THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

The Honorable Thomas Russo, Circuit Court Judge

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

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

v.

NEXSEN PRUET, LLC..... Respondent,

AND

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

FINAL REPLY BRIEF OF APPELLANTS

Andrew K. Epting, Jr.
Jaan G. Rannik
Michelle N. Endemann, *Special Counsel*
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310
ake@epting-law.com
jgr@epting-law.com
mne@epting-law.com

GEORGE J. KEFALOS, PA
George J. Kefalos, Esq.
46A State Street, Charleston, SC 29401
Phone: 843-722-6612; Fax 843-377-1310
George@kefaloslaw.com

Attorneys for Appellants

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INTRODUCTION

This is a legal malpractice action filed on August 16, 2011. The action was filed after the settlement of the underlying case brought against Pavilion Development Corp. ("Pavilion") and Larry McNair by DC & Sons, LLC. Pavilion and McNair were represented by Nexsen Pruet in the underlying case. The underlying settlement included an assignment by Pavilion and McNair of the proceeds of their claim against their attorney, Nexsen Pruet.[1] The underlying settlement and assignment took place after summary judgment was entered against Pavilion and McNair by the Honorable Roger M. Young, Sr. and Pavilion and McNair were facing a trial on damages with multimillion dollar exposure. (R. pp. 346-352) The underlying settlement was approved on the record by Judge Young as a "fair resolution of the dispute." (R. p. 373)

This appeal arises out of the lower court's order dated June 29, 2016 denying Appellants' motion to amend their complaint and or substitute parties pursuant to Rules 15 and 17 SCRCP. Pavilion and McNair are former clients of Nexsen Pruet and bring this suit against their attorneys. Nexsen Pruet advocates for the filing of a new case rather than the granting of an amended complaint in this action as the statute of limitations has run, and it does so to avoid a trial on the merits of Appellants' malpractice claim – a malpractice claim based in large part on a summary judgment order in the underlying case in which the trial court found misconduct by Nexsen Pruet. (See *infra*) In this case, the statute of limitations ran during the appeal of a novel issue of South Carolina law (whether a legal malpractice claim can be assigned) decided years after the assignment was drafted – the parties could not have foreseen that the Supreme Court would carve out an exception for legal malpractice claims to the existing black letter law on the

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

assignability of claims. In any event, a client's right to bring his own cause of action for legal malpractice is not vitiated by an invalid assignment of the claim,[2] a concept adopted by this Court by way of its modification of the dismissal from one with prejudice to one without prejudice. Because the statute of limitations has run, failing to allow Appellants' to amend their complaint nullifies this Court's modification and allows a wrong against Appellants to stand without a remedy.

ARGUMENT

1. Nexsen Pruet Cites an Incorrect Standard of Review in its Brief

Nexsen Pruet argues the correct standard of review is abuse of discretion as Court have wide latitude in amending pleadings. (Respondent's Brief, p. 7) However, the lower court's order is not simply an order denying a motion to amend a complaint, if it was this case would be proceeding in the lower court rather than on appeal as the lower court actually held that Pavilion and McNair would be "absolutely entitled" to the amendment under the rules of civil procedure.[3] Rather, the lower court stated it was unable to grant the amendment because of its interpretation of the this Court's previous orders dated August 12, 2015 and September 3, 2015. (R. p. 41 line 14 - p. 42 line 2) In other words, the lower court would have allowed the amendment but for its interpretation that this Court's orders prevented it from doing so.

The lower court's interpretation of Supreme Court orders presents a legal question. The Supreme Court may make its own ruling on a question of law without deferring to the circuit

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[2] *See Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000); *Botma v. Huser*, 202 Ariz. 39 P.3d 538, 542-43 (Ct. App. 2002); *Weiss v. Leatherberry,* 863 So. 2d 368, 372-73 (Fla. Dist. Ct. App. 2003); *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1026 (Ind. 2007); *Weston v. Dowty*, 163 Mich.App. 238, 414 N.W.2d 165 (1987); *Kommavongsa v. Haskell,* 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003).

[3] R. p. 41 line 14 - p. 42 line 2

court. *Henderson v. Summerville Ford-Mercury Inc.*, 748 S.E.2d 221 (S.C. 2013). Questions of law are reviewed *de novo. Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC*, 745 S.E.2d 105 (S.C. 2013).

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

The lower court's interpretation fails to take into consideration the significance of the Supreme Court's modification of the dismissal of the complaint from one with prejudice to one without prejudice (R. pp. 80-81) as well as the significance of the Court's instruction that the motion to amend "should be addressed by the trial court in the first instance." (R. pp. 82-83)

Implicit in this Court's modification to a dismissal without prejudice is that Plaintiffs/ Appellants would have a reasonable time to amend their complaint. *See, e.g., Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (Plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal without prejudice); *Collins v. Sigmon,* 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) (Dismissal of a case "without prejudice" means a plaintiff may reassert her complaint by curing defects that led to the dismissal. In contrast, dismissal of a complaint "with prejudice" is intended to bar relitigation of the same claim).

The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 880 (2006) (citations omitted). In *Spence*, the Supreme Court contemplated a scenario very similar to the one present in this case. The *Spence* Court held:

> When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the

> complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.

Spence v. Spence, 368 S.C. 106, 131. In the case *sub judice*, the Supreme Court affirmed the lower court with regard to the issue of the assignability of legal malpractice claims, but modified the dismissal to one without prejudice. (R. pp. 80-81) Nexsen Pruet argues that under Spence, the appellate court grants a reasonable period of time to amend a complaint when a dismissal with prejudice is amended to one without prejudice. (See Respondent's Brief, p. 8-9) This is exactly why, pursuant to *Spence*, Pavilion and McNair moved before the Supreme Court to be allowed a reasonable time to amend their complaint. Nexsen Pruet ignores the fact that this Court, in ruling on Appellants' motion to amend, instructed that "the motion should be addressed by the trial court in the first instance." (R. pp. 82-83)

At the March 30, 2016 hearing before Judge Nicholson, the lower court agreed with Appellants' interpretation of the September 3, 2015: "THE COURT: I think Mr. Epting is right as far as his interpretation, okay?" (R. p. 57 lines 2-3) Rightly so, as this is the only interpretation that gives meaning to the September 3, 2015 Order. Nexsen Pruet argues that because the case was dismissed without prejudice by this Court, Appellants are unable to seek an amendment of its complaint, and the "only way to interpret" the September 3, 2015 Order is that this Court intended Appellants to file a new complaint. (Respondent's Brief, p. 12) However, the Order specifically references the motion to amend *this case*, and instructs "the motion should be addressed by the trial court. In the first instance." (R. pp. 82-83) Nexsen Pruet's interpretation renders the Supreme Court's instruction meaningless.[4] Of course Nexsen Pruet would argue a

[4] The law favors construction that does not render language meaningless. *See, e.g. Tempel v. S.C. State Election Commn.*, 735 S.E.2d 453, 455 (S.C. 2012), *Hays v. Adair*, 227 S.E.2d 665, 667

new case must be filed, as if a new case is filed, the statute of limitations bars the action, and Nexsen Pruet escapes a very substantial and sizeable malpractice claim. (See R. p. 351 holding: "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.") (citations omitted).

3. Nexsen Pruet's Additional Sustaining Grounds

Nexsen Pruet argues there are three additional sustaining grounds upon which this Court should affirm the denial of Appellants' motion to amend – all of which were presented to the lower court – none of which were deemed persuasive by the lower court as the sole reason articulated by the lower court for denying the motion to amend is its interpretation of this Court's previous orders as a constraint on its ability to grant the motion. The three additional sustaining grounds are as follows: (a) Pavilion and McNair's motion to amend was not a "true motion to amend" (Respondent's Brief, p. 14); (b) neither Rule 15 nor Rule 17 are applicable post judgment (Respondent's Brief, pp. 15-17); (c) denying the motion to amend produces a just result. (Respondent's Brief, pp. 18-19)

a. Appellants' Motion is a True Motion to Amend the Complaint

Nexsen Pruet argues Pavilion and McNair's motion to amend was not a "true" motion to amend because "the proposed amended complaint was virtually identical to the initial complaint and was an attempt to circumvent this Court's opinion." (Respondent's Brief, p. 14).

(S.C. 1976), *Habersham A., LLC v. Firstar Homes, Inc.*, 2012-UP-459, 2012 WL 10862469, at *1 (S.C. App. July 25, 2012).

Nexsen Pruet claims the allegations of the initial complaint and the proposed amended complaint are substantially similar. However, the proposed amended complaint was in no way an attempt to circumvent this Court's order – quite the contrary. The motion to amend sought to file an amended complaint for legal malpractice, independent of the assignment while this Court ruled was void. The motion to amend the complaint was brought by Pavilion and McNair, the former clients of Nexsen Pruet. Independent of the assignment, the allegations of Pavilion and McNair's legal malpractice claim, taken as true in a well-pled complaint, state a claim upon which relief may be granted. Nexsen Pruet has not claimed the malpractice action alleged against them was legally or factually deficient in any way, save that it was initially brought pursuant to an assignment. As the assignment was held void, the amended complaint seeks to bring the malpractice claim "in the normal course, as between the proper parties thereto." *See Joos v. Drillock*, 127 Mich. App. 99, 100, 338 N.W.2d 736, 737 (1983).

Nexsen Pruet alleges that Pavilion and McNair have "done nothing to cure the taint" of the void assignment, primarily because the motion to amend was filed by the undersigned, the same counsel who brought the initial suit. (See Respondent's Brief, p. 10) The motion to amend was filed before this Court a matter of days after Pavilion and McNair received written notice of the entry of the August 12, 2015 Order modifying the dismissal to one without prejudice. In the interest of time, the motion was filed by the undersigned. Moreover, Nexsen Pruet argued in the initial appeal that the "taint" of the assignment warranted a dismissal with prejudice. (See Final Brief of Respondent in initial appeal, R. pp. 214-215) When this Court modified the dismissal to one without prejudice, the undersigned took the ruling as a rejection of this argument. Nexsen Pruet took the position (and continues to make the same argument in this appeal) that the motion to amend in not properly filed because "the case is over," therefore a

motion to amend cannot be granted. (Respondent's Brief, pp. 15-17). If correct, the question of who signed the amended pleading is never implicated.[5] If the court had any objection to the undersigned continuing the representation of Pavilion and McNair, counsel would simply withdraw and new counsel substituted in to prosecute the malpractice claim.

Nexsen Pruet's additional sustaining argument the Pavilion and McNair's motion to amend was not a "true" motion to amend is without merit.

b. <u>The Procedural Rules Cited in Appellants' Motion to Amend Allow the Requested Relief</u>

Pavilion and McNair moved to amend their legal malpractice complaint pursuant to Rule 15 and/or for substitution pursuant to Rule 17 of the South Carolina Rules of Civil Procedure. Nexsen Pruet argues, without any citation to authority, that neither Rule 15 nor Rule 17 are applicable post judgment. (Respondent's Brief, pp. 15-17). Nexsen Pruet argues: "In the present case, the time for substitution of parties has passed. The case as filed has been decided." (Respondent's Brief, p. 17) First, there is some question as to whether a judgment in the traditional sense has been entered in this case. Nexsen Pruet moved for summary judgment on the procedural issue (a novel issue in South Carolina at the time) of whether the assignment between Pavilion and McNair and DC & Sons was valid under South Carolina Law. This Court found the assignment was void as against public policy and dismissed the complaint without prejudice. The Order is not a judgment on the merits of the malpractice claim, the merits were

[5] It seems that the issue of the "taint" of the same counsel bring the case or collusion in the amount of the confession of judgment are all defenses available to Nexsen Pruet, which they would have the opportunity to attempt to prove throughout the course of the malpractice litigation. As no discovery was done even when the case was initially filed, raising this issue at the pleading stage as a bar to the legal malpractice action is premature, especially considering the judgment is supported by hard evidence presented to the trial judge (R. pp. 354-373) and the settlement was put on the record and deemed a "fair resolution of the dispute" by the trial judge. (R. p. 373)

never reached. Only a case that is dismissed *with* prejudice indicates an adjudication on the merits and, pursuant to *res judicata*, prohibits subsequent litigation. *See Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct.App.2003).[6]

i. Rule 17(a)

Even if this Court were to find that Appellants' motion to amend was a post-judgment motion, the rules allow for the amendment. Appellants specifically moved under Rules 15(a), 15(c), and 17(a). As to Rule 17(a) SCRCP, Nexsen Pruet acknowledges the rule requires all actions to by prosecuted in the name of the real party in interest and further provides:

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

Id. Nexsen Pruet claims that the dismissal was not specifically made pursuant to Rule 17(a) but was made because the action was brought pursuant to a void assignment by a party other than the real party in interest, DC & Sons. (See, e.g. Respondent's Brief, p. "Appellants allowed their adversary, DC & Sons, to bring and control this case.") Nexsen Pruet's distinction is one without a difference. If the dismissal was made because a party other than the real party in interest brought the suit, Rule 17(a) provides the suit cannot be dismissed "until a reasonable time has been allowed, after objection, for...joinder or substitution of, the real party in interest" *Id.*

[6] Nexsen Pruet places the blame on the running of the statute of limitations on Appellants, arguing "At any point during this case, Appellants could have chosen to proceed independent of the assignment." (Respondent's Brief, p. 10) However, this action was initially dismissed with prejudice and as stated, a dismissal with prejudice prohibits subsequent litigation. *See also Ciralsky v. C.I.A.*, 355 F.3d 661 (D.C. Cir. 2004)("The refiling of a suit that is dismissed with prejudice is blocked by the doctrine of res judicata").

Appellants moved at the first opportunity to name Pavilion and McNair as the real parties in interest.

Nexsen Pruet argues Rule 25(e) is the procedural mechanism for substitution and that it does not provide for post-judgment substitution. However, Nexsen Pruet's argument is belied by the language of the rule itself. Rule 25(e) provides: "Substitution of parties under the provision of this rule ***may be made by the trial court either before or after judgment***, or pending appeal, by the appellate court." *Id.* (*emphasis added*). Further, Rule 17(a) allows for joinder of the real party in interest. Rule 19 is applicable to the joinder of necessary parties. There is no post-judgment prohibition of its application in the language of Rule 19. *Id.*

ii. Rule 15

Appellants moved to amend their complaint under Rule 15(a) and alleged the amendment would relate back to the original filing sate pursuant to Rule15(c) SCRCP as Rule 15(c) provides "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the original pleading."[7] Rule 15 is routinely applied in the case of a dismissal without prejudice, typically in the context of a dismissal pursuant to Rule 12(b)(6). *See, e.g., Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal without prejudice). Why should this dismissal without prejudice be any different?

[7] If an amendment is allowed pursuant to Rule 15(a), the amendment must relate back to the original filing date as there is no dispute that the claim in the amended complaint arose of the conduct set forth in the original pleadings.

South Carolina courts have held that there is "no time limit" on motions to amend. *Potomac Leasing Co. v. Bone*, 366 S.E.2d 26, 28 (S.C. App. 1988) *citing* H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 288 (1985) (while there is no time limit for making a motion to amend, the court should consider the prejudice to the other party). Further, there are numerous cases that authorize post-judgment amendments pursuant to Rule 15(b) SCRCP. *See, e.g. Ball v. Canadian American Exp. Co., Inc.*, 314 S.C. 272, 442 S.E.2d 620 (S.C.App. 1994) (motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment). Moreover, the notes to Ruel 15(a) state: "This Rule 15(a) is substantially the same as the Federal Rule". Where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive. *Unisun Ins. v. Hawkins*, 537 S.E.2d 559, 562 (S.C. App. 2000). The Federal Circuits have conducted extensive analysis on post-judgment amendments pursuant to Rule 15(a), and "[a]ll circuits acknowledge that post-judgment leave to amend may be granted if timely requested." *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009). Appellants moved to amend within days of receiving this Court's Order modifying the dismissal to one without prejudice. (Motion to Amend).

Even if Appellants' motion to amend is deemed a post-judgment motion, Nexsen Pruet's assertion that Rules 15 and 17 SCRCP are not applicable post-judgment is unsupported by any case law or the rules themselves.

c. Failing to Allow the Amendment Abrogates Appellants' right to bring a Valid and Substantial Malpractice Claim

Nexsen Pruet's final additional sustaining ground concerns whether the denial of the motion to amend provides a "just result." (Respondent's Brief, p. 18). Nexsen Pruet claims the denial of the motion to amend, and thus the loss by Pavilion and McNair to bring their

malpractice claim against Nexsen Pruet as the statute of limitations ran during the appeal of the novel issue of the assignability of legal malpractice claims, is just because:

> Appellants confessed judgment for an unsupported amount. *Id* Appellants then turned around and gave their adversary the right to sue Nexsen Pruet for legal malpractice. *Id.* The complaint was filed without revealing the existence of the assignment to Nexsen Pruet or to the court. *Id* Appellants allowed DC & Sons to prosecute this case all the way up to the highest court in this state. *Id.*

(Respondent's Brief, p. 18). Nexsen Pruet further claims: "Contrary to what Appellants state in their brief, there is no evidence in the record that Judge Young had the handwritten assignment and the confession of judgment in front of him..." (Respondent's Brief, p. 11). Each of these statements, is patently and demonstrably false as now illustrated.

i. Nexsen Pruet's assertion that "Appellants confessed judgment for an unsupported amount"

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. pp. 224-225). 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. 369-371). Judge Young reasoned:

> 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. 373). 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."

ii. Nexsen Preut's Allegations that "the complaint was filed without revealing the existence of the assignment to Nexsen Pruet or to the court" and "there is no evidence in the record that Judge Young had the handwritten assignment and the confession of judgment in front of him"

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 *by the Judge*, 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. pp. 372-373)(emphasis added). Judge Young prepared a Form 4 Order and attached the hand written assignment to his order. (R. pp. 325-330).

iii. Prejudice

Nexsen Pruet claims that it is prejudice because it had to defend the appeal On the validity of the assignment. The party opposing a motion to amend a pleading has the burden of establishing prejudice. *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). Appellants submit defending an appeal of a novel issue of law does not demonstrate prejudice.

It is Appellants that will suffer prejudice – the loss of their claim – if the motion to amend is not granted. In this case, the statute of limitations ran during the appeal of a novel issue of South Carolina law decided years after the assignment was drafted – the parties could not have foreseen that the Supreme Court would carve out an exception for legal malpractice claims to the existing black letter law of the assignability of claims. Further, even those jurisdictions that had decided the issue almost uniformly hold that 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."); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (2000)(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.); *Botma v. Huser*, 39 P.3d 538 (Ariz. 2002) ("Although neither Botma's malpractice claim nor its proceeds are assignable, his malpractice claim does survive the invalid assignment.").

Because the statute of limitations has run, failing to allow Appellants to amend their complaint nullifies this Court's modification to a dismissal without prejudice and allows a wrong against Appellants to stand without a remedy.

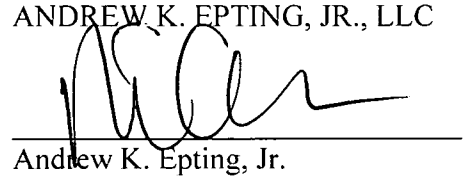
CONCLUSION

Respondent's procedural defense has been spirited which is understandable as the underlying wrong was committed not by Appellants, rather their counsel; the trial court in this same order held Nexsen Pruet's conduct was wrongful. Lacking a substantive defense, Nexsen Pruet argues this Court's Order of September 3, 2015 authorized only the filing of a new case. This is false as appears from the face of the Order. Nexsen Pruet advances a standard of review that is in error. Nexsen Pruet argues that Judge Young did not know the facts of the judgment amount or of the assignment. He did, as the transcript of record states so.

Appellants ask that in all of this procedural wrangling, the Court not lose sight that there was a substantial wrong committed, and the right to bring an action to remedy that wrong belongs to someone. This Court's Order held the right belongs to Appellants. The case should proceed to a conclusion on the merits of the legal malpractice action.

Respectfully submitted by:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.
Michelle N. Endemann, *Special Counsel*
Jaan G. Rannik
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310
ake@epting-law.com
mne@epting-law.com
jgr@epting-law.com

GEORGE J. KEFALOS, PA
George J. Kefalos
46A State Street, Charleston, SC 29401
Phone: 843-722-6612; Fax 843-377-1310
George@kefaloslaw.com

ATTORNEYS FOR APPELLANTS

On this 22nd day of August, 2017
Charleston, SC

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The Honorable Thomas Russo, Circuit Court Judge

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b)

The undersigned certifies that Appellants' Final Brief and Final Reply Brief comply with Rule 211(b).

By _____
Michelle N. Endemann
Andrew K. Epting, Jr.
Jaan G. Rannik

Attorneys for Appellants

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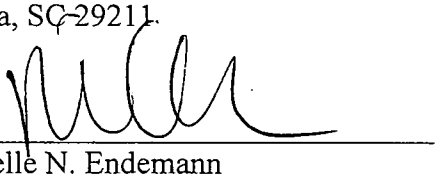
PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant, by depositing a copy in the United States Mail, Postage prepaid, on August 22, 2017, 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 
Michelle N. Endemann
Andrew K. Epting, Jr.
Jaan G. Rannik

Attorneys for Appellants