

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

RECEIVED

APR 23 2014

Alexander J. Macaulay, Circuit Court Judge
Circuit Court Case No. 2009-CP-37-0652

S.C. Supreme Court

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.....PETITIONERS,

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.

PETITION FOR WRIT OF CERTIORARI

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730 / rtl@lylesfirm.com
ATTORNEY FOR PETITIONERS

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 ISSUE OF WHETHER THE HODGIN AFFIDAVIT WAS 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.

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner hereby certifies that a Petition for Rehearing regarding the Order that is the subject of this petition was made by the Petitioner on January 27, 2014 and ruled on by the Court of Appeals on March 19, 2014.

QUESTIONS PRESENTED

- I. Should the Court of Appeals ruled on the issue of whether Hodgins' affidavit is a sham affidavit?
- II. Did the Court of Appeals err 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.

STATEMENT OF THE CASE

This matter was filed by the Plaintiffs, in a individual and representative capacities, as well as by the POA, alleging claims for damages arising from pervasive construction defects at a townhome project in Oconee County known as Stoneledge. Included in that claim were claims against the Appellees, Gunter Heating & Air ("Gunter") and All Pro Heating A/C & Refrigeration, LLC ("All Pro"). The basis of the allegations against Gunter and All Pro arose from observations of a cut roofing truss at the project.

Gunter and All Pro filed essentially identical motions for summary judgment on February 22, 2012 and February 29, 2012, respectively. Appellant opposed those motions with the hearing in the lower court on April 16, 2012.

Notwithstanding Appellant's opposition, the lower court issued two orders dated July 27, 2012, on identical grounds, granting the motions for summary judgment of Gunter and All Pro. Those orders were received by Appellant on August 1, 2012 and the Notice of Appeal was served by Appellant on August 23, 2012. The Court of Appeals affirmed the trial court by order dated February 12, 2014. Appellants' Petition for Rehearing was denied on March 19, 2014.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE DECIDED THE CRITICAL ISSUE OF WHETHER THE HODGIN AFFIDAVIT WAS A SHAM AFFIDAVIT.

The trial court's erroneous finding that Hodgin submitted a "sham" affidavit was the central issue on appeal. The Court of Appeals erroneously declined to rule on that issue. The trial court should be reversed as Hodgin's Affidavit was not a sham affidavit.

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.

The sham or competing affidavit rule is an exception to the general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). As noted in the lower court's order, the factors to consider in determining whether an affidavit is a sham are:

1. Whether an explanation is offered for the statements that contradict prior sworn statements;
2. The importance to the litigation of the fact about which there is a contradiction;
3. Whether the non-movant had access to this fact prior to the previous sworn testimony;
4. The frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
5. Whether the previous sworn testimony indicates the witness was confused at the time; and,
6. When, in relation to summary judgment, the second affidavit is submitted.

Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004).

Applying these factors to the instant situation, it is clear that the trial judge incorrectly and inappropriately applied the sham affidavit rule to the affidavit of Mr. Hodgin.

As in initial matter, in order for the “statements” (here, the affidavit) to contradict “previous sworn statements” (here, Hodgin’s deposition), the deposition must at least be complete. As explained to the lower court, Mr. Hodgin’s deposition is *still*, as of today, unfinished and ongoing. As a matter of law, his affidavit cannot be said to contradict his deposition testimony when his deposition testimony is not yet complete.

Further, Mr. Hodgin’s affidavit is consistent with his deposition testimony (at least that taken to-date), which was submitted to the Court at the hearing by counsel for Plaintiffs and counsel for defendants (*Deposition of Derek Hodgin*). While three or four lines of Mr. Hodgin’s deposition testimony, taken out of context, and read in isolation from the remainder of his testimony, may appear to be contrary to a statement in the affidavit, the deposition testimony as a whole is consistent with the affidavit.

Additionally, the affidavit was not provided to create an issue of fact where none existed previously. Mr. Hodgin’s deposition testimony, standing alone, demonstrates a question of fact. The affidavit merely restates certain testimony and provides the court with additional testimony on matters about which Mr. Hodgin has not yet been thoroughly questioned during his deposition. Mr. Hodgin’s affidavit is not contradictory, as the defendants suggest, merely because it restates, and adds to, previous, and still incomplete, deposition testimony.

Also, an overview of sham affidavit cases illustrate that application of that rule is not not appropriate under the circumstances. In *Cothran*, relied upon by the lower Court, the

Supreme Court actually reversed the trial court's decision to exclude the affidavit and determined that the competing affidavit rule did not apply. Mr. Hodgin's affidavit in this case is also clearly distinguishable from affidavits in cases where the sham affidavit rule has been applied. For example, the federal cases cited in *Cothran* as illustrative of the sham sham affidavit rule, are inapposite to this situation. In a decision from the Second Circuit, Circuit, plaintiff submitted affidavits characterized by the court as "false", delayed errata sheets, and supplemental answers to interrogatories attempting to recant prior deposition testimony, which the district court found so egregious it imposed Rule 11 sanctions on the the plaintiff and its counsel. *Margo v. Weiss*, 213 F.3d 55 (2nd Cir. 2000). The errata sheets, sheets, supplemental discovery responses and affidavits in *Margo*, under no uncertain terms, attempted to *change* and *recant* the testimony given during the deposition and information given in prior discovery responses. *Id.* In fact, the court found the conduct so appalling that, in addition to affirming the award of attorney's fees and costs below, the court court awarded double costs on appeal. *Id.*

For the forgoing reasons the Appellants' respectfully request that the Supreme Court 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 affirmed the trial court by erroneously concluding 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 Hodgins 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, Hodgins 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) Hodgins' 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 Hodgins 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.

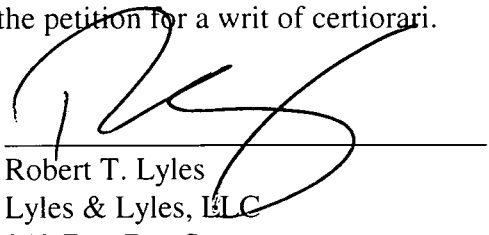
Black's Law Dictionary (5th ed. 1979). Hodgins, an expert in the area of forensic building investigation, with extensive experience, considered the facts before him and deduced that it was the subcontractor who installed the duct work, *which was right next to and installed through the cut in the cut 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 6, 2013, is in error and therefore, Petitioners ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,



Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
T: (843) 577-7730
F: (843) 577-7172
Email: rtl@lylesfirm.com

Attorneys for Petitioner

April 18, 2014

Counsel of Record:

Charles F. Turner, Jr., Esquire
Turner Padget Graham & Laney, PA
200 East Broad Street, Suite 250
Greenville, S.C. 29601

Attorney for Respondent All Pro Heating, A/C & Renovation, LLC

Bradford W. Cranshaw, Esquire
Danielle F. Payne, Esquire
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, S.C. 29202

-and-

J. Victor McDade, Esquire
Doyle, Tate & McDade, PA
Post Office Box 2125
Anderson, S.C. 29622

Attorneys for Respondent Gunter Heating & Air

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APPEAL FROM OCONEE COUNTY
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Alexander J. Macaulay, Circuit Court Judge
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Appellate Case No. 2012-21283

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.....Petitioners,

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

I hereby certify that I have served the Appellants' Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari on Respondent Gunter Heating & Air and Respondent All Pro Heating, *et al.*, by depositing a copy of same in the United States Mail, First Class, with sufficient postage affixed thereto, this 21st day of April, 2014, addressed to their attorneys of record:

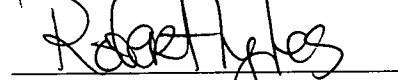
Charles F. Turner, Jr., Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607

J. Victor McDade, Esq., Doyle, Tate &
McDade, PA,
P.O. Box 2125
Anderson, S.C. 29622

Bradford W. Cranshaw, Esq.
Danielle F. Payne, Esq.
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, S.C. 29202

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11639
Columbia, SC 29211

LYLES & LYLES, LLC



Robert T. Lyles, Jr.
342 East Bay Street
Post Office Box 773 (29402)
Charleston, South Carolina 29401
T: (843) 577-7730
F: (843) 577-7172
Email: rtl@lylesfirm.com

ATTORNEY FOR PETITIONER