

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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

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

v.

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

REPLY BRIEF OF PETITIONER GLICK/BOEHM & ASSOCIATES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

REPLY TO CERTAIN REPRESENTATIONS MADE IN 480 KING’S COUNTER-STATEMENT..... 1

ARGUMENT4

 I. The cases 480 King alleges to be controlling precedent are factually distinct from this case and, therefore, are unpersuasive and unapplicable to this appeal.....4

 A. *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 810 S.E.2d 848 (2018)..... 4

 B. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012)6

CONCLUSION.....7

CERTIFICATE OF COMPLIANCE.....9

TABLE OF AUTHORITIES

Cases

Eades v. Palmetto Cardiovascular & Thoracic, PA, 422 S.C. 196, 810 S.E.2d 848 (2018).....4, 5

Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 725 S.E.2d 693 (2012)6

Statutes

S.C. Code 15-36-100(A)(3)4

Reply to Certain Representations Made in 480 King's Counter-Statement

As it pertains to 480 King's counter-statement which sets forth multiple representations made by Glick/Boehm which are allegedly "not supported by the record" and "are otherwise misleading," Glick/Boehm sets out to clarify those specific assertions here for the Court. (*See* Return p. 7-8).

First, 480 King sets forth that Glick/Boehm "misrepresents" that 480 King's Complaint is rooted solely in negligence, pointing out that 480 King did in fact assert three causes of action against Glick/Boehm. (Return. P. 8). In its Brief, Glick/Boehm sets forth that "[i]t is undisputed that 480 King brought a negligence claim against Glick/Boehm *along with claims for Breach of Contract and Breach of Warranty . . .*" (Brief in Support of Writ of Cert, p. 28) (emphasis added). While, yes, three causes of action were brought against Glick/Boehm by 480 King, those three causes of action are *not* distinct from one another but are, in fact, *all* based upon the same alleged failure to perform professional architectural services.

Additionally, 480 King asserts that its Complaint, "*specifically* asserts that [Glick/Boehm] was negligent in performing construction contract administration services, not merely architectural design services." (Return, p. 8). Again, 480 King appears to misconstrue its own allegations against Glick/Boehm and Glick/Boehm's scope of work on this Project. 480 King fails to acknowledge that *all* of its claims against Glick/Boehm are based upon the same alleged failure to perform professional architectural services, whether that be in the design *or* the administration of the construction contract which construction is pursuant to Glick/Boehm's design. Every claim asserted by 480 King relates directly to Glick/Boehm's performance as an *architect*. (Brief in Support of Writ of Cert, p. 30). In fact, 480 King's statement here directly contradicts exactly what is set forth in 480 King's Complaint. 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.” (App. p. 70-71) (emphasis added). As such, 480 King is simply reiterating the same assertions against Glick/Boehm in different ways in an attempt to fit the framework of its multiple causes of action.

Regardless of the above, in its Return, 480 King brings to the Court’s attention that Mr. Hackney testified that he felt “comfortable” discussing the standard of care that a professional would provide for construction administration services. (Return p. 8-9). However, 480 King fails to acknowledge that during the three separate instances in which Mr. Hackney was deposed, he testified that he had *never* provided a professional opinion about the standard of care of an architect and that he had *no intention* of offering such professional opinion in this case prior to issuing his affidavit. (App. pp. 198-199). Further, Mr. Hackney testified that he did *not* feel comfortable specifically talking about an architect’s standard of care, which is precisely what Mr. Hackney’s expert affidavit was required to do to comply with S.C. Code §15-36-100. *Id.* Moreover, Mr. Hackney admitted that he was not intending to state, nor was he stating, any opinions that Glick/Boehm had violated an Architect’s standard of care, nor was he *qualified to express an opinion as to the standard of care of an architectural firm*. Because all three of 480 King’s causes of action against Glick/Boehm are rooted in Glick/Boehm’s performance of architectural services, including the construction observation of the architect’s (not an engineer’s) design, Mr. Hackney is not suitable to comply with S.C. Code § 15-36-100, regardless of the misinformation contained in his affidavit.

Additionally, it appears that 480 King has misunderstood Glick/Boehm's argument as it pertains to 480 King's waiver of any argument pertaining to Glick/Boehm's alleged "missed" court-created deadline to object to 480 King's expert affidavit. 480 King's Return sets forth that 480 King did not consent to the relief sought in Glick/Boehm's motion and expressly stated 480 King's opposition to the motion. (Return p. 9). Glick/Boehm does not attempt to convey to the Court that 480 King consented to the information contained within Glick/Boehm's motion to dismiss and the relief sought therein, in fact, Glick/Boehm noted in its Brief that 480 King did not consent to the relief. (Brief in Support of Writ of Cert, p. 19) Rather, Glick/Boehm's argument is simply that 480 King has waived any argument that Glick/Boehm untimely filed its motion to dismiss to object to 480 King's expert affidavit based upon a court-created deadline as 480 King acquiesced to the *filing* of Glick/Boehm's motion to dismiss.

Finally, as set forth in abundant detail in Glick/Boehm's Brief, Mr. Hackney's affidavit misrepresented, on its face, that Mr. Hackney was qualified to testify as to an Architect's standard of care. In fact, Mr. Hackney's affidavit set forth that "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, App. p. 302). However, throughout his multiple depositions, it became abundantly clear that Mr. Hackney's affidavit contained multiple false representations and Mr. Hackney did not intend to provide opinions related to Glick/Boehm's architectural standard of care, Mr. Hackney did not feel comfortable providing opinions as to Glick/Boehm's architectural standard of care, and most important he was not qualified to provide opinions as to Glick/Boehm's architectural standard of care – directly in contradiction of his affidavit. After uncovering Mr. Hackney's true intent and expertise, Glick/Boehm promptly requested leave to file its renewed motion to dismiss.

ARGUMENT

I. The cases 480 King alleges to be controlling precedent are factually distinct from this case and, therefore, are unpersuasive and unapplicable to this appeal.

480 King asserts that Glick/Boehm failed to address or even cite alleged controlling precedent for this Court. (Return p. 12). While Glick/Boehm does not contest that the cases set forth by 480 King provide interpretations of S.C. Code § 15-36-100, the two cases which 480 King alleges constitute controlling precedent are factually distinct in material ways from the case at hand and, therefore, do not have any bearing on the Court’s ruling in this matter.

a. *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 810 S.E.2d 848 (2018).

480 King cites to *Eades v. Palmetto Cardiovascular & Thoracic, PA*, for the proposition that “[e]ven where an expert witness does not satisfy the particular requirements of 15-36-100(A)(1) or (A)(2), he may still be qualified under subsection (A)(3) if he has ‘scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual’s study, experience, or both.’” (Return p. 12-13) (quoting *Eades*, 422 S.C. at 203, 810 S.E.2d at 851 (quoting S.C. Code 15-36-100(A)(3))).

In *Eades*, this court addressed a case where a plaintiff used an affidavit from a vascular and critical care surgeon in a case against emergency medicine and primary care physicians. *Eades*, 422 S.C. 196, 810 S.E.2d 848 (2018). This court found that that Section 15-36-100(A)(3) “contemplates the production of an expert affidavit from a doctor who is not certified in or does not practice in the same area of medicine as the defendant doctor, but otherwise possesses specialized knowledge to assist the trier of fact.” *Id.* In light of that finding, this court found “the information contained in [the surgeon's] affidavit clearly sufficient to satisfy [the

statutory] provision.” *Id.* at 852. Specifically, this court referenced the surgeon's explanation that “he is aware of the degree of care and skill ordinarily exercised by members of the medical profession under the same or similar circumstances as it relates to the care and treatment of patients such as [plaintiff].... This knowledge is based upon [his] education, training, and experience.” *Id.* Additionally, the surgeon explained that his practice of medicine involved evaluating and treating issues similar to those faced by the plaintiff. *Id.* (internal quotation marks omitted). Importantly, this court characterized Section 15-36-100(A)(3) as imposing “general requirements” compared to the more stringent requirements of Section 15-36-100(A)’s other subsections. *Id.*

Dissimilar to *Eades*, and primary for this Court’s consideration, Mr. Hackney has not set forth that he is aware of the degree of care and skill ordinarily exercised by members of the architecture profession under the same or similar circumstances as it relates to construction contract administration. Rather, Mr. Hackney has repeatedly set forth and testified that he is not comfortable opining as to an architect’s profession, but rather that he can opine as to construction contract administration as it pertains to a professional engineer – which is vastly different – particularly when it is architectural plans Glick/Boehm is observing during the construction phase and not engineering plans. Despite 480 King’s distortion otherwise, 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 of Glick/Boehm’s design; a professional engineer is not qualified to opine as to that scope of work, design, details, and oversight of those items. Clearly, through a complete reading of both statutory definitions related to the practice of engineering and architecture as

espoused in Glick/Boehm's Brief, 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.

As such, contrary to this Court's holding in *Eades*, Mr. Hackney does not have specialized, technical knowledge regarding Glick/Boehm's scope of work related to contract administration as an Architect and, therefore, *Eades* does not apply and is not controlling precedent for this case.

b. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 725 S.E.2d 693 (2012).

Additionally, 480 King cites to *Grier v. AMISUB of S.C., Inc.* to support its contention that Mr. Hackney is qualified to opine as to Glick/Boehm's standard of care – despite repeated admittances by Mr. Hackney that he is not.

In *Grier*, the plaintiff filed a notice of intent to bring a wrongful death suit alleging that defendant's failure to monitor and treat plaintiff for bedsores and sepsis contributed to the decedent's death. 397 S.C. 532, 725 S.E.2d 693 (2012). Plaintiff also filed an affidavit from "a nurse with experience treating bedsores and their complications." *Id.* However, the only argument before this court in *Grier*, "is that the circuit court erred in holding the pre-suit affidavit a plaintiff is statutorily required to file before bringing a medical malpractice claim must contain an expert opinion on proximate cause." *Id.*

As such, *Grier* is completely distinguishable from the current case at hand because this court did not entertain whether the nurse was qualified, as the plaintiff in *Grier* conceded that the nurse was not, instead focusing solely on the statutory interpretation of S.C. Code § 15-36-100(B) and whether the plain language of the statute required an expert affidavit to contain an opinion regarding causation. Here, Glick/Boehm does not contest that Mr. Hackney's affidavit asserts an opinion as to an architect, Glick/Boehm's, standard of care but rather Glick/Boehm challenges Mr.

Hackney's qualifications to be able to assert such standard of care opinion based upon his qualifications and testimony to the contrary.

Therefore, Glick/Boehm does not contest 480 King's statement that Glick/Boehm's Brief failed to note or cite to *Eades* and/or *Grier*, but rather, Glick/Boehm simply understood the facts and law which vastly distinguishes *Eades* and *Grier* from the current case and the issues presented before this Court to address. Glick/Boehm respectfully requests that this Court see these cases for what they are - 480 King's attempts to misconstrue and confuse the Court as to the pertinent issues argued by both parties in this case. As such, *Eades* and *Grier* are not controlling precedent for this Court as it pertains to this case.

CONCLUSION

For the reasons set forth above, and in Glick/Boehm's Brief in Support of Writ of Cert, 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. Notwithstanding, 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 7th day of April, 2025.

Respectfully submitted,

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