The Supreme Court of South Carolina

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Columbia, South Carolina
May 13, 2024

The Supreme Court of South Carolina

In the Matter of Christopher W. Burrows, Respondent.

Appellate Case No. 2024-000726

ORDER

The Office of Disciplinary Counsel asks this Court to appoint the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

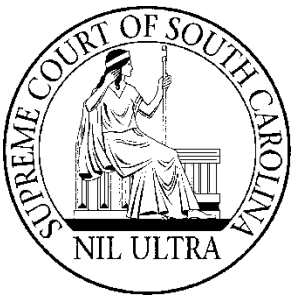
IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Except as authorized by Rule 31(d)(5), RLDE, Rule 413, SCACR, Mr. Lumpkin may not practice law in any federal, state, or local court, including the entry of an appearance in a court of this State or of the United States. Mr. Lumpkin may make disbursements from and close Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
May 15, 2024



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 22, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Daniel O'Shields and Roger W. Whitley, a Partnership d/b/a O&W Cars, Petitioner,

v.

Columbia Automotive, LLC d/b/a Midlands Honda, Respondent.

Appellate Case No. 2021-001388

ORDER

After careful consideration of Petitioner's petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty CJ

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
May 22, 2024

cc: Brooks Roberts Fudenberg
C. Steven Moskos
Harry Clayton Walker Jr.
Sarah Patrick Spruill
James Y. Becker
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daniel O'Shields and Roger W. Whitley, a Partnership d/b/a O&W Cars, Petitioner,

v.

Columbia Automotive, LLC d/b/a Midlands Honda, Respondent.

Appellate Case No. 2021-001388

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
R. Ferrell Cothran Jr., Circuit Court Judge

Opinion No. 28194
Heard September 13, 2023 – Filed May 22, 2024

AFFIRMED

C. Steven Moskos, of C. Steven Moskos, PA, of North Charleston; and Brooks Roberts Fudenberg, of the Law Office of Brooks R. Fudenberg, LLC, of Charleston, both for Petitioner.

James Y. Becker, of Haynsworth Sinkler Boyd, PA, of Columbia; Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville; and Harry Clayton Walker Jr., of Haynsworth Sinkler Boyd, PA, of Charleston, all for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' decision in *O'Shields v. Columbia Automotive, L.L.C.*, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021). The primary issue before us is the court of appeals' affirmance of the trial court's reduction of the punitive damages award. We affirm the court of appeals.[1]

The facts are fully set forth in the court of appeals' opinion, so we provide only a brief summary. In short, Respondent Midlands Honda, a South Carolina car dealership, learned it had sold a car that consisted of two cars welded together—known as a "clipped car." As a result, it re-purchased the car from the buyer. Subsequently, Respondent sold the car "as is" through a North Carolina auction open only to licensed car dealers.

Only four months prior, the auction's terms and conditions of sale changed to require the disclosure of a car's damage, even when it is sold "as is." Respondent was unaware of that new disclosure obligation as it did not receive written notice of the rule change—despite the auction's policy mandating such notice. Accordingly, Respondent did not affirmatively disclose the car's clipped condition. Instead, Respondent relied on the "as is" nature of the auction sale.

At the auction, Petitioner O&W Cars, a North Carolina used car dealership, purchased the car for $5,200. Petitioner did not discover the clipped nature of the car in its inspection. Petitioner sold the car for $6,800. The purchaser subsequently discovered the car's true, clipped condition and returned it to Petitioner.

Petitioner then sued Respondent for actual and punitive damages, asserting fraud and unfair trade practices claims. The jury returned a verdict of $6,645 in actual damages and $2,381,888 in punitive damages, equaling a 358:1 ratio of punitive to actual damages. Pursuant to Respondent's post-trial motion, the trial court found the punitive damages award constitutionally excessive in violation of Respondent's right to due process and reduced the award to $46,515, representing a 7:1 ratio. The trial court made several important factual findings regarding the evidence supporting the punitive damages award. First, the trial court found Respondent had "a good-faith basis for believing no duty to disclose exist[ed]." *See BMW of N. Am., Inc. v. Gore*,

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[1] We affirm the balance of the court of appeals' decision pursuant to Rule 220, SCACR.

517 U.S. 559, 580 (1996) (stating a good-faith omission "of a material fact may be less reprehensible than a deliberate false statement"). Second, "there is no evidence that [Respondent] ever made a false representation." Third, this was an "isolated incident." Finally, the trial court found "there was little, if any, chance of harmful consequences to the [Petitioner]." The reduced punitive damages award was, according to the trial court, the "upper limit of the range of punitive damages awards consistent with due process" given the facts presented. *See generally Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (noting the Due Process Clause places "outer limits" on the size of civil damages awards); *Hollis v. Stonington Dev., L.L.C.*, 394 S.C. 383, 404, 714 S.E.2d 904, 915 (Ct. App. 2011) ("In reducing the amount of the punitive damages, . . . in deference to the jury, we may do no more than determine the upper limit of the range of punitive damages awards consistent with due process on the facts of this case, and set the amount of punitive damages accordingly.").

As noted, the court of appeals affirmed the trial court's reduced punitive damages award. Having carefully reviewed the record and governing federal and North Carolina law,[2] we affirm and adopt the court of appeals' thorough analysis and determination that the punitive damages award represents the highest award due process allows considering the particular facts of this case. As a result, and as explained more fully by the court of appeals, this case will be remanded to the trial court for consideration of additional matters unrelated to the punitive damages award.

AFFIRMED.

FEW, JAMES, and HILL, JJ., concur. BEATTY, C.J., concurring in result only.

[2] As fully explained in the court of appeals' decision, the parties and lower courts all agree North Carolina's substantive law governs this dispute.

The Supreme Court of South Carolina

In Matter of William Christopher Swett, Respondent.

Appellate Case No. 2024-000760

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent consents to the issuance of an order of interim suspension in this matter.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
May 15, 2024

The Supreme Court of South Carolina

In the Matter of Marvin Rashad Pendarvis, Respondent.

Appellate Case No. 2024-000749 and 2024-000750

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Except as authorized by Rule 31(d)(5), RLDE, Rule 413, SCACR, Mr. Lumpkin may not practice law in any federal, state, or local court, including the entry of an appearance in a court of this State or of the United States. Mr. Lumpkin may make disbursements from and close Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s)

and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
May 17, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Blanchard Construction Corp., Inc., Respondent,

v.

480 King Street, LLC, Defendant,

And

480 King Street, LLC, Plaintiff,

v.

Glick/Boehm & Associates, Inc., Defendant,

Of Whom 480 King Street, LLC is the Appellant,

And

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

Appellate Case No. 2021-001510

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 6060
Heard December 5, 2023 – Filed May 22, 2024

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jesse Sanchez, of The Law Office of Jesse Sanchez, of Mount Pleasant, and Brent Souther Halversen, of Halversen & Halversen, LLC, of Mount Pleasant, both for Appellant.

Kent Taylor Stair, Paul Eliot Sperry, and Jordan N. Teich, all of Copeland, Stair, Valz & Lovell, LLP, of Charleston, for Respondent.

LOCKEMY, A.J.: 480 King Street, LLC (480 King), appeals a circuit court order dismissing its action against Glick/Boehm & Associates, Inc. (GBA) with prejudice on the ground that 480 King failed to provide an affidavit in support of its claims as required by section 15-36-100 of the South Carolina Code (Supp. 2023). We affirm in part, reverse in part, and remand.

On June 26, 2017, 480 King filed an action against GBA, the architect of record for a construction project on property owned by 480 King. In its complaint, 480 King alleged claims for breach of contract, breach of warranty, and negligence arising from GBA's performance. Pursuant to section 15-36-100(B), 480 King was required to file with its complaint "an affidavit of an expert witness . . . specify[ing] 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." 480 King did not submit such an affidavit either with its complaint or within the forty-five-day grace period provided in section 15-36-100(C)(1). Nevertheless, on November 17, 2017, Circuit Court Judge J. C. Nicholson signed an order extending the deadline for 480 King to file the required affidavit to November 27, 2017, and further stated that "[u]pon filing of the affidavit by this date, [480 King] will have been deemed to be in compliance with the requirements of [section 15-36-100(B)]." Judge Nicholson also gave GBA thirty days from the date of the filing of the affidavit to file a motion contesting its sufficiency.

480 King filed an affidavit from its retained expert on November 20, 2017, and GBA did not move to challenge its sufficiency within thirty days of its filing. In his affidavit, 480 King's expert stated he was a professional engineer; he held registrations in South Carolina, North Carolina, Florida, Louisiana, Ohio, and

Mississippi; and he was actively investigating the project giving rise to 480 King's action against GBA.

As discovery in the case progressed, the expert gave multiple depositions. In these depositions, he indicated he did not intend to offer a professional opinion about the standard of care applicable to architects and did not feel "comfortable" talking "specifically about the architect's standard of care." He testified he felt "comfortable talking about the standard of care that a professional would provide in either giving or completing construction administration services, whether that be an architect or an engineer" and explained "[t]hose services are similar across the board of professionals."

On June 28, 2021, GBA moved to dismiss 480 King's lawsuit pursuant to Rule 12(b)(6), SCRCP, on the ground that 480 King's retained expert was not qualified to give an opinion about the standard of care applicable to an architect. In its written opposition and at the hearing before Circuit Court Judge Jennifer B. McCoy, 480 King argued GBA's motion was untimely pursuant to the terms of Judge Nicholson's order. 480 King clarified that the expert stated that he could discuss the standard of care applicable to construction administration services provided by either a professional engineer or architect because of similarities between the two professions. Judge McCoy stated that, although she understood 480 King's "logic," she had "to go back to [the] legislative intent" behind section 15-36-100. Judge McCoy stated she believed allowing the expert to testify "as to whether or not an architect [breaches a] standard of care" would "fl[y] in the face of the statute." She explained she understood "sometimes duties overlap between professions" but that allowing this expert to testify would not comport with South Carolina law.

On December 16, 2021, the circuit court dismissed 480 King's action against GBA, finding 480 King failed to present an affidavit in support of its claims as required by section 15-36-100. The circuit court ruled the expert's "failure to express any opinion against [GBA] in terms of the standard of care of an [a]rchitect" and his acknowledgment that he did not intend to offer an opinion, professional or otherwise, about the standard of care of an architect, warranted a finding that 480 King "failed to present an affidavit in support of the claims against [GBA] as required by [section 15-36-100]"; therefore, GBA's motion to dismiss "must be granted."

480 King argues Judge McCoy's order ignores that 480 King's complaint asserts causes of action against GBA in both tort and in contract, and thus some of its claims were exempt from the affidavit requirement of 15-36-100. 480 King asserts the circuit court erred in holding all of its causes of action were based on GBA's allegedly negligent performance of professional services as an architect. We find that if all of the claims included in the complaint were grounded in professional negligence and the affidavit failed to meet the requirements of section 15-36-100, the circuit court would not have erred in dismissing the entire complaint. *See e.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co*., 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (holding circuit court properly granted summary judgment on behalf of a closing attorney being sued by a plaintiff claiming breach of contract because professional negligence claims were subject to section 15-36-100's affidavit requirement; however, triable issues of fact remained as to existence of oral contract related to title insurance). But 480 King raised breach of contract and warranty claims arguably not subject to the contemporaneous affidavit filing requirement of section 15-36-100. Based on the language of 480 King's complaint and the record before us, we are unable to agree that the breach of contract and breach of warranty claims were properly dismissed at this stage of the litigation.

480 King also argues that the thirty-day period Judge Nicholson's order provided for GBA to contest the sufficiency of the expert's affidavit operated as a bar against GBA's belated motion to dismiss. We disagree with 480 King's contention that Judge McCoy overruled Judge Nicholson's order. There was good cause for GBA to contest the sufficiency of the expert's affidavit after further information was uncovered in his three depositions; therefore, Judge McCoy did not err in allowing GBA to make the motion.[1] *See* S.C. Code Ann. § 15-36-100(E). ("The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires.").

Nevertheless, based on our view of the record, we hold the circuit court erred in dismissing the entirety of 480 King's action. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014) ("When reviewing the dismissal of an

[1] Discovery had proceeded for years with much information disclosed by both sides. Therefore, GBA could have raised its objection to the sufficiency of the affidavit through a motion to exclude and for summary judgment. In any event, GBA's filing here is not controlled by Judge Nicholson's November 2017 order.

action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court."). Under subsection (E) of section 15-36-100, an allegedly defective affidavit can be grounds to dismiss the corresponding complaint "for failure to state a claim." Dismissal is improper "[i]f the facts alleged and inferences reasonably deducible therefrom, *viewed in the light most favorable to the plaintiff*, would entitle the plaintiff to relief on *any* theory." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (emphasis added). "Questions of law may be decided with no particular deference to the trial court." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Under section 15-36-100(A), an "expert witness" means "an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue . . . ." Although this subsection includes numerous additional requirements, none specify that the expert witness must be a professional in the same field as the defendant. Section 15-36-100(A)(3) allows the submission of an affidavit from an individual who "has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." Additionally, the statutory definitions of the "Practice of engineering" and "Design coordination" further clarify the expert's ability to satisfy the affidavit requirement for an expert witness pursuant to section 15-36-100. *See* S.C. Code § 40-22-20 (Supp. 2023) (defining the "Practice of engineering" as requiring education, training, and experience in "design and design coordination" and "the review of construction for the purpose of monitoring compliance with drawings and specifications" and "Design coordination" as including "the review and coordination of those technical submissions prepared by others, including . . . architects").

At oral argument, 480 King's appellate counsel noted architectural and engineering services at times overlap, particularly in the area of contract administration. In his depositions, 480 King's expert testified as to his experience as an engineer providing construction contract administration services. Thus, to the extent the circuit court dismissed 480 King's claims relating to contract administration services for which an engineer may be properly qualified, we reverse. However, we affirm the dismissal of 480 King's negligent design and supervision claims to

the extent they require testimony by an expert qualified to address an architect's standard of care.[2]

Therefore, we affirm in part, reverse in part, and remand this matter to the circuit court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MCDONALD and VINSON, JJ. concur.

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