

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culberston, Circuit Court Judge

Appellate Case No. 2019-001485
Case No. 2019-CP-26-00345

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SC Court of Appeals

Michael Marceda and Cheryl Marceda, ...Appellants,

v.

Winchester Oceanview Development, Inc.,
Sands Building Groups, Inc., C3 Studio, LLC,
Sands Realty Group, Inc., Jonathan B. Dickerson,
and John Woodard, Defendants,

Of which C3 Studio, LLC, ...Respondent.

RECORD ON APPEAL

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO: 2019-CP-26-_____

MICHAEL MARCEDA and CHERYL
MARCEDA,

Plaintiff(s)

v.

WINCHESTER OCEANVIEW
DEVELOPMENT, INC.; SANDS BUILDING
GROUP, INC.; C3 STUDIO, LLC; SANDS
REALTY GROUP, INC.; JONATHAN B.
DICKERSON; and JOHN WOODWARD,

Defendant(s)

SUMMONS
(Jury Trial Demanded)

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiffs or their attorneys, Lane D. Jefferies, Eric M. Poulin, and Roy T. Willey, IV at their offices at 32 Ann Street, Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

Dated at Charleston, South Carolina on the 22nd day of January, 2019.

ANASTOPOULO LAW FIRM, LLC

s/Lane D. Jefferies

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
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MICHAEL MARCEDA and CHERYL
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v.

WINCHESTER OCEANVIEW
DEVELOPMENT, INC.; SANDS BUILDING
GROUP, INC.; C3 STUDIO, LLC; SANDS
REALTY GROUP, INC.; JONATHAN B.
DICKERSON; and JOHN WOODWARD,

Defendant(s)

**COMPLAINT
(Jury Trial Demanded)**

The Plaintiff, complaining of the Defendants, alleges and says as follows:

CASE SYNOPSIS

Defendants promised Plaintiffs that “Just as a butterfly, your life will change at this new address.” This appears to be the only promise Defendants fulfilled. Indeed, Plaintiffs’ lives did change when they moved to their new “luxury” address – at which they found non-flushing toilets, leaky windows, cracked joists, faulty wiring, damaged roof trusses, an invasion of ants, and numerous other construction defects. When made aware of the issues, Defendants refused to cure them.

SPECIFIC AVERMENTS

1. That the Plaintiff, Michael Marceda, is a citizen and resident of Horry County, State of South Carolina.
2. That the Plaintiff, Cheryl Marceda, is a citizen and resident of Horry County, State of South Carolina.
3. That Defendant Winchester Oceanview Development, Inc. (“Developer”) is a corporation incorporated and existing under the laws of the State of South Carolina, doing business and owning real property in Horry County, South Carolina, and whose registered agent for

service of process is DAVID C. STRADINGER at 1203 48TH AVE N STE 200, MYRTLE BEACH, South Carolina, 29577.

4. That Defendant Sands Building Group, Inc. ("Builder") is a corporation incorporated and existing under the laws of the State of South Carolina, doing business and owning real property in Horry County, South Carolina, and whose registered agent for service of process is DAVID K WILKES at 1203 48th Ave N, STE 200, Myrtle Beach, South Carolina, 29577.
5. That Defendant C3 Studio, LLC ("Architect") is a limited liability company organized and existing under the laws of the State of Tennessee, doing business in Horry County, South Carolina, and whose registered agent for service of process is HUDDY, GREGORY at 133 W JACKSON AVE, KNOXVILLE, Tennessee 37902.
6. That Defendant Sands Realty Group, Inc. ("Real Estate Agency") is a corporation incorporated and existing under the laws of the State of South Carolina, doing business and owning real property in Horry County, South Carolina, and whose registered agent for service of process is DAVID K WILKES at 1203 48th Ave N, STE 200, Myrtle Beach, South Carolina, 29577.
7. That the Defendant Jonathan B. Dickerson ("Real Estate Broker") is a citizen and resident of Horry County, State of South Carolina.
8. That the Defendant John Woodward, ("Real Estate Salesman") is a citizen and resident of Horry County, State of South Carolina.
9. That Defendants, individually and collectively, are the designers, developers, builders, and sellers of the development known as Papillon, located in Horry County, including the Plaintiffs' residence, which is situated at 7849 North Ocean Blvd, Myrtle Beach, South Carolina.

10. That Plaintiffs' home in Papillon is located in Horry County, South Carolina, South Carolina.
11. That Defendants, individually and collectively, undertook responsibility for: purchasing the land; planning the layout of infrastructure, common areas, and amenities; designing the homes; applying for and obtaining approvals and permits from state and local authorities; hiring and supervising engineers and contractors; clearing and grading the land; installing roads, water, and sewer; properly stabilizing the land; planning and properly establishing drainage from the yards and from the community as a whole; planning and preparing individual house sites with sufficient and effective drainage; hiring and supervising appropriate subcontractors for the construction, and seeing that the work was performed in a good and workmanlike fashion; maintaining common areas and amenities during the buildout and sales phases of the development, and all of the other usual incidents of residential development and construction.
12. That Defendants carried out their obligations and duties in a negligent, grossly negligent, and otherwise wrongful fashion; in breach of contract; in violation of industry standards, building codes, and installation instructions; and in other wrongful way, all of which proximately caused damages to Plaintiffs.
13. That Defendants violated one or more applicable building codes.
14. That Defendants' works deviates from one or more industry standards.
15. The Defendants, individually, collectively, and through various agents and representatives, negligently failed to disclose a variety of facts which were material to the Plaintiffs' decision to purchase their home, including but not limited to the following:
 - a. That the toilets do not flush properly.
 - b. That the windows leak.
 - c. That the shingles along the partial roof over the 3rd floor balcony are not installed properly.

- d. That the exterior doors do not have support boards under the threshold.
- e. That the second floor exterior door to the patio is leaking air around the top.
- f. That one or more of the floor joists under the balconies have a notch cut in them and a couple of the beams are cracked.
- g. That one or more of the joists are bowed.
- h. That the top of the posts on the front porch do not have caps and rain water is dripping down into the posts. The wood has been stained and the nails are starting to rust as they are not protected from rain and/or salt air. one or more of the caps are not yet painted. The edge at the side of one or more of the caps is unsealed.
- i. That the rear outside hose bib/water spigot is at 40 psi and the front hose bib is at 60 psi when tested. Instead, the water pressure measured on the exterior should be at least 80 psi.
- j. That water pressure is weak at the various faucets throughout the home.
- k. That there is a hump in the deck on the second floor balcony.
- l. That the deck joists do not have joist hangers or a ledger board, but should to ensure the strength of the balcony.
- m. That the screws are coming back out of the decking on the front deck.
- n. That the drip edge along the front of the home near the second floor porch is loose.
- o. That inside the attic there are many damaged truss connections with improper attempts at repair.
- p. That there is insufficient insulation on attic floor.
- q. That the right side part of the front wall in the master bedroom is missing insulation.
- r. That the dryer vent hose is of improper length.
- s. That the light and fan in the master bath toilet closet do not work.
- t. That the hand rail for the interior steps has not been stained as it should.
- u. That the closet door stoppers are not adjusted as they should be and are now sticking.
- v. That the master bedroom door handle does not work as it should.
- w. That the hardware for the sliding closet doors is missing.
- x. That the Jack and Jill bathroom door does not stay open as it should due to misalignment.
- y. That the first floor bedroom window is full of ants.
- z. That the Borate treatment on the lumber inside the walls not properly applied.
- aa. That there is a crack along the sill under one of the upstairs windows overlooking the driveway.
- bb. That the window safety tabs are damaged and/or missing throughout the home.
- cc. That the windows at the bottom and top of the steps are not tempered glass which presents a very serious safety issue if someone were to slip and fall down the stairs and into the glass.
- dd. That the window at the bottom of the steps for the second floor has broken spring
- ee. That the kitchen sink is unreasonably slow to drain.

- ff. That one or more of the ground and neutral conductors in the main electrical panel are attached together ("double-lugged") under the same lug/screw.
- gg. That the electrical panel cover is being held in place with wood screws rather than appropriate fasteners.
- hh. That the exterior outlets on the second and third floor balconies are not GFCI.
- ii. That there are oil/oil stain on the floor in the garage next to the furnace.
- jj. That at the outdoor a/c compressors, the suction lines are not completely insulated with a foam sleeve
- kk. That the HVAC suction line running to/from the furnace is missing foam sleeve insulation in spots
- ll. That one or more of the air ducts in the attic are not laying or hanging straight.
- mm. That the air ducts in the attic have fallen from there straps.
- nn. That the inside of the air return registers still have a large amount of drywall dust from construction.
- oo. That the furnace flue pipe is too short.
- pp. That the flue pipe for the gas furnace is in contact with the plywood sheathing as it travels through the roof -- a fire hazard.
- qq. That the lack of gutters is causing water to erode the soil over time and/or pool next to the foundation.
- rr. That one or more areas on the back of the roof have been improperly repaired.
- ss. That there are one or more crack(s) in the garage floor
- tt. That on the front of the house, there are shingles along the partial roof over the 3rd floor balcony which aren't laying right and the edge/trim underneath is curled up.
- uu. That the deck joists do not have joist hangers or a ledger board.
- vv. That the screws are coming back out of the decking on the front decks.
- ww. That the drip edge along the front of the home near the second floor porch is loose.
- xx. That there are many damaged roof truss connections and/or roof truss connections with improper repairs.
- yy. And other defects as are revealed during discovery.

16. That the Defendants had a duty to disclose the foregoing.

17. That the Plaintiffs relied to their detriment on the Defendants to inform them of all material elements of the transaction.

18. That the Plaintiffs' reliance was reasonable.

FOR A FIRST CAUSE OF ACTION
(Negligent Misrepresentation)

19. That the Plaintiffs reallege the foregoing paragraphs as if fully set forth verbatim herein.

20. That Defendants made statements of material fact with a reckless disregard for the truth or falsity thereof, and that said statements turn out to be false.
21. That Defendants made additional misrepresentations by concealing material facts and/or by failing to reveal material facts.
22. That Defendants who did not make particular false statements or conceal particular material facts nonetheless knew or should have known of the false statements and concealments of material fact being made by the remaining Defendants.
23. That each of the Defendants profited from misrepresentations.
24. That Defendants failed to correct misrepresentations.
25. That Defendants held themselves out as having specific expertise and reliability in the fields in which they worked.
26. That Plaintiffs justifiably relied on Defendants.
27. That Defendants owed a duty of care to Plaintiffs to accurately and truthfully disclose all material facts.
28. That Defendants breached their duties by making misrepresentations and/or by permitting them to be made.
29. That Defendants breached their duties by failing to correct misrepresentations when they learned of them or should have learned of them.
30. That as a result of Defendants wrongful conduct, Plaintiffs suffered damages including but not limited to (a) cost of repair, remediation, and/or mitigation, (b) loss of use, (c) diminution of value, (d) aggravation, and (e) emotional distress, and are entitled to recover actual, consequential, incidental, and punitive damages, all in amounts to be determined at trial.

FOR A SECOND CAUSE OF ACTION
(Negligence/Gross Negligence)

31. That the Plaintiffs reallege the foregoing paragraphs as if fully set forth verbatim herein.
32. That having held themselves out as being knowledgeable, experienced, and trustworthy in the relevant fields, and having solicited the Plaintiffs' trust, reliance, and investment, Defendants owed a duty of care to Plaintiffs to act with the knowledge, experience, and trustworthiness they claimed to possess, and which are customary in the development, construction, Marketing, and sales of residential homes such as Plaintiffs'.
33. That Defendants breached these duties negligently, grossly negligent late, recklessly, willfully, and wantonly, which proximately caused the Plaintiffs to suffer damages.
34. That as a result of Defendants wrongful conduct, Plaintiffs suffered damages including but not limited to (a) cost of repair, remediation, and/or mitigation, (b) loss of use, (c) diminution of value, (d) aggravation, and (e) emotional distress, and are entitled to recover actual, consequential, incidental, and punitive damages, all in amounts to be determined at trial.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract/Breach of Duty of Good Faith and Fair Dealing)

35. That the Plaintiffs reallege the foregoing paragraphs as if fully set forth verbatim herein.
36. That one or more of Defendants entered into contracts with Plaintiffs.
37. That every contract contains an implied duty of good faith and fair dealing.
38. That by their actions described herein, Defendants breach their duties of good faith and fair dealing.
39. That Defendants breached their contracts with Plaintiffs by failing to perform in conformity therewith.

40. That Defendants breached their contracts with Plaintiffs by failing to perform in substantial conformity therewith.
41. That as a result of Defendants wrongful conduct, Plaintiffs suffered damages including but not limited to (a) cost of repair, remediation, and/or mitigation, (b) loss of use, (c) diminution of value, (d) aggravation, and (e) emotional distress, and are entitled to recover actual, consequential, incidental, and punitive damages, all in amounts to be determined at trial.

FOR A FOURTH CAUSE OF ACTION
(Breach of Express and Implied Warranties)

42. That the Plaintiffs reallege the foregoing paragraphs as if fully set forth verbatim herein.
43. That by entering into contracts for the construction and/or sale of residential homes, Defendants impliedly warranted that the homes (a) were habitable, (b) were constructed in conformity with applicable law, regulations, and building codes, (c) were fit for their intended purpose, and (d) were constructed in a good and workmanlike manner.
44. That by their conduct described herein, Defendants breached these implied warranties.
45. That Defendants made express warranties to Plaintiffs by, among other things, providing models, diagrams, and brochures to Plaintiffs.
46. That Defendants orally made express warranties to Plaintiffs, including but not limited to the following:
 - a. “Papillon, French for butterfly, reveals a beautiful boutique community that’s larger than life.”
 - b. “That’s 61 luxury homes on a majestic wisp of land that sweeps the north end of Myrtle Beach.”
 - c. “Each Papillon home offers a distinct Lowcountry Charleston design, complete with brick or Hardie exteriors and loads of curb appeal – from each charming front porch to each Charleston-style courtyard.”

- d. “. . . only the finest kitchen cabinetry, countertops, lighting and appliances.”
- e. “. . . centuries-old live oak trees and green areas throughout.”
- f. “Just as a butterfly, your life will change at this new address.”
- g. “We don’t just build homes. We build relationships, so we can better build a new life for our homeowners.”
- h. “With almost 40 years of extensive experience developing luxury oceanfront real estate projects up and down the Grand Strand, the Winchester Development Group is well known for building high-quality work and powerful relationships with some of the best in the business – from architects, builders, land planners and engineers to bankers and interior designers.”
- i. “For Papillon, they’ve partnered with architectural firm C3 Studio out of Knoxville, Tenn., and Myrtle Beach-based Sands Building Group, who share the same professional integrity, quality and experience that are the foundations of Winchester’s business practices – and what you can expect to see in every square inch of every home we’re all involved with bringing to life at Papillon.”
- j. “For Papillon, we all knew our mutual trust, strengths and past working relationships together would unite to build a neighborhood so exceptional and unique to this area: a pedestrian-friendly community that showcases superior homes that are traditional Lowcountry family by design. And we were right.”
- k. “This community was not only architecturally designed with a careful amount of attention to detail from house to house, but also attention to how each house interacts, mingles and complements one another.”
- l. “How each of your neighbors will live in harmony along the tree-lined streets. Which means, Papillon was designed with you, the homeowner, in mind.”
- m. “. . . the result will be a colorful dream.”
- n. “John has lived in Myrtle Beach since 1991, and has developed extensive knowledge of Myrtle Beach and its surrounding areas.”
- o. “John works tirelessly to accomplish his client’s goals. He handles every aspect of the real estate process, from educating his clients on current market conditions to negotiating contracts, all with their best interests in mind.”
- p. “John’s clients find his dedication and guidance go a long way to ensure a stress-free buying experience.”

- q. “When the builder of Papillon has more than 40 years of experience developing luxury oceanfront real estate projects up and down the Grand Strand, we think it’s best to say homeowners are in good hands.”
- r. “Winchester Development Group is well-known for this high-quality work, along with recruiting the best architects, builders, planners, engineers and more. Which is why they chose C3 Studio, an architectural firm out of Knoxville, Tenn., and Sands Building Group, based right here in Myrtle Beach.”
- s. ““These homes aren’t easy builds because the topography isn’t all flat, and Sands didn’t want to ruin the natural integrity of the levels of land,” says Woodard. “It just shows the exceptional level of quality of this builder.””
- t. “Papillon’s quality is proven in its natural beauty, quality, layout and unbeatable location. “This is one of the very rare opportunities to purchase a new build this close to the ocean without any hotels nearby,” says Woodard, “which is why they’re selling fast.””
- u. “Here in Myrtle Beach since 1991, Woodard knows the area like he knows every square inch of these luxury homes – that, and he knows the real estate process, inside and out, including market conditions, values and contract negotiations, so you’re getting exactly what you want and need at the price that’s best for you.”
- v. “We take pride in offering our clients professional service and expert advice.”
- w. “When you’re buying or selling a home, you can trust our team of top Myrtle Beach real estate agents to deliver results and meet your high expectations. Discover why so many consider Sands Realty the experts in Real Estate along the Grand Strand.”
- x. “Sands Building Group is a trusted builder of new homes with an unwavering commitment to quality craftsmanship and customer service. The Sands team utilizes their composite experience of land acquisition, development and home building expertise to acquire and build homes in desirable communities that cater to almost any lifestyle.”

47. That Defendants made express warranties to Plaintiffs, including but not limited to express warranties as to (a) quality of construction, (b) existence of amenities, (c) location of property lines, (d) dimensions of driveways, and (e) types and quality of material to be used.

48. That Defendants breached these and other express warranties.
49. That as a result of Defendants wrongful conduct, Plaintiffs suffered damages including but not limited to (a) cost of repair, remediation, and/or mitigation, (b) loss of use, (c) diminution of value, (d) aggravation, and (e) emotional distress, and are entitled to recover actual, consequential, incidental, and punitive damages, all in amounts to be determined at trial.

FOR A FIFTH CAUSE OF ACTION
(Unfair Trade Practices; S.C. Code Section 39-5-10 *et seq.*)

50. That the Plaintiffs reallege the foregoing paragraphs as if fully set forth verbatim herein.
51. That Defendants conduct is unfair and/or deceptive.
52. That Defendants conduct is unethical, oppressive, immoral, and/or offensive to public policy.
53. That there exists a legitimate public interest in the quality of housing in South Carolina.
54. That a home is a completely different type of manufactured good than any other type of product that a consumer will buy.
55. That a home is typically an individual's single largest investment.
56. That a buyer of a home has likely invested his life savings and executed a 20, 30, or 40 year mortgage.
57. That the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties.
58. That allowing builders to place defective or inferior construction into the stream of commerce is intolerable and against the public policy of South Carolina.
59. That Defendants conduct negatively impacts the public interest.
60. That Defendants conduct is capable of repetition, and is, in fact, ongoing.

61. That through the exercise of due diligence, persons of ordinary prudence engaging in trade or commerce could have ascertained that Defendants' conduct violates the Act.
62. That Defendants should have known that their conduct violates the South Carolina Unfair Trade Practices Act, S.C. Code Section 39-5-10 *et seq.* ("Act").
63. That Defendants violations of the Act were willful.
64. That as a result of Defendants' wrongful conduct, Plaintiffs suffered damages including but not limited to (a) cost of repair, remediation, and/or mitigation, (b) loss of use, (c) diminution of value, (d) aggravation, and (e) emotional distress, and are entitled to recover actual, consequential, incidental, and punitive damages, all in amounts to be determined at trial.
65. That as a result of Defendants' wrongful conduct in violation of the Act, Plaintiffs are entitled to attorney's fees and costs.
66. That as a result of Defendants' willful violation of the Act, Plaintiffs are entitled to treble damages.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants for an amount to be ascertained by the jury at the trial of this action for all damages – actual, consequential, incidental, punitive, and treble where provided by statute – for attorney's fees where provided by statute, for the cost and disbursements of this action, and both prejudgment and post-judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

[SIGNATURE ON FOLLOWING PAGE]

ANASTOPOULO LAW FIRM, LLC

s/Lane D. Jefferies

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Dated at Charleston, SC

This 22nd day of January, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	CIVIL ACTION NO.: 2019-CP-26-0345
Michael Marceda and Cheryl Marceda,	)	
	)	
Plaintiffs,	)	DEFENDANT C3 STUDIO, LLC'S
	)	NOTICE OF MOTION AND MOTION
v.	)	TO DISMISS PLAINTIFFS'
	)	COMPLAINT
Winchester Oceanview Development, Inc.,	)	
Sands Building Group, Inc., C3 Studio, LLC,	)	
Sands Realty Group, Inc., Jonathan B.	)	
Dickerson, and John Woodward,	)	
	)	
Defendants.	)	

COMES NOW the Defendant, C3 Studio, LLC ("Defendant"), pursuant to S.C. Code Ann. § 15-36-100 and S.C. R. Civ. P. 12(b)(6), by and through its undersigned counsel, and moves this Honorable Court for an Order dismissing all claims against Defendant contained in Plaintiffs' Complaint. The basis for this motion is that Plaintiffs failed to attach an expert affidavit to their Complaint as required by S.C. Code Ann. § 15-36-100, under the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), S.C. Code Ann. § 15-36-10 to - 100, as Plaintiffs asserted professional negligence-based claims against Defendant.

This motion is based upon applicable South Carolina law, the pleadings in this case, and any affidavits and memorandum of authority to be submitted hereafter.

Background

Defendant is located in Knoxville, Tennessee, but provides architectural services in the Myrtle Beach, South Carolina area. Defendant's CEO, Greg Huddy, is a licensed architect in the State of South Carolina (License Number AR .7568). *See* LLR license lookup results, attached hereto as Exhibit "A."

Plaintiffs filed their Complaint against Defendant on January 22, 2019, alleging negligent misrepresentation, negligence/gross negligence, breach of contract/breach of duty of good faith and fair dealing, breach of express and implied warranties, and Unfair Trade Practices pursuant to S.C. Code Section 39-5-10 *et seq.*, stemming from architectural services provided by Defendant at Plaintiffs' residence. Specifically, Plaintiffs allege that Defendant carried out its "obligations and duties in a negligent, grossly negligent, and otherwise wrongful fashion; in breach of contract; in violation of industry standards, building codes, and installation instructions; and in other wrongful way [sic], all of which proximately caused damages to Plaintiffs." (Compl. ¶¶ 12, 13, 14, & 15).

Argument

1. Plaintiffs' Claims Should Be Dismissed, Because They Are Dependent Upon A Showing Of Professional Negligence And Were Not Supported With The Requisite Expert Affidavit.

In 2005, as part of its tort reform efforts and in an attempt to curtail frivolous claims against professionals, the South Carolina Legislature implemented the Act. *See* S.C. Code Ann. § 15-36-10 to -100; *see also* 2005 S.C. Acts 32. Among other things, the Act requires attorneys to read and verify the legitimacy of pleadings filed with the Court, and sets forth penalties to be imposed when parties file frivolous and unmeritorious documents. *See* S.C. Code Ann. § 15-36-10. Moreover, with regard to claims against professionals, the Act sets forth the mandatory pre-suit procedure through which professional negligence-based claims may be asserted. *See* S.C. Code Ann. § 15-36-100.

Specifically, § 15-36-100 of the Act applies to actions "for damages alleging professional negligence" against architects. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(1). In such actions, "the plaintiff *must* file as part of the complaint an affidavit of an expert witness which

must specify at least one negligent act or omission claimed to exist and the factual basis for each claim” S.C. Code Ann. § 15-36-100(B) (emphasis added); *see also* S.C. Code Ann. § 15-36-100(C)(1) (explaining that, except under inapplicable circumstances, the affidavit must be filed contemporaneously with the complaint). 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). Additionally, an expert affidavit is required to support breach of contract claims associated with claims of professional negligence. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 473, 570 S.E.2d 197, 204 (Ct. App. 2002) (holding that the party claiming professional negligence was required to support both its tort and contract claims with expert testimony to establish the standard of care).

Plaintiffs’ negligent architectural services allegations fall squarely within the purview of the Act’s affidavit requirement, because Plaintiffs must prove that the licensed professional architect breached the standard of care for a professional architect. Additionally, Plaintiffs’ breach of contract claim against Defendant falls within the purview of the Act’s affidavit requirement as Defendant could not have breached the alleged contract with Plaintiffs without negligently performing its architectural services. The same is true for Plaintiffs’ Unfair Trade Practices claim because it would be dependent upon conduct by Defendant that amounts to negligent performance of its architectural services. Therefore, Plaintiffs were statutorily required to investigate Plaintiffs’ architectural services claim before suing Defendant, and to evidence such investigation by an architect’s affidavit filed contemporaneously with Plaintiffs’ Complaint. Plaintiffs failed to meet this requirement. Instead, Plaintiffs filed precisely the type of unsubstantiated lawsuit the Act is intended to prevent; Plaintiffs sued Defendant claiming negligence and breach of contract in a professional service provided to Plaintiffs without

submitting evidence that Plaintiffs obtained the opinion of a qualified expert before embroiling the architectural professional in litigation.

For this reason, and pursuant to S.C. Code Ann. § 15-36-100(B), Plaintiffs' claims against Defendant should be dismissed.

Conclusion

Each of Plaintiffs' claims against Defendant requires proof of professional negligence on the part of Defendant. Therefore, Plaintiffs must meet the Act's contemporaneous affidavit requirement. Plaintiffs failed to meet this requirement, and the Act plainly states that Plaintiffs' Complaint shall be dismissed for failure to state a claim. Defendant prays that this Court will dismiss Plaintiffs' claims against Defendant for Plaintiffs' failure to meet the Act's requirements.

Respectfully submitted,

WILKES LAW FIRM, P.A.

March 11, 2019

s/ Myra V. Whitener
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Attorneys for Defendant C3 Studio, LLC

EXHIBIT A

[Print this page](#)**Board: Architect****GREGORY L HUDDY**

312 SOUTH GAY STREET SUITE 200
KNOXVILLE, TN 37902

License number: AR .7568

Expiration: 06/30/2019

Initial Registration Date: 06/05/2007

Company Name: C3 STUDIO LLC

Company Phone: (843) 597-4331

Type: Architect

Board Public Action History:[View Orders](#)[View Other License for this Person](#)

No Orders Found

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
)
Michael Marceda and Cheryl Marceda,)
)
)
Plaintiffs,) **DEFENDANT C3 STUDIO, LLC'S**
) **SUPPLEMENTAL MEMORANDUM OF**
v.) **LAW IN SUPPORT OF ITS MOTION TO**
) **DISMISS PLAINTIFFS' COMPLAINT**
Winchester Oceanview Development, Inc.,)
Sands Building Group, Inc., C3 Studio, LLC,)
Sands Realty Group, Inc., Jonathan B.)
Dickerson, and John Woodward,)
)
)
Defendants.)

Defendant C3 Studio, LLC (“C3 Studio”) hereby files this Supplemental Memorandum of Law in support of its Motion to Dismiss Plaintiffs’ Complaint under S.C. Code Ann. § 15-36-100 and S.C. R. Civ. P. 12(b)(6). Defendant seeks dismissal because Plaintiffs have asserted professional negligence-based claims against architecture firm C3 Studio and Plaintiffs failed to attach an affidavit of an architect to their Complaint as required by S.C. Code Ann. § 15-36-100, under the South Carolina Frivolous Civil Proceedings Sanctions Act (the “Act”), S.C. Code Ann. § 15-36-10 to -100.

Subsequent to the filing of C3 Studio’s Motion to Dismiss, Plaintiffs raised the argument that the Act does not apply to lawsuits brought against employers of licensed professionals, but applies only to lawsuits against the individual licensed professionals themselves. Defendant submits this Supplemental Memorandum of Law to address the inapplicability of *Oakman v. Lincare, Inc.*, C.A. No. 1:13-cv-00428-JMC, 2013 U.S. Dist. LEXIS 96697 (D.S.C. July 10, 2013), an unpublished, District Court opinion which is not binding on this Court, and does not address whether the Frivolous Civil Proceedings Sanctions Act (the “Act”), S.C. Code Ann. § 15-36-10, *et. seq.* (the “Act”) applies to architectural firms. For the reasons set forth below, C3

Studio respectfully submits that *Oakman* is a misplaced and irrelevant holding which should not guide this Court's interpretation of the Act, and is contrary to numerous orders of South Carolina Circuit judges.

Argument

I. ***Oakman* Does Not Address The Question Before This Court.**

Oakman arose from a wrongful death, product defect suit against the manufacturer of a medical device and the suppliers of the device. *See Oakman* at *2-3. The plaintiff in *Oakman* asserted UCC breach of warranties and strict liability claims against the defendants. *See Oakman* at *7-8. As noted by the court in *Oakman*, the circumstances at hand did not involve a "professional engineering consulting firm." *Oakman* at *18. Instead, the defendant was a manufacturer, which apparently claimed that some tangential engineering would typically have been performed to develop the product at issue. *See Oakman* at *10. The distinction between claims against manufacturers and those against professional engineering firms is significant both for the obvious reason that claims against professional engineering firms this fall squarely within the realm of cases intended to be addressed by statute, but also because licensing laws which blur the distinction between the firm and the professional (discussed further below) were not implicated in *Oakman*. *See* S.C. Code Ann. § 40-3-30.

Stated simply, in *Oakman*, the court was faced with deciding whether the Act should be extended outside of the realm of professional services firms to product defect claims against sellers and manufacturers. Conversely, the issue before this Court is whether, read in its entirety and in light of the Act's intent, the Act's affidavit requirement applies when a plaintiff sues a professional architecture firm alleging professional malpractice.

In a more recent South Carolina Circuit Court decision, *Shirley Collins v. Harrison Investments and Technological Enterprises, Inc., et al.*, C.A. No.: 2016-CP-04-01577 (Court of Common Pleas, Anderson County, SC, March 3, 2017), the court held that the *Oakman* decision was not binding in that case, which involved claims that engineering firm Cottingham & Associates was negligent in providing engineering services (see attached Order). The *Collins* court therefore held that the Act applies to professional negligence claims against professional engineering firms, and thus an affidavit from an engineer was required. The court's logic in *Collins* is equally applicable in this case involving architecture firm C3 Studio and points out how the *Oakman* decision is distinguishable from the set of facts in this case.

II. In Light Of The Intent Of The Act And South Carolina Licensing Laws Concerning The Practice Of Architecture Through A Firm, The Act Applies To Professional Negligence Claims Against Professional Architecture Firms.

“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Where a statute is in derogation of common law, “it must be strictly construed and not extended in application beyond clear legislative intent”; however, “the statute must also be read as a whole and in harmony with its purpose” and “. . . as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (emphasis added). “Any ambiguity in a statute must be resolved in favor of a just, equitable, and beneficial operation of the law.” *Sweat*, 386 S.C. at 350, 688 at 575.

A. The Act's Broad Title And Application To The Architecture "Profession" Evidence That Claims Against Professional Firms Fall Within The Act's Purview.

Section 15-36-100 of the Act is entitled "Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission." S.C. Code Ann. § 15-36-100 (emphasis added). Moreover, Section (G) of the Act states that its affidavit requirement applies to the architecture "profession". See S.C. Code Ann. § 15-36-100(G)(stating: "this section applies to the following professions: . . . (1) architects")(emphasis added). These portions of the Act evidence that claims alleging professional negligence against an architecture firm fall within the purview of the Act.

B. In Light Of South Carolina Licensing Laws Which Eliminate Any Distinction Of Consequence Between The Professional And The Firm, The Act Applies To Claims Asserted Against Professional Services Firms.

This Court's interpretation of the Act's requirement of a contemporaneous affidavit "in an action for damages alleging professional negligence against a [licensed] professional," should be guided by South Carolina's architecture licensing laws, S.C. Code Ann. § 40-3-5, *et. seq.* (the "Licensing Statute"), which make clear that, although a plaintiff may choose to sue the architecture firm, such claims are, in reality, nothing more than claims asserted against the professional services of an individual licensed architect practicing through the firm.

The Licensing Statute permits an architect to affiliate with a firm, but only if the firm possesses a certificate of authorization. See S.C. Code Ann. § 40-3-30(C). As described by the Licensing Statute, this certificate of authorization permits the architect to practice through a firm. See S.C. Code Ann. § 40-3-30(C). The Licensing Statute does not confer upon the firm an ability to perform professional architectural services without the involvement of a licensed professional; rather, a licensed professional must be involved with, and responsible for, such

services. *See* S.C. Code Ann. § 40-3-30(C) (describing that each firm must employ one or more architects registered in this State who are designated as being in full authority and responsible charge of the architecture practice); *see also* S.C. Code Ann. § 40-3-270(B) (providing that, as a prerequisite to obtaining a certificate of authorization, a firm must designate a licensed professional as being in full authority and responsible charge). In sum, when professional services are performed by virtue of a professional's association with a firm, the professional services nonetheless are rendered by, and traceable directly to, a licensed architect with professional responsibility for such services.

Taken together, the General Assembly's use of the phrase "through a firm" when describing the services rendered by a professional affiliated with a firm, its requirement that licensed professionals perform all architectural services offered by the firm, and its statutorily rendering the firm responsible for the acts of the professional, evidence that, under South Carolina law, no distinction of consequence exists between the professional and the firm. Thus, at core, claims against a professional architecture firm are claims "against a professional licensed by . . . the State of South Carolina," S.C. Code Ann. § 15-36-100(B), and such claims fall within the purview of the Act.

III. This Court Should Refuse To Adopt A Statutory Interpretation Which Excludes From The Act's Purview Claims Against Professional Architecture Firms, Because The Same Would Lead To An Absurd Result Completely Antagonistic To The Act's Intent.

"However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. UA Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366

(1994). If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect. *Id.*

The Act was implemented by the South Carolina General Assembly as part of 2005 S.C. Acts 32 (“Act 32”). As described in Part I of Act 32, the laws contained therein shared the common purpose of “tort and other civil action reform.” In addition to implementing new laws and modifying existing tort laws, such as the elimination of joint and several liability where a defendant is determined to be less than 51% at fault for the alleged damages, Act 32 also implemented and modified numerous measures tailored specifically to protecting professionals, including laws establishing: (1) liability caps on medical malpractice claims, (2) pre-litigation requirements for medical malpractice claims, and (3) limitations on the liability of members of professional committees (including, specifically, professional engineer committees). Stated simply, the changes contained in Act 32 were intended to decrease the potential exposure of professionals.

An interpretation excluding professional firms from the Act would render the Act largely nugatory by narrowing its protections to only those few professionals who practice only in their individual name, without the protection of a corporate or business form. In other words, such an interpretation would lead to an absurd result. For instance, as to architects specifically, because the Licensing Statute renders the firm through which the architect practices statutorily responsible for the professional’s actions, a plaintiff which cannot obtain an affidavit evidencing the legitimacy of its professional malpractice claim can simply circumvent the Act by suing the firm, thereby embroiling the firm (irrespective of its size or resources) in litigation and exposing its members/shareholders to a drain in resources that the Act is intended to prevent. South Carolina’s corporate laws allow professionals to operate in a corporate form to enjoy the benefits

of pooling capital, as well as reducing personal risk in certain circumstances. Adopting an interpretation of the Act which renders the Act inapplicable to professional firms would be deleterious to professional corporate formation and would serve no useful purpose. No logical reason exists for the Act to protect individual professionals and not professional corporations. Accordingly, C3 Studio respectfully submits that interpreting the Act to apply only to claims against individual professionals would be an absurd result, which this Court is empowered to prevent.

IV. This Court Should Interpret The Act In Way Which Comports With Equal Protection Principles, As Opposed To One Which Strains And/Or Violates The Same.

All statutes are “presumed constitutional and, if possible, will be construed to render them valid.” *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2009). When interpreting a statute, a “possible constitutional construction must prevail over an unconstitutional interpretation.” *Id.*

“The constitutional guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978); *see also* S.C. Const. art. I, § 3 (containing South Carolina’s Equal Protection Clause). The Equal Protection Clause applies to both natural persons and business entities. *See generally Southern Bell Tel. & Tel. Co. v. Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985)(applying the equal protection clause to a business entity, and finding an ordinance unconstitutional).

The requirements of the Equal Protection Clause are satisfied if: “1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests

on some reasonable basis." *Samson v. Greenville Hospital Systems*, 295 S.C. 359, 364, 368 S.E.2d 665, 666 (1988). While great deference is provided to the legislature, a classification must not be arbitrary. *See, e.g., Robinson v. Richland County Counsel*, 293 S.C. 27, 31-32, 358 S.E.2d 392, 395 (1987).

Applying the Act to professional firms comports with Equal Protection principles by treating similarly situated professionals and professional firms uniformly, despite the technical fact that professional firms are corporate business entities through which licensed professionals practice. Conversely, an interpretation which excludes professional service firms from the Act's purview arbitrarily and inexplicably: (1) excludes professional service firms from the class of protected persons; and (2) treats members of the class of individual professionals differently based solely on whether or not the professional practices through a firm. In interpreting the Act, this Court should do so in a way which comports with the Equal Protection Clause as opposed to one which strains or violates same.

Conclusion

C3 Studio's Motion to Dismiss should be granted because Plaintiffs have neglected to consult a licensed architect to determine if such architect believes C3 Studio committed a negligent act that proximately caused damaged to Plaintiffs. Plaintiffs have fired a broadside at multiple defendants, but South Carolina does not permit inclusion of an architectural firm in that shot without a supporting affidavit. The sanction for this failure under the South Carolina Frivolous Civil Proceedings Sanctions Act is dismissal of Plaintiffs' Complaint.

Respectfully submitted,

WILKES LAW FIRM, P.A.

April 23, 2019

s/ Michael B.T. Wilkes

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Attorneys for Defendant C3 Studio, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON,)
Shirley Collins,)
Plaintiffs,)
vs.)
Harrison Investments and Technological)
Enterprises, Inc.; John Harrison; Ronald C.)
Bond, (individually and d/b/a C&D)
Specialty Contractors); Cadworks)
Corporation; Cottingham & Associates,)
Inc.; Bill Gwinn, (individually and d/b/a)
Creative Exteriors); Glenn Gatewood;)
Travis James; Krupps Karpentry, LLC;)
Dean Krupp; Overholt Truss Co., Inc.;)
Barrett Reese; Ronald Stancil, (individually)
and d/b/a Ronald M. Stancil Masonry);)
Sunbelt Painting; Randall Willis,)
(individually and d/b/a Willis Plumbing)
Company); Paul Wington; HK)
Construction and Service, LLC; Brian Mize;)
and John Does 1-10,)
Defendants.)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No.: 2016-CP-04-01577

**ORDER GRANTING DEFENDANT
COTTINGHAM & ASSOCIATES, INC.'S
MOTION TO DISMISS**

This matter came before the court for a hearing on Defendant Cottingham & Associates, Inc.'s ("Cottingham") Motion to Dismiss Plaintiff's Complaint. This Motion was argued before the Court on February 2, 2017 and taken under advisement. The Court allowed supplemental briefing after the hearing, which the parties submitted.

FINDINGS OF FACT

Defendant provides engineering services in the upstate South Carolina area. Cottingham possesses a Certificate of Authorization under S.C. Code Ann. § 40-22-250 permitting it to provide engineering services in South Carolina, which are provided by Richard Cottingham, P.E.

Plaintiff filed its Complaint on July 12, 2016, alleging only a negligence cause of action

against Cottingham, contending that Cottingham was negligent in providing engineering services. (Compl. ¶ 63). Plaintiff did not attach to her Complaint an affidavit of an expert to support her professional negligence cause of action against Cottingham.

CONCLUSIONS OF LAW

A. Plaintiff's Claims against Cottingham are Dismissed Because They Are Dependent upon a Showing of Professional Negligence and Were Not Supported with the Required Expert Affidavit.

Plaintiff asserts a claim of professional negligence against Cottingham, but did not attach an affidavit of a licensed professional engineer to support its claim against Cottingham.

The Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et. seq.* (the "Act") applies to actions "for damages alleging professional negligence" against engineers. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). In such actions, "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) (emphasis added); *see also* S.C. Code Ann. § 15-36-100(C)(1) (explaining that, except under inapplicable circumstances, the affidavit must be filed contemporaneously with the complaint). 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).

Plaintiff's negligent engineering allegation falls within the purview of the Act's affidavit requirement, because Plaintiff must prove that the licensed engineer breached the standard of care for a professional engineer. Therefore, Plaintiff was statutorily required to investigate Plaintiff's engineering claim before suing Cottingham, and to evidence such investigation by an engineer's affidavit filed contemporaneously with Plaintiff's Complaint. Plaintiff failed to meet this requirement.

B. The *Oakman* Decision is Not Binding on this Court.

Plaintiff argues that she need not meet the affidavit requirement, because she has sued a corporation, not an individual engineer. Plaintiff relies on *Oakman v. Lincare, Inc.*, C.A. No. 1:13-cv-00428-JMC, 2013 U.S. Dist. LEXIS 96697 (D.S.C. July 10, 2013), which is a Federal District Court unpublished decision, and is not binding precedent on this Court. *Oakman* arose from a wrongful death, product defect suit against the manufacturer of a medical device and the suppliers of the device. (*See Oakman* at *2-3.) The plaintiff in *Oakman* asserted UCC breach of warranties and strict liability claims against the defendants. (*See Oakman* at *7-8.) As noted by the court in *Oakman*, the circumstances at hand did not involve a “professional engineering consulting firm.” (*Oakman* at *18.) Instead, the defendant was a manufacturer, which apparently claimed that some tangential engineering would typically have been performed to develop the product at issue. (*See Oakman* at *10.) The distinction between claims against manufacturers and those against professional engineering firms is significant in that claims against professional engineering firms like Cottingham fall squarely within the realm of cases intended to be addressed by the Act.

Stated simply, in *Oakman*, the court was faced with deciding whether the Act should be extended outside of the realm of professional services firms to product defect claims against sellers and manufacturers. Conversely, the issue before this Court is whether, read in its entirety and in light of the Act's intent, the Act's affidavit requirement applies when a plaintiff sues a professional engineering firm alleging professional negligence. For the following reasons, I find that the Act applies to a corporation like Cottingham, which provides professional engineering services, like those complained of in this action:

- 1. In Light Of The Intent Of The Act And South Carolina Licensing Laws Concerning The Practice Of Engineering Through A Firm, The Act Applies To Professional Negligence Claims Against Professional Engineering Firms.**

“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). When a statute is in derogation of common law, “it must be strictly construed and not extended in application beyond clear legislative intent”; however, “the statute must also be read as a whole and in harmony with its purpose” and “. . . as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (emphasis added). “Any ambiguity in a statute must be resolved in favor of a just, equitable, and beneficial operation of the law.” *Sweat*, 386 S.C. at 350, 688 at 575.

a. The Act’s Broad Title And Application To The Engineering “Profession” Evidence That Claims Against Professional Firms Fall Within The Act’s Purview.

Section 15-36-100 of the Act is entitled “Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.” S.C. Code Ann. § 15-36-100 (emphasis added). Moreover, Section (G) of the Act states that its affidavit requirement applies to the engineering “profession.” See S.C. Code Ann. § 15-36-100(G) (stating: “this section applies to the following professions: . . . (17) professional engineers”) (emphasis added). These portions of the Act evidence that claims alleging professional negligence against an engineering firm fall within the purview of the Act.

b. In Light Of South Carolina Licensing Laws Which Eliminate Any Distinction Of Consequence Between The Professional And The Firm, The Act Applies To Claims Asserted Against Professional Services Firms.

This Court’s interpretation of the Act’s requirement of a contemporaneous affidavit “in an

action for damages alleging professional negligence against a [licensed] professional,” is guided by South Carolina’s engineering licensing laws, S.C. Code Ann. § 40-22-2, *et. seq.* (the “Licensing Statute”), which make clear that, although a plaintiff may choose to sue the engineering firm, such claims are, in reality, nothing more than claims asserted against the professional services of an individual licensed engineer practicing through the firm.

The Licensing Statute permits an engineer to affiliate with a firm, but only if the firm possesses a certificate of authorization. *See* S.C. Code Ann. § 40-22-250(A). As described by the Licensing Statute, this certificate of authorization permits the engineer to practice “through a firm.” *See* S.C. Code Ann. § 40-22-250(A); *see also* S.C. Code Ann. § 40-22-250(B) (describing the requirements for an engineer to offer professional services “through a firm”); S.C. Code Ann. § 40-22-260(C) (setting forth additional requirements where a professional offers professional services “through a firm”). The Licensing Statute does not confer upon the firm the ability to perform professional engineering services without the involvement of a licensed professional; rather, a licensed professional must be involved with, and responsible for, such services. *See* S.C. Code Ann. § 40-22-250(B)(2) (describing that all professional engineering services performed in the firm’s name must be performed by licensed professional engineers); *see also* S.C. Code Ann. § 40-22-250-B(1) (providing that, as a prerequisite to obtaining a certificate of authorization, a firm must designate a licensed professional as being responsible for all professional services rendered). In sum, when professional services are performed by virtue of a professional’s association with a firm, the professional services nonetheless are rendered by, and traceable directly to, a licensed engineer with professional responsibility for such services.

In addition to the fact that the firm is nothing more than a corporate form through which professional services are rendered by licensed professional engineers, the Licensing Statute blurs

the distinction between the firm and the professional. Specifically, the Licensing Statute provides that “disciplinary action against a firm must be administered in the same manner and on the same grounds as disciplinary action against an individual.” S.C. Code Ann. § 40-22-250(E). Moreover, the Licensing Statute specifically provides that the firm may be held liable for the professional services performed by the engineers practicing through it, and that the individual licensee “is not relieved of responsibility for professional services” merely because such services are performed through a firm. S.C. Code Ann. § 40-22-250(E).

Taken together, the General Assembly’s repeated use of the phrase “through a firm” when describing the services rendered by a professional affiliated with a firm, its requirement that licensed professionals perform all engineering services offered by the firm, and its statutorily rendering the firm responsible for the acts of the professional, evidence that, under South Carolina law, no distinction of consequence exists between the professional and the firm. Thus, at their core, claims against a professional engineering firm are claims “against a professional licensed by . . . the State of South Carolina,” S.C. Code Ann. § 15-36-100(B), and such claims fall within the purview of the Act.

2. This Court Should Refuse To Adopt A Statutory Interpretation Which Excludes From The Act’s Purview Claims Against Professional Engineering Firms, Because The Same Would Lead To An Absurd Result Completely Antagonistic To The Act’s Intent.

“However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.” *Kiriakides v. UA Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect. *Id.*

The Act was implemented by the South Carolina General Assembly as part of 2005 S.C. Acts 32 (“Act 32”). As described in Part I of Act 32, the laws contained therein shared the common purpose of “tort and other civil action reform.” In addition to implementing new laws and modifying existing tort laws, such as the elimination of joint and several liability where a defendant is determined to be less than 51% at fault for the alleged damages, Act 32 also implemented and modified numerous measures tailored specifically to protecting professionals, including laws establishing: (1) liability caps on medical malpractice claims, (2) pre-litigation requirements for medical malpractice claims, and (3) limitations on the liability of members of professional committees (including, specifically, professional engineer committees). Stated simply, the changes contained in Act 32 were intended to reform and limit the civil liability exposure of professional service providers in South Carolina.

An interpretation excluding professional firms from the Act would render the Act largely nugatory by narrowing its protections to only those few professionals who practice only in their individual name, without the protection of a corporate or business form. In other words, such an interpretation would lead to an absurd result. For instance, as to engineers specifically, because the Licensing Statute renders the firm through which the engineer practices statutorily responsible for the professional’s actions, a plaintiff which cannot obtain an affidavit supporting its professional malpractice claim can simply circumvent the Act by suing the firm, thereby embroiling the firm (irrespective of its size or resources) in litigation and exposing its members/shareholders to a drain in resources that the Act is intended to prevent. South Carolina’s corporate laws allow professionals to operate in a corporate form to enjoy the benefits of pooling capital, as well as reducing personal risk in certain circumstances. Adopting an interpretation of the Act which renders the Act inapplicable to professional firms would be deleterious to

professional corporate formation and would serve no useful purpose. No logical reason exists for the Act to protect individual professionals and not professional corporations. Accordingly, interpreting the Act to apply only to claims against individual professionals would be an absurd result, an interpretation that this Court refuses to adopt.

3. This Court Interprets The Act In Way Which Comports With Equal Protection Principles, As Opposed To One Which Strains And/Or Violates The Same.

All statutes are “presumed constitutional and, if possible, will be construed to render them valid.” *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2009). When interpreting a statute, a “possible constitutional construction must prevail over an unconstitutional interpretation.” *Id.*

“The constitutional guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978); *see also* S.C. Const. art. I, § 3 (containing South Carolina’s Equal Protection Clause). The Equal Protection Clause applies to both natural persons and business entities. *See generally Southern Bell Tel. & Tel. Co. v. Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985) (applying the equal protection clause to a business entity, and finding an ordinance unconstitutional).

The requirements of the Equal Protection Clause are satisfied if: “1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis.” *Samson v. Greenville Hospital Systems*, 295 S.C. 359, 364, 368 S.E.2d 665, 666 (1988). While great deference is provided to the legislature, a classification must not be arbitrary. *See, e.g., Robinson v. Richland County Counsel*, 293 S.C. 27, 31-32, 358 S.E.2d 392, 395 (1987).

Applying the Act to professional firms comports with Equal Protection principles by treating similarly situated professionals and professional firms uniformly, despite the technical fact that professional firms are corporate business entities through which licensed professionals practice. Conversely, an interpretation which excludes professional service firms from the Act's purview arbitrarily and inexplicably: (1) excludes professional service firms from the class of protected persons; and (2) treats members of the class of individual professionals differently based solely on whether or not the professional practices through a firm.

CONCLUSION

For the reasons stated above, Cottingham's Motion to Dismiss Plaintiff's Complaint is GRANTED, subject to the following: Plaintiff is allowed the right to file an amended complaint within thirty (30) days after the entry of this Order, attaching an affidavit in compliance with the requirements of S.C. Code Ann. § 15-36-100. If Plaintiff does not so amend within thirty (30) days, Cottingham is dismissed from this case without prejudice.

IT IS SO ORDERED.

[Judicial signature page to follow]

Anderson, South Carolina



Anderson Common Pleas

Case Caption: Shirley Collins VS Harrison Investments and Technological Enterprises Inc , defendant, et al
Case Number: 2016CP0401577
Type: Order/Dismissal

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2017-03-03 15:45:18 page 10 of 10

FILED 2020 MAR 03 02:06 PM HARRISON COUNTY CLERK JESSICA S. ASHLEY #2908280804577

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2600345

Michael Marceda et al
PLAINTIFF(S)

Winchester Oceanview Development, Inc. et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Defendant's Motion to Dismiss pursuant to Rule 12(B), SCRCP, is GRANTED to the extent that the plaintiff shall have 30 days from the date of this hearing to file and serve an affidavit as required by S.C. Code section 15-36-100. Should plaintiff file and serve the required affidavit within 30 days, then the defendant shall have 30 days to file responsive pleadings. Should the plaintiff fail to file and serve the required affidavit within 30 days, then all causes of action against the defendant C3 Studio, LLC are dismissed, without prejudice.

Atty Michael B.T. Wilkes is to prepare a formal order.

ORDER INFORMATION

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

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/24/2019.

David J. Parrish for Winchester Oceanview Development, Inc.
Michael B.T. Wilkes for C3 Studio, LLC
Myra V. Whitener for C3 Studio, LLC
John Horton Guerrey for Sands Building Group, Inc.
Drew Hamilton Butler for Sands Building Group, Inc.
David Allen Anderson for John Woodward, Jonathan B. Dickerson, Sands Realty Group, Inc.
Jasmine D. Wyman for John Woodward, Jonathan B. Dickerson, Sands Realty Group, Inc.
Roy T. Willey, IV for Michael Marceda, Cheryl Marceda
Eric Marc Poulin for Michael Marceda, Cheryl Marceda
Lane Douglas Jefferies for Michael Marceda, Cheryl Marceda

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Horry Common Pleas

Case Caption: Michael Marceda , plaintiff, et al VS Winchester Oceanview
Development, Inc. , defendant, et al
Case Number: 2019CP2600345
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-04-24 12:13:45 page 3 of 3

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2019-CP-26-00345

Michael Marceda and Cheryl Marceda,)

Plaintiffs,)

versus)

Winchester Oceanview Development,)

et al.,)

Defendants.)

April 24, 2019

B E F O R E:

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Lane D. Jefferies, Esquire
Attorney for Plaintiffs

Michael B.T. Wilkes, Esquire
Attorney for Defendant,
C3 Studio, LLC

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

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1 (On the record, April 24, 2019.)

2 THE COURT: All right. Next is 2019-CP-26-345, Michael
3 Marceda and Cheryl Marceda versus Winchester Oceanview
4 Development, Inc., Sands Building Group, Inc., C3 Studio, LLC,
5 Sands Realty Group, Inc., Jonathan B. Dickerson, and John
6 Woodward. According to my roster, this is a motion to
7 dismiss. Please give the court reporter your names and who
8 you represent.

9 MR. WILKES: Your Honor, good morning. I'm Mike Wilkes.
10 I represent C-3 Studio, LLC, which is moving to dismiss.

11 MR. JEFFERIES: Good morning, Your Honor. My name is
12 Lane Jefferies. I represent the Plaintiffs in this matter.

13 THE COURT: All right. Mr. Wilkes, this is your motion?

14 MR. WILKES: Yes, Your Honor.

15 THE COURT: All right. Let me hear from you.

16 MR. WILKES: Thank you, Your Honor. C-3 Studio, LLC, is
17 an architectural firm. It's based in Tennessee. The
18 Plaintiff filed this lawsuit against developers and sellers
19 and realtors and the architectural firm and alleging 36 plus
20 different problems with their single-family residence which I
21 believe they bought in 2018. The, the complaint includes
22 allegations of negligent design and is a classic professional
23 negligence case. Your Honor, under the Affidavit of Merit
24 Statute, and we've detailed this in our motion. I'm glad to
25 hand you a copy of our motion if you would like to have that.

1 THE COURT: I've got it right here.

2 MR. WILKES: Okay. And then last night we filed a
3 supplemental memorandum addressing the issue of whether the
4 Affidavit of Merit Statute applies to companies or not. May I
5 hand that up to you?

6 THE COURT: All right. That'll be fine.

7 MR. WILKES: Thank you, Your Honor. Thank you, Your
8 Honor.

9 THE COURT: All right.

10 MR. WILKES: Your Honor, I'm confident you're familiar
11 with the Affidavit of Merit Statute. It's uncontested and
12 we've proved by affidavit that C-3 Studio is an architectural
13 firm. The Plaintiff has alleged that it's an architectural
14 firm. There should be no factual dispute about that.
15 Plaintiff did not file an affidavit to prove through an
16 architect, a licensed architect that there is at least one
17 negligent act that probably caused Plaintiffs' damages. The
18 action is against the -- a company and not an individual.
19 After we filed our motion in communications Plaintiffs'
20 counsel raised the issue of whether the Affidavit of Merit
21 Statute applies to companies as well. Most of our practice is
22 defending architects and engineers. We have a number of state
23 court orders that find that the Affidavit of Merit Statute
24 applies both to individuals and to companies. Your Honor,
25 I've attached to the brief that I just handed up the Collins

1 order signed by Judge Sprouse in another case that we had.

2 THE COURT: Yeah, but I mean, have you done an exhaustive
3 study of every circuit judge's decision on this issue?

4 MR. WILKES: I have just not seen any to the contrary --
5 to -- in support. So there's a federal court decision, the
6 Oakman decision. That is --

7 THE COURT: That's a -- is that an appellate decision?

8 MR. WILKES: It is not -- it is a nonbinding --

9 THE COURT: Okay.

10 MR. WILKES: -- Circuit Court decision, District Court
11 decision that was a product liability defect case.

12 THE COURT: Well, I mean, I guess my position, and excuse
13 me for interrupting.

14 MR. WILKES: Yes, sir.

15 THE COURT: If you've got an appellate decision on point
16 that's controlling. If it is just a trial court decision,
17 unless you've done an exhaustive study and said every trial
18 court in South Carolina, federal and state circuit court has
19 reached this same conclusion, I don't find it very persuasive
20 because I don't -- I agree, Judge Sprouse might rule this way.
21 Judge Buckner might rule different. Judge Few, well, now he's
22 on the Supreme Court, but you know, any judge on a trial court
23 level, unless we've got an exhaustive study, I don't really
24 consider it authority unless you've got an appellate decision
25 that more or less focuses on it --

1 MR. WILKES: Well, Your Honor --

2 THE COURT: -- or, like I said, unless you've done an
3 exhaustive study that shows every judge in the state is ruling
4 this same way.

5 MR. WILKES: Well, I really jumped to, I think, the
6 defense to their proposition. I believe they will rely on the
7 Oakman versus Lincare decision. This is a district court
8 decision. It is a -- not binding on Your Honor or any other
9 court, state court in South Carolina, not binding on any other
10 federal judge.

11 THE COURT: Right.

12 MR. WILKES: It is one federal judge's decision in a
13 product liability case. I've cited this at length. It's a
14 product liability case. It's a, it's a, in my view, a sort of
15 bad facts can make bad law sometime in the Oakman case. So, I
16 mean, I, I believe it's clear that the statute is intended to
17 prevent civil actions against architectural firms or
18 individuals, professionals until another professional like
19 licensed has signed an affidavit to prove the claim, prove
20 part of the claim, present a factual issue. In response,
21 Plaintiffs' counsel has raised, "Well, we don't think that the
22 statute applies to a company." I am aware of the Oakman
23 decision which is not binding on Your Honor. The Oakman
24 decision involves a suit. It's a product liability case
25 against some companies. They manufactured an oxygen

1 concentrator machine and a poor gentleman named George Oakman,
 2 while sleeping and breathing through cannulas supplied by
 3 Lincare breathed fire into his throat, lungs and stomach,
 4 sustained burns to his face, and he died, and the Defendant in
 5 that case said, "Well, there's no affidavit proving that our
 6 engineers who designed this machine were negligent," and the
 7 court said, "Well, we don't -- you know, we don't think that
 8 the affidavit applies to this company in this setting." So I
 9 think it's limited to a product liability defect circumstance.
 10 So, Your Honor, the same case, this Oakman case, has been
 11 argued, again, not binding on the state court judges. Judge
 12 Sprouse is one judge who heard the same Oakman decision and
 13 he's written a lengthy order stating that, "I've
 14 reviewed the statute." There are just a number of reasons as
 15 we've outlined in our supplemental memorandum why the statute
 16 applies to both individuals and architects. Your Honor, the
 17 intent of the act is to prevent civil actions against
 18 professionals without the support of a licensed professional
 19 in that same field. That's the intended purpose of the
 20 statute, Your Honor, is the frivolous, Frivolous Proceeding
 21 Sanctions Act, and in this instance, the sanction for failing
 22 to attach the affidavit is dismissal, and Your Honor has
 23 probably heard a number of these motions. My experience has
 24 been that the Court may give them 30 days to amend and attach
 25 an affidavit, and we certainly would be -- would understand

1 that relief. The, the licensing laws of South Carolina with
2 respect to architects make no distinction between the
3 professional and a firm. An architectural firm may not exist
4 without licensed individual architects. That's the basis of
5 the licensure of a firm. So an action against an
6 architectural firm is an action against the licensed
7 architect. Also, we would not interpret a statute, of course,
8 to obtain an absurd result. There's no rational basis for not
9 applying the Affidavit of Merit Statute to both individuals
10 and companies. The idea under tort and other civil reform in
11 the act is to prevent non-meritorious claims, and stated the
12 other way, to make it more likely that there is merit to a
13 claim when it is filed. We believe interpreting the act
14 otherwise would just be an absurd result and would not foster
15 the intent of the act, and finally, as we briefed,
16 interpreting the act this way comports with equal protection
17 principles, companies and individuals, professionals should be
18 treated the same, and so interpretation of the statute to
19 include both is the appropriate interpretation in our view.
20 So, Your Honor, for those reasons we believe that it was
21 incumbent upon the Plaintiff to attach the affidavit of a
22 licensed architect stating that there was at least one
23 negligent act that was a proximate cause of the damages the
24 Plaintiffs contend that Plaintiffs suffered. This house was
25 just built within the last year. We don't have a statute of

1 limitations problems. There's, there's certainly -- it
 2 shouldn't be much of a burden on the Plaintiff to go out and
 3 see if they can find an architect who would support their
 4 claim, and as Your Honor understands, that if we were to stay
 5 in the case, then after a short period of time we'll move for
 6 summary judgment and then they will have to support their case
 7 with an affidavit. So we should -- we respectfully submit we
 8 shouldn't have to take those next few steps. Your Honor, we
 9 would ask you to dismiss it or in the alternative give them 30
 10 days to amend and attach an affidavit and then we'll, we'll
 11 fight the battle if we have to. Thank you, Your Honor.

12 THE COURT: All right. Mr. Jeffries.

13 MR. JEFFERIES: Thank you, Your Honor. As an initial
 14 matter, Mr. Wilkes begins by saying that the statutes make no
 15 distinction between architects and architectural firms.
 16 That's not so. The Title 40, Professions and Occupations,
 17 Chapter 3, Section 20, begins with definitions, and it defines
 18 an architect, quote, "Architect means an individual who by
 19 reason of the individual's general knowledge," and it goes on
 20 and defines architect. Two lines down it defines firm, quote,
 21 "Firm means a business entity functioning as a partnership,
 22 limited liability partnership," etcetera. So the statutes do
 23 make a distinction between architects and architectural firms.
 24 The affidavit requirement applies to people. It does not
 25 apply to companies. That is the -- and there's no dispute.

1 The Defendant does not dispute that it's an architectural
2 firm.

3 THE COURT: So, I mean, you're saying if I sue an
4 individual lawyer I have to have an expert affidavit, but if I
5 sue a law firm for professional negligence I don't have to
6 have an expert affidavit.

7 MR. JEFFERIES: That would seem to be the -- yes, Your
8 Honor, that would seem to be the same result. Of course, here
9 we're dealing specifically with an architect who has different
10 ethical duties.

11 THE COURT: Well, and I understand that, but basically
12 you're drawing a distinction between an individual regardless
13 of whether or not he's an employee of a firm or a private
14 practitioner versus a firm business that employs those
15 licensed within the field.

16 MR. JEFFERIES: Yes, Your Honor, there is a distinction.
17 It's not one I'm drawing. It's one that the legislature drew
18 very clearly, and I'll explain how that is. In the section of
19 our statute 15-36-100 that requires the affidavit it says that
20 it applies, quote, "In an action for damages alleging
21 professional negligence against a professional, a
22 professional, against a professional licensed or registered
23 with the State of South Carolina and listed in subsection G,"
24 and then when you go down to subsection G you see that it
25 lists 22 different types of people beginning with architects,

1 attorneys at law, certified public accountants. They're all
2 types of people. The legislature knows the difference. As I
3 said, it knows the difference between an architect and an
4 architectural firm. It defined it in section 40-3-20. So the
5 legislature included architects in the list. It chose not to
6 include architectural firms even though it knows that they are
7 two different things.

8 THE COURT: Well, I mean, it's got a list. It doesn't
9 distinguish attorneys at law and law firms. It doesn't --

10 MR. JEFFERIES: It does not include law firms. That's
11 correct, Your Honor.

12 THE COURT: It doesn't include CPA firms. It doesn't
13 include chiropractic clinics.

14 MR. JEFFERIES: No. No firms at all with one exception,
15 Your Honor, I think that highlights it, too. The legislature
16 knows the difference between architects and architectural
17 firms. It included architects, but not firms, but then it
18 chose to include one type of company. There's an exception.
19 It goes on where it says any action against any licensed
20 healthcare facility alleged to be liable based on the action
21 or inaction of one of the listed people. So it included one
22 type of entity. It listed 22 types of people and then said
23 and this type of entity. If the Defendant were right, that
24 the list already included entities then that section that says
25 and against any licensed healthcare facility would be

1 completely superfluous. It'd already be in there. So it
2 shows that the legislature knew it was naming people, it was
3 not naming entities. It, it specifically left out
4 architectural firms and it specifically brought in one type of
5 entity called a healthcare facility. So it knew what it was
6 doing. It included that one entity.

7 Mr. Wilkes is somewhat right about reliance on Oakman.
8 We don't rely on Oakman. Oakman's not binding. Oakman
9 illustrates a really detailed analysis by Judge Childs of this
10 exact issue that comes to the same conclusion we've come to,
11 but it's not binding on this Court. This Court can go either
12 way, but there's a standard for that, but under the plain
13 language clearly the Plaintiff prevails on this because the
14 plain language says architects not architectural firms. There
15 is a case that controls, an appellate case that controls.
16 It's Greer versus Amisub, 397 S.C. 532 and it controls in this
17 way, it sets forth the really narrow set of circumstances
18 where the circuit court or the appellate court can go beyond
19 the plain language of this statute, and this isn't a general
20 observation about when the court can expand the plain
21 language. Greer versus Amisub applies specifically to section
22 15-36-100, the section that's at issue right here. Greer
23 versus Amisub is a 2012 decision. The same thing was stated
24 by our Supreme Court last year in Eades versus Palmetto
25 Cardiovascular, 422 S.C. 196, and I'll quote from what the

1 court said there. It said Section 15-36-100 restricts a
2 Plaintiff's common law right to bring a malpractice claim by
3 imposing the affidavit requirement. Consequently the language
4 in the statute is to be strictly construed and Section 15-36-
5 100 cannot extend any further than what the General Assembly
6 clearly intended. Then it goes on, quote, "We must follow the
7 plain and unambiguous language in a statute and have no right
8 to impose another meaning. It is only when applying the words
9 literally leads to a result so patently absurd that the
10 General Assembly could not have intended it that we look
11 beyond the statute's plain language," and the court continues,
12 and again, with reference to this specific statute, "We are
13 confined to what the statute says, not what it ought out to
14 say for we have no right to modify a statute's application
15 under the guise of judicial interpretation." So the threshold
16 for this Court to do what the Defendant wants, this Court has
17 to first find that the result under the plain language is so
18 patently absurd.

19 THE COURT: Well, what was the issue in that case?

20 MR. JEFFERIES: So the issue in that case related to what
21 the content of the affidavit was. The statute says there has
22 to be an affidavit as to the negligent act or omission, and
23 what the Defendant was saying was, well, that relates to
24 causation. So you have to have causation in there, too, and
25 what the court said was, you know, that would probably be

1 better. That would make sense if there's a negligent act but
2 no causation, why are we here, but the court said even though
3 that would be better that's not the standard because it's
4 clear what the legislature did, and the result isn't so
5 patently absurd it could not have intended it. So we're
6 powerless to change it, and that's the same situation here.
7 It's not whether the result under the plain language is great
8 or if the Defendant likes it or even if it's bad. In order
9 for this Court or even our Supreme Court to modify the
10 language of the statute this Court would have to find that the
11 result under the plain language is patently absurd and so
12 patently absurd that the legislature could not have intended
13 it, not might not have intended it or probably didn't or
14 should not have but could not have intended it, and that's an
15 incredibly high bar, Your Honor. There's lots of reasons that
16 the legislature might have chosen to do exactly what it did.
17 It might have wanted to protect individuals, sole proprietors
18 that might not have great insurance coverage versus big
19 entities that probably do. So there's any number of reasons.
20 The burden is on --

21 THE COURT: But, I mean, what, what -- where you have an
22 individual who forms an LLC and I'm the only principal of the
23 LLC, I'm doing the architectural work or I'm doing the legal
24 practice, I'm practicing law and my law firm is a PA.

25 MR. JEFFERIES: And that, and that does protect that

1 individual, Your Honor, because as Your Honor knows a lawsuit
2 that contains a judgment let's say against that little LLC
3 does not get through to that individual person, so his house,
4 his car, his savings.

5 THE COURT: So you're saying you don't need an affidavit
6 for the LLC if you're suing the LLC but if you're suing the
7 individual you do need the affidavit.

8 MR. JEFFERIES: You do, and there's a -- any number of
9 rational reasons why the legislature chose to do that. One is
10 to protect people rather than entities because those people
11 might not have insurance, etcetera. The, the point there is
12 not that the legislature made a great law. Maybe the law
13 would be better if it included, for instance, in the Greer
14 versus Amisub case a requirement that the affidavit talked
15 about causation. That would probably be better, but it's not
16 absurd the way it is, and if the law required here that you
17 had to have an affidavit against the firm in addition to
18 against the people that might be better but it's not absurd
19 the way it is and that's the standard. He's got to show that
20 an absurd result that the legislature could not have intended,
21 and the problem with that is what that means then is all the
22 judges who have seen this our way are endorsing this absurd
23 result. The result is not absurd. Maybe it's less than ideal
24 from his standpoint but it's not an absurd result and that's
25 the standard before this Court can change what it said, and in

1 fact, what our Supreme Court went on to say in Greer, and I
2 think this is, is clear, even to quote further the intent
3 behind the statute, the court cannot, quote, "Judicially
4 engraft extra requirements to legislation just because doing
5 so would further the intent." So even if Mr. Wilkes is right
6 about what the intent is, unless the Court finds that there's
7 a patently absurd result that could not under any circumstance
8 have been intended the Court can't add anything to the
9 legislation to make it better, and that's the situation we
10 have here. It lists people. The legislature clearly knew the
11 difference between architects and architectural firms. It
12 defined that difference by statute. It included architects
13 not firms. It included one type of company and it included no
14 other. So it knew what it was doing.

15 Your Honor, I, I would say two, two other, two other
16 minor points that I don't think the Court needs to get to, but
17 there is an exception, also, even if an affidavit were
18 required because of the type of Defendant being sued there is
19 an exception when the subject matter is within common
20 knowledge. That applies here as well. It's been found to
21 apply in legal malpractice cases where a statute of
22 limitations has been blown, common knowledge says you can't
23 blow the statute. It's been found.

24 THE COURT: So what are you saying is common knowledge of
25 their negligence in this?

1 MR. JEFFERIES: We have toilets here that don't flush and
2 roofs that leak. Regular people understand that toilets are
3 supposed to flush. It's not something highly technical.

4 THE COURT: But I mean, is that an architectural issue?

5 MR. JEFFERIES: We don't think it is an architectural
6 professional issue. It's just -- it's a negligence issue. I
7 don't think the Court needs to get there because we didn't sue
8 an architect, but if the Court did get there that's yet
9 another reason why the affidavit is not required.

10 THE COURT: Okay.

11 MR. JEFFERIES: And Your Honor, the same point I make
12 very briefly is just this, as Mr. Wilkes said, they filed a
13 20-page memorandum just last night. If the Court is inclined
14 to rule against the Plaintiff, what I would say is that the
15 memorandum is out of time under the Supreme Court civil
16 motions pilot program order in Horry County. So that if, if
17 the Court's inclined to rule against the Plaintiff by all
18 fairness we should have the 30 days that the Supreme Court's
19 order says we have to reply to this memo before, before this
20 Court makes a decision, but again, I don't think we have to
21 get there because absent a showing of patent absurdity that
22 could never have been intended by the legislature, the Court's
23 powerless to make changes to add extra requirements, to add
24 entities to the statute when they're just not there.

25 THE COURT: All right.

1 MR. JEFFERIES: And Your Honor, if I may hand up, I'll
2 hand up a copy of Greer and Oakman.

3 THE COURT: All right. All right.

4 MR. JEFFERIES: Thank you, Your Honor.

5 THE COURT: Thank you. Anything in reply?

6 MR. WILKES: May it please the Court. Your Honor, the
7 statute at the beginning states complaints in actions for
8 damages alleging professional negligence. It doesn't say
9 complaints for damages against individual professionals, and
10 of equal importance a lot of focus on these -- the total list.
11 It's under Section G where we list architects and all these
12 other categories of professionals, it says, "G, this section
13 applies to the following professions", Your Honor, does not
14 say professionals. So this was the legislature's effort to
15 describe the professions that would be at issue and subject to
16 the requirement for the Affidavit of Merit. So that is the
17 proper interpretation of this. This says professions. It
18 doesn't say professionals. It doesn't say individual
19 professionals. The court just chose to use the name
20 architects and attorneys at law and certified public
21 accountants to describe the professions, and Your Honor, if
22 you wish, I'd be glad to hand you this statute.

23 THE COURT: I've got it right up here.

24 MR. WILKES: Thank you, Your Honor.

25 THE COURT: Yeah.

1 MR. WILKES: The -- we, we do not have the burden of
2 proving that this would be an absurd result and that would be
3 just part of the statutory construction. So, Your Honor, our,
4 our brief, our memorandum, supplemental memorandum, which was
5 written in response to their informal response, so we
6 anticipated that argument, and of course, here we are and so
7 Your Honor will have that to consider, outlines the various
8 ways that the statute needs to be evaluated and the various
9 elements of statutory construction I've already been through
10 those. So I will not reiterate those.

11 The common law, common knowledge exception clearly
12 doesn't apply in this case. I mean, this, this is certainly a
13 situation where if they can -- if they -- they have to prove
14 negligence, Plaintiffs have to prove negligence in order to
15 recover against the architect Defendant and just saying that
16 your toilet's leaking does not mean that somehow an architect
17 negligently designed the toilet. We know that's absurd. He
18 didn't design the toilet, maybe we'd get down to maybe some
19 sub-engineer in the plumbing. I don't know, but that's why
20 you have professionals required to sign affidavits to prove a
21 case against a professional, and that's the commonsensical
22 interpretation of the statute and it is not -- and again, I, I
23 will say, I have not attempted to survey, and I certainly have
24 not intended to misrepresent to the Court anything about the
25 extent of my survey of state court decisions. I just have

1 never seen one the other way.

2 THE COURT: All right.

3 MR. WILKES: Thank you, Your Honor.

4 THE COURT: Thank you. All right. I don't know if this
5 is going to help you all or not, but since there is no
6 appellate decision to guide me, I'm going to grant the motion
7 to the extent that you have to file and serve your affidavit
8 within 30 days or else it's going to be dismissed pursuant to
9 Rule 12(B)(6). That way if you think you don't need one, we
10 can take it up on appeal, if you're, if you're that confident
11 in your argument, Mr. Jeffries, but if you, like me and you
12 don't know, then get your affidavit filed within 30 days and
13 then the Defendant has 30 days from the service of that
14 affidavit to file responsive pleadings and that's the best way
15 I know to handle it. I'm not going to -- I'm sure some day
16 we're going to have an appellate decision that's going to make
17 a decision on it, but I'm just going to get this case moving
18 that way. Like I say, you don't have to do it, but it gives
19 your -- an issue to appeal because my -- basically, I'm going
20 to just grant the motion to dismiss if an affidavit is not
21 produced and served within 30 days. Do it that way.

22 MR. WILKES: Thank you, Your Honor.

23 THE COURT: All right.

24 MR. JEFFERIES: To clarify, Your Honor, the motion, if,
25 if it is granted to dismiss it would be dismissed without

1 prejudice, I would take it, since there is a remaining
2 statute.

3 THE COURT: I'm trying to think. What does 12(B)(6),
4 what does that -- it says --

5 MR. WILKES: I think without prejudice is fine with us,
6 Your Honor. We, we understand.

7 THE COURT: Okay.

8 MR. WILKES: I mean, we, we -- it -- there's arguments to
9 that it should be with prejudice but we won't make that --
10 take that position.

11 THE COURT: Okay. Well, this is a little bit different
12 in that the 12(B)(6) says that you have not stated grounds
13 upon which relief can be granted, and the complaint does state
14 grounds upon which relief can be granted. It's just that 15-
15 36-100 adds an additional requirement to get to that. So I
16 think it is a proper 12(B)(6) motion, but it's not confined
17 just to the complaint where most motions to -- 12(B)(6)
18 motions are confined just to the pleadings. This one, I guess
19 if you consider the affidavit a portion of the pleadings
20 because it's required to be filed simultaneously except in
21 certain situations it could be considered a part of the
22 pleadings. So but in any event I'm going to let my ruling
23 stay the way it is. Okay?

24 MR. JEFFERIES: Thirty days or it's dismissed without
25 prejudice. If we do file it then Defense has 30 days to

1 answer?

2 THE COURT: Thirty days to file responsive pleadings.

3 All right.

4 MR. JEFFERIES: Excellent. Thank you, Your Honor.

5 MR. WILKES: May I submit a proposed order or --

6 THE COURT: Do you want an order or I --

7 MR. WILKES: You'll do it?

8 THE COURT: I mean, I was just going to do a form four
9 that says --

10 MR. WILKES: That'll be fine.

11 THE COURT: -- this, if that satisfies everybody.

12 MR. WILKES: That's fine with me, Your Honor.

13 MR. JEFFERIES: Your Honor, understanding that it might
14 end up on appeal, if Mr. Wilkes is volunteering to do a
15 proposed order that's probably best.

16 THE COURT: All right. If you'd just do an order and but
17 just put in the order that it's based upon arguments of
18 counsel that there is no -- that there was no appellate
19 guidance presented to the Court, and that it was all just
20 based upon arguments of counsel, my interpretation being that
21 it doesn't make sense for the legislature to require an
22 affidavit when you're suing an individual, but it does not
23 require an affidavit when you're suing a business entity even
24 though that business entity might be an LLC with only one
25 principal involved in it and one employee involved in it and

1 one person doing the work, and so that's my rationale.

2 MR. JEFFERIES: Your Honor, do I understand Your Honor
3 correctly that you're -- have denied our -- Plaintiffs'
4 request for 30 days to file a -- pardon me, a responsive
5 memorandum based on the civil motions pilot program wherein I
6 think we're entitled to have that.

7 THE COURT: No. I'm just going to leave it the way it
8 is. Let's not kick this can down the road any further. You
9 got 30 days to get your affidavit. I mean, if I'm wrong I'm
10 wrong. There's no appellate decision, and trust me I, you
11 know, I, I don't like getting reversed, but when I get
12 reversed on novel issues I don't take it nearly as bad so.

13 MR. WILKES: Your Honor, I don't, I don't want to write
14 more than you want. Would, would Your Honor mind looking at
15 the order that's attached to my supplemental memorandum? Do
16 you want, do you want that statutory interpretation analysis
17 or do you want it more limited to what you've just said?

18 THE COURT: Just limit it to what I've said.

19 MR. WILKES: Yes, sir. Will do so.

20 THE COURT: All right.

21 MR. JEFFERIES: Thank you, Your Honor.

22 THE COURT: All right. Thank you.

23 MR. WILKES: Thank you, Your Honor.

24 (Adjourned.)

25

C E R T I F I C A T E

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I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the hearing held in the case of Michael Marceda and Cheryl Marceda versus Winchester Oceanview Development, Inc., Sands Building Group, Inc., C3 Studio, LLC, Sands Realty Group, Inc., Jonathan B. Dickerson, and John Woodward, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on April 24, 2019.

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

Grace L. Hurley, CVR-CM-M
Official Reporter

October 11, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	CIVIL ACTION NO.: 2019-CP-26-0345
Michael Marceda and Cheryl Marceda,	)	
	)	
Plaintiffs,	)	ORDER ON DEFENDANT C3 STUDIO,
	)	LLC'S MOTION TO DISMISS
v.	)	PLAINTIFFS' COMPLAINT
	)	
Winchester Oceanview Development, Inc.,	)	
Sands Building Group, Inc., C3 Studio, LLC,	)	
Sands Realty Group, Inc., Jonathan B.	)	
Dickerson, and John Woodward,	)	
	)	
Defendants.	)	

This action came before this Court on April 24, 2019, for hearing of the Motion to Dismiss of Defendant C3 Studio, LLC. The Court received and considered briefs, and heard oral argument by counsel for C3 Studio, LLC and counsel for Plaintiffs.

Pursuant to S.C. Code Ann. § 15-36-100 and S.C. R. Civ. P. 12(b)(6), Defendant, C3 Studio, LLC ("Defendant"), has moved this Court for an order dismissing all claims against Defendant in Plaintiffs' Complaint. The basis for this motion is that Plaintiffs failed to attach to their Complaint the affidavit of an expert to support Plaintiffs' professional negligence-based claims against Defendant, as required by S.C. Code Ann. § 15-36-100 under the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), S.C. Code Ann. § 15-36-10 to -100.

Background

Defendant is based in Knoxville, Tennessee, but has provided architectural services in South Carolina. Defendant's CEO, Greg Huddy, is a licensed architect in the State of South Carolina (License Number AR .7568).

Plaintiffs filed their Complaint against Defendant on January 22, 2019, alleging negligent misrepresentation, negligence/gross negligence, breach of contract/breach of duty of good faith

and fair dealing, breach of express and implied warranties, and Unfair Trade Practices pursuant to S.C. Code Section 39-5-10 *et seq.*, stemming from architectural services provided by Defendant in connection with Plaintiffs' residence. Specifically, Plaintiffs allege that Defendant carried out its "obligations and duties in a negligent, grossly negligent, and otherwise wrongful fashion; in breach of contract; in violation of industry standards, building codes, and installation instructions; and in other wrongful way [sic], all of which proximately caused damages to Plaintiffs." (Compl. ¶¶ 12, 13, 14, & 15).

Analysis

In 2005, as part of its tort reform efforts and in an attempt to curtail frivolous claims against professionals, the South Carolina Legislature implemented the Act. *See* S.C. Code Ann. § 15-36-10 to -100; *see also* 2005 S.C. Acts 32. Among other things, the Act requires attorneys to read and verify the legitimacy of pleadings filed with the Court, and sets forth penalties to be imposed when parties file frivolous and unmeritorious documents. *See* S.C. Code Ann. § 15-36-10. Moreover, with regard to claims against professionals, the Act sets forth the mandatory pre-suit procedure through which professional negligence-based claims may be asserted. *See* S.C. Code Ann. § 15-36-100.

Specifically, § 15-36-100 of the Act applies to actions "for damages alleging professional negligence" against architects. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(1). In such actions, "the plaintiff *must* file as part of the complaint an affidavit of an expert witness which *must* specify at least one negligent act or omission claimed to exist and the factual basis for each claim" S.C. Code Ann. § 15-36-100(B) (emphasis added); *see also* S.C. Code Ann. § 15-36-100(C)(1) (explaining that, except under inapplicable circumstances, the affidavit must be

filed contemporaneously with the complaint). 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). Additionally, an expert affidavit is required to support breach of contract claims associated with claims of professional negligence. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 473, 570 S.E.2d 197, 204 (Ct. App. 2002) (holding that the party claiming professional negligence was required to support both its tort and contract claims with expert testimony to establish the standard of care).

Plaintiffs' negligent architectural services allegations fall squarely within the purview of the Act's affidavit requirement, because Plaintiffs must prove that the licensed professional architect breached the standard of care for a professional architect. Additionally, Plaintiffs' breach of contract claim against Defendant falls within the purview of the Act's affidavit requirement as Defendant could not have breached the alleged contract with Plaintiffs without negligently performing its architectural services. The same is true for Plaintiffs' Unfair Trade Practices claim because it would be dependent upon conduct by Defendant that amounts to negligent performance of its architectural services. None of these claims fall within the common knowledge exception to the affidavit requirement under the Act. Therefore, Plaintiffs were statutorily required to investigate Plaintiffs' architectural services claim before suing Defendant, and to evidence such investigation by an architect's affidavit filed contemporaneously with Plaintiffs' Complaint. Plaintiffs failed to meet this requirement.

Plaintiffs contend that S.C. Code Ann. § 15-36-100 applies only to individuals engaged in the professions listed therein, and not to companies like Defendant. Section 15-36-100 of the Act is entitled: "Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission." S.C. Code Ann. § 15-

36-100 (emphasis added). Moreover, Section (G) of the Act states that its affidavit requirement applies to the architecture “profession.” See S.C. Code Ann. § 15-36-100(G) (stating: “this section applies to the following professions: . . . (1) architects”) (emphasis added). These portions of the Act evidence that S.C. Code Ann. § 15-36-100 applies to both individual professionals and professional companies like Defendant. Because the intent of the Act is to limit non-meritorious claims against those engaged in the listed professions, there is no logical reason for S.C. Code Ann. § 15-36-100 to distinguish between individual professionals and professional companies; and the Act cannot reasonably be construed to support such a distinction.

Order

Defendant's Motion to Dismiss pursuant to Rule 12(b), SCRCP, is GRANTED to the extent that Plaintiffs shall have 30 days from the date of this hearing, April 24, 2019, to file and serve an affidavit as required by S.C. Code § 15-36-100. Should Plaintiffs file and serve the required affidavit within said 30 days, then Defendant shall have 30 days after such service to file responsive pleadings. Should Plaintiff fail to file and serve the required affidavit within said 30 days, then all causes of action against Defendant C3 Studio, LLC are dismissed, without prejudice.

[Judge's Electronic Signature Page to Follow]



Horry Common Pleas

Case Caption: Michael Marceda , plaintiff, et al VS Winchester Oceanview
Development, Inc. , defendant, et al
Case Number: 2019CP2600345
Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-05-08 08:39:32 page 5 of 5

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO: 2019-CP-26-00345

MICHAEL MARCEDA; and CHERYL
MARCEDA,

Plaintiff(s),

v.

WINCHESTER OCEANVIEW
DEVELOPMENT, INC.; SANDS
BUILDING GROUP, INC.; C3 STUDIO,
LLC; SANDS REALTY GROUP, INC.;
JONATHAN B. DICKERSON; and JOHN
WOODWARD,

Defendant(s).

**MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59, SCRCP**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Plaintiff MICHAEL MARCEDA and CHERYL MARCEDA, by and through undersigned counsel and pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, will move before the Presiding Judge of the Court of Common Pleas, within ten (10) days of the date of this Motion, or as soon as counsel may be heard, to alter or amend this Court's Order dated May 8, 2019 ("Order"), and in its place to enter an order DENYING Defendant C3 Studios, LLC's ("Defendant") Motion to Dismiss.

The above-described alteration or amendment is necessary and proper for three reasons. First, because the affidavit requirement contained in the Frivolous Civil Proceedings Sanctions Act ("Act"), S.C. Code § 15-13-100 does not apply to architectural Firms, which Defendant concedes it is. Second, because pursuant to the Supreme Court's Order dated September 10, 2015, this Court should not have considered (or based its Order upon) Defendant's untimely memorandum of law. Third, because the Order is not based upon any evidence.

I. The Frivolous Civil Proceedings Sanctions Act does not require affidavits in actions against architectural “Firms” as distinct from actions against “Architects.”

The affidavit requirement contained in SC Code § 15-36-100 applies to human beings, not companies. This is unambiguously set forth in the plain language of the statute, and it is also the proper interpretation of the statute. Section 15-36-100(B) states “Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against *a professional licensed by or registered with the State of South Carolina* and listed in subsection (G) . . .” (Emphasis added). Subsection G lists twenty-two different types of people – not companies – including “architects”, “attorneys at law”, and “certified public accountants.” SC Code § 15-36-100(G).

The General Assembly knows the difference between people and companies. Indeed, in Title 40, Chapter 3, Professions and Occupations, Architects, the General Assembly defined both “Architect” and architectural “Firm.” The General Assembly said:

““Architect” means *an individual* who, by reason of the individual's general knowledge of the principles of architecture acquired by professional education and practical experience, is qualified to engage in the practice of architecture as attested by the individual's registration as an architect.” SC Code Ann. § 40-3-20(1) (emphasis added). ““Individual” means a single human being.” SC Code Ann. § 40-3-20(5).

In contrast, the General Assembly defined an architectural “Firm” as follows:

““Firm” means *a business entity* functioning as a partnership, limited liability partnership, professional association, professional corporation, business corporation, limited liability company, or other firm association which practices or offers to practice architecture” SC Code Ann. § 40-3-20(3) (emphasis added).

Thus, it is clear that “architects” are individual human beings, while architectural “firms” are business entities. Plaintiff has searched exhaustively for an instance where the General Assembly defined “architect” to include entities in addition to human beings. None have been found, and Defendant does not cite any.

When the General Assembly uses a term that it defined itself, it is presumed to know what that term means. See e.g. State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) (“where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.”). The General Assembly defined “Architect” to include only human beings long before it enacted the Act. Accordingly, when the General Assembly chose to include “Architects” rather than architectural “Firms” in the list of those receiving protection from the Act, it knew that it was including human beings and excluding business entities.

In addition to being expressed in the plain language of the Act, the General Assembly’s intent that the Act apply only to human beings is highlighted by the single exception that the General Assembly chose to include. In addition to applying to actions “for damages alleging professional negligence against *a professional* licensed by or registered with the State of South Carolina and listed in subsection (G),” the affidavit requirement also applies in actions “against any *licensed health care facility* alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G).” SC Code § 15-36-100(B) (emphasis added). That the General Assembly chose to include within the Act’s protection health care facilities that employ licensed professionals shows that the General Assembly knew that such facilities were not already included. State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (“A statute should be so construed that no word, clause, sentence,

provision or part shall be rendered surplusage, or superfluous.”). As result, even if the Act were ambiguous (which it’s not), the proper interpretation is that it applies to human beings, not entities.

The foregoing analysis its similar to and consistent with the analysis of the Act provided by Federal Judge Michelle Childs in Oakman v. Lincare, Inc., 2013 WL 3549848 (D.S.C. 2013) (Exhibit A incorporated by reference). While Oakman is not binding on this Court, and while its facts differ in several respects, its thoughtful attention to statutory construction is highly persuasive. Moreover, Judge Childs’ analysis is consistent with the analysis that our own Supreme Court has given to similar matters, including for example, other aspects of a Section 15-36-100 affidavit. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012).

In Grier v. AMISUB the issue was not whether an affidavit was required – the parties agreed that it was. Instead, the parties disagreed as to whether the Act required the affidavit to address causation in addition to breach. The Grier court reasoned as follows (and the same reasoning applies here and is incorporated herein):

The issue before us is purely one of statutory interpretation. “Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.” *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). It is well-established that “[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the General Assembly.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “What a General Assembly 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 General Assembly.” *Id.* (quotation omitted). Thus, we must follow the plain and unambiguous language in a statute and *536 have “no right to impose another meaning.” *Id.* It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute’s **696 plain

language. *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

In ascertaining the meaning of language used in a statute, we presume the General Assembly is “aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *see also Beck v. Prupis*, 529 U.S. 494, 500–01, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) (“[W]hen Congress uses language with a settled meaning at common law, Congress ‘presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.’ ” (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952))).

Finally, statutes in derogation of the common law are to be strictly construed. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Under this rule, a statute restricting the common law will “not be extended beyond the clear intent of the General Assembly.” *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Statutes subject to this rule include those which “limit a claimant’s right to bring suit.” 82 C.J.S. *Statutes* § 535.

With these principles in mind, we turn to the statutes at issue in this case. Section 15–79–125(A) provides, “Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15–36–100.” The statute then gives specific guidance as to the requirements for the notice document:

The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure.

Id.

However, it provides no specifics for the expert affidavit. For that, the statute directs the reader to section 15–36–100. This section in turn states the plaintiff has to submit “an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” *Id.* § 15–36–100(B).

We begin by examining the statute concerning the affidavit itself, section 15–36–100(B). No party disputes that this statute is unambiguous, and thus we must apply its plain language. In our opinion, the language that the affidavit must “specify at least one negligent act or omission” encompasses only the breach element of a common law negligence claim and not causation. Thus, the statute limits its requirement for the affidavit to only breach.

First, the term “negligent act or omission” consistently has been used to refer *only* to breach and never to causation. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (“A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty.” (emphasis added)); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (“To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) *a breach of that duty by negligent act or omission*; and (3) damage proximately caused by the breach.” (emphasis added)); *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000) (“To establish a cause of action in negligence, a plaintiff must prove the following ^{**697} three elements: (1) a duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; and (3) ^{*538} damage proximately resulting from the breach of duty.” (emphasis added)); *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998) (“To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; and (3) damage proximately resulting from the breach of duty.” (emphasis added)).

Furthermore, proximate cause requires proof beyond just the act or omission in question and concerns whether it is the “but for” cause of the plaintiff’s injuries and whether the harm was foreseeable. *Bishop*, 331 S.C. at 88–89, 502 S.E.2d at 83.

The General Assembly therefore used a term of art which has a well-defined common law meaning as just breach, and we can find nothing indicating the General Assembly intended to vary from it. Accordingly, the plain and unambiguous language of the statute forecloses any argument that the affidavit contain a proximate cause opinion.

Moreover, section 15–36–100 restricts a plaintiff’s common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed, and section 15–36–100 cannot extend any further than what the General Assembly clearly intended. Once again, this statute plainly and unambiguously uses a term of art which at common law refers only to the breach element of a negligence claim. The plain language of a statute being

the best evidence of the General Assembly's intent, there is no clear indication it sought to go any further. Thus, we are in no position to go further ourselves.

We therefore hold under these well-established principles that section 15-36-100(B) requires that the expert render an opinion only as to a breach of the standard of care. In its brief, Piedmont appears to concede as much by pointing out that it “has never made the argument that the ‘plain language’ of Section 15-36-100(B) requires an expert affidavit to opine on proximate cause. Instead, [Piedmont] focus upon Section 15-79-125(A) which requires a plaintiff alleging medical malpractice show a claim upon which a plaintiff is entitled to relief.”¹ Under this guise, Piedmont advances two arguments *539 regarding this statute: (1) the plain language of section 15-79-125(A) requires the affidavit contain an opinion as to proximate cause because it requires that a plaintiff show he is entitled to relief, and in the alternative, (2) section 15-79-125(A) implicitly imposes this requirement. We disagree with both.

Like section 15-36-100(B), section 15-79-125(A) is unambiguous and in derogation of the common law. Read plainly and strictly, section 15-79-125(A) simply requires the contemporaneous filing of both the notice and the affidavit. While this statute supplies several requirements for the notice, it does not speak at all to what is required for the affidavit beyond stating that it is “subject to the affidavit requirements established in Section 15-36-100.” S.C.Code Ann. § 15-79-125(A). While Piedmont argues that the affidavit must contain the same information as the notice—i.e., a demonstration that the plaintiff is entitled to relief, which would include causation—its construction is refuted by the plain language of section 15-79-125(A). By its very terms, this statute imposes no content requirements for the expert affidavit and specifically delegates that task to section 15-36-100.

We also reject Piedmont's “implicit legislative intent” argument. For this, Piedmont turns to the policies behind tort reform legislation such as section 15-79-125. It correctly notes that one of the major goals behind these requirements is to curtail frivolous litigation **698 by ensuring plaintiffs only present colorable claims. Moreover, section 15-79-125(C) requires that parties to a medical malpractice claim engage in mandatory pre-suit mediation. It is only if this mediation fails that a civil action officially is initiated in the circuit court. S.C.Code Ann. § 15-79-125(E). Thus, Piedmont argues having a fuller picture of a plaintiff's claim prior to mediation, including the basis for proximate cause, enables a more productive mediation *540 process which can avoid the need for a protracted battle in court.

We do not doubt that requiring the affidavit to contain an opinion regarding causation furthers these important goals. Nevertheless, the statute is unambiguous and we are confined to what the statute says, not what it ought to say, for we have no right to modify a statute's application “under the guise of judicial interpretation.” See *Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 182, 161 S.E.2d 175, 178 (1968). In other words, when a statute is clear on its face, it is “improvident to judicially engraft extra requirements to legislation” just because

doing so may further the intent behind the statute. *See Berkebile v. Outen*, 311 S.C. 50, 55–56, 426 S.E.2d 760, 763 (1993). We must also be mindful that section 15–79–125(A) is to be strictly construed, and imposing requirements which are not clearly intended to be in it violates this rule. We do not believe it is clear the General Assembly intended to include this requirement, and there are many reasons why it could have chosen not to do so. Moreover, Piedmont has not shown how an application of the plain language would lead to a result so patently absurd it could not have been intended by the General Assembly. We therefore are in no position to look beyond the plain language of the statute and read into it a requirement that the expert also opine as to causation at this stage in the proceedings.

Accordingly, we hold nothing in section 15–79–125(A) requires that an expert affidavit in a medical malpractice action submitted pursuant to section 15–36–100(B) contain an opinion regarding causation.

Grier v. AMISUB of South Carolina, Inc.,
397 S.C. 532, 535-40, 725 S.E.2d 693, 695-
98 (2012).

As noted by the Grier court, the threshold question that would allow the court to look beyond the plain language of the Act is not whether the Act would better achieve the General Assembly’s goals if it were written as Defendant would prefer. Instead, the threshold question is whether “applying the words [of the Act] literally leads to a result *so patently absurd* that the General Assembly *could not have intended it*.” Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012) (emphasis added). Defendant has not shown that applying the words of the Act literally would lead to a result so patently absurd that the General Assembly could not have intended it. On the contrary, there are many legitimate reasons that the General Assembly might have chosen to protect human beings but not entities, not the least of which is that entities tend to have better insurance coverage than human beings (who may have little or none at all). The burden is on Defendant to show the absurd result; it has failed to do so.

Because Plaintiff complied with the unambiguous terms of the Act, and because Plaintiff complied with the proper interpretation of the Act, the Order dismissing all causes of action against Defendant cannot stand.

II. Defendant's memorandum in support should not have been considered by the Court in reaching its decision because the memorandum was grossly untimely in non-compliance with the Supreme Court's Order dated September 10, 2015.

The Supreme Court's Civil Motions Pilot Program order dated September 10, 2015 required Defendant to submit "a supporting memorandum of law" contemporaneously with its motion, and *prior* to any hearing on the matter.¹ **Exhibit B incorporated by reference (highlighting added).** Defense counsel is presumed to be aware of the governing orders, rules, etc. in the counties where they practice. However, contrary to the Supreme Court's Order, Defendant did not submit a memorandum of law with its motion. Instead, Defendant filed its twenty-page memo at 5:27 the night before the hearing, and Plaintiffs received notice at 8:41 on the morning of the hearing, thus seriously prejudicing Plaintiffs by depriving Plaintiffs of proper notice of Defendant's argument prior to the hearing, and depriving Plaintiffs' of their right under the Supreme Court's Order to file a memorandum in opposition. This issue was raised by Plaintiffs' counsel during the hearing, and the Court declined to permit Plaintiff to file a memo before ruling. This Court's Order does not set forth any basis for denying Plaintiffs' request to submit a memo, or for denying the Plaintiffs' broader request that the mandatory procedure set forth by the Supreme Court be followed.

As a result, the Hearing was held, and an Order issued, all contrary to the mandatory procedure required by the Supreme Court's September 10, 2015 Order.

¹ The sole exception for instances where "a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose" is facially inapplicable here.

Even if Plaintiff had not raise the issue during the hearing, non-compliance with the Supreme Court's Order is not in the nature of an affirmative defense, which may only apply when asserted. Rather, each of us is required to comply with the Supreme Court's valid orders, even when no one reminds us. In return, each of us is entitled to presume that *others* will comply with the Supreme Court's valid orders – even when no one is looking. Non-compliance with the Supreme Court's Order alone is sufficient to require this Court to alter or amend its Order. See e.g. Matter of Krawcheck, 417 S.C. 470, 473, 790 S.E.2d 781, 782 (2016) (not proper “to willfully violate a valid order of the Supreme Court.”). If this Court does not alter or amend its Order, then Plaintiffs respectfully request that this Court set forth the basis for non-compliance with the Supreme Court's Order.

Because the Order dismissing causes of action against Defendant was entered in non-compliance with a valid order of the Supreme Court, the Order dismissing causes of action against Defendant cannot stand.

III. This Court's Order is not supported by any evidence.

It is axiomatic that decisions be based on legal argument about evidence. Without any evidence, a decision based on factual conclusions cannot stand. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997) (An abuse of discretion occurs when an order based upon factual conclusions is without evidentiary support). The Order contains and relies upon purported factual findings – e.g. Defendant's CEO is Greg Huddy; Greg Huddy is an architect; Greg Huddy is licensed in South Carolina – that are not supported by any evidence. For this reason as well, the Order dismissing causes of action against Defendant cannot stand.

PRAYER

For the reasons set forth above, and for such additional reasons as may be described in supplemental memoranda and/or during a hearing on the matter, Plaintiffs respectfully request that this Court alter or amend its Order dated May 8, 2019, and in its place enter an order DENYING Defendant C3 Studios, LLC's Motion to Dismiss.

Respectfully submitted,

ANASTOPOULO LAW FIRM, LLC

s/ Lane D. Jefferies
Lane D. Jefferies, Esq.
S.C. Bar No.: 101764
Eric M. Poulin, Esq.
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United States District Court, D.
South Carolina, Aiken Division.

Jeanette OAKMAN, individually and
as the Personal Representative of the
Estate of George Oakman, Plaintiff,
v.

LINCARE INC., Linde A.G. (a/k/
a Linde, LLC), Airsep Corporation and
Chart Industries, Inc., Defendants.

Civil Action No. 1:13-cv-00428-JMC.
|
July 10, 2013.

Attorneys and Law Firms

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Plaintiff.

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OPINION AND ORDER

J. MICHELLE CHILDS, District Judge.

*1 This matter is before the court upon Defendants
Airsep Corporation, Chart Industries, Inc., and Lincare
Inc.'s (collectively "Defendants") Motions to Dismiss¹
pursuant to FED. R. CIV. P. 12(b)(6) and for failure to
comply with S.C.Code Ann. § 15-36-100 (2005). [Dkt.
Nos. 6, 9]. Plaintiff opposes these motions on the ground
that she has, in fact, complied with the requirements of §
15-36-100 [Dkt. Nos. 11, 12].

PROCEDURAL BACKGROUND

Plaintiff Jeanette Oakman, individually and as the
Personal Representative of the Estate of George J.
Oakman ("Plaintiff"), filed this products liability action
with the Court of Common Pleas for the Second Judicial
Circuit of the State of South Carolina on October 2,

2013 [Dkt. No. 1, State Case No.2012-CP-02-2449].
Plaintiff served Defendants through the Office of the
Secretary of State on January 18, 2013. Defendants
Airsep Corporation ("Airsep") and Chart Industries, Inc.
("Chart Industries") filed a Notice of Removal properly
based upon diversity jurisdiction on February 15, 2013
[Dkt. No. 1]. Airsep and Chart Industries filed their
Answers [Dkt. Nos. 4, 5] and their Motion to Dismiss
[Dkt. No. 6] on February 18, 2013. Defendant Lincare Inc.
("Lincare") filed its Answer [Dkt. No. 8] and its Motion
to Dismiss [Dkt. No. 9] on February 21, 2013.

FACTUAL BACKGROUND

The decedent, George J. Oakman, obtained a prescription
oxygen concentrator machine from Lincare. [Comp. ¶ 5.]
Airsep, which is owned in whole by Chart Industries,
manufactured the oxygen concentrator machine. [Id. ¶¶
3, 5.] On October 3, 2009, the machine caught fire at
George Oakman's residence, located at 144 St. John's
Place, Warrenville, South Carolina, while he was asleep
and breathing through a cannula supplied by Lincare.
[Id. ¶ 6.] Mr. Oakman inhaled fire into his throat, lungs,
and stomach, and sustained burns to his face and body
as a result of the fire. [Id.] Afterward, Aiken County
Emergency Medical Services transported Mr. Oakman to
the Joseph M. Still Burn Center (Southeastern Regional
Burn Center) at Doctor's Hospital, located in Augusta,
Georgia. [Id. ¶ 7.] As a result of the fire, Mr. Oakman died
on October 7, 2009. [Id. ¶¶ 7, 8.] His family and estate
allege losses from incurred medical bills and lost future
earning potential, and Plaintiff Jeanette Oakman, widow
of the decedent, claims a loss of her husband's consortium.
[Id. ¶ 8.]

First Cause of Action

In her first cause of action, Plaintiff alleges products
liability, strict liability, negligence, and breach of warranty
against Airsep and Chart Industries.² [Id. at 3.] Plaintiff
claims the oxygen concentrator machine at issue was
unreasonably dangerous due to its manufacturing and
design defects, the serious risk of fire associated with its
use, and its lack of warning of these dangers. [Id. ¶¶ 11-
13.] Thus, according to Plaintiff, Airsep was negligent
and is liable for placing this defective product into the
stream of commerce based on South Carolina law, as
well as on the principle of seller liability. [Id. ¶¶ 13, 19.]

Furthermore, Plaintiff claims Airsep is strictly liable for falsely misrepresenting that the machine was safe for use in a manner indicated by Airsep to be suitable for consumer use. [*Id.* ¶¶ 14, 15.]

*2 Additionally, Plaintiff asserts that Airsep breached its express and implied warranties that the machine was fit for its intended use, and thus violated the provisions of S.C.Code Ann. § 36–2–314 (1976) (Implied Warranty of Merchantability), § 36–2–315 (1976) (Implied Warranty of Fitness for a Particular Purpose), and § 36–2–313 (1976) (Express Warranty). [*Id.* ¶¶ 16, 17.] Plaintiff also claims that Airsep's conduct was done knowingly and that its acts constituted malice, [*Id.* ¶¶ 18, 20], and that as a result of Airsep's alleged wrongful conduct, the decedent suffered extensive physical injuries and death, and Plaintiff suffered pecuniary loss of service, mental anguish, loss of consortium with her husband, and incurred expenses from her emotional trauma. [*Id.* ¶ 24.]

Second Cause of Action

In her second cause of action, Plaintiff alleges products liability, strict liability, negligence, and breach of warranty against Lincare and Defendant Linde, A.G. (“Linde”).³ [*Id.* at 7.] Plaintiff claims that the oxygen concentrator machine was defective at the time it was marketed, promoted, advertised, distributed, and sold by Lincare [*Id.* ¶ 27], and that Lincare failed to give adequate and proper warnings and instructions regarding the dangers of the machine [*Id.* ¶ 28]. According to Plaintiff, these acts and omissions rendered the machine unreasonably dangerous, thus making Lincare liable for placing this defective product into the stream of commerce based on South Carolina law and on the principle of seller liability. [*Id.* ¶ 29.] Moreover, Plaintiff claims Lincare is strictly liable for falsely misrepresenting that the machine was safe for use in a manner indicated by Airsep to be suitable for consumer use. [*Id.* ¶ 30.]

Plaintiff claims that Lincare breached its express and implied warranties that the machine was fit for its intended use, and thus violated S.C.Code Ann. § 36–2–314 (Implied Warranty of Fitness for a Particular Purpose) and § 36–2–313 (Express Warranty). [*Id.* ¶¶ 31, 32.] Furthermore, Plaintiff alleges that one or more of the following acts and/or omissions on behalf of Lincare constitute negligence: (a) failing to warn the decedent about the known dangers associated with the use of the machine; (b) putting a

product in decedent's home that was known to be defective and cause life threatening fires; (c) providing the decedent with the machine after it had already been used for an excessive number of hours; (d) failing to provide adequate maintenance to the product in question; and (e) failing to respond to complaints of unusual noises coming from the machine. [*Id.* ¶ 34.]

As a result of Lincare's alleged wrongful conduct, the decedent allegedly suffered extensive physical injuries and death, and Plaintiff suffered pecuniary losses of services, expenses incurred from her emotional trauma, mental anguish, and loss of consortium with her husband. [*Id.* ¶ 36.] Plaintiff believes she is entitled to punitive damages, in addition to actual damages and the costs of this action, because Lincare's aforesaid actions constituted malice and negligence *per se*, and were wanton, willful, and careless. [*Id.* ¶¶ 33, 39, 40, 41.]

Third Cause of Action

*3 For a third cause of action, Plaintiff alleged civil conspiracy against Airsep, Chart Industries, Lincare, and Linde. [*Id.* at 11.] However, Plaintiff withdrew this claim [Dkt. No. 11 at 2] and thus the court need not consider it.

STANDARD OF REVIEW

When ruling on a motion to dismiss filed pursuant to FED. R. CIV. P. 12(b)(6), the court must presume all facts alleged in the complaint to be true and draw all reasonable inferences in the plaintiff's favor. *Edwards*, 178 F.3d at 243. However, the court is not required to accept the legal conclusions the plaintiff sets forth in her complaint as true. *Id.* at 244. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 666, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A complaint requires more than a statement simply alleging that the defendants illegally harmed the plaintiff. *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The court must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any

legal theory that might plausibly be suggested by the facts alleged.” *Edwards*, 178 F.3d at 245.

DISCUSSION

In their Motions to Dismiss, Defendants assert (1) that Plaintiff failed to plead special damages resulting from her first cause of action for civil conspiracy [Dkt. No. 6 at 3–4; Dkt. No. 9 at 3–4], and (2) that Plaintiff was required under S.C.Code Ann. 15–36–100(B) to submit an expert affidavit as to defective design by a professional engineer contemporaneously with her complaint alleging defective design of the oxygen concentrator machine in the first cause of action against Airsep and Chart Industries. [Dkt. No. 6 at 3–4; Dkt. No. 9 at 4–5.] Plaintiff agreed to withdraw the cause of action for civil conspiracy. [Dkt. No. 11 at 2.] Thus, this claim is dismissed with prejudice. Therefore, the court only need consider Defendants’ argument as to the expert affidavit for Count 1, which Plaintiff claims is unnecessary. [*Id.*]

The South Carolina General Assembly enacted the Frivolous Civil Proceedings Sanctions Act (“FCPSA”) in an effort to prevent the filing of frivolous lawsuits and initiate the investigation and settlement of cases prior to the filing of complaints. *See In re Steinmetz*, Bankruptcy Nos. 07–00628, 07–00579, Adversary No. 10–80177, 2012 WL 4543894 (Bankr.D.S.C. Mar. 18, 2011). S.C.Code Ann. § 15–36–100, a subsection of the FCPSA, requires the contemporaneous filing of an expert affidavit with the complaint in certain lawsuits alleging professional negligence. S.C.Code Ann. § 15–36–100. Defendants argue that Plaintiff was required under § 15–36–100(B) to submit an expert affidavit regarding the alleged defective design of the oxygen concentrator machine at issue because “[t]he design of a device such as an oxygen concentrator is performed by professional engineers who are afforded protection by [§ 15–36–100(B)].” [Dkt. No. 6 at 4.] Plaintiff contends, however, that no expert affidavit is necessary for her defective design claim because “this lawsuit is not being brought against any individual professional engineer,” but “against corporate entities organized in the United States and in foreign European counties.” [Dkt. No. 11 at 2.]

*4 United States District Courts for the District of South Carolina and South Carolina courts have enforced the contemporaneous filing requirement of § 15–36–100(B)

in cases in which the professional alleged to have been negligent was a named defendant,⁴ and in cases alleging professional negligence against the employees of a licensed health care facility in which the health care facility and/or the professionals themselves were named defendants.⁵ However, the question of whether the contemporaneous filing requirement applies in actions against corporations (i.e., non-health care facilities) for the defective design of products by professional engineers employed by those corporations is one of first impression in the State of South Carolina. Thus, the court must interpret the language of § 15–36–100(B) and apply the statute to the facts of this case.

When a federal court interprets a state law, it should apply the statutory construction rules applied by the state’s highest court. *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir.2009). Under South Carolina law, all rules of statutory construction “are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *State v. Sweat*, 386 S.C. 339, 688 S.E.2d 569, 575 (S.C.2010) (quoting *Broadhurst v. City of Myrtle Beach Election Comm’n*, 342 S.C. 373, 537 S.E.2d 543, 546 (S.C.2000)). The words of a statute should be given “their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand that statute’s operation.” *Id.*

“Where [a] 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.” *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 581 (S.C.2000). “It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that [the court should] look beyond the statute’s plain language.” *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693, 695–96 (S.C.2012).

Courts should consider the language of the particular clause being construed, as well as the words of that clause and their meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777, 779 (S.C.1997). Terms should be construed in context, and their meaning should be determined by looking to other terms used in the

statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 505–06 (S.C.Ct.App.2004). “It is the duty of the court ‘to give effect, if possible, to every clause and word of a statute.’” *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955)). Thus, courts should be “‘reluctant to treat statutory terms as surplusage’ in any setting.” *Id.* (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore*, 515 U.S. 687, 698, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995)). Courts should be “‘especially unwilling to do so” when the word or clause at issue occupies a “pivotal” place in the statutory scheme. *Id.*

*5 Specifically, statutes in “derogation of the common law” should be “strictly construed.” *Grier*, 725 S.E.2d at 696. Accordingly, a statute that restricts the common law will “not be extended beyond the clear intent of the legislature.” *Id.* Statutes that “limit a claimant’s right to bring suit” are subject to this rule. *Id.* (citing 82 C.J.S. *Statutes* § 535 (updated June 2013)).

In pertinent part, S.C.Code Ann. § 15–36–100(B) states the following:

... [I] n an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the affidavit (emphasis added).

Section 15–36–100(B) restricts a plaintiff’s common law right to bring a malpractice claim by imposing this simultaneous filing requirement. *Grier*, 725 S.E.2d at 697.

For this reason, its language must be strictly construed. *Id.* The article “a” and the singular noun “professional” in the second clause of the statute clearly and unambiguously demonstrate that the General Assembly intended to apply this filing requirement only to actions brought against individual persons—not to actions brought against the corporations or other business entities by which these individuals are employed—unless those actions are brought against licensed health care facilities. See S.C.Code Ann. § 15–36–100(B).

The exception for health care facilities included in the second clause of the statute further supports the court’s interpretation of the General Assembly’s intent. To hold otherwise, the court would not be giving effect to all words and clauses of the statute. See *Duncan v. Walker*, 533 U.S. at 174. Had the General Assembly intended for § 15–36–100(B) to apply to actions brought against any corporation or business entity (and not solely against individual professional persons), the phrase “or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional ... listed in subsection (G)” would be insignificant and wholly superfluous. If the contemporaneous filing requirement applied to actions brought against any and all corporations or business entities, it could be assumed in the absence of an explicit exception that this requirement would apply to actions against health care professionals as well as the health care facilities by which these individuals are employed because various categories of healthcare professionals are already listed in subsection (G). See S.C.Code Ann. § 15–36–100(G).

*6 Furthermore, the singular language used in the professional engineering licensing and review process guidelines reveals that the characterization of “professional engineer” refers to individual persons. See S.C.Code Ann. § 40–22–222 (2007). Only those “individuals who have graduated in a baccalaureate TAC/ABET accredited curriculum and who have successfully passed the NCEES Principles of Practice and Fundamentals of Engineering Examinations,” in addition to fulfilling many other criteria, may become licensed professional engineers. *Id.* (emphasis added).

The overwhelming majority of cases from South Carolina courts that concern professional engineers refer to individual persons (see, e.g., *Murphy v. South Carolina*

Dept. of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (S.C.2012); *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (S.C.2008); *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 635 S.E.2d 97 (S.C.2006)), and the remainder of those cases refer to professional engineering consulting firms (see, e.g., *Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transp.*, 332 S.C. 197, 503 S.E.2d 761 (S.C.1998)) neither of which applies to Defendants.

Additionally, the other categories of professionals listed in subsection (G), including architects, attorneys at law, land surveyors, occupational therapists, pharmacists, marriage and family therapists, radiological technicians, and veterinarians (among others), each refer to individual persons. S.C.Code Ann. § 15-36-100(G). On the contrary, this subsection does not make reference to any corporations or other business entities. *Id.*

Because the language of § 15-36-100(B) is plain and unambiguous, and a literal application of the words of the statute does not lead “to a result so patently absurd that the General Assembly could not have intended it,” the court has no right to impose a different meaning or to look beyond the statute's plain language for purposes of interpretation. See *Hodges*, 533 S.E.2d at 581; see also *Grier*, 725 S.E.2d at 695-96. However, it may be noted that the court's construction of § 15-36-100(B) is not at odds with the overarching purpose of the FCPSA. Some of the harshest consequences of frivolous litigation, including expensive attorney's fees and other economic and time losses, often affect individual defendant persons more severely than defendant corporations or other business entities because of the potential disparities in financial and human resources between the two.

In its Motion to Dismiss, Lincare cites the District of South Carolina's decision in *Barnes v. Seigler* as support for its argument that Plaintiff must abide by the contemporaneous filing requirement of § 15-36-100(B). [Dkt. No. 9 at 5.] In *Barnes*, the court dismissed a plaintiff's professional negligence claim for failure to file an expert affidavit contemporaneously with his complaint. See *Barnes v. Seigler*, Civil Action No. 5:11-CV-1156-MBS-KDW, 2012 WL 265409 (D.S.C. Jan 30,

2012). However, this case concerned legal malpractice and fraudulent concealment claims against individual persons who were named defendants. See *id.* This case did not concern professional negligence claims against corporations for the actions or inactions of professional engineers employed by said corporations and thus is not directly applicable to the issue at hand. See *id.*

*7 It should also be noted that Defendants do not fall into the health care facility categorical exception that requires contemporaneous filing of an expert affidavit with the complaint because Airsep and Chart Industries do not qualify as health care facilities. Airsep is a manufacturer of medical and industrial air separation equipment (AIRSEP, <http://www.airsep.com> (last visited July 10, 2013)), and Chart Industries is a manufacturer and supplier of standard and custom engineered products and systems for cryogenic and heat transfer applications in the natural and industrial gas industry (CHART, <http://www.chartindustries.com/About-Us.aspx> (last visited July 10, 2013)). Lincare could conceivably be considered a health care facility; however, Lincare's characterization as a health care facility is legally irrelevant because Plaintiff alleged a claim for professional negligence against Airsep and Chart Industries, not against Lincare or its parent company Linde.

CONCLUSION

For the foregoing reasons, the court declares that no affidavit of an expert is necessary under S.C.Code Ann. § 15-36-100 regarding defective design by a professional engineer for Plaintiff's first cause of action. Furthermore, it does not appear that Plaintiff would not be entitled to relief under any legal theory that might plausibly be suggested by the facts alleged. See *Edwards*, 178 F.3d at 245. Therefore, it is hereby **ORDERED** that Defendants' Motions to Dismiss [Dkt. Nos. 6, 9] are **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3549848

Footnotes

- 1 Defendants' Motions to Dismiss are untimely because they were filed after Defendants' answers. FED. R. CIV. P. 12(b) ("A motion asserting any of these defenses must be made *before* pleading if a responsive pleading is allowed.") (emphasis added). However, the court proceeds to consider their motions as Motions for Judgment on the Pleadings in accordance with Rule 12(c). *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1115–16 (7th Cir.1970) ("A motion made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one.") (citing FED. R. CIV. P. 12(c); *United States for Use of E.E. Black Limited v. Price-McNemar Construction Co.*, 320 F.2d 663, 664 n. 1 (9th Cir.1963); *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir.1945)). A party may move for judgment on the pleadings after the pleadings have closed, but must do so early enough to avoid delaying trial. FED. R. CIV. P. 12(c). A motion for judgment on the pleadings is evaluated using the same standard as a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to FED. R. CIV. P. 12(b)(6). *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999).
- 2 Chart Industries, Inc., is the parent company of Airsep Corporation, and is named as Defendant in that capacity.
- 3 Linde, A.G., is the parent company of Lincare Inc., and is named as Defendant in that capacity.
- 4 See, e.g., *Peterson v. Stephens*, Civil Action No. 0:12–1366–GRA–PJG, 2013 WL 1386673 (D.S.C. Mar.7, 2013); *Taylor v. Urch*, Civil Action No. 2:12–cv–1293–JMC–BHH, 2013 WL 756347 (D.S.C. Feb.1, 2013); *Wilder v. Byars*, Civil Action No. 3:12–1743–CMC–JRM, 2013 WL 1181488 (D.S.C. Jan. 30, 2013); *Fordham v. Moore*, Civil Action No. 2:12–974–MGL, 2013 WL 314476 (D.S.C. Jan.28, 2013); *Jamison v. Bamberg*, Civil Action No. 0:11–2245–MGL–PJG, 2012 WL 7656426 (D.S.C. Nov.28, 2012); *Reeves v. McCree*, Civil Action No. 0:11–3112–GRA–PJG, 2012 WL 6674487 (D.S.C. Oct.29, 2012); *Graham v. Ozmint*, Civil Action No. 0:11–2406–MBS–PJG, 2012 WL 6907983 (D.S.C. Oct.5, 2012); *Weil v. Killough*, Civil Action No. 2:12–cv–00856–DCN, 2012 WL 3260395 (D.S.C. Aug.8, 2012); *Straws v. Roach*, Civil Action No. 5:11–132–TMC–KDW, 2012 WL 3157001 (D.S.C. July 13, 2012); *Hornsby v. Hipp*, Civil Action No. 0:11–1749–RBH–PJG, 2012 WL 3230500 (D.S.C. July 10, 2012); *Hernandez v. Barfield*, Civil Action No. 5:11–00641–TLW–KDW, 2012 WL 4344613 (D.S.C. June 29, 2012); *Phomphackdi v. Eagleton*, Civil Action No. 0:10–2633–DCN–PJG, 2011 WL 7063652 (D.S.C. Dec.28, 2011); *Gallipeau v. Correct Care Solutions*, Civil Action No. 3:10–2017–JFA–JRM, 2011 WL 4502043 (D.S.C. Sept. 29, 2011); *In re Steinmetz*, 2012 WL 4543894; *Hays v. Pearlman*, Civil Action No. 2:10–cv–1135–DCN, 2010 WL 4510956 (D.S.C. Nov.2, 2010); *Allen v. Gaskins*, Civil Action No. 0:08–1338–SB–PJG, 2010 WL 1010014 (D.S.C. Feb 18, 2010); *Rotureau v. Chaplin*, Civil Action No. 2:09–cv–1388–DCN, 2009 WL 5195968 (D.S.C. Dec.21, 2009); *H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, Appellate Case No.2012–211167, 2013 WL 2422867 (S.C.Ct.App. June 5, 2013).
- 5 See, e.g., *Hart v. Piedmont Medical*, Civil Action No. 0:13–261–JFA–BM, 2013 WL 1184253 (D.S.C. Feb.21, 2013); *Perry v. South Carolina Dept. of Corrections*, Civil Action No. 4:12–1205–RMG–TER, 2013 WL 681894 (Jan. 22, 2013); *Argot v. Harden*, Civil Action No. 4:11–2755–MBS–TER, 2013 WL 625528 (D.S.C. Jan.10, 2013); *Jeter v. Palmetto Health*, Civil Action No. 3:10–2832–CMC–SVH, 2012 WL 6522093 (D.S.C. Nov.14, 2012); *Sims v. Snyder*, Civil Action No. 0:10–2216–CMC–PJG, 2011 WL 3794156 (D.S.C. Aug.12, 2011); *Jones v. Correctional Care Solutions*, Civil Action No. 0:09–269–HMH–PJH, 2010 WL 2639788 (D.S.C. June 7, 2010); *Eaglin v. Metts*, Civil Action No. 0:08–2547–TLW–PJG, 2010 WL 1051177 (D.S.C. Feb.16, 2010); *Bardes v. Magera*, Civil Action No. 2:08–CV–487–PM D–RSC, 2009 WL 3163547 (D.S.C. Sept. 30, 2009).

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The Supreme Court of South Carolina

Re: Civil Motions Pilot Program

ORDER

Pursuant to the provisions of S.C. Const. Art. V, §4, I find that the expeditious resolution of motions in the Court of Common Pleas would contribute greatly to the timely disposition of pending cases. I also find that due to time and personnel constraints faced by the Judicial Department, administrative action is necessary to ensure that motions are determined as efficiently as possible.

I further find that the Common Pleas Docket Management Task Force has requested that the Supreme Court of South Carolina create a pilot program requiring that parties file and serve supporting authority together with written motions and authorizing the resolution of motions in civil actions without a hearing. Accordingly, a pilot program in the Third and Fifteenth Judicial Circuits is established and the procedures outlined herein are adopted and applicable to all motions filed on or after October 1, 2015.

- 1) A written motion shall be filed and served with a supporting memorandum of law. A supporting memorandum of law is not required if a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose. Affidavits and other materials supportive of the motion shall be filed and served with the motion. In the case of motions to compel discovery, the relevant discovery requests and responses, if any, shall be

filed and served as supporting documentation. These requirements shall not apply to motions made during the course of a trial unless required by the court.

- 2) Except as provided in Rule 59(c), an opposing memorandum of law shall be filed and served not later than 30 days after service of the initial motion. Affidavits and other supporting materials shall be attached.
- 3) The moving party may file and serve a reply memorandum of law not later than 10 days after service of the opposing memorandum, materials, or affidavits. Affidavits and other supporting material shall be attached to the reply. Reply briefs and affidavits are discretionary, but encouraged.
- 4) The court may extend or expedite the briefing schedule in its discretion. The time periods contained in this order may be extended by agreement of the parties if the total time for briefing does not exceed 75 days from the date the initial motion is served. If a party seeks to extend the total briefing period beyond 75 days, the party shall request an extension in writing from the court, and may do so with or without consent of the opposing party. Extensions shall be granted only for good cause shown.
- 5) Unless an exception is granted by the court, no initial or opposing memorandum shall exceed 35 double-spaced pages or 15 double-spaced pages in the case of any reply. This page limitation is exclusive of affidavits and other supporting documentation. Parties shall refer to specific page numbers in citing to affidavits, exhibits, or other written materials provided in support of legal or factual positions. A party may not file a deposition or other transcript without specific reference in writing to the line and page numbers supportive of the particular points at issue in the motion or memoranda.
- 6) After the submission of all timely filed briefs, the trial court may grant oral argument in its discretion or may rule without further notice on the written filings without scheduling oral argument. Oral argument shall be held on all dispositive motions unless the parties agree that no such argument is necessary. Motions pursuant to Rule 59(e) may be decided on briefs without a hearing.

I further find that, in some circuits, motions have been pending for more than 6 months, and sometimes up to a year. The reason for this delay, in most instances, is that it has become the practice in the civil courts of this State to conduct a hearing before a motion is determined. Limited terms of court are available for disposition of motions and such hearings are often time-consuming, expensive, and unnecessary. This burdens the civil court system and delays justice to litigants.

IT IS HEREBY ORDERED that all Circuit Court Judges and Masters in Equity in the pilot circuits reduce the number of motions pending on the civil dockets. Within 15 days of the date of this Order, the Clerks of Court in the Third and Fifteenth Judicial circuits shall provide the designated Chief Administrative Judges a list of motions that are currently pending. The list shall contain the title of the motion, the type of case, the date the motion was filed, and the names of the attorneys or self-represented litigants of record. The Chief Administrative Judge and the Judges assigned to the civil terms of court in the pilot circuits shall work with the Clerks of Court to dispose of pending motions and to thereafter resolve newly-filed motions, with memoranda and supporting materials if desired within 90 days of this order, unless the trial court has already scheduled a hearing on the motion. This rule is not intended to delay the disposition of any motions already scheduled for a hearing.

IT IS FURTHER ORDERED that as jury and nonjury cases settle during any term of court, and during chambers weeks, the Clerks of Court in the Third and Fifteenth Judicial Circuits shall provide judges assigned to the circuit with motions and any accompanying memoranda or other support for resolution without a hearing subject to the provisions of Paragraph 6 above. Special emphasis may be placed on the oldest

pending motions, emergency or injunctive motions, or on motions affecting upcoming trials.

IT IS FURTHER ORDERED that all motions filed on or after October 1, 2015, be disposed of within 90 days of the date of filing, absent extraordinary circumstances. The Clerks of Court in the pilot counties shall submit reports to the Supreme Court every three months, beginning three months after the date of this Order. The report shall contain the status of all pending motions, including the number pending, the date filed, and if requested by the Chief Justice or Court Administration, the reason any motion pending over 90 days has not been decided.

This order is effective immediately and shall remain in effect until amended or revoked by subsequent Order of the Chief Justice or the Supreme Court.

IT IS SO ORDERED.

s/Jean Hoefer Toal
Jean Hoefer Toal
Chief Justice

September 10, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Michael Marceda and Cheryl Marceda,	)	CIVIL ACTION NO.: 2019-CP-26-0345
	)	
Plaintiffs,	)	DEFENDANT C3 STUDIO, LLC'S
	)	BRIEF IN OPPOSITION TO
v.	)	PLAINTIFFS' MOTION TO
	)	ALTER OR AMEND
Winchester Oceanview Development, Inc.,	)	
Sands Building Group, Inc., C3 Studio, LLC,	)	
Sands Realty Group, Inc., Jonathan B.	)	
Dickerson, and John Woodward,	)	
	)	
Defendants.	)	

Defendant C3 Studio, LLC ("C3 Studio") hereby files this Brief in Opposition to Plaintiffs' Motion to Alter or Amend (the "Plaintiffs' Motion"), which motion seeks the reversal of this Court's May 8, 2019, Order Granting C3 Studio's Motion to Dismiss (the "Court's Order") due to Plaintiffs' failure to attach to their Complaint the affidavit of an architect, as required by the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), S.C. Code Ann. § 15-36-10, *et seq.* For the reasons discussed herein, C3 Studio respectfully submits that Plaintiffs' Motion should be denied.

STANDARD OF REVIEW

Plaintiffs' Motion fails to present any colorable standard governing the Court's analysis, so C3 Studio does so herein. "The purpose of Rule 59(e), SCRCp, to alter or amend the judgment, is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)).

No reported South Carolina case decision specifically addresses when a Rule 59 motion to alter a judgment may be granted, but the Fourth Circuit Court of Appeals has done so with respect to this rule's federal counterpart, FRCP 59(e). Federal court decisions instruct that a court

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may alter or amend its prior judgment under FRCP 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available previously; or (3) to correct a clear error of law or prevent manifest injustice. *See, e.g., Zinkland v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005).

Of equal importance here are the grounds upon which Plaintiffs' Motion may not be granted. A party cannot use Rule 59(e) to "rehash the same arguments and facts previously presented" or to raise new arguments. *Dockins v. Benchmark Communications*, 180 F.R.D. 294, 295 (D.S.C. 1998), *aff'd*, 176 F.3d 745 (4th Cir. 1999). Stated otherwise, "a motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court rethink what the Court has already thought through—rightly or wrongly." *Id.* (citing *United States v. Dickerson*, 971 F.Supp. 1023, 1024 (E.D.Va. 1997)). Likewise, a Rule 59(e) motion may not be used to raise arguments which could have been raised before the judgment was issued, or "to enable a party to complete presenting his case after the court has ruled against him." *Pacific Insurance Co. v. American National Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998); *see also C.A.H. v. L.H.*, 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993); *Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009); *Crary v. Djebelli*, 321 S.C. 38, 43, 467 S.E.2d 128, 131-32 (Ct. App. 1995), *rev'd on other grounds*, 329 S.C. 385, 496 S.E.2d 21 (1998).

ARGUMENT & RECITATION OF AUTHORITY

I. Plaintiffs' Motion Presents No Appropriate Grounds For Altering, Amending, Or Reconsidering This Court's Order.

When viewed in light of the appropriate standard of review, Plaintiffs' Motion must fail, because Plaintiffs have not demonstrated any of the appropriate bases for the relief sought. Plaintiffs have not even referenced any intervening change in controlling law or new evidence. Moreover, while Plaintiffs' Motion outlines Plaintiffs' position that the Court's Order is

incorrect, it makes no reference to correcting a clear error of law or preventing manifest injustice; a mere disagreement with an Order (which exists on every court order) is a wildly insufficient basis for reversal thereof. Therefore, Plaintiffs' Motion has failed to present grounds for the relief sought.

Nevertheless, C3 Studio briefly addresses herein the (insufficient) arguments contained in Plaintiffs' Motion.

II. As Already Determined By This And Several Other Courts, The Act Applies To Architectural Firms.

Plaintiffs' first argument – that the Act applies to individual architects, but not architectural firms is both (1) improperly raised in Plaintiffs' Motion, and (2) incorrect.

A. Plaintiffs are prohibited from rehashing their argument that the Act does not apply to C3 Studio.

The precedent cited above is clear: Rule 59 motions are not to be used merely to: (1) rehash arguments already presented; (2) request the Court to rethink its decision; (3) raise arguments which could have previously been raised; or (4) enable a party to continue presenting its case. Plaintiffs did not submit a brief in opposition to C3 Studio's Motion to Dismiss, which was filed and served 45 days before the hearing, but before the hearing, Plaintiffs' counsel raised the issue of the applicability of the Act informally by email to defense counsel, which is why Defendant filed its Brief on this issue. Plaintiffs' counsel fully argued this issue at the hearing, and the court specifically addressed it at the hearing and in its order. Therefore, Plaintiffs are simply (1) rehashing their same argument, (2) requesting the Court to rethink its decision, (3) raising an argument *actually* raised previously, and (4) seeking to continue presenting their case. The Court should not entertain this blatant disregard of the rules of civil procedure.

B. The Act applies to C3 Studio.

As to the merits of this contention, C3 Studio craves reference to its position, as previously stated in its Supplemental Memorandum in Support of its Motion to Dismiss, and in oral argument, which disposes of same. C3 Studio addresses herein only the few points argued for the first time in Plaintiffs' Motion (even though these points should have been raised previously).

Plaintiffs have pointed to a subsection of the Act referencing the protected "health care facility," to argue that the converse must be true for the architectural industry (*i.e.*, that architectural firms must not be covered, because the Act does not similarly reference same). This contention ignores the point already made in this Court's Order: "Section (G) of the Act states that its affidavit requirement applies to the architecture 'profession.'" (Order on Def. C3 Studio, LLC's Mot. To Dismiss, p. 4, May 8, 2019) (emphasis in original). This Court has already, correctly, found that the architecture "profession," not just the individual architects, is covered by the Act. As discussed further below, several other circuit court Orders have ruled similarly. Moreover, Plaintiffs' argument exhibits the fallacy of the converse. The Act's reference to "health care facilities" is not intended to preclude protection for other industries' firms/facilities. Instead, it is explained easily by the unique nature of the healthcare industry, where doctors regularly practice inside hospitals which do not actually employ them (*cf.*, architectural firms which directly employ their affiliated architects). In this scenario, the hospital could be sued for the actions of a doctor which it does not employ. This is a unique characteristic of the healthcare industry warranting the Act's specific attention; the legislature merely wanted to ensure that the Act's protections of the firms employing the architects, attorneys, etc., were equally available to the facilities/hospitals housing, but not employing, doctors. The location of the Act's reference to

"health care facility" further supports this common-sensical explanation. This reference is not contained in subsection (G), the list of protected "professions;" rather, it is contained in subsection (B), the paragraph enumerating the contemporaneous affidavit requirement, as a supplement to subsection (G)'s list, for the reasons set forth above.

C. Plaintiffs' reliance on *Grier v. AMISUB of S.C., Inc.*, is misplaced.

Unless and until the Court requests otherwise, C3 Studio will refrain from addressing all points set forth in the nearly 4-page block quote in Plaintiffs' Motion. However, C3 Studio notes that Plaintiffs' reliance on the *Grier* case is misplaced, because it assumes a condition precedent which this Court has already rejected. Plaintiffs contend that C3 Studio has not made the necessary showing "that applying the words of the Act literally would lead to a result so patently absurd that the General Assembly could not have intended it." (Pls.' Mot. to Alter or Amend, p. 8, May 20, 2019). However, this argument assumes that this Court, in granting C3 Studio's Motion to Dismiss, ventured outside the plain language of the Act. This is not the case; this Court instead correctly found that the language of the Act necessitates its application to companies and individuals alike. (Order on Def. C3 Studio, LLC's Mot. To Dismiss, p. 4, May 8, 2019).

D. Prior, similar orders, and common sense, prove that the Court's Order is not in clear error, nor does it result in manifest injustice.

The numerous decisions in line with this Court's Order (several attached hereto as Exhibit "A") prove that the Court's Order is not in clear error, nor does it result in any manifest injustice. *See, e.g.*, Ex. B, p.3-9 (where Judge Sprouse ordered, in great detail, that the Act applies to firms); Ex. B, p.12-13 (where Judge Hyman found that applying the Act to individuals, but not firms, produces an absurd result); Ex. B, p. 17 (Judge Nicholson); Ex. B, p.23 (Judge

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Newman); Ex. B, p.26 (Judge Dukes); Ex. B, p.32 (Judge Coltrane); Ex. B, p.36 (Judge Miller); Ex. B, p.40 (Judge Hughston).

Moreover, Plaintiffs are required to eventually support their professional negligence claims with expert testimony. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002). Thus, and by following the Act's mandate, the Court's Order merely requires that Plaintiffs procure such expert support now. In doing so, the Court's Order both promotes judicial economy, and protects C3 Studio from frivolous litigation (*i.e.*, the primary purpose of the Act).

Logically, if C3 Studio is to be held vicariously liable for the actions of its architects, it should be provided the same statutory protections afforded those architects. Forcing this state's professionals to choose between the protections of the corporate structure or the protections of the Act, as Plaintiffs would have this Court do, would be nonsensical.

III. The Court Was Not Prohibited From Considering C3 Studio's Supplemental Memorandum In Support Of Its Motion To Dismiss, Nor Was Plaintiff Prejudiced By The Timing Of Its Filing.

Plaintiffs next argue that this Court was prohibited from considering C3 Studio's Supplemental Memorandum, because it was untimely. This argument was rejected by the Court at the hearing, and is likewise improperly included in Plaintiffs' Motion, and without merit.

A. Plaintiffs are prohibited from re-arguing the timeliness of C3 Studio's Supplemental Memorandum.

Plaintiffs' Motion specifically states that this argument "was raised by Plaintiffs' counsel during the hearing." (Pls.' Mot., p. 9). Therefore, by Plaintiffs' own admission, they are prohibited from raising this argument in Plaintiffs' Motion. *Dockins*, 180 F.R.D. at 295 (a party cannot use a Rule 59 motion to "rehash the same arguments and facts previously presented").

- B. C3 Studio was not prohibited from filing its Supplemental Memorandum, nor was this Court prohibited from considering same.

Under the South Carolina Supreme Court's Order regarding the Civil Motions Pilot Program (the "CMPP Order") supporting memoranda are required if an explanation of the motion is omitted therefrom. Such was not the case in C3 Studio's 4-page Motion to Dismiss; that motion contained a detailed explanation of C3 Studio's position. As discussed above and below, C3 Studio thereafter became aware that Plaintiffs intended to argue that the Act does not apply to C3 Studio, because it is a company. Plaintiffs' argument necessitated the Supplemental Memorandum, which C3 Studio filed and served, so that the Court would be fully briefed on the issues, which were fully argued at the hearing. Importantly, the need for a "Supplemental" Memorandum, which Plaintiffs now attack as being untimely, would have been obviated had Plaintiffs filed a Memorandum in Opposition to C3 Studio's Motion to Dismiss, to which C3 Studio could have submitted a Reply Memorandum. Regardless, there is no prohibition in the CMPP Order against filing supplemental memoranda, nor are there time constraints for doing so.

Moreover, paragraph 4 of the CMPP Order states that this Court may, at its discretion, extend the deadlines set forth therein. This Court's discretionary powers allowed it to consider C3 Studio's Supplemental Memorandum, and the Court does not owe Plaintiffs their demanded explanation of its "non-compliance with the Supreme Court's Order." (Pls.' Mot., p. 10).

- C. Plaintiffs were abundantly aware of C3 Studio's position, and thus were not prejudiced by the timing of C3 Studio's Supplemental Memorandum.

Notwithstanding the above, the email exchange between counsel, outlined below and attached hereto as Exhibit "B", establishes that Plaintiffs were abundantly aware of C3 Studio's position that the Act applied to companies.

On March 26, 2019, Plaintiffs' counsel questioned whether the Act applies to architectural firms, and stated that, if C3 Studio had orders ruling that it did, such "would, of course, be helpful in attempting to save the court some time" (Ex. B, p. 2). That same day, counsel for C3 Studios replied, attaching two such orders, explaining C3 Studio's position that the Act clearly applies to architectural firms, and advising that Plaintiffs' position would lead to an absurd result. (Ex. B, p. 1). With this knowledge, Plaintiffs were not prejudiced by the timing of C3 Studio's Supplemental Memorandum. Notably, Plaintiffs made no effort to discuss or inquire further into C3 Studio's position before the hearing, which occurred nearly one month later. Instead, Plaintiffs chose to proceed to that hearing without submitting a brief of their own (which would have elicited a reply), and now complain of the timeliness of a supplemental memorandum of which they were already substantively aware. In sum on this issue, Plaintiffs chose not to brief the issue of the applicability of the Act before the hearing, and therefore argued this issue on the record for the first time at the hearing. Defense counsel provided Plaintiffs' counsel the substance of their position well before the hearing, and then briefed the defense position for the Court's benefit prior to the hearing. Plaintiffs were not surprised by Defendants' argument in its Memorandum, as this issue was first raised by Plaintiffs.

IV. The Court's Order Was Appropriately Based On All Evidence Necessary For Same.

Lastly, Plaintiffs complain of three factual findings allegedly unsupported by evidence: (1) that C3 Studio's CEO is Greg Huddy, (2) that Greg Huddy is an architect, and (3) that Greg Huddy is licensed in South Carolina. (Pls.' Mot., p. 10).

As to the findings that Mr. Huddy is an architect licensed in South Carolina, Exhibit A to C3 Studio's Motion to Dismiss, filed with this Court, is Mr. Huddy's South Carolina architectural license. Therefore, the evidence supporting this factual finding is in the Court's

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record. Moreover, Rule 201, SCRE, allows this Court to take judicial notice of this publicly-accessible record.

As to the finding that Mr. Huddy is the CEO of C3 Studio, Plaintiffs do not explain the significance of or purported reliance on this finding, nor does C3 Studio see any.

CONCLUSION

For the foregoing reasons, C3 Studio submits that this Court's Order was correctly decided and properly grounded, and requests that Plaintiffs' Motion be denied. In so doing, a new deadline for Plaintiffs to Amend their Complaint to attach the statutorily-required affidavit of a qualified professional architect must be established, lest Plaintiffs' Complaint be dismissed.

WILKES LAW FIRM, P.A.

June 7, 2019

s/ J. Alexander Joyner
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Attorneys for Defendant C3 Studio, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON,)
Shirley Collins,)
Plaintiffs,)
vs.)
Harrison Investments and Technological)
Enterprises, Inc.; John Harrison; Ronald C.)
Bond, (individually and d/b/a C&D)
Specialty Contractors); Cadworks)
Corporation; Cottingham & Associates,)
Inc.; Bill Gwinn, (individually and d/b/a)
Creative Exteriors); Glenn Gatewood;)
Travis James; Krupps Karpentry, LLC;)
Dean Krupp; Overholt Truss Co., Inc.;)
Barrett Reese; Ronald Stancil, (individually)
and d/b/a Ronald M. Stancil Masonry);)
Sunbelt Painting; Randall Willis,)
(individually and d/b/a Willis Plumbing)
Company); Paul Wigington; HK)
Construction and Service, LLC; Brian Mize;)
and John Does 1-10,)
Defendants.)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No.: 2016-CP-04-01577

**ORDER GRANTING DEFENDANT
COTTINGHAM & ASSOCIATES, INC.'S
MOTION TO DISMISS**

This matter came before the court for a hearing on Defendant Cottingham & Associates, Inc.'s ("Cottingham") Motion to Dismiss Plaintiff's Complaint. This Motion was argued before the Court on February 2, 2017 and taken under advisement. The Court allowed supplemental briefing after the hearing, which the parties submitted.

FINDINGS OF FACT

Defendant provides engineering services in the upstate South Carolina area. Cottingham possesses a Certificate of Authorization under S.C. Code Ann. § 40-22-250 permitting it to provide engineering services in South Carolina, which are provided by Richard Cottingham, P.E.

Plaintiff filed its Complaint on July 12, 2016, alleging only a negligence cause of action

against Cottingham, contending that Cottingham was negligent in providing engineering services. (Compl. ¶ 63). Plaintiff did not attach to her Complaint an affidavit of an expert to support her professional negligence cause of action against Cottingham.

CONCLUSIONS OF LAW

A. Plaintiff's Claims against Cottingham are Dismissed Because They Are Dependent upon a Showing of Professional Negligence and Were Not Supported with the Required Expert Affidavit.

Plaintiff asserts a claim of professional negligence against Cottingham, but did not attach an affidavit of a licensed professional engineer to support its claim against Cottingham.

The Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et. seq.* (the "Act") applies to actions "for damages alleging professional negligence" against engineers. *See* S.C. Code Ann. §§ 15-36-100(B) & -100(G)(6) & (17). In such actions, "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) (emphasis added); *see also* S.C. Code Ann. § 15-36-100(C)(1) (explaining that, except under inapplicable circumstances, the affidavit must be filed contemporaneously with the complaint). 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).

Plaintiff's negligent engineering allegation falls within the purview of the Act's affidavit requirement, because Plaintiff must prove that the licensed engineer breached the standard of care for a professional engineer. Therefore, Plaintiff was statutorily required to investigate Plaintiff's engineering claim before suing Cottingham, and to evidence such investigation by an engineer's affidavit filed contemporaneously with Plaintiff's Complaint. Plaintiff failed to meet this requirement.

B. The *Oakman* Decision is Not Binding on this Court.

Plaintiff argues that she need not meet the affidavit requirement, because she has sued a corporation, not an individual engineer. Plaintiff relies on *Oakman v. Lincare, Inc.*, C.A. No. 1:13-cv-00428-JMC, 2013 U.S. Dist. LEXIS 96697 (D.S.C. July 10, 2013), which is a Federal District Court unpublished decision, and is not binding precedent on this Court. *Oakman* arose from a wrongful death, product defect suit against the manufacturer of a medical device and the suppliers of the device. (See *Oakman* at *2-3.) The plaintiff in *Oakman* asserted UCC breach of warranties and strict liability claims against the defendants. (See *Oakman* at *7-8.) As noted by the court in *Oakman*, the circumstances at hand did not involve a “professional engineering consulting firm.” (*Oakman* at *18.) Instead, the defendant was a manufacturer, which apparently claimed that some tangential engineering would typically have been performed to develop the product at issue. (See *Oakman* at *10.) The distinction between claims against manufacturers and those against professional engineering firms is significant in that claims against professional engineering firms like Cottingham fall squarely within the realm of cases intended to be addressed by the Act.

Stated simply, in *Oakman*, the court was faced with deciding whether the Act should be extended outside of the realm of professional services firms to product defect claims against sellers and manufacturers. Conversely, the issue before this Court is whether, read in its entirety and in light of the Act’s intent, the Act’s affidavit requirement applies when a plaintiff sues a professional engineering firm alleging professional negligence. For the following reasons, I find that the Act applies to a corporation like Cottingham, which provides professional engineering services, like those complained of in this action:

- 1. In Light Of The Intent Of The Act And South Carolina Licensing Laws Concerning The Practice Of Engineering Through A Firm, The Act Applies To Professional Negligence Claims Against Professional Engineering Firms.**

“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). When a statute is in derogation of common law, “it must be strictly construed and not extended in application beyond clear legislative intent”; however, “the statute must also be read as a whole and in harmony with its purpose” and “. . . as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (emphasis added). “Any ambiguity in a statute must be resolved in favor of a just, equitable, and beneficial operation of the law.” *Sweat*, 386 S.C. at 350, 688 at 575.

a. The Act’s Broad Title And Application To The Engineering “Profession” Evidence That Claims Against Professional Firms Fall Within The Act’s Purview.

Section 15-36-100 of the Act is entitled “Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.” S.C. Code Ann. § 15-36-100 (emphasis added). Moreover, Section (G) of the Act states that its affidavit requirement applies to the engineering “profession.” *See* S.C. Code Ann. § 15-36-100(G) (stating: “this section applies to the following professions: . . . (17) professional engineers”) (emphasis added). These portions of the Act evidence that claims alleging professional negligence against an engineering firm fall within the purview of the Act.

b. In Light Of South Carolina Licensing Laws Which Eliminate Any Distinction Of Consequence Between The Professional And The Firm, The Act Applies To Claims Asserted Against Professional Services Firms.

This Court’s interpretation of the Act’s requirement of a contemporaneous affidavit “in an

action for damages alleging professional negligence against a [licensed] professional,” is guided by South Carolina’s engineering licensing laws, S.C. Code Ann. § 40-22-2, *et. seq.* (the “Licensing Statute”), which make clear that, although a plaintiff may choose to sue the engineering firm, such claims are, in reality, nothing more than claims asserted against the professional services of an individual licensed engineer practicing through the firm.

The Licensing Statute permits an engineer to affiliate with a firm, but only if the firm possesses a certificate of authorization. *See* S.C. Code Ann. § 40-22-250(A). As described by the Licensing Statute, this certificate of authorization permits the engineer to practice “through a firm.” *See* S.C. Code Ann. § 40-22-250(A); *see also* S.C. Code Ann. § 40-22-250(B) (describing the requirements for an engineer to offer professional services “through a firm”); S.C. Code Ann. § 40-22-260(C) (setting forth additional requirements where a professional offers professional services “through a firm”). The Licensing Statute does not confer upon the firm the ability to perform professional engineering services without the involvement of a licensed professional; rather, a licensed professional must be involved with, and responsible for, such services. *See* S.C. Code Ann. § 40-22-250(B)(2) (describing that all professional engineering services performed in the firm’s name must be performed by licensed professional engineers); *see also* S.C. Code Ann. § 40-22-250-B(1) (providing that, as a prerequisite to obtaining a certificate of authorization, a firm must designate a licensed professional as being responsible for all professional services rendered). In sum, when professional services are performed by virtue of a professional’s association with a firm, the professional services nonetheless are rendered by, and traceable directly to, a licensed engineer with professional responsibility for such services.

In addition to the fact that the firm is nothing more than a corporate form through which professional services are rendered by licensed professional engineers, the Licensing Statute blurs

the distinction between the firm and the professional. Specifically, the Licensing Statute provides that “disciplinary action against a firm must be administered in the same manner and on the same grounds as disciplinary action against an individual.” S.C. Code Ann. § 40-22-250(E). Moreover, the Licensing Statute specifically provides that the firm may be held liable for the professional services performed by the engineers practicing through it, and that the individual licensee “is not relieved of responsibility for professional services” merely because such services are performed through a firm. S.C. Code Ann. § 40-22-250(E).

Taken together, the General Assembly’s repeated use of the phrase “through a firm” when describing the services rendered by a professional affiliated with a firm, its requirement that licensed professionals perform all engineering services offered by the firm, and its statutorily rendering the firm responsible for the acts of the professional, evidence that, under South Carolina law, no distinction of consequence exists between the professional and the firm. Thus, at their core, claims against a professional engineering firm are claims “against a professional licensed by . . . the State of South Carolina,” S.C. Code Ann. § 15-36-100(B), and such claims fall within the purview of the Act.

2. This Court Should Refuse To Adopt A Statutory Interpretation Which Excludes From The Act’s Purview Claims Against Professional Engineering Firms, Because The Same Would Lead To An Absurd Result Completely Antagonistic To The Act’s Intent.

“However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.” *Kiriakides v. UA Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect. *Id.*

The Act was implemented by the South Carolina General Assembly as part of 2005 S.C. Acts 32 (“Act 32”). As described in Part I of Act 32, the laws contained therein shared the common purpose of “tort and other civil action reform.” In addition to implementing new laws and modifying existing tort laws, such as the elimination of joint and several liability where a defendant is determined to be less than 51% at fault for the alleged damages, Act 32 also implemented and modified numerous measures tailored specifically to protecting professionals, including laws establishing: (1) liability caps on medical malpractice claims, (2) pre-litigation requirements for medical malpractice claims, and (3) limitations on the liability of members of professional committees (including, specifically, professional engineer committees). Stated simply, the changes contained in Act 32 were intended to reform and limit the civil liability exposure of professional service providers in South Carolina.

An interpretation excluding professional firms from the Act would render the Act largely nugatory by narrowing its protections to only those few professionals who practice only in their individual name, without the protection of a corporate or business form. In other words, such an interpretation would lead to an absurd result. For instance, as to engineers specifically, because the Licensing Statute renders the firm through which the engineer practices statutorily responsible for the professional’s actions, a plaintiff which cannot obtain an affidavit supporting its professional malpractice claim can simply circumvent the Act by suing the firm, thereby embroiling the firm (irrespective of its size or resources) in litigation and exposing its members/shareholders to a drain in resources that the Act is intended to prevent. South Carolina’s corporate laws allow professionals to operate in a corporate form to enjoy the benefits of pooling capital, as well as reducing personal risk in certain circumstances. Adopting an interpretation of the Act which renders the Act inapplicable to professional firms would be deleterious to

professional corporate formation and would serve no useful purpose. No logical reason exists for the Act to protect individual professionals and not professional corporations. Accordingly, interpreting the Act to apply only to claims against individual professionals would be an absurd result, an interpretation that this Court refuses to adopt.

3. This Court Interprets The Act In Way Which Comports With Equal Protection Principles, As Opposed To One Which Strains And/Or Violates The Same.

All statutes are “presumed constitutional and, if possible, will be construed to render them valid.” *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2009). When interpreting a statute, a “possible constitutional construction must prevail over an unconstitutional interpretation.” *Id.*

“The constitutional guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978); *see also* S.C. Const. art. I, § 3 (containing South Carolina’s Equal Protection Clause). The Equal Protection Clause applies to both natural persons and business entities. *See generally Southern Bell Tel. & Tel. Co. v. Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985) (applying the equal protection clause to a business entity, and finding an ordinance unconstitutional).

The requirements of the Equal Protection Clause are satisfied if: “1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis.” *Samson v. Greenville Hospital Systems*, 295 S.C. 359, 364, 368 S.E.2d 665, 666 (1988). While great deference is provided to the legislature, a classification must not be arbitrary. *See, e.g., Robinson v. Richland County Counsel*, 293 S.C. 27, 31-32, 358 S.E.2d 392, 395 (1987).

Applying the Act to professional firms comports with Equal Protection principles by treating similarly situated professionals and professional firms uniformly, despite the technical fact that professional firms are corporate business entities through which licensed professionals practice. Conversely, an interpretation which excludes professional service firms from the Act's purview arbitrarily and inexplicably: (1) excludes professional service firms from the class of protected persons; and (2) treats members of the class of individual professionals differently based solely on whether or not the professional practices through a firm.

CONCLUSION

For the reasons stated above, Cottingham's Motion to Dismiss Plaintiff's Complaint is GRANTED, subject to the following: Plaintiff is allowed the right to file an amended complaint within thirty (30) days after the entry of this Order, attaching an affidavit in compliance with the requirements of S.C. Code Ann. § 15-36-100. If Plaintiff does not so amend within thirty (30) days, Cottingham is dismissed from this case without prejudice.

IT IS SO ORDERED.

[Judicial signature page to follow]

Anderson, South Carolina



Anderson Common Pleas

Case Caption: Shirley Collins VS Harrison Investments and Technological Enterprises Inc , defendant, et al
Case Number: 2016CP0401577
Type: Order/Dismissal

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2017-03-03 15:45:18 page 10 of 10

ELECTRONICALLY FILED: 2017-03-03 15:45:18 JUDGE: 2752 NP/AN/H/HTS/CNC/COMMON/PLEAS/SC/AS/16/2016CP0401577

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	THE FIFTEENTH JUDICIAL CIRCUIT
JAMELAH BARICH,	)	CASE NO.: 2015-CP-26-8170
	)	
Plaintiff,	)	ORDER GRANTING ROWE
	)	PROFESSIONAL SERVICES COMPANY'S
v.	)	MOTION TO DISMISS
	)	
HORRY COUNTY, ROWE	)	
PROFESSIONAL SERVICES	)	
COMPANY, LEATHERS &	)	
ASSOCIATES, INC., AND GENERAL	)	
RECREATION, INC.,	)	
	)	
Defendants.	)	

This matter came before the Court on Rowe Professional Services Company's ("Rowe") Motion to Dismiss Plaintiff's Amended Complaint. Counsel for Plaintiff and Rowe were present at the hearing on January 4, 2017, and arguments were heard from both sides. For the reasons set forth herein, Rowe's Motion to Dismiss is **GRANTED** without prejudice.

FACTUAL BACKGROUND

Per the allegations of the Amended Complaint, Plaintiff was injured while attempting to operate a piece of playground equipment at the Palmetto Adventure Land Playground in Myrtle Beach ("the Playground"). The Complaint alleges that Rowe, along with other Defendants, "participated in and oversaw the concept, design, construction, and building" of the Playground. (Complaint Para 11). The Amended Complaint contains a negligence and gross negligence cause of action against Rowe for, *inter alia*, failing to supervise the construction of the premises and "negligently designing said premises." (Complaint Para. 12).

Rowe is a registered engineering firm and provided professional services in conjunction with the development and construction of the Playground. Rowe has moved to dismiss Plaintiff's claims due to Plaintiff's failure to comply with the expert affidavit requirements of the

South Carolina Frivolous Civil Proceedings Sanction Act found at S.C. Code Ann. § 15-36-100 (2016). Pursuant to the Act, an affidavit from an expert must be filed contemporaneously with any complaint alleging damages arising from alleged professional negligence of an engineer. The affidavit “must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” S.C. Code § 15-36-100(B). If a proper affidavit is not filed . . . and the defendant against whom an affidavit should have been filed alleged, 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 Ann. § 15-36-100(C)(1).

FINDINGS

The Court finds that Rowe is a professional engineering firm which provided professional services in conjunction with the design, development and construction of the Playground. The Court also finds that Plaintiff’s claims are predicated upon Rowe’s provision of professional services. Therefore, the Court concludes that the provisions of Section 15-36-100 apply to the claims asserted by Plaintiff against Rowe. Accordingly, Plaintiff failed to comply with the statutory requirements, and Plaintiff’s claims against Rowe are hereby dismissed for failure to state a claim upon which relief may be granted.

Plaintiff argues that the expert affidavit requirements are inapplicable to this case because Rowe is not a “professional” pursuant to Section 15-36-100(B). Plaintiff argues that the statute only applies to claims against individuals, and does not encompass engineering firms such as Rowe. This interpretation ignores the purpose of Section 15-36-100. The purpose of the Act is to limit frivolous lawsuits, not to limit the Act’s protections to only individual unincorporated professionals. Design professional firms are just as susceptible to frivolous lawsuits for alleged acts and/or omissions as individuals. Moreover, accepting Plaintiff’s interpretation of Section 15-36-100 would negate the statute’s effectiveness and allow Plaintiffs and Third-Party Plaintiffs

to avoid the statute's affidavit requirement by choosing to file suit against a professional entity, rather than the individual professional as a means to end-run around the statute's requirements. Such an interpretation produces an absurd result and frustrates the purpose the Act. See Ranucci v. Crain, 409 S.C. 493, 500, 763 S.E.2d 189, 192-93 (2014) (stating statutory language must be construed in light of the intended purpose of the statute and should not be construed in a way which leads to an absurd result or renders it meaningless.) Rowe is a licensed professional engineering firm in South Carolina; accordingly, the requirements of Section 15-36-100(B) apply to Plaintiff's claims filed against Rowe.

Plaintiff further argues that it has not asserted any claim for "professional negligence," but rather, has only alleged "general negligence" against Rowe. The Court finds this argument unpersuasive. As set forth hereinabove, Rowe is a licensed professional entity in the State of South Carolina who provided professional services in conjunction with the design, development, and construction of the Playground. Any claim of negligence against Rowe with respect to the Playground is predicated upon Rowe's provision of professional services. Although the term "professional negligence" does not appear in the Amended Complaint, Plaintiff's allegations against Rowe spring from allegations of an act or omission during the performance of Rowe's professional services. Moreover, the Amended Complaint sets forth claims of negligent design against Rowe; such a claim will necessitate expert testimony and is indicative of a claim for professional negligence. Accordingly, Plaintiff's failure to file an expert affidavit is fatal to its claim against Rowe.

Based on the findings set forth above, and viewing the facts in the light most favorable to the non-moving party, Rowe's Motion to Dismiss is **GRANTED** without prejudice.

IT IS SO ORDERED

The Honorable Larry B. Hyman
Presiding Judge
Fifteenth Judicial Circuit

January __, 2017

_____, South Carolina



Horry Common Pleas

Case Caption: Jamelah Barich VS Horry County , defendant, et al
Case Number: 2015CP2608170
Type: Order/Dismissal

So Ordered

s/ Larry B. Hyman 2152

Electronically signed on 2017-11-16 10:36:00 page 5 of 5

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

3 CHISOLM STREET HOMESOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LLC,
MURRAY SCHOOL PARTNERS, LLC,
GENOA CONSTRUCTION SERVICES, INC.,
MASTERPIECE MILLWORK, INC., ALLEN
ROPER, JR. d/b/a MASONRY BRICKWORK,
CAROLINA ROOFING SYSTEMS, INC., and
LACY PAINTING, RESTORATION
SERVICES and GENESIS RESTAURANT
PROPERTIES, LLC,

Defendants.

GENOA CONSTRUCTION SERVICES, INC.,

Third-Party Plaintiff,

vs.

THE FOX STEEL COMPANY, CAROLINA
SERVICES, INC., LESCO RESTORATION,
INC., FERST PLASTERING, INC.,
CHARLESTON GLASS & MIRROR
COMPANY, 3D RENOVATIONS,
WILLIAMS MECHANICAL,
MASTERCRAFT INTERIOR & EXTERIOR,
BONIFAY MASONRY, COASTAL GLASS
AND BLOCK, ADAMS DAVIS &
PARTNERS, TROY PARDEE HEATING
AND AIR CONDITIONING (d/b/a PARDEE
HEATING AND AIR) AND BROCK GREEN
ARCHITECTS AND PLANNERS,

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-10-267

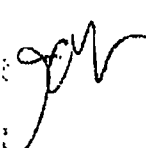
**ORDER DISMISSING THIRD PARTY
DEFENDANT BROCK GREEN
ARCHITECTS AND PLANNERS
WITH PREJUDICE**

2010 MAY -5 AM 11:13
JULIE J. ARSTRONG
CLERK OF COURT
BY _____

FILED

This matter came before the Court on March 2, 2010, on Third-Party Defendant Brock Green Architects and Planners' ("Brock Green") Motion to Dismiss the Third Party Complaint filed against it by Third-Party Plaintiff Genoa Construction Services, Inc. ("Genoa") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure Section 15-36-100 of the South Carolina Code. For reasons set forth below, Brock Green's Motion is GRANTED with prejudice.

BACKGROUND

 This is a construction defects lawsuit arising out of the renovation of a historic building on into condominiums on Chisholm Street in Charleston, South Carolina (hereinafter "the Project"). The initial Complaint was filed in January 2009. Defendant/Third-Party Plaintiff Genoa, the general contractor for the Project, impleaded Brock Green into the present lawsuit by an Amended Third-Party Complaint filed on May 26, 2009 (hereinafter "Third-Party Complaint"). In the Third-Party Complaint, Genoa alleges Brock Green was hired to design the construction plans for the renovation and reconstruction of the Project. See Third-Party Complaint ¶ 104.

FINDINGS

The Court finds that Brock Green is an architectural firm which falls within S.C. Code § 15-36-100's list of covered professionals. The Court finds that Genoa's claims are predicated upon Brock Green's provision of professional services as the architect for the Project. Therefore, the provisions of S.C. Code § 15-36-100 apply to the claims asserted by Genoa against Brock Green.

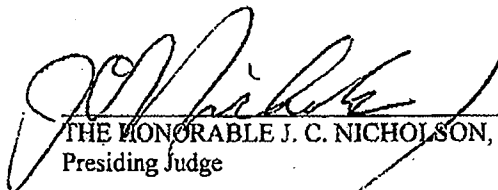
Section 15-36-100(B) of the South Carolina Code states that in an action alleging professional negligence, "the plaintiff must file as part of the complaint an affidavit of an expert

witness which must specify at least on negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of filing of the affidavit." Genoa failed to comply with the requirements of S.C. Code § 15-36-100, because Genoa's Third Party Complaint does not include a supporting expert affidavit specifying at least one negligent act or omission claim to exist and the factual basis for each claim based on the available evidence. Therefore, the Third-Party Complaint against Brock Green is dismissed with prejudice for failure to state a claim upon which relief may be granted. Genoa may petition the Trial Court for leave to assert acts and alleged omissions of Brock Green as a defense at trial.

Therefore, Brock Green's Motion to Dismiss is GRANTED and Genoa's claims against Brock Green are hereby DISMISSED with prejudice.

IT IS SO ORDERED.

This 3 day of ^{May}~~April~~, 2010.


THE HONORABLE J. C. NICHOLSON, JR.
Presiding Judge

Charleston, South Carolina

_____, 2010

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

NORTH SHORE PLACE)
HORIZONTAL PROPERTY)
REGIME AND NORTH SHORE PLACE)
PROPERTY OWNERS ASSOCIATION,)
INC.,)

Plaintiffs,)

v.)

NORTH SHORE PLACE)
DEVELOPMENT COMPANY, INC.,)
GRAVES CONSTRUCTION)
COMPANY, INC. a/k/a GRAVES)
COMMERCIAL BUILDERS, INC.,)
HARDEN FRASER CONSTRUCTION,)
INC., a/k/a FRASER CONSTRUCTION,)
INC., and GROUP 3 ARCHITECTURE)
INTERIORS PLANNING, LTD.,)

Defendants.)

HARDEN FRASER CONSTRUCTION,)
INC., a/k/a FRASER CONSTRUCTION,)
INC.,)

Third-Party Plaintiff,)

v.)

ABG CAULKING CONTRACTORS,)
INC., CONRAD CONSTRUCTION)
COMPANY, INC., PARADIGM)
ENTERPRISES, INC., BATISTA)
ENTERPRISES d/b/a PANA ROOFING,)
CONE CAULKING COMPANY,)
CENTER BROTHERS, INC., GALE)
INDUSTRIES, INC. d/b/a GALE)
INSULATION OF THE)
LOWCOUNTRY and/or GALE)
INSULATION, SOUTHERN STATES)
REBAR OF SOUTH CAROLINA, INC.,)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 07-CP-07-2706

ORDER GRANTING ADC ENGINEERING,
INC.'S MOTION TO DISMISS HARDEN
FRASER CONSTRUCTION INC. A/K/A
FRASER CONSTRUCTION INC.'S
FOURTH AMENDED THIRD PARTY
COMPLAINT

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2009 MAY 26 AM 3:31

B&B MASONRY, RODNEY BATISTE)
d/b/a B&B MASONRY, CALVIN)
MITCHELL; CALVIN MITCHELL d/b/a)
HANDI CONCRETE FINISHING, INC.,)
K CONSTRUCTION, INC. a/k/a)
K CONSTRUCTION COMPANY, INC.,)
RILEY CONCRETE CONSTRUCTION,)
DEPENDABLE PLUMBING)
COMPANY, WHITAKER)
LABORATORY INC, BUNTON)
CONSTRUCTION, INC. n/k/a ROBBIE)
BUNTON CONSTRUCTION, LLC,)
CLELAND CONSTRUCTION CO., INC.,)
ALAN ULMER, individually, and)
ULMER BROTHERS, INC.,)
PIEDMONTE PAINTING AND)
POWER WASHING, PIEDMONTE)
PAINTING, INC., BONITZ OF)
GEORGIA, INC., SOUTHEASTERN)
FIRE PROTECTION, INC.,)
DULOHERY, WEEKS AND)
GAGLIANO, INC., AND ADC)
ENGINEERING, INC.,)

Third-Party Defendants.)

CONRAD CONSTRUCTION)
COMPANY, INC.,)

Fourth-Party Plaintiff,)

v.)

YEAR ROUND POOL CO.,)

Fourth-Party Defendant.)

This matter came before the Court on April 13, 2009, on ADC Engineering Inc.'s
("ADC") Motion to Dismiss Harden Fraser Construction Inc. a/k/a Fraser Construction Company

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Inc.'s ("Harden Fraser") Fourth Amended Third Party Complaint. For the reasons set forth below, ADC's Motion is GRANTED.

FACTUAL BACKGROUND

ADC is a full service professional engineering firm with locations in Hanahan and Irmo, South Carolina. As a consultant to Group III Architecture Interiors Planning, LLC ("Group III"), ADC provided certain engineering design services for the construction of the North Shore Place Condominium project located in Hilton Head, South Carolina ("the Project"). Plaintiffs' complain of myriad problems with the Project, including elements related to ADC's services. Harden Fraser was the general contractor for the construction of the Project. In its Fourth Amended Third Party Complaint, Harden Fraser alleges that ADC provided services in conjunction with design, development and/or construction of the North Shore complex, and Harden Fraser asserts indemnity claims against ADC.

HARDEN FRASER'S FOURTH AMENDED THIRD PARTY COMPLAINT

Harden Fraser's Fourth Amended Third Party Complaint asserts indemnity claims against ADC based on the following:

1. In the event that Plaintiffs establish that the materials and/or services of ADC were not in compliance with the relevant contract documents, industry standards and/or building code requirements, and Harden Fraser is held liable to Plaintiffs for ADC's wrongful acts, omissions, negligence and/or representations, Harden Fraser is entitled to common law or equitable indemnification (Harden Fraser's Fourth Amended Third Party Complaint ¶¶ 72-77).
2. In the event that Plaintiffs establish that ADC breached implied warranties of workmanlike services in connection with design, engineering, construction and/or

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development of the Project, and Plaintiffs obtain judgment against Harden Fraser for breach of implied warranties of workmanlike services, Harden Fraser is entitled to judgment against ADC in that amount (*Id.* ¶¶ 78-81).

3. In the event that Plaintiffs establish that ADC failed to exercise due care in the provision of materials or services in connection with design, engineering, construction and/or development of the Project, and Plaintiffs obtain judgment against Harden Fraser as a direct, foreseeable and proximate result of ADC's negligence, Harden Fraser is entitled to judgment against ADC in that amount (*Id.* ¶¶ 82-85).
4. In the event that Plaintiffs prove that the Harden Fraser contract was breached due to improper or inadequate materials or services provided by ADC, and in the event that ADC breached its contract by failing to adequately provide materials and services in connection with design, engineering, construction and/or development of the Project, Harden Fraser is entitled to judgment against ADC in that amount (*Id.* ¶¶ 86-89).

In support of each of these indemnity claims, Harden Fraser alleges that it may be subject to liability to Plaintiffs because of ADC's "services in conjunction with the original design, development and/or construction" of the Project. (*Id.* at ¶ 75 (emphasis added).) Harden Fraser further alleges that the breach of implied warranties of workmanlike services, duty of care in providing services and materials, and contractual responsibility for provision of adequate materials and/or services arise "in connection with their respective undertakings regarding design, engineering, construction and/or development." (*Id.* ¶¶ 79, 87; *See also* ¶ 83 (emphasis added).)

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FINDINGS

The Court finds that ADC is a professional engineering firm which provided professional services on the Project. The Court finds that Harden Fraser's indemnification claims are predicated upon ADC's preparation of design documents and provision of engineering services. Therefore, the Court holds that the provisions of S.C. Code § 15-36-100 apply to the claims asserted by Harden Fraser against ADC. Harden Fraser failed to comply with the requirements of S.C. Code § 15-36-100, because it failed to file an Affidavit specifying at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence. Therefore, Harden Fraser's claims against ADC shall by and are hereby DISMISSED for failure to state a claim upon which relief may be granted.

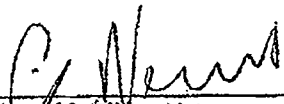
Harden Fraser argued that S.C. Code § 15-36-100 should be strictly construed to apply to only the negligence cause of action, because the statute refers only to "professional negligence." Therefore, Harden Fraser argued that the statute does not apply to its breach of warranty and breach of contract claims against ADC. The Court does not find this argument compelling. Our courts have specifically held that to prove both negligence or breach of warranty claims against a design professional, a plaintiff must present expert testimony to establish the standard of care and the professional's deviation from the standard of care. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 204 (S.C. Ct. App. 2002). Professional negligence is a predicate act or omission upon which various causes of action could be alleged against a design professional. The Court holds that S.C. Code § 15-36-100 is not limited to a particular legal or equitable cause of action against a design professional, but applies to any cause of action against a design professional predicated upon a breach of that professional's standard of care. In this case, all of Harden Fraser's claims against ADC are

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based on allegations of the breach of ADC's standard of care as an engineer. Therefore, the provisions of S.C. Code § 15-36-100 apply, and Harden Fraser's claims against ADC shall be and hereby are DISMISSED.

AND IT IS SO ORDERED.

May 14, 2009
Conway, South Carolina


The Honorable Clifton Newman

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COPY

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ROBERTS CONSTRUCTION COMPANY,
INC.,

Plaintiff,

vs.

ALL AMERICAN GLASS CO., INC.,
JACKSON MAINTENANCE &
ELECTRICAL, CUSTOM METAL
FABRICATORS, INC., ACKERMAN, INC.,
D/B/A COASTAL FOUNDATIONS, CHASE
HEATING & AIR CONDITIONING, INC.,
ARCH ALUMINUM & GLASS, INC.,
SAVANNAH HARDSCAPES, INC., YKK AP
AMERICA, INC., STANLEY BEAMAN &
SEARS, INC., AND WPC, INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) CASE NO.: 2009-CP-07-01514

) ORDER GRANTING WPC, INC.'S MOTION
) TO DISMISS

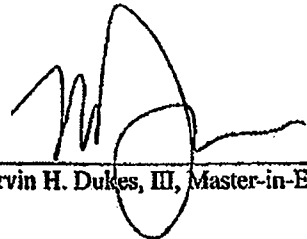
2009 SEP -4 AM 10:57
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

This matter came before the Court on Defendant WPC, Inc.'s Motion to Dismiss Plaintiffs claims for failure to file an expert affidavit with the Complaint pursuant to South Carolina Code § 15-36-100. A hearing was held on September 2, 2009 at which time arguments were made by both sides. The Court has reviewed the pleadings, motions, memorandums and evidence presented on the issue, considered the oral arguments raised at the hearing, and hereby issues an Order granting the Motion to Dismiss with prejudice as no expert affidavit was filed simultaneously with the Complaint.

 COPY

IT IS HEREBY ORDERED, ADJUDGED and DECREED that all claims by the Plaintiff against Defendant WPC, Inc. are dismissed with prejudice.

IT IS HEREBY ORDERED!



Marvin H. Dukes, III, Master-in-Equity

Beaufort, South Carolina
9/4, 2009

2434732v.1

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ELECTRONICALLY FILED - 2019 Jun 07 2:32 PM - Horry - COMMON PLEAS - CASE#2019CP2600345

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

LAWRENCE ZEISER,

Plaintiff,

vs.

KEVIN KELLEY d/b/a KELLEY
CONSTRUCTION, MARK KELLEY,
AMVEST CONSTRUCTION, INC., JOHN
S. DUNN, and ISLAND STRUCTURAL,
LLC,

Defendants.

) IN THE COURT OF COMMON PLAS
) THE FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 06-CP-07-1212

) ORDER DISMISSING DEFENDANTS JOHN
) S. DUNN AND ISLAND STRUCTURAL,
) LLC, WITH PREJUDICE

2006 OCT -2 AM 11:01
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

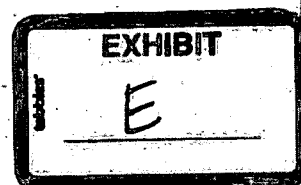
This matter is before the Court on Defendants John S. Dunn and Island Structural, LLC's Motion to Dismiss pursuant to S.C. Code §15-36-100. A hearing was held on this motion on September 7, 2006. The question before this Court was whether or not S.C. Code §15-36-100 applies to Plaintiff's claims against John S. Dunn and Island Structural, LLC, and, if so, whether Plaintiff's claims should be dismissed with prejudice under that rule.

Having reviewed the submissions by the parties and heard oral argument, I find as follows:

FACTS:

The Plaintiff, Lawrence Zeiser, owns a home in Beaufort County, South Carolina. On or about August, 8, 2005, Mr. Zeiser entered in to a contract with Defendant Kevin Kelley d/b/a Kelley Construction for the enclosure and addition of a patio and screened porch at the Plaintiff's residence. On or about May 15, 2006, Plaintiff filed a Complaint against Mr. Kelley, Defendants John S. Dunn and Island Structural, LLC, and others for damages arising out of a dispute

entry 10/17



between the Plaintiff/homeowner and the allegedly unlicensed contractor, Kevin Kelley. Plaintiff has specifically alleged that Defendants John S. Dunn and/or Island Structural, LLC, provided design documents to Mr. Kelley for use on the Plaintiff's home, and in doing so, violated South Carolina Code of Regulations R. 49-300, *et. seq.* (Complaint, para. 14.) Plaintiff has asserted claims against Dunn and Island Structural under the causes of action of negligence, negligence per se, and breach of the Unfair Trade Practice Act ("UTPA"). (See Complaint.)

On or about June 12, 2006, Defendants John S. Dunn and Island Structural, LLC, (herein collectively "Defendants Dunn") filed an Answer generally denying Plaintiff's claims and contemporaneously filed a Motion to Dismiss pursuant to S.C. Code §15-36-100. No response or affidavit was ever filed by the Plaintiff.

LEGAL ANALYSIS

S.C. Code §15-36-100 provides, in part, "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina . . . , the plaintiff must file as a part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis of each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code § 15-36-100 (B). "If the plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. . . ." *Id.*, at (E). "If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the

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Additionally, each of the Plaintiffs causes of action essentially relies on the presumption of some duty and breach of that duty by the engineer. In pleading his negligence cause of action, Plaintiff alleges that Defendants Dunn "owed a duty not to assist unlicensed and unqualified individuals . . . from engaging in construction and contracting services . . .", again relying on the "Averments" to plead an alleged duty. (Complaint, para. 26.) In asserting claims for "negligence per se", Plaintiff alleges that Defendants Dunn violated one or more of the Regulations governing the actions of an engineer, and, therefore, committed negligence per se. (Id., para. 31.) Likewise, Plaintiff alleges that Defendants Dunn committed some act which was deceptive and/or unfair in their trade practice. (Id., para. 36.) However, to sustain this first element of a UTPA claim, the Plaintiff requires the Court to presume some act was committed by the Defendants Dunn the capacity of an engineer in order to sustain a claim of a wrongful trade practice. Each of these causes of action rely solely on the underlying element of some allegedly negligent act in the capacity as a licensed engineer.

In asserting these causes of action, Plaintiff relies on the underlying assumption as to what Defendants Dunn's knowledge or actions were in the course and scope of a licensed engineer. In each cause of action, Defendants Dunn would be no more responsible for the contractor's actions than the Plaintiff but for some presumption that Dunn, as an engineer, held a higher knowledge or duty in dealing with a contractor than the Plaintiff. If, in the alternative, Dunn's actions are interpreted as being those of a lay person, the Court would also have to interpret the Plaintiff's execution of a contract with the contractor as an act in furtherance of a misdemeanor causing Plaintiff's alleged damages. Clearly, this conclusion is contrary to the Plaintiff's intended claims. Therefore, the Court interprets Plaintiff to intend some presumption of some heightened knowledge or duty by a licensed engineer in the act of providing plans. The

continued

Plaintiff should therefore, be required to produce an affidavit to speak to that knowledge and duty pursuant to S.C. Code §15-36-100.

Even though Plaintiff does not identify the causes of action in his complaint as "Professional Malpractice", the rule cannot be avoided by packaging the same elements under a differently named action. Each of the causes of action asserted under the Plaintiff's Complaint state or otherwise imply that Defendants Dunn made some action contrary to the Regulations governing the actions of a licensed engineer. That action is the act which Plaintiff relies in alleging that Dunn acted in furtherance of the contractor's alleged misdemeanor. To sustain a claim that the engineer breached a regulatory duty, Plaintiffs are alleging a professionally negligent act, and must, under the provisions of S.C. Code § 15-36-100, provide an affidavit of a professional engineer.

For these same reasons, Defendants Dunn are entitled to dismissal with prejudice. Under S.C. Code § 15-36-100(F), the defendant is entitled to dismissal and the complaint is not subject to renewal after the expiration of the applicable period of limitation. This Court interprets the "period of limitation" in this section to refer back to that period set out in section (E), which states, in part, "the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective." S.C. Code §15-36-100(E). To hold otherwise, would presume that the legislature intended for the Court to further extend the statute of limitations. This Rule, which is born in the era of "Tort Reform," was not likely intended to give additional time to a Plaintiff outside the existing statute of limitations in the event a plaintiff files an action without the requisite affidavit at the conclusion of the statutory period. Therefore, this Court interprets the "applicable period of time" to mean the 30 day renewal period. As Plaintiff

CU# 5 of 4

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Dated OCTOBER 2, 2000

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a “careful, diligent and workmanlike manner.” Hunsinger has further alleged to have failed to “supervise and direct the work” on this project. The causes of action asserted in the Cross-Claims against Hunsinger are for negligence, breach of contract, contractual indemnity and equitable indemnity.

Section 15-36-100 (B) of the South Carolina Code of Laws, 1976; provides:

Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

Subsection (G) includes twenty-two (22) professions including surveyors.

Under the allegations of the Cross-Claim, in order to recover J.C. Wilkie Construction, LLC would have to establish that Hunsinger was negligent, willful and wanton in its surveying work by breaching the standard of care required of a surveyor. Hunsinger asserts the causes of action fall under the affidavit requirement of §15-36-100 (B) of the South Carolina Code (1976). The statute states that the Complaint (in this case the Cross-Complaint) “must” have an affidavit.

The requirement to have an affidavit clearly applies to negligence claims. Hunsinger asserts the statute applies to the causes of action for negligence, breach of contract, contractual indemnity and equitable indemnity.

The wording of the statute states in pertinent part that “in an action for damages alleging professional negligence against a professional” (emphasis added) an affidavit is required. Since this “action” also involves causes of action for breach of contract and indemnity against Hunsinger that have as their underlying basis, a breach of the standard of care through negligent conduct, Hunsinger asserts the statute should be construed to apply to the breach of contract and indemnity claims.

The Cross-Claimant Wilkie argues that the statute should be construed to apply only the negligence claim and should only to individuals listed in Section 15-36-100 (G) of the South Carolina code and not to “entities” such as land surveyors, engineers, attorneys listed in the statute.

The Court finds that the statute should be interpreted to apply in this case to the land surveying firm, but only to the negligence cause of action. The Court finds that only the negligence cause of action should be dismissed for failure to have the affidavit required by Section 15-36-100 of the South Carolina Code of Laws as amended. The other causes of action remain.

Hunsinger further asserts that the contribution claim by J.C. Wilkie Construction, LLC should be dismissed because it is not timely at this time under the decision of the South Carolina Supreme Court in First General Services v. Miller v. Servicemaster, Inc., 314 S.C. 439, 446 S.E.2d 446 (1994). In First General Services the Court found that:

Trial court held that First General “must have paid” before an action for contribution is viable. We agree.

The right to contribution is controlled by S.C. Code Ann. § 15-38-10, *et seq.*, which provides:

The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability. S.C. Code Ann. § 15-38-20(B) (Supp.1993) (Emphasis added).

Under this statute, the right to contribution does not arise prior to payment. Here, First General has made no payments to the Millers. Therefore, no right to contribution from Servicemaster yet exists. Since a third-party complaint is premised upon an existing right of the third-party plaintiff, First General’s impleader action against Servicemaster for contribution is not ripe. See *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994) (dicta).

Despite the fact that Wilkie has made no payment in this case and despite the fact the right of contribution did not exist for joint liability in South Carolina until the Uniform Contribution Among Joint Tortfeasors Act was enacted by the South Carolina Legislature in 1988, Wilkie

argues that the claim for contribution should not be dismissed, but rather stayed to prevent the later contention that its claim for contribution is barred by the statute of repose, assuming the statute of repose is applicable in this case. Wilkie in essence asserts that the dismissal of its claim for contribution has the potential for negating its right of contribution as being time barred.

After hearing the arguments of counsel the Court concludes that the claim for contribution should be stayed until such time as it is determined that Wilkie has in fact made a payment that would place it within the terms and provisions of the Uniform Contribution Among Joint Tortfeasors Act so that it is ripe for Wilkie to seek to recover for contribution.

Accordingly, for the reasons stated herein, the negligence cause of action in the Cross-Claim asserted by Defendant J.C. Wilkie Construction, LLC against Hunsinger Long Associates, LLC should be dismissed for failure of J.C. Wilkie Construction, LLC to provide the required affidavit. Moreover, the claim for contribution asserted by J.C. Wilkie Construction, LLC should be stayed so that the issue of the right contribution can determined once Wilke establishes that it has made a payment that would make it ripe to seek to recover for contribution.

AND IT IS SO ORDERED.


 Judge, Court of Common Pleas for Lexington
 County

December 13, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2010-CP-10-5780

CITY OF NORTH CHARLESTON,)
Plaintiff,)

v.)

BRUNSON CONSTRUCTION)
COMPANY, MECHANICAL SYSTEMS)
INC., COAST ARCHITECTS, INC., &)
MECHANICAL ENGINEERING)
CONSULTANTS ASSOCIATES, INC.)
Defendants.)

**ORDER DENYING DEFENDANTS
COAST ARCHITECTS INC. AND
MECHANICAL ENGINEERING
CONSULTANTS ASSOC. INC.'S
MOTIONS TO DISMISS PURSUANT
TO RULE 12(b)(6) AND GRANTING
MOTIONS TO DISMISS PURSUANT
TO SECTION 15-36-100(B) OF THE
SOUTH CAROLINA CODE**

2011 MAY 26 PM 2:43
JULIE J. ARMS, PROthonary
CLERK OF COURT
BY _____

FILED

This matter is before me on Defendants Mechanical Engineering Consultants Assoc. Inc. and Coast Architects Inc.'s Motions to Dismiss pursuant to Rule 12(b)(6) of South Carolina Rules of Civil Procedure and/or § 15-36-100 of the South Carolina Code of Laws as amended. A hearing was held on May 9, 2011. I have carefully considered the arguments presented by counsel, as well as supporting memoranda.

Standards of Review

A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Flateu v. Harrelson, 355 S.C. 197, 201-02, 584 S.E.2d 413, 415-16 (Ct. App. 2003). In reviewing a motion to dismiss, the trial court must base its ruling "solely upon the allegations set forth on the face of the complaint." Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." Chewning v. Ford Motor Co., 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

I have carefully considered the arguments presented by counsel, as well as supporting memoranda. Viewing the evidence as a whole and in the light most favorable to the plaintiff, I find that the plaintiff has stated facts sufficient to constitute a cause of action in the pleadings filed with this court, and therefore Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) is DENIED.

§15-36-100 Code of Laws of South Carolina (1976, as amended) reads, in pertinent part, as follows:

§15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.

...

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in Subsection (G) or against any licensed healthcare facility alleged to be liable based upon the action or inaction of a healthcare professional licensed by the State of South Carolina and listed in Subsection (G), the plaintiff must file as part of the Complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

....

It is undisputed that Plaintiff did not file such an affidavit with its Complaint. It is also undisputed that as a professional architectural group and professional engineering group, Defendants are covered by the statute pursuant to §15-36-100(G)(1).

Plaintiff contends that the Complaint brings causes of action for breach of implied warranties and breach of contract, not claims for negligence or professional malpractice and therefore, the statute does not apply and no affidavit is required.

After reviewing the causes of action outlined in the Complaint, I find that while the Plaintiff does not list causes of action for negligence, the pleading allege failure to "design,... inspect... supervise, and administer... according to proper standards of the industry." (Complaint 26, 27).

#2
T.H.

Our appellate courts have recognized that in examining the Complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim. Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Assn., 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991). In this context, the present action alleges a deviation from the standard of care in the industry.

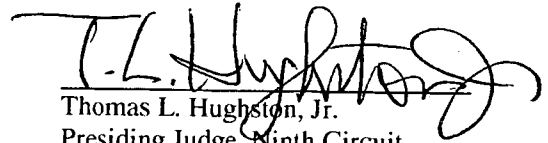
However, there is still one more step in the professional negligence analysis because §15-36-100(C)(2) relieves the plaintiff of the affidavit obligation if the pleaded specification of negligence involves a subject that lies within the ambit of common knowledge and experience so that no special learning is needed to evaluate the conduct of the defendant.

I have reviewed the Complaint and while it is true at first glance that precipitation inside a building seems like the sort of thing that is so obviously faulty that it would fall within the common knowledge and experience exception, the relevant legal question is whether Defendants breached the standard of care of a professional under these circumstances. The appropriate behavior for a professional architect or engineer in its design and supervisory role in a construction project is not normally a matter of common knowledge. See generally, Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (SC App 2002)(where professional engineering firm had similar design and supervisory roles, and the Court held it not to be matter of common knowledge). I find that a reasonable juror would not necessarily know what duties are owed by a professional architectural or engineering firm with regard to the design and the supervision of construction projects like the one in this case, nor could they be expected to know if the architect or engineer has any duties concerning the inspection and maintenance of the project. These are the sorts of things experts explain to fact-finders. As such, Plaintiff's claim does not fall under the exception granted by §15-36-100(C)(2). Therefore, Defendants' Motion to Dismiss pursuant to §15-36-100 is GRANTED WITHOUT PREJUDICE.

#3
T.L.H.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Defendants' Motions to Dismiss pursuant to Rule 12(b)(6) is DENIED, however Defendants' Motions to Dismiss pursuant to § 15-36-100 of the South Carolina Code of Laws as amended is GRANTED WITHOUT PREJUDICE. Plaintiff is given 30 days to file an Amended Complaint including Affidavits pursuant to § 15-36-100; otherwise for the foregoing reasons, this case is dismissed.

IT IS SO ORDERED.


Thomas L. Hughston, Jr.
Presiding Judge, Ninth Circuit

#2
May 24, 2011
Charleston, South Carolina.

Alex Joyner

From: Myra Whitener
Sent: Tuesday, March 26, 2019 12:42 PM
To: Roy Willey
Cc: TeamJefferies; eric@akimlawfirm.com; sarah@akimlawfirm.com; Mike Wilkes; Amanda Camp; danderson@richardsonplowden.com; jwyman@richardsonplowden.com; jguerry@richardsonplowden.com; lane@akimlawfirm.com; btobul@richardsonplowden.com
Subject: RE: Michael and Cheryl Marceda v. Winchester Oceanview Development, Sands Building Group, C3 Studio, et al. - Time Sensitive Request (Case No. 2019-CP-26-0345)
Attachments: Collins v. Cottingham Order of Dismissal (Filed) 3-3-17 (refusal to apply Oakman to eng'g firm).pdf; North Shore - Order - Judge Newman.pdf

Roy,

I appreciate your email and understand your position, but we respectfully disagree with your interpretation of the statute. I have attached orders from two Circuit Court cases involving lawsuits brought against engineering firms, where the court in each case granted a Motion to Dismiss based on a lack of an affidavit of merit from an expert witness. As I am sure you are aware, engineers, like architects, are design professionals. As such, the same logic applied by Judge Sprouse and Judge Newman respectively in these two cases would apply to our situation involving a lawsuit with claims against an architecture firm. Please take a close look at these two orders. To interpret the statute and apply it as you contend would produce an absurd result that was undoubtedly not the intent of the Legislature when it enacted the South Carolina Frivolous Civil Proceedings Sanctions Act.

Kind regards,

Myra V. Whitener

**WILKES
LAW FIRM P.A.**

843.737.6229 Charleston
 864.591.2355 Spartanburg

200 Meeting St. | Ste 205 | Charleston, SC 29401
 127 Dunbar St. | Ste 200 | Spartanburg, SC 29306

mwhitener@wilkeslaw.com
 www.wilkeslaw.com

From: Roy Willey <roy@akimlawfirm.com>
Sent: Tuesday, March 26, 2019 9:09 AM
To: Myra Whitener <MWhitener@wilkeslaw.com>
Cc: TeamJefferies <teamjefferies@googlegroups.com>; eric@akimlawfirm.com; sarah@akimlawfirm.com; Mike Wilkes <MWilkes@wilkeslaw.com>; Amanda Camp <ACamp@wilkeslaw.com>; danderson@richardsonplowden.com; jwyman@richardsonplowden.com; jguerry@richardsonplowden.com; lane@akimlawfirm.com
Subject: Re: Michael and Cheryl Marceda v. Winchester Oceanview Development, Sands Building Group, C3 Studio, et al. - Time Sensitive Request (Case No. 2019-CP-26-0345)

Myra,

Do you have any authority for the position that the affidavit requirement in the statute applies to architecture firms? I am not aware of a single instance of it being interpreted the way you assert. If you have any such orders that would, of course, be helpful in attempting to save the court some time.

Thanks,

Roy

On Mon, Mar 25, 2019 at 4:23 PM Myra Whitener <MWhitener@wilkeslaw.com> wrote:

Lane,

Thank you for the clarification regarding the RTA's (or lack thereof). We will take the 30-day discovery extension you have offered. We stand by our position on the Motion to Dismiss and will be sure to notify everyone as soon as a hearing date has been scheduled.

Kind regards,

Myra V. Whitener

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mwhitener@wilkeslaw.com

www.wilkeslaw.com

From: Lane Jefferies <lane@akimlawfirm.com>

Sent: Monday, March 25, 2019 3:37 PM

To: Myra Whitener <MWhitener@wilkeslaw.com>

Cc: eric@akimlawfirm.com; roy@akimlawfirm.com; sarah@akimlawfirm.com; Mike Wilkes <MWilkes@wilkeslaw.com>; Amanda Camp <ACamp@wilkeslaw.com>; danderson@richardsonplowden.com; jwyman@richardsonplowden.com; jguerry@richardsonplowden.com; TeamJefferies <teamjefferies@googlegroups.com>

Subject: Re: Michael and Cheryl Marceda v. Winchester Oceanview Development, Sands Building Group, C3 Studio, et al. - Time Sensitive Request (Case No. 2019-CP-26-0345)

Importance: High

Dear Myra —

Regarding RTA's, you are correct that your client was not served with RTA's. The reference thereto in the interrogatories is an oversight. You may disregard it.

Regarding discovery responses, we are glad to grant a 30-day extension, thus making the responses due on April 25, 2019. We cannot agree to an open-ended extension however.

Regarding your motion to dismiss, as you know, an expert affidavit is not required when the allegations of negligence involve subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant. Do you not agree that it is within common knowledge and experience that toilets should flush, windows should not leak, joists should not be cracked, and new homes should not be infested with ants?

Finally, for your convenience, please be advised that my official email of record on file with the South Carolina Supreme Court is teamjefferies@googlegroups.com. If you send emails to any of my other addresses, they may not be timely received.

Please let us know if you would like the discovery extension.

Best,

Lane

--

Lane D. Jefferies
Trial Lawyer
Anastopoulos Law Firm, LLC
 32 Ann Street | Charleston, SC 29403
 Tel: 843-614-8888 | Fax: 843-494-5536

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On Mar 25, 2019, at 2:23 PM, Myra Whitener <MWhitener@wilkeslaw.com> wrote:

Lane, Eric, and Roy,

I am following up on a message I left on Friday with a receptionist at your office (and then another identical message I left just a little while ago), asking that an attorney please contact me in reference to this case. Mike Wilkes and I represent C3 Studio, LLC, an architecture firm who is a named defendant in this lawsuit which Plaintiffs Michael and Cheryl Marceda recently filed in Horry County. This is essentially a defective house case. As you can see, we filed the attached Motion to Dismiss Plaintiffs' Complaint on 3.11.19, based on the lack of affidavit from an architect in this case, pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act.

Our client C3 Studio was also served with discovery requests (Interrogatories and Requests for Production) along with the Summons and Complaint, and by my calculations, our discovery responses would be due today, 3.25.19. We would ask that you agree for C3 Studio's discovery response deadline to be extended until after the Court has ruled on our Motion to Dismiss. If you could please respond by email confirming in writing that we have an agreement as to that issue, we can avoid filing a motion

today asking the Court to grant that extension on our discovery responses. **Please consider this our good faith attempt to resolve this matter prior to filing a motion, pursuant to Rule 11 of the SCRPC.**

I would also like to clarify that C3 Studio was not served with any Requests to Admit, although the Plaintiffs' Interrogatories that were served on C3 Studio make reference to Requests to Admit (Supplemental Interrogatory No. 7, on Page 4). C3 Studio must be served with these Requests to Admit, if that is the Plaintiffs' intent, before C3 Studio can respond, and that has yet to take place.

Please contact me at your earliest convenience. My cell number is (843) 860-0819 if for some reason you are unable to reach me at my office number in Charleston below, or a return email will certainly suffice. Thank you for your prompt attention to this matter.

Kind regards,

Myra V. Whitener

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<3.11.19 C3's Ntc of Mtn & Mtn to Dismiss Plt's Complaint.pdf><3.11.19 Exhibit A to C3's Mtn to Dismiss.pdf>

--

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2600345

Michael Marceda et al
PLAINTIFF(S)

Winchester Oceanview Development, Inc. et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion/Alter and/or Amend (BC) is DENIED, except to the extent that the plaintiff shall now have 30 days from 7/23/2019 to file an affidavit as required by S. C. Code Ann. section 15-36-100. All other mandates of the court's prior order shall remain in full force and effect.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/23/2019 :

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Horry Common Pleas

Case Caption: Michael Marceda , plaintiff, et al VS Winchester Oceanview
Development, Inc. , defendant, et al
Case Number: 2019CP2600345
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-07-23 11:48:25 page 3 of 3

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

MICHAEL MARCEDA and)
CHERYL MARCEDA,)
)
 PLAINTIFFS,)

VERSUS)

TRANSCRIPT OF RECORD

WINCHESTER OCEANVIEW)
DEVELOPMENT, INC, ET AL.,)
)
)
 DEFENDANTS.)

2019-CP-26-00345

JULY 23RD, 2019
CONWAY, SOUTH CAROLINA

B E F O R E:

THE HONORABLE BENJAMIN H. CULBERTSON

A P P E A R A N C E S:

LANE D. JEFFERIES, ESQUIRE
ATTORNEY FOR THE PLAINTIFF
(MICHAEL MARCEDA)

MICHAEL WILKES, ESQUIRE
ATTORNEY FOR THE DEFENDANT
(C3 STUDIO)

SANDRA H. DAVIS
OFFICIAL COURT REPORTER
EIGHTH JUDICIAL CIRCUIT
AT-LARGE, EIGHTH JUDICIAL CIRCUIT

THIS TRANSCRIPT WAS PREPARED FOR MR. LANE D. JEFFERIES, ESQUIRE

I N D E X

ARGUMENT BY MR. JEFFERIES	4
ARGUMENT BY MR. WILKES	10
RULING	13
CERTIFICATE	15

E X H I B I T S

(NO EXHIBITS WERE MARKED FOR THIS HEARING.)

THIS TRANSCRIPT WAS PREPARED FOR MR. LANE D. JEFFERIES, ESQUIRE

P R O C E E D I N G S

July 23rd, 2019

THE COURT: All right. Next is 2019CP26345.

Michael Marceda and others versus Winchester Oceanview Development, Inc. and others.

According to my roster, the matter is before the Court on a Motion to Alter and/or Amend.

Please give the court reporter your names and who you represent.

MR. JEFFERIES: Good morning, --

MR. WILKES: Good morning, --

MR. JEFFERIES: -- Your Honor.

MR. WILKES: -- Your Honor. My name is Mike Wilkes. I represent C3 Studio, one of the defendants in this case, responding party in the -- in the current matter this morning.

THE COURT: All right.

MR. JEFFERIES: Good morning, Your Honor. Lane Jefferies for plaintiff, Michael Marceda.

THE COURT: All right. Mr. Jefferies, this is your Motion.

ARGUMENT BY MR. JEFFERIES

MR. JEFFERIES: Yes, Your Honor. Thank you.

May it please the Court. It's a Rule 59, really on a narrow issue.

THIS TRANSCRIPT WAS PREPARED FOR MR. LANE D. JEFFERIES, ESQUIRE

1 This is a construction defect case. We sued a
2 number of entities. One of them is an architectural firm
3 called C3 Studio.

4 C3 moved to dismiss on the basis of our not
5 filing an expert affidavit, which then claimed this --
6 required under the Frivolous Civil Proceedings Sanctions
7 Act. That Motion was granted.

8 Our Rule 59 is just on the narrow issue to
9 clarify how the Court got to that result. We don't
10 anticipate that the Court will change its mind and not
11 grant the Motion. Although, we certainly would like that.

12 But what we need, and what's not reflected in the
13 Order, is the one, kind of, threshold issue as to how the
14 Court got there.

15 Defendant's Motion is based on the statute. The
16 -- Like any statute, the Court can do really one of three
17 things with the statute. It can read the literal words of
18 the statute and say these are unambiguous and applying the
19 words literally for what they say. That's one thing.

20 The second thing it can do, is it can say, "Well,
21 the literal words are unambiguous, but they lead to an
22 absurd result, and it's so absurd that the legislature
23 never could believe that, so we're going to set those aside
24 and do what we think the legislature meant." That's the
25 second thing.

1 The third thing a Court could do is say, "We read
2 it. It's ambiguous, so we're going to interpret it in line
3 of what we think the legislature meant."

4 So those are the three ways that you could get to
5 the result that the defendants asked for, and that the
6 Court gave.

7 What the Order doesn't say is which -- how the
8 Court got there. The -- the default position is, well, the
9 Court read the literal words and applied literally what
10 they mean is -- and what happens 99 percent of the time.

11 The reason we filed this Rule 59 is, in the case,
12 the literal words of the statute appear unambiguously to
13 favor the plaintiff.

14 So, if that's how the Court got there, we just
15 ask the Court to say that, "We read the Rules as this.
16 Plaintiff, you were wrong. It means this." If that's not
17 how the Court got there, then we need to know whether it is
18 because the literal words lead to a certain result, or
19 whether the statute is ambiguous in the Court's view and
20 the Court's interpreting it.

21 And the whole point of that is we need to know
22 which appellant issue to take to Columbia.

23 **THE COURT:** If I recall from your argument, your
24 argument was that an affidavit was not required because
25 even though the architect was licensed, it was issued by an

1 LLC, and, therefore, an affidavit is not required since
2 there was a business as opposed to an individual.

3 **MR. JEFFERIES:** That's correct, Your Honor. And
4 -- and that, specifically, -- It's section 15-36-100(b)
5 which provides that an affidavit is required, quote, " --
6 in an action for damages alleging professional negligence
7 against a professional licensed by or registered with the
8 state of South Carolina and listed in subsection G." So
9 that's, "A professional licensed by the state of South
10 Carolina."

11 **THE COURT:** So a professional working -- employed
12 by -- or an LLC that employs a number of professionals, you
13 sue that LLC, you're saying an affidavit is not required.

14 **MR. JEFFERIES:** That's correct, Your Honor. And
15 we believe not only is that what the statute literally says
16 --

17 When you look at subsection G, it lists
18 professionals. It says "architects, attorneys, CPAs,
19 medical doctors, occupational therapists." It -- it goes
20 on. All of them are individuals.

21 **THE COURT:** So by your rationale, if there was a
22 medical malpractice case and these doctors worked for a
23 hospital, and the hospital is ultimately vicariously liable
24 for the doctors, you don't need an affidavit because you're
25 suing the hospital and not the doctors.

1 **MR. JEFFERIES:** Your Honor, put your -- right on
2 -- hit the nail right on the head. That would be the case,
3 and the legislature realized that and so they added one
4 exception, they added one company -- one type of company;
5 they said, "Healthcare facilities. In addition to these
6 professionals, we also need an affidavit for healthcare
7 facilities." That's another section in there. That's the
8 only company that they added to that list of individuals.

9 So we think that shows that the use of that
10 language was not accidental. When they said "a
11 professional," and then they listed architects, attorneys,
12 they truly meant human beings. Because if they didn't, if
13 they meant the companies that the human beings work for,
14 then there would have been no need to add healthcare
15 facilities. Healthcare facilities would already have been
16 embraced. But they specifically went out of their way to
17 say, "Oh. In addition to these professionals, also
18 healthcare facilities."

19 **THE COURT:** So if they sue Anastopoula Law Firm,
20 LLC for your legal malpractice, they don't need an
21 affidavit.

22 **MR. JEFFERIES:** That's correct, Your Honor.
23 Because while the professionals who work at Anastopoulo
24 each have a license, each are -- using the words of the
25 statute, "licensed -- professionally licensed or registered

1 with the state of South Carolina." Each of us that works
2 there has a law license, but Anastopoulo Law Firm doesn't
3 have a law license. It is not a professional licensed by
4 the state of South Carolina. I am. Roy Willey is. Eric
5 Poulin is. Likewise with -- with CPAs. Likewise with
6 architects.

7 The legislature knows the difference between an
8 architect and an architectural firm. It listed all of
9 these individuals, and then, for whatever reason, probably
10 by the -- by the healthcare industry, it said, "Oh. In
11 this one type of entity -- healthcare facilities," it
12 added, but it didn't add law firms; it didn't add CPA
13 firms, and it didn't add architectural firms.

14 So the literal reading of the language favors us.
15 It just doesn't include architectural firms.

16 Accordingly, in order for the Court to get to the
17 result that it got to, and that the defendant wants, the
18 Court either has to say, "Lane, you're -- you're wrong.
19 You're just reading the literal language wrong. You're
20 just wrong. It literally does include it." We think
21 that's unlikely because the plain language just doesn't say
22 that.

23 So there's two other ways it can get there. Your
24 Honor could say, "Yeah, that's what the literal language
25 says, but that result is so absurd, so plainly and patently

1 absurd, that the legislature never could have meant that."
2 And then Your Honor could go beyond and make that decision.

3 Your Honor could say, "Well, it's ambiguous. We
4 just don't know what they intended, so now we get to
5 interpret it." And that's another way to get where the
6 defense wants to go.

7 But it's got to be one of those three ways. We
8 just need to know which it is because which it is drives
9 the appellant issue. Are we just reading the statute
10 literally wrong, or do we disagree over whether the result
11 is absurd? Is it ambiguous? That's the only Ruling we
12 need from the Court.

13 Now, of course, our argument would be it's
14 unambiguous; it means what it says, and the result is not
15 so patently absurd, and legislature never could have
16 intended it. That's a high bar.

17 **THE COURT:** But, I mean, why do you need
18 clarification by this Court? Why don't you just argue that
19 on appeal, and then they'll decide? You either need -- It
20 either applies to professional firms, or it doesn't apply
21 to professional firms.

22 **MR. JEFFERIES:** We think it's important for the
23 Court of Appeals to understand what the Order of this Court
24 is. Is this Court holding the statute is ambiguous, or
25 that it's unambiguous?

1 **THE COURT:** Well, why -- I mean, but what
2 difference does it make? If I say it's ambiguous and the
3 Court of Appeals says, "It's not ambiguous, but, still,
4 that's absurd. We're going to require it and we think the
5 legislature intended that." Or if I say, "It's absurd.
6 The legislature intended that," and they say, "No, you're
7 wrong, but it is kind of ambiguous and we think it's still
8 required," why do you need any further clarification from
9 this Court?

10 **MR. JEFFERIES:** Well, it's really just narrowing
11 the issue. This Court has a threshold it has to meet to
12 get to that result and at that threshold. If nots literal
13 language, then the threshold is either absurdity or
14 ambiguity, and there's no holding in the Order that says
15 either it's absurd or it's ambiguous. That -- that
16 threshold has to be crossed in order to set aside the plain
17 meaning; the plain language. The literal employ of the
18 word.

19 **ARGUMENT BY MR. WILKES**

20 **THE COURT:** All right. Mr. --

21 **MR. WILKES:** If it --

22 **THE COURT:** -- Wilkes.

23 **MR. WILKES:** -- pleases the Court, Your Honor.

24 The Court's Order has addressed the
25 interpretation and found directly on page four of the

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1 Order, I'm citing from the statute, the statute begins --
2 section 15-36-100, "Complaint and actions for damages
3 alleging professional negligence." That's the title. And
4 right before they list the professions, it says, "Paragraph
5 G. This section applies to the following professions.
6 Number one; architects." And, Your Honor, you have cited
7 both of those provisions in your Order. You've interpreted
8 the statute that it applies to the profession of
9 architecture and that an affidavit is required in order to
10 plead the causes of action against an architect.

11 We have, essentially, collaterally, as far as I'm
12 concerned, I think, in our perspective, an architectural
13 firm cannot exist without an architect who is licensed
14 within that firm. Doctors practicing would not -- within
15 hospitals are a completely separate animal, completely
16 separate matter, and for --

17 You know, the Court -- the legislature decided to
18 address the circumstance where independent doctors are
19 practicing in hospitals, and then hospitals' and doctors'
20 liabilities become confusing; and so when do you need
21 affidavits?

22 That's just a discrete issue that the Act applies
23 to. It does not change the Court's interpretation, as
24 you've already written it, that the Act applies to
25 professions. The idea, of course, is to limit professional

1 negligence claims to claims which are supported by the
2 affidavit of a professional. You can prove the standard of
3 care and prove that there's at least one negligent act.
4 And that's the -- the Rules. It's the Frivolous
5 Proceedings Act. The purpose is to limit those claims.

6 If the plaintiff's have a good claim, they should
7 hire an architect, submit an affidavit, which they can do.

8 And, Your Honor, in that regard, I would say that
9 if Your Honor denies this Order, they should be given 30
10 more days. Either grant our Motion to -- grant our Motion
11 to Dismiss, give them 30 more days to file an affidavit,
12 amend their Complaint, and file an affidavit, or,
13 otherwise, the Motion would be granted so we --

14 **THE COURT:** So what did -- Excuse me for
15 interrupting. What did my last Order do? Gave --

16 **MR. WILKES:** Well, it was supposed --

17 **THE COURT:** -- them 30 days?

18 **MR. WILKES:** It was 30 days from the date of the
19 -- actually, the hearing, but then they moved to reconsider
20 so that --

21 **THE COURT:** I see.

22 **MR. WILKES:** -- stayed the Order in effect until
23 -- here we are today.

24 So, the next Order we need to address the
25 deadline to let them amend, to attach an affidavit, or our

1 Motion to Dismiss will be granted, and, as your Order said,
2 without -- without prejudice.

3 **THE COURT:** All right. Thank you.

4 Anything in reply?

5 **MR. JEFFERIES:** Very briefly, Your Honor.

6 I don't think opposing counsel really answered
7 the question. The question is is the Order based on the
8 plain meaning of the words, or we just disagree about what
9 they mean, or is it based on setting aside the plain
10 meaning because that leads to an absurd result, or is based
11 on the statute being ambiguous? That's -- The question is
12 how -- which of those three ways did the Court get to the
13 result? That's the only question that we would like to
14 have answered so we can narrow the appeal to the actual
15 question that exist rather than hypotheticals.

16 **MR. WILKES:** Your Honor, briefly, the -- the
17 Order --

18 **THE COURT:** That's all right. I've heard enough.

19 **MR. WILKES:** Thank you, Your Honor.

20 **THE COURT:** All right.

21 **RULING BY THE COURT**

22 **THE COURT:** All right. I'm going to deny the
23 Motion to Alter/Amend except to the extent that the
24 plaintiff has 30 days to submit an affidavit or else that
25 Order -- or it dismissed without prejudice. Correct?

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1 MR. JEFFERIES: Yes, sir.

2 THE COURT: All right. So you've got 30 more
3 days from today to get your affidavit. All right.

4 MR. JEFFERIES: Thank you, Your Honor.

5 THE COURT: Thank you.

6 (WHEREUPON, THE HEARING IN THE ABOVE-
7 ENTITLED MATTER WAS CONCLUDED.)

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Michael Marceda , plaintiff, et al VS Winchester Oceanview Development, Inc. , defendant, et al

Case Number:	2019CP2600345	Court Agency:	Common Pleas	Filed Date:	01/22/2019
Case Type:	Common Pleas	Case Sub Type:	Motor Veh Accid 320	File Type:	Mediator - Jury
Status:	Pending/ADR Sanctions	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Marceda, Michael	NEF(12-18-2019 05:35:03 PM) Notice/Notice of Appearance	Filing		12/18/2019-17:35		
Marceda, Michael	Notice/Notice of Appearance	Filing		12/18/2019-17:35		
Marceda, Michael	ADR/Notice of ADR	Action		11/17/2019-09:17		
Marceda, Michael	NEF(11-04-2019 01:55:40 PM) Order/Consent Order	Filing		11/04/2019-13:55		
Marceda, Michael	CONSENT ORDER COMPELLING PLAINTIFFS' RESPONSES TO DEFENDANT	Order		11/04/2019-13:55		
Marceda, Michael	NEF(11-01-2019 06:31:32 PM) Proposed Order/Consent Order	Filing		11/04/2019-10:28		
Marceda, Michael	Order/Order Cover Sheet \$25.00	Filing		11/01/2019-17:31		
Winchester Oceanview Development, Inc.	NEF(10-08-2019 03:04:07 PM) Stipulation Of Dismissal	Filing		10/08/2019-16:05		
Winchester Oceanview Development, Inc.	Stipulation Of Dismissal Without Prejudice as to	Filing		10/08/2019-15:04		
Jefferies, Lane Douglas	11/4/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		10/07/2019-12:53		
Parrish, David J.	11/4/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		10/07/2019-12:53		
Joyner, James Alexander	11/4/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		10/07/2019-12:53		
Wilkes, Michael B.T.	11/4/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		10/07/2019-12:53		
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Willey, Roy T. IV	11/4/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		10/07/2019-12:53		
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Sands Realty Group, Inc.	NEF(09-16-2019 04:12:46 PM) Motion/Compel	Filing		09/17/2019-08:23		
Sands Realty Group, Inc.	Motion/Compel	Motion		09/16/2019-16:12	11/01/2019-16:12	
Marceda, Michael	NEF(08-30-2019 01:41:31 PM) Notice/Other	Filing		08/30/2019-13:49		
Marceda, Michael	Notice/NOTICE OF APPEAL	Filing		08/30/2019-13:41		
Marceda, Michael	NEF(08-26-2019 01:24:09 PM) Notice/Notice of Appearance	Filing		08/26/2019-13:24		
Marceda, Michael	Notice/Notice of Appearance	Filing		08/26/2019-13:24		
Marceda, Michael	NEF(08-21-2019 08:50:10 PM) Notice/Other	Filing		08/22/2019-08:52		
Marceda, Michael	Notice/Appeal	Filing		08/21/2019-20:50		
Marceda, Michael	ADR/Alternative Dispute Resolution (Workflow)	Action		08/20/2019-21:12	11/17/2019-21:12	
Marceda, Michael	NEF(08-19-2019 09:17:11 AM) ADR/Notice of ADR	Filing		08/19/2019-09:17		
Marceda, Michael	NEF(07-23-2019 02:11:25 PM) Order/Electronic Form 4	Filing		07/23/2019-14:11		
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C3 Studio, Llc	NEF(07-10-2019 05:19:03 PM) Motion/Withdraw	Filing		07/11/2019-08:22		
C3 Studio, Llc	CONSENT MOTION FOR MYRA V. WHITENER TO WITHDRAW AS COUNSEL	Motion		07/10/2019-17:19	07/15/2019-17:19	
Joyner, James Alexander	7/22/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		06/25/2019-08:37		
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Sands Building Group, Inc.	Order/Electronic Form 4-Motion/Dismiss Denied	Order		06/24/2019-15:17		
Marceda, Michael	NEF(06-24-2019 12:59:33 PM) Memo/Memo in Opposition	Filing		06/24/2019-13:07		
Marceda, Michael	Memo/Memo in Opposition	Filing		06/24/2019-12:59		
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C3 Studio, Llc	Memo/Memo in Opposition	Filing		06/07/2019-14:32		
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Marceda, Michael	NEF(05-20-2019 11:59:46 AM) Motion/Alter and/or Amend	Filing		05/20/2019-12:23		
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C3 Studio, Llc	Order/Dismissal	Order		05/08/2019-09:14		
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C3 Studio, Llc	Order/Order Cover Sheet \$25.00	Filing		05/01/2019-15:48		
Marceda,	NEF(04-24-2019 02:40:24 PM)	Filing		04/24/2019-		

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C3 Studio, LLC	Notice/Notice of Appearance	Filing		03/26/2019-13:21		
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Sands Building Group, Inc.	Notice/Notice of Appearance	Filing		03/01/2019-14:17		
Woodward, John	NEF(02-18-2019 08:45:26 AM)	Filing		02/18/2019-08:49		
Woodward, John	Notice/Notice of Appearance	Filing		02/18/2019-08:45		
Woodward, John	Answer/Answer	Filing		02/18/2019-08:45		
Marceda, Michael	Summons & Complaint	Filing		01/22/2019-21:12		