

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

JAN 21 2016

SC Court of Appeals

Perry M. Buckner Circuit Court Judge

Appellate case No. 2015-001988

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 EXCLUDE MATTERS NOT PRESENTED
TO THE LOWER COURT AND STRIKE SUCH ARGUMENTS FROM
THE REPLY BRIEF OF THE APPELLANTS**

Now Comes the Respondents in this matter, Christina Hines and Stewart Hines, by and through their counsel of record Brian D. McDaniel, pursuant to Rule 240(a), SCACR requests that, in addition to those items previously motioned to be excluded and stricken from the record on appeal and briefs in this matter, that this court exclude items 5, 6, 7, and 8 of Appellants' Designation of Matter to be included in the Record on Appeal dated January 12, 2016 as well as the

following portions of the Reply Brief in which the Appellants reference and rely upon matters not presented to the lower court:

- A) Arguments II of the Reply Brief (p. 2-4 Reply Brief),
- B) The next to last paragraph of Argument III (p. 6 of Reply Brief) and
- C) At pages 10 and 11 of Argument V, the paragraphs which starts “Finally, Respondents’...” (p. 10 Reply Brief) should also be stricken.

The grounds for this motion are as follows:

Per Rule 210(c) SCACR, the Record on Appeal may not include matter which was not presented to the lower court or tribunal. The Respondents previously set out by way of motion the grounds for excluding those items not served, not filed, and not offered to the court in the lower court proceeding and those arguments are hereby incorporated by reference.

PROCEDURAL HISTORY

On December 16th 2015 the Respondents filed a Motion to Exclude Matters Designated by the Appellants from the Record on Appeal¹. The Respondents’ motion contested the inclusion of items 5, 6, 7, and 8 of the Appellants’ designations (all of which are deposition transcripts) arguing that none of those was presented to the lower court. The Appellants have not disputed that the items were not presented in court, nor filed, but instead have argued that

¹ The Appellants first Designation of Matter to Be Included in the Record on Appeal is dated November 4, 2015.

the disputed transcripts were made available upon a third-party server, of which the trial judge and counsel were made aware by an email² with a web link and statement that the disputed items would be available to the court if they “need to verify cites...”(Email- Exhibit ‘A’ to Appellants’ Return to Motion To Exclude). The disputed materials were not sent in any printed or digital format directly (i.e. as an attachment) to the Court or opposing counsel. The Appellants however are contending that providing the email link meets their obligation of presentment as required by the SCACR.

The Court has not yet ruled on the Respondents’ motion to Exclude. In the interim the Appellants have now filed a Reply Brief in Response to the Initial Brief of the Respondents. The Reply Brief also relies upon materials which are believed to not be properly part of the record on appeal, including some of those materials objected to in the Respondents’ first Motion to Exclude, but the Reply Brief also contains reference to additional materials believed to be improperly submitted.

ARGUMENT

In the Appellants’ Reply Brief at Argument II (p. 2-4 Reply Brief) they again make reference to the materials which are not properly part of the record on appeal including both deposition transcripts and other materials which the Appellants admit is not part of the record presented to the lower court judge. The

² Said email is admitted by the Appellants to have been sent after the hearing on the motion for summary judgment in this matter.

references to, and reliance upon, the deposition transcript excerpts of Elizabeth Heil p. 70:7-11 and p 68:15-71:17³ and of Mark Heil p. 14: 2-35 are improper because those transcripts are not part of the lower court record and presentment via email link to a third party server is insufficient. However, in their Reply the Appellants also make reference to other materials **they admit** are not part of the record. (p. 2-3 Appellants' Reply). The Appellants contend that information contained in "June 2014 discovery responses" should be considered by this court but these materials they admit are "not in the record or material to this appeal, but [are] unfortunately relevant". The insertion of these matters into Appellants' Reply Brief and the arguments based upon this improper reference should not be considered by this Court and Respondents request an Order striking Argument II from the Reply and/or all paragraphs that reference or rely upon such improper materials. At a minimum this Court should strike from the Reply the three paragraphs starting with "Even though..." from page 2 of the Reply through the first paragraph on page 3 ending with "evidence in the record."

Also on page six of the Reply Brief the Appellants make three references to the deposition excerpts of Sam Imler, specifically references to pages 17 and 18 of that deposition, neither of which was presented to the lower court. Striking these references is proper because the Appellants base their argument for inclusion in the record upon the email and third party link they sent after the hearing for summary judgment to opposing counsel and the trial judge (See

³ Elizabeth Heil deposition p. 71 was not included in any previous filing nor in Appellants' original Record on Appeal designation dated November 4, 2015

Exhibit A to Appellants' Return to Respondents' motion). However, this Court has never recognized an email link to a third-party server as sufficient presentment to the lower court and doing so would be a dramatic expansion of SCACR 210. Therefore, the Respondents seeks an Order striking the second full paragraph on page 6 of the Reply Brief which starts with "Respondents' interpretation...".

Finally, and for the same reasons, on pages ten and eleven of the Reply Brief the Appellants' multiple references to the deposition excerpts of Stewart Hines pages 37 through page 48 is improper as those materials were never presented to the lower court. The Respondents request an Order that the second full paragraph on page ten, starting with "Finally, Respondents..." through the end of that argument on page eleven ending with "failure of the judicial system." be stricken from the Reply Brief as those references and arguments are so intertwined and related to make that portion improper.

CONCLUSION

The Respondents seek the Court to strike and exclude from the January 12, 2016 Designation of Matters to be Included In the Record on Appeal items 5, 6, 7, and 8 and all references thereto in any filing or Brief. In addition the Respondents specifically requests that this Court Order Appellants to strike from the Reply Brief of the Appellants A) the three paragraphs starting with "Even though..." from page 2 of the Reply through the first paragraph on page 3 ending

with “evidence in the record.” B) the second full paragraph on page 6 of the Reply Brief which starts with “Respondents’ interpretation...”. and C) the second full paragraph on page ten, starting with “Finally, Respondents...” through the end of that argument on page eleven ending with “failure of the judicial system.”.



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Attorney for the Respondent
January 17, 2016

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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

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

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SC Court of Appeals

Mark and Elizabeth Heil,

Appellants,

v.

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Defendants

Of whom Stewart and
Christina Hines are the

Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Motion to Exclude Matters Not Presented to the Lower Court and Strike Such Arguments from the Reply Brief of the Appellants by depositing a copy in the United States mail, postage prepaid, on January 18, 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.

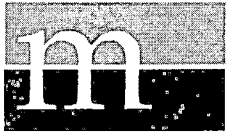
January 18, 2016



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Law Office of
BRIAN McDANIEL, LLC

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VIA US MAIL

January 18, 2016

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

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SC Court of Appeals

RE: Mark and Elizabeth Heil, Appellents v.
Stewart and Christina Hines, Respondents;
Appellate Case No. 2015- -001988.

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the **Respondents' Motion To Exclude Matters Not Presented to the Lower Court and Strike Such Arguments from the Reply Brief of the Appellents**, 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.

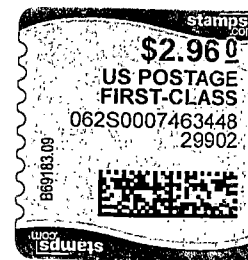
Also enclosed is an additional copy of the documents and a stamped, self-addressed envelope which I would appreciate you returning to my office after filing. Thank you.

Sincerely,

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

Enclosures

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