THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

RECEIVED
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S.C. SUPREME COURT

Unpublished Opinion No. 2022-UP-175
Filed April 20, 2022
Petition for Rehearing Denied May 19, 2022

Appellate Court Case No. 2022-000854

Brown Contractors, LLC under S.C. Residential Builders License No. 20378,
..... Respondent-Petitioner,
v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,
.....Petitioners-Respondents,
and

Andrew McMarlin and Amy Salzhauer,
..... Petitioners-Respondents,
v.

James Brown IV and Brown-Meihaus Construction, LLC,
.....Third-Party Defendants.

RESPONDENT-PETITIONER BROWN-CONTRACTOR'S <u>RETURN TO PETITION FOR CERTIORARI</u> OF PETITIONERS-RESPONDENTS ANDREW MCMARLIN AND AMY SALZHAUER

The Respondent-Petitioner Brown Contractors, LLC ("Respondent" or "Brown Contractors") pursuant to Rule 242(f), S.C.A.C.R., submits the following return to the Petition for Certiorari of the Petitioners-Respondents Andrew Joseph McMarlin *et al.* and Amy Salzhauer ("Petitioners" or "McMarlins").

In section B of its Opinion, the Court of Appeals affirmed the ruling of the Special Referee on the Petitioners' cross-appeal. [R. pp. 958-959]. Therein, the Court of Appeals

found that the Special Referee issued a "lucid order" that "Jay Brown did not commit any breach of contract or tort in his personal capacity against the McMarlins," and that "[t]his finding is reasonably supported by the record." [*Id.*]. Accordingly, the Court of Appeals declined to find error by the Special Referee; it also held that the 'single-enterprise theory' (advanced by Petitioners) is an "equitable remedy for plaintiffs" who have been wronged by business entities, but "does not apply as a tool for imposing personal liability on individuals" – citing the Supreme Court's decision in *Stoneledge at Lake Keowee Owner's Association, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 127, 866 S.E.2d 542 551-552 (2021).

Here, try as they might, the Petitioners cannot point to any of the five (5) grounds set forth in Rule 242(b), S.C.A.C.R., nor can they demonstrate any logical rationale for the Supreme Court to accept *certiorari*.

First, Petitioners have failed to demonstrate an "error of law" by either the Special Referee or the Court of Appeals. This is because the Special Referee explicitly stated – as even quoted by Petitioners – that there was "not sufficient **evidence** of Jay Brown's personal negligence to impose liability on Mr. Brown (emphasis added)." [R. p. 19; Petition for Cert., p. 4]. Petitioners can argue (without citation to authority) that the Special Referee failed to cite authority of "what kind of evidence is required to impose liability" [*Id.*], but anyway you cut it, the Petitioners are *really* arguing evidentiary "balls and strikes" with the Special Referee. It is clear, on the issue at bar, that they failed to carry their burden of proof at the trial; none of the caselaw cited by Petitioners can undo the Special Referee's findings of fact which are *evidentiary* in nature. *See Ritter and Associates, Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013) (cert. dismissed) ("[W]hen reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate

court will not disturb the [special referee]'s findings of fact as long as they are reasonably supported by the evidence..”). Thus, there is simply no basis for the Supreme Court to accept *certiorari* over this portion of the appeal.

In their second argument (“The Evidence Supports Personal Liability”), once again the Petitioners argue that the Special Referee should have ruled on the evidence *to their satisfaction*, saying that “to hold otherwise ignores the record.” [Petition for Cert., p. 11]. Nevertheless, the Special Referee gave a comprehensive, thoughtful and “lucid” order denying personal liability for Jay Brown, which is reasonably supported by the evidence. Once again, evidentiary disagreements are not a basis for extending *certiorari* under Rule 242(b)!

Finally, it is worth nothing that the *Stoneledge* case – which the Court of Appeals frames section B of its Opinion around [R. pp. 958-959] – is **never once mentioned**, **analyzed or discussed** by Petitioners. [Petition for Cert., p. iv]. How can the Supreme Court accept *certiorari* here, when the Petitioners do not bother to address the *Stoneledge* case which the Court of Appeals says supports the Special Referee’s Order?

CONCLUSION

For the foregoing reasons, the McMarlin’s Petition for Certiorari should be denied.

Respectfully submitted,

/s Robert B. Varnado

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