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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
DEC 21 2015
SC Court of Appeals

Mark Heil and Elizabeth Heil,

Appellants,

v.

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

Defendants

Of whom Stewart Hines and
Christina Hines are the

Respondents.

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

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. The Respondent (Hines) pursuant to Rule 240(a), SCACR requests that items 5, 6, 7, 8, in the Appellants' Designation of Matter to be included in the Record on Appeal be excluded or that the Designation be modified as set forth herein to

remove items not presented to the lower court. The grounds for this motion are as follows:

1. Per Rule 210(c) SCACR, the Record on Appeal may not include matter which was not presented to the lower court or tribunal. The Appellants' Designation of Matter is hereby incorporated by reference into this motion and is attached here to. In their proposed Designation of Matters the Appellants designate deposition excerpts of Sam Imler (item 5), Elizabeth Heil (item 6), Mark Heil (item 7), and Stewart Hines (item 8) and includes many pages from each which were not presented to the lower court and which were not previously served upon the Respondents in this matter.

2. The following pages of depositions the Appellants have designated in their Designation are not included in any filing in this case and were not presented to the trial court:

(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

While some of the above excerpts are referenced in the Appellants' Motion to Reconsider¹, the actual transcript testimony was not presented to the Court nor served upon Respondents' counsel. Additionally, the reference made by the Appellants to the above transcript portions are not done through quotations of

¹ Had the Appellants attempted to submit the additional documents to the lower court as part of the Motion to Alter or Amend the Respondent would have rightly objected to exclude since they were not presented for consideration in the underlying motion for Summary Judgment.

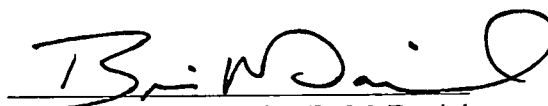
those transcripts but are done by paraphrase of the transcript in their Motion to Alter or Amend. It would be improper for the Appellants to submit a paraphrase of deposition testimony to the lower court but have the transcript submitted for appellate review and the Respondents therefore object to the inclusion of the listed items.

3. Furthermore, all of the materials submitted to the trial court (and which would therefore be proper for inclusion in the record on appeal), other than Orders and Pleadings, are already included in, or attached as exhibits to, either the Defendants' Motion and Memorandum in Support of Summary Judgment (Respondents/Defendants' Motion) or the Plaintiffs' Memorandum in Opposition to Hines' Motion for Summary Judgment (Appellants/ Plaintiffs' Memo) which are designated by the parties to be included in the Record on Appeal. Therefore, it is proper for this Court to exclude entirely items 5 – 8 of the Appellant's Designation of Matter, because those deposition excerpts which may be properly part of the Record on Appeal are already included as attachments to the Defendants' Motion and Plaintiffs' Memo. Furthermore, the Appellants Motion to Alter or Amend, which is included in the Record on Appeal, did not have attached any new documents or materials.

4. The Appellants may contend that they made reference in their Motion to Alter or Amend to several of the contested deposition passages, but those transcripts were not included in the materials presented to the court and should therefore not be part of the Record on Appeal. However, numerous passages

designated by the Appellant are actually referenced for the first time in their Initial Appellants Brief even though those passages were never put forth to the lower court in any filing nor even referenced in any past filing. Specifically, the Appellant in their Initial Appellants Brief² reference the deposition testimony of Sam Imler at pages 17, ln 21- 22; p. 27, ln 23-28 and p. 31, ln 9-13; they reference the deposition of Elizabeth Heil³ at pp. 43, ln 3-24; pp. 65 ln 15 – p 67, ln 5; p. 69, ln 11- p. 70, ln 6; and they reference the deposition of Stewart Hines⁴ p. 57 ln 17- 25. All of these references and the designation of those deposition transcript portions are improper because they are being presented for the first time on appeal and have not been included in any past filing.

The Respondents therefore object to the listed items 5- 8 from the Appellants Designation and request that the Court Order that those items be excluded from the Record on Appeal, and that all references to those materials be removed from the Brief of the Appellants.



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Law Office Of Brian McDaniel, LLC
Post Office Box 2085
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SC Bar # 68618
(843) 379-5117

Attorney for the Respondent
December 14, 2015

² Sam Imler depo references at pp. 6 and 7 of the Appellants' Initial Brief

³ Elizabeth Heil depo references at pp. 3, 4, & 6 of the Appellants' Initial Brief

⁴ Stewart Hines depo references at p. 10 of the Appellants' Initial Brief

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

EXHIBIT TO RESPONDENTS'
MOTION TO EXCLUDE DESIGNATIONS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Circuit Court Case No. 2013-CP-07-1231

Appellate Case No. 2015-001988

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Mark Heil and Elizabeth Heil,

Appellants,

v.

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

Defendants,

Of whom Stewart Hines and
Christina Hines are the

Respondents.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order Granting Defendants' Motion for Summary Judgment;
2. Order Denying Motion to Alter or Amend;
3. Amended Summons and Complaint;
4. Answer and Motion to Dismiss to Plaintiffs' Amended Complaint;
5. Deposition Transcript of Sam Imler pp. 1-3, 7-8, 12-21, 24, 27-28, 31-32, 48;
6. Deposition Transcript of Elizabeth Heil pp. 1-2, 5-6, 11-13, 19-20, 29-30, 44, 65-70;
7. Deposition Transcript of Mark Heil p. 1-2, 14;
8. Deposition Transcript of Stewart Hines pp. 1-4, 14, 37-48, 57, & Ex. 14;
9. Plaintiffs' Memorandum in Opposition to Hines' Motion for Summary

EXHIBIT TO RESPONDENTS'
MOTION TO EXCLUDE DESIGNATIONS

Judgment, Ex. B;

10. Motion to Alter or Amend;

11. Transcript of Record pp. 1-2, 11-12; 15-31.

I certify that this designation contains no matter that is irrelevant to this appeal.

THE CAPELL LAW FIRM, LLC



Glynn L. Capell, Esq.

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**Attorneys for Appellants Mark and
Elizabeth Heil**

November 4, 2015
Hilton Head Island, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner Circuit Court Judge

Case No. 2013-CP-07-1231
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**AFFIDAVIT OF COUNSEL IN
SUPPORT OF MOTION TO EXCLUDE**

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 upon review of my file the Appellants did not serve the following deposition excerpts contained in the Appellants' designation of matter upon my client either directly or through my office:

(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

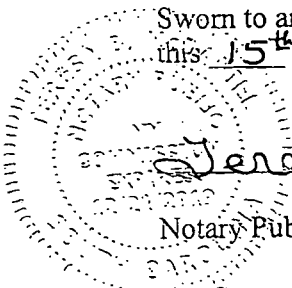
3. Upon review of the Beaufort County Court file for the underlying action in this case, it does not contain a copy of the above referenced transcript items (5) through (8).

4. That the Appellants first make certain transcript references in their Initial Appellants' Brief, namely the references to the deposition testimony of Sam Imler at pages 17, ln 21- 22; p. 27, ln 23-28 and p. 31, ln 9-13; the references to the deposition of Elizabeth Heil at pp. 43, ln 3-24; pp. 65 ln 15 – p 67, ln 5; p. 69, ln 11- p. 70, ln 6; and the references the deposition of Stewart Hines p. 57 ln 17-25. That neither the Appellants' Memorandum in Opposition to Summary judgment nor the Motion to Alter or Amend, no any other filing in the underlying case are believed to have contained these references.

That further the Affiant Sayeth Not,

BY: 
Brian McDanel

Sworn to and subscribed before me
this 15th day of December 15, 2015

 Jerena B. McDaniel

Notary Public For South Carolina

My Commission Expires: 12-21-19

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Mark Heil and Elizabeth Heil,

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Hines and Sam Imler d/b/a
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PROOF OF SERVICE

I certify that I have served the Respondents' Motion to Exclude Matters Designated by Appellants' by depositing a copy of it in the United States mail, postage prepaid, on December 16, 2015, 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.

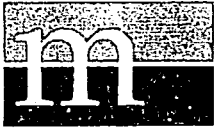
December 16, 2015



Teresa McDaniel
Legal Assistant
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Beaufort, South Carolina 29901
(843) 379-5117
Attorney for Appellant

Other Counsel of Record:

Charles W. Thomson, Esquire
Glynn L. Capell, Esquire
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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
December 16, 2015

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

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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 original and six (6) copies of the **Respondents' Motion To Exclude Matters Designated by Appellants From the Record on Appeal, Affidavit of Counsel in Support of Motion to Exclude** and the original of the **Proof of Service** for filing in the above referenced case. A check for the \$25.00 filing fee is also enclosed.

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

Sincerely,

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

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

