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Jan 25 2024

SC Court of Appeals

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

Appellate Case No. 23-000859

Nathaniel Shell,.....Respondent,

v.

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

RECORD ON APPEAL

Douglas W. Mackelcan
State Bar No.: 76332
Taylor L. Cary
State Bar No.: 105136
Copeland, Stair, Valz & Lovell, LLP
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Charleston, SC 29401
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Ph: 843-727-0307
Attorneys for Appellants

D. Alan Lazenby, Esq.
State Bar No.: 13906
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304
alan@lazenbylawfirm.com
Ph: (864) 804-5050
Attorney for Respondent

INDEX

1.	Form 4 Order Denying Motion to Reconsider, dated April 25, 2023.....	1
2.	Order Granting Motion to Dismiss and Denying Motion to Extend Time, dated March 28, 2023.....	4
3.	South Carolina Court of Appeals Order granting Respondent’s Request to Withdraw His Appeal, dated June 30, 2023.....	7
4.	Notice of Appeal, dated May 25, 2023.	8
5.	Amended Notice of Appeal, dated May 25, 2023.....	10
6.	Notice of Cross-Appeal, dated June 2, 2023.....	11
7.	Amended Notice of Cross-Appeal, dated June 12, 2023.....	14
8.	Summons and Complaint, dated December 8, 2022.....	19
9.	Defendants’ Motion to Dismiss, dated January 6, 2023.....	28
10.	Plaintiff’s Motion to Extend Time, dated February 9, 2023.....	29
11.	Defendants’ Notice of Motion and Motion to Reconsider, dated April 6, 2023.....	31
12.	Transcript of Record for Hearing on March 9, 2023.....	33
13.	Affidavit of Nathaniel Shell with Exhibit A, dated March 8, 2023.....	56
14.	Memorandum in Support of Defendants’ Motion to Dismiss, dated March 7, 2023.....	62
15.	Memorandum in Opposition to Plaintiff’s Motion to Extend Time, dated March 7, 2023.....	84
16.	Memorandum of Law in Support of Defendants’ Motion to Reconsider, dated April 6, 2023.....	86
17.	Letter from Court of Appeals receiving Notice of Appeal.....	93
18.	Certificate of Appellant.....	95

Nathaniel Shell
PLAINTIFF(S)

Neil T Phillips et al
DEFENDANT(S)

DISPOSITION TYPE (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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- 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:

Defendants' Motion to Reconsider is DENIED. The dismissal was not on the merits, and thus was properly without prejudice. See Davis v. Lunceford, 279 S.C. 503 (Ct. App. 1983); Small v. Mungo, 254 S.C. 438 (1970); and Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175 (2019).

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/25/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



York Common Pleas

Case Caption: Nathaniel Shell VS Neil T Phillips , defendant, et al

Case Number: 2022CP4603676

Type: Order/Electronic Form 4

So Ordered

/s William A. McKinnon, #2761, Resident Circuit
Judge and Chief Admin. Judge for CP, 16th Cir.

Electronically signed on 2023-04-25 14:11:48 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	CASE NO.: 2022-CP-46-03676
)	
Nathaniel Shell,)	
)	
Plaintiff,	)	ORDER
)	
vs.)	
)	
Law Office of Neil T. Phillips, LLC; and Neil)	
T. Phillips,)	
)	
Defendants.)	
_____)	

This matter came before the Court on March 9, 2023 on Defendants Neil T. Phillips and Law Office of Neil T. Phillips, LLC’s Motion to Dismiss, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and South Carolina Code Section 15-36-100, filed January 6, 2023, and Plaintiff’s Motion to Extend Time filed on February 9, 2023. Allen Lazenby, counsel for Plaintiff, Doug MacKelcan, counsel for Defendants, and Defendant Neil Phillips all attended the virtual hearing. The Court heard arguments from both sides. For the reasons set forth below, Defendants’ Motion to Dismiss is GRANTED without prejudice, and Plaintiff’s Motion to Extend Time is DENIED.

This is an action for damages alleging Professional Negligence arising out of Defendants’ representation of Plaintiff in a civil lawsuit. Plaintiff filed his Complaint on December 8, 2022 without a supporting expert affidavit, and Defendants responded to the Complaint with a Motion to Dismiss on January 6, 2023. Plaintiff filed a Motion to Extend Time to File the expert affidavit on February 9, 2023, more than 60 days after Plaintiff filed the Complaint.

South Carolina Code § 15-36-100(B) states, “In an action for damages alleging professional negligence against [a licensed attorney]...the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or

omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” A complaint failing to meet this requirement is subject to dismissal for failure to state a claim. S.C. Code §15-36-100(C)(1).

S.C. Code §15-36-100 *et seq.* identifies two exceptions to the contemporaneous filing requirement found in Subsections (B). *See* S.C. Code § 15-36-100(C)(1)(2). Unless one of these two exceptions is met, the expert affidavit must be filed as part of the complaint. The Court finds that Plaintiff has not shown that either exception is applicable here. Accordingly, the Complaint should be dismissed for failure to state a claim pursuant to SC Code Section 15-36-100. Likewise, the Court finds that Plaintiff has not established grounds to justify an extension of time to file an expert affidavit. Plaintiff did not adequately plead entitlement to an extension under the statute, and he did not establish good cause for an extension.

In addition, because Plaintiff’s Breach of Contract cause of action involves an alleged failure to perform professional services based on the same facts and circumstances as the professional negligence cause of action, it is likewise subject to dismissal under South Carolina law. Finally, Plaintiff’s counsel acknowledged at the hearing that Plaintiff has failed to state a cause of action for Negligent Infliction of Emotional Distress, and the Court finds that it should be dismissed for failure to state a claim.

THEREFORE, Plaintiff’s Complaint against Defendants is hereby dismissed **without prejudice.**

IT IS SO ORDERED.

The Honorable William A. McKinnon
Sixteenth Judicial Circuit

This ____ day of _____, 2023.

7034978v1



York Common Pleas

Case Caption: Nathaniel Shell VS Neil T Phillips , defendant, et al

Case Number: 2022CP4603676

Type: Order/Dismissal

So Ordered

/s William A. McKinnon, #2761, Resident Circuit
Judge and Chief Admin. Judge for CP, 16th Cir.

Electronically signed on 2023-03-28 13:58:41 page 3 of 3

The South Carolina Court of Appeals

Nathaniel Shell, Respondent,

v.

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

Appellate Case No. 2023-000859

The Honorable William A. McKinnon
York County
Trial Court Case No. 2022CP4603676

ORDER

Appellant-Respondent Nathaniel Shell has filed a request to withdraw his appeal. This request is Granted and the cross appeal with Nathaniel Shell is dismissed. A partial remittitur regarding the appeal by Nathaniel Shell will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules. All future filings must feature the amended caption above.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

FILED
Jun 30 2023

cc:

Duane Alan Lazenby, Esquire
Douglas Walker MacKelcan, III, Esquire

NOTICE OF APPEAL IN A CIVIL CASE

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

Nathaniel Shell,

Appellant,

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

v.

Respondents.

NOTICE OF APPEAL

Nathaniel Shell appeals the order of the Honorable William A. McKinnon dated April 25, 2023. Appellant received written notice of entry of this order on April 25, 2023.

May 25, 2023

s/ D. Alan Lazenby
D. Alan Lazenby
Post Office Box 6099
Spartanburg, South Carolina 29304
(864) 804-5050
Attorney for Appellant

Other Counsel of Record:
Douglas MacKelcan
40 Calhoun Street, Suite 400
Charleston, SC 2940
Attorney for Respondent
(843) 727-0307

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

Nathaniel Shell,

Appellant,

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

v.

Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent Neil T. Phillips and on Respondent Law Office of Neil T. Phillips, LLC by depositing a copy of it in the United States Mail, postage prepaid, on May 25, 2023 addressed to the attorney of record for Respondents, Douglas MacKelcan, to 40 Calhoun Street, Suite 400, Charleston, SC 29401 and via his email to Dmackelcan@csvg.law.com.

May 25, 2023

s/ D. Alan Lazenby
D. Alan Lazenby
Post Office Box 6099
Spartanburg, South Carolina 29304
(864) 804-5050
Attorney for Appellant

NOTICE OF APPEAL IN A CIVIL CASE

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

Nathaniel Shell,

Appellant,

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

v.

Respondents.

AMENDED NOTICE
OF APPEAL

Nathaniel Shell appeals the order of the Honorable William A. McKinnon dated March 28, 2023. This Order became final upon the Court's denying the Motion to Reconsider on April 25, 2023. Appellant received written notice of entry of this Order on April 25, 2023.

May 25, 2023

s/ D. Alan Lazenby
D. Alan Lazenby

Post Office Box 6099
Spartanburg, South Carolina 29304
(864) 804-5050
Attorney for Appellant

Other Counsel of Record:
Douglas MacKelcan
40 Calhoun Street, Suite 400
Charleston, SC 2940
Attorney for Respondent
(843) 727-0307

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Jun 02 2023

SC Court of Appeals

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

Appellate Case No. 23-000859

Nathaniel Shell,.....Appellant,

v.

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

NOTICE OF CROSS-APPEAL

The Law Office of Neil T. Phillips, LLC, and Neil T. Phillips cross-appeal the Order issued by the Honorable William A. McKinnon and entered on April 25, 2023. Respondents were served with Appellant’s Notice of Appeal on May 25, 2023. A copy of the appealed Order is enclosed herein.

June 2, 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 Respondents

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Jun 02 2023

SC Court of Appeals

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

Appellate Case No. 23-000859

Nathaniel Shell,.....Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served *Respondents' Notice of Cross-Appeal* upon the parties below by electronic mail and/or depositing a copy of it in the United States Mail, postage prepaid, on June 2, 2023, 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 2nd day of June, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
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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 Respondents

LAW OFFICES
COPELAND, STAIR, VALZ & LOVELL, LLP

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Partner
TAYLOR L. CARY

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TELEPHONE (843) 727-0307
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ATLANTA OFFICE
191 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30303-1740
(404) 522-8220

REPLY TO SC OFFICE

RECEIVED

Jun 02 2023

SC Court of Appeals

June 2, 2023

VIA EMAIL and REGULAR U.S. MAIL

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

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 Respondents Law Office of Neil T. Phillips, LLC; and Neil T. Phillips's *Notice of Cross-Appeal* in this case, together with the \$250.00 filing fee. If anything further is required from Respondents at this time, please advise.

Sincerely,

s/Douglas W. MacKelcan

DOUGLAS W. MACKELCAN
TAYLOR L. CARY

DWM:tjr

enclosure: *Respondents' Notice of Cross-Appeal*

cc: D. Alan Lazenby, Esq. w/encl: via email and regular mail: alan@lazenbylawfirm.com

RECEIVED

Jun 12 2023

SC Court of Appeals

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

Appellate Case No. 23-000859

Nathaniel Shell,.....Appellant-Respondent,

v.

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

**AMENDED
NOTICE OF CROSS-APPEAL**

The Law Office of Neil T. Phillips, LLC, and Neil T. Phillips cross-appeal the Order issued by the Honorable William A. McKinnon and entered on April 25, 2023. Respondents received written notice of entry of the Order on April 25, 2023 and were served with Appellant’s Notice of Appeal on May 25, 2023. A copy of the appealed Order is enclosed herein.

June 12, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
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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 Respondents-Appellants

RECEIVED

Jun 12 2023

SC Court of Appeals

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

Appellate Case No. 23-000859

Nathaniel Shell,.....Appellant-Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served ***Respondents-Appellants' Amended Notice of Cross-Appeal*** upon the parties below by electronic mail and/or depositing a copy of it in the United States Mail, postage prepaid, on June 12, 2023, 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 12th day of June, 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 Respondents-Appellants



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
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June 08, 2023

Mr. Duane Alan Lazenby, Esquire
PO Box 6099
Spartanburg SC 29304

Mr. Douglas Walker MacKelcan, III, Esquire
Copeland, Stair, Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston SC 29401

Re: Nathaniel Shell v. Neil T. Phillips
Appellate Case No. 2023-000859

Dear Counsel:

The Court received multiple notices of appeal in this case. The notices of appeal have been consolidated for consideration by the Court, and we anticipate receiving one record on appeal. The times for perfecting the appeal will run from the date of service of the last notice of appeal.

The title in this matter has been changed to read as follows:

Nathaniel Shell, Appellant-Respondent,

v.

Law Office of Neil T. Phillips, LLC; and Neil T. Phillips, Respondents-Appellants.

All future filings should be changed to reflect this title. If you have any questions,

please do not hesitate to contact the Clerk's office.

Very truly yours,

Catherine Hannisa, deputy
CLERK

LAW OFFICES
COPELAND, STAIR, VALZ & LOVELL, LLP

DOUGLAS W. MACKELCAN
Partner
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FAX (843) 727-2995

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(404) 522-8220

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Jun 12 2023

SC Court of Appeals

June 12, 2023

VIA EMAIL and REGULAR U.S. MAIL

Catherine S. Harrison, Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

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. Harrison:

In response to your letter dated June 8, 2023, enclosed please find Respondents Law Office of Neil T. Phillips, LLC; and Neil T. Phillips's *Amended Notice of Cross-Appeal* in this case, which corrects the deficiency identified in your letter. If anything further is required from Respondents at this time, please advise.

Sincerely,

s/Douglas W. MacKelcan

DOUGLAS W. MACKELCAN
TAYLOR L. CARY

DWM:tjr

enclosure: *Respondents' Amended Notice of Cross-Appeal*

cc: D. Alan Lazenby, Esq. w/encl: via email and regular mail: alan@lazenbylawfirm.com

COUNTY OF YORK

2022 DEC -8 PM 12: 20

CIVIL ACTION COVERSHEET

Nathaniel Shell

Plaintiff(s) WILTON C.C.C.P. & GS YORK COUNTY, SC

2022-CP-46-03676

law office of vs.

Neil T Phillips

Defendant(s)

Submitted By: Nathaniel Shell

Address: 1343 E. ...

Rockhill SC 29732

SC Bar #: Telephone #: Fax #: Other: E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint. This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is exempt from ADR. (Certificate Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), General (130), Breach of Contract (140), Fraud/Bad Faith (150), Failure to Deliver/Warranty (160), Employment Discrim (170), Employment (180), Other (199), Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599), Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20 -NI-, Notice/ File Med Mal (230), Other (299), Torts - Personal Injury: Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Assault/Battery (370), Slander/Libel (380), Other (399), Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499), Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Incapacitated Adult Settlement (790), Other (799), Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999), Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Sexual Predator (510), Permanent Restraining Order (680), Interpleader (690), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Pre-Suit Discovery (670)

ENTERED IN SHERIFF'S OFFICE ON 12/8/22 KEVIN TOLSON, SHERIFF ON 2820

Date: 12-8-2022

Submitting Party Signature: Nathaniel Shell

STATE OF SOUTH CAROLINA,

COUNTY OF YORK

Nathaniel Shell

Law Office of

vs. Neil T Phillips

Plaintiff,

Defendant.

)
) FILED IN THE COURT OF COMMON PLEAS
)

2022 DEC -8 PM 12: 20 SUMMONS
CF

) DAVID HAMILTON
)

) C.C.P. & GS
)

) YORK COUNTY, SC
)
)
)

FILE NO. 2022CP4603676

TO THE DEFENDANT ABOVE-NAMED:

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 shown 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.

, South Carolina

Nathaniel Shell

Plaintiff/Attorney for Plaintiff

Dated: 12-8-2022

Address: 1843 Ebenezer Rd
Rock Hill SC 29732

FILED-RECEIVED

2022 DEC -8 PM 12: 20

IN THE CIRCUIT COURT OF YORK COUNTY

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY SC

STATE OF SOUTH CAROLINA

Nathaniel Shell
Plaintiff,

Vs.

The Law Office Of Neil T. Phillips, LLC; Neil
T. Phillips,
Defendant.

2022CP4603676

Case Number:
COMPLAINT
(JURY TRIAL REQUESTED)

COMPLAINT

I, the Plaintiff, Nathaniel Shell, brings this action against Defendant, The Law Office Of Neil T. Phillips, LLC, a limited liability corporation and in support state the following:

PARTIES AND JURISDICTIONS

1. I, Nathaniel Shell, am a citizen and resident of York County in South Carolina.
2. Upon information and belief, Defendant The Law Office Of Neil T. Phillips, LLC, is a South Carolina domestic limited liability corporation with its principal place of business at 30 North Congress Street, Suite 106, York, South Carolina, 29745.

JURISDICTION

3. This Court has subject-matter jurisdiction over the claims in this lawsuit.
4. Venue is proper in this Court pursuant to § 15-7-30.

FACTUAL ALLEGATIONS

5. On November 6, 2017, I entered into a fee agreement with The Law Office of Neil T. Phillips, LLC, to represent me in a civil lawsuit. (See Exhibit A).
6. I paid The Law Office of Neil T. Phillips, LLC \$3950.00.
7. The services to be provided included legal research, consultations, negotiations, correspondence, and court appearances.

8. Throughout the course of representation, I was placed on a trial calendar for the week of December 9, 2019.
9. I appeared at Attorney Phillips' office on the 9th of December 2019, and was in office until on or about 2:00 p.m. waiting for a call from the Court to appear.
10. Attorney Phillips around 2:00 p.m. stated that my case would not be heard on that day. He also stated that if I (and my witness) did not hear from him by 4:00 p.m., that the case would not be heard until next year. Attorney Phillips also told my witness that he could return to the State of Pennsylvania.
11. I did not know that the Court contacted Attorney Neil T. Phillips and gave him the Court date of December 10, 2019, at 9:00 a.m.
12. I received a message around 12:00 p.m. from Attorney Phillips office stating that Attorney Phillips was in Court 'fighting the good fight for me'. I was not told to go to Court. His office did not inform me to appear.
13. Attorney Neil T. Phillips never contacted me with the date and time. The Court held the trial without my presence or ability to present my case, and a judgment was placed against me.

NEGLIGENCE

14. As an attorney, Attorney Phillips owed me the highest duty the law imposes to exercise the utmost care.
15. As the Attorney of record for my case, Attorney Phillips and I had an attorney-client relationship.
16. Attorney Phillips had a duty to contact me when the Court provided my court date of December 10, 2019, and inform me of the Court date.

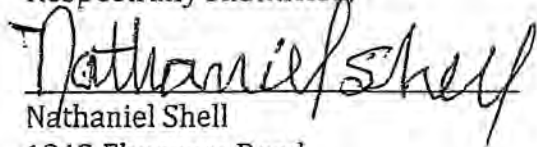
28. As a direct and proximate cause of Defendant's failure to inform me of the Court date,
I paid the Goldwyn Law Firm \$16089.64.

NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

29. Defendant's breach of duty and breach of contract caused me emotional distress,
and I intend to show the Court that I suffered emotional distress because of
Attorney Neil's breach of duty and breach of contract.

WHEREFORE , I pray for an award against the Defendant for actual, special, punitive
damages, costs and any other relief that the Court deems fit and just .

Respectfully submitted,



Nathaniel Shell
1843 Ebenezer Road
Rockhill, SC 29730
T: (347) 668-0510
natemannyc@aol.com

2022CP4603676

EXHIBIT "A"

FILED-RECEIVED

2022 DEC -8 PM 12: 21

DAVID HAMILTON
C.C.P. 2.65
YORK COUNTY, SC

The Law Office of Neil T. Phillips, LLC

30 North Congress Street, Suite 106

York, South Carolina 29745

Phone: (803) 810-5423

Mobile: (980) 225-4857

Neil T. Phillips
Attorney-at-Law



Email: neil@neilphillipslaw.com

November 6, 2017

VIA EMAIL ONLY

Mr. Nathaniel Shell
1843 Ebenezer Road
Rock Hill, SC 29732

RE: **Civil Law Suit/Breach of Contract**

Dear Mr. Shell:

I appreciate your selection of this firm to represent you in the above-referenced matter(s). By this letter, I wish to confirm our agreement regarding the terms and conditions of my representation, including the attorney's fee and costs.

You have retained us to file an answer and required motions in your defense in this civil lawsuit. My fee for representation in this matter is a non-refundable **\$2500.00 flat fee to commence action**, in addition to any filing and motion fees. This office will file a notice of appearance; file appropriate motions and responsive pleadings. I reserve the right to charge additional fees during settlement negotiations and/or upon hearings. My hourly rate is \$275/hr. The services to be provided by our firm will include, but not be limited to any necessary legal research, consultations and telephone conferences with you, court appearances, negotiations, and correspondence.

You will be responsible for all actual out-of-pocket costs we incur on your behalf. Costs include travel expense, online database retrieval charges (Lexis, Westlaw, etc.), filing fees, and other litigation related expenses.

I reserve the right at all times to withdraw from your representation in the event that a conflict arises, or in the event that you have failed to satisfy any monthly billing within sixty days from the date of such statement, or in the event that there is a substantial disagreement between us which render this firm unable to continue to provide you with effective legal counsel. Should that occur, I will provide you with adequate notice so that you may have the opportunity to employ other counsel. All information you give to our law firm is confidential, including your name, address and telephone number(s) and will not be provided to a third party without your consent.

The firm will retain your file after completing work on this matter for up to seven (7) years. We will contact you in writing and inform you if we would like to destroy the file after seven (7)

Ms. Shell

Page 2

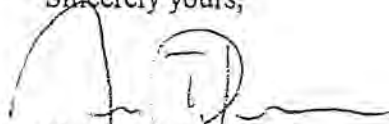
years. You will then have a reasonable opportunity to pick up the original file, to have it sent to you, or, to give us permission to destroy the file. If you do not respond within the stated time period, we will destroy the file.

If you agree with the terms and conditions of my representation as set forth in this letter, please sign and date this letter and return the signed copy in the pre-addressed envelope.

This copy of the letter is for your records.

I look forward to working with you on this matter and if you have any questions, please do not hesitate to contact me.

Sincerely yours,



Neil T. Phillips

I have read the provisions of this letter, and I agree and accept the terms of representation as set forth herein.

NO GUARANTEES HAVE BEEN MADE AS TO WHAT AMOUNTS, IF ANY, YOU MAY BE ENTITLED TO RECOVER IN THIS CASE OR THE FINAL OUTCOME IN THIS CASE

Dated this 3 day of Dec., 2022



Nathaniel Shell

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	CASE NO.: 2022-CP-46-03676
)	
Nathaniel Shell,)	
	)	MOTION TO DISMISS
Plaintiff,)	
vs.)	
)	
Law Office of Neil T. Phillips, LLC; and Neil)	
T. Phillips,)	
)	
Defendants.)	

TO: NATHANIEL SHELL, *PRO SE* PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that, Defendants Neil T. Phillips and the Law Office of Neil T. Phillips, LLC, by and through their undersigned counsel, will move before this Honorable Court on the tenth day after service hereof, or as soon thereafter as counsel may be heard, for an Order dismissing Plaintiff’s Complaint pursuant to Rule 12(b)(6) S.C. R.C.P and South Carolina Code Section 15-36-100, *et seq.* Plaintiff failed to file as part of the Complaint, an affidavit of an expert witness, and therefore, pursuant to Section 15-36-100 (F), this Court must dismiss the Complaint with prejudice.

This Motion is supported by the South Carolina Rules of Civil Procedure, applicable case and statutory law, and a future Memorandum in Support of Defendants’ Motion to Dismiss, to be filed and submitted to the Court prior to a hearing on this Motion.

This 6th day of January, 2023.

Respectfully submitted,

COPELAND, STAIR, VALZ & LOVELL, LLP

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

By: s/Douglas W. MacKelcan
DOUGLAS W. MACKELCAN
State Bar No.: 76332
Attorney for Defendants

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
	)	C.A. No.: 2022-CP-46-03676
Nathaniel Shell,)	
)	
Plaintiff,)	
)	
vs.	)	MOTION TO EXTEND TIME
)	
The Law Office of Neil T. Phillips, LLC)	
and Neil T. Phillips,)	
)	
Defendants.)	
)	

TO: DOUGLAS W. MACKELCAN, ESQ., ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that Plaintiff Nathaniel Shell, by and through his undersigned counsel, will move before this Honorable Court on the tenth day after service hereof, or as soon there after as counsel may be heard, for an Order Extending the Time for Plaintiff to file an affidavit of an expert witness. This motion is being made pursuant to S.C. Code Ann. § 15-36-100(C)(1) which provides that the contemporaneous filing requirement in this statute does not apply to cases where the plaintiff has a good faith basis to believe the statute of limitations will expire within 10 days of the date of filing and allows the trial court to extend the time to file the expert witness affidavit.

This is a legal malpractice case. The underlying case was dismissed on December 10, 2019. On September 12, 2022, the Court of Appeals issued a Remittitur to the Circuit Court along with that Court’s decision denying Plaintiff’s appeal. Plaintiff, acting *pro se*, consulted with an attorney in early December who advised Plaintiff that he could not represent Plaintiff, but that Plaintiff needed to file a Complaint as soon as possible because the statute of limitations may expire on December 10, 2022. On December 8, 2022, Plaintiff filed this Complaint, *pro se*.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	CASE NO.: 2022-CP-46-03676
)	
Nathaniel Shell,)	
)	
Plaintiff,)	
vs.	)	NOTICE OF MOTION AND
	)	MOTION TO RECONSIDER
Law Office of Neil T. Phillips, LLC; and Neil)	
T. Phillips,)	
)	
Defendants.)	
_____)	

TO: D. ALAN LAZENBY, ESQ., ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendants Neil T. Phillips and the Law Office of Neil T. Phillips, LLC (hereinafter “Defendants”), by and through their undersigned counsel, will move before this Honorable Court for an Order amending its Order dated March 28, 2023 (the “Order”), pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, which granted Defendants’ Motion to Dismiss filed on January 6, 2023.¹ Specifically, the Order dismissed Plaintiff’s Complaint pursuant to Rule 12(b)(6), SCRCP and South Carolina Code Section 15-36-100, *et seq.*, without prejudice. The Defendants respectfully ask the Court to amend the language in the Order to allow for the dismissal of Plaintiff’s Complaint *with* prejudice.

This Motion is supported by the South Carolina Rules of Civil Procedure, applicable case and statutory law, and the Memorandum in Support of Defendants’ Motion to Reconsider filed and submitted along with this Motion, along with any other supporting memoranda submitted prior to the hearing on this Motion.

[SIGNATURE PAGE TO FOLLOW]

¹ Defendants incorporate by reference their Memorandum of Law in Support of the Motion to Dismiss, filed with this Court on March 7, 2023.

This 6th day of April 2023.

Respectfully submitted,

COPELAND, STAIR, VALZ & LOVELL, LLP

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

Attorneys for Defendants

40 Calhoun Street, Suite 400
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Ph: (843) 727-0307

1 STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 16
2 COUNTY OF YORK) DOCKET NO. 2022-CP-46-03676

3

4

5 _____
NATHANIEL SHELL,)

6 Plaintiff,

7 versus

8)

9 LAW OFFICES OF NEIL T. PHILLIPS, LLC;
10 AND NEIL T. PHILLIPS,

11 Defendants.)

12

13

14 H E A R I N G

15

16 PRESENT: Neil T. Phillips
17 DATE: March 9, 2023
18 LOCATION: South Carolina Circuit Court 16
19 JUDGE: WILLIAM A. MCKINNON
20 TRANSCRIBED BY: Jeanne Meldrim

21

22

23

24

25

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

1 APPEARANCES:

2 ALAN LAZENBY, ESQUIRE
3 Lazenby Law Firm, LLC
4 PO Box 6099
Spartanburg, SC 39304
864-373-3558

5 Attorney for the Plaintiff

6 DOUGLAS MACKELCAN, ESQUIRE
7 Copeland, Stair, Valz & Lovell, LLP
8 40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

9 Attorney for the Defendant

10

11

12

13 Also Attending:

14 Neil T. Phillips

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INDEX

Proceedings..... 4
Certificate of Transcriber.....23

EXHIBITS

(None marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

PROCEEDINGS

1 THE COURT: Okay. Looks like next up Shell versus
2 Phillips.

3 MR. MACKELCAN: If it please the Court. Your Honor,
4 Doug MacKelcan here on behalf of attorney Neil Phillips,
5 and his law office.

6 THE COURT: All right.

7 MR. MACKELCAN: Mr. Phillips is --- is here on
8 the --- on the Webex as well. And this is --- this is
9 our motion to dismiss the complaint.

10 There is also a pending motion to extent time filed
11 by the plaintiff. And Your Honor, I think from a --
12 would allow from an efficiency standpoint, it probably
13 makes sense for me to argue both the motion to dismiss,
14 and then also respond to the motion to enlarge, if --- if
15 Your Honor will allow that.

16 THE COURT: Okay. I'll hear the motion to dismiss.

17 MR. MACKELCAN: Sure. So the --- the motion to
18 dismiss is fairly straightforward. It --- it is based on
19 a failure to comply with South Carolina Code, Section
20 15-36-100. The plaintiff filed this legal malpractice
21 lawsuit without an affidavit of an expert witness as the
22 statute requires.

23 That was the complaint was filed on December 8,
24 2022. Defendants, we filed the motion to dismiss on
25 January 6, 2023, on those grounds, as the statute

PROCEEDINGS

1 requires.

2 On February 9, 2023, 62 days after the complaint was
3 filed, plaintiff filed the motion to extend time.
4 And --- and so here, you know, I don't --- there's really
5 no debate. There --- there's never --- there were no
6 affidavits filed with the complaint. There has not been
7 an affidavit --- expert affidavit filed since then. And
8 it's --- the statute requires it.

9 I think the --- where we've got --- got a little bit
10 of overlap with the motion to extend, is there is an
11 exception in the statute allowing additional time to file
12 an expert affidavit. 45 days, if the plaintiff alleges
13 in the complaint that the statute of limitations is going
14 to expire within ten days of the filing of the complaint,
15 and that the plaintiff was unable to obtain the expert
16 affidavit.

17 Neither of those aspects were pled in this
18 complaint. It was simply complaint, no expert affidavit,
19 no reference to the statute of limitations, no reference
20 to the inability to get an expert affidavit.

21 And so I've cited in our memorandum in support, the
22 H&H of Johnston case which states for, I think, two
23 important points. First is that it's subject to a
24 dismissal with prejudice. And second, that the breach of
25 contract action can also be dismissed for failure to

1 comply with the statute, because it's essentially saying,
2 you --- you breached contract, because of the
3 malpractice. And --- and the --- the case law states
4 that really it doesn't matter what you call the cause of
5 action, that if it --- it is arises out of the alleged
6 negligence, that it --- that it is also subject to
7 dismissal with prejudice.

8 There --- there's a third cause of action pled in
9 the complaint for negligent infliction of emotional
10 distress. And that those --- those --- the elements of
11 that cause of action are not pled, and cannot be met in
12 this case. So --- so that should also be dismissed.

13 And --- and -- and that's the basis of the motion to
14 dismiss. I --- and so like I said, Your Honor, I
15 would --- I would love to just briefly respond to the
16 motion to extend, as I think it's really the --- the same
17 issue. But ---

18 THE COURT: Sure.

19 MR. MACKELCAN: Okay. So as --- as I mentioned,
20 plaintiff filed a motion to --- to extend time. And
21 yesterday afternoon --- late afternoon, plaintiff filed
22 an affidavit, Your Honor. And in --- in --- in support
23 of the motion to extend. And Your Honor, I -- I would
24 submit to the Court that Mr. Shell's affidavit actually
25 does more to support my motion to dismiss than it ---

1 than it does to help his motion to extend.

2 And --- and -- and I want to point to a few items in
3 this affidavit that I think are really harmful to his
4 motion to extend.

5 So he --- in --- in Paragraph 3, he indicated that
6 on November 17, 2022, he met with attorney Taylor Stanley
7 with Turner Padget. So you know, we're talking about
8 almost a month before the complaint was filed. Mr.
9 Stanley apparently told him he could not help him, but
10 referred him to Eric Bland.

11 So then he says he spoke --- in Paragraph 4, I spoke
12 to Eric Bland in late November or early December, '22 ---
13 2022. He told me he was too busy to help me with the
14 case, but pointed out that the statute of limitations may
15 expire on December 10th, and that I needed to file a
16 lawsuit right away.

17 Your Honor, I --- I have had --- I --- I currently
18 have and have had a number of cases with Mr. Bland and
19 his law firm. Before he --- before he became famous for
20 his television and -- and podcasting, he was --- he's
21 been a long-time very successful plaintiff's legal
22 malpractice lawyer in this state. And he --- he --- he
23 absolutely knows what he's doing. I --- I would --- I
24 would --- well, I --- I don't want to make any
25 assumptions. I have not had an opportunity to speak with

1 Mr. Bland, and even though I believe this affidavit is a
2 waiver of the attorney-client privilege, I'm sure he
3 would not speak to me.

4 But --- but if --- if Mr. Bland pointed out that the
5 statute of limitations would expire, I am nearly
6 100 percent confident that Mr. Bland also told the
7 plaintiff that he needed to look at South Carolina code
8 section 15-36-100, and he needed to get an expert
9 affidavit. That's been the law of this state now for
10 nearly 18 years. And it's --- those of us work in this
11 area, we live in this on a daily basis.

12 So I --- I --- I think to the extent that the Court
13 is interested in --- in --- in giving some leeway to ---
14 to the plaintiff who filed this lawsuit pro se, now has
15 counsel, but filed it pro se. You know, I would suggest
16 (technical difficulty) and I think he --- he (technical
17 difficulty).

18 (Simultaneous speaking)

19 MR. MACKELCAN: -- to the motion to extend, I
20 don't --- I don't believe that the plaintiff has
21 established (technical difficulty).

22 THE COURT: Okay. Mr. MacKelcan, I somehow have
23 lost you. I can't hear you now. Mr. MacKelcan. I can't
24 hear you. Ms. Foster, can you hear me?

25 MR. LAZENBY: I can hear you, Your Honor.

PROCEEDINGS

1 MS. FOSTER: Yes, sir.

2 THE COURT: Okay. Can y'all here Mr. MacKelcan?

3 MS. FOSTER: No, sir.

4 MR. LAZENBY: I can't hear a thing.

5 THE COURT: Mr. MacKelcan --- Mr. MacKelcan. Mr.
6 MacKelcan. Mr. MacKelcan, we --- we can't hear you. We
7 can hear you. Mr. MacKelcan, we --- we can't hear you.
8 We still can't hear you, Mr. MacKelcan.

9 Mr. Lazenby, can you hear me okay?

10 MR. LAZENBY: I --- I can hear you, Your Honor.

11 THE COURT: Mr. Phillips, can you hear me? Mr.
12 Phillips, I think you may be muted.

13 MR. PHILLIPS: Yes, I was muted. Sorry.

14 THE COURT: All right. Go and remute yourself.

15 MR. PHILLIPS: Would the Court like me to --- to
16 respond while ---

17 THE COURT: Well ---

18 MR. PHILLIPS: --- the issues are being ---

19 THE COURT: --- no, because Mr. MacKelcan can't hear
20 you.

21 MR. PHILLIPS: Okay.

22 THE COURT: I thought about that as well. You know.

23 Okay. There is a call-in number. But I don't know
24 what it is. Give me just a second. He's asking if there
25 is a call-in number.

PROCEEDINGS

1 MS. FOSTER: I can --- I have it Judge McKinnon,
2 would you like for me to send it to him --

3 THE COURT: Yes please, if you just put ---

4 MS. FOSTER: -- in the chat?

5 THE COURT: Put it in the chat, that would be
6 wonderful. Thank you, Ms. Foster.

7 MS. FOSTER: I'll do that now.

8 THE COURT: All right. Mr. MacKelcan is back.

9 MR. MACKELCAN: Can y'all --- can y'all hear me now?

10 THE COURT: We can. We can still see you on Webex,
11 so it --- it's working well. All right. So ---

12 MR. MACKELCAN: Okay. I ---

13 (Simultaneous speaking)

14 THE COURT: Let a me hear from --- let me --- let me
15 stop you for a second. Let me hear from ---

16 MR. MACKELCAN: Sure.

17 THE COURT: -- Mr. Lazenby and I'll come back to
18 you.

19 MR. MACKELCAN: Okay.

20 THE COURT: Go ahead, Mr. Lazenby. Mr. Lazenby,
21 I'll tell you, I --- I'm reading 15-36-100. I mean, can
22 you --- can you even file a motion for extension after
23 the deadline's already passed?

24 MR. LAZENBY: Your Honor, in --- in --- in reading
25 that motion, I --- I do not see a requirement that ---

PROCEEDINGS

1 I --- I --- I don't see that requirement in there. Also,
2 I --- I believe it's significant that there's no
3 requirement that it be pled in the complaint that the
4 statute of limitations the is about to expire, if you
5 read the --- the statute.

6 If --- if --- if --- if I can first back up to
7 the --- to the motion to dismiss, I will state that I
8 substantially agree with what Mr. MacKelcan argued,
9 and -- and wrote. Especially the intentional infliction
10 of emotional distress claim is --- is not proper here.
11 If --- if allowed to go forward, that would be a claim
12 that I would --- I would remove. And --- and --- and
13 support --- and preparing an amended complaint.

14 My --- my disagreement is that any dismissal would
15 be with prejudice. And --- and also, I --- I --- I
16 believe it's significant in finding the motion to
17 dismiss, Your Honor, I would argue that the statute
18 5-36-102, which (technical difficulty) requirement is
19 required in a case that --- that the matter --- such a
20 matter lies within in the ambit of common knowledge.

21 If I can briefly back up. What this --- what the
22 plaintiff alleges in --- in the pro se complaint, mind
23 you, this is a pro se complaint. He alleges Paragraph 9
24 that he appeared at his attorney's office on
25 December 9th, ready to attend court.

PROCEEDINGS

1 Paragraph 10, he alleges that his attorney told him
2 and his witness, that they could leave and that they
3 would not be reached for court that week if they did not
4 hear back from him by 4:00.

5 Paragraph 12. He says he received a call the next
6 day around noon, that the case was proceeding, and he did
7 not need to move forward.

8 Your Honor, I would argue that I --- I --- I did not
9 find any cases on point. This is such an unusual
10 situation, but I would argue that --- that this doesn't
11 involve trial strategy. It doesn't involve an --- an
12 issue of law. Doesn't involve Mr. Phillips performance
13 or preparation.

14 I --- I think it's within the common knowledge that
15 if your attorney tells you to leave without getting
16 permission --- and --- and --- this is just what's been
17 alleged. Okay. This is alleged in the complaint.
18 (Technical difficulty) alleged in the complaint an
19 affidavit's not required for that.

20 Now, my intention is to file an affidavit for ---
21 for other reasons. I --- I would allege that there's an
22 unpublished opinion, which is attached to Mr. Shell's
23 affidavit, where the Court clearly states -- states
24 that --- that no motion for continuance was made, and
25 therefore the --- the issue's not preserved. The issue

1 of a new trial is not preserved for Appellate review.

2 And so, Your Honor, on the issue of the motion to
3 extend time, the --- the --- the good cause, this is a
4 case that was on appeal for nearly three years. The ---
5 the final order of remittitur was sent back in
6 September -- September 22nd, of 2022.

7 And the point of my affidavit was --- was to show
8 how hard it is to find an attorney to represent somebody
9 in a legal malpractice case in South Carolina. There ---
10 there's only a handful of attorneys who do it. He spoke
11 to, I think seven or eight different lawyers. He was --
12 he was diligent in -- in trying to get an attorney to
13 help him.

14 And so, Your Honor, I --- I would argue that ---
15 that the good cause here is that he's --- he's done, you
16 know, everything that he could do. He was a resident of
17 New York at the time. So he was having to --- to do this
18 remotely. When I filed my motion, the --- the affidavit,
19 if it --- if it's required, was only 17 days late.

20 And I immediately filed an affidavit -- I'm sorry, I
21 immediately filed a motion and had some talks with ---
22 with Mr. MacKelcan about whether he would --- would agree
23 there's a --- the issue about whether the statute of
24 limitations runs --- begins to run on December 10, 2019,
25 when the case was dismissed, or begins to run on

PROCEEDINGS

1 September 22, 2022, is an issue that I think is decided
2 by the Stokes-Craven case. In that case, the Court held
3 that the --- the cause of action for legal malpractice
4 did not begin to accrue until the appeal is finalized.

5 But --- but out of an abundance of caution, I wanted
6 to --- to file this motion to extend the time. We are
7 prepared to submit an affidavit within two with weeks, if
8 the Court deems that --- that one is required. I --- I
9 believe the affidavit of --- of Mr. Shell establishes
10 good cause that --- that he, you know, acted with due
11 diligence, and simply was unable to find an attorney to
12 assist him, and did not know about the contemporaneous
13 filing requirement of the affidavit.

14 THE COURT: All right. But what --- hold on a
15 second. (Unintelligible) the statute in. What about
16 Subsection F under the statute? Doesn't that foreclose
17 his argument? Well, I guess your argument is the statute
18 hasn't run, so that doesn't apply, correct?

19 MR. LAZENBY: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. LAZENBY: And --- and --- and, Your Honor, my
22 only response to that would --- would be that --- that I
23 think that the motion to extend --- the motion to extend
24 time under C1 would trump this. And surprisingly --- or
25 not surprisingly, there was no --- there was no law in

PROCEEDINGS

1 South Carolina that I could find, concerning the --- the
2 Court granting or not granting a motion to extend time.

3 THE COURT: So tell me what the good cause is. I
4 mean --- (technical difficulty) pro se litigants are held
5 to the same standard as a regular litigant. So the ---
6 the --- the good cause cannot be the --- the --- the ---
7 it --- there was a pro se complaint. So other than that,
8 what --- what is the good cause?

9 MR. LAZENBY: I --- I mean if --- if --- if the
10 Court's gonna --- gonna take the position that --- that
11 he's held to --- to have known it ---

12 THE COURT: Well, I'm not saying that. I'm just
13 saying that it ---

14 MR. LAZENBY: Yeah.

15 THE COURT: -- my understanding of the law is that
16 a --- a --- a -- all litigants are held to the same
17 standards as far as complying with the rules. And if I'm
18 wrong on that ---

19 MR. LAZENBY: No. I --- I --- I --- I don't believe
20 you're wrong Your Honor. I would just argue that, you
21 know, this is a court of equity, and --- and --- and the
22 Court should try to do justice. And --- and the fact of
23 the matter is, we have a --- Judge McKinnon, are you
24 still there? (Technical difficulty).

25 MR. PHILLIPS: I think Judge McKinnon is gone.

PROCEEDINGS

1 MR. LAZENBY: No. No, Your Honor, we cannot. See
2 how we do this.

3 MR. PHILLIPS: Doug, can you hear us, Doug?

4 MR. MACKELCAN: Yes, I can hear everyone.

5 MR. PHILLIPS: Okay.

6 MR. MACKELCAN: With --- with the exception of the
7 judge. I cannot hear the judge right now.

8 MR. PHILLIPS: Yeah, he's gone. There he is.

9 THE COURT: Can you hear me now?

10 MR. LAZENBY: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. MACKELCAN: Yes, Your Honor.

13 MR. PHILLIPS: Yes.

14 THE COURT: Okay. So again, so Mr. Lazenby, let
15 me --- so is there any good cause other than your client
16 was --- was a pro se complainant?

17 MR. LAZENBY: The --- the --- the fact that he was a
18 pro se complainant and that he --- he did a lot of work,
19 talked to several attorneys, and tried very hard to find
20 an attorney to --- to represent him. He wasn't --- he
21 wasn't sitting on his rights for three-years. This is
22 a --- a case where the appeal was only finalized in late
23 September of --- of 2022. And he immediately ---
24 immediately got to work, and was simply unable to --- to
25 find an attorney in time.

PROCEEDINGS

1 And --- and so it's the fact that he's pro se did
2 not know about it, but that he --- he didn't sit on his
3 rights, but that he was actively trying to --- trying
4 to --- to find an attorney. And --- and --- and this is
5 17 days. This is 17 days late. And --- and --- and
6 there's --- there's no prejudice, I know that's not
7 really a factor. The --- the good cause standard of this
8 is completely within the Court's discretion.

9 But there's --- there's no --- there's no prejudice.
10 I can have an affidavit filed within would weeks, and ---
11 and we can --- we can pursue and have this --- pursue
12 this case and have it --- have it decided on the merits.

13 THE COURT: I'm still here. I'm just reading the
14 statute again.

15 MR. LAZENBY: Yes, sir.

16 THE COURT: Mr. Lazenby, I just --- I --- I mean, I
17 understand we want justice to be done, and I definitely
18 want that in my courtroom. But I just --- I'm not aware
19 of any law that I can --- I mean, I --- I --- I can't
20 hang my hat, I don't think, on the fact that your
21 client's pro se. And other --- other than that, I
22 just --- I --- I haven't heard good cause.

23 I -- I am reluctantly going to grant --- I'm going
24 to grant the motion to --- to dismiss, for failure to
25 state a claim under Rule 12.

PROCEEDINGS

1 Mr. Lazenby, if you can find case law saying
2 that --- or --- or precedence saying I should give your
3 client a break because he's a pro se, in this kind of
4 situation, please submit it, but I don't --- I don't want
5 to do an injustice here. But I --- I'm not aware of any
6 case law like that.

7 So I mean, he --- he --- he --- he didn't have the
8 affidavit when he filed the complaint, he didn't have
9 it --- he didn't have it within 45 days after. He didn't
10 ask for an extension. So I --- I think my hands are tied
11 on this, unfortunately. So I --- I --- I'm going to
12 grant the motion to dismiss.

13 MR. LAZENBY: Can --- can we clarify that -- that
14 this is without prejudice?

15 THE COURT: Yes, it --- it --- it --- it is without
16 prejudice. I mean, obviously that brings you back to the
17 statute of limitations issue. But, yes, the --- the
18 motion is without prejudice.

19 MR. LAZENBY: Thank you, Your Honor.

20 MR. MACKELCAN: Your Honor, I -- I did submit in ---
21 in my memo, some case law supporting that it is a
22 dismissal with prejudice.

23 THE COURT: Give me that --- give me that --- give
24 me your best case on while we're ---

25 MR. MACKELCAN: I can give you the cite. Give me a

1 second here. It is 405-SC-469748 ---

2 (Simultaneous speaking)

3 THE COURT: It's H --- H --- H & H of Johnston v.
4 Old Republic National Title?

5 MR. MACKELCAN: Yes, Your Honor.

6 THE COURT: Okay. Okay. Where in that case should
7 I be looking? I've got the case pulled up here.

8 MR. MACKELCAN: I do not have the cause pulled up,
9 Your Honor. Sorry. I was just looking at my --- my
10 memo. So it --- it's going to take me a minute to ---

11 THE COURT: That's okay. I want to get it right.

12 MR. MACKELCAN: --- find that.

13 MR. LAZENBY: And --- and Your Honor, I --- I --- I
14 assume the Court's not persuaded by my argument that this
15 is what's been alleged within the common knowledge of
16 a --- of an ordinary person?

17 THE COURT: I am not. I mean, I --- and the basis
18 for that is I read the Court of Appeals opinion and, I
19 mean, you know, whether --- whether Mr. Phillips had
20 grounds to ask for a continuance or not, I think that's a
21 professional judgment issue.

22 MR. LAZENBY: Sure, but the --- but the argument
23 that an attorney should tell his client to --- to --- to
24 come to court, I think is --- is --- is --- it's a
25 simpler issue, than I think was pled in the complaint. I

PROCEEDINGS

1 would just ask the Court to consider that.

2 THE COURT: I mean, the Court of Appeals opinion
3 says that your client had a conflict, and that's why he
4 couldn't come to court. Is that not --- I mean ---

5 MR. LAZENBY: Your Honor, and --- and -- and this is
6 just the motion to dismiss, so I don't think anything
7 outside the four corners of the complaint can be
8 considered. In the --- in the four corners of the
9 complaint, my client's alleged that he --- he showed up
10 for trial, his attorney told him he could leave, and he
11 didn't get a call back until trial was over. And --- and
12 that's just considering that evidence. I --- I think ---
13 I think that it --- that's within the common realm of ---
14 of knowledge. You don't need to be a lawyer to know
15 that ---

16 THE COURT: Right, but that --- that --- that's
17 contradictory to the --- that --- that contradicts the
18 facts set up by the Court of Appeals. You --- you don't
19 think I can look at the Court of Appeals opinion and ---
20 and --- and ---

21 MR. LAZENBY: I don't think it contradicts, I --- I
22 think the Court of Appeals opinion provides additional
23 information which is why if --- if --- if I would have
24 filed this, I would alleged as --- as a ground for
25 malpractice the failure to move for continuance. But

PROCEEDINGS

1 that's not what was alleged in --- in this complaint.
2 But --- but I don't think they're in --- I don't think
3 they --- they conflict, I --- I think it's just
4 additional facts that have been provided by the Court of
5 Appeals.

6 THE COURT: Well, but the Court of Appeals says he
7 was busy. I mean, and --- and he alleges in the
8 complaint that he didn't know.

9 MR. LAZENBY: But the --- the --- the fact remains
10 he was --- he was told by his attorney to leave, and that
11 he would not need to --- to be --- to have court that
12 week. So I think --

13 (Simultaneous speaking) (technical difficulty)

14 MR. LAZENBY: I --- I --- I mean, I think Mr.
15 Phillips concedes that in the --- in the Court of Appeals
16 case that --- that he told his client that the case was
17 not gonna be reached that day -- or would not be reached
18 that --- that --- that week. I'm sorry.

19 MR. MACKELCAN: Your Honor, I was --- I was trying
20 to look in the case, but then also trying to listen to
21 the --- the common knowledge argument, so I --- I
22 apologize. I stopped looking in the case, because I did
23 want to just briefly respond ---

24 (Simultaneous speaking)

25 THE COURT: Let me, I --- I don't see ---

PROCEEDINGS

1 (Simultaneous speaking)

2 THE COURT: I don't even see the mention of the word
3 prejudice in that opinion.

4 MR. MACKELCAN: I --- okay. Like I said, I --- I
5 stopped looking because I was trying to listen to the ---
6 to the argument on the common knowledge issue.

7 Your Honor, I don't --- I don't see it in that ---
8 in that opinion either. So in --- in looking through it.

9 THE COURT: Okay. All right. Well, we need to move
10 on, we've got a lot of folks waiting. So my inclination
11 is gonna be to grant this without prejudice. I will take
12 a look at exactly what the Court of Appeals opinion says.
13 And I --- on the --- and --- and consider the issue of
14 a --- the common knowledge. But so I'm going to take it
15 under advisement. But my inclination is --- it is to
16 grant the motion.

17 So give me --- give me just one second to make my
18 notes here.

19 All right, Counsel, I'm going to take this under
20 advisement.

21 MR. LAZENBY: Thank you, Your Honor.

22 MR. PHILLIPS: Thank you, Your Honor.

23 (PROCEEDINGS CONCLUDED)

24

25

CERTIFICATE OF TRANSCRIBER

I, JEANNE MELDRIM, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of CIRCUIT 16 for YORK County, South Carolina, on the 9th Day of March, 2023.

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

August 18, 2023

A handwritten signature in black ink that reads "Jeanne Meldrim". The signature is written in a cursive, flowing style with a prominent dot above the 'i' in "Meldrim".

Jeanne Meldrim

Transcriber

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
	)	C.A. No.: 2022-CP-46-03676
Nathaniel Shell,)	
)	
Plaintiff,)	
)	
vs.	)	AFFIDAVIT OF
	)	NATHANIEL SHELL
The Law Office of Neil T. Phillips, LLC)	
and Neil T. Phillips,)	
)	
Defendants.)	
_____)	

PERSONALLY appeared before me, Nathaniel Shell, who being duly sworn, deposes and states the following:

1. I am the Plaintiff in this action.
2. Mr. Phillips represented me in a dispute that I had with my brother, Winston Shell. That case was dismissed on December 10, 2019, and we appealed it. I retained another attorney to represent me in the appeal. That appeal was finalized on September 12, 2022 by letter from the Court of Appeals which I received shortly thereafter.
3. At the time I was living in New York. I contacted two separate attorneys in New York. One of them referred me to Taylor Stanley with the Turner Padgett law firm. I met with Mr. Stanley on November 17, 2022. He stated he was unable to help me but referred me to Eric Bland in Columbia.
4. I spoke to Eric Bland in late November or early December 2022. He told me he was too busy to help me with the case but pointed out that the statute of limitations may expire on December 10 and that I needed to file a lawsuit right away.
5. I drafted and filed the complaint on December 8, 2022. It took a lot of work for me to figure out how to file it and how to properly serve it. Immediately after I filed

the Complaint I began searching for an attorney to assist me. I spoke to Peter Protopapas and Thomas Pendarvis. Neither of them were able to help me.

6. I contacted the South Carolina Lawyer's Referral Service at the suggestion of one of the attorneys. They referred me three attorneys. I contacted all of them and none of them were able to take the case. They referred me to three other attorneys and on the last try I contacted and retained attorney Alan Lazenby on February 9.

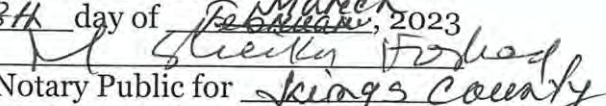
7. I know firsthand how hard it is to hire an attorney to sue another attorney in South Carolina. Even in a clear case like this. According to the decision of the Court of Appeals, they denied my appeal because Mr. Phillips never requested a continuance of the trial in the underlying case. **Exhibit A.**

8. Now that I have an attorney I understand that I have an obligation to file an affidavit to support the complaint if specialized knowledge is required to show the attorney committed malpractice. Personally I believe it is clear that the attorney made a mistake because the Court of Appeals decision says so.

9. However, Mr. Lazenby has discussed this case with someone who is willing to serve as an expert witness and I believe I can submit an affidavit of an expert witness, if necessary, within two weeks. I am pleading with the court to allow me this time to submit the affidavit.

Further the affiant sayeth naught.


Nathaniel Shell

SWORN to before me this
8th day of ~~February~~ ^{March}, 2023

Notary Public for Kings County
My Commission Expires 03-30-2025

M. SHEIKH FORHAD
NOTARY PUBLIC-STATE OF NEW YORK
No. 01FO6203086
Qualified in Kings County
My Commission Expires 03-30-2025

**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 a 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), SCRCPP, 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.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	CASE NO.: 2022-CP-46-03676
)	
Nathaniel Shell,)	
)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANTS’ MOTION TO DISMISS
vs.)	
)	
Law Office of Neil T. Phillips, LLC; and Neil)	
T. Phillips,)	
)	
Defendants.)	
_____)	

COME NOW, Defendants Neil T. Phillips and the Law Office of Neil T. Phillips, LLC, by and through their undersigned counsel, and hereby submit this Memorandum in Support of Defendants’ Motion to Dismiss filed January 6, 2023 (“Defendants’ Motion”). Defendants respectfully request this Court issue an Order dismissing the case with prejudice, and in support of Defendants’ Motion, show the Court as follows:

FACTS

In the Complaint, Plaintiff alleges Defendants represented him in a civil lawsuit. *See* Compl. ¶¶ 5, 15. Plaintiff alleges that Defendants never contacted him with the date and time of the trial, and the Court held the trial without his presence. *See* Compl. ¶ 13. Plaintiff alleges Defendants breached their duty to him, causing a judgment to be entered against the Plaintiff. *See* Compl. ¶ 17. Plaintiff’s Breach of Contract cause of action arises out of the same allegations contained in Plaintiff’s Negligence cause of action.

PROCEDURAL HISTORY

Plaintiff filed the Complaint on December 8, 2022. Defendants filed its Motion to Dismiss on January 6, 2023. Plaintiff filed a Motion to Extend Time on February 9, 2023. Plaintiff’s Complaint did not include an affidavit of an expert witness, and he has not filed one since that

time. Defendants' Motion to Dismiss clearly states the grounds for relief as required in S.C. Code § 15-36-100, *et seq.*, and Plaintiff's Motion to Extend was filed 62 days after Plaintiff filed the Complaint. The Complaint does not allege or otherwise reference any pending expiration of the statute of limitations or that an affidavit of an expert could not be prepared prior to filing the Complaint.

STANDARD OF REVIEW

When ruling on a Motion to Dismiss, “[t]he circuit court may dismiss a claim when the defendant demonstrates the plaintiff’s ‘failure to state facts sufficient to constitute a cause of action’ in the pleadings filed with the court.” *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006) (*citing FOC Lawshe Ltd. P'ship v. Int'l Paper Co.*, 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct.App.2002)). Further, the trial court must base its ruling solely on allegations set forth in the complaint. *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45, (2004).

ARGUMENT

I. Plaintiff’s Complaint fails to state a valid claim for relief because Plaintiff did not file as part of the Complaint, an affidavit of an expert witness.

S.C. Code Ann. § 15-36-100 states, “in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G)...the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” S.C. Code Ann. § 15-36-100(C)(1). The statute expressly applies to actions for professional negligence against attorneys. *See* S.C. Code Ann. § 15-36-100(G)(2).

S.C. Code Ann. § 15-36-100(C)(1) 1 states, “[I]f an affidavit is not filed ... and the defendant against whom the affidavit should have been filed alleges, by motion to dismiss filed

contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.”. Further, S.C. Code Ann. § 15-36-100(F) states, “If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a) of the South Carolina Rules of Civil Procedure.”.

South Carolina Appellate Courts have followed the clear language contained in S.C. Code § 15-36-100 *et seq.* in finding that professional negligence actions require an expert affidavit filed with the Complaint, and are subject to dismissal with prejudice if one is not filed with the complaint. For example, in *H&H of Johnston, LLC v. Old Republic Nat'l Title Ins. Co.*, the Court of Appeals affirmed an order dismissing the case due to plaintiff's failure to file an expert affidavit. 405 S.C. 469, 748 S.E.2d 72 (2013). The Court of Appeals held that the defendant in that case was acting in his professional capacity as a real estate closing attorney, when he provided legal opinions to his client, the plaintiff, regarding certain aspects of the plaintiff's contemplated real estate purchase. *See id.* at 474, 748 S.E.2d at 74. As a result, the court found “the plaintiff must file an affidavit of an expert witness in support of the complaint specifying particular negligent acts or omissions of the attorney,” *id.*, and the court affirmed the trial court's grant of summary judgment to the defendant based upon the plaintiff's failure to do so. *See id.*

Furthermore the Court of Appeals in *H&H of Johnson* affirmed the trial court's dismissal despite plaintiff's characterization of the cause of action as contractual in nature. The Court

examined the specific allegations in the complaint to determine whether they fell within the scope of the practice of law. This approach is consistent with the Court’s general discretion to determine the character of an action by its main purpose and broad outline of allegations, even if such a determination is inconsistent with the “intention or characterization of the pleader.:" See *Bramlet v. Young*, 229 S.C. 519, 531, 93 SE 2nd 873,879 (1956) (citing *Steizman v. Guirl*, 202 S.C. 498, 25 SE 2nd 731 (1943)). In this case, the allegations in the Negligence cause of action and the Breach of Contract cause of action are virtually indistinguishable. The Breach of Contract arises out of a failure to perform professional services, and therefore, the Breach of Contract cause of action is also subject to dismissal with prejudice under South Carolina law. Therefore, Defendants are entitled to a dismissal with prejudice of both causes of action.

II. Plaintiff has failed to state a cause of action for Negligent Infliction of Emotional Distress.

South Carolina does recognize a cause of action for Negligent Infliction of Emotional Distress; however, Plaintiff cannot recover on this theory under the facts as pled in the Complaint. First and foremost, Negligent Infliction of Emotional Distress is limited to bystander recovery. *Collard v. Agusta Sash and Door Co.* 286 S.C. 579, 336 SE 2nd 465 (1985). Plaintiff was not a bystander. In addition, the emotional distress must manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony. *Id.* Plaintiff has not pled physical injury. Therefore, Plaintiff in this case cannot recover for Negligent Infliction of Emotional Distress under the facts as pled in the Complaint, and this Court should dismiss it.

CONCLUSION

Based on the foregoing, and any other arguments at the hearing on March 9, 2023, Defendants submit to the Court that they are entitled to a dismissal with prejudice of all causes of action in this case, and any other relief the Court deems just and proper.

[SIGNATURE PAGE TO FOLLOW]

This 7th day of March, 2023.

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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 Defendants

EXHIBIT
A

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
	)	Civil Action No. 2017-CP-46-01964
Winston Shell,)	
)	
Plaintiff,	)	<u>AFFIDAVIT OF NATHANIEL SHELL</u>
vs.)	
)	
Nathaniel Shell,)	
)	
Defendant.)	
)	

PERSONALLY APPEARED BEFORE ME, Nathaniel Shell who, being duly sworn deposes and says:

I am over the age of 18 and am the Defendant in the above-styled action.

My attorney for the trial in this case was Neil T. Phillips.

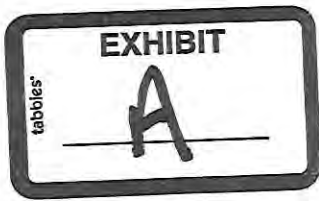
This case was on the trial roster the week of December 9, 2019.

The witnesses expected to be called on behalf of the defense were myself and Willie Shell, who lived in Pennsylvania.

On December 9, 2019, Willie Shell drove from Pennsylvania to testify. On this date, Willie Shell and I appeared in Mr. Phillip’s office to get instructions on when to appear in court to try the case.

Mr. Phillips appeared at the roster meeting, returned to his office, then called the clerk to get more clarity on if the case would be called that week. After talking to the clerk, Mr. Phillips told us that the clerk indicated that it would be highly unlikely for the case to be called that week.

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Based on this information from the clerk and the judge, Mr. Phillips advised Willie Shell to return to Pennsylvania and advised me that the case would not be called and to wait for the case to be rescheduled for January.

Based on this information, Willie Shell returned to Pennsylvania, I made plans for Tuesday and was not available to appear in trial when the case was called on Tuesday.

I believe that I would have been able to present a meritorious defense had Willie Shell and myself been present for the trial.

I believe it to be unfair that the court proceeded with the trial in Willie Shell and my absence after telling us that it was highly unlikely that the case would be called and being told by my attorney that the case would be rescheduled for January.

Upon receiving notice of the result of the trial on December 17, 2019, I was upset with Mr. Phillips for having told me and Willie Shell not to appear that week for the trial and I terminated his services.

I immediately began searching for an attorney to represent me to bring a motion for a new trial and/or an appeal of the court's verdict. I was able to retain T. Jeff Goodwyn, Jr. of Goodwyn Law Firm, LLC on December 31, 2018.

FURTHER AFFIANT SAYETH NOT.

1-3-2020
Date

Nathaniel Shell
Nathaniel Shell

Mary S. Bush
Notary Public

1/3/2020
Date

My Commission Expires 10-02-2029

MARY S. BUSH
Notary Public-State of South Carolina
My Commission Expires
October 02, 2029

**EXHIBIT
B**

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

Daniel D. Hall, Circuit Court Judge

Case No. 2017-CP-46-01964
Appellant Case No. 2020-000027

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SC Court of Appeals

Winston Shell.....Respondent,

vs.

Nathaniel Shell.....Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 3

Standard of Review 5

Argument 6

 I. Did the lower court err as a matter of law in moving forward with the bench trial when an essential witness, the appellant himself, was not present for the trial after the court informed the parties that the assigned judge could not hear the case the date the case was called 6

Conclusion 10

TABLE OF AUTHORITIES

CASES

Ilderton v. Charleston C. R. & L. Co., 113 S.C. 91, 101 S.E. 282 at 283 (S.C. 1919)...5, 6, 9, 10

OTHER AUTHORITIES

South Carolina Rules of Civil Procedure, Rule 40.....5, 6, 8

STATEMENT OF ISSUES ON APPEAL

- I. **Did the lower court err as a matter of law in moving forward with the bench trial when an essential witness, the Appellant himself, was not present for the trial after the court informed the parties that the assigned judge could not hear the case the date the case was called.**

STATEMENT OF THE CASE

Winston Shell, Respondent, commenced this action with the filing of a Summons and Complaint on July 7, 2017, alleging a single cause of action for breach of contract to collect money claimed to be owed to him by his brother, Nathaniel Shell. Nathaniel Shell, Appellant, timely filed an Answer and Counterclaim on December 18, 2017 denying Respondent's allegations and filed an Amended Answer removing the Counterclaim on January 4, 2018. The Circuit Court denied Respondent's Motion for Summary Judgment in an order dated July 11, 2019. Thereafter, a bench trial was scheduled in the case for the trial week beginning Monday, December 9, 2019. The case was called Tuesday, December 10, 2019 and was completed that same day. The Court issued a Form 4 Order December 10, 2019 at 3:09 p.m. ruling in Respondent's favor in the amount of "\$211,2887.12". The Court issued an order correcting this typographical error on December 10, 2020 at 3:29 p.m. with the only difference being the amount of the judgment being changed to read "\$211,287.12".

Subsequent to service of this Order, Appellant served and filed his Motion for a New Trial pursuant to Rule 59, SCRCPP on January 3, 2020. Appellant also filed a Notice of Appeal from the December 10, 2019 trial order on January 8, 2020. A hearing on Appellant's Motion for New Trial was scheduled and held before the Honorable Daniel D. Hall on February 3, 2019. Following this hearing, the Court entered a Form 4 Order denying Appellant's Motion for New Trial on February 6, 2020. Appellant filed a Notice of Appeal of the denial of his Motion for New Trial February 6, 2020. Seeing that two appeals had been filed on the same case, the Court of Appeals consolidated these appeals into one appeal with the above caption in its letter to the parties dated February 10, 2020.

STATEMENT OF FACTS

This case involves an action by Respondent to collect money he claimed to have loaned Appellant, his brother, over the years. The case hinged on the disputed characterization of money that Respondent had given Appellant over the years and the true nature of a purported mortgage Respondent had on a property owned by Appellant. Appellant had also raised disputes relating to how much money had Appellant repaid Respondent over the years.

Appellant was represented by Neil T. Phillips, Esquire for the trial and the case was set on the trial roster of the week beginning Monday, December 9, 2019 in York County. Judges William A. McKinnon and Daniel D. Hall were the two trial judges for this trial term in York County.

Both Counsel for Appellant and Respondent received an email from the Lynn Straight at the York County Clerk of Court's office on December 4, 2019 indicating that Judge McKinnon had a date certain jury trial beginning Monday, December 9, 2019, would have to stop Tuesday at 2:00 so Judge McKinnon could attend to a prior commitment, and then continue Wednesday morning. (email dated December 4, 2019; R. p.184). The email also indicated that Mr. Phillips had a jury trial before judge Hall set to begin the Wednesday of this trial week, December 11, 2019. *Id.* The email from Ms. Straight specifically asked Beverly Carroll and Neil Phillips to attend the roster meeting to discuss the issues surrounding the Wednesday jury trial and the "Shell v. Shell non-trial [sic] scheduled before Judge McKinnon." *Id.*

Appellant and his witness, Willie Shell, who lived in Pennsylvania, appeared at Mr. Phillips' office the Monday morning of the trial week for the trial. (12/9/19 email, R. p. 187; affidavit of N. Shell, R. pp. 176-177). Mr. Phillips appeared at the roster meeting on December 9, 2019 at 9:30 a.m. before Judge Hall and was told that this case would be subject to being called in front of Judge McKinnon. (Trial Tr. p. 5, ll. 17-20; R. p. 82). Mr. Phillips was also told by Judge

Hall that Judge Hall himself had a jury trial set to be trial Monday. (Trial Tr. p. 5, ll. 17-20; R. p. 82). The court obtained the parties' attorney's cell phone numbers to let them know about any changes (Trial Tr. p. 5, l. 24 – p. 6, l. 3; R. pp. 82-83).

Mr. Phillips sent the clerk, Lynn Straight, copying Beverly Carroll, an email at 2:10 p.m. Monday, December 9, 2019 letting her know that he had out of state witnesses that needed to return home and asking if there was any chance at the case would be heard on Tuesday by Judge McKinnon. (12/9/19 email; R. p. 60). Ms. Carroll replied to the email at 2:14 p.m. reminding Mr. Phillips that the court had informed them that Judge McKinnon was in a trial and also had a personal commitment Tuesday afternoon. (12/9/19 email; R. p. 59). Mr. Phillips responded at 2:20 p.m. indicating that he had forgotten about the conflict Judge McKinnon had and would have to regroup with his client. (12/9/19 email; R. p. 58). Knowing that the assigned judge, Judge McKinnon, was in a jury trial and had a personal conflict through at least Tuesday and that Mr. Phillips himself was scheduled to start a jury trial before Judge Hall on Wednesday that would take precedence over this bench trial, Mr. Phillips told his client and the witness who travelled from Pennsylvania that the case would not be called this trial week. (Trial Tr. p. 6, ll. 18-21, R. p. 83; Affidavit of N. Shell; R. p. 176-177). Based on this information, Appellant then made alternate plans for Tuesday and the rest of the week, and his out of state witness returned home Monday evening. (Affidavit of N. Shell; R. p. 176-177).

After telling his client and his out of state witness that the trial would not be called this trial week, Mr. Phillips began preparing for the jury trial he had scheduled before Judge Hall that Wednesday. (Trial Tr. p. 6, l. 22 – p. 7, l. 3; R. pp. 83-84). At 2:30 p.m. on Monday, December 9, 2019, Lynn Straight sent Mr. Phillips and Ms. Carroll an email that Judge Hall was calling this case for trial before himself for Tuesday Morning. (12/9/19 2:30 p.m. email; R. p. 58). Judge

Hall's jury trial set for Monday ended up resolving and he was now available to hear this case and was willing to hear it despite the parties being told that Judge McKinnon was assigned the case. (Trial Tr., p. 5, ll. 20-23; R. p. 82). This email from Ms. Straight was the only communication Ms. Straight made to Mr. Phillips informing him the case was being called for trial Tuesday morning. There is no evidence that Ms. Straight called Mr. Phillips on the cell phone number the court had received from him at the roster meeting for this purpose.

Because he was dedicating all of his attention to preparing for Wednesday's jury trial, Mr. Phillips did not receive the email from Lynn Straight on Monday afternoon informing him that Judge Hall wanted to hear this case on Tuesday morning until early Tuesday morning. (Trial Tr. p. 6, ll. 4-6; R. p. 83). Mr. Phillips was not able to get in touch with Appellant to inform him of the last minute schedule change on Tuesday morning when he received Ms. Straight's email. (Trial Tr. p. 5, ll. 9-12; R. p. 82). Despite Appellant's counsel's complaints about needing additional time to contact his client and not being able to present his case without him, the court proceeded with the trial without the presence and testimony of Appellant and his out of state witness. (Trial Tr. p. 5, l. 9 – p. 7, l. 14; R. p. 82).

STANDARD OF REVIEW

Rule 40(i) SCRPC and the case law interpreting continuances being denied due to the absence of a necessary witness determine the standard of review for the issue on appeal in this case. Rule 40(i)(1) states that the court *may* grant a continuance for good and sufficient cause shown. In reviewing a decision to refuse to grant a continuance, the abuse of discretion standard applies. The appellate courts must consider whether to interfere with the exercise of discretion by the trial judge in the matter of continuances. *Ilderton v. Charleston C. R. & L. Co.*, 113 S.C. 91, 101 S.E. 282 at 283 (S.C. 1919).

ARGUMENT

I. The lower court abused its discretion in hearing this trial the Tuesday of the trial week with Appellant not having a single witness available to present its case when the court was aware that Appellant was present and ready the Monday of the trial term, was told the judge assigned to the case was not available Tuesday because of a jury trial and a personal conflict, and when Appellant's attorney did not receive notice the trial was beginning on Tuesday until that same morning.

The trial judge abused his discretion in deciding to move forward with the trial without the presence of a key witness and a party in the case leaving Appellant without any witnesses to present its side of the case. SCRCP Rule 40(i)(2), states in relevant part, "No motion for continuance 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 that the motion is in not intended for delay."

"But we have often said that, in exercising discretion, courts must be guided by law, and that discretion may not be exercised so as to deprive a litigant of a substantial right, except for good and sufficient reasons." *Ilderton v. Charleston C. R. & L. Co.*, 113 S.C. 91, 101 S.E. 282 at 283 (S.C. 1919). "*A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense*, unless it appears that he has been guilty of negligence in procuring the attendance of such witness, or in obtaining his testimony." *Id.* at 283 (emphasis added).

The trial judge, Judge Hall, was also the judge that was present for the roster meeting the day before the trial began and was well aware of what the parties had been told regarding the scheduling of the case. Specifically, the parties had been told that the case was assigned to Judge

McKinnon in the December 4, 2019 email from the clerk of court and that this bench trial would be subject to being called in front of Judge McKinnon. (12/4/19 email, R. p. 184; Trial Tr. p. 5, ll. 17-20; R. 82). The parties were also told that Judge Hall was beginning a trial that would last until at least Tuesday and that Judge McKinnon had a personal conflict that would make him unavailable after 2:00 on Tuesday. (email dated December 4, 2019; R. 184).

When Appellant's counsel appeared Tuesday morning for the trial, he told the judge that his client was not present and that he had not been able to get in touch with him that morning to let him that the case had been called. (Trial Tr. p. 6, ll. 16-21; R. p. 83). Judge Hall did inquire of Appellant's counsel as to what he told his client about when the trial would begin. Mr. Phillips told the court that Appellant and his out of state witness were at his office Monday morning ready for trial and after the roster meeting, he told them that he conveyed the information he received from the court and "that we're gonna have to see when this case can actually be heard; there are a lot of moving pieces." (Trial Tr. p. 6, ll. 16-21; R. p. 83). Mr. Phillips also informed the court that he did not receive the notice that the case was being called for Tuesday until Tuesday morning. (Trial Tr. p. 6, ll. 4-6; R. p. 83). Mr. Phillips also indicated that while he was unable to reach Appellant that morning, he had not had any difficulty getting in touch with his client throughout the attorney-client relationship. (Trial Tr. p. 7, ll. 10-12; R. p. 84).

When asked by the court if he was ready to proceed with the trial, Mr. Phillips indicated that he didn't have his client present with the obvious implication that he would not be able to present his defenses in the case without him. (Trial Tr. p. 6, ll. 10-12; R. p. 83). Mr. Phillips also represented to the court that he needed Appellant present to introduce testimony and evidence in the case and could not do so without him present. (Trial Tr. p. 9, ll. 15-18; R. p. 86). Mr. Phillips also showed the court that Appellant was present and ready Monday morning for trial and that he

had diligently tried to contact Appellant that morning to no avail. (Trial Tr. p. 6, ll. 10-12; R. p. 83). Appellant's attorney also demonstrated that needing additional time was not meant for the purpose of delay by showing that Appellant and his out of state witness were present and ready for trial the day before. It cannot credibly be argued that Appellant had purposefully failed to appear on Tuesday in an effort to delay the trial when he was present and ready Monday morning for the trial.

With Appellant's counsel having substantially complied with SCRCP Rule 40(i), the trial judge was 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. At this point, the trial judge knew Appellant's attorney was told that the assigned judge was unavailable Tuesday for multiple reasons, that Appellant's attorney told Appellant and his out of state witness that the case would not be tried that week, that Appellant was present with his witness ready for trial Monday morning, that Appellant's attorney found out the case was being called on Tuesday only that same morning, that Appellant had been responsive to his attorney's attempts to contact him in the past, and that moving forward would leave Appellant with no witnesses to present evidence and testimony relating to his side of a contested debt collections action between brothers. Also, there was no indication that Appellant was guilty of being negligent in failing to be present or have his witness present. In fact, the court told Appellant's attorney it was very unlikely the case would be called that week due to multiple conflicts with the assigned judge. The court actually told the parties that the case was assigned to Judge McKinnon and never indicated that the case would be called to be heard by Judge Hall.

While Appellant doesn't accuse the court of being intentionally deceptive, the way the court presented the scheduling situation telling the parties that the assigned judge could not hear

the case on Tuesday, then calling the case on Tuesday, would make any reasonable attorney feel he had been misled by the court, even if unwittingly so. In addition, any reasonable attorney hearing what the court told the parties about scheduling would have felt safe in telling his client the case would not be tried that Tuesday and likely for the rest of the week.

Given the fact that Appellant was present Monday morning ready to try the case and the fact that Appellant's attorney didn't find out about being called for trial until what appears to be a matter of minutes before the start of the trial, the fair and prudent thing to have done would have been to give Appellant's counsel at least the day Tuesday to track Appellant down before forcing the trial to begin. If Appellant's attorney could not reach Appellant within enough time to fit the trial in Tuesday, continuing the trial until the next term would have only been fair and prudent since moving forward with the trial would deprive Appellant of a substantial right – the right to be able to present testimony to defend against allegations made against you. As the court in *Ilderton* held, “A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense.” *Id.* This is exactly what the trial judge in this case did. While being present and ready the Monday of the trial week with his out of state witness, due to information received from the court and his attorney that the assigned judge was not available Tuesday, Appellant ended up being deprived of his right to present testimony in the case since he only had his attorney present for the trial to try to present his side of this contested debt dispute.

For the above reasons and in light of all of the above-described circumstances, this court should find that the trial judge abused his discretion in moving forward with the case without the presence of Appellant and subsequent denial of Appellant's Motion for New Trial, and this court should reverse the trial judge on this issue and remand the case for a new trial.

CONCLUSION

Appellant was present and ready for trial with his out of state witness the Monday of the trial week when the court told the parties that the assigned judge had a conflicting jury trial and a personal conflict on Tuesday. The other sitting judge that term, Judge Hall, also had a jury trial scheduled. No indication was given that the case would be called by Judge Hall. As a result, Appellant's attorney told Appellant the case would not be heard Tuesday and he made other plans and could not receive his attorney's emails and calls to inform him the case was called on Tuesday morning. Judge Hall called the case anyway after his jury trial settled late Monday. Not receiving the email from the clerk that the case would be called Tuesday until Tuesday morning, Appellant's attorney was not able to get in touch with Appellant on such short notice and after telling him the case would not be called Tuesday. As held by the Supreme Court in *Ilderton*, "A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense." *Id.* Knowing all of this and that Appellant would be severely prejudiced by having no witnesses to present his side of the case, the trial judge abused his discretion in deciding to move forward with the trial without Appellant present. As a result, this court should reverse the trial judge's decision to move forward with the case and subsequent denial of Appellant's Motion for New Trial and remand the case for a new trial.

Respectfully Submitted,

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September 8, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

Daniel D. Hall, Circuit Court Judge

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Sep 08 2020

SC Court of Appeals

Case No. 2017-CP-46-01964
Appellant Case No.: 2020-000027

Winston Shell.....Respondent,

v.

Nathaniel Shell.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b),
SCACR.



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indicates Plaintiff received advice from a lawyer prior to filing the Complaint. Furthermore, Plaintiff was previously represented by a lawyer other than Defendants for the appeal of the underlying case, *Shell v Shell*, C/A No. 2017-CP-46-001964.

Plaintiff is a sophisticated party, as is evident from the Complaint. He was aware of the circumstances that give rise to the Complaint as of December 10, 2019, and he pursued an appeal on those issues. See attached **Exhibit A** (*Affidavit of Nathaniel Shell*) and **Exhibit B** (*Final Brief of Appellant*). As Plaintiff alleges in his Complaint, he was forced to spend money on an appellate lawyer as a result of the judgment against him following the December 10, 2019 Bench Trial, thus, he was aware of, and has pled separate and distinct damages from those in the judgment.

Plaintiff has not provided any justification for why he should not be required to follow S.C. Code S.C. Code § 15-30-100, *et seq.* He is a sophisticated party who had counsel and sought the advice of counsel prior to choosing to file a *pro se* Complaint. He should not get special treatment as a (formerly) *pro se* party, and South Carolina law requires that this Court deny Plaintiff's Motion to Extend Time and grant Defendants' Motion to Dismiss with Prejudice.

This 7th day of March, 2023.

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therefore, pursuant to Section 15-36-100(F), this Court must dismiss the Complaint with prejudice. On February 9, 2023 (62 days after Plaintiff filed the Complaint), Plaintiff filed a Motion to Extend Time, which requested an Order from the Court extending the time for Plaintiff to file an affidavit of an expert witness, and on March 7, 2023, Defendants submitted their opposition to the same.

On March 28, 2023, this Court entered the Order, which granted Defendants' Motion to Dismiss without prejudice and denied Plaintiff's Motion to Extend Time. In its Order, the Court specifically found that S.C. Code § 15-36-100 *et seq.* identifies two (2) exceptions to the contemporaneous filing requirement found in Subsections (B), and that Plaintiff did not show that either exception was applicable in this case. Accordingly, the Court found that Plaintiff did not establish any grounds to justify an extension of time to file an expert affidavit, and the Complaint was dismissed *without* prejudice for failure to state a claim pursuant to S.C. Code § 15-36-100.

SUMMARY OF PLAINTIFF'S FACTUAL ALLEGATIONS

In the Complaint, Plaintiff alleges Defendants represented him in a civil lawsuit. *See* Compl. ¶¶ 5, 15. Plaintiff alleges that Defendants never contacted him with the date and time of the trial, and the Court held the trial without his presence. *See* Compl. ¶ 13. Plaintiff alleges Defendants breached their duty to him, causing a judgment to be entered against the Plaintiff. *See* Compl. ¶ 17. Plaintiff's Breach of Contract cause of action arises out of the same allegations contained in Plaintiff's Negligence cause of action. The Complaint does not allege or otherwise reference any pending expiration of the statute of limitations or that an affidavit of an expert could not be prepared prior to filing the Complaint.

GOVERNING LEGAL STANDARD

Rule 59(e), SCRCP, permits a party to move the court to alter or amend its judgment. A circuit court's interlocutory orders are amendable. *Johnston v. Bowen*, 313 S.C. 61, 63, 437 S.E.2d

45, 47 (1993). Rule 59(e) of the civil rules allows a party to move the court to alter or amend a judgment within ten (10) days after it receives written notice the order was entered. *See* Rule 59(e), SCRCPP; *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21–22, 602 S.E.2d 772, 778–79 (2004) (“A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule”). A party is permitted to file a motion to reconsider pursuant to Rule 59(e), SCRCPP, upon a belief that: “the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue.” *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). “Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* (citing *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)).

The decision to grant a motion for relief from judgment lies within the sound discretion of the circuit court and will not be disturbed upon appeal absent an abuse of discretion. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). A circuit court abuses its discretion when there is an error of law, or the order is based on factual conclusions that are without evidentiary support. *Id.* (citing *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

ARGUMENT

For the reasons outlined in the Defendants’ Prior Memorandum in Support, this Court granted Defendants’ Motion to Dismiss the Plaintiff’s Complaint for his failure to contemporaneously file an expert affidavit as required by S.C. Code. § 15-36-100. However, these Defendants respectfully request that this Court reconsider amending the language in the Order such that the dismissal of Plaintiff’s Complaint be *with* prejudice as Defendants believe dismissal with prejudice is required pursuant to the statutory language and intent of Section 15-36-100.

It is imperative that Plaintiff's claims be dismissed with prejudice. Without a dismissal with prejudice, the intent of the statute is not met. S.C. Code § 15-36-100(B) requires a plaintiff to "file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim," and only two (2) specific exceptions to this "contemporaneous filing requirement" are provided by the statute.

The first exception exists in Section 15-36-100(C)(1), which permits plaintiffs in actions that are filed within ten (10) days prior to the expiration of the statute of limitations, to file the expert affidavit within 45 days of the filing of the complaint upon pleading that there is a good faith basis to believe the statute of limitations will expire on a claim stated in the complaint and that an expert affidavit could not be prepared due to the time constraints. The statute then provides that if the "affidavit is not filed within the period specified in this subsection . . . , the complaint is subject to dismissal for failure to state a claim." *See* S.C. Code § 15-36-100(C)(1). Here, Plaintiff's Complaint does not plead any good faith basis for the belief that the statute of limitations may expire within ten (10) days of the filing of the Complaint or that because of this, an expert affidavit could not be prepared.

The second exception allows for an "amended affidavit" pursuant to S.C. Code § 15-36-100(E). The statute does not allow for a *new* affidavit to be filed. Instead, it only allows for an "amendment" to the initial timely filed contemporaneous affidavit. That is not the situation here, where Plaintiff did not file an affidavit, and thus, there can be no amendment to an existing affidavit. Section 15-36-100(E) explicitly states:

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that *the*

plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective.

See S.C. Code § 15-36-100(E) (emphasis added).

“The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” See *Sumter Police Department v. Blue Mazda Truck*, 330 S.C. 371 (Ct. App. 1998). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute.” *Id.* “Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.” *City of Camden v. Brassell*, 326 S.C. 556 (Ct. App. 1997). Statutes “should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. 215, 219 (1995) (citation omitted).

The legislature provided express time constraints to the exceptions requiring contemporaneous filing of the Complaint and “the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that a plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake.” See S.C. Code. 15-36-100(F). If the dismissal of a complaint for failure to file an expert affidavit pursuant to S.C. Code § 15-36-100 is without prejudice, the legislative intent of the exceptions to the contemporaneous filing requirements would be rendered meaningless.

For example, Section 15-36-100(E) gives a plaintiff thirty (30) days to file an *amended* affidavit. However, if dismissal of a complaint is without prejudice under S.C. Code § 15-36-100, a plaintiff could easily choose to ignore the deadline for the filing of an amended affidavit and refile its complaint with the amended affidavit upon dismissal without prejudice. Moreover, the

lack of a comparable provision to Section 15-36-100(E) for when a Plaintiff fails to file an expert affidavit is indicative of the importance of the contemporaneous filing requirements. If a dismissal under S.C. Code § 15-36-100 is without prejudice, plaintiffs can choose to ignore the requirements of Section 15-36-100(B) altogether because a plaintiff can refile its complaint with an expert affidavit upon dismissal.

Indeed, the statute lacks meaning if a plaintiff is allowed to remedy any deficiencies related to the affidavit, including the failure to file an affidavit altogether, at a later date than the statute sets forth. Pursuant to S.C. §§ 15-36-100(C)(1), (E), the Plaintiff's time to cure his failure to file an affidavit has expired. In addition to the plain language of Section 15-36-100 requiring the contemporaneous filing of an expert affidavit, the very purpose of the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act") is to limit litigation in situations where the plaintiff lacks the basis for a claim. A dismissal with prejudice when an expert affidavit is not filed with a complaint is consistent with both South Carolina law and the intent of the Act.

Georgia has a virtually identical statute, and its Courts have determined that dismissal of a Complaint for failure to file the required affidavit is with prejudice. The Georgia Civil Practice Act, O.C.G.A. § 9-11-9.1, requires an expert affidavit to be filed contemporaneously with the filing of a complaint alleging professional malpractice, and the Courts there have held that:

In construing the statute as amended, it would be unreasonable to hold that the legislature intended for complaints to be dismissed *with* prejudice when a defective affidavit is not timely corrected, and dismissed *with* prejudice when an affidavit is not filed within a certain number of days after the eleventh-hour filing of a complaint, but that complaints are to be dismissed *without* prejudice when the plaintiff fails to file any affidavit whatsoever. No part of the statute provides that a complaint is subject to dismissal without prejudice.

Construing the statute as a whole, we conclude that the legislature intended that dismissals for complete failure to file an affidavit would have the same effect as dismissals for failure to file a proper

affidavit: each of these dismissals is for failure to state a claim. Not only is this construction consistent with common sense, it is consistent with the long line of decisions rendered by this Court holding that dismissal for failure to file an expert's affidavit is with prejudice.

See Jordan, Jones & Goulding, Inc. v. Balfour Beatty Const., Inc., 246 Ga. App. 93, 94-95 (2000) (emphasis in original).

The same should be found here as this Court has already correctly determined that the Plaintiff has failed to file the expert affidavit pursuant to S.C. Code §15-36-100(B), and that no exceptions apply. Additionally, this Court has correctly held that the Plaintiff has not established any grounds to justify an extension of time to file an expert affidavit under the statute. Therefore, the dismissal of Plaintiff's Complaint should be with prejudice and the Court should amend its Order to reflect the same.

This 6th day of April 2023.

Respectfully submitted,

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The South Carolina Court of Appeals

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May 31, 2023

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Re: Nathaniel Shell v. Neil T. Phillips
Appellate Case No. 2023-000859

Dear Counsel:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-15-02. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will *not* review filings for redaction or to determine if materials should be sealed.

This is to advise that the title in the above matter has been changed to read as follows:

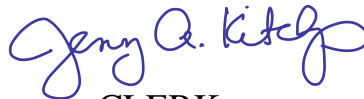
Nathaniel Shell, Appellant,

v.

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

All future records in this matter should be changed to reflect this title. If you have any questions, please do not hesitate to contact this office.

Very truly yours,



CLERK

cc: Douglas Walker MacKelcan, III, Esquire

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

Appellate Case No. 23-000859

Nathaniel Shell,.....Respondent,

v.

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

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

This 25th day of January, 2024.

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

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SC Court of Appeals

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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

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 the Record on Appeal Index and documents identified thereon, upon the parties below by electronic mail only, on January 25, 2024, 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 25th day of January, 2024.

COPELAND, STAIR, VALZ & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvg.law
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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

From: [Rewt, Teri J.](#)
To: alan@lazenbylawfirm.com
Cc: [Mackelcan, Douglas W.](#); [Cary, Taylor L.](#); [Moran, Rosie](#)
Subject: Shell v Phillips; Appellate Case No.: 23-000859; CSVL File No.: 64793
Date: Thursday, January 25, 2024 2:09:00 PM
Attachments: [Record on Appeal \(Index, documents, Appellants' Cert. & Proof of Service\).pdf](#)
[image001.png](#)

good afternoon Alan,

Attached please find the Record on Appeal Index in this case, together with the documents listed on the Index including Appellants' Certificate, and Proof of Service. We will be submitting this to the Appellate Clerk today. Please let us know if you have any questions or concerns.

Thank you and best regards,



Teri Rewt
Legal Assistant II
d: 843.329-8346 | f: 843.727.2995
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REPLY TO SC OFFICE

RECEIVED

Jan 25 2024

SC Court of Appeals

January 25, 2024

VIA EMAIL ONLY

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

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 the Record on Appeal Index in this case, the documents identified on the Index, and Proof of Service, as well as a copy of our service email to Respondent's counsel. By copy of this letter, and we are providing copies of the same to Repondent's counsel. If anything further is required at this time, please advise.

Sincerely,

s/Douglas W. MacKelcan

DOUGLAS W. MACKELCAN
TAYLOR L. CARY

DWM:tjr

enclosures: *Record on Appeal, Documents Identified in Record on Appeal, Proof of Service*
cc: D. Alan Lazenby, Esq. w/encl: via email: alan@lazenbylawfirm.com