

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge
Case No.: 2022-CP-46-03676

RECEIVED

Dec 21 2023

SC Court of Appeals

Appellate Case No. 23-000859

Nathaniel Shell,.....Respondent,

v.

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

INITIAL REPLY BRIEF OF APPELLANTS

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
tcary@csvl.law
Ph: 843-727-0307

By: s/Douglas W. MacKelcan
DOUGLAS W. MACKELCAN
State Bar No.: 76332
TAYLOR L. CARY
State Bar No.: 105136
Attorneys for Appellants

TABLE OF CONTENTS

ARGUMENT 3

 I. RESPONDENT’S ARGUMENT THAT DISMISSAL UNDER RULE 12(b)(6), SCRCP
 REQUIRES DISMISSAL WITHOUT PREJUDICE IS MISPLACED IN THIS CASE. .. 3

CONCLUSION..... 4

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d 869 (2006)	3
<i>Santos v. Harris Investment Holdings, LLC</i> , 439 S.C. 214, 886 S.E.2d 483 (Ct. App. 2023).....	3

ARGUMENT

I. RESPONDENT’S ARGUMENT THAT DISMISSAL UNDER RULE 12(b)(6), SCRPC REQUIRES DISMISSAL WITHOUT PREJUDICE IS MISPLACED IN THIS CASE.

While Respondent correctly notes that South Carolina Courts generally grant dismissal under Rule 12(b)(6), SCRPC without prejudice to allow the pleader to amend, South Carolina Courts may, and do, dismiss with prejudice, where the amendment would be futile or where the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted. *See Spence v. Spence*, 368 S.C. 106, 131, 628 S.E.2d 869 (2006) (“On the other hand, when a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice.”); *Santos v. Harris Investment Holdings, LLC*, 439 S.C. 214, 221, 886 S.E.2d 483 (Ct. App. 2023). For example, in *Santos*, this Court held that dismissal with prejudice on a Rule 12(b)(6) motion was appropriate where the plaintiff never moved to amend her complaint under Rule 15, SCRPC, and “merely stated she would be ready to amend her complaint upon the court’s request or finding that the complaint was deficient.” *See Santos*, 439 S.C. at 221.

Here, the same applies, and dismissal with prejudice is appropriate where Respondent did not move to amend his Complaint and did not present the circuit court with an expert affidavit containing “additional factual allegations or a different theory of recovery which may give rise to a claim.” *See Spence*, 368 S.C. at 106. As in *Santos*, Respondent merely requested additional time to file the expert affidavit within two (2) weeks if the circuit court deemed it required. **Transcript**

pp. 14, 17. Further, Respondent also failed to present an expert affidavit to the circuit court despite having four (4) months before the underlying Motion to Dismiss hearing was held by the circuit court (and three (3) of those months with retained counsel). **Appellants' Motion to Dismiss; Transcript p. 1.** Thus, this Court should dismiss the Respondent's Complaint with prejudice as a dismissal without prejudice does not align with the purpose and intent of South Carolina Code § 15-36-100, *et seq.*

CONCLUSION

For the aforementioned reasons and for the reasons set for in Appellants' Brief, Appellants respectfully request that this Court partially reverse the Circuit Court's Order and dismiss the Respondent's Complaint *with* prejudice.

This 21st day of December, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
tcary@csvl.law
Ph: 843-727-0307

By: s/Douglas W. MacKelcan
DOUGLAS W. MACKELCAN
State Bar No.: 76332
TAYLOR L. CARY
State Bar No.: 105136
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge
Case No.: 2022-CP-46-03676

RECEIVED
Dec 21 2023
SC Court of Appeals

Appellate Case No. 23-000859

Nathaniel Shell,..... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served *Initial Reply Brief of Appellants*, upon the parties below by electronic mail on December 21, 2023, addressed as follows:

D. Alan Lazenby, Esq.
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304
alan@lazenbylawfirm.com
Attorney for Respondent

This 21st day of December, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
tcary@csvl.law
Ph: 843-727-0307

By: *s/Douglas W. MacKelcan*
DOUGLAS W. MACKELCAN
State Bar No.: 76332
TAYLOR L. CARY
State Bar No.: 105136
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge
Case No.: 2022-CP-46-03676

RECEIVED

Dec 21 2023

SC Court of Appeals

Appellate Case No. 23-000859

Nathaniel Shell,.....Respondent,

v.

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

**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
tcary@csvl.law
Ph: 843-727-0307

By: s/Douglas W. MacKelcan
DOUGLAS W. MACKELCAN
State Bar No.: 76332
TAYLOR L. CARY
State Bar No.: 105136
Attorneys for Appellants

Pursuant to Rule 209, SCACR, Appellants designate the following to be included in the Record on Appeal:

1. Summons and Complaint, dated December 8, 2022;
2. Defendants' Motion to Dismiss, dated January 6, 2023;
3. Plaintiff's Motion to Extend Time, dated February 9, 2023;
4. Memorandum in Support of Defendants' Motion to Dismiss, dated March 7, 2023;
5. Memorandum in Opposition to Plaintiff's Motion to Extend Time with Exhibits, dated March 7, 2023;
6. Order Granting Motion to Dismiss and Denying Motion to Extend Time, dated March 28, 2023;
7. Defendants' Notice of Motion and Motion to Reconsider, dated April 6, 2023;
8. Memorandum of Law in Support of Defendants' Motion to Reconsider, dated April 6, 2023;
9. Form 4 Order Denying Motion to Reconsider, dated April 25, 2023;
10. Transcript of Record for Hearing on March 9, 2023;
11. Notice of Appeal, dated May 25, 2023;
12. Amended Notice of Appeal, dated May 25, 2023;
13. Notice of Cross-Appeal, dated June 2, 2023;
14. Amended Notice of Cross-Appeal, dated June 12, 2023;
15. South Carolina Court of Appeals Order granting Respondent's Request to Withdraw His Appeal, dated June 30, 2023.

The undersigned counsel certifies pursuant to Rule 209(c), SCACR, the Designation contains no matter which is irrelevant to this appeal.

[SIGNATURE PAGE TO FOLLOW]

This 21st day of December, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
tcary@csvl.law
Ph: 843-727-0307

By: s/Douglas W. MacKelcan
DOUGLAS W. MACKELCAN
State Bar No.: 76332
TAYLOR L. CARY
State Bar No.: 105136
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge
Case No.: 2022-CP-46-03676

RECEIVED

Dec 21 2023

SC Court of Appeals

Appellate Case No. 23-000859

Nathaniel Shell,..... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served Appellants' *Designation of Matter to be Included in the Record on Appeal* upon the parties below by electronic mail, addressed as follows:

D. Alan Lazenby, Esq.
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304
alan@lazenbylawfirm.com
Attorney for Appellant

This 21st day of December, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvg.law
tcary@csvg.law
Ph: 843-727-0307

By: s/Douglas W. MacKelcan
DOUGLAS W. MACKELCAN
State Bar No.: 76332
TAYLOR L. CARY
State Bar No.: 105136
Attorneys for Appellants

LAW OFFICES
COPELAND, STAIR, VALZ & LOVELL, LLP

DOUGLAS W. MACKELCAN
Partner
TAYLOR L. CARY

DIRECT DIAL NUMBERS
(843) 266-8228
(843) 266-8214

E-MAIL ADDRESSES
dmackelcan@csvl.law
tcary@csvl.law

40 Calhoun Street, Suite 400
CHARLESTON, SC 29401

TELEPHONE (843) 727-0307
FAX (843) 727-2995

www.csvl.law

ATLANTA OFFICE

191 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30303-1740
(404) 522-8220

REPLY TO SC OFFICE

December 21, 2023

VIA EMAIL ONLY

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

RECEIVED
Dec 21 2023
SC Court of Appeals

Re: Nathaniel Shell v Law Office of Neil T. Phillips, LLC; and Neil T. Phillips
York County Case No.: 2022-CP-46-03676
Appellate Case No.: 23-000859
CSVL File No: 5457-64793

Dear Ms. Kitchings:

Enclosed please find Appellants Law Office of Neil T. Phillips, LLC, and Neil T. Phillips's *Reply Brief and Designation of Matter to be Included in the Record on Appeal* in this case, together with Proof of Service. By copy of this letter, and we are providing copies of the same to Repondent's counsel. If anything further is required from Appellants at this time, please advise

Sincerely,

s/Douglas W. MacKelcan

DOUGLAS W. MACKELCAN
TAYLOR L. CARY

DWM:tjr

enclosure: *Appellants' Reply Brief and Designation of Matter to be Included in the Record on Appeal*
cc: D. Alan Lazenby, Esq. w/encl: via email: alan@lazenbylawfirm.com

From: [Rewt, Teri J.](#)
To: alan@lazenbylawfirm.com
Cc: [Mackelcan, Douglas W.](#); [Cary, Taylor L.](#); [Moran, Rosie](#)
Subject: Nathaniel Shell v Law Office of Neil T. Phillips, LLC and Neil T. Phillips; Appellate Case No.: 23-000859; CSVL File No.: 64793
Date: Thursday, December 21, 2023 3:36:00 PM
Attachments: [Appellants' Designation of Matter to be Included in the Record on Appeal \(with Reply Brief\).pdf](#)
[image001.png](#)
[Appellants' Reply Brief.pdf](#)

Good afternoon Alan,

This afternoon, we will be submitting to the Court, the attached Appellants' Reply Brief and Designation of Matters. You will be cc'd on that email.

Best regards,



Teri Rewt
Legal Assistant II
d: 843.329-8346 | f: 843.727.2995
trewt@csvl.law | www.csvl.law
40 Calhoun Street, Suite 400, Charleston, SC 29401