THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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. 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 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.....Appellants,

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.

INITIAL BRIEF OF RESPONDENT
ALL PRO HEATING A/C & REFRIGERATION, LLC

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November 2, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES
SOUTH CAROLINA CASES

OTHER STATE AND FEDERAL CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in excluding Derek Hodgin's affidavit from its consideration of Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment when the affidavit was not timely served on Respondent All Pro Heating, A/C & Refrigeration, LLC within the time required by Rule 56 of the South Carolina Rules of Civil Procedure?

II. Did the circuit court abuse its discretion in finding Derek Hodgin's affidavit to be a "sham affidavit," where Appellant submitted the affidavit on eve of the summary judgment hearing and it contradicted the affiant's prior deposition testimony?

III. Did the circuit court abuse its discretion in finding that, even if Derek Hodgin's affidavit was not a "sham affidavit," it could not be considered on summary judgment because it was otherwise inadmissible?

IV. Was the circuit court correct in granting Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment because even if Derek Hodgin's affidavit was considered on summary judgment it did not create a genuine issue of material fact?

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. Appellants are homeowners at Stoneledge and have brought an action against All Pro as well as numerous other construction entities.

Appellants 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, Appellants 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 Appellants' 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, Appellants filed a Second Amended Complaint, asserting causes of action directly against a number of the subcontractors, including All Pro. Appellants allege 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 Appellants' Second Amended Complaint on October 31, 2011, and on February 29, 2012, All Pro filed a Motion for Summary Judgment as to Appellants' and Marick's claims, asserting that there was no basis to conclude that All Pro cut the roof truss. Subsequently, Marick's third-party action against All Pro was voluntarily dismissed without prejudice on April 19, 2012, by stipulation of the parties. (Stip. of Dismiss. without Prejudice). Thus, the only remaining claims against All Pro are those asserted by Appellants.

A hearing on All Pro's remaining Motion for Summary Judgment was held on Monday, April 16, 2012. Counsel for Appellants 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 Appellants on August 23, 2012.

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. (Affidavit of Steve Logan). All Pro installed the units as requested, without significant issues or complaints, without retainage, and was paid in full. *Id.*

After some alleged problems with the townhomes at Stoneledge began to arise, Appellants retained Derek Hodgin to investigate possible construction defects at Stoneledge and to serve as an expert witness in this matter. Mr. Hodgin began his investigation on May 22, 2009. (Deposition Testimony of Derek Hodgin, p. 25, lines 16-18). On December 22, 2010, before All Pro was named as a party, Mr. Hodgin testified that a representative of CSE found one attic truss member was cut in one of the inspected units. *Id.* at p. 60, 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 to date. (Deposition Testimony of Burgess Metcalf, p. 89, lines 7-13).

Mr. Hodgin 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. (Deposition Testimony of Derek Hodgin, p. 66, lines 16-19). This testimony, however, was not based on any direct observations by Mr. Hodgin, but rather on a discussion he

had with a building official for Oconee County. *Id.* at p. 60, lines 24-25, p. 61, lines 1-3. Indeed, Mr. Hodgin 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." *Id.* at p. 61, lines 7-12. Most importantly, Mr. Hodgin 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.

(Deposition Testimony of Derek Hodgin, Second Deposition, p. 167, 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 (Deposition Testimony of Burgess Metcalf, p. 18, lines 10-12), 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 have been deposed, and not a single individual testified that All Pro cut the truss. 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 it had been repaired:

18	Q.	It's my understanding from your earlier testimony,
19		the only HVAC issue you raised deals with the

truss?
A. I believe that's correct, yes.
Q. And you don't know who cut or damaged the truss?
A. That's correct.
Q. And it's been repaired?
A. Yes, sir.

(Deposition Testimony of Derek Hodgin, Second Deposition, p. 173, lines 18-25). Mr. Hodgin further testified he testified that this cut truss had been repaired for approximately a few hundred dollars:

Q. And it was repaired for just a few hundred dollars?
A. I don't know specifically the cost. That was my -- I was trying to give it a range. It's not a huge cost. I'm sure it was done at a reasonable cost.
Q. That was your ballpark figure, a few hundred dollars?
A. Yes, sir.

Id. at p. 174, lines 1-7.

Significantly, Mr. Hodgin testified that after two and a half years on the project and after six to ten visits to the site, *id.* at p. 160, lines 8-12, he still did not have an opinion as to who cut the truss:

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

Id. at p. 172, lines 15-20. Indeed, he did not even have an opinion as to anyone who would have cut the truss:

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

Id. at p. 173, lines 22-23. Furthermore, Mr. Hodgin was not even able to affirmatively state when the truss was cut:

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

Id. at p. 162, lines 12-15 (emphasis added).

Moreover, Burgess Metcalf, an associate of CSE and another engineering expert identified by the Appellants, 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:

> Q. So that's what you observed. Is it your opinion that the HVAC people were the ones that cut the truss?
> A. Again, that's a sequencing issue that I can't speak to.
> Q. So you don't have an opinion on that?
> A. No, not a definitive opinion.
> Q. I understand, but any resulting damage other than the truss being cut itself?
> A. Not that I'm aware of.

(Deposition Testimony of Burgess Metcalf, p. 86, lines 16-22, p. 89, lines 4-6). Additionally, Mr. Metcalf testified that no other cut trusses had been found at Stoneledge.

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

Id. p. 89, lines 7-13. Accordingly, the testimony provided by Appellants' experts amounts only to various unknowns surrounding the cut truss, and none of which establish that the truss was cut by All Pro.

Indeed, the only affirmative testimony and evidence in this case shows that All Pro *did not* cut the truss. Nathan Hornaday, the onsite project manager who supervised the day-to-day construction of the project for the general contractor, Marick, specifically testified that neither All Pro, nor any other HVAC contractor, cut the truss. (Deposition Testimony of Nathan Hornaday, p. 221, lines 13-22). Moreover, Mr. Hornaday testified that there would have been no reason for the HVAC contractors to cut the truss because it was an open-web truss, which would allow for the installation of ductwork without having to cut it:

15	Q.	Do you recall who cut the truss?
16	A.	No. I guess it was the framer.
17	Q.	Could it have been an HVAC contractor?
18	A.	It could have been. It could have been a plumber,
19		if he run pipes, but the trusses I don't think they
20		would have cut any of the trusses or anything,
21		because they were open web trusses. So I don't
22		think they would have -- the HVAC or nobody would
23		have cut them.

Id. at p. 81, lines 15-23.

Additionally, the material used by All Pro for any HVAC installation was flexible and capable of being routed around the trusses. (Affidavit of Steve Logan). In fact, even Mr. Hodgin testified that it was reasonable to believe that if the material used by the HVAC contractor was flexible, it would lessen the possibility that the HVAC contractor would have a need to cut the truss. (Deposition Testimony of Derek Hodgin, Second Deposition, p. 168, lines 2-5). Therefore, in addition to the express testimony of Mr. Hornaday that All Pro did not cut the truss, the only other evidence indicates that there would have been no conceivable reason for All Pro to cut the truss.

In addition to Mr. Hornaday's testimony, Steve Logan of All Pro explicitly stated in his Affidavit that he personally supervised all of the work performed by All Pro and that All Pro did not cut the truss. (Affidavit of Steve Logan). Additionally, Mr. Logan stated that All Pro did not even have the tools necessary to cut a truss. *Id.* Therefore, before the circuit court, there was only explicit, affirmative testimony that All Pro did not cut the truss and absolutely no evidence that whoever cut the truss did so at All Pro's direction or request.

Finally, as alluded to by Mr. Hornaday's testimony discussed above, the only evidence present in this case suggests that the framer on the project, Carl Catoe Construction ("Catoe"), cut the truss. As set forth in the documents produced by Catoe, one of its employees most likely cut the truss because Catoe's notes specifically reference labor involved in cutting trusses. (Doc. Prod. Catoe, bate nos. CATOE 000227, 000228, 000239, 000231). Indeed, Carl Catoe himself testified that trusses are sometimes cut in the construction process, but that when they are cut, Catoe has a simple policy: just fix the truss and move on. (Deposition Testimony of Carl Catoe, p. 99, lines 21-25, p. 100, lines 1-2).

Overall, after six to ten site visits, incurring $250,000 in fees, and almost three years on the project, the Appellants' expert offered no testimony or concrete evidence that All Pro cut the truss. On the other hand, both the project manager for the general contractor Marick as well as Steve Logan of All Pro specifically testified that All Pro did not cut the truss.

Notwithstanding the extensive testimony evidencing that All Pro did not cut the truss and Mr. Hodgin's deposition testimony indicating that he did not know when nor

who cut the truss, Appellants submitted a last-minute affidavit of Mr. Hodgin purporting to impose additional duties on All Pro. (Affidavit of Derek Hodgin). All Pro received Mr. Hodgin's affidavit via facsimile on the afternoon of Friday, April 13, 2012—the last business day immediately preceding the hearing on All Pro's Motion for Summary Judgment, which was held on Monday, April 16, 2012. Mr. Hodgin's affidavit was based on photographs of the cut truss, which were taken by his staff at CSE. In his affidavit, Mr. Hodgin surmised that the truss was likely cut to accommodate HVAC duct work because of the proximity of the duct work to the location of the cut truss. *Id.* In addition, the affidavit claimed that HVAC installers have a duty and obligation to report open and obvious cut trusses to their supervisor or to the upstream contractor at the time of discovery and installation, and that the truss at issue was either caused by an HVAC installer or was open and obvious to an HVAC installer. *Id.* Appellants' causes of action against All Pro are based on the testimony of Mr. Hodgin and his subsequent affidavit.

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 (Hearing Transcr., p. 9, 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). (Hearing Transcr., p. 9, lines 21-25 – p. 10, lines 1-12, 19-25 – p. 11, lines 1-13. Further, All Pro argued that even the court looked to Mr. Hodgin's affidavit, it would be otherwise inadmissible. *Id.* at p. 11, 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 Appellants' 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. *Id.* at p. 17, lines 20-23, p. 18, lines 2-5, p. 23, 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." *Id.* at p. 31, lines 18-20. Accordingly, the court directed counsel for All Pro to draft a proposed order for the court's review. The final order granting All Pro's Motion for Summary Judgment was filed on July 27, 2012.

ARGUMENTS

I. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Pursuant to Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Likewise, the appellate court must view the evidence and all inferences therefrom in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

However, the evidence presented by the party opposing a motion for summary judgment "must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Where a verdict is not reasonably possible under the facts presented,

summary judgment is proper." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (internal quotation marks and citations omitted). One of the purposes of summary judgment is to determine whether the parties can provide evidentiary support for their version of the facts. If a party has credible evidence for its position, it must make the existence of such evidence known because summary judgment cannot be defeated by the vague hope that something may turn up at trial. *See E. P. Hinkel & Co., Inc. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974).

While the granting of summary judgment is reviewed under the same standard applied by the trial court, the appellate court employs the abuse of discretion standard when reviewing the trial court's admission or exclusion of evidence. The trial judge has considerable latitude when determining the admission of evidence. Accordingly, "his decision will not be reversed absent an abuse of discretion." *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)).

"An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citations omitted). In order to constitute an abuse of discretion, the trial court's ruling must be manifestly arbitrary, unreasonable, or unfair. *See id.* (applying standard to the admissibility of an expert's testimony) (citing *Means v. Gates*, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). Furthermore, in order "[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice . . ." *Id.* (citations omitted).

II. The circuit court correctly excluded Derek Hodgin's affidavit from its consideration of Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment because the affidavit was not timely served on Respondent All Pro Heating, A/C & Refrigeration, LLC within the time required by Rule 56 of the South Carolina Rules of Civil Procedure

The circuit court did not abuse its discretion by rejecting Mr. Hodgin's affidavit from its consideration of All Pro's Motion for Summary Judgment because Appellants did not timely serve the affidavit on All Pro in accordance with Rule 56 to allow them time to fully prepare a response.

Rule 56 explicitly provides "[t]he motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party may ***serve opposing affidavits not later than two days before the hearing.***" Rule 56(c), SCRCP (emphasis added); *see also* Rule 6(d), SCRCP (setting forth same requirement). When computing time, the South Carolina Rules of Civil Procedure state that:

> the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Rule 6(a), SCRCP.

In the instant matter, the hearing on All Pro's Motion for Summary Judgment was held on Monday, April 16, 2012. Mr. Hodgin signed the affidavit on Friday, April 13, 2012, and it was received by All Pro via facsimile that afternoon. Accordingly, Appellants were not in compliance with Rules 6(a) and 56(c). Appellant's affidavit was not served on opposing counsel ***no less than two days*** prior to the hearing because it was served on a Friday, rendering the first day of computation Monday, April 16, 2012—the same date as the hearing on the motion for summary judgment. *Jernigan v. King*, 312 S.C. 331, 335 n.1, 440 S.E.2d 379, 380 n.1 (Ct. App. 1993) (stating that affidavits served

on opposing parties the date of the hearing may not be considered by the trial court). This factor alone was sufficient for the circuit court to exclude Mr. Hodgin's affidavit from its consideration of All Pro's Motion for Summary Judgment. *See Smith v. Hastie*, 367 S.C. 410, 419 n.1, 626 S.E.2d 13, 18n.1 (Ct. App. 2005) (noting that it is within the trial court's discretion to reject an untimely affidavit."); *Jernigan*, 312 S.C. at 335 n.1, 440 S.E.2d at 380 n.1 (same).

Further, the Supreme Court of South Carolina has held that it is not an abuse of discretion for the trial court to refuse to consider an affidavit on summary judgment when it was not served within the time required under Rule 56(c) and there was no good excuse for the party's failure to comply with Rule 56(c). *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, S.E.2d 327, 329 (1997). Appellants have not set forth any excuse, much less a "good excuse," for their failure to timely serve All Pro with Mr. Hodgin's affidavit. Accordingly, the circuit court did not abuse its discretion by excluding the affidavit and the Court should uphold its decision.

III. The circuit court correctly found that Derek Hodgin's affidavit was a "sham affidavit" where Appellants submitted the affidavit on the eve of the summary judgment hearing and it contradicted the affiant's prior deposition testimony

The circuit court did not abuse its discretion by finding that Mr. Hodgin's affidavit was a "sham affidavit" that could not be considered on All Pro's Motion for Summary Judgment because the affidavit, which contradicts Mr. Hodgin's prior deposition summary, was submitted solely to create issues of fact to preclude summary judgment.

Rule 56 allows a party to oppose a motion for summary judgment, and thereby raise issues of fact, by means of affidavits. Rule 56(e), SCRCP. South Carolina

recognizes the general principle that a judge should not exclude an affidavit from consideration on summary judgment when determining whether there is a genuine issue of material fact. *Cothran*, 357 S.C. at 218, 592 S.E.2d at 633 (citing *Hancock v. Bureau of Nat'l Affairs*, 645 A.2d 588, 591 (D.C. 1994)). However, "[w]hen, on a motion for summary judgment, a judge is confronted with a party's deposition and affidavit which contradict each other, the deposition is usually considered more reliable." *Hancock*, 645 A.2d at 590-91. "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Grace v. Family Dollar Stores, Inc. (In re Family Dollar FLSA Litig.)*, 637 F.3d 508, 513 (4th Cir. 2011) (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984)).

In following the footsteps of the federal courts—including the Fourth Circuit—South Carolina adopted the sham affidavit rule, which allows judges to excluded contradictory affidavits that are "an attempt to create a sham issue of material fact." *Cothran*, 357 S.C. at 218-19, 592 S.E.2d at 633 (citing *Hancock*, 645 A.2d at 591). Under this rule, courts should "disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, but submitting the subsequent affidavit to contradict that parties own prior sworn statement." *Id.* at 218 (citations omitted).

When determining whether an affidavit is a "sham" affidavit,[1] rather than a clarifying or correcting affidavit, the court considers the following factors:

[1] "Sham" affidavits may also be referred to as "competing" affidavits. *Cothran v. Brown*, 357 S.C. 210, 217, 592 S.E.2d 629, 633 (2004).

> (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 nonmovant 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; (6) when, in relation to summary judgment, the second affidavit is submitted.

Id. Considering these factors, it is evident that Mr. Hodgin's affidavit is a sham submitted solely in attempt to establish an issue of fact to preclude summary judgment by imposing a newly created duty and obligation on All Pro.

First, there was no explanation provided to explain why Mr. Hodgin did not previously mention in his deposition or otherwise the alleged duty that HVAC installers have to report open and obvious cut trusses to their supervisor or the upstream contractor at the time of discovery and installation. Secondly, these contradictory statements are highly important to the litigation involving these parties because they form the entire basis that All Pro is liable for this one cut truss. Third, Mr. Hodgin had an abundance of access to these facts prior to his affidavit. Mr. Hodgin's on-site investigation spanned over three years, beginning in May of 2009, and involved numerous on-site inspections and reports. Fourth, the contradictory statements set forth in the affidavit greatly vary from Mr. Hodgin's prior deposition testimony because he previously testified that any opinion he would have regarding the cut truss would be speculative (Deposition Testimony of Derek Hodgin, Second Deposition, p. 167, lines 1-7), but now he is suddenly able to change that opinion to conclude that the cut truss "was either caused by the HVAC installer or was open and obvious to the HVAC installer." (Affidavit of Derek Hodgin). In addition, Mr. Hodgin previously testified that he did not know when the

truss was cut. Without knowledge of when the truss was cut, Mr. Hodgin cannot possibly suggest—as he attempts to do in his affidavit—that the truss would have been cut at the time an HVAC installer worked on the project. Mr. Hodgin's affidavit also mentions for the first time that the truss was "open and obvious," despite the fact that he never personally observed it or mentioned this in his depositions. Furthermore, throughout Mr. Hodgin's lengthy deposition and line of questioning regarding the cut truss, he never mentioned any duty or obligation of an HVAC installer to report an open and obvious cut truss. Fifth, throughout the relevant portions of Mr. Hodgin's deposition, there were no indications that he was confused. In fact, he repeatedly testified that he did not know who cut the truss or when the truss was cut, and that any opinion formed on the issue would be based on speculation. Lastly, and most importantly, the timing of Mr. Hodgin's affidavit is indicative of Appellants' attempt to merely create and issue of fact to preclude summary judgment. The affidavit was submitted the Friday before the Monday summary judgment hearing. This was also approximately three months after Mr. Hodgin's second deposition, which was taken on January 23, 2012, and almost a year and a half after his first deposition, which was taken on December 22, 2010. The fact that Mr. Hodgin and the Appellants waited until the eve of the summary judgment hearing to abruptly change his testimony to impose a duty on the HVAC installers is highly suggestive of their duplicitous intentions in submitting the affidavit. Looking to the factors as a whole, it is apparent that Mr. Hodgin's affidavit was a sham submitted solely to create an issue of fact to forestall summary judgment. Therefore, the circuit court did not abuse its discretion in finding the affidavit to be a sham and disregarding it from consideration of All Pro's Motion for Summary Judgment.

Appellants contend that the circuit court erred in refusing to consider Mr. Hodgin's affidavit because his deposition is still ongoing and it does not contradict Mr. Hodgin's prior deposition testimony. Generally, summary judgment should not be granted until the opposing party has had a full and fair opportunity for discovery. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). However, "[a] party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) (citation omitted); *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 ("Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." (internal quotation marks and citations omitted)).

In the instant case, it is immaterial that Mr. Hodgin's lengthy deposition may not be fully complete. Discovery in this case has been ongoing for over three years and Mr. Hodgin's deposition began in 2010. Appellants cannot argue that they have not been provided a full and fair opportunity to complete discovery. In addition, Appellants have not presented a good reason why further discovery is needed with regard to this one cut truss. There is no indication that further discovery will uncover additional evidence relevant to the issue at hand or that Mr. Hodgin's deposition needs to continue. *Baughman v. AT&T Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). In his depositions, Mr. Hodgin repeatedly stated his opinion, or lack thereof, for when and who

could have possibly cut the truss and testified several times that any conclusion would be purely speculative. Appellants have not advanced any reason nor indication as to why discovery and Mr. Hodgin's deposition must continue on this issue other than the fact that they set forth contradictory statements in the sham affidavit.

Appellants' argument that Mr. Hodgin's affidavit is consistent with his testimony is without merit—a simple comparison of the deposition testimony and the affidavit unequivocally shows that the statements are conflicting. In addition, Appellants do not demonstrate how the deposition testimony and affidavit align. Rather, Appellants attempt to dismiss the fact that the evidence is contrary by simply stating that the portions of the testimony quoted in All Pro's Motion for Summary Judgment were "taken out of context."[2]

Appellants further claim that the sham affidavit rule is only used in situations where "the subsequent affidavit was very clearly and squarely contradictory, if not opposite, to the prior testimony or discovery process." (Appellants' Br., p. 11-12). They argue that Mr. Hodgin's affidavit does not contradict, but adds to his deposition testimony. Although All Pro contends that the deposition testimony and affidavit flatly contradict each other, such a requirement is not necessary. In *Jackson v. Consolid. Coal Co.*, 21 F.3d 422 (4th Cir. 1994) (unpublished table decision),[3] the Fourth Circuit found that the district court correctly disregarded the plaintiff's affidavit because there was an

[2] It is noteworthy that while this matter was under advisement and the circuit court was reviewing All Pro's proposed order, the court was in possession of the entire deposition transcript for both days of Mr. Hodgin's deposition.

[3] *See Cothran*, 357 S.C. at 218, 592 S.E.2d at 633 ("We find persuasive the reasoning of federal case law. Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement.").

inherent contradiction between his deposition testimony and the affidavit. *Id.* In *Jackson*, the plaintiff asserted a discriminatory discharge claim against the defendant, alleging that he was terminated in retaliation for his receipt of workers' compensation benefits. On several occasions during his deposition, the plaintiff was asked to identify the factual basis for his discriminatory discharge claim and he did not mention any alleged threats from his employer. *Id.* However, after the defendant filed its motion for summary judgment, the plaintiff submitted an affidavit stating that he was threatened by his employer. *Id.* Even though the plaintiff was never expressly asked at his deposition whether he had been threatened, the Fourth Circuit found that such statements in the affidavit "clearly conflict[ed] with his deposition testimony." *Id.* As in *Jackson*, Mr. Hodgin was repeatedly asked various questions surrounding the issue of the cut truss, to which he never mentioned any duty imposed on the HVAC installers to report a cut truss. Therefore, his sudden statements imposing such a duty on HVAC installers should be disregarded as a sham, even though he had not been expressly questioned about whether the HVAC installers had such a duty to report. *See Hancock*, 645 A.2d at 591 ("Where a party emphatically and wittingly swears to a fact, it bears a heavy burden—even in the summary judgment context—when it seeks to jettison its sworn statement." (citation omitted)).

For the various reasons set forth above, it is abundantly clear that the circuit court did not abuse its discretion in concluding that the affidavit of Derek Hodgin was a sham and could not be considered on All Pro's Motion for Summary Judgment. Because this sham affidavit was the only pertinent evidence submitted by the Appellants, the circuit court's granting of summary judgment was appropriate and should be affirmed.

IV. Even if Derek Hodgin's affidavit was not a "sham affidavit," the circuit court did not abuse its discretion in refusing to consider the affidavit on summary judgment because it was inadmissible since it did not establish the requisite causal connection between Appellants' damages and the acts of Respondent All Pro Heating, A/C & Refrigeration, LLC and it provided testimony on an issue of law

Even if the circuit court erred in ruling that Mr. Hodgin's affidavit was a sham, the court would still not have been able to consider the affidavit on summary judgment because it was otherwise inadmissible. While Appellants argue that that Rule 703 of the South Carolina Rules of Evidence allows expert opinion to be based on inadmissible evidence, the circuit court did not err in refusing to Hodgin's affidavit because it is still inadmissible due to the fact that it does not establish a causal connection between the cut truss and the actions of All Pro. *Baughman*, 306 S.C. at 111, 410 S.E.2d at 543. The affidavit is also inadmissible because it attempts to set forth a legal opinion regarding All Pro's duties.

Rule 56(e) provides that on summary judgment, "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein." Rule 56(e), SCRCP. In addition to this, Rule 703 of the South Carolina Rules of Evidence states that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 703, SCRE. Accordingly, "'an expert witness may state an opinion based on facts not within his firsthand knowledge. . . . He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the

type reasonably relied upon in the field to make opinions.'" *Dawkins*, 354 S.C. at 64-65, 580 S.E.2d at 436 (quoting *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 529 S.E.2d 45, 50 (Ct. App. 2000)). Nevertheless, the circuit court's decision should not be disturbed because refusing to consider Mr. Hodgin's affidavit was a harmless error due to the fact that it is otherwise inadmissible since it purports to establish an issue of law and it does not establish that the truss was "most probably" cut by All Pro.

In a negligence action, a plaintiff must show that: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Dorrell v. S.C. Dept. of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). "The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 135-36, 638 S.E.2d 650, 656 (2006) (citations omitted).

"In general, expert testimony on issues of law is inadmissible." *Dawkins*, 354 S.C. at 66, 580 S.E.2d at 437 (citations omitted). Mr. Hodgin's affidavit is inadmissible because it is an attempt on behalf of Appellants to establish that All Pro had a duty to report the cut truss to its supervisor or upstream contractor at the time of discovery and installation. Such a finding is an issue of law for trial court to determine. Therefore, Mr. Hodgin's affidavit inappropriately attempts to usurp the trial court's role in determining whether All Pro owes such a duty of care and was correctly disregarded by the circuit court. *See id.* (holding that the trial court correctly refused to consider an expert's

affidavit where it offered some helpful factual information, but was mainly a legal argument as to why summary judgment should be denied).

In addition, "before expert testimony is admissible upon the question of causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probably' rule." *Baughman*, 306 S.C. at 111, 410 S.E.2d at 543; *see also Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002). It is insufficient for the expert to testify that the injury may or could have resulted from All Pro. "He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question ***most probably*** came from the cause alleged." *Id.* (emphasis added) (quoting *Eubanks v. Piedmont Natural Gas Co.*, 198 F. Supp. 522, 526-27 (W.D.S.C. 1961)). While the expert is not required to explicitly say "most probably," the testimony must make the impression that it is within his professional judgment as to which cause *most likely* resulted in the injury. *Id.* (quoting *Norland v. Wash. Gen. Hosp.*, 461 F.2d 694, 697 (8th Cir. 1972)). Accordingly, Mr. Hodgin's affidavit must do more than establish that it is within the realm of possibility that All Pro cut the truss. *Id.*

Mr. Hodgin's affidavit does not meet the "most probably" rule because he only states that it is "likely" that truss was cut to accommodate the duct work. Such a conclusion is insufficient to establish causation, rendering the affidavit inadmissible. Accordingly, it was a harmless error for the circuit court to refuse to consider the affidavit on the basis that it was not supported by admissible evidence when, in fact, the affidavit was inadmissible for other reasons.

V. The circuit court correctly granted Respondent All Pro Heating, A/C & Refrigeration, LLC's Motion for Summary Judgment because even if Derek Hodgin's affidavit was considered on summary judgment it did not create a genuine issue of material fact

The circuit court did not err in granting All Pro's Motion for Summary Judgment because even if the court took Mr. Hodgin's affidavit into consideration, it does not establish a genuine issue of material fact because it only sets forth speculation that the HVAC installers may have cut the roof truss.

Pursuant to Rule 56(c), 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), SCRCP. 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) (Hearn, J., dissenting) (emphasis added) (internal citations omitted).

Nevertheless, even if the affidavit of Derek Hodgin had been considered, All Pro would still have been entitled to summary judgment. It is uncontroverted that All Pro has 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) Appellants and Mr. Hodgin do not know who cut the truss or when it was cut; 2) All Pro would not need 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 Appellants to show specific facts evidencing a genuine issue of material fact, which Mr. Hodgin's affidavit does not accomplish. The affidavit purports to show that All Pro cut the truss or would have seen the cut truss and been required to report it. However, the affidavit only presents speculation and conjecture, which is insufficient to preclude summary judgment. First, the affidavit states that it is ***likely*** the truss was cut to accommodate the duct work. Mr. Hodgin claims the truss was either cut by the HVAC installer or was open and obvious to the HVAC installer because of the proximity of the cut truss to the HVAC duct work. Mr. Hodgin's assertions do not set forth an expert opinion with reasonable certainty and are speculative at best. Second, the affidavit attempts to impute a duty on the HVAC installers to report open and obvious cut trusses and concludes that this truss was either cut an HVAC

installer or was open and obvious at the time of discovery and installation. However, Mr. Hodgin clearly testified that he does not know who conducted the HVAC installation in this unit; therefore, even if such duty was imputed on HVAC installers, it is unknown whether it was All Pro's or another HVAC installer's duty to uphold. Further, Mr. Hodgin also testified that he does not know when the truss was cut; therefore, there is no evidence showing that it was cut at the time of the HVAC installation. Such speculation only results in "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, which does not impede the granting of summary judgment under Rule 56. Accordingly, the circuit court's decision to award summary judgment in favor of All Pro should be affirmed.

VI. Respondent All Pro Heating, A/C & Refrigeration, LLC adopts by reference the brief of Respondent Gunter Heating and Air

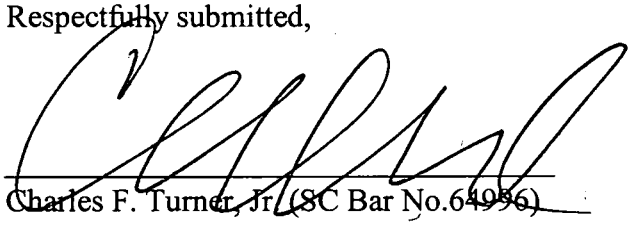
Pursuant to South Carolina Appellate Court Rule 208(b)(6), All Pro adopts by reference any and all arguments made by Respondent Gunter Heating and Air, as set forth in its initial brief.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the circuit court. The circuit court did not err in excluding Mr. Hodgin's affidavit from its consideration on summary judgment because it was not timely served and was a sham affidavit. In addition, the affidavit was otherwise inadmissible due to the fact that it provided testimony on an issue of law and did not establish the requisite causal connection between the cut truss and All Pro's actions. Furthermore, even if the circuit court did consider Mr. Hodgin's affidavit, it would not have established a genuine issue of material fact to preclude the award of summary judgment because it only presented

speculation, which is insufficient to survive summary judgment. Accordingly, the circuit court's decision to grant All Pro's Motion for Summary Judgment should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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. 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 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.....Appellants,

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.

PROOF OF SERVICE

I certify that I have served the Respondent All Pro Heating, A/C & Refrigeration, LLC's Initial Brief by depositing a copy of it in the United States Mail, First Class postage prepaid, on November 2, 2012, 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

Respectfully submitted,

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November 2, 2012

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Stoneledge at Lake Keowee Owners Association, Inc., et al. v. All Pro Heating A/C & Refrigeration, LLC et al*
Case No.: 2009-CP-37-652
Appellate Case No.: 2012-212830
TPGL File No.: 03993.00366

Dear Ms. Kitchings:

Please find enclosed the following documents with regard to the above-referenced matter for the filing:

1. The original and one copy of Respondent All Pro Heating, A/C & Refrigeration, LLC's Initial Brief and Designation of Matter to be Included in the Record on Appeal; and

2. The original and one copy of the Proof of Services for these documents.

Please file the original documents and return clocked copies to me in the self-addressed stamped envelope provided. Thank you for your assistance and please contact me if you have any questions.

TPGL 4748529v1

With kind regards, I remain

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Charles F. Turner, Jr

CFT:pam
Enclosures: As set forth hereinabove
CC: Robert Lyles, Esq., *Attorney for Appellants*
Bradford W. Cranshaw, Esq., *Attorney for Respondent Gunter Heating & Air*
Danielle F. Payne, Esq., *Attorney for Respondent Gunter Heating & Air*
J. Victor McDade, Esq., Attorney *for Respondent Gunter Heating & Air*