

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
Circuit Court Case No. 2009-CP-37-0652
Appellate Case No. 2012-212830

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., C. DAN CARSON, JEFFREY J. DAULER, JOAN W. DAVENPORT, MICHAEL FURNARI, DONNA FURNARI, JESSY B. GRASSO, NANCY E. GRASSO, ROBERT P. HAYES, LUCY H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W. HUND, III, RUTH E. ISAAC, MICHAEL D. PLOURDE, MARY LOU PLOURDE, CAROL C. POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.....Appellants,

v.

IMK DEVELOPMENT CO., LLC, KEOWEE TOWNHOUSES, LLC, LUDWIG CORPORATION, LLC, SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC, BRADFORD D. SECKINGER, JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, M GROUP CONSTRUCTION AND DEVELOPMENT, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., RICK THOENNES, MEL MORRIS, JOE BOSTIC, JEFF BOSTIC, CLEAR VIEW CONSTRUCTION, LLC, MICHAEL FRANZ, MHC CONTRACTORS, MIGUEL PORRAS CHONCOAS, BUILDERS FIRST SOURCE SOUTHEAST GROUP, MIKE GREEN, SOUTHERN CONCRETE SPECIALTIES, CARL COMPTON D/B/A COMPTON ENTERPRIZE A/K/A COMPTON ENTERPRISES, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, COLEMAN WATERPROOFING, HEYWARD ELECTRICAL SERVICES, INC., TINSLEY ELECTRICAL, LLC, HUTCH N SON CONSTRUCTION, INC., CARL CATOE CONSTRUCTION, INC., T.G. CONSTRUCTION, LLC, DELFINO CONSTRUCTION, FRANCISCO JAVIER ZARATE D/B/A ZARATE CONSTRUCTION, ALEJANDRO AVALOS CRUZ, HERBERTO ACROS HERNANDEZ, MARTIN HERNANDEZ-AVILES, FRANCISCO VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER MORAN MENTADO, SOCORRO CASTILLO MONTEL, UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC, INC., D/B/A KMAC NORTH CAROLINA, EUFACIO GARCIA, EVERADO JARMAMILLO, GARCIA PARRA INSULATION, INC., J&J CONSTRUCTION, JOSE NINO, JOSE MANUEL GARCIA, EASON CONSTRUCTION, INC., AND VINCENT MORALES D/B/A MORALES MASONRY, MILLER/PLAYER & ASSOCIATES,Defendants,

OF WHOM, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, Respondents

APPELLANT'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

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FEB 27 2014

SC Court of Appeals

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

The Appellants, by and through their undersigned counsel, hereby petition this Honorable Court for a rehearing of the above referenced appeal, pursuant to Rule 221, *SCACR*. Said petition for rehearing is in regard to the Court's February 12, 2014 Opinion which affirmed the instant appeal.

The grounds for Appellants' petition for rehearing are as follows:

GROUND FOR REHEARING

- I. **THE COURT OF APPEALS SHOULD HAVE RULED ON THE ISSUE OF WHETHER HODGINS AFFIDAVIT IS A SHAM AFFIDAVIT.**

- II. **THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANTING OF SUMMARY JUDGMENT**
 - A. **The testimony of Hodgin was not speculation.**

 - B. **The testimony of Hodgin, while based on circumstantial evidence, presented more than the required scintilla of evidence to overcome summary judgment.**

I. THE COURT DECLINED TO ADDRESS A CRITICAL ISSUE IN THE CASE, THAT BEING WHETHER THE HODGIN AFFIDAVIT WAS A SHAM. THAT ISSUE WAS PRESERVED AS WAS THE PRIMARY ISSUE NOTED BY APPELLANTS IN THEIR APPEAL. IN ORDER TO PRESERVE THE ISSUE FOR FURTHER REVIEW, APPELLANTS RESPECTFULLY REQUEST THAT THAT ISSUE BE DECIDED.

The trial court's erroneous finding that Hodgin submitted a "sham" affidavit was the central issue on appeal. In order to preserve that issue for further review, the Court of Appeals should have considered and ruled upon that issue and reversed the trial court.

Under Rule 242(d)(2), SCACR, only those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari....” (emphasis added)); *See also Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the Court of Appeals and not raised in petition for rehearing); *Holly Hill Lumber Co. v. McCoy*, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

As noted in Appellant’s brief, the affidavit of Hodgin was not a sham affidavit. In fact, it completely consistent with his earlier deposition testimony. Additionally, Hodgin's deposition was not complete when the hearing was held, leaving the record open to further inquiry and explanation by Hodgin. His affidavit was in no way a sham affidavit and the trial court’s finding in that regard was clearly erroneous and an abuse of discretion in light of the trial court’s failure to properly apply the law and its disregard of the facts.

For the forgoing reasons the Appellants’ respectfully request that the Court of Appeals rule upon the issue of Hodgin’s affidavit and reverse the trial court on this issue.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANTING OF SUMMARY JUDGMENT

The court erroneously concluded that the evidence presented by Plaintiffs was "speculative." In fact, the circumstantial evidence submitted by Plaintiffs, supported by the Hodgin testimony, was not speculation, and was more than the scintilla of evidence needed to overcome summary judgment.

It is not disputed that the cutting of a roof truss, and creating a life-safety issue, is negligence. The question is, which contractor cut the truss? Plaintiffs submitted proof in the form of Hodgin's testimony and photographs establishing that, in his opinion, the HVAC subcontractor is the "most likely" subcontractor to have cut the truss (Hodgin depo 66:16-19). That was based on several pieces of evidence, notably, 1) the proximity of the cut truss to the HVAC duct (Hodgin depo 60:25-61:12 and 162:8-11); 2) conversations with Channon Chambers (the building inspector) (Hodgin depo 162:19-24); and, 3) his experience with cut trusses on other projects (Hodgin depo 166:15-19 and 166:23-25). Further, in his affidavit, Hodgin definitively opined about that and articulated not one but two alternative opinions of fault on the part of the HVAC sub (negligently cutting the truss, or alternatively, failing to report it) Hodgin's opinion presented the trial court with more than the required scintilla of evidence needed to overcome summary judgment. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Without explanation, the Court ruled that such evidence was "speculation." While Hodgin admittedly does not know, by admission or direct evidence, who cut the truss, his testimony was not speculation at all. Rather, it was an opinion based upon the three things noted above (comprised of facts and experience), namely, the proximity of the duct to the truss, his conversations with the building inspector and his experience with cut trusses on other projects.

Plaintiffs' burden is merely a preponderance of the evidence and, as noted by the Supreme Court in *Mahaffey v. Ahl*, 264 S.C. 241, 214 S.E.2d 119, "It is axiomatic in this State that issue of negligence and proximate cause may be resolved by direct or circumstantial evidence." Circumstantial evidence is defined as,

Testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. *People v. Yokum*, 145 C.A.2d 245, 302 P.2d 406, 410.

Black's Law Dictionary (5th ed. 1979). Hodgin, an expert in the area of forensic building investigation, with extensive experience, considered the facts before him and deduced that it was the subcontractor who installed the duct work, *which was right next to and installed through the cut in the cut truss*, by who cut the truss. This is the essence of circumstantial evidence.

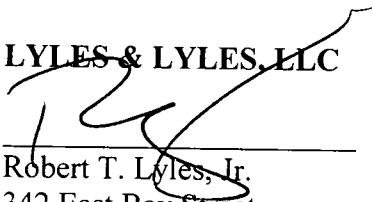
While the proof, at the time of the hearing on the motion for summary judgment may not have been persuasive to the trial judge, it was certainly more than scintilla of evidence necessary to overcome summary judgment.

CONCLUSION

Based on the foregoing, the Court's Opinion filed February 12, 2014, is in error and therefore, Appellant's Petition for Rehearing must be granted.

Respectfully submitted:

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February 26, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay
APPEAL NO. 2012-121830

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., C. DAN CARSON, JEFFREY J. DAULER, JOAN W. DAVENPORT, MICHAEL FURNARI, DONNA FURNARI, JESSY B. GRASSO, NANCY E. GRASSO, ROBERT P. HAYES, LUCY H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W. HUND, III, RUTH E. ISAAC, MICHAEL D. PLOURDE, MARY LOU PLOURDE, CAROL C. POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.....Appellant,

v.

IMK DEVELOPMENT CO., LLC, KEOWEE TOWNHOUSES, LLC, LUDWIG CORPORATION, LLC, SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC, BRADFORD D. SECKINGER, JOHN LUDWIG, LARRY D. LOLLIS, WILLIAM C. COX, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, M GROUP CONSTRUCTION AND DEVELOPMENT, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., RICK THOENNES, MEL MORRIS, JOE BOSTIC, JEFF BOSTIC, CLEAR VIEW CONSTRUCTION, LLC, MICHAEL FRANZ, MHC CONTRACTORS, MIGUEL PORRAS CHONCOAS, BUILDERS FIRST SOURCE SOUTHEAST GROUP, MIKE GREEN, SOUTHERN CONCRETE SPECIALTIES, CARL COMPTON D/B/A COMPTON ENTERPRIZE A/K/A COMPTON ENTERPRISES, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, COLEMAN WATERPROOFING, HEYWARD ELECTRICAL SERVICES, INC., TINSLEY ELECTRICAL, LLC, HUTCH N SON CONSTRUCTION, INC., CARL CATOE CONSTRUCTION, INC., T.G. CONSTRUCTION, LLC, DELFINO CONSTRUCTION, FRANCISCO JAVIER ZARATE D/B/A ZARATE CONSTRUCTION, ALEJANDRO AVALOS CRUZ, HERBERTO ACROS HERNANDEZ, MARTIN HERNANDEZ-AVILES, FRANCISCO VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER MORAN MENTADO, SOCORRO CASTILLO MONTEL, UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC, INC., D/B/A KMAC NORTH CAROLINA, EUFACIO GARCIA, EVERADO JARMAMILLO, GARCIA PARRA INSULATION, INC., J&J CONSTRUCTION, JOSE NINO, JOSE MANUEL GARCIA, EASON CONSTRUCTION, INC., AND VINCENT MORALES D/B/A MORALES MASONRY, MILLER/PLAYER & ASSOCIATES,Defendants,

Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

PROOF OF SERVICE

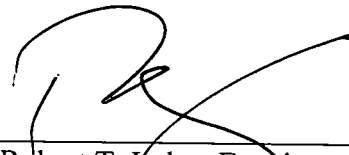
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FEB 27 2014

SC Court of Appeals

I certify that I have served the Appellant's Petition for Rehearing and Motion in Support of Petition for Rehearing on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on February ~~20~~ 2014, addressed to Respondent's attorneys of record, Charles F. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C. 29601, Bradford W. Cranshaw, Esquire and Danielle F. Payne, Esquire, Post Office Box 2823, Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622.

February ~~20~~ 2014



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January 26, 2013

VIA FEDERAL EXPRESS

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: *Stoneledge vs. IMK Development Co., LLC, et al.*
Appellate Case No.: 2012-212830

Dear Clerk Allen:

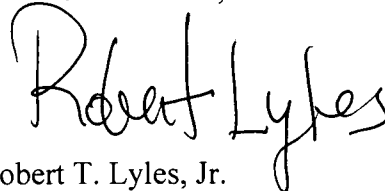
Enclosed herein for filing is the Appellant's original and seven (7) copies of the Petition for Rehearing and Memorandum in Support in the above referenced appeal. Please cause the original to be filed, and return a clocked copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter, all counsel of record are copied on this enclosure via U.S. Mail.

Please let me know if you need anything further or have any questions.

Very truly yours,

LYLES & LYLES, LLC



Robert T. Lyles, Jr.

RTL/hch

cc: Appellate Counsel of Record (*Via Email*)
Stoneledge Litigation Committee (*Via Email*)

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FEB 27 2014

SC Court of Appeals