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**Feb 08 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

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Appellate Case No. 23-000859

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Nathaniel Shell,.....Respondent,

v.

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

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**FINAL REPLY BRIEF OF APPELLANTS**

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## ARGUMENT

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

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

Here, the same applies, and dismissal with prejudice is appropriate where Respondent did not move to amend his Complaint and did not present the circuit court with an expert affidavit containing “additional factual allegations or a different theory of recovery which may give rise to a claim.” *See Spence*, 368 S.C. at 106. As in *Santos*, Respondent merely requested additional time to file the expert affidavit within two (2) weeks if the circuit court deemed it required. **R. p. 46,**

**line 5-13; R. p. 49, line 10-12.** Further, Respondent also failed to present an expert affidavit to the circuit court despite having four (4) months before the underlying Motion to Dismiss hearing was held by the circuit court (and three (3) of those months with retained counsel). **R. pp. 28, 33.** Thus, this Court should dismiss Respondent's Complaint with prejudice, as a dismissal without prejudice does not align with the purpose and intent of South Carolina Code § 15-36-100, *et seq.*

**CONCLUSION**

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

This 8<sup>th</sup> day of February, 2024.

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**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that the Final Reply Brief of Appellants Law Office of Neil  
T. Phillips, LLC and Neil T. Phillips complies with Rule 211(b), SCACR.

This 8<sup>th</sup> day of February, 2024.

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**PROOF OF SERVICE**

I certify that I have served *Final Reply Brief of Appellants*, upon the parties below by electronic mail on February 8, 2024, addressed as follows:

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