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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001510
Case No. 2016-CP-10-03468

Charles Blanchard Construction Corp.,Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

Glick/Boehm & Associates, Inc. is the Respondent.

FINAL BRIEF OF RESPONDENT GLICK/BOEHM & ASSOCIATES, INC.

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Charleston, South Carolina
July 26, 2022

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STATEMENT OF THE CASE

This case involves the design and construction of a stair tower (the "tower") located at 480 King Street, in Charleston, South Carolina, which provides elevator access to tenants of two apartment buildings. 480 King Street, LLC ("Appellant"), the building's owner, engaged the architectural firm of Glick/Boehm & Associates, Inc. ("Respondent") to serve as the "architect of record" for the construction of the stair tower. (Compl. at ¶ 3, R. at p. 70). Charles Blanchard Construction Corp., Inc ("Blanchard") constructed the stair tower. (Compl. at ¶ 6, R. at p. 71). Following numerous delays and issues with the construction of the tower, on July 6, 2016, Blanchard filed suit against Appellant, asserting claims related to non-payment. (App. Br. at p. 2). Appellant then asserted counterclaims against Blanchard, alleging Blanchard's work was defective. (App. Br. at p. 2). On June 26, 2017, Appellant filed a separate case against Respondent,[1] including Breach of Contract, Breach of Warranty, and Negligence, all of which were founded upon the Architect's alleged negligent performance of services under its Professional Services Agreement with Appellant. (Compl. at ¶¶ 5-29, R. at pp. 71-79).

In actions for damages alleging negligence against certain professionals, including Architects, the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et. seq. (the "Act") applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). Here, because Respondent is an architectural firm organized and licensed under the laws of South Carolina, "the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act and the factual basis for each claim . . . ." S.C. Code Ann. § 15-36-100(B).

[1] Following a Motion to Consolidate, filed by Appellant, the two separate cases were consolidated via Form 4 Order on August 24, 2018. (Order dated August 24, 2018, R. at p. 91).

If a plaintiff fails to comply with the Act's affidavit requirement, the complaint "is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1). Appellant did not submit an affidavit with the initial Complaint filed against Respondent. Apparently realizing this critical omission, on August 10, 2017, Appellant filed a Motion for Extension of Time to file the required Affidavit by representing that Appellant's retained expert was unable to review sufficient documents prior to filing the Complaint to properly furnish an affidavit. (Mot. dated Aug. 10, 2017, R. at p. 97). Respondent in turn filed a timely Motion to Dismiss for failure to comply with the affidavit requirement on August 29, 2017. (Mot. dated August 29, 2017, R. at p. 100). On November 17, 2017, the Honorable J.C. Nicholson, Jr., conducted a hearing on these motions and thereafter issued an Order on December 7, 2017,[2] granting Appellant's Motion for Extension of Time and denying Respondent's Motion to Dismiss. (Order dated Dec. 7, 2017, R. at p. 88). In his Order, Judge Nicholson allowed Appellant to "file [a supporting affidavit] within ten days of the date of this Order," and further provided that "[u]pon the filing of the Affidavit by this date, the Appellant will have been deemed to be in compliance with the requirements of S.C. Code §15-36-100(B). Respondent will then have 30 days from the date of the filing of the Affidavit to file any motion contesting the sufficiency of the Affidavit." (Order dated Dec. 7, 2017 at p. 3, R. at p. 90).

On November 20, 2017, Appellant filed an affidavit from Louis Hackney, P.E., REWC, RRC, CDT, LEED AP, Appellant's prior-retained expert (the "Affidavit"). In the Affidavit, Mr. Hackney suggested he was qualified to testify as to an Architect's "standard of care," stating: "I have experience investigating and assessing the design and construction of commercial buildings in Charleston, South Carolina and my investigation of the 480 King Stair Tower is ongoing . . . I

[2] While the Circuit Court's Order was entered on December 7, 2017, it is dated November 27, 2017.

further reviewed the architectural drawings . . . prepared by [Respondent].” (Aff. of Hackney at p. 1, R. at p. 301). Mr. Hackney proceeded to opine that Respondent breached the “standard of care” of an Architect, further stating: “. . . it is my professional opinion, to a reasonable degree of professional certainty that the Architect [Respondent] deviated from the standard of care ….” (Aff. of Hackney at p. 2, R. at p. 302). On its face, through Mr. Hackney’s representations, the Affidavit appeared to meet the requirements of the Act, and absent any information indicating otherwise, Respondent did not immediately contest the Affidavit’s contents.

As the case progressed, Mr. Hackney was deposed three times, January 28, 2019, August 27, 2020, and September 4, 2020, and on these occasions, Counsel questioned Mr. Hackney twice regarding his qualifications. During Mr. Hackney’s August 27, 2020 deposition, the following exchange occurred:

> Q ***You do not intend in this case to offer a professional opinion about the standard of care of an architect, do you?***
>
> A ***No.***
>
> Q That’s something that would be beyond your qualifications?
>
> A I don’t believe so, but I have never done it in the past. I’ve looked at enough buildings, I have looked at enough plans, and seen enough issues to feel like I could provide an opinion about that but I have -- to this point, I have not provided one.
>
> Q *And you don’t intend to start in this case?*
>
> A *No*, not at this time.

(Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2, R. at pp. 210-211) (emphasis added).

When further queried in his September 4, 2020 deposition, as to whether he would be offering an opinion as to the Architect’s standard of his care, Mr. Hackney testified:

> Q ***Do you recall telling me when we were together last that you were not going to offer an opinion about the standard of care of the architect in this case?***

A ***Yes.***

Q ***Does that remain your intention?***

A ***Yes***. I feel comfortable talking about individual details if questioned about them, and I feel comfortable talking about construction phase services, but *not specifically about the architect's standard of care.*

Q In relation to either of those things, correct?

A Correct. I'll talk about -- I feel comfortable as a design professional talking about details specifically and/or lack of details as a design professional but *not specifically to the standard of care of an architect.*

Q And, in fact, *without addressing the standard of care of the architect* in this case, right?

A *Correct.*

***

Q. When he asked you to sign the Affidavit, did you tell him that you would *not offer an opinion about the standard of care of an architect in the case?*

A *I don't recall the specific conversations about standard of care* at that point in time.

Q ***By signing the Affidavit, though, you did not intend to offer an opinion about the standard of care of an architect, did you?***

A ***No.*** The Affidavit says, and I talked about it before, that pertaining to the construction phase services and construction administration services that were provided.

Q But when you talked about those things in your Affidavit, *you did not intend to state an opinion about the standard of care of an architect performing those services, did you?*

A A *better word there* than a professional performing -- *a design professional* performing the role of a -- during construction phase services.

Q You are an engineer?

A I am.

Q Mr. Glick is an architect?

A Correct.

Q *Glick/Boehm are architects and not engineers?*

A *Correct.*

Q Getting back to question then is: *You did not intend this Affidavit to contradict your intention against offering an opinion of the standard of care related to the architect, did you?*

A My intent -- again, I know we're parsing words a little bit. My intent is that I feel comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer. Those services are similar across the board of professionals, and I feel confident and comfortable in talking about them.

Q ***So your intention is to state an opinion of the standard of care of a professional but not an architect, correct?***

A ***That's probably a better way to say it. Yes.***

(Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12; Ex. 5 at pp. 282-84 ll. 22-13, R. at pp. 213-214; R. at pp. 216-218) (emphasis added). In sum, Mr. Hackney admitted on multiple occasions that he was not intending to state, nor was he stating, any opinions that Respondent Architect had violated the Architect's standard of care, and that he was not qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Once Respondent became aware that Mr. Hackney was not stating an opinion as to an Architect's standard of care as previously represented, Respondent promptly requested leave to file a renewed Motion to Dismiss. (Req. for Leave to File Mot. to Dismiss dated Sept. 17, 2020, R. at p. 189). Respondent's Request remained pending until a status conference was scheduled for March 24, 2021. One day prior to the Circuit Court's March 24, 2021 status conference, counsel for Appellant consented to Respondent filing a renewed Motion to Dismiss without the necessity of leave of court. (E-mail from Stair to Circuit Court and All Counsel of Record dated March 23, 2021, R. at p. 304). Therefore, with Appellant's consent, on June 28, 2021, Respondent filed a

second Motion to Dismiss on the basis that Appellant failed to file a proper expert affidavit; Respondent now had clear confirmation from Mr. Hackney's testimony that he could not and would not opine as to the standard of care of an Architect. (Motion dated Jun. 28, 2021, R. at p. 195). Appellant filed a response in opposition on November 19, 2021. (Resp. in Opp., R. at p. 225).

The Circuit Court held a hearing on Respondent's Motion on December 2, 2021. The Circuit Court heard arguments from both Appellant and Respondent. The Circuit Court stated:

> I mean, there's a reason the legislature laid out specific professions for which you must submit an affidavit stating the deviation from the standard of care **from that particular profession**.
>
> ***
>
> . . . respectfully, I have to go back to legislative intent. I don't get to, you know, legislate from the bench, I have to go by what's in the black and white statute.
>
> ***
>
> . . . [the Act] clearly delineates profession. And from there under that professional umbrella, then someone can speak to whether or not someone deviated the standard of care.
>
> ***
>
> I'm granting the motion to dismiss. I think that allowing [Mr. Hackney] to testify as to whether or not an architect reaches the standard of care, with any job that architect reformed, it's [sic] frankly flies in the face of the statute.

(Hearing Tr. dated Dec. 2, 2021 at p.15, ll. 20-23; p. 21 ll. 5-9; 11-14; 22-25; R. at p. 292; R. at p. 298) (emphasis added).

Via written Order (the "Order") dated December 16, 2021, the Circuit Court granted Respondent's Motion to Dismiss. (Order dated Dec. 16, 2021, R. at p. 92). The Circuit Court held that because Respondent is an architectural firm and Mr. Hackney's experience mostly lies in professional engineering, not architecture, Mr. Hackney was not qualified to opine as to

Respondent's performance in this matter, and therefore Appellant failed to satisfy the Act's affidavit requirement. (Order dated Dec. 16, 2021 at pp. 2-3, R. at pp. 93-94) ("[T]he Defendant in this case is an architect and its services must be judged against the standard of care of an Architect."). Accordingly, the Circuit Court dismissed all of Appellant's claims against Respondent, not just Appellant's claim for professional negligence, with prejudice. Appellant did not file a motion under South Carolina Rule of Civil Procedure Rule 59(e) contesting the Circuit Court's ruling. This appeal followed.

STANDARD OF REVIEW

The sound ruling of the trial court will not be overturned on appeal unless the trial court abused its discretion in rendering its ruling. *Blue Star Rental & Sales, Inc. v. Ridge Env't, LLC,* No. 2014-MO-048, 2014 WL 6977616, at *1 (S.C. Dec. 10, 2014) ("The decision to dismiss a case is within the purview of the trial court and will not be disturbed absent an abuse of discretion.") Generally, "[a]n abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support." *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). Specifically, as to questions about expert witnesses, "[t]he qualification of expert witnesses and the admissibility of their testimony is largely within the discretion of the trial court." *Walker v. The Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996).

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED IN CONSIDERING RESPONDENT'S MOTION TO DISMISS BEYOND A COURT IMPOSED FILING DEADLINE WHEN RESPONDENT PROMPTLY SOUGHT LEAVE TO FILE ITS MOTION WHEN IT BECAME NECESSARY AND APPELLANT CONSENTED TO RESPONDENT'S FILING BEYOND THE DEADLINE.

Appellant asserts that Respondent was "time-barred" from challenging the sufficiency of Mr. Hackney's affidavit due to a court-imposed deadline. However, good cause existed for Respondent to seek leave to file a second Motion beyond that deadline in light of Mr. Hackney's testimony which effectively rendered his Affidavit invalid. Furthermore, Appellant consented to the post-deadline filing.

Respondent learned during Mr. Hackney's deposition that Appellant's sole expert tapped to opine as to the standard of care of an Architect was unqualified despite the representations in the Affidavit to the contrary and that, in any event, the expert expressly acknowledged that he was not stating any opinion as to the standard of care of an Architect. (Mot. dated Jun. 28, 2021 at pp. 4-5, R. at pp. 198-199). Unfortunately, Mr. Hackney's deposition occurred almost three years after the court-imposed deadline passed. Notwithstanding, Respondent acted promptly and filed its Request for Leave to file its second Motion to Dismiss just three weeks after Mr. Hackney's final deposition concluded. Prior to the court granting Respondent's requested leave, Appellant's counsel acquiesced to Respondent filing a second Motion to Dismiss. (E-mail from Stair to Circuit Court and All Counsel of Record dated March 23, 2021, R. at p. 304). Counsel for Appellant even addressed this consent at the hearing on Respondent's Motion to Dismiss, stating: "You'd look at me like I had three heads on. So I said, Ken [sic] you can file whatever motion you want. Okay. [But] I don't consent to the relief you're talking about." (Hearing Tr. dated Dec. 2, 2021 at p. 20 ll. 2-5, R. at p. 297). As such, Appellant has waived any argument that Respondent missed the court-created deadline to object to Appellant's Affidavit.

Furthermore, Respondent should have the right to contest the substance of Mr. Hackney's Affidavit as a matter of public policy. "South Carolina's policy favor[s] the disposition of issues their merits rather than on technicalities." *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506,

511, 548 S.E.2d 223, 226 (Ct. App. 2001); *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) ("We favor trial of issues on merit over securing judgment by slight technicalities."); *Smith v. Kelso*, No. 2:20-CV-0180-DCN, 2020 WL 3964806, at *4 (D.S.C. July 13, 2020) ("[T]he court encourages the parties to resolve the issue of service amicably, understanding that technicality-driven arguments devoid of substantive meaning will win no favor with this court."). It is important to note that § 15-36-100 is contained within South Carolina's Frivolous Proceedings Act, and the affidavit requirement is an important way to keep such frivolous proceedings out of our courts. The Circuit Court's evaluation of the merits of Mr. Hackney's affidavit is also consistent with its role as gatekeeper and evaluators of expert qualifications. *Walker*, 324 S.C. at 353, 477 S.E.2d at 473. It is also well-settled that parties may challenge the qualifications of expert witnesses and their affidavits. *See*, *e.g.*, *Ranucci v. Crain*, 409 S.C. 493, 508, 769 S.E.2d 189, 196 (2014) (stating that a party may challenge the sufficiency of an expert affidavit where there is a "factual basis in the record" to contest the expert's qualifications of the content of the affidavit); *State v. Franks*, 432 S.C. 58, 75, 849 S.E.2d 580, 589 (2020)("Courts are often presented with challenges [to experts'] qualifications and reliability.").

Finally, and perhaps most importantly, Appellant does not show, or even suggest, the existence of a statutory deadline or any time-barring rule established by any appellate court. Instead, Appellant quotes from a trial court Order that was permissive, but not prohibitive, in nature. Significantly, it was the *same* Court in the *same* case (albeit different judges) which entertained - and rejected - Appellant's argument that Respondent's Motion should be time-barred. The Circuit Court did not abuse its discretion in deciding Respondent's second Motion on the merits at the moment in litigation in which it did. The Circuit Court's Order was therefore based on the

substance of Respondent's argument, and resulted in a meaningful, fair, and informed decision, which should be upheld on appeal.

II. WHETHER THE CIRCUIT COURT ERRED IN DISMISSING ALL CAUSES OF ACTION BROUGHT AGAINST RESPONDENT WHEN THEY EACH RESOUND IN RESPONDENT'S PERFORMANCE AS AN ARCHITECT.

Appellant asserts that the Circuit Court erred in dismissing all "non-negligence based" causes of action against Respondent because the Act only applies to situations where professional negligence is alleged. Much of Appellant's argument, including the dismissal of all claims against the Respondent, is predicated on unpreserved issues. For an issue or an argument to be properly preserved for appellate review, it is well settled that it must have been raised to and ruled upon by the trial court. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). Simply, "[a]n issue that was not preserved for review should not be addressed by the Court of Appeals …." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Furthermore, in situations where it is not clear whether issues were raised or ruled upon, courts will find that those issues are not preserved. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. The issue must be sufficiently clear to being into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.") (internal citations omitted); *Carolina First Bank v. Ashley Tower, LP*, 2005 WL 7084806 at *2 (Ct. App. Nov. 21, 2005) ("[T]here is no way for this court to determine if the issues asserted on appeal have been raised to and ruled upon by the trial court. As such, we find none of the issues are preserved for our review.").

Appellant states that the Circuit Court erred in "finding that Appellant's claims against Respondent . . . are all based upon Respondent's alleged negligent performance . . . ." (App. Br. at p. 8). In its Response in Opposition to Respondent's Motion to Dismiss, Appellant stated:

> Finally, [Respondent's] motion made no mention that [Appellant] has lodged breach of contract and warranty claims against [Respondent] as [Appellant] and [Respondent] were operating under a contract to perform contract administration services. The Court needs no authority for the proposition that an Affidavit of an expert witness is not needed to make a breach of contract or warranty claim. Accordingly, there is absolutely no basis to dismiss these counts either.

(Resp. in Opp. to Motion to Dismiss at p. 9, R. at p. 232). Notably, Appellant failed to argue with any legal support or thought that it would be error to dismiss Appellant's other claims against Respondent on the premise that they also fall within the Act's requirements of a supporting Affidavit. In the Circuit Court's Order granting Respondent's Motion to Dismiss, the Circuit Court briefly decided this issue: "[i]n its Motion, [Respondent] contends that the claims asserted against it by Plaintiff are all based upon its alleged negligent performance of professional services as an Architect and that Plaintiff failed to file a proper Affidavit in support of those claims … the Court agrees … and … grants the Motion." (Order dated Dec. 16, 2021 at p. 2, R. at p. 93). Appellant did not file a Rule 59(e) motion challenging this finding.

In addition to Appellant's negligence claim, Appellant brought claims of Breach of Contract and Breach of Warranty. Appellant asserts that those are separate claims which do not require a supporting affidavit. (App. Br. at pp. 8-9). Nonetheless, Appellant did not clearly raise the issue of whether issues and claims falling under the umbrella of, and arising out of a negligence cause of action, should not fall under the Act's purview, and accordingly whether they should not be dismissed. Because Appellant did not clearly raise this issue to the Circuit Court, either in its Response or in a Rule 59 motion, this Court cannot consider Appellant's arguments to that effect.

Even assuming Appellant's unpreserved arguments were maintained for appeal, Appellant's arguments would nonetheless fail. Based on the plain language of the Act, failure to file an expert affidavit with the Complaint necessitates dismissal of the Complaint as a whole. The

Act dictates that "if an affidavit is not filed . . . and the defendant against whom an 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.*" S.C. Code § 15-36-100(C)(1) (emphasis added).

Here, it is undisputed that Appellant brought a negligence claim against Respondent along with claims for Breach of Contract and Breach of Warranty that were each based upon the same alleged negligent performance of professional architectural services. The Act provides the sanction of dismissal of "*the complaint*" when there is non-compliance with its terms. The Act's choice of words here is notable – the Act does not reference dismissal of just negligence causes of action, and instead chooses to reference the "complaint" as a whole. The Act's text conveys clear meaning and must be respected. As the Supreme Court has explained:

> Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted). Section 15-36-100's meaning is clear and must be respected, and the Complaint must be dismissed as a whole.

Additionally, all of Appellant's causes of action against Respondent are *rooted* in allegations that Respondent was negligent in the performance of its duties as an architectural firm and as the "architect of record," even if Appellant did not caption its allegations as such or now attempts to characterize Respondent's work on the tower as not being that of an Architect. The Circuit Court explicitly found that Respondent is an Architect and Mr. Hackney is a Professional

Engineer and that those two professions are distinct and that Respondent's work must "be judged against the standard of care of an architect." (Order dated Dec. 16, 2021 at p. 2, R. at p. 93). These important findings of the Circuit Court cannot be disturbed now on appeal. *See City of Chester v. Addison*, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) ("[A]ppellate courts will be bound by such findings where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law.").

South Carolina courts routinely hold that claims arising under professional negligence, while not plead explicitly as "professional negligence," still fall under § 15-36-100's purview. *See, e.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (finding that a plaintiff's claim for breach of contract against its closing attorney was actually a claim for professional negligence and that plaintiff was required to comply with 15-36-100, even though it did not explicitly plead professional negligence); *see also David v. Savage*, No. 2:19-CV-3139-SAL, 2020 WL 12618896, at *7 (D.S.C. July 6, 2020) (applying South Carolina law) ("Because this court concludes *that all of Plaintiff's claims stem from and relate to the same factual allegations of legal malpractice,* it must determine whether the affidavit requirement in S.C. Code Ann. § 15-36-100 applies to the negligence claim. It finds that it does.") (emphasis added); *In re Steinmetz*, No. ADV 10-80177, 2011 WL 4543894 at *7 (Bankr. D.S.C. Mar. 18, 2011) (applying South Carolina law) ("Since *the **essence** of Plaintiffs' Fifth Cause of Action is a claim for professional negligence* against a professional licensed by the state of South Carolina, South Carolina law requires that Plaintiffs file an affidavit of an expert witness.") (emphasis added).

Appellant asserted that Respondent breached its contract with Appellant by failing to "properly design and prepare specifications for the stair tower." (Compl. at ¶ 9, R. at pp. 72-73).

Additionally, Appellant alleges that Respondent breached its contract by "[f]ailing to act as a reasonably prudent design professional would act under similar circumstances." (Compl. at ¶ 9,R. at pp. 72-73). Regarding Appellant's claim for Breach of Warranty, Appellant posits that Respondent "breached [its] express and implied warranties by failing to design the stair tower free from defects and in compliance with applicable building codes and industry standards." (Compl. at ¶ 20, R. at p. 75). Whether Respondent failed to act as a "reasonably prudent design professional," whether Respondent "properly" created specifications, and whether Respondent furnished plans "free from defects," necessarily hinges on whether Respondent's architectural scope of work met the professional standard of care. It is axiomatic that an Architect's breach of contract or breach of an implied warranty requires a showing of how an Architect failed in the performance of his or her duties. Therefore, though stated in different ways in an attempt to fit the framework of multiple causes of action, both Appellant's claims for Breach of Contract and Breach of Warranty nonetheless require the support of an expert affidavit under the Act.

Furthermore, Appellant attempts to circumvent the substantive affidavit requirement by asserting that Respondent, an architectural firm, "agreed to provide professional architectural and ***engineering*** services" and "performed construction contract administration services, and not merely architectural design services." (App. Br. at p. 9) (emphasis in original). However, this is not consistent with Appellant's previous characterizations of Respondent and its work on the project subject to this appeal. For instance, in Appellant's Complaint, Appellant states that Respondent "served as the ***architect of record*** for the stair tower located at 480 King Street … agreeing to ***provide professional architectural services*** for the design of the stair tower, specifically including, but not limited to, the issuance of plans and specifications for the construction of the stair tower." (Compl. at ¶ 3, R. at p. 70) (emphasis added).

Accordingly, the Circuit Court was correct in dismissing Appellant's Complaint against Respondent in its entirety, as each of Appellant's causes of action against Respondent are integrally related to Respondent's duties as an Architect and fit squarely within the Act's purview.

III. WHETHER THE CIRCUIT COURT ERRED IN FINDING APPELLANT'S EXPERT AFFIDAVIT INSUFFICIENT UNDER SECTION 15-36-100 OF THE SOUTH CAROLINA CODE, WHICH PERMITS EXPERTS TO OPINE ONLY AS TO THE STANDARD OF CARE OF A PROFESSIONAL IN THEIR SPECIFIC FIELD.

Appellant again attempts to circumvent the Act's affidavit requirement by stating that "South Carolina does not require that one must have an affidavit from *an architect* in order *to sue an architect*" and instead appears to argue that any professional with experience relevant "to the case" in general would suffice. (App. Br. at pp. 10-11) (emphasis added). To the contrary, law in this State clearly provides that in order to satisfy the affidavit filing requirement in the Act, an expert must provide relevant testimony on the performance of an allegedly negligent professional in their *specific* field. The Act provides parameters for what experts are qualified to opine:

> (A) As used in this section, "expert witness" means an expert *who is qualified as to the acceptable conduct of the professional whose conduct is at issue* and who:
>
> > (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
> >
> > (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or
> >
> > (b) has actual professional knowledge and experience *in the area of practice or specialty in which the opinion is to be given* as the result of having been regularly engaged in . . . .

§15-36-100(A)(1-2(b)). Additionally, courts in this State overwhelmingly agree that relevant professionals must opine as to the alleged negligence of other professionals. *See e.g., Doe v. Am. Red Cross Blood Servs.,* 297 S.C. 430, 435, 377 S.E .2d 323, 326 (1989) ("[T]he standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices ***in his profession***.") (emphasis added); *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005) (citing *Doe*); 18 S.C. Jur. Negligence § 58 ("In a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession, and if the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law."); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 474, 570 S.E.2d 197, 204 (Ct. App. 2002) ("Without expert testimony, a jury cannot determine whether [defendant] was negligent when it relied on [] studies in designing the project, because there is no way for a jury to compare [defendant's] actions *with the actions other similarly situated engineering firms* would have taken when confronted with the situation.") (emphasis added); *Walker*, 324 S.C. at 354, 477 S.E.2d at 473 ("Although [a licensed residential builder] may be versed in building codes and in the inspection of buildings, ***there is no evidence in the record that she has any architectural experience or training . . . [t]he trial court did not abuse its discretion, therefore, in finding that Lain could not properly testify as to an architect's standard of care.***) (emphasis added).

Because this case involves the performance of the "architect of record," it follows that the only expert qualified to opine as to an Architect's performance would be an Architect, as only an Architect would have "actual professional knowledge and experience *in the area of practice or*

specialty in which the opinion is to be given." S.C. Code Ann. § 15-36-100(A)(2)(b). Mr. Hackney, Appellant's sole affiant to offer an opinion on Respondent's standard of care, admitted that he is a Professional Engineer and not an Architect in his deposition testimony. (Mot. dated Jun. 28, 2021 Ex. 5 at pp. 282-84 ll. 22-13, R. at pp. 216-218). Mr. Hackney also refers to himself as a "design professional." (Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12, R. at pp. 213-214). The universal term "design professional" is not referenced in the Act; instead, the Act carefully distinguishes types of professionals by practice area, including Architects. Furthermore, Professional Engineers are also covered by Act, but are distinguished as separate professionals. Architects and Professional Engineers receive different educational degrees, are licensed and regulated by separate registration boards, and otherwise are, simply stated, different professions. Therefore, the Circuit Court was correct in holding that the Affidavit was insufficient as it was not prepared by a professional architect.

Finally, beyond the fact that the expert was not a member of the profession he sought to criticize, this particular "expert" expressly stated, on multiple occasions, that he did not intend to express, nor was he expressing, an opinion concerning the standard of care of the profession he sought to criticize. For this reason and the reasons noted above, the trial judge was not in error in dismissing this Complaint.

CONCLUSION

South Carolina Code Section 15-36-100 requires that when bringing negligence causes of action against specific professionals, including Architects, the claimant must furnish a supporting affidavit from an expert in that same field detailing at least one allegation of professional negligence – necessarily utilizing the standard of care applicable to the professional field of the defendant being sued. Failure to comply with this requirement can result in dismissal of the

claimant's complaint as a whole. Distilled down to its purest form, Appellant did not furnish an affidavit of an Architect with its Complaint, which details allegations of professional negligence against Respondent, an architectural firm. Accordingly, the decision of the Circuit Court must be affirmed.

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Charleston, South Carolina
July 26, 2022

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001510
Case No. 2016-CP-10-03468

Charles Blanchard Construction Corp. Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

Glick/Boehm & Associates, Inc. is the Respondent.

CERTIFICATE OF COMPLIANCE

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

[Signature page to follow]

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