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**Dec 15 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

William A. McKinnon, Circuit Court Judge  
Case No. 23-000859

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Appellate Case No. 23-000859

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Nathaniel Shell,

Respondent,

v.

Law Office of Neil T. Phillips, LLC  
and Neil T. Phillips

Appellants.

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**INITIAL BRIEF OF RESPONDENT**

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December 15, 2023

s/ D. Alan Lazenby \_\_\_\_\_

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## STATEMENT OF THE CASE

This case arises out of Appellants' representation of Respondent in a civil lawsuit. The facts of this underlying civil lawsuit are set forth in this Court's unpublished opinion. Shell v. Shell, 2022 S.C. App. Unpub. LEXIS 190 (S.C. Ct. App., Mar. 24, 2022) Briefly, Respondent's case was called to trial during the week of December 9, 2019. (Compl. ¶ 9). Respondent and his trial witness traveled to York, South Carolina, from out of town, and were ready to testify at trial. (Compl. ¶ 9). Appellant called Respondent after the roster meeting and then advised that the case would not be heard that week and the witness should return home. (Complaint ¶ 10). Respondent was never told about the trial taking place the next day on December 10, 2019. The trial took place in Respondent's absence and judgment was entered against him. (Complaint ¶ 11-13).

Respondent appealed the decision. The case was finally dismissed by this Court on September 12, 2022 by Remittitur to the Circuit Court. (Shell Aff. ¶2). The Court of Appeals affirmed the decision of the trial court because Appellant never requested a continuance of the trial despite not having his client or any witnesses present. (Shell Aff., Ex. A. P. 4). Respondent immediately consulted with several attorneys. One attorney advised him that the statute of limitations may expire on December 10, 2022, and that he should file the lawsuit immediately. (Shell Aff. ¶¶ 3,4). Respondent filed the complaint on December 8, 2022, pro se, while he continued to search for an attorney to represent him. He finally retained the undersigned on February 9, 2023. (Shell Aff. ¶¶ 5, 6).

When Respondent retained counsel, Appellants had already appeared in the case and filed a Motion to Dismiss. Respondent's counsel immediately filed a motion to extend time to file an expert witness affidavit. (Res. Motion to Extend February 9, 2023). Respondent argued that the time for filing an affidavit should be extended based upon Respondent's good faith belief that the

statute of limitations may expire. S.C. Code Ann. § 15-36-100(C)(1). Respondent argued that in addition to the 45 days extension allowed by this code section, “the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.” The trial court refused to extend the time to submit an affidavit and granted the motion to dismiss without prejudice. During argument, Respondent argued that if the case were to be dismissed, it should be without prejudice since it is very likely the statute of limitations did not begin to run until September 12, 2022. (Hrg. Tr. 13-14).

### **STANDARD OF REVIEW**

Respondent agrees with Appellants’ statement of the Standard of Review.

### **ARGUMENT**

#### **I. THE CIRCUIT COURT CORRECTLY INDICATED THE DISMISSAL WAS WITHOUT PREJUDICE BECAUSE THE DISMISSAL WAS NOT BASED ON THE MERITS OF THE CASE.**

In denying Appellants’ motion for reconsideration to dismiss the case with prejudice, the circuit court correctly noted that a dismissal without prejudice was proper because the dismissal is not based upon the merits of the case. It is important to note that Appellants’ motion was one to dismiss pursuant to 12(b)(6), SCRPC. Our Supreme Court has held that a motion under this rule “permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim.” Skydive Myrtle Beach v. Horry Cty., 426 S.C. 175, 180 (2019). Clearly, a review of the trial transcript shows that the dismissal is not based on the merits of this case. Further South Carolina law supports the fact that dismissals under Rule 12(b)(6) are without prejudice.

Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. Dismissal of a case precludes relitigation only on matters actually decided in the dismissal. When a complaint is dismissed under

Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint.

Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

**II. THE CIRCUIT COURT SHOULD BE AFFIRMED BECAUSE CONSIDERATION SHOULD BE GIVEN TO RESPONDENT BECAUSE THE COMPLAINT WAS FILED PRO SE.**

Rule 8(f), SCRCF, succinctly holds that all pleadings should always be construed in order to do substantial justice for the parties. Our courts extend further consideration for pro se parties. Because I do not believe I can state this better than Judge Casey Manning, I quote extensively from his Order Granting Defendant's Motion to Dismiss Complaint in Taylor v. State of South Carolina, 2019-CP-40-00486, filed June 28, 2019.

The Court always liberally construes Pro se pleadings and holds them to a less stringent standard than formal pleadings drafted by attorneys. *See, e.g. Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *De'Lontav. Angelone*, 330 F.3d 630, 633 (4th Cir. 2003). Generally, a pro se litigant's pleadings should be construed liberally to avoid inequity, and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Sweeting v. McCabe*, 141 Fed Appx. 2177 (4th Cir. 2005).

Although Judge Manning ruled against the pro se Plaintiff, these considerations hold true for the case at bar.

Even assuming the statute of limitations would have expired on December 10, 2022, justice requires that Respondent be permitted to have his case heard on the merits and not have it summarily dismissed because of a technical violation. Appellants have not been prejudiced in any way. In fact, Respondent could have waited until as late as April 8, 2023 before serving the Summons and Complaint on appellants in this case. Yet because of a technicality Respondent's case is deemed forever dismissed if the affidavit is not filed 45 days after filing the summons and complaint. This is not a just result that should stand. Respondent should be allowed to refile his

complaint as a matter of equity.

**III. APPELLANTS' ARGUMENT THAT STATUTORY CONSTRUCTION OF S.C. CODE ANN. § 15-36-100 SUPPORTS A DISMISSAL WITH PREJUDICE IS WITHOUT MERIT.**

Appellants argue that if this lawsuit is not dismissed with prejudice, the intent of this code section cannot be met. However, Appellants have not cited any legislative history, nor do I believe any exist, to support the fact that S.C. Code Ann. § 15-36-100 gives potential plaintiffs one bite at the apple. In fact, because this statute is under the same heading as the Frivolous Proceedings Act, the true intent of this statute is to prevent filing of frivolous claims against professionals. This statute is not intended to be a technicality to allow professionals with fiduciary duties to clients to avoid consequences for their malpractice.

Simply stated, there is no language in this statute which indicates in any way that a dismissal for failing to comply with the statute should be deemed a dismissal with prejudice. In fact, the language of the statute indicates that the plaintiff failing to file the required affidavit should be able to submit another complaint.

S.C Code Ann. § 15-36-100(F) provides a mechanism for re-filing the complaint after a complaint is initially dismissed. The section holds that where a complaint is initially dismissed for failing to attach the required affidavit, "the complaint is not subject to renewal after the expiration of the applicable period of limitations...." This language suggests that the complaint is subject to renewal or being refiled if it is still within the statute of limitations.

**IV. APPELLANTS' RELIANCE ON CASELAW FROM THE STATE OF GEORGIA IS MISPLACED BECAUSE GEORGIA'S PROCEDURAL LAW IS DIFFERENT FROM SOUTH CAROLINA.**

Appellants' reliance on Georgia case law is misplaced. Unlike South Carolina law, the procedural law in Georgia supports the proposition that dismissal for failing to state a claim is a

dismissal with prejudice. In the case Appellants cite as persuasive authority from the State or Georgia, Jordan, Jones & Goulding v. Balfour Beatty Constr., 539 S.E.2d 828, 829 (Ga. Ct. App. 2000), the court specifically holds that “[a] dismissal for failure to state a claim is a dismissal on the merits and is with prejudice.” This holding is completely at odds with South Carolina case law discussed above. In fact, the analysis of that decision focuses on the fact that the statute refers multiple times to a dismissal for “failing to state a claim” to support the fact that under Georgia law that means a dismissal should be with prejudice. South Carolina jurisprudence supports the fact that the dismissal under S.C. Code Ann. 15-36-100 should be without prejudice. See Rotureau v. Chaplin, Civ. No. 2:09-1388-DCN 2009 U.S. Dist. LEXIS 118618, at \*17, 2009 WL 5195968, (D.S.C. Dec. 21, 2009) and Rodgers v. Glenn, Civ. No. 1:16-16-RMG, 2017 U.S. Dist. LEXIS 40745, at \*12 2017 WL 1051011 (D.S.C. Mar. 20, 2017).

**V. THE COURT SHOULD AFFIRM BASED ON ANY OTHER REASON APPARENT IN THE RECORD ON APPEAL.**

Respondent also request that the decision of the Circuit Court be affirmed on any ground appearing in the record in accordance with Rule 220(c), SCACR.

**CONCLUSION**

For the reasons set forth above, Respondent respectfully request that the decision of the Circuit Court of allowing Respondent the right to refile the complaint be affirmed.

Respectfully submitted,

December 15, 2023

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