THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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

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Michael Marceda and Cheryl Marceda, Appellants,

v.

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

of which C3 Studio, LLC, is the Respondent.

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF JURISDICTION

This appeal arises out of the May 8, 2019 Order of the Honorable Benjamin Culbertson granting Respondent's motion to dismiss; and the July 23, 2019 Order of Judge Culbertson denying Appellant's Rule 59 motion to alter or amend the May 8 Order. Appellant received notice of the final order of the Trial Court on July 23, 2019. Appellant timely filed and served the Notice of Appeal on August 21, 2019. This Court has jurisdiction to entertain this appeal and to correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

## STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in disregarding the plain language of the Frivolous Civil Proceedings Sanctions Act and holding instead that the Act requires expert affidavits in actions against architectural "Firms" in addition to actions against "Architects"?

II. Did the Trial Court err in considering and/or relying upon Respondent's Memorandum in Support of its Motion to Dismiss, when the memorandum was grossly untimely in non-compliance with the Supreme Court's Order dated September 10, 2015?

III. Did the Trial Court err in basing its May 8, 2019 Order on factual conclusions that are without evidentiary support?

## STATEMENT OF THE CASE

This statutory interpretation matter arises out of a residential construction defect case filed in January 2019. Appellants are Plaintiffs in the underlying case. Respondent C3 Studio, LLC is one of several defendants. Appellants alleged that Respondent took part in various aspects of the design and construction of a defective home and did so negligently. (R. p. 5, lines 11-12).

On March 11, 2019, Respondent filed a Motion to Dismiss on the basis 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." (R. p. 16). Respondent did not contemporaneously file a memorandum in support of its motion. On March 26, 2019 Respondent's motion was placed on the motions roster for the April 23, 2019 term of court. (R. p. 170). At 5:27 on the night before the hearing Respondent filed a memorandum in support. (R. p. 170).

Respondent's motion was heard on April 24, 2019. Appellants agreed that no affidavit was filed. Appellants argued an affidavit is not required. Appellants argued that the plain language of the Act applies to human beings, not entities, and thus an affidavit was not required as Respondent is not a human being. Accordingly, dismissal for lack of an affidavit would not be proper.

Appellants further argued that Respondent's memorandum in support was untimely under the Supreme Court's Civil Motions Pilot Program order dated September 10, 2015, and should not be considered, or in the alternative, that the court should allow Appellants thirty days in which to submit a memorandum in opposition as provided by the Civil Motions Pilot Program order. The Court did not allow Appellants any time to file a responsive memorandum. Instead, the Court granted Respondent's motion from the bench and instructed that a formal order would be forthcoming. A formal order granting Respondent's motion was entered on May 8, 2019. On May 20, 2019[1], Appellant timely filed a motion to alter or amend pursuant to Rule 59, SCRCP. On July 23, 2019 the Honorable Benjamin Culbertson heard and denied Appellants' Rule 59 motion. On August 21, 2019 Appellants initiated this appeal by timely filing and serving the Notice of Appeal.

[1] May 18, 2019 fell on a Saturday, thus making the deadline for filing the following Monday, May 20, 2019.

## STANDARD OF REVIEW

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012). "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 [this Court] look[s] beyond the statute's plain language." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695–96 (2012).

## ARGUMENT

### I. The Trial Court erred in disregarding the plain language of the Frivolous Civil Proceedings Sanctions Act and holding instead that the Act requires expert affidavits in actions against architectural "Firms" in addition to actions against "Architects".

The affidavit requirement contained in SC Code § 15-36-100 applies to human beings, not to 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." S.C. Code Ann. § 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. Appellant 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 Respondent 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)." S.C. Code Ann § 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."). Under Respondent's view, the Act protects not only professionals, but also the companies where the professionals work. Thus, under Respondents' view, the additional language in the Act to protect licensed health care facilities would have no function. Statutes should not be read – as Respondent advocates – so that portions have no function. *Id.* 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). 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. *See 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 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 plain language. *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)." *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 535-40, 725 S.E.2d 693, 695-98 (2012).

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

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

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

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

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

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

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

"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 contains a proximate cause opinion." *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 535-40, 725 S.E.2d 693, 695-98 (2012).

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

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

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

"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 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 process which can avoid the need for a protracted battle in court." *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 535-40, 725 S.E.2d 693, 695-98 (2012).

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

"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 Trial 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 Respondent 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).

Respondent 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 Respondent to show the absurd result; it has failed to do so.

Because Appellants complied with the unambiguous terms of the Act, and because Appellants complied with the proper interpretation of the Act, the May 8, 2019 Order dismissing

all causes of action against Respondent is in error, as is the July 23, 2019 Order denying Appellants' Rule 59 Motion.

During the July 23, 2019 hearing on Appellants' Rule 59 Motion, Appellants specifically asked the Trial Court to set for the basis for its holding that an affidavit was required – i.e. did the Trial Court reach its decision because (a) it believed the statute unambiguously required that result, or (b) it believe the statute was ambiguous and thus open to interpretation, or (c) it believed that the statute was unambiguous but created a result so patently absurd that the legislature could not have intended it. Unfortunately, the Trial Court declined to explain. (R. p. 160-161; 164-165).

Consistent with the analysis of our Supreme Court in *Grier v. AMISUB*, and likewise consistent with the analysis of South Carolina law by Federal Judge Michelle Childs in *Oakman v. Lincare, Inc.*, Appellants complied with the plain language of the Act which does not lead to a result so patently absurd that the Trial Court may set it aside in favor of a result that the Trial Court likes better. Accordingly, the Trial Court erred in substituting its preference for that of the General Assembly as clearly set forth in the plain language of the Act.

## II. The Trial Court erred in considering and/or relying upon Respondent's Memorandum in Support of its Motion to Dismiss, because the memorandum was grossly untimely in non-compliance with the Supreme Court's Order dated September 10, 2015.

South Carolina does not favor trial by ambush. The Supreme Court's Civil Motions Pilot Program order dated September 10, 2015 required Respondent to submit "a supporting memorandum of law" contemporaneously with its motion, and ***prior*** to any hearing on the matter.[2]

[2] 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 as the last-minute memo contains great detail as to numerous new arguments not even suggested, let alone fully developed, in the body of the Motion to Dismiss.

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, Respondent did not submit a memorandum of law with its motion. Instead, Respondent filed its twenty-page memo at 5:27 the night before the hearing – thus seriously prejudicing Appellants by depriving Appellants of proper notice of Respondent's numerous additional arguments sufficiently prior to the hearing, and depriving Appellants' of their right under the Supreme Court's Order to file a memorandum in opposition.

This issue was raised by Appellants' counsel during the hearing, and the Court declined to permit Appellant to file a memo before ruling. (R. p. 60). 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.

This Court's May 8 Order does not set forth any basis for denying Appellants' request to submit a memo before ruling, or for denying the Appellants' broader request that the mandatory procedure set forth by the Supreme Court be followed. Appellants raised the issue again in their Rule 59 Motion, and even included a copy of the Supreme Court's September 10, 2015 Order as an exhibit to the motion. The Trial Court denied the Rule 59 Motion, again without addressing Respondent's (or the court's) non-compliance with the Supreme Court's September 10, 2015 Order.

Even if Appellant had not raised the issue during the hearing and in the Rule 59 motion, 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 to do so. 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.

The Trial Court erred in disregarding the Supreme Court's September 10, 2015 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.").

### III. The Trial Court erred in basing its May 8, 2019 Order on factual conclusions that are without evidentiary support.

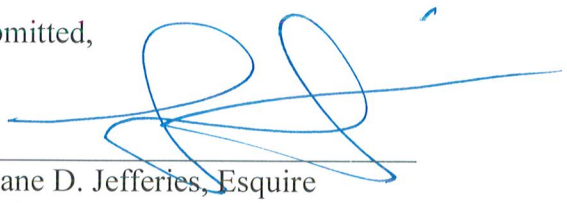
It is axiomatic that decisions be based on legal argument about evidence. Without any evidence, a decision based on factual conclusions cannot stand. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997) (An abuse of discretion occurs when an order based upon factual conclusions is without evidentiary support). The May 8 Order contains and relies upon purported factual findings – e.g. Respondent's CEO is Greg Huddy; Greg Huddy is an architect; Greg Huddy is licensed in South Carolina – that are not supported by any evidence of record.

## CONCLUSION

For the foregoing reason, Appellants respectfully argue that the Trial Court's Orders dismissing Respondent from this action are in error and should be reversed, and that the Respondent should be returned to the case and given thirty days in which to file an answer to Appellants' Complaint.

*[Signature on following page]*

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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

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