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

RECEIVED
MAY 19 2014
S.C. Supreme Court

Appellate Case No. 2014-000860

Stoneledge at Lake Keowee Owners' Association, Inc., et al.,.....Petitioners,

v.

Gunter Heating & Air & All Pro Heating, A/C & Renovations, LLC,.....Respondents

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AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT GUNTER HEATING & AIR

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QUESTIONS PRESENTED

I. Should Petitioners' petition for writ of certiorari be denied because it does not fall within the purview of Rule 242(b), *SCACR*?

II. Did the Court of Appeals correctly affirm the granting of summary judgment?

III. Did the Court of Appeals correctly decline to rule on the issue of whether Hodgin's affidavit was a sham affidavit?

IV. Gunter adopts by reference the return of Respondent All –Pro Heating, A/C Refrigeration, LLC.

STATEMENT OF THE CASE

Respondent Gunter adopts the Petitioners' statement of the case.

STATEMENT OF THE FACTS

Petitioner Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "Stoneledge HOA") was created on May 24, 2005, pursuant to the South Carolina Horizontal Property Regime Act. (Second Amended Cmplt. ¶ 1). Stoneledge HOA is obligated to maintain, repair, and replace components of the eighty (80) townhomes at Stoneledge at Lake Keowee (hereinafter "the Project"). (Id. at ¶ 2). The remaining Petitioners (hereinafter "Individual Owners") are owners of townhomes located in Phases I and/or II of the Project and have all alleged to have suffered injury and damage, or will suffer injury or damage. (Id. at ¶ 3).

Petitioners' allege that Respondent Gunter Heating and Air (hereinafter "Gunter") provided HVAC work for Phase II of the Project. (Id. at ¶ 27). Petitioners state that "due to Marick's (the general contractor for the project that subcontracted with Gunter) involvement in the construction of the project, Petitioners believe that there is a reasonable basis to assert fault on Gunter." (Id. at ¶ 34). Petitioners refer to the Scope of Repair by Construction Science & Engineering dated January 24, 2011 to detail the construction deficiencies associated with their allegations against the various Defendants. (Id. at ¶ 49). On January 23, 2012, Petitioners' expert, Derek Hodgin, P.E., specifically relied on Section B2, located on page 2 in the CSE Matrix dated November 21, 2011, to assess liability on Gunter for the cut roof truss in unit number 552 at the Project. (Hodgin Depo. dated 1/23/12, p. 162, ll. 5-20). However, Hodgin stated that he was unable to

provide an opinion within a reasonable degree of engineering certainty as to who cut the truss. (Id.) He admitted that his opinions are speculative at best. (Id. at p. 167, ll. 1-7). Prior to this deposition, Hodgin testified on December 22, 2010 that "the likely candidate for the cut truss was the HVAC installer" without further explanation. (Hodgin Depo. dated 12/22/10, p. 66, ll. 12-19). Hodgin further testified that he did not have any direct observations of the condition but had a discussion with a building official from Oconee County about the cut roof truss. (Id. at p. 60, ll. 24-25, p. 61, ll. 1-3). After spending more than $250,000 in expert investigation fees and numerous visits to the Project for inspections, to date, the only alleged cut roof truss that has been discovered was the one cut roof truss in unit 552. (Burgess Metcalf Depo, p. 89, ll. 7-13). Petitioners have failed to present one witness to testify that Gunter did in fact cut the roof truss at issue in this case.

However, Gunter presented the Affidavit of Teddy Gunter to show otherwise. Gunter contracted with Marick Home Builders to perform HVAC work in a limited number of units at the Project. (Affidavit of Gunter ¶ 3). Gunter did not perform any work on unit 552. (Id. at ¶¶ 7 and 9). Furthermore, Gunter did not cut any roof trusses at the Project. (Id. at ¶9).

Additionally, Nathan Hornaday, the project manager for Marick, the general contractor, specifically testified that an HVAC subcontractor did not cut the roof truss. (Hornaday Depo, p. 221, ll. 13-22). He specifically testified that there would have been no reason for the HVAC subcontractor to have cut the roof truss because it was an open-web truss which would have accommodated the installation of the ductwork without the need to cut it. (Id. at p. 81, ll. 15-23).

Lastly, during the written discovery phase, it was uncovered that the framer on the project, Carl Catoe Construction (hereinafter "Catoe") specifically notes cutting the truss in question. The invoices and project notes specifically reference cutting the roof trusses. Carl Catoe testified that there are occasions wherein roof trusses are cut during the construction process. (Catoe Depo, p. 99, ll. 21-25).

It is clear from the facts presented in this case that Gunter did not cut the roof truss in unit 552 and that Petitioners have failed to present any factual evidence to suggest otherwise.

ARGUMENT

I. PETITIONERS' PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT DOES NOT FALL WITHIN THE PURVIEW OF RULE 242(b), *SCACR*.

The Supreme Court of South Carolina should decline to consider Petitioners' petition for writ of certiorari as the writ does not contain special and important reasons for which the Court should expend its time on Petitioners' issues. Petitioners' petition is two-fold: 1) summary judgment should not have been granted to Respondent Gunter because there is a 'mere scintilla of evidence' and 2) the Court of Appeals should have ruled on the issue of whether Derek Hodgin's affidavit was a sham affidavit. Neither of these bases for Petitioners' petition are special and important reasons. Furthermore, Rule 242(b), *SCACR* states in pertinent part:

> The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> 1) Where there are novel questions of law.

2) Where there is a dissent in the decision of the Court of Appeals.
3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4) Where substantial constitutional issues are directly involved.
5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Petitioners' petition for writ of certiorari does not address nor implicate any of the five (5) character of reasons enumerated above. While these five (5) character of reasons do not fully measure the Supreme Court's power to review, Petitioners failed to set forth with particularity any significant or considerable legal issues which this Rule envisions. The issues in the petition for writ of certiorari are rudimentary and straight-forward. Therefore, the Supreme Court should decline to review Petitioners' petition for writ of certiorari.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GRANTING SUMMARY JUDGMENT.

This appeal concerns one cut roof truss in unit 552 at the Stoneledge project. The Appellate Court applies the same standard that governs the trial court under Rule 56(c), SCRCP, when reviewing the grant of a summary judgment motion. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (2003). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Burriss v. Anderson County Bd. of Educ., 369 S.C. 443, 633 S.E.2d 482 (2006); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). Once the moving party demonstrates summary judgment is appropriate, the non-moving

party must "do more than simply show that there is some metaphysical doubt as to material facts [and] must come forward with **specific facts** showing that there is *a genuine issue for trial.*" George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990)) (emphasis in original and further internal quotation marks omitted). Respondent Gunter produced the Affidavit of Teddy Gunter which clearly stated that Gunter did not perform any work in unit 552, nor did Gunter cut any roof trusses in any attic at the Project. (Affidavit of Teddy Gunter). More importantly, Catoe, another contractor on the project, specifically noted in their invoices and project notes cutting roof trusses. (Appendix to Petition, pp. 181-184). Carl Catoe testified that there are occasions wherein roof trusses are cut during the construction process. (Catoe Depo, p. 99, ll. 21-25).

Furthermore, the testimony of Nathan Hornaday, Marick's project manager, supports Gunter. Hornaday testified that an HVAC subcontractor did not cut a roof truss at the property. (Hornaday Depo, p. 221, ll. 13-22). Hornaday specifically testified that there would have been no reason for the HVAC subcontractor to have cut the roof truss because it was an open-web truss which would have accommodated the installation of the ductwork without the need to cut it. (Id. at p. 81, ll. 15-23). Petitioners would have the Court ignore the non-rebuttable evidence submitted by Respondent Gunter and focus solely on Derek Hodgin's speculation of who could have possibly cut the roof truss.

The Court of Appeals correctly held that, even considering Hodgin's affidavit, Petitioners submitted only speculation, and no evidence, as to who cut the roof truss. "To survive summary judgment, the evidence presented must amount to more than mere

speculation and conjecture." Harris Teeter, Inc. vs. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010). "The expert must therefore state his opinion with reasonable certainty." Id. Derek Hodgin, Petitioners' Expert, testified that he did not have an opinion to a reasonable degree of engineering certainty whether Gunter damaged or cut the roof truss. (Hodgin Depo. dated 1/23/12,p. 167, ll. 7-11). Hodgin testified that he has no firsthand knowledge of who cut the truss and that his opinions regarding this condition are speculative. (Id., p. 167, ll. 1-7)(emphasis added). Hodgin himself has not even witnessed the alleged condition of which they complain. He relies solely on hearsay evidence to support his speculative theories. Petitioners' failed to meet its burden by showing specific facts to support a genuine issue for trial, and relied solely upon the speculative theories propounded by Derek Hodgins' in direct contravention to the law requiring an expert to provide an opinion with reasonable certainty. The Supreme Court should deny Petitioners' petition for writ of certiorari as the Court of Appeals and trial court properly held that Petitioners' failed to meet their burden.

III. THE COURT OF APPEALS DID NOT ERR IN DECLINING TO DECIDE WHETHER HODGIN'S AFFIDAVIT WAS A SHAM AFFIDAVIT.

The only critical issue in this case is whether Petitioners have any evidence that Respondent Gunter cut the roof truss in unit 552. The Court of Appeals ruled that, even considering Derek Hodgin's affidavit, Petitioners' did not present evidence as to who cut the truss, only speculation. Neither the Court of Appeals nor the Supreme Court should be forced to rule on matters that are peripheral to the central dispositive issue in the case, which was ultimately decided in Respondent Gunter's favor. The law is clear that an

appellate court need not address remaining issues when disposition of an issue is dispositive to the entire matter. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Whiteside v. Cherokee County School District No. One, 311 S.C. 335, 428S.E.2d886 (1993). This issue was correctly ruled upon by the trial court but did not need to be readdressed by the Court of Appeals because they affirmed the central, dispositive issue in the case. Petitioners produced no evidence, even considering Hodgin's affidavit, that Respondent Gunter cut the roof truss in unit 552.

Furthermore, Petitioners' have not provided any substantive arguments as to why this Court should review the Court of Appeals ruling on the issue of the sham affidavit. Therefore, this Court should decline Petitioners' petition for writ of certiorari as it was not necessary for the Court of the Appeals to consider the issue of whether Hodgin's affidavit was indeed a sham affidavit.

IV. GUNTER ADOPTS BY REFERENCE THE BRIEF OF RESPONDENT ALL-PRO HEATING, A/C REFRIGERATION, LLC

Pursuant to South Carolina Appellate Rule 208(b)(6), Gunter adopts by reference any and all arguments made by Respondent All-Pro Heating, A/C & Refrigeration, LLC in its return to Petitioners' petition for writ of certiorari.

CONCLUSION

For the above-stated reasons, the Supreme Court should deny Petitioners' petition for writ of certiorari as it does not fall within the purview of Rule 242(b), SCACR, the Court of Appeals correctly affirmed the granting of summary judgment by the trial court

and did not need to address the issue of whether Derek Hodgin's affidavit was a sham affidavit.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT GUNTER HEATING & AIR

West Columbia, South Carolina
May 7, 2014.

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PROOF OF SERVICE

I certify that I have served the Amended Return to Petition for Writ of Certiorari by Respondent Gunter Heating and Air on Petitioners by depositing a copy of it in the United States Mail, First Class postage prepaid, on **May 19, 2014**, addressed to Petitioners' attorneys of record, Robert T. Lyles, Jr., Lyles & Lyles, LLC, P.O. Box 773, Charleston, SC 29402

Respectfully Submitted,

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