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

Mark Heil and **Elizabeth Heil**, Appellants,

v.

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

Of whom **Stewart Hines** and **Christina Hines** are the Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

Charles W. Thomson, Esq.
Glynn L. Capell, Esq.
THE CAPELL LAW FIRM, LLC
Post Office Box 6628
Hilton Head Island, SC 29938
Telephone: (843) 689-4280
Attorneys for Appellants Mark and Elizabeth Heil

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The only issue on appeal is whether or not the Court failed to recognize a scintilla of evidence of breach for the two negligence duties applicable to this case. As set forth more fully below, Respondents' brief presents issues that are not properly before the Court, misapplies the law and facts of this case, and fails to discredit the copious evidence of breach cited in Appellants' Brief.

I. Respondents' argument that the Amended Complaint does not state correct claims is neither properly before the Court nor meritorious.

Respondents' argument as to deficiencies in the Amended Complaint is difficult to follow. Its purpose appears to be to ask the Court not to consider evidence of the subject tree rubbing on the roof as evidence of breach or causation because that specific fact is not pled in the Amended Complaint. This argument appears to be Respondents' only hope to eliminate a key fact that singlehandedly provides a basis to reverse the lower court.[1] The argument fails.

Respondents did not raise the issue of defective pleading to the lower court, and the lower court did not rule upon it. Thus, Respondents' argument of deficient pleading is not properly before the Court. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue "must have been raised to and ruled upon by the trial judge to be preserved for appellate review").

If the Court were to indulge this argument of improper pleading anyway, it should easily discard it. "Under our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts." Food Lion v. United Food & Commercial, 351 S.C. 65, 79, 567 S.E.2d 251 (S.C. App., 2002). Paragraphs 12, 13, and 15 of the Amended Complaint properly state the ultimate facts relevant to both duties relevant to this appeal,

[1] This appeal truly is that simple, notwithstanding the lengthy briefs.

in addition to breach of those duties, causation, and damages that flowed. Appellants had no requirement to plead that a tree rubbing against their roof is specifically what led to their damages. Thus, even if the Court did entertain Respondents' argument of deficient pleading, the Court should discard it.

II. Respondents' argument that Appellants presented no evidence of causation is neither properly before the Court nor meritorious.

Several of Respondents' arguments rest upon assertions that Appellants presented no evidence of causation. (Respondents' Brief, 1, 6, 8, 14, 15). However, the lower court did not rule upon causation. Thus, that issue is not properly before the Court. *See* Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733 (holding an issue raised but not ruled upon by the trial judge is not preserved for appellate review).

Even though causation is not at issue, discussion as to causation is still helpful because causation and breach are inextricably linked in this case. Evidence of causation can simultaneously be evidence of breach in this case. The Court should be aware that Respondents' assertions that there is no evidence of causation are improper even if the Court is not ruling on the issue.

Appellant Mark Heil testified that the hole in his roof was caused by the Respondents' tree rubbing a hole in it, and that the hole led to other internal damages. (Dep. of Mark Heil 14:2-25). Appellant Elizabeth Heil testified as to that same effect. (Dep. of Elizabeth Heil 70:7-11). Each of those two statements alone satisfies the scintilla standard that Appellants are required to meet on the issue of causation **and** breach. Respondents fail to refute that, which is fatal to their request for the Court affirm the lower court.

Appellants' opinions on causation were formed upon consulting with professionals. (Id. 68:15 – 71:17). Appellants listed five different professionals, all insurance claims adjusters or contractors who visited the property, as fact witnesses in this matter. These witnesses were identified in Appellants' June

2014 discovery responses to Respondents, a fact that is not in the record or material to this appeal, but is unfortunately relevant to refute any potential taint from Respondents' repeated mentions of Appellants' inability to prove a causation issue that is not at issue in this appeal. Appellants did not present an affidavit from any of the five professionals listed as fact witnesses to the lower court because that should not have been necessary to surpass summary judgment in light of the other evidence in the record.

Respondents argue that the professionals' opinions that made it to the record by way of an email and by way of Elizabeth Heil's testimony constitute hearsay. The determination of hearsay is not before the Court because the lower court did not rule as to whether the evidence constitutes hearsay. *See* Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; *see also* State v. Ivey, 325 S.C. 137, 142-143, 481 S.E.2d 125, 127 (1996) (holding that even general objections made to the lower court as to admissibility of evidence are not preserved for appeal unless the party stated the specific grounds for the objection). That aside, the evidence that Respondents purport to be hearsay is superfluous because Appellants offered their own personal opinions as to causation and breach. The issues of causation and breach in this case are issues for which a lay opinion suffices.

Respondents state multiple times in their brief that the lower court ruled correctly because Appellants did not offer an expert opinion as to causation. (Respondents' Brief, 6, 8, 13, 14, 15). An expert witness is not necessary to prove causation of a hole in the roof where the location of the hole coincides with where a large tree branch was resting on it. The inference drawn is clear to a layman and juror. Appellants meet their burden with such evidence, and that burden shifts to Respondents to prove some alternate cause of the hole. If a party in this matter could benefit from the use of an expert on the issue of causation, it would be Respondents, not Appellants.

There is also evidence of causation from Respondents' negligent hiring and supervision of Imler. This causation may be inferred from the Imler's failure to report the roof damage his worker discovered. (Dep. of Sam Imler 32:9-16). The only reasonable inferences a juror could draw are that Imler's worker either caused the roof leak, or failed to discover and report the roof leak. Even if Imler's worker characterized the damage he discovered as not seeming substantial, it does not take much damage to cause a leaky roof. A tree contractor that had been reasonably vetted and hired would have reported the damages it found to one or both of the neighboring property owners. The failure to do so shows what little care was placed into this tree removal process by Respondents and Imler. Had the damage been reported, the parties would have been able to prevent the internal damages that festered for months afterward.

This discussion of causation might seem excessive in light of the Court not even needing to rule upon the issue. However, the discussion is warranted because Respondents' brief raises the issue of causation throughout several of their arguments, and because the understanding of causation in this matter is helpful to understand breach, the real issue at the heart of this appeal. The Court should be mindful not to allow Respondents' improper assertions that there is no evidence of causation affect its disposition.

III. Respondents' argument that there is no duty to inspect and maintain the subject tree is neither properly before the Court nor meritorious.

The lower Court held as follows:

> (Appellants) admitted photographs on the record, as Exhibit 14, from which an inference could be drawn that the subject tree was encroaching over (Appellants') roof in an unsound manner. In the light most favorable to the non-moving party, these photographs are evidence that (Respondents) had a duty to their neighbors to exercise reasonable care of these allegedly unsound trees.

(Order Granting Defendants' Motion for Summary Judgment, 2). Appellants appealed that order, but did not place that particular finding at issue. Respondents did not institute a cross-appeal pursuant to Rule 203(c), SCACR. Thus, the above-cited excerpt is the law of the case and is not properly before the Court. *See* Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (providing that a holding contested by a respondent is the law of the case where the respondent failed to cross-appeal that holding); In re Estate of Rider v. Estate of Rider, Opinion No. 4842 (S.C. App., 2011) (holding same).

Additionally, Respondents' argument as to duty to inspect and maintain the tree would fail even if the Court were to entertain it. Respondents' analysis of Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 356 S.E.2d 123 (S.C. App. 1986) is deeply flawed. That case provides as follows:

> a landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from **defective or unsound** trees on his premises, including trees of purely natural origin.

Id., 292 S.C. at 288, 356 S.E.2d at 127 (emphasis added).

Respondents' apparent interpretation of this holding is that a healthy tree cannot be "defective or unsound." This is not a logical framework. Healthy trees can eventually grow into streets, neighbors' houses, neighbors' driveways, etc. Per Israel, the onus to make those repairs falls on the landowner where the tree is based, not the neighboring owner. Id. at 292 S.C. at 288-289, 356 S.E.2d at 127-128. The case further explains that the general law of the land is that a neighboring landowner "is not chargeable with negligence if he fails to take steps to make his property safe against invasion by or injury from a tree **on adjoining land**." Id. (emphasis added) (dicta). Thus, the law places the onus on the landowner where the tree is based, and it is not logical to hold that healthy trees are

excluded from the owners' duties because some healthy trees can cause harm if not well-kept.

The qualifier "defective or unsound" is presumably included in the caselaw to excuse landowners from liability where an act of God, such as a high wind event, causes damages to a neighbors' property, despite lack of negligence on behalf of the landowner. No such event took place here.

Respondents' interpretation that a healthy tree cannot be "defective or unsound" is also not workable. In the present case, Respondents point out that Appellants testify that the subject tree was "healthy." However, Imler found dead branches on Appellants' roof and on the ground. (Dep. of Sam Imler, 12:8-10; 17:11-15; 17:21-22; 20:15-24). Trees that are mostly healthy can still shed dead limbs. (Id., 17:23 – 18:1). Mere general testimony that a tree is healthy cannot abrogate all questions of fact as to whether a tree is defective or unsound. Courts cannot apply such a framework because there is no workable way to determine when a tree is sufficiently healthy to discard the tree owner's liability.

Respondents failed to appeal the lower court's finding of duty and a challenge of that finding is not properly before the Court. Regardless, Respondents' argument as to a lack of duty to inspect and maintain the subject tree fails.

IV. Respondents' argument that there is no duty to use reasonable care in vetting, hiring, and supervising a tree contractor is neither properly before the Court nor meritorious.

Respondents argue in their brief that they had no duty to use reasonable care in vetting, hiring, or supervising a tree contractor, and presumably in the alternative, that such a duty is limited in scope. (Respondents' Brief, 1, 4-11, 15-17). The lower court did not rule upon whether Respondents' duties in this case included a duty to use reasonable care in "vetting, hiring, and supervising a tree contractor." It held that Appellants presented no evidence of breach of such; thus, presumably there was no need to rule on whether Respondents' duty

included that requirement. The finding being appealed on this point reads as follows:

> Next (Appellants) argue that there was a breach of this duty because (Respondents) improperly vetted the tree contractor Sam Imler and his company Sam's Tree Service, who (Respondents) hired to remove the trees, and failed to inspect their work. (Respondents) argued at the hearing that Sam's Tree Service specialized in the work he was hired to do and that the job occurred without incident. There has been no evidence presented that (Respondents) breached their duty by hiring Sam's Tree Service, a contractor specializing in tree removal, and therefore (Respondents) are entitled to judgment as a matter of law, as to the negligence claim.

(Order Granting Defendants' Motion for Summary Judgment, 2-3). This finding is tantamount to a holding that hiring a contractor specializing in the work performed disposes of all other evidence of breach of a duty the vet, hire, review the scope, and supervise that contractor. Such is the issue before the Court as to this duty. The existence of a duty to use reasonable care in vetting, hiring, and supervising a tree contractor was raised by Appellants in both underlying motions (Plaintiffs' Memorandum in Opposition to Hines' Motion for Summary Judgment, 3-4); (Motion to Alter or Amend, 4), but was not ruled upon. Thus, the existence of that duty is not at issue. *See* Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. The Court should determine whether that duty was breached, presuming *arguendo* that the duty exists. The lower court will still be free to rule on the issue of existence of the duty to reasonably vet, hire, and supervise after the Court reverses summary judgment.

To be fair to Respondents, Appellants' brief does include an assertion that there is a duty to reasonably vet, hire, and supervise that flows from Israel and Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (S.C. 1990). Thus, it is understandable why Respondents would include an alternate interpretation in their brief. However, Appellants included that law in their brief solely to give the

Court background information on the application of breach. It was not presented as a basis for an independent argument on the issue of duty.

Even if the Court were to entertain Respondents' argument that this duty either does not exist or is somehow limited, Respondents do not prevail at the summary judgment level. Appellants submitted more than a scintilla of evidence suggesting that Respondents had a duty to use reasonable care in vetting, hiring, supervising, and checking behind the work of the tree contractor. This duty flows from Israel, City of Columbia, and common law negligence generally. The burden shifts to Respondents to prove otherwise at the summary judgment level, and Respondents cannot use evidence that the duty to supervise was "outside the scope" of their duty, or evidence that they did not "increase the risk of harm," unless that evidence is conclusive and no other reasonable inference can be drawn, which is not the case. As such, the Court cannot hold as a matter of law that Respondents had no duty to vet, hire, or supervise.

Again, the Court is not to rule on the existence of a duty in this appeal, but even if it were, Respondents application of the existence of duty at the summary judgment level is incorrect.

V. Respondents misapply the summary judgment standard extensively throughout their brief.

Respondents improperly apply the summary judgment standard of review. (Respondents' Brief, *passim*). Appellants need only present a mere scintilla of evidence to withstand a motion for summary judgment. *See* Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). Respondents assert that there exists no genuine issue of material fact related to

certain uncontroverted evidence presented, but fail to recognize that conflicting conclusions can be drawn from those facts.

For instance, Respondents argue that there can be no evidence of breach because of Appellants' testimony that one is unable to see from the ground the extent of the contact being made between the tree and the roof. Even if that fact could help Respondents at trial, it bolsters Appellants' argument for denial of summary judgment because it demonstrates that there is a question of fact as to the conclusions drawn from how that evidence applies to the issue of breach of the duty to inspect and maintain the subject tree.

Respondents also misapply the summary judgment standard when attempting to refute items (a) through (j) on pp. 6-7 of Appellants' Brief, presented as evidence of breach of the duty to inspect and maintain the subject tree. Respondents inadequately refute items (a) and (j) by taking a position that limbs crossing boundary lines is not necessarily evidence of negligence. That fact does not abrogate the reasonable inference that a juror could draw from those photos that Respondents did not properly maintain the tree. A similar blatant misapplication occurs in Respondents' attempt to refute items (c), (d), (e), (f), and (g).

Respondents improperly assert that Appellants need to admit indisputable evidence at the summary judgment level showing that the photograph referenced in item (h) is of the subject tree. Respondents never argued to the lower court that the photograph was not a depiction of the subject tree, presumably because such an argument has no merit. It is not proper to argue this for the first time on appeal, even if evidence at the summary judgment level were treated with the same standard as evidence presented at trial. Moreover, the lower court found that the exact same photograph constituted a scintilla of evidence as to the existence of a duty to inspect and maintain the subject tree. (Order Granting Defendants' Motion for Summary Judgment, 2). Respondents' flimsy argument as to why the Court should discard this photograph, depicted in

Dep. of Stewart Hines, Ex. 14, is Respondents' only hope to convince the Court to ignore yet another piece of evidence that singlehandedly provides a basis to reverse the lower court.[2] The argument fails.

Respondents' argument that they are entitled to summary judgment on the issue of comparative negligence is an egregious misapplication of the summary judgment standard. This issue was not ruled upon and by the lower court and is not at issue on appeal either. The Court may refer to Appellants' counter-argument in Appellants' memo to the lower court if it believes this issue to be of any relevance. (Plaintiffs' Memorandum in Opposition to Hines' Motion for Summary Judgment, 6-7).

Finally, Respondents' attempted refutation of the evidence Appellants presented of breach of the duty to reasonably vet, hire, and supervise is far beyond proper, especially at the summary judgment level. Respondents' own testimony is that they did absolutely nothing to vet Imler or determine the scope of services proposed before hiring him, and did nothing to supervise or check Imler's work afterward. (Dep. of Stewart Hines, 37:6 - 48:4). Respondents present only one reason why their damning testimony does not raise questions of fact as to the reasonableness of their conduct. That one reason is that there could be no breach because Imler has a business license, has not been sued before, and specializes in pruning. Those facts were apparently not even discovered by Respondents until after Appellants' damages accrued. They can't possibly negate inferences of breach committed beforehand.

Respondent Stewart Hines attempted to give a valid excuse for his lack of action by testifying in his deposition that Appellants were the ones who selected and referred Imler. Id. Because both Appellants and Imler refuted that story, Respondents have run from using that excuse to justify their lack of reasonable-

[2] Again, this appeal truly is that simple, notwithstanding the lengthy briefs.

ness. By their own devices, Respondents are stuck with their testimony that they did nothing to vet or supervise Imler, or to determine the scope of services he offered or performed, even if that testimony might not be true. To argue that no inferences of breach can be drawn from testimony of doing is beyond reason.

Respondents' argument as to the lack of evidence of breach does mostly echo the lower court's holding, but that holding is a major reason why this appeal was necessary. To hold that the scarce fact that Imler specializes in tree removal precludes all of the overwhelming evidence of breach is more than just a simple error. Such a holding constitutes a poor juror vote and a blatant refusal to apply the summary judgment standard. Depriving Mark and Elizabeth Heil of their right to a jury trial on such a loose premise would be a failure of the judicial system.

CONCLUSION

This appeal is far simpler than one might surmise from reading Respondents' brief. The length of this reply brief far exceeds what Appellants' counsel would normally have issued for an appellate reply brief in any case, much less a case as simple as this one. Unfortunately, that length was required, in large part because of a need to address the superfluous arguments made by Respondents that are neither at issue in this appeal nor valid.

Despite the lengthy briefs, the Court's decision here is not that difficult. The appealing party is not asking for much. The Court need only discard the superfluous issues, find a scintilla of evidence of breach among the sea of evidence presented, and reverse the lower court accordingly.

Respectfully submitted,

THE CAPELL LAW FIRM, LLC

Glynn L. Capell, Esq.
SC Bar #: 16552
Email: gcapell@capelllaw.com
Charles W. Thomson, Esq.
SC Bar #: 101471
Email: cthomson@capelllaw.com
Post Office Box 6628
Hilton Head Island, SC 29938
Telephone: (843) 689-4280
Attorneys for Appellants Mark and Elizabeth Heil

January 12, 2016
Hilton Head Island, SC

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PROOF OF SERVICE

I certify that I have served the **Appellants' Initial Reply Brief** on Stewart Hines and Christina Hines by depositing a copy of it in the United States Mail, postage prepaid, on January 11, 2015, addressed to their attorney of record, Brian McDaniel, P.O. Box 2085, Beaufort, SC 29901.

January 12, 2015

Charles W. Thomson, Esq.
Glynn L. Capell, Esq.
THE CAPELL LAW FIRM, LLC
Post Office Box 6628
Hilton Head Island, SC 29938
Telephone: (843) 689-4280
Attorneys for Appellants Mark and Elizabeth Heil

The Capell Law Firm, LLC

17 Executive Park Road, Suite 5B (29928)
Post Office Box 6628
Hilton Head Island, SC 29938

Glynn L. Capell
Licensed also in NC & FL
Email: gcapell@capelllaw.com

Charles W. Thomson
Email: cthomson@capelllaw.com

Phone: 843.689.4280
Facsimile: 843.689.4281

January 12, 2016

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

Re: **Mark and Elizabeth Heil, Appellants v. Stewart and Christina Hines, Respondents**
Appellate Case No. 2015-001988

Dear Ms. Kitchings:

Enclosed for filing in the above case are as follows:

1) An original and one copy of the Initial Reply Brief of Appellants;

2) An original and one copy of the Proof of Service of the Initial Reply Brief of Appellants to the respondents;

3) An original and one copy of the Designation of Matter to be Included in the Record on Appeal; and

4) An original and one copy of the Proof of Service of the Designation of Matter to be Included in the Record on Appeal to the respondents.

Please file all four of originals and return one clocked copy of each to me in the self-addressed, stamped return envelope also enclosed. Thank you for your attention to this matter.

Sincerely yours,

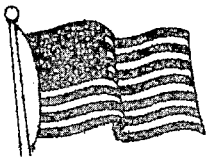
THE CAPELL LAW FIRM, LLC

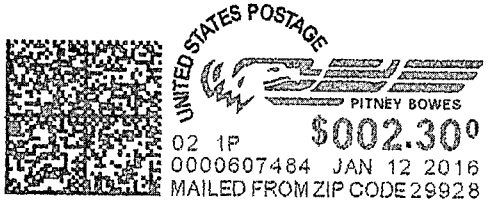
Charles W. Thomson, Esq.

Enclosures
cc: Brian McDaniel, Attorney for Respondents

The Capell Law Firm, LLC

Post Office Box 6628 • Hilton Head Island
South Carolina • 29938





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