

Dear Council member Derrick Lindsay

Attn: Council member Derrick Lindsay:

I am writing this letter to get your assistance and support in resolving my legal situation with the court. On December. 9, 2019 my witness and I sat at my attorney's Neil Phillip's office all morning waiting to go to court. However, he advised my witness and I he had received a call from the court between 1pm and 2pm on December.9, 2019 saying that my hearing was being postponed. My attorney Neil Phillip's advised me and my witness that we could go home. He stated to my witness that if he didn't hear from him by 4pm on December.9, 2019 that he could return to Pennsylvania. He informed me that the case would not be heard until after the New Year if we hadn't heard from him by 4:00pm that evening. My witness neither I heard from Mr. Phillips anymore that day. Later that night after not hearing from Mr. Phillips my witness returned back home to Pennsylvania. On December. 10th, 2019 I received several calls from the office of Mr. Phillip's between 9:30am and 11:00am. However, I did not receive the calls until later in the afternoon. After speaking to his secretary she advised me that he was in court fighting a good fight for me.

After about a week I was informed from Mr. Phillip's that the court had ruled in favor of the plaintiff. I was found guilty for being a NO SHOW. This did not sit well with me. After spending time in Mr. Phillip's office the previous day and being misled as to the court appearances, I obtained another attorney. Attorney Jeff Goodwyn I hired to appeal the courts decision. All of the courts have denied my appeal. The court has denied me justice.

I am asking of you any advice or assistance that you me be to me in order for the courts to reconsider their decision with my appeal. I have received no written reason as to why I was denied my appeal. Anything that you may be able to do to assist me would be greatly appreciated.


Your constituency

Nathaniel Shell

Cc / Senator Lindsey Graham

Cc/Congressman Ralph Norman

Cc /Representative Tim Scott



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S.C. SUPREME COURT

**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 Court of Appeals**

Winston Shell, Respondent,

v.

Nathaniel Shell, Appellant.

Appellate Case No. 2020-000027

Appeal From York County
Daniel Dewitt Hall, Circuit Court Judge

Unpublished Opinion No. 2021-UP-436
Submitted November 18, 2021 – Filed December 8, 2021

AFFIRMED

Thomas Jefferson Goodwyn, Jr., of Goodwyn Law Firm,
LLC, of Columbia, for Appellant.

Beverly A. Carroll, of Morton & Gettys, LLC, of Rock
Hill, for Respondent.

PER CURIAM: Nathaniel Shell (Appellant) appeals an order granting judgment in favor of his brother Winston Shell (Respondent) in a breach of contract case related to Appellant's failure to repay monies Respondent had loaned him. Appellant argues the circuit court erred in moving forward with the bench trial in his case when he, an essential witness, was not present. Appellant maintains he

was misled by the trial court's statement at the roster meeting that the assigned judge would not be able to hear the case on the date it was eventually called. We affirm.

I.

The case was set for trial the week of December 9, 2019, by Judge Hall. On September 26, 2019, the court coordinator emailed the parties, advising that the case "appears for trial on the Monday, December 9, 2019 York County CP Jury Roster before Judge Hall" and telling the parties to report to the roster meeting at 9:00 a.m. on December 9. A second email was sent on November 25, 2019, reminding the parties to report to the roster meeting and including a roster for the December 9 trial term in front of Judge Hall and Judge McKinnon, which listed Appellant's case as the fifth on the roster. A third email was sent on December 4, 2019, telling the parties to report to the roster meeting to discuss the case. The email reported the case was to be held before Judge McKinnon; Judge McKinnon had another trial beginning at 9:30 a.m. on December 9; Judge McKinnon had a prior commitment on December 10 so court would end at 2:00 p.m. that day; and court would resume the morning of December 11.

The parties appeared at the roster meeting with Judge Hall, who advised counsel that this case would be subject to being called this week. Judge Hall stated the bench trial would likely be called in front of Judge McKinnon. At 2:10 p.m., Appellant's attorney emailed the court coordinator and asked if there was "any chance" the case would be heard by Judge McKinnon the next day because he had witnesses from out of town who "may have to return tonight." The court coordinator informed Appellant's attorney Judge McKinnon was in the middle of a case that would last until the midday December 10 and that Judge McKinnon then had to leave for a prior commitment. Appellant's attorney stated he would have to regroup with his client. Just twenty minutes later, at 2:30 p.m., the court coordinator emailed Appellant's attorney, informing him Judge Hall would hear this case the next day, December 10, and to report at 9:30 a.m. Judge Hall's law clerk also called Appellant's attorney at 2:52 p.m. and left a voicemail stating the case was being called for trial beginning at 9:30 a.m. the next day.

On December 10, Judge Hall held the bench trial. Judge Hall noted this case was originally going to be tried by Judge McKinnon, but Judge Hall's case resolved, so he moved the case to be heard in front of him. Immediately after calling the case, Judge Hall noted Appellant's attorney had been unable to reach Appellant, and Appellant was not present. Judge Hall also noted Appellant's attorney stated he did

not check his email or voicemails until earlier that morning, so he was not aware the case was being called until then. Judge Hall noted the court was ready to proceed with the case and asked Appellant's attorney if he was ready. Appellant's attorney replied, "Yes, your Honor, without my client." Judge Hall then asked Appellant's attorney to summarize the situation and why his client was not present for the record. Appellant's attorney stated Appellant was present and ready for trial the day before, but after the roster meeting, he informed Appellant "we're gonna have to see when this case can actually be heard; there are a lot of moving pieces." Appellant's attorney noted he emailed the court coordinator about the case and after those emails, he started preparing for another case and did not contact Appellant again. Appellant's attorney stated he tried to get in touch with Appellant that morning through phone, email, and text messages, but he had not been able to contact him. Appellant's attorney noted he had never had problems contacting Appellant before. Judge Hall then began the trial, which resulted in a verdict in favor of Respondent.

Appellant moved for a new trial, arguing he should be granted a new trial because (1) his counsel told him the trial would not occur that week and (2) he had a meritorious defense. In an affidavit supporting his motion, Appellant, a resident of Rock Hill, stated on Monday, December 9, his attorney told him the case was "highly unlikely" to be called that week, so his out of state witness returned to Pennsylvania and Appellant made plans for that Tuesday and "was not available to appear in trial when the case was called." Appellant did not explain what he was doing that prevented him from attending his trial. The circuit court denied Appellant's motion for a new trial. This appeal followed.

II.

Appellant argues Judge Hall abused his discretion in moving forward with the bench trial because his counsel "substantially complied" with Rule 40(i), SCRCP,¹

¹ Rule 40(i), SCRCP ("As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. . . . No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: that the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court

and Judge Hall was therefore "in a position where he had to decide whether or not to move forward with the trial without Appellant or his out of state witness present." We disagree.

We find this issue is not preserved for appellate review because Appellant's counsel never made a motion for a continuance to Judge Hall. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *McGee v. Bruce Hosp. System*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (an issue may not be raised for the first time in a motion for a new trial). Therefore, Appellant's counsel did not substantially comply with Rule 40(i), SCRCP, which in the case of a continuance based on a missing witness requires a party or its counsel to make a motion for a continuance and to make an oath that the missing witness was material and that due diligence had been done to bring the witness to trial.² Accordingly, we affirm.

AFFIRMED.³

KONDUROS, HILL, and HEWITT, JJ., concur.

that the motion is not intended for delay A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief.").

² We acknowledge Appellant's counsel discussed that he had tried to contact Appellant the morning of the trial, and during a motion in limine, he discussed that he had planned to admit checks that Appellant allegedly gave to Respondent, using Appellant to lay the foundation. Thus, Appellant's counsel may have satisfied the oath requirement *had he moved for a continuance*. The record does not disclose how the witness from Pennsylvania was material.

³ We decide this case without oral argument pursuant to Rule 215, SCACR.

The Respondent Winston Shell hereby moves the Court for an Order taxing the Appellant with the Respondent's costs and the maximum attorney's fees allowable under Rule 222(b), SCACR associated with this appeal.

The Respondent would show that he sought to collect monies he loaned to Appellant in a breach of contract matter in the York County Circuit Court. Appellant failed to appear for the trial held on December, 10, 2019, in front of Judge Hall. The Trial Court ruled in Respondent's favor. Appellant filed a motion for new trial which the Circuit Court denied. This appeal followed.

On May 13, 2020, Appellant appealed Judge Hall's Order to the Court of Appeals. The parties filed Briefs and other documents as required by the South Carolina Appellate Court Rules. The Court of Appeals issued its opinion on December 8, 2021, affirming Judge Hall's Order in all respects. A Petition for Rehearing dated December 20, 2021, filed thereafter, which resulted in an Order being issued on March 24, 2022, denying rehearing. On April 25, 2022, Appellant submitted a Petition for Writ of Certiorari, which was denied on September 8, 2022. The Remittitur was sent to the York County Clerk of Court on September 12, 2022 and filed on September 15, 2022.

As a matter of law, and in order to properly appeal this matter, the Respondent was required to obtain copies of transcripts, file duplicate copies of briefs, and file duplicate copies of a Record on Appeal, in order to properly present their appeal to the Court of Appeals and to the Supreme Court. Therefore, the Appellant would respectfully request that this court tax the Respondents with the costs as set forth in the Statement of Costs attached hereto.

The Supreme Court of South Carolina

Winston Shell, Respondent,

v.

Nathaniel Shell, Petitioner.

Appellate Case No. 2022-000503

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
September 8, 2022

cc:
Thomas Jefferson Goodwyn, Jr., Esquire
Beverly A. Carroll, Esquire
The Honorable Jenny Abbott Kitchings

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September 9, 2022

Nathaniel Shell
1843 Ebenezer Road - Apt. I
Rock Hill, SC 29732

RE: *Winston Shell v. Nathaniel Shell*
Case No.: 2017-CP-46-01964
Our File No.: 3000-0555

Dear Mr. Shell:

Enclosed please find a copy of the Order received from the Court of Appeals denying our Petition for Writ of Certiorari in regards to the above referenced matter. With this last order being denied, we no longer have any appeals.

Please contact my office with any questions.

Sincerely,



T. Jeff Goodwyn, Jr.

TJG:enc
Enclosure

LUCAS MC Fadden ANZ
WSON JASON STOGENKE 704-374-3511
704-335-4738

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