

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

RECEIVED  
JAN 23 2015  
SC Court of Appeals

**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.

**APPELLANTS' RETURN TO RESPONDENTS' MOTION TO EXCLUDE  
MATTERS AND STRIKE ARGUMENTS FROM APPELLANTS' REPLY BRIEF**

The Appellants Mark and Elizabeth Heil, by and through their undersigned counsel, pursuant to Rule 240(e), SCACR, hereby submit this Return to Respondents' Motion to Exclude Matters and Strike Arguments from Appellants' Reply Brief. Respondents' motion is a repeat of an argument Respondents have already made twice before, once in their previous Motion to Exclude, and again in Respondents' Brief. Appellants have not designated any new evidence subsequent to Respondents' previous motion and brief. The only discernable purpose of the present motion is to muddy the waters on the issue of presentment to the

lower court, to urge the Court to ignore *analysis* in addition to evidence, or to stall the Court's decision on this appeal. In any event, this motion is duplicative and improper.

**I. Despite Respondents' attempts to muddy the waters on the issue of presentment, the legal question before the Court remains the same.**

As an initial matter, as addressed in Respondents' previous motion to exclude, all deposition transcripts relevant to these two motions were emailed to the lower court judge's chambers prior to the lower court signing any order being appealed. Appellants defer to their argument on presentment by email in their Return to Respondents' previous motion to exclude, but seek to explain herein why two issues raised by Respondents in this motion are not material.

The first immaterial issue is Respondents' assertion that the use of a third party service should alter the Court's analysis of presentment by email. This tertiary issue is not relevant. The use of the third party service Dropbox in emailing the transcripts required no extra work or technical knowledge on behalf of the recipients other than clicking a hyperlink in the body of the email and, once on the hyperlinked page, clicking a large blue "Download" button. The technological skills required upon the recipients were no more complex than the skills required to download documents attached directly to an email.

Attorneys, support staff, and court reporters regularly use Dropbox and similar third party services to share large files in South Carolina cases. After downloading attachments from a sender's third party service, a recipient may store the attachments on the recipients' own computer system or print hard copies. The recipient is not dependent on the sending party's third party service to host the attachments subsequent to the initial receipt. This process is no different than the receipt of a document attached directly to an email.

The second immaterial issue is Respondents' assertion that the transcripts were not filed with the lower court. Rule 210(c) does not include a requirement

that documents be filed with the lower court. The rule provides for exclusion only where documents were “not presented.”

Despite Respondents’ attempts to muddy the waters, the Court may dispose of Respondents’ two motions by answering a single legal question:

In an appeal of an order granting summary judgment, are deposition transcripts “presented to the lower court” where the transcripts were sent by email to the lower court judge’s chambers prior to the issuance of the order?

**II. Even if presentment by email were not acceptable, Respondents made additional requests for exclusion in this motion that are not proper.**

Much of the evidence Respondents seek to strike in the present motion was presented by way of email to the lower court and encompassed by Respondents’ prior motion. Such requests are duplicative, and are addressed as improper above and in Appellants’ Return to Respondents’ previous motion. The non-duplicative requests in Respondents’ present motion, as discussed below, are even more improper than Respondents’ previous requests for exclusion.

Respondents requested that the Court strike Appellants’ entire argument on the issue of causation from Appellants’ Reply Brief, inclusive of analysis on the issue, and even the citation of law showing that the issue of causation is not even properly before the Court. This request exceeds the bounds of propriety.

The only evidence discussed within the causation argument of Appellants’ Reply Brief that was not presented to the lower court includes an appropriate disclaimer of such. That evidence should not have been relevant, but unfortunately Respondents attempted to make it relevant by improperly raising the issue of causation in their Initial Brief. Respondents admitted in oral argument before the lower court that Appellants provided testimony that the subject tree caused a hole in the roof. The lower court did not ever rule on the issue of causation; thus, the Court should not even consider such an argument on appeal. Despite these facts, Respondents argue in their brief that Appellants could not

prove causation because Appellants did not name an expert witness. Under these circumstances, the Court deserves to know why Appellants do not need an expert witness to prove causation. When providing a counter-argument to an issue that is not even properly before the Court, it is reasonable for a party to discuss a piece of evidence outside of the record on appeal, along with an appropriate disclaimer, for the purpose of clarifying misinformation offered by an opposing party. Such was the case for the single piece of evidence outside of the record that Appellants mentioned in their Reply Brief, being offered for a purpose similar to impeachment.

Additionally, Respondents seek to exclude, from Argument V of Appellants' Reply Brief, evidence that was presented by way of hard copy to the lower court that Respondents previously conceded is part of the record. That request should be ignored.

**III. Respondents' requests for exclusion do not materially affect the Court's disposition on this appeal and should not stall the Court's final decision on this appeal.**

The only issue on appeal is whether the record includes at least a scintilla of evidence from which a breach of negligence duty can be inferred. The Court can ignore all evidence that Respondents seek to exclude in both motions and still have ample basis to reverse the lower court. Respondents' motions to exclude ultimately are not material and constitute a waste of resources and judicial economy. Additionally, granting Respondents' motion to strike in the present motion would deprive the Court of much needed clarity on this case after Respondents' Initial Brief so thoroughly obscured the facts and issues before the Court. Most of the evidence, legal analysis, and citation of legal authority that Respondents seek to strike from Appellants' reply brief relate to issues that Respondents improperly brought before the Court.

The Court may decide to reverse the grant of summary judgment by viewing a mere single piece of evidence cited within the Order Granting Summary Judg-

ment itself. Likewise, the Court may decide to reverse the lower court by viewing any one of several other pieces of evidence that Respondents concede as being part of the record. All other evidence either provides additional scintillas of evidence giving additional independent grounds to reverse, or helps tell the backstory of this case. None of the evidence that Respondents seek to exclude changes the fact that Appellants submitted to the lower court more than a scintilla of evidence from which breach can be inferred.

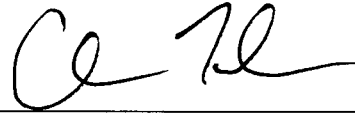
The interests of judicial economy will best be served by the Court taking one of two options:

- (i) deciding the merits of this appeal by reading the briefs in camera, and conducting oral arguments if desired, while preserving Respondents' motions for exclusion to be decided only after the Court determines that the motions for exclusion might potentially be material; or
- (ii) denying both of Respondents' motions to exclude on the grounds that evidence presented by email to the lower court does not run afoul to the requirements of Rule 210(c) when applied to an appeal arising from a summary judgment motion.

An outright denial of the motions is a superior option because such a denial is the most logical application of the South Carolina Appellate Court Rules. Nonetheless, should the Court have any hesitancy in applying the Rules in such a manner, neither the Court nor the parties would be well served by a subversion of this appeal to address issues that ultimately will not affect the Court's disposition.

Respectfully submitted,

**THE CAPELL LAW FIRM, LLC**



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**Attorneys for Appellants Mark and  
Elizabeth Heil**

January 27, 2016  
Hilton Head Island, SC

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11/23/2016

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

**AFFIDAVIT OF APPELLANTS' COUNSEL IN SUPPORT OF THEIR RETURN  
TO RESPONDENTS' MOTION TO EXCLUDE MATTERS AND STRIKE  
ARGUMENTS FROM APPELLANTS' REPLY BRIEF**

1. I am counsel for Appellants in this matter and over 18 years of age.
2. The Designation of Matter to be Included in the Record served simultaneously with Appellants' Reply Brief did not include any evidence not previously designated to be included in the record by Appellants or Respondents.
3. When compared to the emailing of a document attached directly to the body of the email, Appellants' use of the third party service Dropbox in emailing the transcripts at issue required no extra work or technical knowledge on behalf of the recipients (Respondents' counsel and Judge Buckner's law clerk), other than clicking a hyperlink in the body of the email and, once on the hyperlinked page, clicking a large blue "Download" button.

4. Respondents never made an objection to the lower court on the grounds that any of the deposition transcripts were not filed with the clerk of the lower court.

5. Respondents admitted in oral argument before the lower court that Appellants testified that a tree in Respondents' yard caused a hole in Appellants' roof.

6. The lower court did not rule on the issue of causation.

7. Respondents argued in their Initial Brief that Appellants could not prove causation because Appellants did not name an expert witness.

8. Appellants listed five different professionals, all insurance claims adjusters or contractors who visited the property, as fact witnesses in this matter in Appellants' June 2014 discovery responses to Respondents. Appellants testified that some of these professionals formed opinions on causation, specifically that the tree in Respondents' yard caused the hole in Appellants' roof.

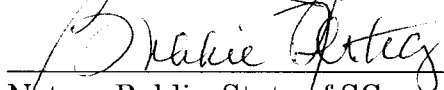
9. Appellants submitted pages 39 to 43 of Stewart Hines' deposition transcript in hard copy format as an Exhibit to Appellants' Memorandum in Opposition to Respondents' Motion for Summary Judgment.

10. All evidence included in the Designation of Matter to be Included in the Record, served simultaneously with Appellants' Reply Brief, was presented to the lower court, either by hard copy service or by email.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Charles W. Thomson, Esq.

SWORN TO AND SUBSCRIBED before  
me this 27 day of January, 2016

  
\_\_\_\_\_  
Notary Public, State of SC  
My Commission expires: 11-27-22

**Bobbie S Fertig**  
Notary Public, State of South Carolina  
My Commission Expires Nov. 27, 2022

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Of whom **Stewart Hines and  
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PROOF OF SERVICE

I certify that I have served the **Appellants' Return to Respondents' Motion to Exclude Matters and Strike Arguments from Appellants' Reply and Affidavit of Appellants' Counsel in support of same** on Stewart Hines and Christina Hines by depositing a copy of it in the United States Mail, postage prepaid, on January 27, 2015, addressed to their attorney of record, Brian McDaniel, P.O. Box 2085, Beaufort, SC 29901.

January 27, 2015



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January 27, 2016

**RECEIVED**

JAN 29 2016

**SC Court of Appeals**

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 seven copies of the Appellants' Return to Respondents' Motion to Exclude Matters and Strike Arguments from Appellants' Reply Brief;
- 2) An original and seven copies of the Affidavit of Appellants' Counsel in Support of Their Return to Respondents' Motion to Exclude Matters and Strike Arguments from Appellants' Reply Brief;
- 3) An original and seven copies of the Proof of Service of both of the above.

Please 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,

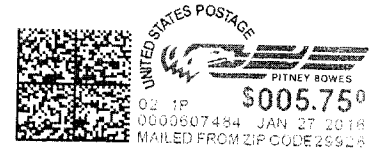
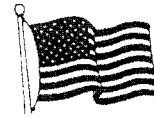
**THE CAPELL LAW FIRM, LLC**



Charles W. Thomson, Esq.

Enclosures

cc: Brian McDaniel, Attorney for Respondents



The Capell Law Firm, LLC

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South Carolina • 29938

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JAN 29 2016

SC Court of Appeals

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