

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

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SC Court of Appeals

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

v.

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

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

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ARGUMENTS

I. THE AFFIDAVIT OF DEREK HODGIN CREATES AN ISSUE OF FACT.

a. Respondents fail to establish that Mr. Hodgin's affidavit is a "sham affidavit."

The initial briefs of the Respondents fail to establish that Mr. Hodgin's affidavit contradicts his previous deposition testimony, which is the required first factor to establish that an affidavit is a sham affidavit. See, *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). Respondents do not point to any contradictions between the affidavit and the prior deposition testimony. Rather, they point to deposition testimony where Mr. Hodgin acknowledged that he does not conclusively know who cut the attic truss observed by CSE. (R. 150.) Critically, Mr. Hodgin's affidavit does not contradict that testimony. His affidavit merely states that (in part):

- The cut truss in question is adjacent to HVAC duct work.
- Due to the proximity of the duct work to the location of the cut truss, it is likely that the truss was cut to accommodate the duct work.
- Due to the proximity of the cut truss to the HVAC duct work, the cut truss was either caused by the HVAC contractor *or* was open and obvious to the HVAC installer.
- The HVAC installer has 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

(R. 78, emphasis added)

Both his prior testimony and his affidavit acknowledge that it may have been a party other than the HVAC installer that cut the truss. In fact, the parties acknowledge that the

affidavit merely sets forth a “new” (not contradictory) basis for liability, which is perfectly permissible prior to the close of discovery (and even prior to the completion of Mr. Hodgins deposition).

Respondents cite the deposition testimony of various witnesses including the project’s manager and the framer. None conclusively establish that any party did or did not cut the truss. Who cut the truss is an issue of fact for a jury to decide. Furthermore, as the Respondents acknowledge, the deposition of Mr. Hodgins was not complete at the time of the hearing and both the affidavit and portions of the transcript cited by the Respondents indicate that more research, investigation, etc., may be required or forthcoming.

Because Mr. Hodgins affidavit did not contradict his incomplete deposition, his affidavit was not a sham, as a matter of law, and that ruling should be reversed.

b. Mr. Hodgins affidavit does not contain improper conclusions of law or fact.

Respondents assert that even if Mr. Hodgins affidavit is not a “sham affidavit”, it does not meet requirements for an expert affidavit to defeat summary judgment. As set for in Appellant’s initial brief, the trial court’s finding that Mr. Hodgins affidavit contained improper conclusions of law and fact was in error and Respondents cite no valid authority to dispute this point.

Respondent Gunter asserts the cases of *Yarborough & Co. v. Schoolfiend Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) and *Charles R. Allen, Inc., v., Island Cooperative Service Coop. Ass’n., Ltd.*, 234 S.C. 537, 109 S.E.2d 446 (1959) in support of the position that Mr. Hodgins affidavit is “conclusory” and cannot defeat summary judgment. Neither of these cases address the applicability of the rules of

evidence and civil procedure to an affidavit prepared by an expert. Both involve affidavits of fact witnesses and are therefore inapplicable.

Additionally, cases cited by Respondents regarding standards for testimony regarding causation are not applicable. *E.g. Baughman v. American Tel. & Tel. Co.*, 306, S.C. 101, 111, 410 S.E.2d 2d 537, 543 (S.Ct. 1991). These cases address the sufficiency of medical testimony to establish causation of injury or illness. This matter involved an attic truss which was unquestionably cut. Plaintiff's expert has opined that based on the conditions of the location of the cut, the truss was either cut by the HVAC installer or it would have been open and obvious to him and therefore he should have reported it. (R. 76.) That testimony illustrates that a genuine issue of material fact exists and summary judgment should therefore have been denied.

II. THE TRIAL COURT DID NOT REJECT THE AFFIDAVIT OF MR. HODGIN BASED ON THE TIMING OF ITS SERVICE.

Both All Pro and Gunter assert that the trial court rejected the affidavit of Mr. Hodgin because it was not served within the time required by Rules 56(c) and 6(a), *SCRPC*. This misconstrues the order of the court. The two orders granting summary judgment to these parties do not state that the affidavit was rejected on timeliness. (See R.1 and R. 9.) In fact, the Court expressly considered the affidavit in determining whether Respondents were entitled to summary judgment. *Id.* The court merely considered the timing of the filing of the motion when evaluating the validity of affidavit for purposes of defeating summary judgment under the factors set forth in *Cothran*, 357 S.C. 210, at 218, one of which being when the affidavit was filed in relation to summary judgment. Therefore, the court did not reject the affidavit on the basis of when it was served.

Second, as acknowledged by All Pro, the affidavit was served on April 13, 2012, three days before the April 16, 2012 hearing. Rule 56(c) requires the following with regard to an affidavit in opposition to summary judgment “The adverse party may serve opposing affidavits not later than two days before the hearing”. Rule 56(c), *SCRCP*. Therefore, the affidavit was timely served.

Finally, the court was within its discretion in considering the affidavit. Absence a showing of prejudice, a trial court may consider even a late-served affidavit. *Smith v. Hastie*, 367 S.C. 410, 626 S.7.2d 13, (2005), cert. dismissed 379 SC 563, 666 S.E.2d 892 (2008). “Given the recognition that the trial court has the discretion to reject an untimely affidavit in a summary judgment motion, it follows that acceptance of a late affidavit would also be within its discretion.” *Id.* at 418, n 10. All Pro and Gunter make no argument that the court abused its discretion in considering the affidavit. In its brief All Pro acknowledges that it received the affidavit on the Friday afternoon of April 13, 2012, and neither party makes any argument that it was prejudiced by the service date of the affidavit. Both parties were clearly prepared to address the affidavit in their argument. Therefore the court was proper in considering the affidavit.

III. MR. HODGIN’S AFFIDAVIT CREATES AN ISSUE OF FACT AS TO ALL PARTIES AND THE TRIAL COURT WAS PREMATURE IN GRANTING SUMMARY JUDGMENT.

The court’s granting of summary judgment in this matter will prevent a jury from not only determining which party cut the truss that was discovered during emergency repairs at Stoneledge, but will also prevent recovery against parties who may be culpable should future destructive testing or emergency repairs reveal the same conditions in similar locations. This case illustrates the policy behind South Carolina law regarding summary

judgment. *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 346 (2003), cert. denied. (Summary judgment is a “drastic remedy” which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. (citations omitted)).

In *Baughman v. American Tel. & Tel. Co.*, 305 S.C. 101, 410 S.E.2d 2d 537 (1991), the Plaintiffs brought a personal injury claim based on pollution emissions from a refinery. The Supreme Court found that the granting of partial summary judgment was premature based on an opinion letter from an expert that found that the injuries were consistent with toxic exposure and because further testing was needed. Likewise, in this matter Mr. Hodgin sets forth that his opinion that based on the location of the cut truss, the cut likely was related to HVAC duct work installation. (R. 78.) Additionally, he states that based on his experience trusses may have been cut in areas with similar framing configurations and HVAC layouts, but that his firm has not done any destructive testing to verify other conditions at similar locations. *Id.* Importantly, this motion was granted during active discovery and the case still, as of today, has not been scheduled for trial. Therefore it is highly likely that additional evidence relevant to this issue will still come to light. (R. 78).

The various portions of depositions transcripts from multiple witnesses cited by the Respondents do nothing but establish the question of who cut the truss is an issue of fact to be tried by a jury. The trial court’s grant of summary judgment deprives a jury of consideration of one of the potentially culpable parties and also deprives them of considering the factual issue of whether the condition should have been reported to the general contractor. Additionally, the court’s ruling has deprived the Plaintiffs of recovery

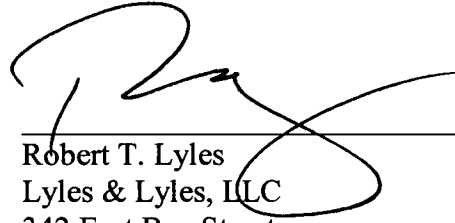
should additional emergency repairs or destructive testing reveal similar problems at other locations where both Respondents admit to performing work. For this reason, the trial court's summary judgment motion was premature and must be reversed.

CONCLUSION

For the foregoing reasons, Respondents' Briefs do not establish that Hodgin's affidavit was a sham affidavit, or that it was untimely and, furthermore, do not refute that a genuine issue of material fact exists with regard to the Respondents' liability for the cut truss and summary judgment was therefore improper.

January 9, 2013

Respectfully submitted,



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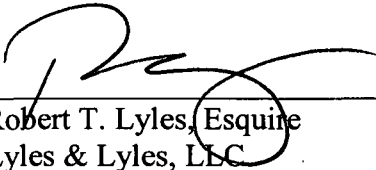
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Of Whom, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellants on Respondents by depositing a copy of it in the United States Mail, First Class postage prepaid, on January 9, 2013, addressed to Respondent's attorneys of record, Charles F. Turner, Jr., Esquire, 200 East Broad Street, Suite 250, Greenville, S.C. 29601, Bradford W. Cranshaw, Esquire and Danielle F. Payne, Esquire, Post Office Box 2823, Columbia, S.C. 29202, and J. Victor McDade, Esquire, Post Office Box 2125, Anderson, S.C. 29622.

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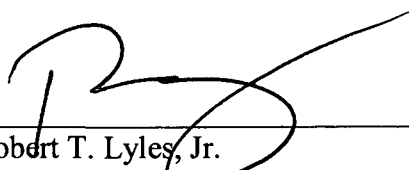
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

January 9, 2013



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