs would show the Court the following.

1. Plaintiff Pavilion Development Corporation ("Pavilion") is a corporation organized and existing under the laws of the State of South Carolina, doing business in Charleston County, South Carolina.

2. Plaintiff Larry McNair is an individual residing in the State of South Carolina.

3. The Defendant, Nexsen Pruet, is a law firm organized and existing under the laws of the State of South Carolina with an office in Charleston County, South Carolina, holding itself out as "The Carolinas' Leading Real Estate Law Firm." (Nexsen Pruet Website http://www.nexsenpruet.com/practices-area-59.html).

4. In 2006, Pavilion retained Nexsen Pruet to advise it regarding the purchase of three parcels of real property with the addess of 100 Mill Street located on Shem Creek and known as the "Cottage on the Creek" property.

5. As part of the undertaking, Nexsen Pruet was retained to advise Pavilion regarding the condition of the title to the Cottage on the Creek property and the filing of a litigation and a lis pendens.

6. On August 18, 2006, Pavilion entered into a contract to purchase the Cottage on the Creek property from DC & Sons, LLC for Five Million Dollars ($5,000,000.00) to close on or before December 31, 2006.

7. By the terms of the contract, Pavilion was to make a Fifty Thousand Dollar ($50,000.00) earnest money deposit, which was made and kept in an escrow account with real estate agent Ocean One Realty.

8. The real estate contract further provided that Pavilion was to provide proof of financing to the Seller within 30 days of signing the contract. Pavilion never provided proof of financing, a fact of which Nexsen Pruet was fully aware.

9. In the fall of 2006, Richard Coen contacted Pavilion and told Pavilion that the Seller could not deliver title because Richard Coen and/or his entities had the right to buy and/or lease the Cottage on the Creek property.

10. Nexsen Pruet wrote to counsel for the Seller, DC & Sons demanding that DC & Sons remedy the alleged cloud on title created by Mr. Coen's claims and requesting assurances from the Seller that Mr. Coen's claims were without merit DC & Sons advised the claims were without merit.

11. DC & Sons wrote Nexsen Pruet and insisted that Pavilion either accept title insurance and close on the property or release DC & Sons from the contract.

12. Nexsen Preut advised Pavilion not to close on the Cottage on the Creek property or release the property from the contract.

13. On March 19, 2007, despite Pavilion's unwillingness to close, Nexsen Preut filed a lis pendens on the Cottage on the Creek property, together with a lawsuit for specific performance, declaratory judgment, and quiet title styled, *Pavilion Development Corp v DC & Sons, LLC, Dianne Crowley, Cecil Crowley, Coenco, LLC, Lowcountry Capital, LLC, Wings Over America, LLC, Redwing, LLC, Up The Creek, Inc., and Richard H Coen*, case no. 2007-CP-10-1457.

14. Although Nexsen Pruet named Richard Coen and his entities in the complaint, neither Richard Coen nor any of his entities were served with the complaint.

15. DC & Sons counterclaimed against Pavilion claiming breach of contract and abuse of process, and filed a separate action to include claims against Larry McNair, Ocean 1 Realty and Rick Maull (the escrow agent), case no. 2008-CP-10-4675.

16. Nexsen Pruet appeared on behalf of Larry McNair and Pavilion and agreed to consolidate the cases and refer them to the Business Court and the Honorable Roger M. Young.

17. On January 17, 2008, Pavilion entered into a stipulation wherein Pavilion stipulated that neither Richard Coen nor any of his entities, or anyone other than the Seller, DC & Sons, had any "current, future, or contingent property interests in the subject property."

18. In or around February of 2008, Pavilion determined that it was no longer willing to purchase the Cottage on the Creek property at the contract price of Five Million Dollars ($5,000,000.00).

19. On February 28, 2008, Nexsen Pruet wrote counsel for DC & Sons, stating that Pavilion desired to purchase the Cottage on the Creek property at the reduced price of Three Million Five Hundred Thousand Dollars ($3,500,000.00).

20. As a result, Counsel for DC & Sons asked that the lis pendens be removed from the property. Nexsen Pruet advised Plaintiff to refuse to cancel the lis pendens.

21. At a May 20, 2008 hearing, Nexsen Pruet agreed to dismiss Pavilion's actions for declaratory relief and quiet title.

22. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and seeking to impose an equitable lien on the Cottage on the Creek property.

23. DC & Sons asked that the lis pendens be removed from the property. Nexsen Pruet advised Plaintiffs to refuse. Nexsen Pruet advised the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent.

24. On March 23, 2009, the Honorable Roger M. Young held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was wrongful, as an action for money damages will not support a lis pendens.

25. The case was set to be tried on January 18, 2011; however before trial, DC & Sons renewed its motion for summary judgment as to Pavilion and Larry McNair's liability for abuse of process and breach of contract.

26. After a hearing on the Motion for Summary Judgment, the Honorable Roger M. Young found in favor of DC & Sons and granted it summary judgment as to Pavilion and Larry McNair's liability holding that:

a. "Pavilion's filing of an action for specific performance was a willful act in the use of process not proper in the regular conduct of the proceeding" .. as "An action for specific performance will lie only when the supposed cloud on title is caused and controlled by the seller."

b. "Defendants' filing an action for specific performance and *lis pendens* was not proper as it failed to prove it was ready, willing, and able to pay the agreed upon purchase price or had arranged its financing, which was required by law and the real estate contract."

c. "Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons."

d. "Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing."

e. "The continued maintenance of a *lis pendens* and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title."

f. "As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper."

g. "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."

27. Left with no defenses, Pavilion confessed judgement in the amount of Four Million Five Hundred Eighty Thousand Fifteen Dollars and Ninety Three Cents ($4,580,015.93) in exchange for a release of Mr. McNair's personal liability.

FOR A FIRST CAUSE OF ACTION
LEGAL MALPRACTICE

28. The foregoing allegeations are incorporated herein by reference.

29. Plaintiffs hired Nexsen Pruet as their attorneys with the full faith and expectation that Nexsen Pruet would competently and professionally advise and represent Plaintiffs. Nexsen Pruet accepted this duty, thus creating an attorney-client relationship between Plaintiffs and Nexsen Pruet.

30. Nexsen Pruet holds itself out as "The Carolinas' Leading Real Estate Law Firm" and advertises that "Unlike many firms whose real estate practice focuses only on transactional work, Nexsen Pruet's team also includes attorneys who are highly skilled in litigation of real property disputes. "(Nexsen Preut Website http://www.nexsenpruet.com/practices-area-59.html).

31. In agreeing and undertaking to represent and advise Plaintiffs, Nexsen Pruet undertook the following duties:

a. to conform to generally recognized and accepted practices among the legal profession;

b. to perform its tasks with reasonable care and diligence;

c. to act in the bests interest of Plaintiffs;

d. to exercise that degree of skill, knowledge, as possessed and exercised by the ordinary attorney in similar circumstances,

e. to provide competent representation, including possessing the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of Plaintiffs;

f. to exercise independent professional judgment and render candid advice to Plaintiffs.

32. Nexsen Pruet was negligent in its representation of Plaintiffs, failing to exercise reasonable care, skill and diligence in the following ways:

a. In advising Plaintiffs to file a lis pendens and suit for specific performance when Pavilion was in breach of the real estate contract;

b. In advising Plaintiffs to file a lis pendens and suit for specific performance when the alleged cloud on title was created by third parties outside of the Seller's control;

c. In advising Plaintiffs to file a lis pendens and suit for specific performance when Pavilion was no longer ready, willing, and able to close on the terms of the contract;

d. In advising Plaintiffs to file a lis pendens and suit for quiet title and failing to serve or join those necessary parties whose claims created the cloud on title;

e. In advising Plaintiffs to maintain a lis pendens on the Cottage on the Creek Property and suit for specific performance and quiet title even after stipulating that no party other than the Seller, DC & Sons had any "current, future, or contingent property interests in the subject property";

f In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property even after Pavilion amended its complaint to sue only for money damages;

g. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property in order to obtain a return of the escrow funds; and

h. In advising Plaintiffs that it was proper to maintain a lis pendens on the Cottage on the Creek Property in order to obtain the property at a lower purchase price.

33. Nexsen Pruet's conduct as described above constitutes negligence as well as a breach of the contractual obligations owed to the Plaintiffs.

34. As a direct and proximate result of Nexsen Pruet's failure to exercise reasonable care, skill, and diligence in representing Plaintiffs, Plaintiffs were forced to confess judgment in the amount of Four Million Five Hundred Eighty Thousand Fifteen Dollars and Ninety Three Cents ($4,580,015.93) or risk trying the case without any defense as to Plaintiffs' liability as well risk a significant judgment being entered against Mr. McNair personally. Plaintiffs are entitled to damages both actual and punitive.

FOR A SECOND CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY

35. The foregoing allegeations are incorporated herein by reference.

36. Nexsen Pruet entered into a fiduciary relationship with the Plaintiffs.

37. By entering into a fiduciary relationship with the Plaintiffs, Nexsen Pruets obligated itselfs to act only in the best interests of the Plaintiffs.

38. Nexsen Pruet's conduct, especially as more particularly described above, constitutes a breach of this duty.

39. As a direct and proximate result of Nexsen Pruet's actions, inactions, and breach of fiduciary duty, the Plaintiffs have been injured and suffered damage.

40. Plaintiffs are entitled to judgment against Nexsen Pruet for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by this Defendant and others, in an amount determined by this Court.

WHEREFORE, Plaintiffs pray for judgment against Nexsen Pruet for damages in the amount of the outstanding judgment against Pavilion Development Corp., plus punitive damages, post-judgment interest, costs and attorneys' fees associated with this lawsuit, and such other and further relief the Court may deem appropriate.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

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ATTORNEYS FOR PLAINTIFFS

On this 10 day of August 2011
Charleston, SC

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Pavilion Development Corp. & Larry McNair, Plaintiffs, vs. Nexsen Pruet, LLC, Defendant.	CA# 2011-CP-10- 5774 AFFIDAVIT OF EXPERT OPINION OF DR. GREGORY B. ADAMS

FILED
2011 AUG 16 PM 2:37
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PERSONALLY APPEARED before me Gregory B. Adams who, being duly sworn, deposes and says that:

1. It is my expert opinion, held to a reasonable degree of professional certainty, that the Complaint in this matter alleges facts establishing that the defendant law firm (and its participating lawyers) committed acts of professional negligence proximately damaging the plaintiffs; that the defendant law firm and its participating lawyers breached their fiduciary duties to the plaintiffs, proximately damaging them; and that the defendant law firm breached its contract with plaintiffs, proximately damaging them, as more particularly set forth below:

   A. attorney-client relationships existed between plaintiffs and the defendant law firm and its lawyers who were advising and representing plaintiffs in connection with the contract to purchase the Cottage on the Creek property and the related disputes and litigation [NP's participating lawyers];

   B. these attorney-client relationships created professional, ethical, contractual, and fiduciary duties from the law firm and each of its participating lawyers to plaintiffs;

C. the defendant law firm (and its participating lawyers) violated their duties to plaintiffs in numerous ways, including

i. by failing to provide their clients with competent advice and representation:

a. by failing to use the legal knowledge, skill, thoroughness, and preparation reasonably necessary in the circumstances; and

b. by violating the standard of care, which required them to render their services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession;

ii. by failing to provide their clients with candid advice based on their exercise of independent professional judgment on their clients' behalf; and

iii. by failing to explain the matter to their clients to the extent reasonably necessary to permit them to make informed decisions regarding the representation;

D. these negligent failings included:

i. failing to serve Richard Coen and his entities as defendants in the lawsuit, thereby eliminating the ability to use the litigation to adjudicate the validity of Mr. Coen's claim that he (individually or through one of his entities) had the right to buy or lease the Cottage on the Creek property and thus to determine judicially whether DC & Sons could deliver marketable title to the property;

ii. continuing the specific-performance action against DC & Sons and maintaining the *lis pendens* against the Cottage on the Creek property after Pavilion decided that it did not want to purchase the property pursuant to the contract;

iii. continuing the action against DC & Sons for specific performance and maintaining the *lis pendens* after Pavilion had stipulated that neither Richard Coen nor any of his entities had any "current, future, or contingent property interests" in the Cottage on the Creek property;

iv. continuing the action against DC & Sons for specific performance and maintaining the *lis pendens* while knowing that their client, Pavilion, had materially breached the contract and failed to satisfy its express proof-of-financing condition, and thus was clearly not entitled to specific performance of that contract to purchase the Cottage on the Creek property;

v. amending the complaint against DC & Sons on August 15, 2008, transforming it from an action for specific performance to one for damages, while maintaining the *lis pendens* and seeking to impose an equitable lien on the Cottage on the Creek property, although Pavilion was entitled to neither a *lis pendens* nor an equitable lien in an action for damages and although Pavilion was no longer seeking to purchase the property and was still in material breach of the contract,

having failed to cure its breach and being unable to satisfy its express proof-of-financing condition;

vi. filing and maintaining the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the ernest money, although doing so constituted an improper, ulterior purpose, subjecting their clients to liability for abuse of process;

vii. advising their clients to file and maintain the specific performance action against DC & Sons and the *lis pendens* against the Cottage on the Creek property although doing so constituted a willful act improperly using legal process for an ulterior purpose, subjecting their clients to liability for abuse of process;

viii. failing to advise their clients that filing and maintaining the specific performance action against DC & Sons and the *lis pendens* against the Cottage on the Creek property constituted a willful act improperly using legal process for an ulterior purpose, subjecting them to liability for abuse of process;

ix. advising their clients to file and maintain the declaratory judgment action to quiet title against DC & Sons without effectively joining Richard Coen and his entities as defendants, although doing so constituted a willful act

improperly using legal process for an ulterior purpose, subjecting their clients to liability for abuse of process;

x. failing to advise their clients that filing and maintaining the declaratory judgment action to quiet title against DC & Sons without effectively joining Richard Coen and his entities as defendants constituted a willful act improperly using legal process for an ulterior purpose, subjecting them to liability for abuse of process;

xi. advising their clients to file and maintain the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the ernest money, although this constituted an improper, ulterior purpose, subjecting their clients to liability for abuse of process;

xii. failing to advise their clients that filing and maintaining the lawsuit against DC & Sons and the *lis pendens* against the Cottage on the Creek property in order to compel a reduction in the purchase price of the property or the return of the ernest money constituted an improper, ulterior purpose, subjecting them to liability for abuse of process;

E. these failings also constituted breaches of the attorney-client contract between the defendant law firm and the plaintiffs as well as breaches of the fiduciary duties owed by the defendant law firm and its participating lawyers to the plaintiffs;

[redacted]

F. these breaches proximately caused damage to plaintiffs, including

i. the entry of Summary Judgment holding Pavilion liable for abuse of process; and

ii. the resulting Confession of Judgment for $4,580,015.93.

2. My resumé, attached as Exhibit A, demonstrates why federal and state courts, including the South Carolina Supreme Court and Court of Appeals, have held that I am qualified as an expert witness and thus am qualified to conduct the review required by S.C. Code Ann. §15-36-100(B).

A. I am a tenured law professor at the University of South Carolina School of Law, where I have been teaching since 1978. My subjects of expertise include lawyers' ethics and professional responsibility, corporate law, fiduciary duties, and contract law, as well as judicial ethics, agency, and partnership law.

B. I have earned a J.S.D. (Doctor of Juridical Science) and an LL.M. from Columbia University School of Law, as well as my J.D. from Louisiana State University.

C. Federal and state courts in South Carolina have recognized my expertise, including the South Carolina Supreme Court in *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding that I am qualified as an expert witness and that my expert testimony was accurate and proper) and *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding it was reversible error to fail to conclude that I was qualified as an expert

witness on issues of lawyers' duties), and the Court of Appeals in *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (holding it was reversible error to discount my expert opinion in a legal malpractice case and to fail to give it efficacy). Additionally, three South Carolina Attorneys General, the South Carolina Secretary of State, and the United States Attorney for the District of South Carolina have relied upon my expertise to guide and assist them in significant criminal investigations and prosecutions, many of which targeted wrongdoing by lawyers or wrongdoing by corporate officers and directors.

3. Documentary evidence I have reviewed supports the allegations of the Complaint and proves negligent acts of defendant law firm and its participating lawyers, as detailed above. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, such as

   A. Judge Roger M. Young, Sr.'s 1/18/2011 Order Granting DC & Sons Summary Judgment as to the Liability of Pavilion for Abuse of Process and Breach of Contract in DC & Sons, LLC. v. Richard H. Coen, et al., C/A No. 08-CP-10-4675;

   B. Judge Roger M. Young, Sr.'s 1/18/2011 Judgment in a Civil Case (Form 4 and attached settlement agreement) in DC & Sons, LLC. v. Pavilion Development Corp., C/A No. 08-CP-10-4675;

   C. Pavilion Development Corp.'s 1/18/2011 Confession of Judgment in DC & Sons, LLC. v. Richard H. Coen, C/A No. 08-CP-10-4675.

4. I have been retained as an expert witness by counsel for plaintiffs. My expert opinions are based upon the allegations of the Complaint and the evidence available to me at this time; these opinions are, therefore, subject to expansion and modification as further evidence or issues develop.

Further the affiant sayeth not.

Dr. Gregory B. Adams

Sworn to and subscribed before me
this 2nd day of August 2011.

Notary Public for South Carolina
My Commission Expires: Jan 29, 2020

EXHIBIT A

DR. GREGORY B. ADAMS

University of South Carolina School of Law
Columbia, South Carolina 29208

Professional Experience

Law Professor (tenured), University of South Carolina, 1978–present.
SUBJECTS TAUGHT: Professional Responsibility; Judicial Ethics, Legal Profession; Contracts; Corporate Law; Business Planning; Agency, Partnership & Limited Liability Companies; Antitrust, International Business Law, European Union (Common Market) Law

Founding Director, Program on Judicial Ethics, Selection, Accountability, and Independence, University of South Carolina School of Law (2003-present).

Visiting Professor of Law, Pskov Volny University, Pskov, Russia, Spring 2001.

Visiting Professor of Law, University of Southampton, Southampton, England, Fall 1989.

Visiting Professor of Law, Rutgers University, Newark, NJ, 1983-1984

Stagiaire, Commission of the European Communities (European Union), Brussels, Belgium, 1979.

Research Associate, Institute of European Studies, University of Brussels (U.L B.), 1979.

Visiting Scholar, Faculté de Droit, Université Catholique de Louvain, Louvain-la-Neuve, Belgium, 1978

Jervey Fellow in Foreign Law, Parker School, Columbia University, 1977-1979.

Assistant Professor, Southern University School of Law, 1975-1977

Consultant, Louisiana Legislative Council, 1976-1977.

Attorney with Breazeale, Sachse & Wilson, Baton Rouge, LA, 1973-1975

Education

J.S.D. 1986
Columbia University School of Law *New York, New York*
Dissertation: Control of Monopoly Power in Europe and the United States

LL.M. 1979
Columbia University School of Law *New York, New York*
Thesis: E E.C. and U.S Antitrust Regulation of Monopolists' Refusals to Deal

J.D. 1973
Louisiana State University Law Center Baton Rouge, LA
Order of the Coif; Louisiana Law Review, Moot Court Board; Winner, Robert Lee Tullis Moot Court Competition before the Louisiana Supreme Court.

B.S. 1977
Louisiana State University *Baton Rouge, LA*
Phi Kappa Phi
College of Arts & Science, Vanderbilt University Nashville, TN 1966-1968

Honors and Recognition

Outstanding Faculty Publications Award, University of South Carolina School of Law (April 2006, Book, Runner Up)
Louisiana State University Law Center Hall of Fame
Who's Who in the World
Who's Who in America
Who's Who in American Law
Who's Who in American Education
Who's Who in the South and Southwest
Who's Who of Emerging Leaders in America
Who's Who in Law Education
Dictionary of Int'l Biography (Cambridge, U.K.)
Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C 433, 472 S.E 2d 612 (1996) (holding GBA qualified as an expert witness, reversible error to rule otherwise)
State v. Morris, 376 S.C 189, 656 S E 2d 359 (2008) (holding GBA qualified as an expert witness and that GBA's expert testimony was accurate and proper)
Ellis v. Davidson, 358 S.C. 509, 595 S E 2d 817 (Ct App, 2004) (holding it was reversible error to discount GBA's expert opinion and fail to give it efficacy)
Davis v. Hamm, 300 S C. 284, 387 S E 2d 676 (Ct App, 1989) ("excellent discussion of the ramifications of these statutes" by GBA in "Litigation of Corporate Law Disputes After the Recent Amendments of the Corporate Code," in Current Issues in Civil Litigation, a South Carolina Bar Continuing Judicial Legal Education Seminar 4/14/89)

Publications

South Carolina Corporate Practice Manual (2nd ed. 2005, S C. Bar) (lead author, coauthors Burkhard, Cleveland, Clark, Hellwig, Merline)
"Reflections on the Reactions to Proposed Rule 8.5: Consensus of Failure," 36 S. Texas Law Review 1101 (1995).
"Introductory Remarks to the Conference on the Commercialization of the Legal Profession," 45 S C. L. Rev. 883 (1994) (with Nathan M. Crystal)
Report of the Proceedings, Conference on the Commercialization of the Legal Profession (with Nathan M. Crystal). "Summary of Discussion of Frankel Paper," 45 S.C.L. Rev. 901; "Summary of Discussion of Palay/Galanter Paper," 45 S.C.L. Rev 929, "Summary of Discussion of Martyn Paper," 45 S C.L Rev 961; "Summary of Discussion of Dimitriou Paper," 45 S.C.L. Rev. 999 (1994).
"The Ethical Lawyer," occasional column in the S C. Trial Lawyer Bulletin since 1994.
"Suing Corporations and Those Behind Them," 1992 S C Trial Lawyer Bulletin 17.
South Carolina Corporate Practice Manual (S C Bar, 1989) (with Cleveland, Burkhard,McWilliams).
"European and American Antitrust Regulation of Pricing by Monopolists," 18 Vanderbilt Journal of Trans. Law 1 (1985).
"Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States," 20 Texas Int'l L. J 1 (1985).
"The 1981 Revision of the South Carolina Business Corporation Act," 33 S C L. Rev. 405 (1982)
"Inheritance Taxation of Trusts," in 11 L. Oppenheim & S. Ingram, Louisiana Civil Law Treatise, Trusts (1977).

Amicus Curiae Briefs

Ex Parte Strom, in re Collins Entertainment Corp v Columbia "20" Truck Stop, 343 S C. 257, 539 S.E 2d 699 (2000) (establishing that attorney's duties to client continued until court granted motion relieving attorney as counsel of record).
Linder v Insurance Claims Consultants, 348 S.C. 477, 560 S E.2d 612 (2002) (on behalf of the S C Bar, clarifying scope of activities constituting the practice of law).
Brown v Bi-Lo, 354 S C. 436, 581 S.E.2d 836 (2003) (on behalf of the S.C. Trial Lawyers Association, protecting the confidentiality of physician-patient relationship)

Public Service

Invited Expert Witness, Judicial Merit Selection Study Committee, SC Senate (9/17/07)
Member, S C. Bar, Professional Responsibility Committee, 1993-present (chair or member of numerous subcommittees, including Ethics 2000 Subcommittee; presented Ethics 2000 recommendations to S.C. Bar House of Delegates).
Member, S.C. Bar, Unauthorized Practice Committee, 1994, 2000-2003
Member, S C Bar, Technology Committee, 1996-1998.
Ethics Consultant, South Carolina Association for Justice, 1994-present.
Founder and Vice-President, South Carolina Association of Ethics Counsel, 2000-present.
Expert Witness and advisor to the South Carolina Attorney General in the criminal investigation and prosecutions for securities fraud in connection with the failure of Carolina Investors and HomeGold Financial, 2003-2008
Expert Consultant for the South Carolina Department of Health and Environmental Control, re: piercing the corporate veil to impose environmental liability under CERCLA, 1997-1999.
Reporter, South Carolina Uniform Commercial Code Article 2A (South Carolina Law Institute for the South Carolina General Assembly, 1996-2001).
Expert Witness and advisor to the South Carolina Attorney General in criminal prosecution of John O'Quinn, Esq for unauthorized practice of law and illegal solicitation, 1996-1997.
Co-Reporter, Conference on the Commercialization of the Legal Profession, Charleston, S C , May 1993
Expert Witness for the United States before the Federal Grand Jury investigating securities fraud, May 1993.
Member, Governing Board, Center for Law, the Legal Profession, and Public Policy, 1991-93, 1998-2000.
Member, Blue Ribbon Committee on Corporate Law, South Carolina Secretary of State, 1991-1995.
Securities Law Expert for the South Carolina Attorney General in connection with the bankruptcy of Patriots Point Associates, 1989-91.
Advisor to the S C. Deputy Securities Commissioner and the S C. Senate Judiciary Committee on Corporate Law issues
Co-Reporter, South Carolina Business Corporation Act of 1988 (South Carolina Law Institute for the South Carolina General Assembly, 1986-88).
Member, Louisiana State Law Institute, Civil Code Revision Committee, 1975-1977

Presentations

"Judicial Ethics for S C Workers' Compensation Commissioners," S C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/16/10)
"Current Ethical Issues and Trends," York County Bar Association Ethics CLE, Panel with S C. Supreme Court Justice Costa M. Pleicones and S.C Disciplinary Counsel Lesley M. Coggiola, Esq , Rock Hill, SC (3/12/10)
"Lawyers in the Crosshairs: Recent South Carolina Cases of Concern to Estate Planning and Probate Lawyers," Fourteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/15/09)
"Judicial Ethics for S.C. Workers' Compensation Commissioners," S C Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/17/09)
"Regulating Lawyer Behavior Through Recent South Carolina Tort Cases: Issues of Lawyer Ethics, Professionalism, and Liability," S.C. Tort Law Update, S C. Bar CLE, U.S C. Law School (11/13/09)
"Lawyers' Ethical Responsibilities and the Torture Memoranda," Amnesty International Panel Discussion, University of South Carolina, Columbia, SC (4/15/09)
"The 'Of Counsel' Agreement," S.C. Bar Annual Convention, Myrtle Beach, SC (1/24/09)
"Ethical Duties in Family Estate Planning," Thirteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/11/08)
"Teaching Professional Responsibility in U.S Law Schools," Southeastern Ass'n of Law Schools, Ritz Carlton, Palm Beach, FL (7/31/08)

"Judicial Selection in the United States," S.C. Supreme Court Teachers Institute, Columbia, SC (6/23/08)
"Corporate Lawyers as Fiduciaries," S.C. Bar Annual Convention, Charleston, SC (1/25/08)
"My Heroes Have Always Been Lawyers and They Still Are, It Seems," Twelfth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/07)
"Prosecutorial Ethics: Was the Duke Lacrosse Case an Aberration or the Tip of the Iceberg?," SCTLA Annual Convention, Hilton Head Island (8/3/07)
"Malpractice Liability of Estate-Planning Lawyers," Eleventh Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S C. (12/7/06)
"Ethics for Trial Lawyers How to Avoid Those Hidden Land Mines," S C T L A. Auto Torts Seminar XXIX, Ritz-Carlton, Buckhead, Atlanta, GA (12/2/06)
"Ethical Issues for the Sports Attorney-Agent Lessons from *Vortex v Ware*," International Sport and Entertainment Management Conference, Metropolitan Convention Center, Columbia, SC (11/9/06)
"Ethics in Workers Comp Practice Negotiation," ASCCAWC Annual Convention, Grove Park Inn, Asheville, NC (11/4/06).
"Probate Judges and Lawyers: Prohibition of *Ex Parte* Communications," Fourteenth Annual Probate Bench/Bar Conference, Columbia, SC (9/15/06)
"The Future Regulation of Lawyer Advertising Under the Proposed S C Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/4/06).
"Free Speech and Judicial Selection. Implications of *White v Republican Party*," Southeastern Association of Law Schools, The Breakers Hotel, Palm Beach, FL (7/20/06)
"The New South Carolina Rules of Professional Conduct," Tenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/15/05)
"Ethical Use of Discovery Under the Workers' Compensation Act, Contact with Employer Witnesses; Use of Subpoenas in a Workers' Compensation Case; Frivolous Defenses· What to do About Them," ASCCAWC Annual Meeting, Grove Park Inn, Asheville, N.C. (11/4/05).
"Applying the SC Code of Judicial Conduct to Workers' Compensation Commissioners· Lessons for Lawyers Practicing Before the Commission," SCWCEA Educational Conference CLE, Marriott Myrtle Beach Resort (10/24/05)
"The New SC Rules of Professional Conduct. You Really Can't Do THAT Anymore!," SCWCEA Educational Conference, Marriott Myrtle Beach Resort (10/24/05)
"Newly Revised Frivolous Procedures Act & Other Ethical Issues," SCTLA Tort Reform Seminar, Columbia, S.C (10/14/05)
Moderator and Coordinator, S C. Corporate Practice Seminar, S.C. Bar CLE, U.S C. Law School (9/30/05). Speaker "Ethical Issues in S.C Corporate Law for the General Practitioner and the Corporate Lawyer
Ethical Issues Presented by Choices of Control Devices
Ethical Issues Arising from Threats of Owner Liability
The Big Ethical Question Who Is The Client?"
"The Code of Judicial Conduct· Does It Effect How We Practice Workers' Comp?," S.C. Bar CLE, U.S.C. Law School (8/26/05)
"Ethics Seminar: The New Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/5/05).
"Ethics 2000. The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L E. Ethics Seminar, Richland County Bar Association (11/5/04)
"Judicial Ethics Review," J C L E. Ethics Seminar, S C. Court Administration Magistrates' Training Program, Charleston, S.C. (8/18/04)
"The New S.C. Lawyers' Oath," C.L E Seminar, S C Bar, Charleston, S C. (6/25/04)
"Judicial Ethics Review," J C L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Columbia, S.C. (4/23/04).
"Ethics 2000 and Lawyers' Fees," C.L.E. Ethics Seminar, S.C. Bar & S C .Association of Ethics Counsel, Columbia, S.C. (11/15/03)
"The Ethical Implications of *Brown v. Bi-Lo*," S.C Workers Comp. Educational Ass'n Educational Conference, Kingston Plantation, Myrtle Beach, S C. (10/20/03).
"Ethics 2000· The New Rules of Professional Conduct & Multi-Jurisdictional Practice of Law," C.L.E. Ethics Seminar, Investors Title Insurance Co. Seminars (9/17/03 Rock Hill, 9/12/03 Hilton Head).

"Ethics 2000. The New Rules of Professional Conduct — You Can't Do That Anymore!," C L E Ethics Seminar, S.C.T L.A Convention (8/8/03).
"Political & Legal Ethics. The Pitfalls to Avoid," C.L E. Ethics Seminar, S.C. Bar Annual Convention (Young Lawyers Division) (1/24/03).
"Recent Developments in Legal Ethics," C L.E Ethics Seminar, S C. Bar & S.C. Association of Ethics Counsel (12/14/02).
"Current Ethical Issues in Real Estate Practice," C L E. Ethics Seminar, Security Title Insurance Company (11/8/02)
"Ethics of Attorney's Fees for Domestic Law Attorneys," C.L E Ethics Seminar, S.C. Bar (9/20/02).
"Discovery Abuse and Litigation Ethics," Paralegal Continuing Education Seminar, S.C.T L A Convention (8/3/02).
"Discovery Abuse, Litigation Ethics, Supervision and Other Horrors," C.L.E. Ethics Seminar, S.C T L A. Conv. (8/2/02)
"Ethical Issues in Attorney Marketing Under the Amended Rules," C.L E. Ethics Seminar, S.C Bar (7/26/02).
"Ethics in the Practice of Criminal Law," C L E Ethics Seminar, S C Bar (5/10/02)
"Professional Ethics in the Real World Communication with Witnesses," C.L E Ethics Seminar, Ass'n S C Claimants' Attorneys for Workers Comp. (5/3/02)
"Lawyers and Paralegals Practicing Law When and Where They Shouldn't," C.L.E Ethics Seminar, S C Bar and South Carolina Ass'n of Ethics Counsel (12/15/01)
"Proposed Disclosure Rule and Goods Funds Statute in South Carolina,"C.L.E. Ethics Seminar, S C. Bar (8/17/01).
"Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C T.L.A. Convention (8/3/01).
"Ethical Perils for Family Practitioners: Keeping Your License and Keeping Your Practice," C.L E Ethics Seminar, S C Bar (12/2/00)
"Ethical Issues in Workers Compensation Practice," C.L E. Ethics Seminar, S.C Workers' Comp. Educational Ass'n, Kingston Plantation, Myrtle Beach, S.C (10/23/00).
"The Things That Make Paralegals Indispensable Technology and the Future of the Practice of Law," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/5/00)
"Recent Developments in Ethics and Professional Responsibility," C L E. Ethics Seminar, S C.T.L.A. Convention (8/4/00)
"The Internet – Legal Ethics in Cyberspace Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," SC Defense Trial Attorney's Association & SC Claim Manager's Association CLE at Grove Park Inn, Asheville, N.C. (7/29/00)
"The Internet – Legal Ethics in Cyberspace Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L E. Ethics Seminar, S.C. Bar (4/28/00)
"The Responsibility of Administrative Law Judges to Control Unethical and Unprofessional Conduct by Lawyers: Ethical Prohibitions, Remedies and Sanctions," ALJ CLE Seminar, Southern States Association of Administrative Law Judges (3/17/00).
"S.C Appellate Procedure The New Relationship Between the Supreme Court and the Court of Appeals," Paralegal Continuing Education Seminar, Ass'n S.C Claimant Attorneys for Workers Comp , Asheville, N C (1/22/00).
"Professionalism Advertising Ethically Under the Amended S.C Rules of Professional Conduct," C L.E. Ethics Seminar, S.C. Bar (1/14/00)
"Multi-Jurisdictional Practice of Law· *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E Ethics Seminar, S.C Bar (12/11/99).
"Hot Issues in Ethics. Marketing Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L E Ethics Seminar, S C. Bar (10/29/99).
"Ethical and Professional Responsibility Issues in Litigation· Discovery Abuse," C L E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (12/12/98)
"Multi-Jurisdictional Practice of Law *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E Ethics Seminar, S C. Bar (12/8/98)

"Discovery Abuse: Bane of Professionalism? Ethical Prohibitions & Court-Ordered Sanctions," C L E. Ethics Seminar, S C T.L A. Convention (8/14/98)
"*Hedgepath & McCormick* and the Ethics of Ex-Parte Communication with Treating Physicians," Workers Comp. C.L.E. Seminar, S.C.T L A. Convention (8/14/98)
"Legal Ethics for a Multi-State Law Firm," C L E for a Major S.C. Law Firm (8/8/98).
"Prudent Ethical Conduct after *Hedgepath*," Medical Staff, McLeod Hospital, Florence, S C (4/6/98)
"What is the Effect of *Hedgepath* on Doctors' Duties to Workers' Comp Patients?" S.C. Workers Comp. Educational Ass'n Annual Meeting, Charleston, S C (2/22/98)
"Confidentiality, Privilege, and the Attorney as Witness, Gossip, or Snitch," C.L E. Ethics Seminar, S C. Bar and Univ. of South Carolina School of Law (1/10/98).
"Law Firm Breakups and Departing Lawyers," C.L.E Ethics Seminar, S C Bar and University of South Carolina School of Law (12/13/97)
"*Hedgepath* & Lawyers' Professional Conduct Implications in Workers' Compensation Proceedings," C L E. Seminar, The Association of South Carolina Claimant Attorneys for Workers' Compensation, Asheville, N C. (11/14/97).
"Ethics· Judicial Immunity for Administrative Law Judges," J.C.L E Seminar, Chief Administrative Law Judges Conference, Charleston, SC (11/6/97).
"*Hedgepath* and the Rules of Professional Conduct· Who Can We (and They) Talk to Now?" C L.E. Ethics Seminar, S.C T.L.A. Convention (8/15/97)
"Ways to Get in Trouble Old and New," C L E Ethics. Seminar, University of South Carolina School of Law (12/7/96)
"Ethics for the Modern Lawyer on the Information Superhighway," C L.E. Ethics Seminar, S C T.L A. Convention (8/9/96)
"Mobile Lawyers and Mobile Clients," C.L.E Ethics Seminar, University of South Carolina School of Law (12/95)
"Constitutional Restrictions on Regulation of Lawyer Advertising," House of Delegates, S.C Bar (1/21/94)
"Ethical Issues Facing Law Firms," C L E. Seminar, University of South Carolina School of Law (1/9/93)
"Ethical Issues in Office Practice," C.L E Seminar, University of South Carolina School of Law (12/5/92)
"Lawyer Television Advertising A Video Presentation," U.S C Law School Faculty Ethics C.L.E. Seminar (10/22/92).
"The Ethical Dilemma of Corporate Counsel," C.L.E Seminar, Farm Credit Sys. General Counsels Conference (10/7/92).
"Lawyer Advertising – The Great Debate," Moderator, C.L.E. Ethics Seminar, S.C.T.L.A Convention (8/14/92).
"Civil Litigation," in Ethical Issues in Litigation, C L.E. Seminar, University of South Carolina School of Law (1/11/92).
"Shareholders' Rights in Disputes with a Corporation and those in Control," in Planning for Business Corporations. A Guide for General Practitioners, C L E. Seminar (1/3/92).
"Ethical Issues in Civil Litigation," in Legal Ethics and Professional Responsibility, a Video/C L.E Seminar (12/6/91).
"A Walk Through the New South Carolina Rules of Professional Conduct," C L E., U.S C School of Law (1/12/91)
"Corporate Litigation and Liabilities of Corporations, Directors, Officers, and Shareholders after the 1988 Revision of the South Carolina Business Corporation Act," in Current Issues in Civil Litigation, a C J.E. Seminar (4/14/89).
"Fundamental Corporate Changes and Dissenters' Rights under the South Carolina Business Corporation Act of 1988," in The New South Carolina Corporation Act, a Video/C.L.E. Seminar (12/16/88)

University and Community Service

Parliamentarian, University of South Carolina School of Law Faculty, 2004-2007, 2008-2011.
Member, Dean Review Committee for the Dean of the College of Criminal Justice, 2003
Member, Faculty Manual Revision Committee, Faculty Senate, University of South Carolina, 1998-1999
Parliamentarian, University of South Carolina Faculty, 1997-2004
Member, Steering Committee, University of South Carolina Faculty Senate, 1997-2004.
Faculty Senator, University of South Carolina, 1983-1985, 1995-1998, 2000-2003
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1995-1996
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1982-1983 (winner Regional Competition)
Faculty Advisor, National Moot Court Competition Team, University of South Carolina School of Law, 1980-1981
Committee Chairman, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1996-2003.
Scoutmaster & Founder, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1992-1996.
Assistant Scoutmaster, Committee Chairman, Committee Member, BSA Troop 388, Windsor United Methodist Church, Columbia, SC 1986-1992
Junior Warden, Vestry, St. David's Episcopal Church, Columbia, SC 1984-1987.
Chorister, Good Shepherd Episcopal Church, Columbia, SC 1999-2004
Chorister, St. David's Episcopal Church, Columbia, SC 1984-1998
Chairman, Christian Education Committee, St. Michael and All Angels Episcopal Church, Columbia, SC 1981-1983.
President, Richland Northeast High School Parents, Teachers, Students Organization, Columbia, SC 1992-1997.
Member, Richland School District Two Strategic Planning Committee, Columbia, SC 1995-96
Member, Richland School District Two New High School (Ridge View) Planning Committee, Columbia, SC 1993-1994.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No : 2011-CP-10-05774
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	**ANSWER TO COMPLAINT AND COUNTERCLAIM AGAINST PLAINTIFFS AND DC & SONS, LLC**
Defendant,	)	
v.	)	
DC & Sons, LLC,	)	
Counterclaim Defendant.	)	

Nexsen Pruet, LLC, specifically reserving its rights under the Motion to Disqualify Counsel pending in this case, and answering the Complaint of Pavilion Development Corporation and Larry McNair (Plaintiffs), and counterclaiming against the Plaintiffs and Counterclaim Defendant DC & Sons, LLC ("DC & Sons"), denies each and every allegation not specifically admitted, qualified, or explained below, and further alleges and states a counterclaim against Plaintiffs and DC & Sons as follows:

FOR A FIRST DEFENSE

1. Nexsen Pruet admits that portion of paragraph 1 of the Complaint which alleges that Plaintiff Pavilion Development Corporation is a South Carolina corporation. Nexsen Pruet lacks knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 1 of the Complaint and therefore denies them.

2. Nexsen Pruet admits the allegations of paragraph 2 of the Complaint based on information and belief.

3. Nexsen Pruet admits that portion of paragraph 3 of the Complaint which alleges that Nexsen Pruet is a law firm organized and existing under the laws of the State of South Carolina and that the phrase quoted in paragraph 3 either now appears or has appeared on the Nexsen Pruet website, but Nexsen Pruet craves reference to the entire firm website for a complete statement of its content. The remaining allegations in paragraph 3 of the Complaint are denied.

4. Nexsen Pruet denies the allegations of paragraph 4 of the Complaint.

5. Nexsen Pruet denies the allegations of paragraph 5 of the Complaint as stated and in connection therewith alleges that Nexsen Pruet was retained by Pavilion to provide legal advice in conjunction with a real estate transaction involving real property located at Shem Creek, and that such representation commenced after Pavilion signed the Agreement to Buy and Sell Real Estate ("purchase agreement") agreeing to purchase the property. The representation included matters relating to zoning issues and the closing of the purchase. Nexsen Pruet continued its representation of Pavilion in the matter, which eventually resulted in the filing of a lis pendens and a lawsuit.

6. Nexsen Pruet admits on information and belief that portion of paragraph 6 of the Complaint which states that Pavilion entered into the purchase agreement with Diane and Cecil Crowley who are the owners of DC & Sons, LLC, but further alleges that such purchase agreement was executed before Nexsen Pruet's representation of Pavilion commenced. Nexsen Pruet was never asked for, nor ever gave advice to Pavilion with respect to the execution of the

purchase agreement by Pavilion. The remaining allegations of paragraph 6 of the Complaint are denied.

7. Nexsen Pruet admits the allegations of paragraph 7 of the Complaint and in connection therewith craves reference to the purchase agreement for a complete statement of its terms.

8. Nexsen Pruet denies the allegations of paragraph 8 of the Complaint and in connection therewith craves reference to the purchase agreement for a complete statement of its terms.

9. Nexsen Pruet lacks information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint and therefore denies them. In connection therewith, Nexsen Pruet states that Richard Coen filed a lawsuit on September 19, 2006, against DC & Sons and others asserting parking and leasehold rights on the Cottage on the Creek property.

10. Nexsen Pruet denies the allegations of paragraph 10 of the Complaint and in connection therewith alleges that Nexsen Pruet wrote multiple letters and emails to counsel for DC & Sons concerning the cloud on the title created by the claims asserted by Richard Coen and his entities but counsel for DC & Sons could not assure Nexsen Pruet that the sellers would be able to deliver good title, suggesting instead that Pavilion should close on the property and rely upon title insurance for protection. Nexsen Pruet craves reference to the written correspondence and emails exchanged between lawyers at Nexsen Pruet and counsel for DC & Sons related to the cloud on title for a complete statement of their terms.

11 Nexsen Pruet denies the allegations of paragraph 11 of the Complaint and in connection therewith alleges that counsel for DC & Sons wrote a letter to Nexsen Pruet acknowledging that the sellers were obligated to deliver good title and that if it failed to do so,

Pavilion would be entitled to a return of the earnest money. The letter further states that if Pavilion was "uncomfortable with moving forward under those circumstances," then the purchase agreement could be terminated and the earnest money forfeited to the sellers. Nexsen Pruet craves reference to the November 30, 2006 letter from Richard J. Brownyard to M Jeffery Vinzani for a complete statement of its terms.

12. Nexsen Pruet denies the allegations of paragraph 12 of the Complaint, and in connection therewith states that there were conflicting representations concerning the status of the title of the property from DC & Sons on the one hand and Richard Coen and his entities on the other.

13. Nexsen Pruet denies so much of paragraph 13 of the Complaint as alleges that Pavilion was unwilling to close on the property. Nexsen Pruet admits that after the sellers failed to provide good title, Nexsen Pruet filed a notice of lis pendens and a lawsuit on behalf of Pavilion against DC & Sons and others seeking a declaratory judgment and specific performance as well as an action to quiet title and in connection therewith states that the action was styled *Pavilion Development Corporation v Diane Crowley, Cecil Crowley, Coenco, LLC, Lowcountry Capital, LLC, Wings Over America LLC, Redwing, LLC, DC & Sons, LLC, Up the Creek, Inc, and Richard H. Coen*, Case No. 2007-CP-10-1451.

14. Nexsen Pruet admits the allegations of paragraph 14 of the Complaint but in connection therewith alleges that Nexsen Pruet contacted Drew Epting, counsel for DC & Sons, and told him that Nexsen Pruet intended to hold off on serving Coen and his entities until Nexsen Pruet and Epting resolved by stipulation who the proper parties were. Epting agreed with this course of action and DC & Sons never moved to dismiss the lawsuit for failure to serve Coen or his entities.

15. Nexsen Pruet admits the allegations of paragraph 15 of the Complaint.

16. Nexsen Pruet admits the allegations of paragraph 16 of the Complaint.

17. Nexsen Pruet denies the allegations of paragraph 17 of the Complaint as stated and in connection therewith craves reference to the Stipulation between Pavilion and DC & Sons dated January 17, 2008, for a complete statement of its terms.

18. Nexsen Pruet lacks information sufficient to form a belief as to the truth of the allegations of paragraph 18 of the Complaint and therefore denies them

19. Nexsen Pruet denies the allegations of paragraph 19 of the Complaint as stated and in connection therewith states that on February 21, 2008, Nexsen Pruet wrote to counsel for DC & Sons in an effort to settle all claims asserted by Pavilion and DC & Sons in litigation, and as part of that effort communicated an offer from Pavilion in compromise to purchase the property for $3.5 million. Nexsen Pruet craves reference to the February 21, 2008 letter for a complete statement of its terms.

20 Nexsen Pruet denies the allegations of paragraph 20 of the Complaint as stated and in connection therewith alleges that counsel for DC & Sons asked that the lis pendens be removed and Nexsen Pruet advised Pavilion and McNair that there was a reasonable basis for not removing the lis pendens from the property until the litigation regarding the property concluded and the $50,000 paid by Pavilion as earnest money was returned to Pavilion.

21. Nexsen Pruet lacks information sufficient to form a belief as to the truth of so much the allegations in paragraph 21 of the Complaint as allege that a hearing occurred on May 20, 2008, and therefore denies the same Nexsen Pruet denies the remaining allegations of paragraph 21.

22. Nexsen Pruet admits the allegations of paragraph 22 of the Complaint.

23. Nexsen Pruet denies the allegations of paragraph 23 of the Complaint as stated and in connection therewith alleges that counsel for DC & Sons asked that the lis pendens be removed, and Nexsen Pruet advised Pavilion and McNair that there was a reasonable basis for not removing the lis pendens from the property until the litigation regarding the property concluded and the $50,000 paid by Pavilion as earnest money was returned to Pavilion

24. Nexsen Pruet denies the allegations of paragraph 24 of the Complaint as stated and craves reference to the March 23, 2009 order for a complete statement of its terms.

25. Nexsen Pruet lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25 of the Complaint and therefore denies them.

26. Nexsen Pruet admits based on information and belief the portion of paragraph 26 of the Complaint stating that Judge Young granted summary judgment in favor of DC & Sons but denies the remaining allegations of paragraph 26 and its subparts as stated and craves reference to Judge Young's order for a complete statement of its terms

27 Nexsen Pruet admits based on information and belief the portion of paragraph 27 of the Complaint which alleges that Pavilion purported to confess judgment in the amount of $4,580,015.93 but denies the remaining allegations in paragraph 27 of the Complaint Nexsen Pruet admits that there is a document titled "Confession of Judgment" signed by Pavilion in the amount of $4,580,015.93. Nexsen Pruet was not counsel to Pavilion at the time and therefore it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 27 and denies the same

28. Nexsen Pruet incorporates paragraphs 1 – 27 above in response to the allegations of paragraph 28 of the Complaint

29. Answering the allegations of paragraph 29 of the Complaint, Nexsen Pruet admits that it had an attorney-client relationship with Pavilion and Larry McNair up until the time that Nexsen Pruet withdrew as counsel of record with approval from the Court. Nexsen Pruet lacks information sufficient to form a belief as to the expectations of Plaintiffs and therefore denies those allegations and the remaining allegations of paragraph 29 of the Complaint.

30. Nexsen Pruet admits that the phrase quoted in paragraph 30 of the Complaint either now appears or has appeared on the Nexsen Pruet website, but Nexsen Pruet craves reference to the entire firm website for a complete statement of its content. The remaining allegations in paragraph 30 of the Complaint are denied

31. The allegations of paragraph 31 of the Complaint constitute conclusions of law and therefore Nexsen Pruet can neither admit nor deny them, but to the extent such allegations relate to facts, Nexsen Pruet denies the same

32. Nexsen Pruet denies the allegations of paragraph 32 of the Complaint, including the allegations set forth in subparagraphs a - h

33. Nexsen Pruet denies the allegations of paragraph 33 of the Complaint.

34 Nexsen Pruet denies the allegations of paragraph 34 of the Complaint.

35. Nexsen Pruet incorporates paragraphs 1 – 34 above in response to the allegations of paragraph 35 of the Complaint.

36. The allegations of paragraph 36 of the Complaint constitute conclusions of law and therefore Nexsen Pruet can neither admit nor deny them, but to the extent such allegations relate to facts, Nexsen Pruet denies the same.

37. The allegations of paragraph 37 of the Complaint constitute conclusions of law and therefore Nexsen Pruet can neither admit nor deny them, but to the extent such allegations relate to facts, Nexsen Pruet denies the same.

38. Nexsen Pruet denies the allegations of paragraph 38 of the Complaint.

39. Nexsen Pruet denies the allegations of paragraph 39 of the Complaint.

40. Nexsen Pruet denies the allegations of paragraph 40 of the Complaint.

FOR A SECOND DEFENSE

41. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE

42. The claims in the Complaint are barred by the equitable defense of waiver because Plaintiffs have expressly assigned the right to bring and control these claims to their adversary in the underlying litigation, DC & Sons, and have assigned all proceeds flowing from such claims to DC & Sons. As a result, Plaintiffs have voluntarily waived their right to assert the claims set forth in the Complaint against Nexsen Pruet.

FOR A FOURTH DEFENSE

43. Plaintiffs lack standing to bring the causes of action alleged in the Complaint because Plaintiffs have not retained any independent right to pursue this action and control this litigation.

FOR A FIFTH DEFENSE

44. To the extent Plaintiffs have incurred damages, which is denied, such damage was not proximately caused by the actions of Nexsen Pruet and therefore Nexsen Pruet is not liable.

FOR A SIXTH DEFENSE

45. Plaintiffs' claims are barred by the doctrines of comparative and contributory negligence because any harm suffered by Plaintiffs was caused by Plaintiffs own conduct and not by the conduct of Nexsen Pruet.

FOR A SEVENTH DEFENSE

46. The claims are barred because any harm suffered by Plaintiffs was caused by the superseding and intervening negligence of third parties other than Nexsen Pruet for which Nexsen Pruet is not liable.

FOR AN EIGHTH DEFENSE

47. The claims are barred by the doctrine of assumption of the risk because Plaintiffs assumed the risk of injury by the decisions made by them and their counsel in the litigation after Nexsen Pruet withdrew as counsel

FOR A NINTH DEFENSE

48. The claims are barred by the doctrine of release because Plaintiffs have assigned their rights to bring these claims to another party.

FOR A TENTH DEFENSE

49 Plaintiffs' claims for punitive damages are barred by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and related sections of the South Carolina Constitution. In addition, a claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 8, of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR AN ELEVENTH DEFENSE

50. Plaintiffs' claims are barred by the applicable statute of limitations

FOR A TWELFTH DEFENSE

51. Plaintiffs have failed to join all parties needed for a complete resolution of this matter in that Plaintiffs have not named the entity (DC & Sons) that owns the right to the proceeds of this claim and that has unfettered control of the litigation and all of the privileges attendant thereto

FOR A THIRTEENTH DEFENSE

52. Plaintiffs' claims are barred by the doctrine of estoppel due to Plaintiffs' conduct in the previous litigation.

FOR A FOURTEENTH DEFENSE

53. Any harm suffered by Plaintiffs was caused by intervening events that took place after Nexsen Pruet withdrew as counsel for Plaintiffs and therefore Nexsen Pruet is not liable for the harm alleged.

FOR A FIFTEENTH DEFENSE

54. The claims are barred because they result from an illegal assignment of a legal malpractice claim from Plaintiffs to their adversary in the underlying litigation.

FOR A SIXTEENTH DEFENSE

55. Plaintiffs have failed to mitigate their damages, if any.

FOR A SEVENTEENTH DEFENSE

56. This case is barred by the doctrine of unclean hands.

FOR AN EIGHTEENTH DEFENSE

57. Defendant will rely on all defenses lawfully available to it at the time of trial, and reserves the right to amend this answer to include additional defenses or withdraw others after completion of discovery

FOR A NINETEENTH DEFENSE AND BY WAY OF COUNTERCLAIM AGAINST PLAINTIFFS AND DC & SONS

58. Paragraphs 1 through 57 above are incorporated here.

59. Upon information and belief, DC & Sons, LLC, is an entity existing under the laws of the State of South Carolina.

60. DC & Sons was Plaintiffs' adversary in the case below which forms the basis of the allegations in the Complaint.

61 DC & Sons was represented by Andrew Epting and George Kefalos. Epting and Kefalos now represent Plaintiffs in the present case

62. DC & Sons should be made a party to this case pursuant to S.C. Code Ann. § 15-53-80 and Rule 13, SCRCP, because according to a document on file with the Clerk of Court of Charleston County, DC & Sons has an interest in this case that will be affected by a declaratory judgment. The document purports to give DC & Sons the right to assert the claims alleged in the Complaint and to control this litigation. It also purports to give DC & Sons the right to any and all proceeds from this case.

63. DC & Sons purportedly obtained these rights pursuant to a supposed agreement signed by Pavilion, Larry McNair, and DC & Sons prior to the commencement of the first day of trial in the case below, when the parties took a recess and settled the case. Nexsen Pruet was not counsel for Pavilion at this time, nor had it been counsel for Pavilion for almost two years

64. The agreement purporting to assign the claims and proceeds to DC & Sons (the Assignment) is attached to the Form 4 Order that the trial court issued when the case settled. Also attached to the Form 4 Order is a Confession of Judgment crafted by DC & Sons and Pavilion in which Pavilion confessed judgment for $4,580,015.93 in exchange for a release of personal liability for Larry McNair and a waiver of trial against Pavilion for punitive damages. The entire Form 4 Order, which includes the Assignment and the Confession of Judgment, is attached as Exhibit A.

65. January 18, 2011, was also the day the trial was to commence on the claims asserted by DC & Sons against Pavilion and McNair for breach of contract and abuse of process. The Honorable Roger M. Young, Sr., presided.

66. Based on information and belief, the first day of trial began with the court hearing arguments from counsel on DC & Sons's motion for summary judgment After the arguments concluded, Judge Young stated from the bench that he intended to grant the motion for summary judgment in favor of DC & Sons. Following the court's pronouncement, Dan David, who became counsel for Pavilion and McNair after Nexsen Pruet withdrew as counsel almost two years before, and who continued to represent Pavilion over the course of the litigation until its conclusion, requested "just a few minutes" to see if an agreement could be reached between the parties. The court granted the request and a recess was taken A copy of the transcript of the January 18, 2011 hearing is attached as Exhibit B.

67. Based on information and belief, the parties signed a purported Assignment and Confession of Judgment during the court recess

68. Also during the court recess, Judge Young signed the order granting summary judgment in favor of DC & Sons. A copy of the order had been sent to the judge by email the day before. (Ex. B, pp. 2, 16.)

69. When the parties were back on the record, counsel for DC & Sons announced that the parties had reached an agreement and that Pavilion had confessed judgment for $4,580,015.93 (Ex. B, pp 16 - 17.)

70. Drew Epting, counsel for DC & Sons, made a general statement about the assignment of claims and proceeds from Pavilion and McNair to DC & Sons, but Mr. Epting did not explain that Pavilion and McNair had waived any right they might have to file a legal malpractice claim against Nexsen Pruet and had purported to assign any such right to DC & Sons. The terms of the Assignment were not discussed with the court on the record. (Ex. B, p. 17.)

71. According to the language of the Assignment, its terms were as follows:

a. Pavilion and McNair assigned to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against Nexsen Pruet.

b. At the election of DC & Sons, Pavilion and McNair assigned all claims to be asserted against Nexsen Pruet to include breach of contract, breach of fiduciary duty, professional negligence, etc.

c. Pavilion and McNair placed full control of the litigation in the hands of DC & Sons, including the handling of the litigation, trial, appeal, settlement, and waiver of the attorney-client privilege and work-product protection.

d. Pavilion and McNair agreed to cooperate in the prosecution of the action against Nexsen Pruet and to pursue the litigation as if they retained a right to the proceeds.

e. DC & Sons agreed to bear the cost of the litigation.

f Pavilion and McNair acknowledged that the suit will be brought in their names.

g. Pavilion and McNair directed the earnest money plus interest to be turned over to DC & Sons and their counsel.

h. The parties agreed that the first $250,000 received in a settlement or judgment will be split equally between DC & Sons on the one hand and Pavilion and McNair on the other. All additional funds shall be for the benefit of DC & Sons.

72. Counsel for DC & Sons proffered the Confession of Judgment to the trial court and explained how the amount of $4,580,015.93 was determined. No evidence was presented to support the amount and no hearing was conducted to test the amount. (Ex. B, pp. 17 - 19.)

73. The trial court then asked counsel for DC & Sons how the assignment should be reflected, and counsel for DC & Sons said that the assignment was handwritten and would be provided to the court and did not need to be reflected in the Form 4 Order. The court then suggested that the Form 4 state merely that the case had been settled and the amount of damages had been put on the record. Counsel for DC & Sons agreed. (Ex. B, pp. 20 - 21.)

74. Nexsen Pruet was not counsel for Pavilion and McNair at this time and had not been counsel for Pavilion and McNair since March 2009 After Nexsen Pruet's withdrawal from the case, Pavilion and McNair were represented by Attorney Dan David.

75. Based on information and belief, the present case is proceeding pursuant to the Assignment, and Pavilion and McNair are not the real parties in interest The real party in

interest is DC & Sons because the claims and proceeds from this case have been assigned to DC & Sons

76 Although DC & Sons has never been a client of Nexsen Pruet, DC & Sons controls this case and Pavilion and McNair have allowed DC & Sons to use their names as former clients of Nexsen Pruet to bring this litigation. By purporting to be a case brought by Pavilion and McNair, this action conceals from the Court and the factfinder the real party in interest.

77. DC & Sons and Pavilion and McNair have colluded to harm Nexsen Pruet by entering into an agreement permitting an entity that is not and has never been a client of Nexsen Pruet (DC & Sons) to control litigation filed against Nexsen Pruet for legal malpractice and breach of fiduciary. Additionally, the parties have colluded to obtain a confession of judgment from Pavilion for an amount that is excessively high and unsupported, allowing a windfall to DC & Sons who was never a client of Nexsen Pruet with no risk to Pavilion and McNair who confessed the judgment. The parties have also colluded to conceal these facts from the Court and the factfinder in the present case.

78. As a result of the actions of Plaintiffs and DC & Sons, Nexsen Pruet has suffered damages by having to defend a case that is based on an illegal assignment and that is so tainted by the conduct of Plaintiffs and DC & Sons that it should be dismissed.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

79. Paragraphs 1 through 78 above are incorporated here.

80. Pavilion and McNair have waived their right to assert the claims alleged in the Complaint because they have assigned the claims and the proceeds to DC & Sons as well as the right to control the litigation.

81. Upon information and belief, the present case is proceeding pursuant to the Assignment and DC & Sons is the real party in interest.

82. DC & Sons is not and has never been a client of Nexsen Pruet and therefore cannot state a claim against Nexsen Pruet for legal malpractice and breach of fiduciary duty.

83. Additionally, the circumstances under which the Assignment and Confession of Judgment were crafted and executed are of such a collusive nature that these entire proceeds are tainted and should be dismissed.

84. Accordingly, Nexsen Pruet seeks a declaration pursuant to Rule 57, SCRCP, and S.C. Code Ann. § 15-53-10 *et seq.*, that (1) the Assignment is illegal because it violates the public policy of this State; (2) Plaintiffs have waived their right to assert the causes of action alleged here because they have assigned those claims and the proceeds from such claims to DC & Sons; (3) DC & Sons is the real party in interest because the claims and proceeds have been assigned to DC & Sons and Plaintiffs have given DC & Sons full control of the litigation; and (4) the Complaint should be dismissed with prejudice because DC & Sons has never been a client of Nexsen Pruet and therefore cannot state a claim against Nexsen Pruet.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Complaint and stated a Counterclaim against Pavilion and McNair (Plaintiffs) and DC & Sons, Nexsen Pruet prays that the Court:

1. Deny the relief sought by Plaintiffs in the Complaint and dismiss the Complaint with prejudice;

2. Declare the agreement between Plaintiffs and DC & Sons assigning the claims and proceeds of this case to DC & Sons void as against public policy;

3. Enter judgment in favor of Nexsen Pruet as to the Counterclaim asserted against Plaintiffs and DC & Sons;

4. Award Nexsen Pruet all other relief that the Court deems just and proper under the circumstances, including attorneys' fees and costs associated with having to defend the allegations in the Complaint and to assert the Counterclaim.

SOWELL GRAY STEPP & LAFFITTE LLC

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Columbia, South Carolina
October 20, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR, Plaintiffs, v. NEXSEN PRUET, LLC, Defendant, v. DC & SONS, LLC, Counterclaim Defendant.	)	Civil Action No.: 2011-CP-10-05774

FILED
2013 OCT -9 AM 10:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER

This matter is before the Court on Defendant Nexsen Pruet LLC's motion for summary judgment. Nexsen Pruet seeks an order granting summary judgment in its favor as to all causes of action in the complaint and counterclaim on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

The motion was heard on March 13, 2013. Elizabeth Van Doren Gray and Tina Cundari of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Nexsen Pruet. Andrew K. Epting, Jr., and George Kefalos appeared on behalf of Pavilion Development Corporation and Larry McNair (Plaintiffs) and on behalf of Counterclaim Defendant DC & Sons, LLC (DC & Sons). After considering the arguments presented by counsel and the written memoranda filed, the Court grants Nexsen Pruet's motion for summary judgment. The Court finds that this case, although brought in the name of Plaintiffs, is proceeding pursuant to an assignment of a legal malpractice claim from Plaintiffs to DC & Sons. The Court concludes the assignment in this

case is void as against public policy because it is an assignment between adversaries in litigation. Judgment is entered in favor of Nexsen Pruet.

BACKGROUND

This is a legal malpractice case. Pavilion Development Corporation and Larry McNair have sued Nexsen Pruet, LLC for legal malpractice that allegedly arose in litigation between Plaintiffs and DC & Sons. The litigation between Plaintiffs and DC & Sons began in 2007, when Plaintiffs sued DC & Sons for specific performance of a contract to purchase a piece of property at Shem Creek. [Compl. ¶ 13.] At the same time that they filed the complaint, Plaintiffs filed a notice of lis pendens. *Id* Plaintiffs subsequently amended the complaint, dropping the cause of action for specific performance and pursuing claims for breach of contract and an equitable lien only. [Compl. ¶ 22.] Plaintiffs maintained the lis pendens, however, which DC & Sons alleged constituted an abuse of process. [Compl. ¶¶ 15, 23, 25.]

Plaintiffs were represented by Nexsen Pruet from the beginning of the case until April 2009, when Nexsen Pruet was permitted to withdraw as counsel by order of the court. [Wallace Aff., Jan. 14, 2013, ¶¶ 3, 6, 7.] The court permitted Nexsen Pruet to withdraw as counsel because Nexsen Pruet's lawyers had become witnesses to the facts of the case due to the allegations of abuse of process. [*Id.* ¶¶ 6, 7.] Attorney Dan David was substituted as counsel for Plaintiffs. [Wallace Aff., Oct. 19, 2011, ¶¶ 7, 8.] DC & Sons was represented throughout the case by Andrew K. Epting, Jr., and George Kefalos, who represent DC & Sons in this action as well. [Wallace Aff., Jan. 14, 2013, ¶ 4.]

On January 18, 2011, nearly twenty-one months after Nexsen Pruet withdrew as counsel, Plaintiffs and DC & Sons settled the case. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] The settlement was reached during a court recess on what was to be the first day of

trial. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Jan. 18, 2011, Hr'g Tr. p. 14.] The recess was taken after DC & Sons argued its motion for summary judgment. *Id* at pp. 13, 14. The trial judge stated that he intended to enter judgment in favor of DC & Sons. *Id.* The parties asked for time to see if they could reach an agreement. *Id.*

The Settlement

The terms of the settlement reached between Plaintiffs and DC & Sons are as follows. First, Pavilion Development Corporation (Pavilion) confessed judgment in favor of DC & Sons for $4,580,015.93. [Ex. A, Nexsen Pruet's Mot. for Summ. J.] In exchange, Plaintiffs received a release of personal liability of Larry McNair and Lowell Frazier, the principals of Pavilion, and a waiver of trial against Pavilion on punitive damages. *Id.* Second, the parties entered into an agreement in which Plaintiffs assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect to own the claims themselves. *Id.* Plaintiffs also gave DC & Sons the right to control the litigation, including trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with Nexsen Pruet. *Id.*

The pertinent terms of the agreement are as follows.

- "Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties."
- "At DC & Sons election Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc."
- "Further, Pavilion and McNair place full control of the said litigation in the hands of DC & Sons, to include the handling of the litigation, trial, appeal,

settlement, and the waiver of the attorney-client and work-product privilege with the Nexsen Pruet firm."

- "Further, Pavilion and McNair agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds."
- "The cost of the litigation will be borne by DC & Sons alone."
- "Pavilion and McNair acknowledge [that the] suit will be brought in their names."
- "Pavilion and McNair direct that the earnest money [$50,000] plus interest shall be turned over to DC & Sons and their counsel."
- "DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons."

Id.

After reaching an agreement, the parties went back on the record. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J , Hr'g Tr., Jan. 18, 2011, p. 14.] Counsel for DC & Sons announced to the court that the case had been settled. *Id.* Counsel for DC & Sons summarized the terms of the settlement by stating that "the effective deal is Mr. McNair is relieved from liability," and that Pavilion confessed judgment in the amount of $4,580,015.93, which according to counsel for DC & Sons, represented the actual damages to DC & Sons. *Id* When the court asked how the amount was determined, counsel for DC & Sons provided an explanation "from memory," without submitting any evidence or testimony. *Id.* at pp. 15-16. Although counsel for DC & Sons told the court that claims and proceeds had been assigned to DC & Sons, he did not say

which claims or which proceeds, and did not tell the court that the assignment was an assignment to DC & Sons of all proceeds from a legal malpractice case to be brought against Nexsen Pruet, and that it gave DC & Sons full control over the litigation, including the right to elect to own the very claims themselves. *Id.* at p. 14.

When the trial judge asked counsel for DC & Sons how the assignment should be reflected in the Form 4 order, counsel for DC & Sons stated that the assignment was handwritten and did not need to be reflected in the Form 4 Order. *Id.* at p. 17. The court then suggested that the Form 4 Order state merely that the case has been settled and the amount of damages was put on the record. *Id.* at pp. 17-18 Counsel for DC & Sons agreed. *Id.* at p. 18.

The Present Case

As contemplated in the agreement between Plaintiffs and DC & Sons, Nexsen Pruet has now been sued for legal malpractice and breach of fiduciary duty. [Compl.] The case was filed on August 16, 2011, and has been brought in the names of Pavilion Development Corporation and Larry McNair. *Id.* The assignment was not attached to or otherwise referenced in the complaint. *Id.* Plaintiffs are now represented by Andrew K. Epting, Jr., and George J. Kefalos, the very same lawyers who represented DC & Sons in the litigation between Plaintiffs and DC & Sons, and who represent DC & Sons in this action. *Id.*

Nexsen Pruet answered the complaint and asserted a counterclaim for declaratory judgment against Plaintiffs and a new party, DC & Sons, which was added to the case by Nexsen Pruet as a counterclaim defendant. [Ans. & Countercl.] Among other things, the counterclaim seeks an order declaring the assignment void as against public policy. Plaintiffs and DC & Sons moved to dismiss the counterclaim. [Mots. to Dismiss, Nov. 2, 2011, and Nov. 21, 2011.]

Following a hearing, the court denied the motions to dismiss, allowing the counterclaim against Plaintiffs and DC & Sons to proceed. [Order, Apr. 26, 2012.]

On January 14, 2013, Nexsen Pruet filed a motion for summary judgment arguing, among other things, that judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C 223, 235, 692 S.E.2d 499, 505 (2010). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203. "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 198, 659 S.E.2d at 203.

An assignment is a contract, and the question of whether it is void as against public policy is a question of law. ("The interpretation of a contract is an action at law."). *See also*

Gurski v. Rosenblum & Ftlan, LLC, 885 A 2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.")

LAW / ANALYSIS

Nexsen Pruet contends that summary judgment should be granted in its favor as to all causes of action in the complaint and counterclaim because this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Nexsen Pruet further contends that the circumstances under which this case arose are tainted with collusion, and the taint cannot be cured by simply striking the assignment and allowing the case to proceed as filed. The Court agrees.

I. Assignment of Legal Malpractice Claims

A. Law

South Carolina appellate courts have not addressed the question of whether a legal malpractice claim is assignable. Courts in other jurisdictions have.

1. The majority view

The majority view is that legal malpractice claims are not assignable because they are void as against public policy. The following states have adopted the majority view: **Arizona,** *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002); **California,** *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); **Colorado,** *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); **Florida,** *Law Office of David J. Stern v. Sec Nat'l Servicing Corp* , 969 So.2d 962 (Fla. 2007); **Illinois,** *Wilson v. Cornet Ins Co.*, 689 N.E.2d 1157 (Ill. 1997), *but see Learning Curve Intern., Inc. v. Seyfarth Shaw LLP*, 911 N.E.2d 1073 (Ill. App. 2009) (allowing

an assignment as part of a transfer of assets in a merger); **Indiana,** *Picadilly, Inc. v. Raikos,* 582 N.E 2d 338 (Ind. 1991) and *State Farm Fire Mut. Auto Ins. Co. v. Estep,* 873 N.E.2d 1021 (Ind. 2007); **Kansas,** *Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson,* 827 P.2d 758 (Kan. 1992); **Kentucky,** *Davis v. Scott,* 320 S.W.3d 87 (Ky. 2010) and *Coffey v. Jefferson County Bd. of Educ.,* 756 S.W.2d 155 (Ky. Ct. App. 1988); **Michigan,** *Joos v. Drillock,* 338 N.W.2d 736 (Mich. Ct. App. 1983); **Minnesota,** *Wagener v McDonald,* 509 N.W.2d 188 (Minn. Ct. App. 1993); **Missouri,** *Freeman v. Basso,* 128 S.W.3d 138 (Mo. Ct. App. 2004); **Nebraska,** *Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C.,* 523 N.W.2d 254 (Neb. 1994); **Nevada,** *Chaffee v. Smith,* 645 P.2d 966 (Nev. 1982); **New Jersey,** *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.,* 925 F. Supp. 252 (D N.J. 1996) *aff'd,* 124 F.3d 185 (3d Cir.1997); **Tennessee,** *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865 (Tenn. 1996); **Virginia,** *MNC Credit Corp. v. Sickels,* 497 S.E.2d 331 (Va. 1998); **West Virginia,** *Delaware CWC Liquidation Corp. v. Martin,* 584 S.E.2d 473 (W. Va. 2003). *See also* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable."). **North Carolina** recently adopted the majority view. *Revolutionary Concepts, Inc. v. Clements Walker PLLC,* __ S.E.2d ___, 2013 WL 1876777 (N.C. Ct. App. May 7, 2013).

Several public policy reasons have been recognized for prohibiting such assignments. "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v. Martin,* 584 S.E.2d 473 (W. Va. 2003). Assignments of legal malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of

the relationship between an attorney and a client and the need to preserve the sanctity of that relationship" counsel against permitting such assignments. *Gurski v. Rosenblum & Filan,* LLC, 885 A.2d 163 (Conn. 2005). Assignments of legal malpractice claims "relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights" *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

Additional reasons cited for prohibiting the assignment of legal malpractice claims are that they "place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* Allowing legal malpractice claims to be assigned "would encourage the commercialization of such claims and in turn spawn increased and unwarranted malpractice actions." *Gurski*, 885 A.2d at 170. Finally, allowing such assignments "would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender." *Id.*

2. The minority view

A minority of jurisdictions have declined to adopt a *per se* bar against the assignment of legal malpractice claims but have instead taken a case-by-case approach in evaluating whether a particular assignment is void. These include **Connecticut,** *Gurski v. Rosenblum & Filan, LLC,* 885 A.2d 163 (Conn. 2005); **District of Columbia,** *Richter v. Analex Corp.,* 940 F. Supp. 353 (D.D.C. 1996); **Georgia,** *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108, 111 (Ga. 2013)l

Maine, *Thurston v Cont'l Cas Co.,* 567 A.2d 922 (Me. 1989); **Massachusetts,** *New Hampshire Ins. Co., Inc. v. McCann,* 707 N.E.2d 332 (Mass. 1999); **New York,** *Vitale v. City of New York,* 183 A.D.2d 502, (N.Y. App. Div. 1992); **Oregon,** *Gregory v. Lovlien,* 26 P.3d 180 (Or. Ct. App. 2001); **Pennsylvania,** *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 539 A.2d 357 (Pa. 1988); **Rhode Island,** *Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057 (R.I. 1999); **Texas,** *Zuniga v. Groce, Locke & Hebdon,* 878 S.W.2d 313 (Tex. App. 1994); and **Washington,** *Kommavongsa v. Haskell,* 67 P.3d 1068, 1078 (Wash. 2003). *See also St. Luke's Magic Valley Reg'l Med Ctr. v Luciani,* 293 P.3d 661 (Idaho 2013) (holding that "while legal malpractice claims are generally not assignable, where the legal malpractice claim is transferred to an assignee in a commercial transaction, along with other business assets and liability, such a claim is assignable.").

3. Assignments between adversaries in litigation.

Although there is division among courts as to whether to adopt an absolute bar against the assignment of legal malpractice claims or to take a case-by-case approach, courts uniformly hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. *See, e g, Kim v. O'Sullivan,* 137 P.3d 61 (Ct. App. Wash. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga v. Groce, Locke & Hebdon,* 878 S.W.2d 313 (Tex. Ct. App 1994) ("It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause given them a financial interest in switching."); *Picadilly, Inc. v. Raikos,* 582 N.E.2d 338 (Ind 1991) (citing the "disreputable public role reversal that would

result during the trial" if assignments between adversaries were permitted), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy"). This is true even in states that have adopted the minority, case-by-case approach. *See Kommavongsa v Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) ("In sum, we can see no advantage flowing to the legal system or the public that it serves from permitting assignments of malpractice claims to adversaries in the same litigation that gave rise to the alleged malpractice.").

There are several reasons for prohibiting assignments between adversaries in litigation in which the alleged legal malpractice arose. To begin, the "counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when she was the very party who benefited from that malpractice in the underlying litigation, would engender a perversion that would erode public confidence in the legal system." *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005). Additionally, assignments between adversaries provide an "opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa*, 67 P.3d at 1078. "[S]uch a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the legal malpractice." *Id.* (citing *Coffey*, 756 S.W.2d at 156-57).

As one court has explained:

> A party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action "is one peculiarly vested in the client." . . . There is, in addition, a high risk

> that the plaintiff and defendant in the underlying litigation will collude to the detriment of the defendant's lawyer.
>
> . . .
>
> If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.

Alcman Servs. Corp. v. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) (internal citations omitted).

Further, "[a] defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence." *Kommavongsa*, 67 P.3d at 1078. Additionally, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.* Moreover, because legal malpractice cases present a "trial within a trial," an assignment to an adversary "arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession." *Id.*

Finally, courts have expressly denounced the scenario where a party confesses judgment in favor of his adversary and then assigns to his adversary the right to sue the party's lawyer for legal malpractice. *See Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (describing the assignment and confession scenario as a "contrived and elaborate scheme" that has been denounced by other courts); *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (referring to a settlement involving an assignment of a legal malpractice

claim to an adversary and a confession of judgment as a "contrived and elaborate scheme" that is "so collusive that same should be held to be against public policy").

B. Analysis

The present case involves a confession of judgment and an assignment of a legal malpractice claim between adversaries in litigation in which the alleged legal malpractice arose. To settle the litigation with DC & Sons, Pavilion confessed judgment in the amount $4,580,015.93 in exchange for a release of personal liability as to Pavilion's principals, Larry McNair and Lowell Frazier. Pavilion did so without challenging the amount or requiring DC & Sons to present evidence to support it. Plaintiffs then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, and assigned the right to elect to own the claims themselves. Plaintiffs gave DC & Sons complete control over the malpractice case, including the trial, appeal, and settlement, and the power to waive the attorney-client privilege and work-product protection. Plaintiffs agreed to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. Plaintiffs acknowledged that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone.

This scenario has been expressly denounced by other courts, and the Court denounces it here. Plaintiffs and DC & Sons have converted the legal malpractice action into a commodity to be exploited and transferred to an economic bidder (DC & Sons) that Nexsen Pruet has never represented or owed any legal duties to. By placing full control of the litigation against Nexsen Pruet in the hands of DC & Sons and their counsel, including the right to waive the attorney-client privilege between Plaintiffs and Nexsen Pruet, Plaintiffs have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and

fiduciary nature of the relationship. The assignment spawned this litigation, which appears to have been brought for the purpose of collecting a judgment confessed rather than remedying a wrong. Accordingly, the Court concludes that the assignment is void as against public policy.

In their opposition to Nexsen Pruet's motion for summary judgment, Plaintiffs do not defend the validity of the assignment or argue that it is not void as against public policy. Instead, Plaintiffs argue that they have not assigned the claims to DC & Sons, but rather have assigned only a portion of the proceeds, and argue that they remain the real parties in interest. This is contrary to the plain language of the assignment.

According to the plain language of the assignment, the proceeds have been assigned to DC & Sons The assignment states: "Pavilion and McNair assign to DC & Sons *all proceeds* from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties." [Ex A, Nexsen Pruet's Mot for Summ. J.] The assignment also states: "[Pavilion and McNair] agree to cooperate in the prosecution of this action and to pursue the litigation *as if they retained the right to all proceeds.*" *Id.* There is nothing unclear or ambiguous about the language in the assignment. Additionally, the assignment states: "At DC & Sons election, Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc." *Id* This "right to elect" reinforces the fact that DC & Sons is in control and has the right at any time and without any notice to own the very claims themselves. DC & Sons simply has to say when.

The fact that DC & Sons agreed to give half of the first $250,000 received in its pursuit of this action to Plaintiffs does not change the fact that DC & Sons owns the right to the proceeds. DC & Sons has simply agreed to allocate the proceeds in a way that gives Plaintiffs some nominal interest in the case, in an attempt to avoid the conclusion that an assignment of a

legal malpractice claim has occurred. At most, Plaintiffs stand to receive $125,000 – $50,000 of which represents the money they have already directed to be paid to DC & Sons in settlement of the prior case – when there is allegedly $4,580,015.93 at stake. Plaintiffs' interest represents 2.7% of the total damages alleged. When the $50,000 in earnest money is taken into account, Plaintiffs' interest diminishes to 1.637%. This is far less than the interest held by assignors in other cases, and yet the courts in those cases have held that an illegal assignment had occurred. *See Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) (holding that an illegal assignment had occurred even though the assignor retained a 20% interest in the proceeds); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred even though the assignor retained a 10% interest in any net recovery). Accordingly, the Court concludes that DC & Sons is the party that has the real, actual, material, and substantial interest in this case.

Moreover, the control that DC & Sons has over this case overcomes Plaintiffs' argument that only a portion of the proceeds has been assigned. Similar arguments have been made in other courts and rejected. For example, in one case the plaintiffs, conceding that Arizona law would not permit the assignment of the claim itself and in an effort to circumvent the prohibition, argued that only the proceeds of the action had been assigned, and not the cause of action itself. *Botma v Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). In rejecting this argument, the court stated:

> Whatever the form, whatever the label, whatever the theory, the result is the same. The policies create an interest in any recovery against a third party for bodily injury. Such an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable.

Id. at 542.

Similarly, in another case, the plaintiff argued that only the proceeds had been assigned and that an assignment of the malpractice claim itself had not occurred. *Davis v. Scott*, 320

S.W.3d 87 (Ky. 2010). But after examining the substance of the agreement, the court disagreed. In holding that the legal malpractice claim had been assigned, the court stated:

> This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. The terms of this settlement agreement essentially placed the control of the malpractice suit in [the assignee's] hands and rendered [the assignor's] interest merely nominal. Though [the parties to the agreement] assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against [the lawyer], but of the entire claim itself.

Id. at 91 (internal citations omitted).

Applying this same principle of looking to the substance of the agreement, courts in other jurisdictions have reached similar conclusions. *See Kim v. O'Sullivan*, 137 P.3d 61 (Wash. App. 2006) (holding that an assignment of a legal malpractice claim had occurred because the assignee and his attorney were in complete control of the malpractice suit and only they would benefit from a settlement or judgment); *Gurska v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005) (stating "we agree with those courts that have identified the 'meaningless distinction' between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments"); *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Dist. Ct. App. 2003) (recognizing that the rule prohibiting the assignment of legal malpractice claims "has been applied even in the absence of a formal assignment of the claim"); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred despite the fact that the assignor retained a ten percent interest in any net recovery because the assignor gave his former adversary "absolute control over the litigation, including the unfettered right to settle the malpractice suit on such terms as [the adversary] determines")

Finally, Plaintiffs have all but admitted that an illegal assignment has occurred. On March 21, 2013, eight days after the hearing before this Court on Nexsen Pruet's motion for summary judgment, Plaintiffs and DC & Sons arranged a hearing before The Honorable Roger Young for the purpose of presenting an amended settlement agreement. [Tr. dated Mar. 21, 2013.] In the proposed amended settlement agreement, titled "Amended Agreement re: Assignment," Plaintiffs state: "the parties to the settlement wish to remove from the settlement the right of control by DC & Sons and to remove the right of assignment of proceeds or claims . . . ." [Ex. D, Pls.' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.] By stating that the parties wish to remove the right of assignment of proceeds or claims, Plaintiffs appear to have conceded that the claims and proceeds have been assigned. Further, counsel's conduct of attempting to have another judge approve an amended settlement agreement after the hearing on the motion for summary judgment is a concession that the settlement agreement in its current form is illegal.

Plaintiffs also contend that summary judgment is not appropriate because they have not had a full and fair opportunity to complete discovery. But there are no facts to be discovered that will impact the analysis of whether the assignment is void as against public policy. The assignment is a contract, and the question of whether it is void as against public policy is a question of law. *Alexander's Land Co , LLC v. M & M & K Corp.*, 390 S.C. 582, 592, 703 S.E.2d 207, 212 (2010) ("The interpretation of a contract is an action at law."). *See also Gurski v. Rosenblum & Filan, LLC*, 885 A 2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs , LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

No facts or testimony can change the Court's conclusion that the agreement between Plaintiffs and DC & Sons is an assignment of a legal malpractice claim that is void as against public policy. The assignment says what it says. There is no genuine issue of material fact regarding the terms of the assignment or the circumstances under which it was entered. Plaintiffs have not presented any evidence to dispute the existence of the assignment or the circumstances under which it was entered.

Accordingly, the Court finds that Plaintiffs have assigned the legal malpractice claim against Nexsen Pruet to their adversary in the litigation in which the alleged legal malpractice arose The Court concludes as a matter of law that the assignment is void as against public policy. The Court reaches this conclusion without deciding whether South Carolina courts should adopt the majority or minority rule. That is for the appellate courts to decide. Instead, the Court is guided by decisions in other jurisdictions – some of which have adopted the majority view, and some of which have adopted the minority view – that hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. The Court is further persuaded by those courts that have expressly denounced scenarios like the one in the present case, involving a confession of judgment and an assignment.

The Court concludes that the assignment in this case is void as against public policy. Nexsen Pruet's motion for summary judgment is granted.

II. The Remedy

Plaintiffs argue that even if the assignment is void as against public policy, the proper remedy is to strike the assignment and to allow the case to proceed as pled and filed. Nexsen Pruet argues that the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form.

The Court finds that this case cannot simply proceed as filed because it was never filed by Plaintiffs in the first instance. Plaintiffs ceded all rights and control of the case to DC & Sons, including the right to determine whether to file the case in the first instance. The entire case has been controlled by DC & Sons and their counsel, who also represent Plaintiffs. Further, the facts and circumstances under which the assignment was entered created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment. Accordingly, the Court concludes that the appropriate remedy is to dismiss the case with prejudice.

A. Law

1. Dismissal with prejudice / Judgment in favor of law firm

Most courts that have addressed the question of whether an assignment of a legal malpractice claim is void as against public policy do not discuss the remedy. The courts either dismiss the case outright or enter summary judgment in favor of the law firm. *See, e.g., Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) (dismissing the case outright and entering judgment in favor of the law firm); *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn 1996) (affirming dismissal of case brought pursuant to the illegal assignment); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (affirming summary judgment in favor of the attorney or the law firm without addressing whether the client has the right to re-file the case), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson County Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (same).

2. Dismissal without prejudice

At least three courts that have addressed the remedy question have concluded that the case should be dismissed without prejudice. This is because cases born out of an illegal assignment are "tainted in some respect," and to allow them to proceed as filed would be "to wink at the rule against assignment of legal malpractice claims." *Davis v Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (quoting *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. 2002)). In *Davis*, the court held that the proper remedy was dismissal without prejudice and stated that although the client did not forfeit the malpractice claim, "the current suit, born of the improper assignment, cannot be permitted to continue." 320 S.W.2d at 92. Accordingly, if the client decided to reassert his claim against the attorney, the client could do so "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest." *Id.* In *Botma*, the court ruled that the case could not continue in the client's name because the client retained no interest in the lawsuit. 39 P.3d at 543. Any benefit that the client received in simply continuing the case would be used to pay the $12 million judgment confessed in favor of the client's adversary. *Id.*

Similarly, another court held that a case brought pursuant to illegal assignment should be dismissed without prejudice and that if the client wanted to re-file a malpractice claim against the law firm, the new case could not be controlled in any way by the party to whom the claims were initially assigned and the client could not be represented by attorneys associated with that party. *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009) The court recognized that a dismissal without prejudice "does not eliminate the risk of collusion in future cases completely, but it does provide the client with more of an incentive to 'seriously litigate the amount of damages' in the underlying suit because now the

client bears the risk of not recovering in the legal malpractice action." *Id.* "Furthermore, it eliminates the public and disreputable role reversals that have concerned many courts." *Id.*

B. Analysis

The Court finds that the circumstances under which the present case arose and has proceeded require the Court to dismiss the case with prejudice. The present case was filed by Plaintiffs in name only and without notice to the Court or to Nexsen Pruet that Plaintiffs assigned the proceeds and the claims to their adversary in the litigation in which the alleged legal malpractice arose. [Compl.] Although brought in Plaintiffs' name, the Court finds that the case has belonged to DC & Sons since its inception. As the owner of the claims and proceeds, and as the party with full control over the case, the Court finds that DC & Sons is responsible for every decision made in this case on behalf of Plaintiffs, including the choice of counsel, the filing and service of the complaint, the serving of discovery, and the filing of motions opposing all motions filed by Nexsen Pruet in the case, including the motion to disqualify counsel[1] and the present motion for summary judgment. The Court concludes that the case cannot proceed as pleaded because it was not brought by the client, Pavilion and McNair, in the first instance.

Moreover, the circumstances under which the assignment arose and the conduct of counsel for Plaintiffs and DC & Sons, indicate that the opportunity for collusion was present. The circumstances are as follows:

1. The settlement of the case between Plaintiffs and DC & Sons was reached during a court recess on what was to be the first day of trial after Plaintiffs learned that the trial court

[1] Nexsen Pruet filed a motion to disqualify Andrew Epting and George Kefalos as counsel for Plaintiffs on the basis that they are witnesses to the facts of the case in which the alleged legal malpractice arose because they represented Plaintiffs' adversary, DC & Sons, in the underlying litigation. Plaintiffs opposed the motion, and following a hearing, the court ruled that the motion be held in abeyance pending discovery and any necessary evidentiary hearing. [Order, Apr. 26, 2012.]

intended to grant DC & Sons's motion for summary judgment. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.]

2 During the court recess, Pavilion confessed judgment in favor of DC & Sons for $4.5 million without challenging the amount of damages or requiring DC & Sons to present evidence to support the amount confessed. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] In exchange, Plaintiffs obtained a full release of personal liability as to its principals, Larry McNair and Lowell Frazier. *Id.* At the same time, Plaintiffs assigned all proceeds in a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty to DC & Sons and gave DC & Sons full control over the litigation, including the right to elect to own the claims themselves. *Id.* The assignment was drafted by counsel for DC & Sons. [Tr. 6:14-23, Mar. 13, 2013.]

3. Counsel for DC & Sons did not put all terms of the assignment on the record. [Ex B, Nexsen Pruet's Mem in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.] Counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair. *Id.*

4. Plaintiffs filed the present case against Nexsen Pruet without revealing the existence of the assignment. [Compl.] The existence of the assignment came to the Court's attention through the filing of the counterclaim by Nexsen Pruet. [Answer & Countercl.]

5. Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and also represent DC & Sons in the present case. [Wallace Aff., Jan. 14, 2013, ¶ 4.] This means that the lawyers who represented the adverse party in the case in which the alleged legal malpractice arose have now switched sides and represent the plaintiffs who were

once adverse to their client. At the same time, the lawyers continue to represent DC & Sons, in whose favor the judgment was confessed.

6. Eight days after the hearing on Nexsen Pruet's motion for summary judgment regarding whether the assignment is void as against public policy, Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its counsel) asking Judge Young to approve a proposed amended settlement agreement striking the assignment but keeping the confession of judgment in place. [Hr'g Tr., Mar. 21, 2013.]

7. After the hearing, Judge Young issued a Form 4 order and entered it in the present case, Case No. 2011-CP-10-05774. [Order, Mar. 21, 2013.] The order states: "The proposed Amended Settlement Agreement has been DISMISSED." *Id.* Thereafter, Nexsen Pruet filed the transcript from the hearing before Judge Young. [Not. of Filing Tr. of H'rg..]

8. According to the transcript, the attorneys present were Andrew K. Epting, Jr., George J. Kefalos, who represented DC & Sons in the litigation between Plaintiffs and DC & Sons and who represent both Plaintiffs and DC & Sons in the present case, and Dan David, who represented Plaintiffs in the prior litigation. [Hr'g Tr , Mar. 21, 2013] The only attorneys who spoke on the record were Epting and Kefalos. *Id.* Dan David was silent. *Id.* Mr. Epting asked Judge Young to approve an amended agreement regarding the assignment of the legal malpractice claim to "put the control in the [malpractice suit] in McNair and Pavilion and to void the assignment." [Hr'g Tr. 4:6-8.] Mr. Kefalos stated

> I didn't want to have Judge Nicholson issue an order about the validity of this one way or another because then it would create some precedent in South Carolina about this thing, and my feeling was the best thing to do is just take it off the table and void the assignment so he doesn't have to decide and we'll give up – return the right to control back to Pavilion and we can move forward.

[Hr'g Tr. 5:20 – 6:6.] Judge Young declined to approve the amended agreement, stating: "I'm a little concerned that you're asking the Court to do something to help you out in the position in another case and there is another party out there that has an interest in what we do here in that it affects their case." [Hr'g Tr. 6:8-12.] Further, Judge Young repeatedly stated that he was "uncomfortable" with what he was being asking to do and that his "inner alarms" were going off. [Hr'g Tr. 6:15-16, 21; 7:1, 13-14, 20-21; 8:14.]

9. In response to Requests for Admission served by Nexsen Pruet, Plaintiffs admit that Pavilion has not paid anything to satisfy the $4.5 million judgment. [Ex. C, Nexsen Pruet's Mem. in Supp. of Mot. for Summ. J.] Moreover, it does not appear that Pavilion is at risk of having to pay the judgment, given that its counsel has asked the Court to keep the confession of judgment in place. [Hr'g Tr. 34.3-7, Mar. 13, 2013.] In addition, counsel submitted a proposed amended agreement to Judge Young stating that Pavilion agrees that DC & Sons retains the judgment and all rights as judgment creditor. [Ex. D, Pls' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.].

These circumstances lend further support to the Court's conclusion that the proper remedy is dismissal with prejudice. Plaintiffs have used the court system to litigate a claim they do not own, without revealing this important fact to the Court or to the defendant. By assigning the proceeds, control, and the right to own all claims to DC & Sons, Plaintiffs completely and voluntarily relinquished their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. Further, after the hearing on the motion for summary judgment, Plaintiffs and DC & Sons went to another judge to try to have the assignment voided while the motion was still pending.

Additionally, the confession of judgment for an unsupported, multi-million dollar amount, coupled with the assignment of the legal malpractice claims, strongly suggest that collusion has occurred. The fact that counsel for Plaintiffs and DC & Sons seek to have the confession of judgment remain in place further supports the conclusion that Plaintiffs do not have any intention of paying the judgment and DC & Sons does not have any intention of executing on it, and therefore the confession was never intended to have any purpose other than to be used in a case against Nexsen Pruet as purported evidence of damages. At the very least, the Court finds that the opportunity for collusion was present.

Given these facts and circumstances, the Court concludes that this case is not a genuine legal malpractice case It is an action to collect a judgment confessed. The Court concludes that the only proper remedy under the circumstances is dismissal with prejudice. By dismissing the case with prejudice, the Court is not ruling on the merits of the legal malpractice or breach of fiduciary duty claims, especially given that the claims have been brought by an entity that has never been a client of Nexsen Pruet.

Because this case was brought by Plaintiffs in name only and under circumstances that suggest collusion, or the opportunity for collusion, the Court declines to simply strike the assignment and allow the case to proceed as pled. The conduct of Plaintiffs and DC & Sons with respect to the courts and with respect to Nexsen Pruet cannot be undone with the stroke of a pen The case is dismissed with prejudice.

CONCLUSION

Nexsen Pruet's Motion for Summary Judgment is granted on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public

policy. Accordingly, judgment is entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim, and this case is dismissed with prejudice.

IT IS SO ORDERED.

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge

Charleston, South Carolina
10/6, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	MOTION FOR SUMMARY JUDGMENT
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

FILED
2013 JAN 14 PM 2:03
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Nexsen Pruet, LLC moves for summary judgment pursuant to Rule 56(a) and (b) of the South Carolina Rules of Civil Procedure for the following reasons:

1. Summary judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim because this entire case arises out of an illegal assignment of a legal malpractice claim from Pavilion Development Corp. and Larry McNair (Plaintiffs) to their adversary, DC & Sons, as part of a settlement in the case below. **Exhibit A.** Such assignments are void as against public policy, and this case should not be permitted to proceed given these circumstances.

2. Summary judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim because Plaintiffs have waived their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty because they assigned those claims and the proceeds resulting from such claims to their adversary in the case below, DC & Sons, as part of a settlement reached between the parties.

3. Summary judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim because Plaintiffs are not the real parties in interest and the real party in interest, DC & Sons, cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet because DC & Sons is not and has never been a client of Nexsen Pruet

This motion is based upon the pleadings, the responses to written discovery, the record in the case below, the affidavit of Bruce Wallace, and any other material that may be served upon Plaintiffs and DC & Sons prior to a hearing.

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By: _____

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January 11, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR, Plaintiffs, v. NEXSEN PRUET, LLC, Defendant, v. DC & SONS, LLC, Counterclaim Defendant.	)	Civil Action No.: 2011-CP-10-05774 **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Defendant Nexsen Pruet LLC seeks an order granting summary judgment in its favor as to all causes of action on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Pavilion Development Corporation and Larry McNair (Plaintiffs) and DC & Sons, LLC, were adversaries in another case in which the alleged legal malpractice arose, and as part of the settlement of that case, Pavilion confessed judgment in favor of DC & Sons for $4,580,015.93 and then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty and the right to elect to own the claims themselves. Assignments of legal malpractice claims are void as against public policy and this case should not be permitted to proceed any further.

Even if the assignment of the legal malpractice claim were valid, summary judgment should be entered in favor of Nexsen Pruet because Plaintiffs are not the real parties in interest and have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

Further, as the real party in interest, DC & Sons cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet because DC & Sons has never been a client of Nexsen Pruet and Nexsen Pruet did not owe any duties to DC & Sons.

This motion presents a question of law as to whether the assignment of a legal malpractice claim is void as against public policy, and whether this case can be maintained under the terms of the agreement between Plaintiffs and DC & Sons. There are no genuine issues of material fact to be decided. The assignment is either void as against public policy or valid. If it is void, the case should be dismissed with prejudice. If it is valid, then it should be enforced against the parties

FACTS

On its face this case appears to be an action for legal malpractice and breach of fiduciary duty. But in reality it is an action to collect a judgment confessed by Pavilion Development Corporation in favor of DC & Sons, LLC, in the case in which the alleged legal malpractice occurred.

The Case Between Plaintiffs and DC & Sons

On April 9, 2007, Pavilion Development Corporation and Larry McNair sued DC & Sons, LLC, for specific performance of a contract to purchase a piece of property at Shem Creek. More than a year after the litigation commenced, DC & Sons asserted a counterclaim, filed a third-party complaint, and brought an independent action against Pavilion and McNair. Nexsen Pruet represented Pavilion and McNair in all pending matters until April 2009, when Nexsen Pruet was permitted to withdraw as counsel by order of the court

On January 18, 2011, nearly twenty-one months after Nexsen Pruet withdrew as counsel, the parties settled the case. The settlement was reached during a court recess on what was to be

the first day of trial. The recess was taken after the trial judge stated that he was going to enter judgment in favor of DC & Sons as to liability and that trial would proceed on damages only.

The Terms of the Settlement

There are two parts to the settlement. First, Pavilion confessed judgment in favor of DC & Sons, for $4,580,015.93, in exchange for a release of personal liability of Larry McNair and a waiver of trial against Pavilion for punitive damages. Second, the parties entered into an agreement in which Plaintiffs, among other things, assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty. **Exhibit A.**

The terms of the assignment are as follows:

- "Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties."
- "At DC & Sons election Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc."
- "Further, Pavilion and McNair place full control of the said litigation in the hands of DC & Sons, to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with the Nexsen Pruet firm."
- "Further, Pavilion and McNair agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds."
- "The cost of the litigation will be borne by DC & Sons alone."

- "Pavilion and McNair acknowledge [that the] suit will be brought in their names."
- "Pavilion and McNair direct that the earnest money [$50,000] plus interest shall be turned over to DC & Sons and their counsel."
- "DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons."

Ex. A.

After settling the case during the court recess, the parties went back on the record. Counsel for DC & Sons announced to the court that the case had been settled. **Exhibit B.** But counsel did not put all of the terms of the settlement on the record. Instead, he told the court that "the effective deal is that Larry McNair is relieved from liability," and that the confession of judgment is by Pavilion in the amount of $4,580,015.93, which according to counsel for DC & Sons, represented the actual damages to DC & Sons. *Id.* When the court asked how the amount was determined, counsel for DC & Sons provided an explanation "from memory," without submitting any evidence or testimony. *Id* Counsel for DC & Sons told the court that "the claims and the proceeds" had been assigned to DC & Sons, but he did not say which claims or which proceeds. *Id* He did not tell the court that the assignment was an assignment to DC & Sons of all proceeds from a legal malpractice case to be brought against Nexsen Pruet, or that the assignment gave DC & Sons the option to elect to own the claims themselves, or that the assignment gave DC & Sons full control over the malpractice case.

When the trial judge asked counsel for DC & Sons how the assignment should be reflected in the Form 4 order, counsel for DC & Sons stated that the assignment was handwritten and did not need to be reflected in the Form 4 Order. *Id.* The court then suggested that the Form 4 state merely that the case had been settled and the amount of damages had been put on the record. *Id.* Counsel for DC & Sons agreed. *Id.*

The Present Case

True to the agreement reached between Plaintiffs and DC & Sons, Nexsen Pruet has now been sued for legal malpractice and breach of fiduciary duty. The case was filed on August 16, 2011, and has been brought in the names of Pavilion Development Corporation and Larry McNair.[1] The assignment was not attached to or otherwise referenced in the complaint. Counsel for Nexsen Pruet discovered the assignment when searching the public index after the present case was filed.

Plaintiffs are represented by Andrew K. Epting, Jr., and George J. Kefalos, the same lawyers who represented DC & Sons in the litigation against Pavilion and McNair. Epting and Kefalos also represent their former client, DC & Sons, in the present case.

Nexsen Pruet answered the complaint and brought a counterclaim for declaratory judgment against Plaintiffs and DC & Sons to expose the fact that this case is proceeding pursuant to an assignment of a legal malpractice claim from Plaintiffs to DC & Sons. The counterclaim seeks an order declaring the assignment void as against public policy. The counterclaim also seeks an order declaring that Plaintiffs have waived the right to sue Nexsen

[1] Part of the reason that the case has been pending for so long is that there were early motions to disqualify counsel and to dismiss the counterclaim that were filed in October and November 2011 The court issued a Form 4 Order on April 26, 2012, indicating the court's ruling and stating "[f]ormal orders to follow." But no such formal orders have been issued, and the case has been stagnant for some time.

Pruet for legal malpractice and breach of fiduciary duty by assigning that right to DC & Sons. Additionally, the counterclaim seeks an order declaring that DC & Sons, as the owner of the claims and proceeds in this case, is the real party in interest, and as the real party in interest, cannot state a claim against Nexsen Pruet for legal malpractice and breach of fiduciary duty because DC & Sons has never been a client of Nexsen Pruet and Nexsen Pruet owed no duties to DC & Sons.

STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v Cnty of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203. "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 198, 659 S E.2d at 203

There are no questions of fact presented here. The pending motion presents only a discrete question of law that requires judgment to be entered in favor of Nexsen Pruet.

ARGUMENT

Summary judgment should be entered in favor of Nexsen Pruet because this case arises out of an assignment of a legal malpractice claim that is void as against public policy. Even if the assignment is not void as against public policy, judgment should still be entered in favor of Nexsen Pruet because Plaintiffs have given an entity that has never been a client of Nexsen Pruet complete control over this litigation, including the right to elect to own the very claims themselves. The terms of the assignment should be enforced against Plaintiffs and DC & Sons. Plaintiffs are not the real parties in interest, and the entity that is, DC & Sons, cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet.

For these reasons, judgment should be entered in favor of Nexsen Pruet as to all causes of action.

A. This case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

This case arises out of a settlement agreement reached between Plaintiffs and DC & Sons in other litigation in which Pavilion Development Corporation confessed judgment in favor of DC & Sons for $4,580,015 93, and then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty as a way to collect the judgment. Assignments of legal malpractice claims between adversaries in litigation are void as against public policy For this reason alone, this case should be terminated and judgment entered in favor of Nexsen Pruet.

1. A majority of states hold that legal malpractice claims are not assignable.

Eighteen states that have addressed the issue of whether a legal malpractice claim is assignable have held that it is not, no matter what the facts and circumstances surrounding the assignment. States adopting such a per se bar against the assignment of legal malpractice claims

include **Arizona,** *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002); **California,** *Goodley v. Wank & Wank, Inc*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); **Colorado,** *Roberts v. Holland & Hart,* 857 P.2d 492 (Colo. Ct. App. 1993); **Florida,** *Law Office of David J. Stern v. Sec. Nat'l Servicing Corp*, 969 So.2d 962 (Fla. 2007); **Illinois,** *Wilson v Cornet Ins Co.*, 689 N.E.2d 1157 (Ill. 1997), *but see Learning Curve Intern, Inc. v. Seyfarth Shaw LLP*, 911 N.E.2d 1073 (Ill. App. 2009) (allowing an assignment as part of a transfer of assets in a merger); **Indiana,** *Picadilly, Inc v. Raikos,* 582 N.E.2d 338 (Ind. 1991) and *State Farm Fire Mut Auto Ins Co v Estep*, 873 N.E.2d 1021 (Ind. 2007); **Kansas,** *Bank IV Wichita, Nat'l Ass'n v Arn, Mullins, Unruh, Kuhn & Wilson,* 827 P.2d 758 (Kan. 1992); **Kentucky,** *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) and *Coffey v. Jefferson County Bd of Educ*, 756 S W.2d 155 (Ky. Ct. App. 1988); **Michigan,** *Joos v Drillock,* 338 N.W.2d 736 (Mich. Ct. App. 1983); **Minnesota,** *Wagener v McDonald,* 509 N.W.2d 188 (Minn. Ct. App. 1993); **Missouri,** *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct App. 2004); **Nebraska,** *Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C.*, 523 N.W.2d 254 (Neb. 1994); **Nevada,** *Chaffee v. Smith,* 645 P.2d 966 (Nev. 1982); **New Jersey,** *Alcman Servs Corp v. Samuel H Bullock, P.C.,* 925 F. Supp. 252 (D.N.J. 1996) *aff'd,* 124 F.3d 185 (3d Cir.1997); **Tennessee,** *Can Do, Inc. Pension & Profit Sharing Plan v Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865 (Tenn. 1996); **Texas,** *Zuniga v Groce, Locke & Hebdon,* 878 S.W.2d 313 (Tex. App. 1994); **Virginia,** *MNC Credit Corp. v. Sickels,* 497 S.E.2d 331 (Va. 1998), **West Virginia**, *Delaware CWC Liquidation Corp v Martin*, 584 S E.2d 473 (W. Va. 2003). *See also* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable.").

2. There are strong policy reasons for prohibiting assignments of legal malpractice claims.

Courts have recognized several reasons for prohibiting assignments of legal malpractice claims. In the seminal case of *Goodley v. Wank & Wank, Inc.*, 133 Cal Rptr. 83 (Cal. Ct. App. 1976), the court summarized the public policy reasons for prohibiting such assignments as follows:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

133 Cal. Rptr. at 87.

The *Goodley* case and the public policy reasons stated therein have been quoted and relied upon by numerous courts across the country in holding that legal malpractice claims are not assignable as a matter of law. *See, e g , Law Office of David J. Stern v. Sec. Nat'l Servicing Corp* , 969 So.2d 962 (Fla. 2007); *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473, 478 (W. Va. 2003); *MNC Credit Corp v Sickels*, 497 S.E.2d 331 (Va. 1998); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991).

3. Assignments between adversaries in litigation are void as against public policy.

Although a minority of courts have adopted a case-by-case approach in deciding whether legal malpractice claims are assignable and have permitted assignments in commercial transactions involving the purchase and sale of assets and liabilities of a company, virtually all courts have held that assignments between adversaries in litigation are void as against public policy. *See, e.g., Kim v. O'Sullivan*, 137 P 3d 61 (Ct. App. Wash. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga v Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1994) ("It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause giving them a financial interest in switching."), *Picadilly, Inc. v Raikos*, 582 N.E.2d 338 (Ind. 1991) (citing the "disreputable public role reversal that would result during the trial" if assignments between adversaries were permitted), *abrogated on other grounds by Liggett v Young*, 877 N E.2d 178 (Ind. 2007); *Coffey v. Jefferson Cnty Bd of Educ.*, 756 S.W.2d 155 (Ky. Ct App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy").

a. Assignments between adversaries encourage collusion.

One of the reasons that assignments between adversaries are prohibited is that they provide an "opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa v Haskell*, 67 P.3d 1068, 1078 (Wash. 2003). "[S]uch a stipulated judgment cannot properly serve as an

indication of the actual damages, if any there were, as a result of the legal malpractice." *Id* (citing *Coffey v. Jefferson Cnty Bd of Educ.*, 756 S.W.2d 155, 156-57 (Ky. Ct. App. 1988)).

As one court has explained:

> A party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action "is one peculiarly vested in the client." . There is, in addition, a high risk that the plaintiff and defendant in the underlying litigation will collude to the detriment of the defendant's lawyer.
>
> . . .
>
> If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.

Alcman Servs Corp. v. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) (internal citations omitted).

Moreover, "[a] defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence." *Kommavongsa*, 67 P.3d at 1078. Additionally, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.*

b. Assignments between adversaries result in an abrupt and shameless shift of positions.

Further, because legal malpractice actions present a "trial within a trial," an assignment to an adversary "arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that

litigation is a mere game and not a search for truth, thereby demeaning the legal profession." *Kommavongsa v. Haskell,* 67 P.3d 1068, 1078 (Wash. 2003).

4. The assignment in this case is void as against public policy.

Although the question of whether assignments of legal malpractice claims are void as against public policy has not been addressed in South Carolina, the assignment in this case is exactly the type of assignment that has been held void as against public policy in courts across the country. The assignment is between adversaries in litigation and was entered into as part of the settlement of the case between Plaintiffs and DC & Sons. Pavilion confessed judgment in favor of DC & Sons in the amount of $4,580,015.93 and at the same time assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect at any time to own the claims themselves. Further, Plaintiffs gave DC & Sons complete control over the malpractice case, including the trial, appeal, and settlement, and the power to waive the attorney-client privilege and work-product protection. Plaintiffs agreed to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. Plaintiffs acknowledged that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone.

An assignment of this nature and under these circumstances is void as against public policy. Plaintiffs and DC & Sons were adversaries in the case in which the alleged legal malpractice occurred and have now aligned themselves in this case for the purpose of suing Nexsen Pruet and collecting whatever can be collected to satisfy the $4.5 million judgment confessed in favor of DC & Sons. By confessing judgment and then turning around and assigning all proceeds from a case to be brought against Nexsen Pruet for legal malpractice to

their adversary, Plaintiffs have converted the legal malpractice action into a commodity to be exploited and transferred to an economic bidder that Nexsen Pruet has never had a relationship with and to whom Nexsen Pruet has never owed any legal duties. By placing full control of the litigation in the hands of DC & Sons, including the right to waive the attorney client privilege between Plaintiffs and Nexsen Pruet, Plaintiffs have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship. The assignment has spawned litigation in the form of this case, even though it is questionable whether Plaintiffs have suffered any harm at the hands of Nexsen Pruet given that Plaintiffs settled the case 22 months after Nexsen Pruet withdrew as counsel and the settlement included a release of personal liability as to Larry McNair Indeed, Plaintiffs admit that they have not paid any money damages to DC & Sons **Exhibit C.**

Moreover, the circumstances under which the settlement was entered presented an opportunity and incentive for collusion. The settlement was reached during a court recess on what was to be the first day of trial. The parties took a break after the trial judge stated that he intended to grant summary judgment in favor of DC & Sons. The settlement included both a confession of judgment and the assignment. No evidence was presented to support the $4.5 million judgment confessed. When the trial judge asked counsel for DC & Sons how the amount was determined, counsel for DC & Sons recited the formula from memory, without presenting a single document or introducing any testimony. Neither counsel for DC & Sons nor counsel for Pavilion and McNair explained to the court that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair. On top

of all of this, Plaintiffs are represented in this case by the very same lawyers who represented DC & Sons in the litigation below, and who continue to represent DC & Sons in this case.

In their opposition to the motion for summary judgment, Plaintiffs do not argue that the assignment is valid or somehow not void as against public policy. Instead, Plaintiffs argue that they are the real parties interest and that they have not assigned their claims against Nexsen Pruet to DC & Sons. They argue that they assigned only a portion of the proceeds of the litigation to DC & Sons as a part of the agreement to avoid personal liability. This is contrary to the plain language of the agreement.

The agreement does not state that only a portion of the proceeds have been assigned to DC & Sons. The agreement states: "Pavilion and McNair assign to DC & Sons *all proceeds* from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties." Exhibit A (emphasis added). The agreement also states. " [Pavilion and McNair] agree to cooperate in the prosecution of this action and to pursue the litigation *as if they retained the right to all proceeds.*" *Id* There is nothing unclear or ambiguous about the language in the agreement. Plaintiffs assigned *all* proceeds to DC & Sons, and not just a portion.

Additionally, the agreement states: "At DC & Sons election, Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc." Ex. A. This "right to elect" reinforces the fact that DC & Sons is in control and has the right at any time and without any notice to own the very claims themselves. DC & Sons simply has to say when.

In any event, the argument that Plaintiffs are making—that the claims have not been assigned and that only a portion of the proceeds have—has been rejected by courts in other jurisdictions. For example, in one case, the plaintiffs, conceding that Arizona law would not

permit the assignment of the claim itself and in an effort to circumvent the prohibition, argued that only the proceeds of the action had been assigned, and not the cause of action itself *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). In rejecting this argument, the court stated:

> Whatever the form, whatever the label, whatever the theory, the result is the same. The policies create an interest in any recovery against a third party for bodily injury. Such an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable.

Id. at 542.

Similarly, in another case, the plaintiff argued that only the proceeds had been assigned and that an assignment of the malpractice claim itself had not occurred. *Davis v. Scott,* 320 S.W.3d 87 (Ky. 2010). But after examining the substance of the agreement, the court disagreed. The terms of the agreement were as follows: (1) the assignee selected and retained the assignor's counsel in the malpractice case, (2) the assignee bore the financial responsibility for the case, (3) the assignee agreed that the suit was to be brought in the name of the assignor, (4) the assignor agreed to share privileged, attorney-client information with the assignee, (5) the assignor was not permitted to settle the malpractice claim without the assignee's express written consent, and (6) the assignee retained control over the initiation, continuation, and/or dismissal of the malpractice claim. *Id.* at 91.

In holding that the legal malpractice claim had been assigned, the court stated:

> This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. The terms of this settlement agreement essentially placed the control of the malpractice suit in [the assignee's] hands and rendered [the assignor's] interest merely nominal. Though [the parties to the agreement] assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against [the lawyer], but of the entire claim itself.

Id In so holding, the court was guided by the principle that courts "look to substance, not form, to determine whether an assignment has occurred." *Id*

Applying this same principle of looking to the substance of the agreement, courts in other jurisdictions have reached similar conclusions. *See Kim v O'Sullivan*, 137 P.3d 61 (Wash. App. 2006) (holding that an assignment of a legal malpractice claim had occurred because the assignee and his attorney were in complete control of the malpractice suit and only they would benefit from a settlement or judgment); *Gurski v. Rosenblum and Filan, LLC*, 885 A.2d 163 (Conn. 2005) (stating "we agree with those courts that have identified the 'meaningless distinction' between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments"); *Weiss v. Leatherberry*, 863 So.2d 368, 371-72 (Fla. Dist. Ct. App. 2003) (recognizing that the rule prohibiting the assignment of legal malpractice claims "has been applied even in the absence of a formal assignment of the claim"); *Tate v Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex App. 2000) (holding that an assignment had occurred despite the fact that the assignor retained a ten percent interest in any net recovery because the assignor gave his former adversary "absolute control over the litigation, including the unfettered right to settle the malpractice suit on such terms as [the adversary] determines").

To further support the conclusion that the present case belongs to DC & Sons, the assignment states: "Pavilion and McNair place full control of the litigation in the hands of DC & Sons, this to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney client and work product privilege with Nexsen Pruet." Exhibit A. The assignment also states that "[Pavilion and McNair] agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds." *Id.* A party does not need to agree to cooperate in an action that the party owns and controls. If the case belongs to the party,

the party is in control and does not need to agree to cooperate. Moreover, the agreement provides that "[t]he cost of the litigation will be borne by DC & Sons alone." *Id.*

Finally, if successful, Plaintiffs stand to receive a nominal amount of money under the terms of the assignment. With $4,580,015.93 million allegedly at stake, the assignment provides that Plaintiffs are permitted to share in the first half of the first $250,000 received in the event of a settlement or a judgment. Plaintiffs do not even get the first dollar. They get half of the first $250,000 recovered, which means that at most, Plaintiffs will receive $125,000, while DC & Sons stands to recover $4.375 million. Plaintiffs' stake represents 2.7% of the total damages alleged. This is far less than the stake held by assignors in other cases, and yet the courts in those cases have held that an illegal assignment had occurred *See Davis v Scott*, 320 S.W.3d 87 (Ky. 2010) (holding that an illegal assignment had occurred even though the assignor retained a 20% interest in the proceeds); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred even though the assignor retained a 10% interest in any net recovery). Moreover, as part of the agreement, Plaintiffs directed that the $50,000 in earnest money from the other litigation be turned over to DC & Sons. When this amount is taken into consideration, Plaintiffs' interest in the proceeds diminishes to 1.637%.

Given that DC & Sons stands to receive the lion's share of proceeds and has complete and total control over this case, including the right at any time to elect to own the claims themselves, the Court should reject the argument that Plaintiffs have not assigned the claims against Nexsen Pruet to DC & Sons. The assignment in this case is void as against public policy and the circumstances under which it was entered are so tainted with collusion that judgment should be entered in favor of Nexsen Pruet.

5. No facts from discovery can change the legal conclusion that the assignment is void.

Plaintiffs also contend that summary judgment is not appropriate because they have not had a full and fair opportunity to complete discovery. They contend that they have noticed several depositions, including a Rule 30(b)(6) deposition of Nexsen Pruet, and Nexsen Pruet has refused to produce any of these witnesses for deposition. But there are no facts to be discovered that will impact the analysis of whether the assignment is void as against public policy. The assignment is a contract and the question of whether it is void as against public policy is a question of law. *See Gurski v Rosenblum and Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation."); *Alexander's Land Co., LLC v M & M & K Corp.*, 390 S.C. 582, 592, 703 S.E.2d 207, 212 (2010) ("The interpretation of a contract is an action at law.").

Here, no facts or testimony will change the conclusion that the agreement is an assignment of a legal malpractice claim that is void as against public policy. Nothing a representative of Nexsen Pruet or any other witness has to say will change this conclusion. The agreement says what it says. Additionally, Nexsen Pruet has not refused to produce witnesses for deposition. Counsel for the parties agreed to postpone the depositions until the motion for summary judgment is decided.[2] Nexsen Pruet should not have to incur the cost and expense of defending a case that is born out of an illegal assignment and controlled by a party that Nexsen Pruet has never represented

[2] Incidentally, Nexsen Pruet has responded to written discovery and produced documents to Plaintiffs even though Plaintiffs have refused to produce a single document until after witnesses from Nexsen Pruet have been deposed.

Because additional discovery will have no impact on the analysis of whether the assignment is void as against public policy, this case should end now. Summary judgment should be entered in favor of Nexsen Pruet.

B. Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

In the event the Court concludes that the assignment is not void as against public policy, the assignment should be enforced against Plaintiffs and DC & Sons and judgment should be entered in favor of Nexsen Pruet because according to the agreement, Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Eason v Eason*, 384 S.C. 473, 480, 682 S E 2d 804, 807 (2009). "Stated differently, waiver requires a party to have known of a right and known he was abandoning that right." *Id.* "In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned." *King v James*, 388 S C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010). "The determination of whether one's actions constitute waiver is a question of fact " *Id*

Here, Plaintiffs voluntarily and intentionally abandoned the right to prosecute the claims in this case. This abandonment is spelled out in the agreement signed by Plaintiffs and DC & Sons and filed with the court as a reflection of the settlement between the parties. In answering requests for admission, Plaintiffs admit that they signed the agreement. **Exhibit C.** Plaintiffs admit that the agreement reflects negotiations between them and DC & Sons. *Id* Plaintiffs admit that the litigation is being conducted pursuant to the terms of the agreement. *Id.* Plaintiffs admit that DC & Sons is paying for or is responsible for paying for the costs of the litigation. *Id* Plaintiffs repeatedly admit that they intend to honor the agreement. *Id.*

Although they admit that they intend to honor the agreement, and the agreement plainly provides that Plaintiffs "assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet," Plaintiffs deny in their answers to the requests for admission that they have assigned any proceeds to DC & Sons. *Id.* Plaintiffs cannot create an issue of fact by simply denying a request for admission, particularly when the denial runs contrary to the very language in the agreement that they admit to signing *Cf. Baughman v. Am. Tel and Tel Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding that the plaintiffs' answers to interrogatories and deposition testimony did not create a genuine issue of material fact for trial because they constituted "bald allegations" having no support in the evidence).

Based on the terms of the agreement, Plaintiffs have waived the right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. As explained above, Plaintiffs assigned to DC & Sons the right to all proceeds from this case, all control, and the right at any time to elect to own the claims themselves. Plaintiffs and DC & Sons signed the agreement and filed it with the court as a reflection of the settlement between the parties. At the time that they signed the agreement, Plaintiffs were represented by counsel and chose to voluntarily and intentionally abandon their right to own the claims in this case. Although the question of waiver is ordinarily a question of fact, there is no question of fact present here. The terms of the agreement are unambiguous and the interpretation and effect of the agreement is a question of law

Summary judgment should be granted in favor of Nexsen Pruet as to all causes of action.

C. DC & Sons is the real party in interest and cannot state a claim for legal malpractice and breach of fiduciary duty against Nexsen Pruet.

Additionally, summary judgment should be entered in favor of Nexsen Pruet because under the terms of the agreement, DC & Sons is the real party in interest, and as the real party in

interest, DC & Sons cannot state a claim for legal malpractice and breach of fiduciary duty against Nexsen Pruet.

"Every action shall be prosecuted in the name of the real party in interest." Rule 17(a), SCRCP. "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Ex Parte Govt. Employees Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007). "The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once." *Bardoon Props. v Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997).

"In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach." *Harris Teeter, Inc v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). "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." *Argoe v Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) Moreover, "an attorney owes no duty to a non-client unless he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client " *Id* (internal quotations and citations omitted).

Here, DC & Sons is the real party in interest because as explained above, DC & Sons has been assigned all proceeds in this case and owns the right at any time to elect to own the claims themselves. DC & Sons has complete control of this litigation, including the right to handle the

litigation, trial, appeal, and settlement, and the right to waive the attorney-client privilege and work product doctrine that Plaintiffs had with the Nexsen Pruet law firm, even though DC & Sons has never been a client of Nexsen Pruet. Plaintiffs have agreed to cooperate "as if they retained the right to all proceeds," because DC & Sons is the party that has that right. Plaintiffs are allowing DC & Sons to use their names, but DC & Sons is funding the litigation.

The fact that DC & Sons has agreed to give the first half of the first $250,000 received in its pursuit of this action to Plaintiffs does not change the fact that DC & Sons owns the right to the proceeds. DC & Sons has simply agreed to allocate the proceeds in a way that gives Plaintiffs some nominal interest in the case, in an attempt to avoid the conclusion that an assignment of a legal malpractice claim has occurred. This maneuver has been rejected by courts in other jurisdictions, which have held that the right to a portion of the proceeds does not make one the real party in interest *E.g*, *Davis v Scott*, 320 S.W.3d 87 (Ky. 2010); *Gurska v. Rosenblum and Filan, LLC*, 885 A 2d 163 (Conn. 2005); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W 3d 627 (Tex. App. 2000) Further, at most Plaintiffs stand to receive $125,000, $50,000 of which they have already turned over to DC & Sons, when there is allegedly $4,580,015.93 at stake. DC & Sons is the party that has the real, actual, material, and substantial interest in this case

As the real party in interest, DC & Sons cannot state a claim against Nexsen Pruet for legal malpractice and breach of fiduciary duty. DC & Sons cannot satisfy the first element of a cause of action for legal malpractice, which is the existence of an attorney-client relationship. DC & Sons is not and never has been a client of Nexsen Pruet. **Exhibit D.** Nexsen Pruet represented DC & Sons's adversary (Plaintiffs) in the action that is the subject of the complaint. Not only can DC & Sons not state a claim against Nexsen Pruet, but Nexsen Pruet is immune

from suit as to DC & Sons. Nexsen Pruet is not liable to DC & Sons for the performance of its professional activities on behalf of Plaintiffs in the litigation against DC & Sons. *See Argoe*, 388 S.C. at 400, 697 S.E.2d at 554 (holding 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").

Thus, the claims for legal malpractice and breach of fiduciary duty fail as a matter of law, and judgment should be entered in favor of Nexsen Pruet.

CONCLUSION

Judgment should be entered in favor of Nexsen Pruet as to all causes of action in this case. This case is based on an assignment of a legal malpractice claim that is void as against public policy. Even if the assignment were enforceable, the end result would be the same. Based on the assignment, Plaintiffs are not the real parties in interest and have waived their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. The real party in interest is DC & Sons, an entity that Nexsen Pruet never represented and that cannot state a claim for legal malpractice or breach of fiduciary duty against Nexsen Pruet. This case should end now.

Nexsen Pruet's motion for summary judgment should be granted.

[Signature on following page.]

SOWELL GRAY STEPP & LAFFITTE LLC

By: Elizabeth Van Doren Gray

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

Attorneys for Nexsen Pruet LLC

Columbia, South Carolina
March 11, 2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
2007-CP-10-1457
CASE NO. ~~2008-CP-10-4675~~

DC & Sons, LLC v **Pavilion Development Corp**

PLAINTIFF(S) DEFENDANT(S)

FILED
2011 JAN 18 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit) Rule 43(k), SCRCP (Settled); ☒ Other ☐

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

Court has been advised by the parties that the case has been settled. Attached notes reflect the terms of the settlement.

Dated at **Charleston,** South Carolina, this **18th** day of January, 2011.

PRESIDING JUDGE

This judgment was entered on the day of , 20, and a copy mailed first class this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By
DEPUTY CLERK

EXHIBIT
A

SCCA SCRCP Form 4 Revised 06/2008

(1)

This agreement is entered into by & between Pavlon Dev. Corp, Larry McNair and DC & Sons:

Recital:

1. The Court has ruled that Pavlon will be trying the case on damages alone leaving McNair & Pavlon exposed to damages, actual & punitive.
2. McNair represents in this recital that he relied on advice of Counsel & did not know & was not told that a lis Pendens could not be filed or continued where:
   a. Pavlon ~~was~~ was in breach.;
   b. the inability of DC & Sons was related to ~~a third~~ actions of a third party;
   c. Pavlon was no longer willing to close on the terms of the contract
   d. Pavlon failed to ~~deliver~~ name needed parties.
   e. a stipulation was entered stating Corp had no claims and became an Order of the Court
   f. Pavlon sought a lower price or a return of the earnest money before it would remove the lis Pendens

DK

COURT'S EXHIBIT NO. 3 IDENTIFICATION/EVIDENCE DKT # 1/13/11 DATE: del

(2)

Agreement

1. The Recitals are part of this agreement
2. In light of the Courts ruling Paulson & McNair have proposed & DC & Sons has agreed as follows:

a. DC & Sons releases McNair ~~& the~~ Lowell Franzis from all claims to subject of this ~~[illegible]~~ suit & waives trial against Paulson ~~[illegible]~~ on punitive damages. In return Paulson confesses judgment in the amount of DC & Sons claimed actual damages in the amt & form shown on Exh A. McNair & Paulson release DC & Sons from all claims which are the subject of this action.

DC

b. Paulson & McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Paulson & McNair against it's counsel Never Pruett & all other responsible parties. Further, Paulson & McNair place full control of the said litigation in the hands of DC & Sons, this to include the handling of the

AT Sons DC & Sons election Paulson & McNair approves BK Gty, to include Breach of Fid. Duty, professional negligence etc.

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(3)

lit. gation, trial, appeal, settlement &
the waiver of the atty client
& work product privilege with the
Nexen Privet firm. Further, P & M
agree to cooperate in the prosecution
of this action & to pursue the lit. gation
as if they retained the right to
all proceeds. The cost of the litigation
~~will be~~ ~~shall~~ will be borne by
D C & Sons alone. ~~Sait~~ P & M
acknowledge, and will be brought
in their names
c. P & M direct that the earnest money
& interest shall be turned over
to D C & Sons & their Counsel
d. D C & Sons agree that in the
event of a settlement or judgment
that the first 250^m will be split
equally between D C & Sons &
P/M so as to defray their
defense cost & compensation for loss
of business & emotional distress
All further funds shall be for
the benefit of D C & SONS.

I witnessed the signature of all three parties.
"John W. Ackerman 1/18/2011
JOHN W. ACKERMAN
NOTARY EXPIRES 11/7/2016

The parties agree to this 1/18/2011

D C & Sons — P/M — V.P. — Harry McMahan

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
DC & SONS, LLC Plaintiff, vs. RICHARD H. COEN, LOWCOUNTRY CAPITAL, LARRY MCNAIR, COENCO, LLC, & PAVILION DEVELOPMENT CORP. Defendants.	)	CASE NO.: 2008-CP-10-4675 CONFESSION OF JUDGMENT
PAVILION DEVELOPMENT CORPORATION, Plaintiff, vs. DC & SONS, LLC, Defendants.	)	CONSOLIDATED UNDER CASE NO. 2007-CP-10-1457

FILED
2011 JAN 18 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PERSONALLY APPEARED BEFORE ME, Larry McNair, on behalf of Pavilion, LLC, who first being duly sworn confesses and states as follows:

1. I am the ~~President~~ Vice President of Defendant Paviliton, LLC ("**Pavilion**") in the above captioned action and have firsthand knowledge of the facts and circumstances relating to this action and to this Confession of Judgment and am authorized to execute this Confession of Judgment on behalf of Pavilion.
2. The Court granted Plaintiff DC & Sons' Motion for Summary Judgment.
3. There is due and owing and unpaid upon Plantiff DC & Sons, LLC, the sum of $4,580,015.93.
4. I ~~agree~~ acknowledge that Plaintiff DC & Sons, LLC ~~is justly owed~~ claims the sum of $4,580,015.93 from

Defendant Pavilion, and Pavilion has no defense to these claims based on the Courts rulings for the Plaintiff for its Sum. Jud

5. Accordingly, Larry McNair, on behalf of Pavilion, confesses judgment to Plaintiff DC & Sons, LLC in the sum of $4,580,015.93, together with interest, and hereby authorizes the Clerk of Court of Charleston County Court of Common Pleas to enter judgment in that amount against Defendant Pavilion in said amount.

Pavilion Development Co., LLC

By: Larry McNair, Vice President

Sworn and subscribed by me this
18th day of January, 2010

John W. Clemmons
Notary Public for the State of South Carolina
My Commission Expires: 11/7/2016

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

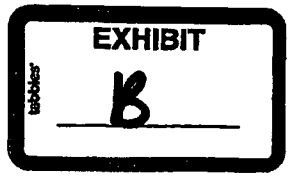
DC & SONS, LLC, Plaintiffs, -vs- RICHARD H. COEN, LOWCOUNTRY CAPITAL, OCEAN I REALTY, JAMES R. MAULL, JR., LARRY MCNAIR, COENCO, LLC & PAVILION DEVELOPMENT Defendants.	TRANSCRIPT OF RECORD January 18, 2010 Charleston, South Carolina 08-CP-10-4675
* * * * * * * * * * * * * PAVILION DEVELOPMENT CORPORATION, Plaintiff, -vs- DC & SONS, LLC, Defendant.	07-CP-10-1475

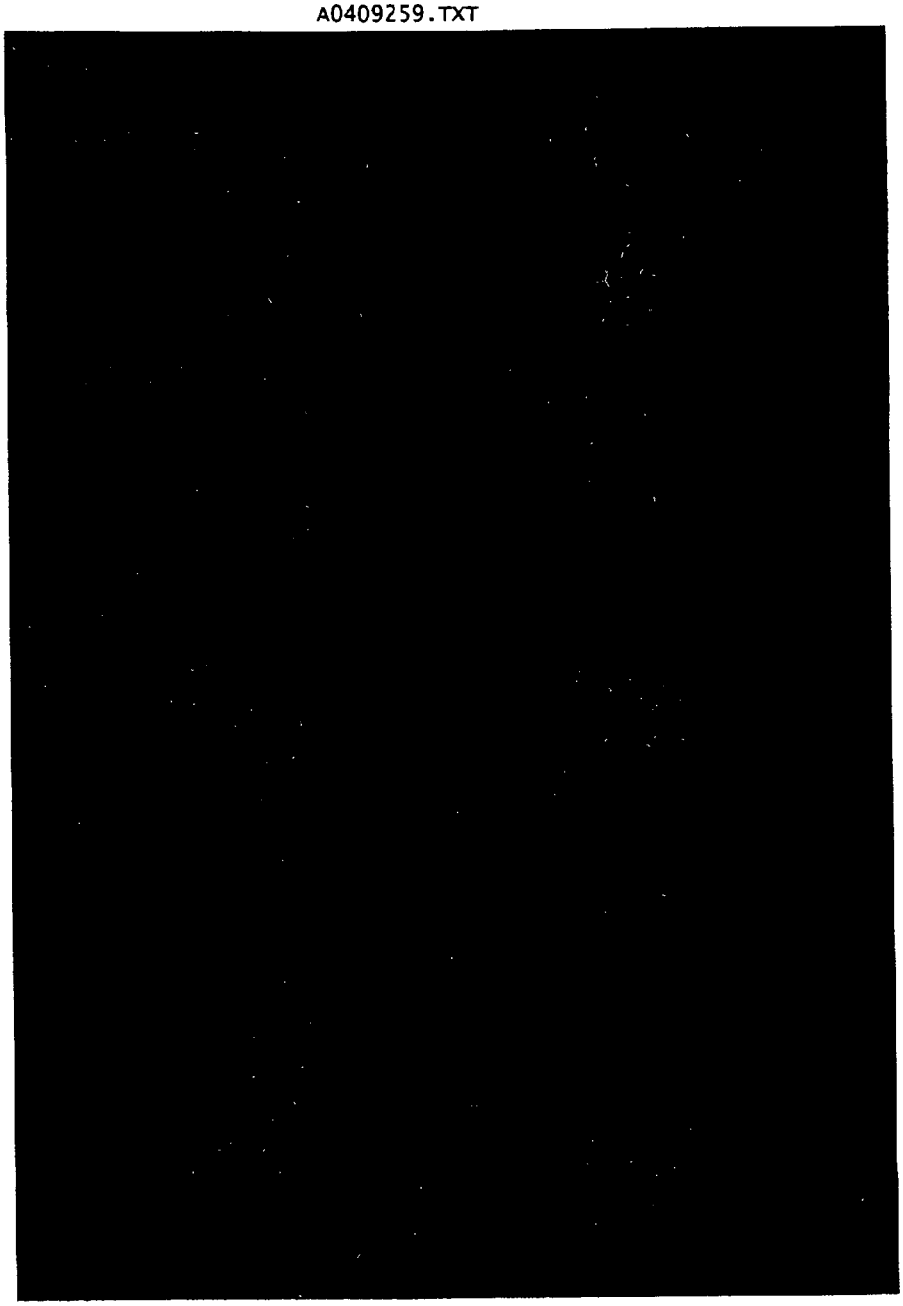
B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

(Court's Exhibit Nos. 1 and 2 were for identification.)

THE COURT: All right. Are you ready? We are here on DC & Sons versus Richard Coen and others, 2008-CP-10-4675 and Pavilion Development Corporation versus DC & Sons 2007 CP-10-1475. This is defendant -- or, excuse me, it's DC & Sons summary judgment as to the liability for Pavilion for abuse of process and breach of contract, so, Mr. Epting, it's your motion. It looks





So I find that proper to grant the summary judgment to DC & Sons, and we'll enter an order to that effect. Okay?

Page 13

MR. EPTING: Thank you, sir.

MR. DAVID: You can give us just a few minutes to see if we can reach some conclusion on this?

THE COURT: Absolutely.

(Recess taken.)

THE COURT: Okay. Y'all asked for a few minutes to work it out, and maybe you've worked something out, I understand. I have, in the meantime, signed the proposed order granting summary judgment that you asked me to take a look at.

MR. EPTING: Judge, in light of the Court's comments, comments then and before concerning the summary judgment, we have reached an agreement.

THE COURT: All right.

MR. EPTING: And, effectively, if it's all right with Your Honor, the effective deal is Mr. McNair

is relieved from liability. That is what he insisted on, and the judgment is entered for the amount of the actual damages claimed by DC & Sons and that we waive any claim to punitive damages, and the claims that Mr. McNair or Pavilion have or are assigned or the proceeds are assigned at DC & Sons election to DC & Sons, and so I would like to proffer, Judge, and there is a confession of judgment against Pavilion for the action of damages.

THE COURT: What amount is that?

MR. EPTING: $4,580,015.93.

THE COURT: Okay.

MR. EPTING: And, Judge, I only have one copy, but I would like to enter this settlement into the court record because it has a confession, and I would

ask, given your familiarity with the case, that the Court, for the parties' benefit here, find that it is a fair settlement for all the parties in light of the circumstances and facts as the Court has come to understand it, so with that, I would like to offer this up, Your Honor.

THE COURT: What is the breakdown on that number? How did you come up with 4,580,00?

MR. EPTING: I think I can do it from memory, Judge. The other purchase was at $5 million and the debt on the property was 2,142,000; therefore, the sale alone

would have realized a profit of $2,852,000.

At that time, Judge, rather than having a sale and paying off the mortgage that existed on the property, my client has continued to bear the interest on that property right up through today's date, and that interest is $675 plus thousand dollars, and as I'm speaking now, Judge, I realize all this is in the booklet that I gave you, but I'm happy to go through this.

When the lis pendens was not lifted -- and there really is, Judge, a terrifying piece in this, and it has a lot to do with you and Mr. Dan David. My client, because this lis pendens was ultimately lifted, and Mr. David, unlike Nexsen Pruet, refused to appeal the order, my client was able to close the entire transaction the cost of which was $43,000, but had they not been able to close that transaction, Judge, they would have lost this property, they would have lost Red's, and they would have lost the entire Wings Over America and the

franchise.

And so thank God we finally got the lis pendens released, and thank God Mr. David came to a different conclusion about appealing something that was just not in doubt, because this would have been a $50 million lawsuit had we gone down that road.

The other component, Judge, of damages of the

profit that we realized on the sale that did not occur, it would be a liquidated sum of 2,852 and so to that we added interest at 8 and three-quarters, and those numbers are added together. It comes to $4,580,015.93.

THE COURT: All right.

MR. EPTING: Can I tender this to the Court?

THE COURT: Does that represent your understanding of what the settlement is?

MR. DAVID: It does, Your Honor, and what can I say? My clients personally, Mr. McNair who was sued, and also the president of the corporation, the two of them are released from the personal liability, and under the circumstances, especially with your ruling this morning, I feel I have no choice but to agree to this to remove my clients from any possible damages that they may suffer.

THE COURT: Mr. McNair, you have already entered into this settlement?

MR. McNAIR: Yes, sir.

MR. DAVID: He has spoken with the president of the company, Pavilion Development, and has informed them of everything that was going on that they consented to.

THE COURT: All right.

MR. DAVID: I have one little thing I want to

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take up. Can you just give me one second, Your Honor?

THE COURT: Sure.

MR. EPTING: Judge, it could be after this is over. Dan has a suggested word to change in the order that doesn't change any substance, but maybe we can simply --

THE COURT: This is which order?

MR. EPTING: The order that you signed, but, I mean, it's a couple words here or there which I don't have any objection.

THE COURT: Well, I can just scratch through the old one.

MR. EPTING: Fine.

THE COURT: All right. Well, then, you want a form four then entered saying this is assigned or that it settled, judgment is entered against Pavilion in the amount of $4,580,015.93 in actual damages only, and how do you want the assignment reflected?

MR. EPTING: The assignment is actually, Judge, reflected in the agreement that is handwritten and provided to the Court, so I don't think there needs to be something in form four.

THE COURT: All right. Well, do you want us to just put on a form four then that the parties have advised the Court that the case was settled and

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settlement was put on the record in lieu of the money damages being put on the form four?

MR. EPTING: That would work, Judge.

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 it out.

MR. DAVID: It's not been easy, Judge.

- - -

(Whereupon, the proceedings were concluded.)

- - -

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 18th of January 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 9, 2011

Circuit Court Reporter

23

AMANDA K. HAFFENDEN, RPR, CRR
Circuit Court Reporter
P.O. Box 424
Summerville, SC 29484
(843) 771-3755

March 9, 2011

TO: George J. Kefalos
3 State Street
Charleston, SC 29401

- -

IN RE: DC & Sons, LLC v. Richard Coen, et al.
DATE: January 18, 2011
TRANSCRIPT OF PROCEEDINGS
BEFORE: Honorable Roger M. Young

22 pages at $3.25 per page: $71.50

POSTAGE: $4.95 = $76.45

TRANSCRIPT WILL BE FORWARDED UPON RECEIPT OF PAYMENT

Thank you!

24

AMANDA K. HAFFENDEN, RPR, CRR
Circuit Court Reporter
P.O. Box 424
Summerville, SC 29484
(843) 771-3755

March 9, 2011

TO: R. Bruce Wallace
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

- -

IN RE: DC & Sons, LLC v. Richard Coen, et al.
DATE: January 18, 2011

TRANSCRIPT OF PROCEEDINGS
BEFORE: Honorable Roger M. Young

22 pages at .75 per page: $16.50

POSTAGE: $4.95 = $21.45

TRANSCRIPT WILL BE FORWARDED UPON RECEIPT OF PAYMENT

Thank you!

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2011-CP-10-05774
PAVILION DEVELOPMENT CORP. & LARRY McNAIR, Plaintiffs, vs. NEXSEN PRUET, LLC, Defendant, vs. DC & SONS, LLC, Counterclaim Defendant.		**ANSWERS TO THE FIRST REQUESTS FOR ADMISSION OF NEXSEN PRUET, LLC DIRECTED TO PLAINTIFFS**

Plaintiffs Pavilion Development Corp. ("Pavilion") and Larry McNair hereby answer the First Requests for Admission propounded by Defendant Nexsen Pruet, LLC ("Nexsen Pruet") in accord with the South Carolina Rules of Civil Procedure as follows:

REQUESTS FOR ADMISSION

1. Admit that you confessed judgment in amount of $4,580,015.93 in the underling litigation by having Larry McNair, on behalf of Pavilion Development Corporation, sign the confession of judgment.

ANSWER: Admitted.

2. Admit that the amount of $4,580,015.93 was determined by DC & Sons or by counsel for DC & Sons.

ANSWER: Denied.

3. Admit that neither you nor your counsel, Dan M. David, challenged the amount of damages confessed.

ANSWER: Denied.

EXHIBIT C

4. Admit that Pavilion has not paid any money in partial or full satisfaction of the judgment confessed in the underlying litigation.

ANSWER: Admitted.

5. Admit that Pavilion is not at risk of having to pay the full amount of the judgment confessed in the underlying litigation.

ANSWER: Denied.

6. Admit that you have not paid any money damages to DC & Sons in connection with the underlying litigation.

ANSWER: Admitted.

7. Admit that you signed the agreement dated January 18, 2011, attached as Exhibit A.

ANSWER: Admitted.

8. Admit that counsel for DC & Sons, Andrew Epting and/or George Kefalos, drafted the agreement attached as Exhibit A.

ANSWER: Denied. Exhibit A reflects negotiations between Plaintiffs and DC & Sons.

9. Admit that DC & Sons is controlling this litigation.

ANSWER: Plaintiffs admit the conduct of the litigation is as agreed in the attached Exhibit A.

10. Admit that DC & Sons is paying for or is responsible for paying the costs and fees associated with this litigation.

ANSWER: Admitted.

11. Admit that you are cooperating with DC & Sons in the prosecution of this case.

ANSWER: Plaintiffs admit that as part of the agreement to avoid personal liability they entered into the agreement attached as Exhibit A, which they intend to honor.

12. Admit that you have given DC & Sons the right to bring this case in your names.

ANSWER: Plaintiffs admit that as part of the agreement to avoid personal liability they entered into the agreement attached as Exhibit A, which they intend to honor. Plaintiffs Larry McNair and Pavilion Development have brought this action.

13. Admit that you have assigned all claims asserted in this case to DC & Sons.

ANSWER: Denied.

14. Admit that you have assigned any proceeds received from this case to DC & Sons.

ANSWER: Denied.

15. Admit that DC & Sons has control over whether to waive the attorney-client privilege and work-product protection between Plaintiffs and Nexsen Pruet.

ANSWER: Plaintiffs have agreed to waive the attorney-client privilege in order to bring this action and claimed as a defense in the underlying action, advice of counsel. Plaintiffs further respond that as part of the agreement to avoid personal liability, they entered into the agreement attached as Exhibit A, which they intend to honor.

16. Admit that you are not entitled to receive any proceeds in this case other than half of the first $250,000 in proceeds received either through settlement or trial.

ANSWER: Admitted.

17. Admit that in the event of a settlement or judgment in this case in your favor, the first $250,000 received will be split equally between you and DC & Sons.

ANSWER: Admitted.

18. Admit that DC & Sons is entitled to receive all proceeds beyond the first $250,000 received either through settlement or judgment in this case.

ANSWER: Admitted.

19. Admit that Pavilion no longer conducts any business.

ANSWER: Denied. Pavilion remains a "for profit" corporation in good standing with the South Carolina Secretary of State. Due to the downturn in the economy, in particular in the real estate development industry, Pavilion's business has slowed considerably, and last year Pavilion did virtually no development business

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 2nd day of October 2012 at Charleston, South Carolina

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ATTORNEYS FOR PLAINTIFFS

This 22 day of October, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORP. & LARRY McNAIR,	)	Civil Action No.: 2011-CP-10-05774
Plaintiffs,	)	
v.	)	
NEXSEN PRUET, LLC,	)	AFFIDAVIT OF BRUCE WALLACE
Defendant,	)	
v.	)	
DC & SONS, LLC,	)	
Counterclaim Defendant.	)	

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

Personally appeared before me Bruce Wallace, who being first duly sworn, deposes, and says as follows:

1. I am Bruce Wallace. I am over the age of 18 years and I submit this affidavit based upon my personal knowledge.

2. I am member of the law firm of Nexsen Pruet, LLC, and I have been admitted to practice law in the State of South Carolina since 1996.

3. I represented Pavilion Development Corporation (Pavilion) and Larry McNair (McNair) in the matters of *Pavilion Development Corporation v. DC & Sons, LLC*, Case No. 07-CP-10-1457, and *DC & Sons v. Richard H. Coen, Lowcountry Capital, Ocean I Realty, James R. Maull, Jr., Larry McNair, Coenco, LLC, and Pavilion Development*, Case No. 08-CP-10-4675, which form the basis of the allegations in the above-captioned case. These two cases were consolidated into one case, Case No. 07-CP-10-1457, by order of the court.

EXHIBIT
D

4. Andrew K. Epting and George J. Kefalos represented DC & Sons, LLC, in the litigation referenced in paragraph 3.

5. Nexsen Pruet and I have never represented DC & Sons, LLC. DC & Sons was our clients' adversary in the litigation referenced in paragraph 3.

6. When DC & Sons sued Pavilion and McNair for abuse of process, I determined that I had become a witness to the facts of the case and that Nexsen Pruet and I needed to withdraw as counsel. Judge Roger Young, who presided over the case for its duration, agreed.

7. The withdrawal was granted after the court entered summary judgment in favor of DC & Sons on March 23, 2009. After the withdrawal, but before the time to appeal the order granting summary judgment had expired, Pavilion and McNair retained new counsel. Once new counsel was retained, Nexsen Pruet and I ceased all legal representation of Pavilion and McNair.

FURTHER AFFIANT SAYETH NOT.

Sworn to before me this 9 day
of January, 2013

Crystal Leftwich
Notary Public for South Carolina
My Commission Expires: 8-4-16

Bruce Wallace

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
DC & Sons, LLC,	)	C/A No. 08-CP-10-4675
Plaintiff,	)	
vs	)	
Richard H. Coen, Lowcountry Capital, LLC, Larry McNair, Coenco, LLC & Pavilion Development Corp ,	)	**ORDER GRANTING DC & SONS SUMMARY JUDGMENT AS TO THE LIABILITY OF PAVILION FOR ABUSE OF PROCESS AND BREACH OF CONTRACT**
Defendants.	)	
Pavilion Development Corporation,	)	C/A No. 07-CP-10-1457
Plaintiff,	)	
vs	)	
DC & Sons, LLC,	)	
Defendant.	)	

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter came before me on Plaintiff, DC & Sons' renewed motion for summary judgment and motion in limine to exclude testimony and/ or evidence relating to Defendant Pavilion Development Corp.'s ("Pavilion") liability for breach of contract and abuse of process. I have considered the arguments of counsel and reviewed the record filed with this Court.

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.

THE UNDISPUTED FACTS

1. On August 18, 2006, Defendant Larry McNair, as vice president of Pavilion, signed a contract for the purchase of lots 18, 19 & 22 ("the Cottage on the Creek") from DC &

Sons for $5 million, closing to be had by December 31, 2006. (See McNair deposition, pg 27).

2. Mr. McNair testified Pavilion was not ready, willing or able to close as long as Richard Coen claimed that he had an in interest in the property. (McNair deposition pgs 60, 66-68; Wallace letter of 2/21/08).
3. Mr. McNair testified Pavilion failed to provide proof of financing as required by the contract (though there is some evidence that he could have funded the closing and would have but for the Coen claims. (Exhibit 5, Depo. of Larry McNair, pgs 42-44).
4. Mr. McNair testified Pavilion was using the lis pendens to get its earnest money back and to get a reduced price for the property. (Exhibit 4, Depo. of Larry McNair, pg 70, line 19 through pg 71 line 8, pg 72, line 4-25).
5. On January 17, 2008, Pavilion entered into a stipulation wherein Pavilion stipulated that none of the Coen Defendants had any "current, future, or contingent property interests in the subject property" (See stipulation).
6. Despite the stipulation, Counsel for Pavilion and McNair refused to remove the lis pendens, claiming the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent (Wallace email of 8/15/08 & letter of 2/21/08).
7. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and seeking to impose an equitable lien on the Cottage on the Creek property.

8. On March 23, 2009, this Court held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was improper, as an action for money damages will not support a lis pendens.

LIABILITY AS A MATTER OF LAW

The South Carolina Supreme Court defines abuse of process as "the employment of legal process for some purpose other than that for which it was intended by the law to effect – the improper use of a regularly issued process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (S.C. 1967). The elements of abuse of process are. (a) an ulterior purpose; and (b) a willful act in the use of process not proper in the regular conduct of the proceeding. *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562 (Ct. App. 2006). This Court's focus in this order is the use of the lis pendens; it is abundantly clear that Coen and his entities claims delayed and ultimately derailed the sale but Pavilion rather than considering its options filed and continued the lis pendens which is the subject of my review herein.

A. Willful Act

1. Pavilion's filing of an action for specific performance was a willful act in the use of process not proper in the regular conduct of the proceeding.

An action for specific performance will lie only when the supposed cloud on title is due to and caused and controlled by the seller. *See Finley v. Burgoyne, Dud*, Eq. 133, 1838 WL 1653 (SC App. Eq. 1838) (If a seller cannot convey marketable title through no fault of its own, the purchaser has the option of rescinding the contract, or taking whatever title the seller could convey, and his failure to make any election constitutes a default by him under the terms of the contract); *See also Calligar v Fradkoff* 154 A.D.2d 495, 498, 546 N.Y.S.2d 121, 124 (N.Y.A.D. 2 Dept.,1989) (Specific performance was not warranted where the seller was unable to convey the property in accordance with the terms of the contract due to the intervention of third-party

litigation entirely outside of the seller's control). Defendants' filing of an action for specific performance was willful act in the use of process not proper in the regular conduct of the proceeding because Defendants admittedly knew the supposed title problem was caused by Richard Coen's allegations and was beyond the control of DC & Sons.

Additionally, an action for specific performance will lie only when the buyer can demonstrate that it was ready willing and able to perform by a tender of the purchase price. *See Shay v. Austin*, 466 F.Supp.2d 664 (D.S.C. 2006) (The party who comes to compel performance must show he has performed his part, or has been and remains ready, able and willing to perform his part of the contract). By the terms of the contract, Pavilion was to provide DC & Sons "with written satisfactory loan approval within 90 consecutive days" and if DC & Sons was not provided with such information, it had the option of canceling the contract. (See contract at paragraph 6) Mr. McNair testified loan approval was never achieved. McNair deposition, pg 45, lines 4-9). Defendants' filing an action for specific performance and *lis pendens* was not proper as it failed to prove it was ready, willing, and able to pay the agreed upon purchase price or had arranged its financing, which was required by law and the real estate contract. While this may have been cured but for the Coen claims, it still amounted to a breach.

In the present case, Defendants' filing an action for specific performance and a *lis pendens* constitutes a willful act in the use of process not proper in the regular conduct of the proceeding because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons. An action for specific performance (being an action in equity) will lie only when the buyer can prove it was not itself in breach of the contract. *See King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (S C.App.1984).

2. **Filing and maintaining actions for declaratory judgment as to what parties had an interest in the Cottage on the Creek property and quiet title was a willful act in the use of process not proper in the regular conduct of the proceeding.**

An action to quiet title coupled with a *lis pendens* will lie only when all persons known to claim an interest in the property have been joined in the action. *See 74 C.J S Quieting Title* § 60 (2010). Defendants' filing an action to quiet title and a *lis pendens* is a willful act in the use of process not proper in the regular conduct of the proceeding because Defendants failed to join and serve the Coen Defendants despite Pavilion's assertions that the Coen Defendants' claims to the property prevented the closing. The fact that the Defendants failed to join a serve the very party who allegedly created the cloud on title shows the lis pendens was based on pretext.

An action for specific performance will not lie absent a bona fide cloud on title. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E 2d 881(S.C.App. 2002). While Pavilion refused to close and filed suit in April of 2007 because of Richard Coen's claims, Pavilion stipulated there was no cloud on title on January 17, 2008, and indeed as this Court has ruled there was no CoenCo lease with the Church or sublease between RedWing, CoenCo, and/or DC & Sons; while these claims may have justified not closing the thinness of the merits of these arguments are an artifice. Despite the stipulation, Pavilion waited almost eight months before amending its complaint to drop its cause of action for specific performance and refused to remove the lis pendens from the property even after dropping the specific performance claim. The continued maintenance of a *lis pendens* and an action for specific performance is an abuse of process because Pavilion stipulated there was no cloud on title.

3. **Refusing to remove the lis pendens constitutes a willful act in the use of process not proper in the regular conduct of the proceeding.**

A *lis pendens* will not lie unless coupled with an action affecting the title to real property. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881(S.C.App. 2002)

(Only an action "affecting the title to real property" allows the filing of a *lis pendens*). A claim for damages will not support a *lis pendens*. *See Armstrong* v. *Carwile,* 56 S.C. 463, 476, 35 S.E. 196, 203(SC 1900) ("An action for money only, even if it relates in some way to specific real property, will not support a lis pendens"). As this Court has previously ordered, Pavilion's continued use of the *lis pendens* after it dropped its quiet title action and amended its complaint to drop its specific performance claim was improper.

B. Ulterior Purpose

Without an improper purpose, there can be no abuse of process. *Johnson v Painter*, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club." *Davis v. Epting*, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994). "The lis pendens mechanism is not designed to aid either side in a dispute between private parties." *Horry County v. Ray*, 382 S.C. 76, 81, 674 S.E.2d 519, 522 (S.C. App. 2009).

As cited above, the Court finds McNair and his counsel ~~concede~~ they 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. *See Broadmoor Apartments of Charleston v. Horwitz,* 306 S.C. 482, 413 S.E.2d 9 (S.C. 1991) (Evidence was sufficient to find that defendant corporation and its president willfully abused process by filing lis pendens and specific performance action with respect to contract of sale for real property with ulterior purpose of preventing sale of property to third parties in hopes of obtaining financial backing with which to purchase property at advantageous price).

It is therefore ORDERED, that DC & Sons' motion for summary judgment is granted and no evidence or testimony disputing Pavilion's liability for breach of contract and abuse of process will be allowed and no mention of it made in counsel's opening arguments.

The Honorable Roger M. Young, Sr. #2134
Circuit Judge for S.C.

On this 18th day of January 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

DC & SONS, LLC, Plaintiffs, -vs- RICHARD H. COEN, LOWCOUNTRY CAPITAL, OCEAN I REALTY, JAMES R. MAULL, JR., LARRY McNAIR, COENCO, LLC & PAVILION DEVELOPMENT Defendants.	TRANSCRIPT OF RECORD January 18, 2010 Charleston, South Carolina 08-CP-10-4675
* * * * * * * * * * * * * PAVILION DEVELOPMENT CORPORATION, Plaintiff, -vs- DC & SONS, LLC, Defendant.	07-CP-10-1475

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

(Court's Exhibit Nos. 1 and 2 were for identification.)

THE COURT: All right. Are you ready? We are here on DC & Sons versus Richard Coen and others, 2008-CP-10-4675 and Pavilion Development Corporation versus DC & Sons 2007 CP-10-1475. This is defendant -- or, excuse me, it's DC & Sons summary judgment as to the liability for Pavilion for abuse of process and breach of contract, so, Mr. Epting, it's your motion. It looks like Mr. -- which are you going --

MR. KEFALOS: I'm going to argue it.

MR. EPTING: Let me just say, I thought it appropriate that you have file copies of everything. It wasn't clear. A lot of this was coming through on e-mail, so I put the exhibits, and I have clocked versions of the summary judgment.

THE COURT: I have multiple notebooks set up and I'm sure Office Depot is glad to see you.

MR. EPTING: And also in here, Judge, is a proposed order.

THE COURT: Okay. Is that the same thing y'all e-mailed me yesterday? Somebody from your office e-mailed me.

MR. EPTING: There might be a few changes. Let me just grab that and I'll bring it up.

THE COURT: All right. Well, it looks like Mr. Kefalos is requesting to handle the argument then, so if you're ready, go ahead.

MR. KEFALOS: The plaintiff would renew its motion for summary judgment or, in the alternative, a motion in limine for certain limiting instructions as to opening statements and evidence, and the motion for summary judgment renewal motion of summary judgment, is on liability for abuse of process.

The facts are not in dispute, and the basis is very simple. There are a variety of bases. Each one seems to get worse as it goes on, but at its heart, an action for a specific performance is in equity and will only lie when the buyer has demonstrated that he is ready, willing, and able to perform and has tendered the purchase price.

In this case, the time for closing passed. The sellers -- a lawyer wrote to the buyer, imposed a new time for closings with -- the due diligence is way past, it's time to set a closing, and we're going to do it in five days if you give us notice or not, and it is undisputed that the defendant failed to appear and the defendant failed to tender the purchase price.

So at its heart, the defendant had no justification for bringing the specific performance

action. If that weren't enough, an action for specific performance will only lie when the defendant, that is, the buyer, is not himself in default because it's in equity and has to be enhanced.

The filing of the specific performance and lis pendens in this case was improper because the defendant was in default. The contract had required the defendant to give certain time notices during the due diligence period of application for loan and approval of loan and those sorts of things, and the contract provided that the failure to give those notices constituted an event of default, and it's undisputed that the defendant failed to give those notices, and it is undisputed that the seller caused a default in March for the defendant's failure to comply with the contract.

Now, it is true that the individual defendant, Mr. McNair, says he never -- his lawyers never told him that the contracts had been called in default, and he allows that he don't know whether he would have gone forward had he known that or not, but, nevertheless, he's charged with what his lawyers knew, so he brings -- they respond to the notice of default by bringing the specific performance action and filing a lis pendens.

Now, here is where it starts to get dicey. He filed a statement that the defendant wouldn't attend

the closing because he claimed there was a cloud on title. It claimed that it was relieved of making a tender because this third person, Richard Coen, had a cloud on title, created a cloud on title, by nature of a lease agreement.

Well, the law is in South Carolina, it's a very old case, but it's right on point, that a specific performance action will not lie when the supposed cloud on title is due to and caused by somebody other than the seller. In other words, where the problem with the title is caused by somebody else, specific performance is not the remedy. Lis pendens is not the remedy.

This case, not only did the defendant, Pavilion, admit in testimony and letter that the cloud was created by this third person, but they pled it in the action, saying that the third person was the one that created a cloud on title and you had to talk to specific performance. That is an abuse of process.

Now, the defendant responds to that by saying, Well, Look, we also join that third person as the defendant in the case and ask the Court to quiet title, and, of course, a lis pendens is appropriate in a suit to quiet title. What the defendant says is we ask the Court to declare the rights of the parties to the contract, say that Coen has no interest in the property, and then

direct the Crowleys to sell us the property.

Well, the problem is that Pavilion never sued, or served, Coen, so Pavilion never had jurisdiction over Coen, but Pavilion tied this property up with a lis pendens and a suit to quiet title, knowing that it could never achieve that end because it had to have Coen as a party that didn't join Coen. Eventually, it amend its caption and dropped Coen altogether, but the pretext of adding Coen has a justification is abusive because they added a party just to justify the lis pendens and never served the party, never pursued them, never required them to answer, and then dropped them.

Now, the thing about Coen is an interesting issue itself because a lis pendens and action for specific performance will not lie absent a bona fide cloud on title. In this case, there was never a bona fide cloud on title because several months after Pavilion filed its suit seeking specific performance and tying this thing up, Pavilion signed a stipulation that Coen had no interest in the property.

So, filed suit, plaintiff Coen has an interest, and this is why we're trying the property up. We want you to sell it to us. Several months later, Pavilion filed a stipulation saying Coen doesn't have an issue, but they won't close. Pavilion has filed a suit

for specific performance, filed a lis pendens, stipulated Coen has no interest and they still refuse to close, so even after they claimed there was no cloud on title, they kept the lis pendens, and he maintained the pretext of the specific performance action.

Now, the problem is that they were using, at this point, the lis pendens and the specific performance action to accomplish things that they weren't supposed to be able to accomplish. The lis pendens is not designed as a mechanism to aid parties to recover money damages. This is exactly what the record shows that the defendant did.

Months after it stipulated that that Coen has no interest, months after it failed to join Coen, months after it stipulated Coen had no interest, Pavilion dropped the claim for specific performance, and you would think, well, that could solve the problem with lis pendens. Refused to lift the lis pendens.

So now Pavilion has a suit for damages only, yet refuses to lift the lis pendens and allow my clients to sell it, sell the property to the alternate buyer that they had.

To complicate things, to make it worse, once Coen or once Pavilion has dropped the suit for specific performance and agreed that Coen has no -- nobody else

has interest in the property, the defendant tried to get the -- wouldn't lift the lis pendens unless Crowleys agreed to sell for a lower price, and we have the correspondence where they kept the lis pendens in place in order to try to compel the Crowleys to sell for about $1.5 million less than what had been originally contracted for.

Finally, when that didn't work, the defendants, Pavilion, wrote and offered to drop the lis pendens if the Crowleys agreed to return the $50,000. So long after the specific performance claim had been -- long after it stipulated there was no interest by the third party and long after Pavilion stipulated that there was no action for specific performance, it still refused to drop the lis pendens until the Crowleys agreed to return the $50,000 escrow, which they wouldn't do because the 50,000 it's undisputed had become hard at that time. The time for due diligence had passed. They weren't entitled to the return of it, and even the defendant McNair testified as much in his deposition.

Well, the bottom line is ultimately several months after all this takes place, we managed to get before the Court, and the Court ordered that the lis pendens be removed. So what the Court has done in effect has ruled at that point the lis pendens was clearly

improper. What we're saying is that the lis pendens has been abusive from the beginning because there was no justification for filing it, given the undisputed circumstances of the case.

Thank you.

THE COURT: All right.

MR. KEFALOS: The other thing I would say is if the case goes to trial, I would ask that the defendant be prevented from asserting judicial estopped from asserting that there was a lease. In other words --

THE COURT: Asserting that Coen or any of Coen's entities had a lease?

MR. KEFALOS: Yeah, and that was the justification for not closing because having stipulated --

THE COURT: They would be estopped to assert that.

MR. KEFALOS: Yes. Thank you.

THE COURT: All right. Mr. David, you want to argue?

MR. DAVID: Well, I do, Your Honor. I guess for some clarification from you, I -- it's always interesting to come into a case that most of it was done before you got there, and I differ in some of the issues that George has brought to light; however, my client in

his deposition is a truthful man, and he admitted about filing of the lis pendens and why he thought it was filed and that he felt he was entitled to have his money back for whatever damages there were and whether he got proper advice about that, I'm not sure.

It appears that there are some little issues about that under the abuse of process cases, and there seems to be a case that is close on point, so I've explained to him that there are -- that if the judge rules and charges to the jury that if any agent or any person that participates in the quote, end quote, abuse of process in this instance, the filing of a lis pendens that that person is liable and there would be some personal liability on his part, which he was unaware of, of course, at the time all that took place.

I cannot argue with most of what George has said. Certainly there is a stipulation of agreement. It has always been my opinion from what information I was able to obtain that there was, in fact, a lease and there was, in fact, a cloud on title and there was a lawsuit that was brought for what appeared to be the purposes of resolving that issue.

During the course of that, there is a stipulation that is prepared and is filed with the Court that seems to resolve all of that. It says, there is, in

fact, no lease and nobody appealed from that, so as I understand the law, I am stuck with that stipulation and the order of the Court and cannot go beyond that to present testimony that I had -- would have liked to have presented.

There is a letter that certainly falls within falls within the purview of the cases that after a lis pendens is filed and you demand a lower price because you have a lis pendens file, and that was a letter that was dated February 21, 2008, and that was from Bruce Wallace to Drew Epting, and it sets out the purchase price is much less and a cause for in operant compromise.

I had initially objected to that letter, but the more I look at it, the more I'm sure the Court will allow it in because it was sent to Mr. Epting and, I believe, that Mrs. Crowley testified to that in her deposition that she had received that along with some other -- we spent all day talking about the events surrounding this with Mrs. Crowley.

So she had testified about receiving this letter, and so under the circumstances, even though I think that it is a negotiations between attorneys, I think that His Honor will let it in since it seems to go to the heart and the crux of the issue of the abuse of process.

In light of the depositions that I reviewed over the weekend in preparation for this trial and discussing with my client the possibility and perhaps the probability that if the jury finds an award, awards the damages to the plaintiff, those damages would flow to him personally. And as I understand the brief conversation that we had with the Court, it is the Court's feeling that some of the cases indicate that if you carry something to its logical conclusion that there is no liability on that person that carried the lawsuit to its logical conclusion.

I think quite contrary. The Court feels that that may even go further to show ill will on the part of the person who refuses to remove the lis pendens, and so based on that information and based on what His Honor has told us that he felt the law was in this case, I would ask that you give us a little bit of time to see if we can't reach some type of agreement that would relieve my client from any personal liability in this matter.

THE COURT: All right.

MR. DAVID: I hope that I have not misstated anything you have shared with us on your feelings on the case --

THE COURT: I don't think so.

MR. DAVID: And based on that, I think it

would be prudent for me to try to have my client removed, if at all possible.

THE COURT: Okay. Mr. Kefalos, you want to say anything more?

MR. KEFALOS: Yes, Your Honor, I would.

We've handed up the exhibits that support the arguments, and we passed up the facts that demonstrate it's not in dispute, and I would ask the Court to issue a ruling at this time to make a decision about the abuse of process as a matter of liability.

THE COURT: All right. Well, you know, I've lived with this case, I guess, now for on and off two, three, years, and at various times it crystallizes and other times it becomes more obscure. It depends on the parties and what issues you're dealing with, but as you get down to, you know, the events of the end of last week where DC & Sons and those related parties and the Coens and those related parties all agreed to go to binding arbitration, what then we're left with is the DC and affiliated parties versus Pavilion and affiliated parties and facts that really make what we tried this week a lot easier to focus in on, and, you know, I know at various times the parties have asked me to grant summary judgment, and on a case -- it's always difficult to grant summary judgment just because you can take a fact and

look at it two different ways, and that is what our appellate Courts have said.

If there is a scintilla of evidence that a fact finder could see it another way, then you have to let the fact finder decide it, but as the events over the last several days have relieved some of that from us, the issues that are left in the case to be tried, the facts are very much in dispute, and as I had thought about this more, the fact that Mr. McNair and Pavilion might have had an opportunity to argue that some of their actions were based on advice of attorneys that -- and you could say, well, you know, maybe a jury would buy in to that, that really doesn't lessen whether or not that was good advice or bad advice. It was the -- in fact acted the way they did and took the actions that they did in filing a lawsuit and more importantly filing a lis pendens, and then what probably moves us into the aspect of some serious exposure is ultimately not removing the lis pendens because I strongly feel that the law didn't allow them to file it in the first place on a breach of contract claim.

They did have originally a specific performance claim, and if you're asking for specific performance, that is, you ultimately want title to the property, a lis pendens, of course, is then the mechanism

by which you alert the world that somebody else is claiming title to that property and they should act accordingly, and it basically stops the ability of any person that owns it to do anything to the property, but once they ultimately conceded that there were no, in fact, clouds on the title caused by third parties, either Mr. Coen or any of his affiliated corporations or entities, there really was no reason at that point to leave the lis pendens in place.

And when you couple that with the fact that there is a very strong factual basis for concluding that it might have been done for the purpose of trying to negotiate a more favorable sales price, then I think you move into the area of not only having liability for the abuse of process claim, but you, in fact, expose yourself to punitive damages, and there is really simply no way of getting around the fact that there doesn't appear, especially in light of the stipulation that would prevent me from allowing Pavilion from arguing the oh, yes, Mr. Coen did have an interest in that property, they would not be allowed to do that because they had stipulated earlier in the lawsuit that he didn't have any cloud on that title, or any claim on that title, legitimate claim, so you can't have it both ways.

That ultimately erases any factual dispute

for the jury to decide, and so ultimately, I find that DC & Sons would be entitled then to a summary judgment, and basically all we would do at this point is instruct the jury that liability is not an issue for them to consider but only the issue of damages, including punitive damages, would be for their consideration.

So I find that proper to grant the summary judgment to DC & Sons, and we'll enter an order to that effect. Okay?

MR. EPTING: Thank you, sir.

MR. DAVID: You can give us just a few minutes to see if we can reach some conclusion on this?

THE COURT: Absolutely.

(Recess taken.)

THE COURT: Okay. Y'all asked for a few minutes to work it out, and maybe you've worked something out, I understand. I have, in the meantime, signed the proposed order granting summary judgment that you asked me to take a look at.

MR. EPTING: Judge, in light of the Court's comments, comments then and before concerning the summary judgment, we have reached an agreement.

THE COURT: All right.

MR. EPTING: And, effectively, if it's all right with Your Honor, the effective deal is Mr. McNair

is relieved from liability. That is what he insisted on, and the judgment is entered for the amount of the actual damages claimed by DC & Sons and that we waive any claim to punitive damages, and the claims that Mr. McNair or Pavilion have or are assigned or the proceeds are assigned at DC & Sons election to DC & Sons, and so I would like to proffer, Judge, and there is a confession of judgment against Pavilion for the action of damages.

THE COURT: What amount is that?

MR. EPTING: $4,580,015.93.

THE COURT: Okay.

MR. EPTING: And, Judge, I only have one copy, but I would like to enter this settlement into the court record because it has a confession, and I would ask, given your familiarity with the case, that the Court, for the parties' benefit here, find that it is a fair settlement for all the parties in light of the circumstances and facts as the Court has come to understand it, so with that, I would like to offer this up, Your Honor.

THE COURT: What is the breakdown on that number? How did you come up with 4,580,00?

MR. EPTING: I think I can do it from memory, Judge. The other purchase was at $5 million and the debt on the property was 2,142,000; therefore, the sale alone

would have realized a profit of $2,852,000.

At that time, Judge, rather than having a sale and paying off the mortgage that existed on the property, my client has continued to bear the interest on that property right up through today's date, and that interest is $675 plus thousand dollars, and as I'm speaking now, Judge, I realize all this is in the booklet that I gave you, but I'm happy to go through this.

When the lis pendens was not lifted -- and there really is, Judge, a terrifying piece in this, and it has a lot to do with you and Mr. Dan David. My client, because this lis pendens was ultimately lifted, and Mr. David, unlike Nexsen Pruet, refused to appeal the order, my client was able to close the entire transaction the cost of which was $43,000, but had they not been able to close that transaction, Judge, they would have lost this property, they would have lost Red's, and they would have lost the entire Wings Over America and the franchise.

And so thank God we finally got the lis pendens released, and thank God Mr. David came to a different conclusion about appealing something that was just not in doubt, because this would have been a $50 million lawsuit had we gone down that road.

The other component, Judge, of damages of the

profit that we realized on the sale that did not occur, it would be a liquidated sum of 2,852 and so to that we added interest at 8 and three-quarters, and those numbers are added together. It comes to $4,580,015.93.

THE COURT: All right.

MR. EPTING: Can I tender this to the Court?

THE COURT: Does that represent your understanding of what the settlement is?

MR. DAVID: It does, Your Honor, and what can I say? My clients personally, Mr. McNair who was sued, and also the president of the corporation, the two of them are released from the personal liability, and under the circumstances, especially with your ruling this morning, I feel I have no choice but to agree to this to remove my clients from any possible damages that they may suffer.

THE COURT: Mr. McNair, you have already entered into this settlement?

MR. McNAIR: Yes, sir.

MR. DAVID: He has spoken with the president of the company, Pavilion Development, and has informed them of everything that was going on that they consented to.

THE COURT: All right.

MR. DAVID: I have one little thing I want to

take up. Can you just give me one second, Your Honor?

THE COURT: Sure.

MR. EPTING: Judge, it could be after this is over. Dan has a suggested word to change in the order that doesn't change any substance, but maybe we can simply --

THE COURT: This is which order?

MR. EPTING: The order that you signed, but, I mean, it's a couple words here or there which I don't have any objection.

THE COURT: Well, I can just scratch through the old one.

MR. EPTING: Fine.

THE COURT: All right. Well, then, you want a form four then entered saying this is assigned or that it settled, judgment is entered against Pavilion in the amount of $4,580,015.93 in actual damages only, and how do you want the assignment reflected?

MR. EPTING: The assignment is actually, Judge, reflected in the agreement that is handwritten and provided to the Court, so I don't think there needs to be something in form four.

THE COURT: All right. Well, do you want us to just put on a form four then that the parties have advised the Court that the case was settled and

settlement was put on the record in lieu of the money damages being put on the form four?

MR. EPTING: That would work, Judge.

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 it out.

MR. DAVID: It's not been easy, Judge.

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(Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 18th of January 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 9, 2011

Circuit Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	) IN THE COURT OF COMMON PLEAS) FOR THE NINTH JUDICIAL CIRCUIT
PAVILION DEVELOPMENT CORPORATION, Plaintiff, vs. COENCO, LLC, LOWCOUNTRY CAPITAL, LLC, DC & SONS, LLC, and RICHARD H. COEN, Defendants.	) CASE NO. 2007-CP-10-1457
DC & SONS, LLC, Third-Party Plaintiff, vs OCEAN 1 REALTY, and JAMES R. MAULL, JR., Third-Party Defendants.	) ORDER

FILED
2008 MAR 23 PM 1:59
JULIE J. ARMSTRONG
CLERK OF COURT

Background

On September 4, 2008, DC & Sons, LLC ("DC & Sons") moved pursuant to § 15-11-40 of the South Carolina Code of Laws to dismiss the *lis pendens* filed by Pavilion Development Corporation ("Pavilion"), § 15-11-40 grants this Court the authority to remove a *lis pendens* on motion of an aggrieved party.

On August 11, 2006, Pavilion entered into a contract to purchase real property on Shem Creek owned by DC & Sons. Pavilion deposited $50,000 with its escrow agent as an earnest money deposit. For reasons the subject of many pleadings, the closing did not occur and on April 9, 2007, Pavilion sued DC & Sons for specific performance and filed its *lis pendens*. Pavilion ultimately determined it did not want specific performance and filed an amended pleading seeking damages for breach of contract and seeking to impose an equitable lien on the real property for the return of the earnest money. Pavilion has refused to remove the *lis pendens*

EXHIBIT
2

that it filed with respect to its original complaint for specific performance, and now claims its *lis pendens* is proper so as to secure the return of the $50,000 earnest money deposit.

Question Presented

Is it proper for Pavilion to file a *lis pendens* against real property to secure the return of an earnest money deposit when the earnest money is in Pavilion's realtor's escrow account?

Discussion

A. Pavilion's Original Complaint for Specific Performance

As Pavilion is no longer ready and willing to buy DC & Sons' property as conceded by Pavilion, the complaint no longer supports a cause of action for specific performance. See Shay v. Austin, 466 F.Supp.2d 664 (D.S.C. 2006) (asserting that under South Carolina law, for specific performance to be an appropriate remedy, a court of equity must find the following: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been *and remains able and willing* to perform his or her part of the contract) (emphasis added). As such, the complaint has been amended to a claim for breach of contract.

B. Pavilion's Amended Complaint for Breach of Contract & Equitable Lien

1. Breach of Contract

It is well settled that under South Carolina law, a breach of contract cause of action does not "affect title to real property", and therefore will not support the filing of a *lis pendens*. *See* 54 C.J.S. *Lis Pendens* § 11 (2005) quoting Armstrong v. Carwile, 56 S.C. 463, 476, 35 S.E. 196, 203(1900). "An action for money only, even if it relates in some way to specific real property,

will not support a lis pendens".[1] Even Pavilion does not claim that the *lis pendens* is supported by its breach of contract claims. (Amended Complaint ¶¶ 9-22).

2. Equitable Lien

As appears from Pavilion's Complaint at paragraph 16, Pavilion claims as "a direct and proximate result of the Defendant's refusal to release the escrow funds, Plaintiff has an equitable lien on the subject real property" in the amount of said escrow funds. Pavilion is wrong in this assertion. It is secured by the escrow funds and not the real property, as Pavilion's claims do not affect title to real property and the disputed funds are distinguishable from the real property.

a. Affecting the Title to Real Property

Pavilion's claim for a release of its earnest money does not affect title to real property. In 2002, the South Carolina Court of Appeals in its Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881(S.C.App. 2002) decision surveyed claims that "affect title to real property". An action to establish an equitable lien is not one of them, especially when the money claimed is held in escrow.[2]

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[1] "A mere breach of contract does not give rise to an equitable lien." Carolina Attractions, Inc. v. Courtney, 287 S.C. 140, 145 337 S.E.2d 244, 247 (Ct. App. 1985) *citing* U.S v. Adamant Co, 197 F.2d 1, 10 (9th Cir.) ("there must be something more than the mere fact that a contract has been breached before a lien is impressed upon a specific fund."), cert. denied sub nom. Bullen v. Scoville, 344 U S 903, 73 S.Ct 283, 97 L Ed 698 (1952); Hallmark Manufacturing, Inc. v. Lujack Construction Co, 372 So 2d 520, 521 (Fla.App.1979) (complaint alleging no more than breach of contract failed to state a claim for equitable lien); McKenna v. Turpin, 128 Ind App. 636, 151 N.E.2d 303, 305 (1958) (where there has been nothing more than a breach of agreement to pay a commission to a broker, he is not entitled to equitable lien on property); Hipps v. McKenzie, 201 Tenn 26, 296 S.W.2d 838, 839 (1956) (action for damages is remedy for breach of contract, not action for equitable lien on land); Keyworth v. Israelson, 240 Md. 289, 214 A.2d 168 (1965) ("A mere promise to pay a debt or obligation does not of itself, however, create a lien unless the intention to create it is apparent from the instrument and circumstances leading to it.").

[2] The Pond Place Court stated that an action "affecting the title to real property" allows the filing of a *lis pendens* by an interested party in order to protect their ownership interest in the property subject to the litigation. Id. The Court stated, "Such actions include actions attempting to set aside a fraudulent conveyance of real property, *see* Lebovitz v. Mudd, 293 S.C. 49, 358 S E.2d 698 (1987); Dickerson v. Oliphant, 160 S.C. 288, 158 S.E. 546 (1931); Berger v. Shea, 150 Ga.App. 812, 258 S.E.2d 621 (1979); and actions to establish a constructive trust over real estate, *see* Finley v. Hughes, 106 F Supp. 355 (E.D S C.1952); Kelly v. Perry, 111 Ariz. 382, 531 P.2d 139 (1975) They also include actions to quiet title, *see* *18 Stewart v. Fahey, 14 Ariz.App. 149, 481 P.2d 519 (1971); actions to establish the existence of an easement, *see* Procacci v. Zacco, 402 So.2d 425 (Fla.Dist.Ct.App.1981); actions to reform deeds to resolve a boundary dispute, *see* Houska v. Frederick, 447 S.W.2d 514 (Mo.1969); actions for

While not to overly complicate the obvious – that Pavilion cannot secure itself twice for the same claim, once in the escrow and once in the land – the case of *Carolina Attractions, Inc v. Courtney*, 287 S.C. 140, 337 S.E.2d 244 (Ct. App. 1985) is instructive. The *Carolina Attractions* Court reasoned,

> An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be proceeded against in equity for payment of a claim

Id. at 145. The "thing" in this case is the escrow account, not the real property. Further, "Whenever, in law or in equity, a lien is created or declared there are two things prominently concerned, namely, an obligation and a *res* or *rem* to which or upon which that obligation fastens itself." Id. Here, the *res* is the escrow account. Finally, "An equitable lien must rest on an expressed or implied contract." Id. In this case, the real estate sales contract expressly states Pavilion is secured in the escrow fund. (Contract ¶ 5).

b. Funds Indistinguishable from the Real Property

Had Pavilion's $50,000 been used by DC & Sons to develop the property and no longer existed as a separate fund, then a lien may attach to the real property. In Finley v. Hughes, 106 F. Supp. 355 (D.S.C. 1952) the funds that were to be held in trust for the Plaintiff were used by the Defendant to purchase and build on the property. Because the funds had been put into the property such that they were indistinguishable from it, the Plaintiff was given an equitable lien in the property. In South Carolina Federal Savings Bank v. San-A-Bel Corp., 307 S.C. 76, 413

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specific performance, *see* Panfel v. Boyd, 187 Ga.App. 639, 371 S.E.2d 222 (1988); Hauptman v. Edwards, Inc., 170 Mont. 310, 553 P.2d 975 (1976); Wendy's of South Jersey v. Blanchard Mgmt. Corp. *of N.J.*, 170 N.J Super. 491, 406 A.2d 1337 (Ch.Div 1979); and actions for mortgage foreclosures, *see* Palmer v. Shelby Plaza Motel, Inc., 443 So.2d 285 (Fla.Dist.Ct.App.1983)." Id. at 16-18, 89-90.

S.E.2d 852 (Ct. App. 1992) the funds of the Plaintiff were paid directly to the Defendant, the Defendant used the funds to build condominiums on the property, and therefore, the Court imposed an equitable lien on the real property. As these cases make clear, when the fund still exists and has not been merged into the real property, a lien cannot attach to the property. By analogy, in Shelby Construction v. Sea Garden, the South Carolina Court of Appeals held where a mechanic's lien had been "bonded off" a *lis pendens* was not required as the lien is against the substitute security. Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985).

Conclusion

Defendant's motion for summary judgment as to the *lis pendens* and equitable lien on the real property is GRANTED. The *lis pendens* and equitable lien shall be removed.

IT IS SO ORDERED!

Roger M. Young, Circuit Judge

Charleston, South Carolina.

March 20, 2009

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S.C. SUPREME COURT

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..... Appellants,

v.

NEXSEN PRUET, LLC . . . . . Respondent,

AND

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

CERTIFICATE OF COUNSEL PURSUANT TO RULE 210(g) SCRAP

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material

By: _____
Michelle N Endemann
Andrew K Epting, Jr.
Jaan G. Rannik

Attorneys for Appellants