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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Perry M. Buckner Circuit Court Judge

Appellate case No. 2015-001988

RECEIVED

JAN 11 2016

SC Court of Appeals

Mark and Elizabeth Heil,

Appellants,

v.

Stewart and Christina Hines  
and Sam Imler d/b/a Sam's  
Tree Service

Defendants

Of whom Stewart and  
Christina Hines are the


Respondents.

**RESPONDENTS' MOTION TO FILE OUT OF TIME REPLY TO  
APPELLANTS' RETURN TO RESPONDENTS MOTION TO EXCLUDE  
MATTERS DESIGNATED BY APPELLANTS FROM THE RECORD ON  
APPEAL**

Now Comes the Respondents in this matter, through their undersigned counsel, requesting that they be allowed to file and submit the attached proposed Reply to the Return of the Appellants' to the Respondents' Motion to Exclude matters designated by the Appellants from the record on Appeal.

Appellants' Proof of Service for their Return to Respondents'

Motion indicates that it was served on December 28, 2015. According to SC Appellate Court Rule 240(f) the Appellants' Reply in this case was due to be filed by January 5, 2016. Respondents counsel has been out of the office celebrating the Christmas holiday and on a long planned family vacation since prior to December 25, 2015 and first return to the office January 8, 2016. Upon return to the office Appellants counsel has promptly acted to file the needed Reply and requests that the Court accept the Reply (attached to this Motion) though it is filed late in this matter.



Brian D. McDaniel  
Law Office Of Brian McDaniel, LLC  
Post Office Box 2085  
Beaufort, South Carolina 29901  
SC Bar # 68618  
(843) 379-5117

Attorney for the Respondent  
January 8, 2015

Other Counsel of Record:

Charles W. Thomson, Esq.  
Glynn L. Capell, Esq.  
The Capell Law Firm, LLC  
Post Office Box 6628  
Hilton Head Island, SC 29938

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**REPLY TO APPELLANTS' RETURN TO  
RESPONDENTS' MOTION TO EXCLUDE MATTERS DESIGNATED BY  
APPELLANTS FROM THE RECORD ON APPEAL**

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Now Comes the Respondents in this matter, Christina Hines and Stewart Hines, by and through their counsel of record Brian D. McDaniel, Esquire of the Law Office of Brian McDaniel, LLC of Beaufort, South Carolina.

In their Return the Appellants' do not deny that the matters which are being contested and which are the subject of the Respondents' Motion to Exclude Matters Designated from the Record on Appeal were never filed in the case but

instead they rely upon an email reference to a third party “file sharing service” as the basis for the claim that these items were “presented” to the lower court.

In support of their Return the Appellants rely upon the Wells Fargo Bank v. Fallon Properties South Carolina, LLC, et al., 2015-08-26-01 (S.C.App 2015) order for the proposition that email constitutes a valid method of presentation to the lower court in South Carolina. The current situation however is quite different than the situation reflected in the Wells Fargo Order, and adopting such an interpretation of the Wells Fargo Order would be a substantial expansion of the principles set forth in that Order and one which the Court should not adopt.

Specifically, the Wells Fargo Bank case dealt with SC Appellate Rule 203 and the receipt of “written notice” and not the SC Appellate Rule 210 requirement of actual presentment to the court as is the case here. Second the email referenced in Wells Fargo came from the Court and included the attached document with the email. In this case the email was sent after the hearing, by Appellants’ counsel and did not include the actual documents but simply provided a reference as to where materials could be found if they were wanted. See Exhibit A to Appellants’ Return. Appellants’ counsel’s email states “if you need to verify cites to the record...” and provides information on how to obtain the deposition transcripts. This is a substantial difference than attaching the documents to the email. If the Court were to adopt the Appellants’ line of reasoning as being “presented to the lower court” then counsel in any case could simply send an email to the judge stating that if the judge wanted any other documents or

materials in the case they should just let the attorney know, and this would be sufficient to allow any and all materials to be part of the record on appeal whether put forth at the hearing or not. This type of catch-all reference to a third party holder of the documents or even to the attorney's office own data compilation server is full of potential abuse and patently unfair to opposing counsel for those materials to be include as "presented to the lower court" though not filed, mailed, referenced at the hearing nor ever specifically identified.

The Appellants also attempt to flip the burden of showing presentment of these materials to the lower court onto the Respondents by claiming that there was no objection made by the Respondents. The burden however to create a record from which they can appeal is upon the Appellants and not the Respondents. If the deposition transcripts upon which the underlying motion is based had been placed in the record then it may be the burden of the Respondents to show why they should not be allowed in the record on appeal, but the Appellants cannot first claim that the Respondents should have objected to something which was never presented to the lower court, when they must first establish that it was in fact presented before an objection would even be proper. Likewise, the Appellants also attempt to require Judge Buckner to object (p. 5 Appellants' Response) though this method of presentment has never been recognized by the Courts of South Carolina.

## CONCLUSION

For these additional reasons and as presented in Respondents Motion the Respondents' object to those matters identified as

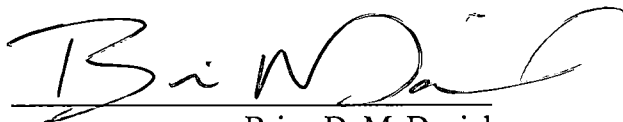
(5) Depo. Transcript of Sam Imler pp 2, 3, 13, 17, 18, 21, 27, 28, & 31;

(6) Depo. Transcript of Elizabeth Heil pp. 44, and 65- 70;

(7) Depo. Transcript of Mark Heil pp. 2, 14;

(8) Depo. Transcript of Stewart Hines pp. 1-4, 14, 37, 38, 44-48, & 57

in Appellants proposed Designation of Matters to be included in the Record on Appeal.



Brian D. McDaniel  
Law Office Of Brian McDaniel, LLC  
Post Office Box 2085  
Beaufort, South Carolina 29901  
SC Bar # 68618  
(843) 379-5117

Attorney for the Respondent  
January 8, 2015

Other Counsel of Record:

Charles W. Thomson, Esq.  
Glynn L. Capell, Esq.  
The Capell Law Firm, LLC  
Post Office Box 6628  
Hilton Head Island, SC 29938

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In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Perry M. Buckner Circuit Court Judge

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Case No. 2013-CP-07-1231  
Appellate case No. 2015-001988

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**AFFIDAVIT OF COUNSEL IN  
SUPPORT OF MOTION TO FILE OUT OF TIME**

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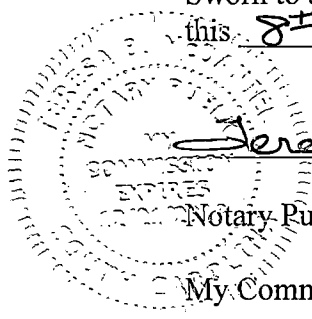
Personally appeared before me, Brian D. McDaniel, counsel for the Respondents, in the above captioned matter, who being duly sworn, deposes and under oath says:

1. That I am counsel for the Respondents in this action and I am over 18 years of age.
2. That I have been out of my office on vacation with my family since December 24, 2015 and was traveling out of state with family only returning to Beaufort on January 7, 2016 and to the office on January 8, 2016.

That further the Affiant Sayeth Not,

BY: Brian McDaniel  
Brian McDaniel

Sworn to and subscribed before me  
this 8<sup>th</sup> day of January 8, 2016



Jeresa B. McDaniel  
Notary Public For South Carolina  
My Commission Expires: 12/21/19

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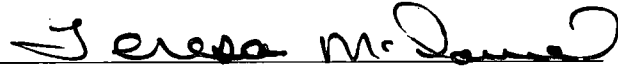
PROOF OF SERVICE

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I certify that I have served the Respondents' Motion to File Out of Time Reply to Appellants' Return to Respondents' Motion to Exclude Matters Designated by Appellants from the Record on Appeal, the Reply to Appellants' Return to Respondents' Motion to Exclude Matters Designated by Appellants from the Record on Appeal and the Affidavit of Counsel in Support of Motion to File Out of Time by depositing a copy of them in the United States mail, postage prepaid, on January 8, 2016, addressed to their attorneys of record, Charles W. Thomson, Esquire, Glynn L. Capell, Esquire of The Capell Law Firm, LLC, Post Office Box 6628, Hilton Head Island, SC 29938.

Appellate case No. 2015-001988  
Proof of Service

January 8, 2016



Teresa McDaniel  
Legal Assistant  
Law Office of Brian McDaniel, LLC  
Post Office Box 2085  
Beaufort, South Carolina 29901  
(843) 379-5117  
Attorney for Appellant

Other Counsel of Record:

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Post Office Box 6628  
Hilton Head Island, SC 29938



Law Office of  
BRIAN McDANIEL, LLC

bmcDaniel@attorneymcdaniel.com

VIA US MAIL  
January 8, 2016

The Honorable Jenny Abbot Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

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JAN 11 2016  
SC Court of Appeals

RE: Mark and Elizabeth Heil v. Stewart and Christina Hines, and Sam  
Imler, d/b/a/ Sam's Tree Service;  
Appellate Case No. 2015- -001988

Dear Ms. Kitchings:

Enclosed please find the originals and six (6) copies of the **Respondents' Motion to File Out of Time Reply to Appellants' Return to Respondents Motion to Exclude Matters Designated by Appellants from the Record on Appeal**, the proposed **Reply to Appellants' Return to Respondents' Motion to Exclude Matters Designated by Appellants From the Record on Appeal**, the **Affidavit of Counsel in Support of Motion to File Out of Time** and the original of the **Proof of Service** for filing in the above referenced case. Enclosed is a \$25 check for the required filing fee.

Also enclosed is an additional copy of the documents and a stamped, self-addressed envelope which I would appreciate you returning to my office after filing. Thank you.

Sincerely,

Brian D. McDaniel  
Law Office of Brian McDaniel, LLC  
Attorney for Respondents  
SC Bar # 68618

BDM/tm

Enclosures

cc: Charles W. Thomson, Esquire  
Glynn L. Capell, Esquire



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To: The Honorable Jenny Abbot Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211-1629

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