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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0652  
Appellate Case No. 2014-000860

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 Nix, Jennifer D. Hix, Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde, Mary Lou K. Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, 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, Integrys Keowee Development, LLC, Marick Home Builders, LLC, Bostic Brothers Construction, Inc. and Miller/Player & Associates, John Ludwig, M Group Construction and Development, LLC, Clearview Construction, Michael Franz, MHC Contractors, Miguel Porras Choncoas, Builders First Source Southeast Group, Mike Green, Southern Concrete Specialties, Carl Compton d/b/a Compton Enterprise a/k/a Compton Enterprises, Gunter Heating and 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, Defendants.

Of Whom Gunter Heating & Air and All Pro Heating, A/C & Refrigeration, LLC  
..... Respondents.

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RETURN TO PETITION FOR WRIT OF *CERTIORARI*  
BY RESPONDENT ALL PRO HEATING A/C & REFRIGERATION, LLC

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May 16, 2014

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Pursuant to Rule 242(f), SCACR, Respondent All Pro Heating, A/C & Refrigeration, LLC respectfully submits this Return to the Petition for Writ of Certiorari.

### **STATEMENT OF THE CASE**

This appeal follows the circuit court's order granting Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment on July 27, 2012. This litigation involves a construction dispute at "Stoneledge at Lake Keowee" ("Stoneledge"), an 80-unit town home community located on Lake Keowee in Oconee County. Petitioners are homeowners at Stoneledge and have brought an action against All Pro as well as numerous other construction entities.

Petitioners originally initiated this action on May 29, 2009, against Bostic Brothers Const., Inc., and Marick Home Builders, LLC ("Marick"), who served as general contractors for most, if not all of Phase I and Phase II of the construction of Stoneledge, respectively. Thereafter, Petitioners amended their Complaint on February 9, 2010, to name additional individual homeowners, among others, as Plaintiffs, and additional construction entities, among others, as Defendants.

On March 15, 2010, Marick filed an Answer to Petitioners' First Amended Complaint and filed a Third-Party Complaint against several subcontractors. Marick then amended its Third-Party Complaint to name All Pro as an additional Defendant. On April 19, 2011, All Pro filed an Answer to Marick's Amended Third-Party Complaint and on April 22, 2011, All Pro filed an Amended Answer to the same. On June 24, 2011, All Pro filed a Motion for Summary Judgment as to the claims asserted against it by Marick.

Thereafter, on October 7, 2011, Petitioners filed a Second Amended Complaint, asserting causes of action directly against a number of the subcontractors, including All Pro. Petitioners alleged negligence and breach of warranty directly against All Pro, arising from one cut attic truss member that was found one of the Stoneledge units. All Pro filed an Answer to Petitioners' Second Amended Complaint on October 31, 2011, and on February 29, 2012, All Pro filed a Motion for Summary Judgment as to Petitioners' and Marick's claims, asserting that there was no basis to conclude that All Pro cut a roof truss. Marick's third-party action against All Pro was voluntarily dismissed without prejudice on April 19, 2012, by stipulation of the parties. (R. pp. 62-63). Thus, the only remaining claims against All Pro were those asserted by Petitioners.

A hearing on All Pro's remaining Motion for Summary Judgment was held on Monday, April 16, 2012. Counsel for Petitioners made oral arguments at the hearing and presented deposition testimony and an affidavit of Derek Hodgin, P.E., with Construction Science and Engineering, Inc. ("CSE"), to support their opposition to the motion. The circuit court ruled from the bench, granting All Pro's Motion for Summary Judgment and directed All Pro to draft a proposed order for the court's review. The court's order granting All Pro's Motion for Summary Judgment was filed on July 27, 2012. The Notice of Appeal was served by Petitioners on August 23, 2012. The Court of Appeals entertained oral arguments and affirmed the circuit court's decision by order dated February 12, 2014. The Court of Appeals denied the Petitioners' Petition for Rehearing on March 19, 2014.

## STATEMENT OF THE FACTS

In or around 2007, All Pro was hired by Marick to install HVAC units in certain townhomes that were built as part of Phase II of the Stoneledge development. All Pro installed the units as requested, without significant issues or complaints, without retainage, and was paid in full. (R. pp. 71-72).

After some alleged problems with the townhomes at Stoneledge began to arise, Petitioners retained Derek Hodgkin to investigate possible construction defects at Stoneledge and to serve as an expert witness in this matter. Mr. Hodgkin began his investigation on May 22, 2009. (R. p. 147, lines 16-18). On December 22, 2010, before All Pro was named as a party, Mr. Hodgkin testified that a representative of CSE found that a single attic truss member was cut in one of the inspected units. (R. p. 148, lines 7-10). Since the investigation began in 2009, the one cut attic truss at issue has been the only cut truss discovered at Stoneledge. (R. p. 154, lines 7-13).

Mr. Hodgkin testified that an HVAC installer would be the “likely candidate” to have cut the truss because the truss would have been in the way of the HVAC equipment. (R. p. 150, lines 16-19). This testimony, however, was not based on any direct observations by Mr. Hodgkin, but rather on a discussion he had with a building official for Oconee County. (R. p. 148, line 24-p. 149, line 3). Indeed, Mr. Hodgkin testified that he had not “done the research to know which unit [referred to by the building official] this was and how many units were constructed prior to this that would have had that same issue.” (R. p. 149, lines 7-12). Most importantly, Mr. Hodgkin later testified that these opinions were purely speculative:

1       Q.     Let me back up. You admit that you don't have any  
2             first-hand knowledge of who cut this truss?

3 A. That's correct.  
4 Q. And you admit that absent somebody telling you they  
5 saw it cut or you being there seeing it cut, your  
6 opinions in this regard are speculative?  
7 A. Yes, sir.

(R. p. 161, lines 1-7).

Based on Mr. Hodgin's initial speculation that an HVAC contractor could have cut the truss, All Pro and Gunter Heating and Air, another HVAC contractor on the project, were named as parties. Remarkably, after incurring more than \$250,000 in fees for his investigation of the units at Stoneledge, which served as the basis for a multi-million dollar repair estimate, Mr. Hodgin has not offered an opinion that All Pro, or anyone else, cut the truss. Upon information and belief, at least 37 witnesses were deposed, and not a single individual testified that All Pro cut the single truss at issue. Moreover, none of these individuals testified that they knew of *anyone* who cut the truss.

On January 23, 2012, over a year after his initial testimony, Mr. Hodgin testified that the cut truss was the only issue he attributed to the HVAC contractors and that the truss had been repaired:

18 Q. It's my understanding from your earlier testimony,  
19 the only HVAC issue you raised deals with the  
20 truss?  
21 A. I believe that's correct, yes.  
22 Q. And you don't know who cut or damaged the truss?  
23 A. That's correct.  
24 Q. And it's been repaired?  
25 A. Yes, sir.

(R. p. 165, lines 18-25). Mr. Hodgin further testified he testified that this cut truss had been repaired for approximately a few hundred dollars:

1 Q. And it was repaired for just a few hundred dollars?  
2 A. I don't know specifically the cost. That was my --  
3 I was trying to give it a range. It's not a huge

4 cost. I'm sure it was done at a reasonable cost.  
5 Q. That was your ballpark figure, a few hundred  
6 dollars?  
7 A. Yes, sir.

(R. p. 166, lines 1-7).

Significantly, Mr. Hodgkin testified that after two and a half years on the project and after six to ten visits to the site, (R. p. 187, lines 8-12), he still did not have an opinion as to who cut the truss:

14 Q. Let me ask it this way, do you have an opinion  
15 within a reasonable degree of engineering certainty  
16 whether All Pro Heating and Air was responsible for  
17 cutting the trusses indicated in Unit 76? In other  
18 words, do you have any evidence that All Pro  
19 Heating and Air installed the HVAC in that unit?  
20 A. Not without doing further research, no.

(R. p. 164, lines 15-20). Indeed, he did not even have an opinion as to anyone who would have cut the truss:

22 Q. And you don't know who cut or damaged the truss?  
23 A. That's correct.

(R. p. 165, lines 22-23). Furthermore, Mr. Hodgkin was not even able to affirmatively state when the truss was cut:

12 Q. Do you know when the truss was cut?  
13 A. I would say approximately at the time of the HVAC  
14 installation, *if* that's the party that caused the  
15 truss to be cut.

(R. p. 159, lines 12-15). (emphasis added).

Moreover, Burgess Metcalf, an associate of CSE and another engineering expert identified by the Petitioners, testified that he did not have an opinion as to whom cut the truss and that it did not result in any further damage other than the truss itself:

16 Q. So that's what you observed. Is it your opinion

17                   that the HVAC people were the ones that cut the  
18                   truss?  
19        A.        Again, that's a sequencing issue that I can't speak  
20                   to.  
21        Q.        So you don't have an opinion on that?  
22        A.        No, not a definitive opinion.  
4        Q.        I understand, but any resulting damage other than  
5                   the truss being cut itself?  
6        A.        Not that I'm aware of.

(R. p. 153, lines 16-22; R. p. 154, lines 4-6). Additionally, Mr. Metcalf testified that no other cut trusses had been found at Stoneledge.

7        Q.        And have you observed, or are you aware of this  
8                   condition, the cut truss being in any other  
9                   locations at the project in any other units?  
10       A.        We have not made any other observations in that  
11                   area.  
12       Q.        Do you know if this truss has been fixed, repaired?  
13       A.        Yes.

(R. p. 154, lines 7-13). Accordingly, the testimony provided by Petitioners' experts amounts only to various unknowns surrounding the cut truss, and none of which establish that the truss was cut by All Pro.

At the hearing on All Pro's Motion for Summary Judgment, All Pro argued that Mr. Hodgin's affidavit was received the Friday afternoon before the Monday hearing, (R. p. 98, lines 14-16), and that it should not be considered by the court because it was a "sham affidavit," as set forth in *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). (R. p. 98, line 21-p.99, line 12; R. p. 99, line 19-p. 100, line 13). Further, All Pro argued that even if the court looked to Mr. Hodgin's affidavit, it would be otherwise inadmissible. (R. p. 100, lines 18-23). Finally, All Pro contended that summary judgment was warranted because none of the evidence or testimony indicated that the truss was cut by All Pro. Accordingly, there were no genuine issues of fact with regard to this issue.

During the Petitioners' response, the circuit court was concerned with the testimony provided in Mr. Hodgin's affidavit, in that it set forth conclusions of fact that were not properly supported. (R. p. 106, lines 20-23; R. p. 107, lines 2-5; R. p. 112, lines 1-4). The circuit court was skeptical of the foundation and authenticity of the photographs relied on by Mr. Hodgin in drawing such conclusions. At the hearing, the circuit court concluded that "a material fact had not been established, and at best it's based on a want of evidentiary support." (R. p. 120, lines 18-20). The Court granted All Pro's motion for summary judgment.

## ARGUMENTS

In their Petition, the Petitioners assert, without the benefit of citation to new or additional authority supporting their contentions, that the Court of Appeals erred when it determined that a ruling on the Hodgin Affidavit was not critical to its decision and when it affirmed the Circuit Court's granting of summary judgment to All Pro. All Pro requests that the Supreme Court deny certiorari.

### **I. THE DECISION BY THE COURT OF APPEALS DOES NOT WARRANT FURTHER REVIEW PURSUANT TO RULE 242, SCACR.**

The South Carolina Appellate Court Rules provide that a “writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. Typically, the granting of certiorari is limited to cases wherein: (1) there are novel questions of law; (2) there is a dissent in the decision of the court of appeals; (3) the decision by the court of appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the court of appeals conflicts with a decision of the Supreme Court of the United States. Rule 242(b), SCACR; *see also* Toal, Vafai & Muckenfuss, *Appellate Practice in South Carolina* (2d Ed.) at p. 276. The present case does not fit within any of these categories, and no “special and important” reason exists to merit further review.

Petitioners have made no attempt to assert why the Supreme Court should grant certiorari, and make no attempt to assert why or how a single cut truss, that has been repaired, gives rise to the “special and important reasons” required for the granting of certiorari. This matter does not warrant further review. The categories enumerated in

Rule 242(b) by definition do not apply to Petitioners' Petition and, therefore, do not require extensive discussion. This case does not present any novel legal issue. The Court of Appeals' decision does not contain dissenting opinion. There are no constitutional issues directly involved, let alone substantial constitutional issues. The Court of Appeals' decision does not include a federal question. The result does not conflict with any prior decision by this Court, and Petitioners do not attempt to argue otherwise. The Court of Appeals applied existing law and unanimously affirmed the decision by the Circuit Court granting summary judgment to All Pro.

While the elements enumerated in Rule 242(b) are not the exclusive parameters upon which this Court may decide to grant or deny certiorari, no other reason exists for this Court to grant Petitioners' Petition. The ruling of the Court of Appeals does not present the significant or far-reaching issues contemplated by Rule 242(b). Moreover, the analysis by the Court of Appeals is straight-forward and does not involve new or emerging legal doctrines or issues general public importance sufficient to justify certiorari review. Accordingly, the Respondent requests that the Supreme Court decline to grant certiorari.

**II. THE COURT OF APPEALS DID NOT ERR IN DECLINING TO DECIDE WHETHER THE HODGIN AFFIDAVIT WAS A SHAM AFFIDAVIT AS THE AFFIDAVIT WAS NOT CRITICAL TO THE COURT'S DECISION**

In its opinion, the Court of Appeals stated “[w]e do not address whether Hodgin’s affidavit was a sham because we agree with the circuit court that, even considering the affidavit, the Plaintiff’s submitted only speculation, and no evidence, as to who cut the truss.” The Petitioners statement that “[t]he Court of Appeals erroneously declined to rule on that issue” sets forth the entirety of the Petitioners’ argument as to why they believe

the Court of Appeals committed an error of law when it determined that a ruling as to the Hodgin Affidavit was not critical to its decision (Petition for Writ p. 4). This statement is insufficient to preserve the argument for review.

Rule 242(d)(4) requires that each question or issue presented requires that each question by a petitioner be supported by legal authority. Rule 242(d)(4) SCARC. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc., Respondent, v. United States Fidelity and Guaranty Company*, 348 S.C. 76; 557 S.E.2d 689 (Ct. App. 1993). Appellate courts will not consider issues raised on appeal but not adequately supported in a brief. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993). Conclusory arguments with no supporting legal authority are insufficient to preserve an argument for review. *Glasscock* at 691, *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001). An argument made in a reply brief cannot present an issue to the appellate court if the argument was not made and addressed in the appellant's initial brief. *Glasscock* at 692.

The Petitioners failed to provide a substantive legal argument as to why the Court of Appeals erred in deciding that a ruling as to the Hodgin Affidavit was not necessary in reaching an appellate decision. Petitioners presented a one line conclusory statement without legal support. All Pro asks that the Supreme Court deem the argument abandoned.

The Court of Appeals did not commit error when it decided that it need not rule on the Hodgin Affidavit. 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, 428 S.E.2d 886 (1993). The Court of Appeals disposed of the case in ruling that the Circuit Court did not err in granting All Pro's summary judgment. Therefore, it need not address Petitioners' remaining issue. The Court of Appeals did not commit error, and therefore, the Petitioners' writ should be denied.

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

The Court of Appeals correctly concluded that, even considering the Hodgin affidavit, All Pro was entitled to judgment as a matter of law. The Petitioners presented only speculation as to who may have cut the single truss at issue.

Pursuant to Rule 56(c) SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot rest on mere allegations or denials contained in the pleadings. Rule 56(e), SCRPC. Rather, the non-movant must come forward with specific facts showing there is a genuine issue for trial. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 578-79, 556 S.E.2d 732, 736 (Ct. App. 2001). In doing so, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a genuine issue for trial." *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004) (citation omitted).

In cases asserting negligence and breach of warranty, where the burden of proof is a preponderance of the evidence standard, “the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment.” *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011). Despite this lowered standard of proof, “[t]o survive summary judgment, the evidence presented ***must amount to more than mere speculation and conjecture***. The expert must therefore state this opinion with reasonable certainty.” *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010). An expert must state his opinions with a degree of reasonable certainty. Id.

Even considering the affidavit of Derek Hodgin, the Court of Appeals and Circuit Court correctly concluded that All Pro was still entitled to summary judgment. It is uncontroverted that All Pro met its initial burden under Rule 56(c) of demonstrating an absence of a genuine issue of material fact. There was no evidence concluding that All Pro cut the truss. In fact, the only evidence negated such an inference because: 1) Petitioners and Mr. Hodgin do not know who cut the truss or when it was cut; 2) Per Hornaday, no HVAC contractor would have needed to cut the truss since the unit had open web trusses and All Pro used flexible HVAC material that could be routed around the trusses; 3) All Pro did not even have the tools necessary to cut the truss; and 4) the framer, Catoe, provided documents suggesting that one of its employees cut the truss.

Accordingly, the burden shifted to Petitioners to show specific facts evidencing a genuine issue of material fact. Petitioners did not satisfy said burden, with or without the Hodgin Affidavit. Petitioners have attempted to persuade the courts to ignore facts and focus on Hodgin. However, no matter the method of presentation, Hodgin only presented

speculation and conjecture, which was insufficient to preclude summary judgment. Mr. Hodgkin conceded that he did not have an opinion to a reasonable degree of engineering certainty as to who cut the truss. Further, Mr. Hodgkin also testified that he does not know when the truss was cut; therefore, there was no evidence showing that it was cut at the time of the HVAC installation. While such speculative theories may create “some metaphysical doubt as to the material facts,” *B & B Liquors, Inc. v. O’Neil*, 361 S.C. at 270, 603 S.E.2d at 631, they do not satisfy Petitioners’ burden and do not impede the granting of summary judgment under Rule 56. Accordingly, the Supreme Court should deny the Petitioners’ Petition for Writ of Certiorari.

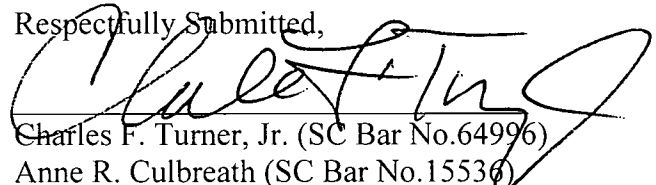
**IV. ALL PRO HEATING, A/C & REFRIGERATION, LLC ADOPTS BY REFERENCE THE RETURN OF GUNTER HEATING AND AIR**

Pursuant to South Carolina Appellate Rule 208(b)(6), All Pro adopts by reference any and all arguments made by Respondent Gunter Heating and Air 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.

Respectfully Submitted,



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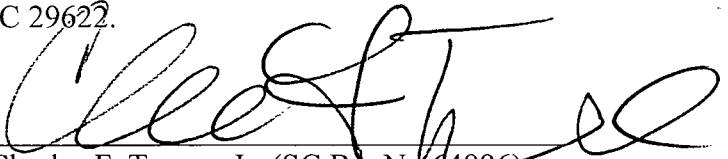
Of Whom Gunter Heating & Air and All Pro Heating, A/C & Refrigeration, LLC  
..... Respondents.

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PROOF OF SERVICE

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I certify that I have served the Respondent All Pro Heating, A/C & Refrigeration, LLC's Return to Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, First Class postage prepaid, on May 16, 2014, addressed to attorneys of record, Robert T. Lyles, Post Office Box 773, Charleston, SC 29401, Bradford W. Cranshaw and Danielle F. Payne, P.O. Box 2823, Columbia, SC 29202, and J. Victor McDade, P.O. Box 2125, Anderson, SC 29622.



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