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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge
Case No. 2016-CP-10-03468

Appellate Case No. 2024-001403

Charles Blanchard Construction Corp. Inc.……………………………………………Plaintiff

v.

480 King Street, LLC ….……………………………………………………………… Defendant

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480 King Street, LLC…………………………………………Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……………………………Third-Party Defendant, Petitioner

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PETITIONER GLICK/BOEHM & ASSOCIATES, INC.'S BRIEF IN SUPPORT OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Where a defendant decides not to file a motion to dismiss *contemporaneously with its initial responsive pleading* on the ground that the affidavit required by section 15-36-100 (Supp. 2024) is defective, may that defendant subsequently base a Rule 12(b)(6), SCRCP, motion to dismiss on the failure to file a sufficient affidavit under section 15-36-100?

II. Did the Court of Appeals err in considering an argument not preserved by 480 King upon Appeal in its finding that the Circuit Court erred in dismissing the entirety of 480 King's action?

III. Did the Court of Appeals err in finding that 480 King's Breach of Contract and Warranty claims are not subject to the contemporaneous affidavit filing requirement under the Frivolous Civil Proceedings Sanctions Act, when each claim resounded in Glick/Boehm's performance as an architect?

IV. Did the Court of Appeals err in finding that 480 King's expert affidavit was sufficient under Section 15-36-100 of the South Carolina Code, which permits experts to opinion only as to the standard of care of a professional in their specific field?

V. Did the Court of Appeals err in failing to clarify its May 22, 2024 Order as to the dismissal of 480 King's claims against Glick/Boehm, prior to remanding the matter to Circuit Court for further proceedings?

INTRODUCTION

Under many circumstances, negligence claims against professionals unsupported by expert testimony are frivolous. Recognizing learned professionals should not face liability based on uneducated judgment, our courts have long required such claims to be supported by expert testimony to reach a jury. By the Frivolous Civil Proceedings Sanctions Act our legislature expanded this policy to further shield professionals from frivolous actions, requiring plaintiffs to file, contemporaneously with a complaint, an expert affidavit establishing the applicable standard of care and the professional's deviation.

But not just any "expert" can meet the expert affidavit mandate. Section 15-36-100(A) requires the expert witness to possess expertise in the area of practice or specialty about which the opinion on the standard of care is offered. The Court of Appeals finding that an *engineer* can testify as to an *architect's* standard of care blurs the brightline interpretation of the Act followed by attorneys, judges, and professionals that the expert should be in the same profession. This Court has the opportunity to correct the Court of Appeals' error and provide certainty and guidance for all in this state who rely upon the clear and unequivocal terms of the Act and its application.

Providing clarity is crucial because the Court of Appeals' limited interpretation of the Act, if applied to the numerous construction cases filed in this state in the future, will require intense factual analysis on a case-by-case basis, increased motion practice, and likely varying and disjointed results. The Court of Appeals undoubtedly failed to recognize the obvious consequences of its own decision: If the Court of Appeals' holding is maintained, not only could an engineer opine on an architect's standard of care, an orthopedist could opine on a pulmonologist's standard of care; a real estate agent could opine on a real estate appraiser's standard of care, etc., just because they may be licensed in the same general area but despite their education or practical experience.

This Court should overrule the Court of Appeals to prevent what could become an absurd application across a multitude of professions in South Carolina.

STATEMENT OF THE CASE

This matter 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. Respondent 480 King Street, LLC (480 King), the building's owner, engaged the architectural firm of Petitioner Glick/ Boehm & Associates, Inc. (Glick/Boehm) to serve as the "architect of record" for the construction of the stair tower. (Compl. at ¶ 3). Glick/Boehm's agreement with 480 King was to perform both an architectural design (prepare contract documents) and provide contract administration services of the contractor's contract pursuant to an American Institute of Architects' Standard Form of Agreement between an Owner and an Architect. In fact, the contract administration services performed by Glick/Boehm were described by 480 King as the *interpretation of the contract documents*, visits to the site, reviewing the Contractor's submittals, rejecting non-conforming work *deviating from Glick/Boehm's plans*, and *reporting to 480 King known deviations from the Contract documents*. (Compl. at ¶ 7) (emphasis added).

Charles Blanchard Construction Corp., Inc. ("Blanchard") constructed the stair tower. (Compl. at ¶ 6). Following numerous delays and issues with the construction of the tower, on July 6, 2016, Blanchard filed suit against 480 King, asserting claims related to non-payment. (App. Br. at p. 2). 480 King then asserted counterclaims against Blanchard, alleging Blanchard's work was defective. (App. Br. at p. 2). On June 26, 2017, 480 King filed a separate case against Glick/Boehm,[1] including claims for Breach of Contract, Breach of Warranty, and Negligence, all

[1] Following a Motion to Consolidate, filed by 480 King, the two separate cases were consolidated via Form 4 Order on August 24, 2018. (Order dated August 24, 2018).

of which were founded upon the Architect's alleged negligent performance of services under its Professional Services Agreement with Respondent. (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. applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). Here, because Glick/Boehm 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). 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).

480 King did not file an affidavit contemporaneously with its Complaint. Apparently realizing this critical omission, over a month after it filed its Complaint, 480 King filed a Motion for Extension of Time to file the required Affidavit by representing that 480 King's retained expert was unable to review sufficient documents prior to filing the Complaint to properly furnish an affidavit. (Mot. dated Aug. 10, 2017). On August 29, 2017, *contemporaneously with its initial responsive pleading*, Glick/Boehm filed a timely Motion to Dismiss on the grounds that 480 King failed to file the requisite expert affidavit against Glick/Boehm as required by the Act. (Mot. dated August 29, 2017). On November 17, 2017, the circuit court heard these motions and thereafter issued an Order on December 7, 2017,[2] granting 480 King's Motion for Extension of Time and denying Glick/Boehm's Motion to Dismiss. (Order dated Dec. 7, 2017).

In its Order, the Circuit Court allowed 480 King 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

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

date, the [480 King] will have been deemed to be in compliance with the requirements of S.C. Code §15-36-100(B). [Glick/Boehm] 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). Although the Court granted 480 King leave to file the affidavit, 480 King had filed an affidavit on November 20, 2017, from Louis Hackney, P.E., REWC, RRC, CDT, LEED, AP (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 further reviewed the *architectural* drawings . . . prepared by [Glick/Boehm]." (Aff. of Hackney at p. 1) (emphasis added). Mr. Hackney opined that Glick/Boehm 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 [Glick/Boehm] deviated from the standard of care…." (Aff. of Hackney at p. 2). Despite filing the Affidavit, 480 King did not file another Complaint, nor did 480 King amend its Complaint such that Glick/Boehm would be obligated to file a responsive pleading. As such, Glick/Boehm satisfied the requirements of the Act by filing a Motion to Dismiss *contemporaneously with its initial responsive pleading*, on August 29, 2017.

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, he testified that he had never provided a professional opinion about the standard of care of an architect, prior to issuing his expert affidavit in this case, and had no intention of offering such professional opinion in this case. (Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2). 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 care, Mr. Hackney testified that while he felt comfortable opining as to specific details and/or lack of details as a design professional, he did *not* feel comfortable specifically talking about an architect's standard of care. (Mot. dated Jun. 28, 2021, Ex. 4 at pp. 278-79 ll. 17-12; Ex. 5 at pp. 282-84 ll. 22-13). In sum, Mr. Hackney admitted on multiple occasions that he was <u>not</u> intending to state, nor was he stating, any opinions that Glick/Boehm had violated the architect's standard of care, and that he was <u>not</u> qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Once Glick/Boehm became aware that Mr. Hackney was not stating an opinion as to an architect's standard of care, as not clearly previously represented, and because Glick/Bohem had reserved its right to contest the Affidavit when it filed its Motion to Dismiss *contemporaneously with its initial responsive pleading*, Glick/Boehm promptly requested Leave to file a renewed Motion to Dismiss. (Req. for Leave to File Mot. to Dismiss dated Sept. 17, 2020). Glick/Boehm's Request remained pending as COVID-19 took its hold over the pragmatic disposition of cases until a status conference could be scheduled on March 24, 2021. One day before the status conference, counsel for 480 King consented to Glick/Boehm 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). Therefore, with 480 King's consent, on June 28, 2021, Glick/Boehm filed a second Motion to Dismiss on the basis that 480 King failed to file a sufficient expert affidavit as Glick/Boehm 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). 480 King filed a response in opposition on November 19, 2021. (Resp. in Opp.).

The Circuit Court heard Glick/Boehm's Motion on December 2, 2021. 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) (emphasis added).

Via written order dated December 16, 2021, the Circuit Court granted Glick/Boehm's Motion to Dismiss. (Order dated Dec. 16, 2021). The Circuit Court held that because Glick/Boehm 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 Glick/Boehm's performance in this matter, and therefore 480 King failed to satisfy the Act's affidavit requirement. (Order dated Dec. 16, 2021 at pp. 2-3) ("[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 480 King's claims against Glick/Boehm with prejudice, not just 480 King's claim for professional negligence. 480 King did not file a motion to reconsider. An appeal followed.

On May 22, 2024, the Court of Appeals affirmed in part, reversed in part, and remanded this matter to the Circuit Court for further proceedings. Notably, the Court of Appeals found that if all of the claims included in the Complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the Circuit Court would not have erred in dismissing the entire Complaint. *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024). However, the Court of Appeals ultimately left the rest of the matter up for interpretation by holding that 480 King's breach of contract and warranty claims are *arguably* not subject to the contemporaneous affidavit filing requirement of Section 15-36-100.[3] *Id.* Glick/Boehm requested the Court of Appeals rehear the appeal and alter its decision following the Court of Appeals' confusing and potentially detrimental holding for many professionals. The Court of Appeals refused. Glick/Boehm timely petitioned this Court for writ of certiorari, which was granted. Glick/Boehm submits this brief in support of its petition, requesting this Court correct the overlooked and misapprehended points which lead to the Court of Appeals' erroneous decision and reinstate the Circuit Court's decision.

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*, 2014 WL 6977616, at *1 (S.C. Sup. Ct. 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.") (citing *In*

[3] Throughout oral arguments, the Court of Appeals, questioned Glick/Boehm for having brought a Motion to Dismiss as opposed to a Motion for Summary Judgment based on S.C. Code 15-36-100, however, the Court of Appeals seemingly failed to acknowledge that it had the power to convert Glick/Boehm's Motion to Dismiss into a Motion for Summary Judgment as both parties were afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See* Rule 12(b), SCRCP; *see also Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69, 73 (1999) (stating that conversion of a motion to dismiss into a motion for summary judgment is proper when the parties are afforded a reasonable opportunity to respond to such matters).

re Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011)). 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. A defendant may challenge a defective affidavit under S.C. Code § 15-36-100 via a 12(b)(6) defense even if a 12(b)(6) motion is not filed *contemporaneously with the initial responsive pleading*; but even if a defendant could not, Glick/Boehm filed a § 15-36-100 motion to dismiss *contemporaneously with its initial responsive pleading*.

This Court requested the parties answer the following question in addition to the issues raised in the writ:

> Where a defendant decides not to file a motion to dismiss *contemporaneously with its initial responsive pleading* on the ground that the affidavit required by section 15-36-100 (Supp. 2024) is defective, may that defendant subsequently base a Rule 12(b)(6), SCRCP, motion to dismiss on the failure to file a sufficient affidavit under section 15-36-100?

As a threshold matter, this question does not appear directly applicable to the circumstances of this appeal because Glick/Boehm moved to dismiss based on section 15-36-100 along with its initial responsive pleading, and raised the defense in its initial responsive pleading. Further, by the time Glick/Boehm's subsequent motion was argued, counsel for 480 King consented to the issue being raised by 12(b)(6) motion. Nevertheless, Glick/Boehm addresses the Court's question below.

A. Where a defendant decides not to file a motion to dismiss *contemporaneously with its initial responsive pleading* on the ground that the affidavit requirement by section 15-36-100 is defective, the defendant can subsequently base a Rule 12(b)(6) motion to dismiss on the failure to file a sufficient affidavit under section 15-36-100.

South Carolina Code § 15-36-100 repeatedly indicates that a filing must be made *contemporaneously with an initial pleading*. *See* S.C. Code § 15-36-100(B) (stating a plaintiff must file "as part of the complaint" an expert affidavit); § 15-36-100(C)(1) (stating a complaint lacking an expert affidavit can be dismissed if raised by a motion "filed contemporaneously with [an] initial responsive pleading"); § 15-36-100(F) (same); § 15-36-100(E) (stating a complaint with a defective expert affidavit can be dismissed if raised by a motion "filed contemporaneously with [an] initial responsive pleading"). As it relates to raising a defective affidavit or the failure to file an affidavit, the Act makes clear the defense raised is one for "failure to state a claim," which mirrors Rule 12(b)(6), SCRCP, language.

However, the Act specifically states it "shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules." S.C. Code § 15-36-10(I). Although section 15-36-100 states that filing a motion to dismiss contemporaneously with the initial pleading alters the timing to answer pursuant to Rule 12(a), SCRCP, nothing within section 15-36-100 alters Rule 12(b)(6). Furthermore, section 15-36-100 discusses altering the timeframe in which to file a responsive answer, it does not propose to alter any timeline related to the filing of a motion. Thus, to the extent a non-contemporaneous motion to dismiss raising the "failure to state a claim" is permissible under the Rules of Civil Procedure, it is permissible to raise the same defense under the Act.

Under Rule 12(b), "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, *shall* be asserted in the responsive

pleading thereto if one is required, except that the following defenses *may* at the option of the pleader be made by motion: . . . (6) failure to state facts sufficient to constitute a cause of action." (emphasis added). "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Rule 12(b), SCRCP. As further explanation of the legislative intent behind Rule 12(b), the legislators note that "[t]he motion should be made before answer for early disposition of cases; but the defenses enumerated *may be made in the responsive pleading and are not waived by being stated in a pleading rather than by motion*." Rule 12(b), Note (emphasis added).

Throughout Rule 12(b) the legislature has highlighted its intent through its use of the words *may* and *shall*. "The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature." *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation." *Elmore v. Ramos*, 327 S.C. 507, 510–511, 489 S.E.2d 663, 665 (Ct. App. 1997). The "use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute." *Kennedy v. South Carolina Ret. Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001). "In determining legislative intent, the prevailing rules of statutory interpretation is that the 'use of the words such as '*shall*' or 'must' indicates the legislature's intent to enact a *mandatory* requirement." *Strickland v. Richland County Legislative Delegation*, 440 S.C. 438, 892 S.E.2d 288 (2023) (quoting *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) (emphasis added) (citation omitted)). This Court, however, acknowledged "that the legislature's use of the word "shall" can in limited circumstances be read as permissive instead

because such a reading would effectuate the intent of the legislature." *Id.*; *see, e.g.*, *State v. Blair*, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981) ("The word 'shall' may be construed as permissive to effect legislative intent, particularly when the statute directs a court to determine certain matters.").

Within Rule 12(b) the legislature sets forth that every defense *shall* be set forth in a responsive pleading, presumably enacting a mandatory requirement that responsive pleadings must have every defense that a party intends to use set forth within them. As such, if a defendant is to raise a defense under section 15-36-100, the defendant is required to set forth a section 15-36-100 affirmative defense in its responsive pleading. However, the legislature goes on to provide an exception to its mandatory requirement by asserting that eight (8) separate defenses *may* be asserted via motion, including the failure to state facts sufficient to constitute a cause of action. Further clarifying its intent, the Note to Rule 12(b) reasserts that the defenses enumerated can be made in a responsive pleading, as opposed to a motion, and are not waived if they are submitted in a pleading as opposed to a motion. There is nothing within the language of Rule 12(b) that suggests that a motion to dismiss for failure to state a claim must be filed contemporaneously with the initial responsive pleading, otherwise a defendant loses the right to assert the 12(b)(6) defense. Rather, the plain language of the Rule states that a defendant must assert a section 15-36-100 defense in its initial responsive pleading and may, upon its own discretion, file a motion to dismiss.

In addition, with respect to a defense of failure to state a claim, Rule 12(h)(2) permits the defense to be asserted in any pleading, a motion for judgment on the pleadings, or even at trial. Rule 12(h)(2), SCRCP. Moreover, although Rule 12(g) suggests a defendant cannot make a second motion raising defenses or objections under Rule 12, Rule 12(g) is limited to the scenario when a motion is made under the Rule but omits a defense or objection and it defers to Rule

12(h)(2). Thus, in a scenario where a defendant does not file a motion to dismiss for failure to state a claim but raises it in an answer, Rule 12(g) does not prohibit that defendant from raising the defense by motion after answering.

Because the Act states it does not alter the Rules of Civil Procedure, dismissal related to expert affidavit defects is raised through a defense of failure to state a claim, and the language of Rule 12 is interpreted to allow raising the defense of failure to state a claim beyond the initial pleading stage, a defendant is permitted to raise by motion after an initial responsive pleading that the plaintiff's expert affidavit is defective. Therefore, while the premise underlying this Court's question is not what occurred in the matter before the Court, the answer to this Court's question is "yes."

B. Even if the answer to the Court's question were "no," Glick/Boehm filed a § 15-36-100 motion to dismiss *contemporaneously with its initial responsive pleading*, thereby allowing it to subsequently base its Rule 12(b)(6) motion to dismiss on the failure of 480 King to file a sufficient affidavit under section 15-36-100.

i. Frivolous Civil Proceedings Sanction Act

Section 15-36-100 of the Act shields professionals from spurious claims of negligence. Pursuant to this Act, to proceed against a licensed professional in the State of South Carolina, the plaintiff must provide an expert affidavit establishing the standard of care and related deviation unless the claim is within the common knowledge of the jury. S.C. Code §15-36-100(B). If an affidavit is not filed contemporaneously with the complaint, "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). However, if the plaintiff does file an affidavit contemporaneously with its complaint, "the defendant is entitled to

challenge the sufficiency of the expert's credentials pursuant to subsection (E)." S.C. Code § 15-36-100(A)(3). If an affidavit is filed with the plaintiff's complaint and that affidavit is allegedly defective, the defendant against whom the affidavit is filed must allege, "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 . . .." S.C. Code § 15-36-100(E).

Glick/Boehm is an architectural firm organized and licensed under the laws of South Carolina, as such, 480 King was required to file, as part of its complaint, an affidavit of an expert witness specifying at least one negligent act of Glick/Boehm and the factual basis for each claim.

ii. 480 King failed to file an expert affidavit contemporaneously with its Complaint and Glick/Boehm, timely, filed an initial Motion to Dismiss contemporaneously with its initial responsive pleading.

480 King filed suit against Glick/Boehm on June 26, 2017, alleging claims for breach of contract, breach of warranty, and negligence, all of which were founded upon Glick/Boehm's alleged negligent performance of services under its Professional Services Agreement with 480 King. (Compl. at ¶¶ 5-29, R. at pp. 71-79). However, 480 King failed to file an expert affidavit with the filing of its initial Complaint against Glick/Boehm, contrary to the Act. Presumably, realizing this critical omission, 480 King filed a Motion for Extension of Time to file the required Affidavit on August 10, 2017, representing that 480 King'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). Glick/Boehm, in compliance with the Act, filed a timely Motion to Dismiss, *contemporaneously with its initial pleading*, for failure to comply with the affidavit requirement of the Act on August 29, 2017, thereby reserving its rights to challenge 480 King for

failure to adhere to the requirements of S.C. Code § 15-36-100. (Mot. dated August 29, 2017, R. at p. 100).

On November 17, 2017, Judge Nicholson, Jr., conducted a hearing on both 480 King's Motion for Extension of Time and Glick/Boehm's Motion to Dismiss and ultimately issued an Order on December 7, 2017, granting 480 King's Motion for Extension of Time and denying Glick/Boehm's Motion to Dismiss. (Order dated Dec. 7, 2017, R. at p. 88). In his Order, Judge Nicholson allowed 480 King 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 [480 King] will have been deemed to be in compliance with the requirements of S.C. Code § 15-36-100(B). [Glick/Boehm] 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). Pursuant to Judge Nicholson's Order, 480 King filed the affidavit of Louis Hackney on November 20, 2017. 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 further reviewed the architectural drawings . . . prepared by [Glick/Boehm]." (Aff. of Hackney at p. 1, R. at p. 301). Mr. Hackney proceeded to opine, in his Affidavit, that Glick/Boehm 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 [Glick/Boehm] deviated from the standard of care …." (Aff. of Hackney at p. 2, R. at p. 302).

Following Judge Nicholson's denial of Glick/Boehm's Motion to Dismiss, discovery commenced and the case progressed.

iii. Louis Hackney, a professional engineer, testifies that he does not, in fact, intend to opine as to Glick/Boehm's standard of care in this case and, as such, Glick/Boehm filed a secondary Motion to Dismiss 480 King's Complaint.

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 Glick/Boehm had violated the *Architect's* standard of care, and that Mr. Hackney was not qualified to express an opinion as to the standard of care of an architectural firm, thereby contradicting his Affidavit.

Once Glick/Boehm became aware that Mr. Hackney was *not* stating an opinion as to an *Architect's* standard of care, as previously represented, and because Glick/Boehm had reserved its right to challenge 480 King pursuant to S.C. Code §15-36-100 based upon its initial Motion to Dismiss filed *contemporaneously with its initial responsive pleading*, Glick/Boehm 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). Glick/Boehm'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 480 King consented to Glick/Boehm 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 480 King's consent, on June 28, 2021, Glick/Boehm filed a second Motion to Dismiss on the basis that 480 King failed to file a proper expert affidavit; Glick/Boehm 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). 480 King filed a response in opposition on November 19, 2021. (Resp. in Opp., R. at p. 225).

The Circuit Court held a hearing on Glick/Boehm's Motion on December 2, 2021. The Circuit Court heard arguments from both 480 King and Glick/Boehm. On December 16, 2021, the Circuit Court granted Glick/Boehm's Motion to Dismiss. (Order dated Dec. 16, 2021, R. at p. 92). The Circuit Court held that because Glick/Boehm 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 Glick/Boehm's performance in this matter, and therefore 480 King failed to satisfy the Act's affidavit requirement. (Order dated Dec. 16, 2021 at pp. 2-3, R. at pp. 93-94) ("[T]he [Glick/Boehm] in this case is an architect and its services must be judged against the standard of care of an Architect.").[4] Accordingly, the Circuit Court dismissed all of 480 King's claims against Glick/Boehm, not just 480 King's claim for professional negligence, with prejudice. 480 King did not file a motion under South Carolina Rule of Civil Procedure Rule 59(e) contesting the Circuit Court's ruling.

It is interesting to note that, upon appeal, 480 King asserts that Glick/Boehm was "time-barred" from challenging the sufficiency of Mr. Hackney's affidavit due to a *court-imposed* deadline. However, good cause existed for Glick/Boehm to seek leave to file a secondary Motion

[4] During oral arguments, the Court of Appeals actually noted that it agreed with the Circuit Court "one hundred percent" in that 480 King is unable to bring in an expert that doesn't have architectural expertise to be an architectural expert. (Oral Argument at 6:23-6:39, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). However, the Court of Appeals held that architectural and engineering services may at times overlap, particularly in the area of contract administration. (Oral Argument at 6:39-6:47 & 39:49-40:12, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). Of importance, however, is the fact that 480 King was unable to discern, when asked by the Court of Appeals, whether or not throughout the entire discovery process, whether an Architect or an Engineer was responsible for contract administration within Glick/Boehm's firm, 480 King conceded that they did not know whether an Architect or Engineer was responsible for performing contract administration on the Project. (Oral Argument at 13:09-14:11, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4).

beyond that deadline in light of Mr. Hackney's testimony which effectively rendered his Affidavit defective. Furthermore, 480 King *consented* to the filing of the secondary Motion to Dismiss and the Circuit Court heard the arguments set forth by the parties and *granted* Glick/Boehm's Motion to Dismiss. Finally, and perhaps mostly importantly, 480 King does not show, or even suggest, the existence of a statutory deadline or any time-barring rule established by any appellate court. As discussed in further detail below, Glick/Boehm's secondary Motion to Dismiss was not filed outside of any Rules of Civil Procedure imposed designated timeline and, as such, 480 King's argument fails. Glick/Boehm learned during Mr. Hackney's deposition that 480 King'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, Glick/Boehm 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 Glick/Boehm's requested leave, 480 King's counsel acquiesced to Glick/Boehm 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 480 King even addressed this consent at the hearing on Glick/Boehm'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, 480 King has waived any argument that Glick/Boehm missed the court-created deadline to object to 480 King's Affidavit.

Accordingly, Glick/Boehm complied with the requirements of the Act by filing its initial Motion to Dismiss *contemporaneously with its initial responsive pleading*, thereby effectively reserving its right to challenge 480 King's affidavit. Upon Glick/Boehm's knowledge of 480 King's defective affidavit, Glick/Boehm again filed a second Motion to Dismiss 480 King's Complaint, citing S.C. Code § 15-36-100, as Mr. Hackney testified that he did not intend to opine as to Glick/Boehm's standard of care. Therefore, Glick/Boehm's secondary Motion to Dismiss was proper and timely.

iv. Glick/Boehm's secondary Motion to Dismiss is proper because, in South Carolina, a defendant generally can file a Motion to Dismiss at any point prior to trial and Glick/Boehm preserved its S.C. Code § 15-36-100 argument by filing a Motion to Dismiss contemporaneously with its initial responsive pleading.

Throughout oral arguments, the Court of Appeals questioned Glick/Boehm for having brought a Motion to Dismiss as opposed to a Motion for Summary Judgment based on S.C. Code § 15-36-100. However, pursuant to S.C. Code § 15-36-100, Glick/Boehm is entitled to challenge the sufficiency of Mr. Hackney's credentials. As set forth in explicit detail above, Glick/Boehm filed a Motion to Dismiss *contemporaneously with its initial responsive pleading* based upon the lack of expert affidavit filed contemporaneously with 480 King's Complaint. It is crucial to note that 480 King did not file another Complaint upon which Glick/Boehm was required to file another responsive pleading, rather 480 King filed the Affidavit of Mr. Hackney to correspond with 480 King's initial Complaint. Upon Glick/Boehm's understanding and knowledge that Mr. Hackney was not, in fact, able to opine as to Glick/Boehm's standard of care, Glick/Boehm properly challenged 480 King's expert affidavit in a secondary Motion to Dismiss.

It is long understood in South Carolina law that dismissal of a complaint may be asked for *at any time before judgment*. *Summer v. Kelly*, 38 S.C. 507, 512, 17 S.E. 364, 366 (1893) (emphasis

added). Generally, a defendant is not precluded from filing a Rule 12(b) motion subsequent to an answer or a prior motion. *Bessinger v. BI-LO, Inc*., 366 S.C. 426, 431, 622 S.E.2d 564, 567 (Ct. App. 2005). Rule 12(b) states, "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." SCRCP, Rule 12(b). As such, there have been no rules interpreted in South Carolina which preclude a defendant from filing a motion to dismiss *after* answering the complaint.

In *Crosswell Enters v. Arnold*, the South Carolina Court of Appeals addressed the issue of whether a Rule 12(b)(6) motion can be granted after a prior motion for summary judgment was denied. 390 S.C. 276, 279, 422 S.E.2d 157, 159 (1992). The defendant, Arnold, filed a motion for summary judgment to determine whether the transfer at issue was within the scope of the law. *Id*. at 279. The circuit court denied this motion. *Id.* Later, but still prior to trial, Arnold filed a motion to dismiss for failure to state a claim and the circuit court granted this motion. *Id.* However, the Rule 12(b)(6) motion was converted into a motion for summary judgment because the court considered matters outside of the pleadings, as discussed in further detail below. *Id.* The court held that denial of a prior motion does not bar a party from filing a subsequent motion to dismiss when the motions are addressing different matters. *Id.*

Here, no judgment had been rendered which would have prohibited Glick/Boehm from filing a secondary Motion to Dismiss based upon 480 King's defective expert affidavit. Further, as the court held in *Arnold*, Glick/Boehm's renewed Motion to Dismiss does, in fact, address different matters; Glick/Boehm's initial Motion to Dismiss addressed 480 King's lack of expert affidavit filed contemporaneously with 480 King's Complaint; Glick/Boehm's secondary Motion to Dismiss addressed the insufficiency of Mr. Hackney's Affidavit under S.C. Code § 15-36-100, as

Mr. Hackney was not, in fact, able to opine as to Glick/Boehm's standard of care. As such, Glick/Boehm's secondary Motion to Dismiss was proper and timely.

v. Even so, the Circuit Court and the Court of Appeals seemingly converted Glick/Boehm's secondary Motion to Dismiss into a Motion for Summary Judgment, without directly acknowledging having done so.

The Court of Appeals, during oral arguments and within its Order, seemingly failed to acknowledge that it had the power to convert Glick/Boehm's Motion to Dismiss into a Motion for Summary Judgment as both parties were afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See* Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); *see also Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69, 73 (1999) (stating that conversation of a motion to dismiss into a motion for summary judgment is proper when the parties are afforded a reasonable opportunity to respond to such matters). When a court considers matters outside of the face of the complaint and exhibits attached to the complaint, the court shall treat the motion to dismiss as a motion for summary judgment. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009); SCRCP, Rule(12)(b); *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987). The court is generally required to provide notice to the parties when this happens, but formal notice is not needed if both parties know that the court is considering evidence outside of the pleadings for the motion to dismiss. *Hodge v. Engleman*, 90

F.4th 840, 845, 117 Fed.R.Serv.3d 1151 (5th Cir. 2024). Further, a court should afford the parties a reasonable opportunity to introduce evidentiary matters. *Crosswell Enters,* 309 S.C. at 279.

In *Johnson v. Dailey*, the Supreme Court of South Carolina analyzed this principle. 318 S.C. 318, 457 S.E.2d 613 (1995). In *Johnson*, a defendant brought a Rule 12(b)(6) motion to dismiss. *Id*. at 320, S.E.2d at 614. The trial court considered matters outside of the complaint that were attached to the motion to dismiss like a letter between the parties. *Id*. In doing so, the motion was converted into a motion for summary judgment and was granted in favor of the defendant. *Id.* at 321, S.E.2d at 615. The plaintiff appealed and argued that the trial court was required to give notice when converting a Rule 12(b)(6) motion into a motion for summary judgment. *Id*. The Court disagreed and held that the plaintiff had notice because the outside materials were referred to in the motion and at the hearing. *Id.*

Affidavits contemporaneously, or later with a court's extension, filed pursuant to S.C. Code Ann. § 15-36-100 are considered exhibits of the complaint. *Brazell*, 384 S.C. at 516; S.C. Code Ann. § 15-36-100(B) (stating the plaintiff must file "as part of the complaint an affidavit"). While an S.C. Code Ann. § 15-36-100 affidavit being considered during a motion to dismiss does not automatically require a court to treat it as a motion for summary judgment, considering facts from a deposition testimony does. *Patterson v. Witter*, 425 S.C. 213, 226, 821 S.E.2d 677, 684 (2018).

Depositions are also within external evidentiary matters that turn a Rule 12(b)(6) motion into a motion for summary judgment. *Id.* In *Patterson*, the Supreme Court of South Carolina affirmed the appellate court's holding that a Rule 12(b)(6) motion was converted into a motion for summary judgment. *Id.* In considering the motion to dismiss, the trial court used some evidence that was not an exhibit to the complaint like an affidavit. *Id.* at 220-21. The Court reasoned that considering matters typically reviewed in a motion for summary judgment, like a deposition, is within the scope of converting a Rule 12(b)(6) motion into a motion for summary judgment. *Id.* at 225.

Here, both the Circuit Court and the Court of Appeals, technically, have turned Glick/Boehm's Motion to Dismiss into a Motion for Summary Judgment, seemingly without acknowledging it. Because Mr. Hackney's Affidavit was not filed contemporaneously with 480 King's Complaint, it is considered to be outside the face of the Complaint and, therefore, in reviewing and considering Mr. Hackney's Affidavit, Glick/Boehm's secondary Motion to Dismiss has, seemingly, been converted into a Motion for Summary Judgment. Additionally, in considering the deposition testimony of Mr. Hackney which was included within Glick/Boehm's secondary Motion to Dismiss, Initial Brief, and Final Brief, the Circuit Court and Court of Appeals seemingly converted Glick/Boehm's secondary Motion to Dismiss into a Motion for Summary Judgment. As such, pursuant to Rule 12(b), SCRCP, because matters outside of the pleading were presented to both the Circuit Court and the Court of Appeals and the Circuit Court nor the Court of Appeals excluded Mr. Hackney's Affidavit or Mr. Hackney's deposition testimony, Glick/Boehm's secondary Motion to Dismiss is to be treated as one for summary judgment. Further, the conversion of Glick/Boehm's secondary Motion to Dismiss into a Motion for Summary Judgment was more than appropriate, and notice was not required to be provided to 480 King because Glick/Boehm's Motion to Dismiss, Initial Brief, *and* Final Brief referred to Mr. Hackney's Affidavit and Mr. Hackney's multiple deposition transcripts repeatedly. As such, 480 King had more than enough "notice" that the Circuit Court, the Court of Appeals, and now this Court will be looking at and considering Mr. Hackney's Affidavit and Mr. Hackney's deposition testimony.

In sum, even if a defendant cannot subsequently base a Rule 12(b)(6) motion to dismiss on the failure to file a sufficient affidavit under section 15-36-100 when a defendant decided not to file a motion to dismiss *contemporaneously with its initial responsive pleading*, Glick/Boehm did, in fact, file a Motion to Dismiss *contemporaneously with its initial responsive pleading* on the grounds that 480 King had failed to file an expert affidavit as required by the Act. Glick/Boehm,

thereby, reserved its right to challenge the affidavit at a later date through a 12(b)(6) motion, which Glick/Boehm timely and properly did. Further, 480 King consented to the later motion to dismiss thereby waiving any right to contest the timing of the motion. But even if it should not have been a "motion to dismiss," the circuit court and Court of Appeals treated it as a motion for summary judgment and did not err in doing so.

II. The Court of Appeals erred in considering 480 King's unpreserved arguments in its finding that the Circuit Court erred in dismissing the entirety of 480 King's action.

The Court of Appeals held that the Circuit Court erred in dismissing the entirety of 480 King's action against Glick/Boehm. *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024). However, the Court of Appeals overlooked the fact that 480 King's argument, including the dismissal of all claims against Glick/Boehm, is predicated on unpreserved issues and, therefore, should not have even been addressed by the Court of Appeals. 480 King failed to clearly raise the issue of whether its contract and warranty claims against Glick/Boehm should not fall under the Act's purview and, therefore, the Court of Appeals should not have considered any of 480 King's arguments to that effect.

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 bring 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*, No. 2005-UP-594, 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.").

480 King failed to argue with any legal support, or thought, that it was error to dismiss 480 King's non-negligence-based claims brought against Glick/Boehm on the premise that they also fall within the Act's requirements of supporting Affidavit because they stem from the alleged negligence of Glick/Boehm's performing its scope of work as an architect. While 480 King merely cited to the Circuit Court's Order finding that,

> [i]n its Motion Defendant 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 as required by S.C. Code Ann. §15-36-100(B). The Court agrees with those and other arguments presented by Counsel for Defendant and, as a result, grants the Motion.

(Order dated Dec. 16, 2021 at p. 2, R. at p. 93). 480 King took no further steps in its appeal to prove the Circuit Court erred in dismissing all causes of action it had asserted against Glick/Boehm. In other words, 480 King's briefing was void of any argument to support why the non-negligence causes of action should be maintained despite the dismissal of the professional negligence cause of action asserted against Glick/Boehm. Additionally, 480 King failed to file a Rule 59(e) motion challenging the Circuit Court's finding.

Simply, 480 King failed to preserve on appeal the ability to challenge dismissal of its warranty and breach of contract causes of action. The Court of Appeals overlooked 480 King's failure and nonetheless held that the Court is, "unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation." As such, the

Court of Appeals erred in considering 480 King's arguments not preserved upon Appeal in its finding that 480 King's claims for Breach of Contract and Breach of Warranty against Glick/Boehm are open for interpretation by the Circuit Court as separate and viable claims, and further that no expert affidavit is required to pursue such claims under the Act, thus reversing the Circuit Court's dismissal of all of 480 King's causes of action against Glick/Boehm.

As such, Glick/Boehm respectfully requests that this Court overrule the Court of Appeals', thereby, correcting the erroneous decision.

III. Even presuming that 480 King's unpreserved arguments were maintained for appeal, ***all*** of 480 King's claims are subject to the Act's expert affidavit requirement.

Even assuming 480 King's unpreserved arguments were maintained for appeal, 480 King'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). 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 abundantly clear – the Act does not reference dismissal of just negligence causes of action, and instead chooses to reference the "complaint" as a whole. To meet the intent conveyed by the Legislature within Section 15-36-100, the Complaint ***as a whole*** must be dismissed. 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.

In actions for damages alleging negligence against certain professionals, including architects, the Act applies. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). Here, because Glick/Boehm 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). 480 King asserts that the Circuit Court erred in dismissing all "non-negligence based" causes of action against Glick/Boehm because the Act only applies to situations where professional negligence is alleged. This is untrue. And while the Court of Appeals misapprehended the Act by holding that 480 King's breach of contract and breach of warranty claims are not subject to the contemporaneous affidavit filing requirement of Section 15-36-100, the Court of Appeals also found, "that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the circuit court would not have erred in dismissing the entire complaint," thereby leaving this matter open for interpretation. *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024).

Further, South Carolina courts routinely hold that claims arising from a professional's scope of work pursuant to a standard of care, 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);[5] *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).

480 King's claims against Glick/Boehm are all *rooted* in allegations that Glick/Boehm was negligent in the performance of its duties as an architectural firm and as the "architect of record" even if 480 King did not caption its allegations as such or now attempts to recharacterize Glick/Boehm's work on the tower as not being that of an architect. As exemplified by the appellate panel at the hearing, all alleged failures by Glick/Boehm pursuant to its contractual requirements fold in some architectural professional work. (Oral Argument at 39:42-40:12, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). The Circuit Court explicitly found that Glick/Boehm is an Architect and Mr. Hackney is a Professional Engineer and that those two

[5] Notably, the same case law cited to in Glick/Boehm's Final Brief and utilized by the Court of Appeals in its attempt to discern whether or not 480 King's breach of contract and breach of warranty claims are grounded in professional negligence.

professions are distinct and that Glick/Boehm'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 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.").

It is undisputed that 480 King brought a negligence claim against Glick/Boehm along with claims for Breach of Contract and Breach of Warranty which cannot be distinguished. 480 King's claims are *all* based upon the same alleged failure to perform professional architectural services, whether in the design or in administering the construction contract which construction is pursuant to Glick/Boehm's design. 480 King asserted that Glick/Boehm breached its contract with 480 King by failing to "properly design and prepare specifications for the stair tower." (Compl. at ¶ 9, R. at pp. 72-73); 480 King asserted that Glick/Boehm 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); 480 King asserted that Glick/Boehm "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 Glick/Boehm failed to act as a "reasonably prudent design professional," whether Glick/Boehm "properly" created specifications, and whether Glick/Boehm furnished plans "free from defects," necessarily hinges on whether Glick/Boehm's architectural scope of work met the professional standard of care <u>for an architect</u>. 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 licensed duties. In fact, during oral arguments, 480 King's counsel conceded that the breach of contract breach of

warranties claims might be sufficiently intertwined with the administration of professional services. (Oral Argument at 16:52-17:07, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4).

480 King attempts to circumvent the substantive affidavit requirement by asserting that Glick/Boehm, an architectural firm, "agreed to provide professional architectural <u>and</u> ***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 480 King's previous characterizations of Glick/Boehm and its work on the project subject to this appeal. For instance, in 480 King's Complaint, 480 King states that Glick/Boehm "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). 480 King simply reiterates its assertions against Glick/Boehm in different ways in an attempt to fit the framework of multiple causes of action, nonetheless, both 480 King's claim for Breach of Contract and Breach of Warranty require the support of an architect expert affidavit under the Act, which according to 480 King's own expert's testimony, 480 King lacks.

Mr. Hackney was deposed on three separate occasions and questioned by 480 King's counsel regarding his qualifications; during Mr. Hackney's August 27, 2020 deposition, he testified that he had never provided a professional opinion about the standard of care of an architect, prior to issuing his expert affidavit in this case, and had no intention of offering such professional opinion in this case. (Mot. dated Jun. 28, 2021, Ex. 3 at pp. 208-09 ll. 15-2, R. at pp.

210-211). 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 that while he felt comfortable opining as to specific details and/or lack of details as a design professional, he did *not* feel comfortable specifically talking about an architect's standard of care. (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). In sum, Mr. Hackney admitted on multiple occasions that he was not intending to state, nor was he stating, any opinions that Glick/Boehm 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.

Therefore, the Court of Appeals' only logical finding should have been that the Circuit Court did not err in dismissing 480 King's Complaint in its entirety because all of 480 King's claims are grounded in Glick/Boehm's alleged non-performance of its standard of care as an architect. This result is in keeping with the unequivocal language of the Act which provides that when a plaintiff brings a professional negligence claim, ***all*** other claims brought along with it (including breach of contract and breach of warranty) are, likewise, subject to the Act's expert affidavit requirement. Any other result is contrary to the language the legislature promulgated to protect licensed professionals in this state.

Accordingly, the Court of Appeals erred in reversing the Circuit Court dismissal of 480 King's Complaint against Glick/Boehm in its entirety, as each of 480 King's causes of action against Glick/Boehm are integrally related to Glick/Boehm's duties as an Architect and fit squarely within the Act's purview. As such, Glick/Boehm respectfully requests that this Court overrule the Court of Appeals to correct the erroneous decision.

IV. To satisfy the Act's expert affidavit filing requirement, an expert must provide testimony as to the professional's performance pursuant to their standard of care in the expert's *specific* field.

The Court of Appeals, during oral arguments, noted that it agreed with the circuit court "one hundred percent" in that 480 King is unable to bring in an expert that doesn't have architectural expertise to be an architectural expert. (Oral Argument at 6:23-6:39, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). And while the Court of Appeals held that architectural and engineering services may at times overlap, particularly in the area of contract administration, there was no legal or factual support for this diversion from the Act's language. (Oral Argument at 6:39-6:47 & 39:49-40:12, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4). In fact, when asked by the Court of Appeals whether or not 480 King was able to discern, throughout the entire discovery process, whether an Architect or an Engineer was responsible for contract administration within Glick/Boehm's firm, 480 King conceded that *they did not know* whether an Architect or Engineer was responsible for performing contract administration on the Project. (Oral Argument at 13:09-14:11, *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 904 S.E.2d 182 (Ct. App. 2024), https://media.sccourts.org/COA_Videos/2021-001510.mp4).

Further, 480 King has gone so far as to argue 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 clearly delineates 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)). (emphasis added). 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."); *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).

Pursuant to 480 King's own allegations, Glick/Boehm was interpreting the contract documents, reviewing the Contractor's submittals, and otherwise rejecting work not in general conformance with the architectural design. (Compl. at ¶ 7). Based upon 480 King's own admissions of Glick/Boehm's architectural scope of work on the Project, under the Act's legislative intent, the alleged negligent acts of Glick/Boehm require an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue; simply put, 480 King is required to set forth an architect expert to opine as to the alleged deficiencies in Glick/Boehm's work on the Project.

The Court of Appeals' decision here serves to disrupt this long-standing principle and have a spider web effect on all licensed professionals/workers in this state. Anyone from any profession would be able to opine as to another's separate and distinct professional standard of care and performance of their contractual duties unbeknownst to the professional whose standard of care is being called into question.

Notwithstanding, the Court of Appeals supported its conclusion herein with reference to the statutory definition of an engineer set forth in S.C. Code §40-22-20 (Supp. 2023), but, unfortunately, such reference was limited. First, the Court of Appeals misapprehended Mr. Hackney's ability to opine on an architect's standard of care in performing contract administration in its interpretation of the definition of the "Practice of Engineering." Read as a whole, one should find that Section 40-22-20(25), "Practice of Engineering" may include design coordination, but only as to how an *engineer's* design correlates with an *architect's* design and the coordination of

the *engineering works and systems*, it does not open the door to an engineer to opine on an architect's design and design coordination. Under Section 40-22-20(25), the "Practice of Engineering" is:

> any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as commissioning, consultation, investigation, expert technical testimony, evaluation, design and design coordination of **engineering works and systems**, design for development and use of land and water, performing engineering surveys and studies, and the review of construction for the purpose of monitoring compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems projects, and industrial or consumer products or equipment of control systems, chemical, communications, mechanical, electrical, environmental, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property, and including such other professional services as may be necessary to the planning, progress, and completion of any engineering services. The mere execution, as a contractor, of work designed by a professional engineer or supervision of the construction of such work as a foreman or superintendent is not considered the practice of engineering. A person must be construed to practice or offer to practice engineering, within the meaning and intent of this chapter who:
>
> (a) Practices any branch of the procession or discipline of engineering;
> (b) By verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer or through the use of some other title implies that he is a professional engineer or that he is licensed under this chapter; or
> (c) Holds himself out as able to perform or does perform any engineering service or work or any other professional service designated by the practitioner or which is recognized as engineering.

(emphasis added). First, Professional Engineers, along with Architects, are covered by the Act, but are distinguished as separate professionals who must stay within their lane pursuant to the

educational degrees, licensing and regulation in which they are bound. Likewise, Architects are restricted to their own lane. For example, South Carolina Code Section 40-3-20(6),

> Practice of architecture' means a service or creative work requiring architectural education, training, and experience and the application of the principles of architecture and related technical disciplines to the professional services or creative work as consulting, evaluating, planning, designing, specifying, coordinating of consultants, **administration of contracts**, and **reviewing of construction for the purpose of assuring compliance with the specifications and design**, in connection with a building or site development.

(emphasis added).

As such, despite 480 King's contention to the contrary, it *does* matter whether an engineer or architect was performing the contract administration services as set forth in Glick/Boehm and 480 King's American Institute of Architects' Standard Form of Agreement. Glick/Boehm is an Architect, performing contract administration services related to its periodic review of construction compared to Glick/Boehm's design; a professional engineer is not qualified to opine as to that scope of work performed by an Architect. Clearly, through a complete reading of both statutory definitions related to the practice of engineering and architecture, Mr. Hackney, a Professional Engineer, does not possess the ability to opine as to an architect's unique role of administrating the project construction contract which sets forth that the contractor is building pursuant to a design prepared by an architect. Allowing Mr. Hackney to indict Glick/Boehm's contract administration work would be condoning Mr. Hackney to practice architecture without the proper licensing requirements. 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 the 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.

Additionally, the definition of an engineer's practice provides that engineers may play a role in the coordination of *engineering* works and systems, it does not refer to the works and systems of <u>any design professional, including the architect</u>. As such, applying the definition of "Design coordination" to the facts here further misapprehends 480 King's Expert, Mr. Hackney's, allowable role in this matter. Section 40-22-20(7) sets forth the definition of "Design coordination" which, "includes the review and coordination of those technical submissions prepared by others, including as appropriate and without limitation, consulting engineers, architects, landscape architects, surveyors, <u>and other professionals working under the direction of the engineer</u>." (emphasis added). Mr. Hackney can <u>only</u> opine, as an engineer, on the scope of work of an architect *if* that architect is working at his discretion. Here, there was no engineer that Glick/Boehm reported to, much less Mr. Hackney himself, therefore, Section 40-22-20(7) is wholly inapplicable.

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 these reasons, and the reasons noted above, the Court of Appeals erred in reversing the Circuit Court's dismissal of this Complaint in its entirety, despite Glick/Boehm's performance of contract administration services on the project as an architect under its architectural contract. As such, Glick/Boehm respectfully requests that this Court overrule the Court of Appeals to correct the erroneous decision.

V. The Court of Appeals erred in failing to clarify its Order as to the dismissal of 480 King's claims against Glick/Boehm prior to remanding the matter to Circuit Court for "further proceedings."

Certain portions of the Court of Appeals' Order are unclear as it currently stands, which will undoubtedly confuse the parties as well as the Circuit Court if the issues are remanded for "further proceedings." First, the Court of Appeals stated that "the circuit court erred in dismissing the entirety of 480 King's action;" however, the Court of Appeals failed to expand upon which portions of 480 King's Complaint the Circuit Court erred in dismissing. *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 171, 904 S.E.2d 182, 185 (Ct. App. 2024). The Court of Appeals confusingly provided that "[b]ased on the language of 480 King's complaint and the record before us, we are unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation." *Id.* at 170, 904 S.E.2d at 184. However, approximately three sentences above this holding, the Court of Appeals stated, "that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of Section 15-36-100, the circuit court would not have erred in dismissing the entire complaint." *Id.* This statement is followed with a citation to a South Carolina case which supports Glick/Boehm's argument that ***<u>all</u>*** of 480 King's claims are

subject to the Act's expert affidavit requirement. *Id.* Yet, the Court of Appeals concludes that 480 King's breach of contract and breach of warranty claims are allegedly not subject to the Act's affidavit requirement. *Id.* The Court of Appeals' position, as currently written, leaves the door open for the Circuit Court to interpret the Court of Appeals without any clear direction, leaving this exact conflict to undoubtedly arise again.

Second, in the Court of Appeals' holding that the Circuit Court erred in dismissing the entirety of 480 King's action, the Court of Appeals failed to clarify whether or not it intended to affirm the Circuit Court's dismissal of 480 King's Negligence claim. The Court holds that,

> to the extent the circuit court dismissed 480 King's claims relating to contract administration services for which an engineer may be properly qualified, we reverse. However, we affirm the dismissal of 480's King negligent design and supervision claims to the extent they require testimony by an expert qualified to address an architect's standard of care.

Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC, 443 S.C. 165, 172, 904 S.E.2d 182, 185 (Ct. App. 2024). Furthering the confusion, the Court of Appeals notes in footnote 2 that the Court of Appeals recognizes that,

> it may be difficult to delineate the engineering and architectural categories. A properly supported motion for summary judgment may be required to aid this sorting process; the parties will also likely need to address whether 480 King's breach of contract and warranty claims are truly disguised claims for architectural negligence or claims about which a non-architect engineer may properly testify.

Id. at 172, 904 S.E.2d at 185 n.2. However, as set forth above, 480 King's asserted allegations against Glick/Boehm in its Breach of Contract and Breach of Warranty claims arise out of 480 King's negligent design and supervision claims. Therefore, it is unclear which of 480 King's claims against Glick/Boehm the Court of Appeals intends to affirm and which claims the Court of Appeals intends to reverse.

Further, the Court of Appeals failed to clarify whether 480 King's remaining claims require an expert affidavit to be filed contemporaneously with the action, instead asserting that 480 King "raised breach of contract and warranty claims *arguably* not subject to the contemporaneous affidavit filing requirement of Section 15-36-100." (emphasis added). *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 443 S.C. 165, 170, 904 S.E.2d 182, 184 (Ct. App. 2024).

The Circuit Court clearly set forth in its decision that the Act delineates certain professions for which it applies to and protects, and plaintiff's required expert can speak to whether or not someone deviated from the standard of care, but only if that expert falls into the same profession for which they seek to opine. (*See* Hearing Tr. dated Dec. 2, 2021 at p.15, ll. 20-23; p. 21 ll. 5-9; 11-14; 22-25). Further, the Circuit Court clearly and correctly held that allowing Mr. Hackney, a professional engineer, to testify as to whether or not an architect adheres to the standard of care, "flies in the fact of the statute." *Id.*

Without a clear and unequivocal direction by the appellate courts, the Circuit Court will be left with little to no guidance on how to conduct "future proceedings" upon remand. Further, Glick/Boehm will be forced to expend significant additional costs and resources defending against claims which were properly argued, briefed, and dismissed by the Circuit Court.

It has become fundamental practice that S.C. Code §15-36-100(A) mandates that the expert witness(es) selected by plaintiff must possess the requisite expertise in the area of practice or specialty about which the opinion on the standard of care is offered. This case provides this Court with an opportunity to correct the law once and for all and to make it abundantly clear that a professional in the same discipline must be the one who testifies as to the standard of care of a defendant in that same profession. Glick/Boehm requests that this Court uphold the words of the

Circuit Court's Order and uphold the black and white words of the Act, i.e., that "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." (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). In this matter, the Court of Appeals has blurred the brightline interpretation which has been applied by the bench, bar, and professionals in this state since the institution of the Act, but the Circuit Court did not. *Id.* ("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."). As such, Glick/Boehm requests that this Court overrule the Court of Appeals and institute certainty and guidance for all in this state who rely upon the clear and unequivocal terms of the Act and its application, to avoid the certain repercussions of the Court of Appeals' decision which will effectively waste judicial resources on intense factual analysis on a case-by-case basis, increased motion practice, and likely varying and disjointed results.

CONCLUSION

For the benefit of the bench and bar, this Court should find that a defendant can raise, by motion to dismiss, the 12(b)(6) ground of failure to state a claim after an initial responsive pleading when plaintiff's affidavit, required by section 15-36-100, is defective. Nevertheless, Glick/Boehm did satisfy the requirement of the Act by filing a Motion to Dismiss *contemporaneously with its initial responsive pleading* on the ground that 480 King had failed to file an expert affidavit. Glick/Boehm thereby reserved its right to challenge the affidavit at a later date, which Glick/Boehm timely and properly did upon Glick/Boehm's knowledge that 480 King's Affidavit was insufficient under the Act.

Further, Glick/Boehm respectfully requests this Court reverse the Court of Appeals' rulings thereby upholding the lower court's decision to dismiss all claims against Glick/Boehm. The Court of Appeals overlooked 480 King's failure to preserve issues on appeal and addressed all causes of action dismissed by the Circuit Court. Additionally, 480 King did not furnish the necessary affidavit of an Architect which details how Glick/Boehm, an architectural firm, breached its standard of care in all aspects it was required to perform under contract related to the underlying project whether in design or in construction administration of the architect's design. Glick/Boehm suggests the Court of Appeals overlooked or misapprehended the aforementioned point which will thereby lead to a potentially devastating and inconsistent conclusion for licensed professionals in this state notwithstanding Glick/Boehm.

Therefore, this Court should correct the overlooked and misapprehended points which lead to the Court of Appeals' erroneous decision and reinstate the Circuit Court's decision.

This 24th day of February, 2025.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge
Case No. 2016-CP-10-03468

Appellate Case No. 2024-001403

Charles Blanchard Construction Corp. Inc.……………………………………………Plaintiff

v.

480 King Street, LLC …………………………………………………………… Defendant

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480 King Street, LLC…………………………………………Third-Party Plaintiff, Respondent

v.

Glick/Boehm & Associates, Inc. ……………………………Third-Party Defendant, Petitioner

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Petitioner Glick/Boehm & Associates, Inc.'s Brief in Support of Writ of Certiorari complied with Rule 242(i), SCACR.

[Signature page to Follow]

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