THE STATE OF SOUTH CAROLINA
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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Appellate case No. 2015-001988

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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.

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# FINAL BRIEF OF THE RESPONDENTS

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## STATEMENT OF THE CASE

The Appellants, Mark Heil and Elizabeth Heil (the Heils) filed suit against the Respondents, Stewart Hines, Christina Hines (the Hines) and Sam Imler d/b/a Sam's Tree Service (Sam Imler) alleging causes of action for negligence and breach of fiduciary duty. The Respondents own the property neighboring the Appellants' property, though neither owner lived at the properties at the time the cause of action is alleged to have accrued. (R. p. 34, at depo p. 5 ln 3 – depo p.7 ln 4; R. p. 15, para. 10).

In late November of 2011 the Respondents inspected their own property upon a routine visit and discovered encroaching tree limbs from a healthy oak tree ("tree") on the Appellants' property, but did not observe any damage to their roof or property at that time. (R. p. 60, ln 25 – p. 61, ln 10; R. p. 37 at depo p.19 ln 2 – depo p .20 ln 7).[1] The Appellants requested the Respondents pay for removing the encroaching growth from their tree and the Respondents paid Sam's Tree Service to perform tree trimming on December 7, 2011. (R. pp. 47-48; R. pp. 63- 64). Sam's Tree Service ("Sam's") is a sole proprietorship created in 2003 and owned by Sam Imler ("Imler"). (R. p. 57, ln 5- 12). Sam's retains a Hilton Head Island business license and an unblemished record with this being the first lawsuit or claim filed against the company since its inception in 2003. (R. p.44, ln 15- 17; R. p. 45, ln 3- 6). A climber performed the limb removal while the owner of the company, Sam Imler, supervised from the ground. The climber did not stand on the roof but rather was suspended above the roof and was tied in with a safety harness. Mr. Imler testified that the climber then removed the encroaching limbs and tied a rope to the limb and lowered it down to the ground. (R. p. 46, ln 5- 25; R. p. 49, ln 8-

[1] The Appellant, Mark Heil, is a contractor specializing in cleaning property, repairing roofs and maintaining property –R. pp 57-58; R. p. 34 at depo p. 8)

18). While performing the tree trimming the climber noticed only a dented shingle, however, the climber made Imler aware that the dented shingle was not significantly damaged and did not affect the roof's integrity in such a way as to allow any leakage into the home. (R. p. 52, ln 21-22; R. p. 51, ln 12- 15; R. p. 52 ln 23- p. 53 ln 4 and R. p. 55, ln 6- 18). Imler did not make the Hines aware of the dent in the shingle as it posed no risk to the integrity of the home. (R. p. 52, ln 23- p. 53, ln 5; R. p. 54, ln 9- 16). More than five months after Sam's Tree Service performed tree trimming services the Appellants claimed to have discovered water damage to their home, in May of 2012 (R. p. 9 at para. 7).

In the FACT recitation of the Appellants' Brief they claim that they asserted the damages alleged in this case against their own insurance but were denied coverage. In their Brief they state that their "insurance company denied coverage because the inspectors for the claim determined..." (p. 3 of Appellants' Final Brief) but this is not a correct statement of the evidence in the case. In fact, the only evidence in the record referenced on this point is an email (R. p. 78) which indicates that the insurance company "settled the above claim with our insured" not that the claim was denied as is alleged by Appellants. In her deposition the Appellant indicates that the insurance company in fact paid for the damage to the roof (R. p. 41 at depo p. 34, ln 16- 17). Further, the email (R. p. 78) upon which this allegation rests references the opinion of a single unidentified "adjuster" and not multiple "inspectors" as posited in the Appellants' Brief at page 3 (Appellants' Final Brief p. 3).

In the FACT recitation of the Appellants' Brief they also claim that they "repaired the Subject Property at their own expense". (p. 4 Appellants' Final Brief). This is also

inaccurate in as much as Elizabeth Heil testified, and the evidence supports, that insurance actually paid for the repairs to the roof (R. p. 78), although it is true that the Appellants have made claims for additional amounts above and beyond the insurance payments.

**Standard of Review**

Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. When ruling on a Motion for Summary Judgment, the evidence and all inferences that can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. E.g., Cunningham v. Helping Hands, 352 S.C. 485, 575 S.E.2d 549 (2003).

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "Summary Judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. at 122, 708 S.E.2d at 769; see also Rule 56(c), SCRCP. "to determine whether any triable issue of fact exists , the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." McLaughlin v. Williams, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct.App.2008).

## ARGUMENT

I. A. Was Summary Judgment proper when the Appellants failed to put forth admissible evidence that the Respondents breached any duty owed to them?

The hearing Judge correctly ruled that there is simply no admissible evidence presented that would support the claims made by the Appellants in this case. In their Amended Complaint the Appellants/Plaintiffs allege that the Respondents were negligent in (a) failing to remove the limbs, (b) failing to hire or oversee the proper removal and (c) in failing to report "tree limb damage" caused, presumably by such removal. (R. p. 10 at para. 13). Moreover, the Respondents did in fact remove the tree limbs and there has been no evidence presented that the removal was done improperly. The Appellants did not present a tree expert or tree removal witness of any kind for the purpose of alleging that the removal was done improperly. There is simply no evidence in the record that the removal was improper. Therefore the only remaining claim would be failing to report tree limb damage caused, and all evidence in the case is that it was not possible to see any damage to the roof of the Appellants' home, and **both Appellants** have testified to this fact (R. p. 37 at depo E. Heil p. 19, ln 2- 9 and R. p. 61, ln 6-24). The Respondents simply can not be liable under current case law (Israel v Carolina Bar-B-Que, Inc. 292 S.C. 282 (S.C. App. 1986) where the undisputed testimony is that they could not observe an unsound or defective condition[2]. In this case, the Respondents have no responsibility for the damages claimed because they had no legal duty to protect an adjacent property from a healthy tree and because no evidence exists which could establish any wrongdoing by them.

[2] The Defendants, Hines, maintain that the tree in this case was sound and not defective in any way.

The Appellants' attempts to characterize the testimony of Appellant, Elizabeth Heil, as supporting a breach of duty (R. p. 109 at "Breach") are untenable in as much as Ms. Heil admitted that she could not see the limbs touching the roof and did not even get on the roof to inspect. (R. p. 37 at depo p. 19, ln 2- 9 and R. p. 36 at depo p. 15, ln 25- p. 16, ln 4) The quotes attributed to Sam Imler which are presented in the Appellants' Brief are likewise unsupported in as much as Mr. Imler's testimony invariably concludes that he did not observe the damage to the roof claimed in this case and that he did nothing improper. (R. p. 52, ln 23 - p. 53, ln 5; R. p. 55. ln 6-18; R. pp. 63 & 64). The Appellants have the burden to put forth some evidence to prove this, and every element, and they have not presented evidence which would do so. Chastain v. Hiltabidle, 381, S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009).

The Court also correctly ruled that there was no admissible evidence that the hiring of Sam's Tree Service was negligent. Sam's Tree Service specializes in general pruning, removals, fertilizing, consultation and permitting. (R. p. 43, ln 25- p.44, ln 4). Sam's retains a Hilton Head Island business license and an unblemished record with this being the first lawsuit or claim filed against the company since its inception in 2003. (R. p.44, ln 15- 24 and p.45, ln 3-6). If Sam's is found to have been negligent in this case, (which is denied) that is through no fault of the Respondents, as they had no evidence that would alert a reasonable person to such likelihood of negligent performance or poor workmanship, and the Appellants have put forth no evidence of that in this case. Because the Appellants have the burden to set forth some evidence as to every element of their case, this failure alone is sufficient for the granting of summary judgment in favor of the Respondents in this case.

However, the Respondents also demonstrated at the hearing that the Appellants put in no admissible evidence from anyone which could establish that the alleged breach was in fact the "proximate cause" of the damages they are claiming. The Appellants contend that the "insurance company's opinion was expressed by email" which meets the causation requirement[3]. This document (R. p. 78) is not sufficient in as much as the email presented clearly would not be admissible as opinion evidence, for several reasons. First, the reference is text-book inadmissible hearsay, second the source is unidentified and can not be qualified in any manner as an expert, third, it does not actually give an opinion of any breach of duty (nor any improper actions in the limb removal), finally the unidentified adjuster (not "inspectors") would presumably have been available to the Appellants but they have failed to try and determine whether testimony which might support the proximate cause element could in fact be obtained. At the time of the hearing of the summary judgment motion upon which this appeal is predicated the civil action has been pending for nearly two years and the Appellants have had adequate time to obtain expert testimony to establish a breach and the proximate cause element of their negligence claims and they have failed to do so. This unnamed "insurance adjuster" is not presented or documented as a "roof" or "tree" expert, and the failure to provide an expert opinion further justifies the courts grant of summary judgment in this case. In whatever form the Appellants try to cast their negligence claim, the failure to provide an expert opinion is fatal.

The Appellants in this matter fail to produce any admissible evidence that would support the claims in their pleadings that the Respondents breached their duty of care to them by "failing to properly remove the limbs/or failing to supervise and hire a tree

[3] (R. p. 110 "Causation" paragraph

company to properly remove/repair the limb damage and by failing to report tree limb damage caused".

I. B. Does case law support the ruling of the court in granting summary judgment where the Appellants seek to create an entirely new duty of care requiring adjoining landowners to insure against all possible harm from healthy and sound trees located in part on their property?

The case identified by both parties as speaking to the issues in this case is the Israel v. Carolina Bar-B-Que case (292 S.C. 282 (S.C. App. 1986) in which a limb fell from property owned by Berry onto the Carolina Bar-B-Que restaurant property injuring a patron of the restaurant. In that case the court notes that the common law generally would **not** impose liability for a falling tree limb, but recognized an exception to this rule, stating that in "urban" areas the landowner has to exercise reasonable care to make sure the tree is safe. Adjoining property owners have only been held liable for damages caused to neighboring property in very unique circumstances, such as where the property owners alter their property to create a condition the foreseeable result of which will be injury to the adjoining property (Duane v. Presley construction Co., Inc., 244 S.E.2d 509, 270 S.C. 682 (S.C. 1978)). Even for businesses their liability to their **invitees** must be premised upon the visibility of the danger from the [adjoining lot] (Israel v Carolina Bar-B-Que, Inc. 292 S.C. 282 (S.C. App. 1986). Citing the Mahurin (71 Ill. App.3d 691 (1979) case the court said that the land owner must exercise reasonable care to "prevent an unreasonable risk of harm arising from defective or unsound trees on his premises..." This exception to the general rule fails to apply in this case for multiple reasons.

First, there is no evidence the tree in this case was defective or unsound. The evidence is undisputed that in late November of 2011 the Appellants inspected their property upon a routine visit and discovered encroaching tree limbs from a **healthy** oak

tree ("tree") on the Respondents' property, but **did not observe** any damage to their roof or property at that time. (R. p. 37 at depo p.19 ln 1- depo p. 20, ln 7). All evidence in the case suggests that even if there were some damage to the Appellants' roof prior to the tree service limb removal, that such damage could not be seen while on the roof (R. p. 61, ln 6-24) and certainly not by an observer on the ground. (R. p. 37 at depo p 19 ln 2- 9 and R. p. 36 at depo p. 15, ln 25- depo. p 16, ln 4). Since the alleged condition was not viewable from the ground it therefore can not create a liability upon these Respondents based upon the case law. (Israel v Carolina Bar-B-Que, Inc. 292 S.C. 282 (S.C. App. 1986)) To extend current case law to include all potential risks whether they can be viewed or not is to make neighbors insurers of their neighbor's property. It is simply not reasonable for the law in South Carolina to make all adjoining landowners insurers of their neighbors' property for property damages caused from natural, healthy and sound trees.

Next, the Appellants' claim for damages does not actually stem from a claim that the tree was unsafe or unsound. In fact, the only theory as to damages claimed in this case is the unsupported opinion of the Appellants themselves in which they surmise that a healthy tree limb must have rubbed the roof of their home. The only tree trimming professional, Mr. Imler, testified that there was no such damage to the roof at the time the encroaching limb was removed, but only a single "dented shingle" causing no issues to the structural integrity of the roof. (R. p. 52, ln 23 – p 53, ln 5; R. p. 55, ln 3 - 18).

Additionally, applying the standard set forth in Israel, the possible harm in no way is "unreasonable", whereas the cases cited were premised on protecting neighbors from serious bodily injury or death from falling trees and limbs, this case involves a dented

shingle that (even taking all evidence in the light most favorable to the Appellants) could have only caused substantial *property* damage if neglected for months by the Appellants. This is clearly not the harm that the Israel case contemplated in its Learned Hand type analysis of the probability of harm, gravity of that harm, weighed against the burden on the Defendant to act to eliminate all such risks.

Next, the duty can only be breached if the Respondents' acted unreasonably, again there is no evidence that the Respondents did not do what was reasonable or even more, given that they hired a reputable service and had the limb removed within 2 weeks of the notice, though not legally bound to do so. This was the finding of the trial judge when he concluded that the "Defendants acted without delay in hiring Sam's Tree Service when asked to do so... [they] did not fail in their duty to inspect and maintain the tree." (R. p. 6 last paragraph).

Finally, it is noteworthy that the subject limb in the current case was not even on the property of the Respondents, but was instead on the property of the Appellants at the time it was alleged to have damaged the Appellants' property. That is to say that the Appellants assert their damages resulted from a swaying limb located on their property and not from a limb suddenly falling from the Respondents' property, crossing the property line and thus invading their property. As such the Appellants had all ability and legal access to remedy the situation themselves and can not rightly shift this duty to the Respondents. Surely the law places at least as great a duty on a homeowner to oversee the maintenance of their own home and property as it might impose on a neighbor with regard to a healthy and naturally growing tree.

II. A. Was summary judgment proper where the Respondents in all regards acted reasonably and no evidence of negligence was presented.

Upon being notified in November 2011 that their tree was encroaching on the Appellants' roof, without delay the Hines agreed to pay for a tree service company to perform tree trimming services in order to prevent any damage to the Appellants' home. The tree service company (Imler) then promptly performed the requested maintenance so that the tree trimming was scheduled and completed by early December, within an approximately 10 day period from the time it was requested. (R. p. 91, ln 23- p. 92, ln 2; R. pp. 63, 64). The tree trimming services provided were paid for by the Respondents, though the law plainly allows the Appellants to conduct such trimmings themselves.

The Respondents agreed to a professional tree company to perform the tree trimming services rather than a company/person without expertise in the tree industry. Specifically, Sam's Tree Service specializes in general pruning, removals, fertilizing, consultation and permitting. Sam's retains a Hilton Head Island business license and an unblemished record with this being the first lawsuit or claim filed against the company since its inception in 2003. (R. pp. 44, ln 15- 17; R. p. 45, ln 3- 6). If Sam's is found to have been negligent in this case, (which is denied) that is through no fault of the Appellants, as they had no evidence that would alert a reasonable person to such likelihood of negligent performance or poor workmanship, and the Appellants have put forth no evidence of that in this case.

II. B. Was summary judgment proper where the items presented by Appellants as "substantial evidence" do not evidence a genuine issue of material fact in dispute in the case

The Appellants put forth items (a) through (j) in their Brief (p. 6-7) which they contend are sufficient to give rise to an "inference of breach" of a duty owed to them by the Respondents. This list of items is however easily refuted. Specifically, items (c), (d), (e), (f) and (g) are all statements from Sam Imler and he indisputably concludes in his deposition that his worker properly removed any encroaching branches and that there was no damage to the roof that would threaten the structural integrity of the roof. (R. p. 52, ln 23 – p 53, ln 5; R. p. 55, ln 3 – 18). The Appellants have put forth no evidence to contradict this testimony.

As to testimony of the Appellants, items (a) and (j), the Appellants both testified that they saw no damage to their roof in November 2011, even though Mr. Heil got on the roof and trimmed branches. Ms. Heil admitted at her deposition that she could not even see if the limbs touched the roof. (R. p. 61, ln 6-24; R. p. 37 at depo p.19 ln 1- depo p. 20, ln 7; R. p. 36 at depo p. 15, ln 25- depo p. 16, ln 4) Limbs growing across property boundary lines from a healthy tree are not evidence of negligence.

As to the "opinion" statement listed as item (b) there is in fact no such opinion from a Gary Garwood, as this is simply a statement from Ms. Heil and Appellants' Brief references only Elizabeth Heil's deposition. Item (b) is in fact unsubstantiated hearsay that has never been presented in this case. Mr. Garwood is not identified and has never given testimony or a report in this case. The Appellants attempt to backdoor this unsupported hearsay opinion from an unknown and unqualified source through Ms. Heil's deposition is improper, would not be admissible, and therefore is not sufficient to

defeat summary judgment. Further, no expert opinion testimony has ever been presented in this case nor submitted to the trial court as evidence at the hearing of this matter.

As to the item (h) photographs, while they were presented at Mr. Hines deposition he was unable to identify them, and they in fact have never been identified in this case, so reliance upon them to defeat summary judgment is improper. However, even if these photographs are assumed to be of the Appellants' roof they are not evidence of negligence of their neighbor, the Respondents. None of the trees are identified as being the Respondents and no damage is evident from the branches. Further, there are no fallen or rotten branches and all the branches that are viewed are healthy. Surely the law and this court cannot place a higher duty on a neighbor to trim branches from the Appellants' roof than it places upon the Appellants themselves. Simply having trees near ones' home can not be evidence of negligence of a neighbor.

Finally, as to item (i) this email (R. p. 78) is not sufficient in as much as the email presented clearly would not be admissible as opinion evidence, for several reasons. First, the reference is text-book inadmissible hearsay, second the source is unidentified and can not be qualified in any manner as an expert, third, it does not actually give an opinion of any breach of duty (nor any improper actions in the limb removal), finally the unidentified adjuster (not "inspectors") would presumably have been available to the Appellants but they have failed to try and determine whether testimony which might support the proximate cause element could in fact be obtained. At the time of the hearing of the summary judgment motion upon which this appeal is predicated the civil action has been pending for nearly two years and the Appellants have had adequate time to obtain expert testimony to establish a breach and the proximate cause element of their

negligence claims and they have failed to do so. This unnamed "insurance adjuster" is not presented or documented as a "roof" or "tree" expert, and the failure to provide an expert opinion further justifies the courts grant of summary judgment in this case.

## III. Is summary judgment appropriate when the Appellants fail to put forth evidence of a genuine issue of material fact in the case to establish a duty, breach of that duty and/or damages:

### III. A. Where there is no evidence of any wrongdoing or damage caused by the Tree Contractor (Sam Imler)?

The non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. Chastain v. Hiltabidle, 381, S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009). The Appellants' claim is they were harmed by a tree limb that rubbed their roof and they argue that the Respondents, and the Tree Contractor, are liable. However, there was no evidence put forth in this case that the Tree Contractor caused any damage to the Appellants' roof. This lack of evidence alone is sufficient to justify the granting of summary judgment as to all claims which relate to the supervision, hiring of the tree service and with regard to all claims that the limb removal was done improperly.

### III. B. Where, if the Respondents' duty arises from undertaking a "voluntary" act there is no evidence that they failed to use reasonable care and no evidence that any such act increased the risk of harm?

The Appellants assert that by hiring Sam's Tree Service, upon their request, that the Respondents undertook a voluntary act and subsequently breached the duty of case associated with the same. This position is not supported by the facts in this case. As stated by the Appellants, a duty can arise for a voluntary act imposing liability for

"physical harm" resulting from a failure to exercise "reasonable care to perform his undertaking" if his failure to exercise such care "increased the risk of such harm". Citing Russell v. City of Columbia, 3056 S.C. 86, 89-90, 406 S.E.2d 338, 340 (S.C. 1990).

In the current case the act at issue would be the hiring of Sam's tree service to do the requested limb trimming. There is however, no evidence that this was not reasonably done as discussed in this brief. Specifically, Sam's Tree Service specializes in general pruning, removals, fertilizing, consultation and permitting. (R. p. 44, ln 3-6). Sam's retains a Hilton Head Island business license and an unblemished record with this being the first lawsuit or claim filed against the company since its inception in 2003. (R. p. 44; R. p. 45, ln 3-6). If Sam's is found to have been negligent in this case, (which is denied) that is through no fault of the Respondents, as they had no evidence that would alert a reasonable person to such likelihood of negligent performance or poor workmanship, and the Appellants have put forth no evidence of that in this case.

Furthermore, there is simply no evidence that Sam's Tree service "increased the risk of such harm" as the Appellants have never put forth any qualified opinion testimony of how or when the damages they assert occurred. The Appellants have no evidence that Sam's Tree Service did any damage to the roof but rest solely on a claim that Sam's Tree Service failed to report existing damage. This claim is without merit however because they present no case law which suggests that a tree trimmer has a duty to report possible roof damage not caused by his work, they present no evidence that damage in fact existed at all or was visible, and so the only available testimony is that hearsay testimony of Sam Imler. Mr. Imler testified to that his worker told him that there was no damage of any

significance to the roof at the time he removed the encroaching limbs. It is incumbent upon the Appellants to provide evidence otherwise and they failed to do so.

Furthermore, as recently as July 2015 the South Carolina Court of Appeals has interpreted the "affirmative acts exception" stating that ""a duty assumed because of a voluntary undertaking must be strictly limited to the scope of the undertaking." Wright v. PRG Rea Estate Mgmt., Inc., Opinion No. 5326 (S.C. App. 2015) See also Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992). In this case, if a duty was assumed it was at most to select and pay for a Tree Service to remove branches. There is no evidence to suggest that the Appellants at any time requested that the Respondents oversee and supervise the limb removal. In fact the Appellant testified that she was seeking to have the Respondent "address the tree situation" (R. p. 35 at depo p.11, ln 20-22) but she in fact never spoke to the Respondent but received a message to "fax him the estimates" for him to pay for the tree trimming. (R. p. 35 at depo p. 11, ln 20- p. 12, ln 3). There is no evidence to even suggest that the Respondents discussed, much less agreed, to do an inspection and/or report to the Appellants as to the condition of their roof after the limb removal. Based upon current case law, any legal duty incurred due to the assumption of a voluntary act would be strictly limited so that the Respondents are not liable if damage was incurred beyond the scope of that assumed act as is claimed in this case. Therefore, the hearing judge was correct in his ruling and the orders granting summary judgment should be affirmed.

III. C. Where the Appellants' reliance on testimony of competing price quotes for the tree trimming work is insufficient to defeat summary judgment?

"It is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. " Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). One of the primary arguments made by the Appellants in this appeal is that a "he said, she said" scenario exists as to how Sam's Tree Service was retained to do the tree trimming work, and that such a "controversy" defeats summary judgment. (p. 4-5 Appellants' Final Brief). However, to be sufficient to defeat summary judgment the facts at issue have to be more than ancillary issue, but must instead by material issues in the case speaking to the elements of the cause of action. Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) In this case, even if this is a matter in dispute, it in no way undermines the granting of summary judgment. That is because if the Appellants retained Sam's Tree service summary judgment is proper, and, because there is no evidence that the selection of Sam's Tree service was negligent, even if the Respondents selected Sam's Tree Service summary judgment is still proper because the Appellants have failed to show any breach of a duty.

Importantly, in the Orders granting summary judgment the trial judge in fact assumes that the Respondents did hire Sam's Tree Service (R. pp. 2 -3) and finds that there is no evidence that this selection breached any duty. Again the trial judge rightly relies on the facts presented that Sam's Tree Service specializes in general pruning, removals, fertilizing, consultation and permitting. (R. p. 44, ln 3, 4, 15- 17; and R. p. 45, ln 3- 6) Sam's retains a Hilton Head Island business license and an unblemished record with this being the first lawsuit or claim filed against the company since its inception in 2003. (R. p. 44, ln 3, 4, 15- 17; and p. 45, ln 3- 6). Furthermore, even if Sam's is found to have been negligent in this case, (which is denied) that is through no fault of the

Appellants, as they had no evidence that would alert a reasonable person to such likelihood of negligent performance or poor workmanship, and the Appellants have put forth no evidence of that in this case. The Appellants' contention that it is negligent to not obtain and confirm the citizenship papers of the workers of a service (Appellants' Final Brief p. 5), even though the company is duly licensed and operating in the county, is simply unsupported in case law, not practical and not reasonable.

III. D. And, where whether Sam's Tree Service had insurance is not evidence of negligence of the Respondents?

The Appellants' contention that it is negligent to hire a service without confirmation of liability insurance is unsupported in case law and without merit. The Appellants cite no case authority for the proposition that failing to confirm insurance coverage is evidence of negligence. Furthermore, as stated several times above, there is no evidence that Sam's Tree Service did anything improper to even make insurance coverage relevant to this case. The Appellants may desire to deal with an insurance company to try and settle this matter but where there is no evidence that Sam's Tree service acted improperly, the filing of an unsubstantiated claim against it and the Respondents does not create an issue of fact in the case.

The Appellants similarly contend that an inference of negligence should arise from a failure of the Respondents to supervise and inspect the work of Sam's Tree Service, "if for no other reason to ensure that the tree no longer encroached on Appellants' property." (p. 10 Appellants' Final Brief) This contention overlooks the fact that a tree branch encroaching onto a neighboring property is NOT evidence of negligence. The Appellants also ignore that there is no evidence in this case to suggest

that Sam's Tree Service did anything improper in the removal of the tree branches so more supervision and/or inspection would have changed nothing in this case. The Appellants again grasp at straws to try and create a controversy in the case where none exists.

IV. Should the Appellate Court consider in its review of the Order granting summary Judgment testimony and arguments not presented to the lower court?

In the Appellants' Brief they reference numerous deposition passages which were not presented to the trial Judge and which it would be improper to consider. In Appellants' Brief at pages 3, 4, and 6 they reference pages 43, 65, 66, 67, 69, and 70 from Elizabeth Heil's deposition none of which were presented to the lower court. Elizabeth Heil's deposition references are used as reference citations for numerous assertions about how their roof was damaged, where at the summary judgment hearing they provided no support for this contention at all. Likewise, this court should not consider the newly submitted deposition excerpts of Sam Imler on pages 6 and 7 of the Appellants' Brief. The Sam Imler deposition references include deposition pp, 17, 27, and 31. They also make improper reference to certain deposition excerpts of Stewart Hines for the first time in their Initial Brief. Specifically the reference on page 10 of the Initial Brief to deposition page 57 of the Respondent, Stewart Hines, is improper because it was not part of the record to the lower court nor argued at the previous hearings.

V. ADDITIONAL GROUNDS

The Respondent requests that the appellate court affirm the decision of the lower court on any grounds found in the record, pursuant to SCACR 220(c), which supports the holdings of the lower court.

V. A. Should issues which arise from claims which were not alleged in the Appellants' Amended Complaint be the basis for reversing the lower courts' grant of summary judgment.

In their Amended Complaint the Appellants/Plaintiffs allege that the Respondents were negligent in (a) failing to remove the limbs, (b) failing to hire or oversee the proper removal and (c) in failing to report "tree limb damage" caused, presumably by such removal. (R. p 10, para. 13). These are the specific allegations of breach that were pled in this case against the Respondents although the Appellants' attempt to raise several new issues in their appeal. It is improper for this court to consider any new issues not pled by the Appellants and it is clear that there exists no evidence in the record to support the assertions that (a) the Respondent failed to remove the limbs (b) that the limbs were not properly removed or (c) that they failed to report "tree limb damage". The Appellants have on appeal asserted that the damage was not caused by improper removal but by the natural growth and sway of the tree rubbing the roof, although they have no evidence of this assertion. The Appellants do however admit the tree was healthy and that it was not possible to view any damage ("tree limb damage" or otherwise) from observation on the ground. (R. p. 60, ln 25 – p. 61, ln 10; R. p. 37 at depo p.19, ln 2 – depo p. 20, ln 7. Therefore, there is simply no support for a claim that the Respondents had a duty to report damage they could not observe. With all three of the alleged breaches of duty refuted and/or unsupported by the evidence, all remaining issues raised by the Appellants are moot and the order granting summary judgment should be affirmed.

V. B. The record demonstrates that the Appellants were aware of the condition of the branches, and their own contributory negligence

was so substantial it would negate any negligent liability of the Respondents.

The Appellants visited their property in November 2011 and first noticed and advised the Respondents that while the Respondents' oak tree had not caused any noticeable damage to the home it was encroaching on the Appellants' roof. (R. p. 37, at depo pp. 19-20). The Appellants did not return to their property again until late April or early May of 2012 at which time they discovered damage to their home that is claimed to be the result of water damage. (R. p. 9 at para. 7). The Appellants both work for a property preservation company (Safeguard) and as such are sophisticated in the business of home maintenance and preservation. When asked about employment in her deposition, Appellant, Ms. Heil, indicated that, "Safeguard, my husband is the contractor for them. He goes in, and he does the property preservation and maintenance from the time that the company first gets it that the property's going into foreclosure. He goes in and does a thorough investigation and inspection of the property, notes any deficiencies or repairs . . . He'll do roof. He'll do whatever needs to be done to this property to keep it in good physical running shape." (R. p 34 at depo p. 8, ln 8-18). When asked about the work he did for Safeguard in his deposition, Mr. Heil indicated that he did "[r]oof repair, any damages on the outside of the property that would intrude into the property, we had to repair stuff like that, . . ." (R. p. 57, ln 21-23). With the Appellants' knowledge of foreseeable property issues that arise in a vacant property, it would be reasonable to expect that they would retain either a property management company, friend, neighbor, acquaintance or other professional to inspect the premises both internally and externally on a periodic basis while they are away in order to alert them to any home maintenance issues so that a small problem did not unnecessarily escalate into a large problem.

The Appellants allege that the damage to their home was substantial and so severe that it was immediately apparent when they entered their home in May 2012. (R. p. 40 at depo p. 29, ln 7-19). However, if the damage was substantial and noticeable then it would have been immediately apparent to anyone entering the home to check on the home's condition. Notably, the Appellants indicate that their close friend, Connie Schwartz, a property manager by profession, checked on the property from time to time. In Elizabeth Heil's deposition she says, ". . . I had someone going by the house once a month. . . She'd go inside, check. She'd look on the outside, see if there were any issues or problems with the house. She was our previous tenant, and since she's a property manager and one of our best friends, I thought she was the best one." (R. p. 38 at depo p. 23) When questioned later in her deposition about the discovery of water damage, mold and termites and why Connie didn't notice these glaring problems, the Appellant had a very shaky response,

"Q. Did you contact Connie after finding all this condition?

A. No. . . .

Q. I guess what I'm wondering, if Connie was checking on the property once or twice a week or weekly or within every month, and the problem had been going on for two or three months, didn't you question her as to why she hadn't told you that there was this ongoing mold problem in the house?

A. I couldn't tell you—I mean, it was two years ago—if I did or I didn't.

Q. You don't recall speaking to Connie about the problem?

A. Any of the mold or anything. And I could have. Like I said, I just don't remember. That was two years ago." (R. p. 40 at depo p. 31, ln 16 –p. 32, ln 11).

Appellant's, Ms. Heil, evasive response indicates that either the property maintenance agreement was so informal that Connie was not aware she should be checking on the property at regular intervals, or Connie was negligent in her periodic inspections of the home. Either result, indicates the Appellants' lack of reasonable care in maintaining their secondary property while it was vacant for a period of six months. In addition, Appellant, Ms. Heil, indicated that sometime between 2002 and 2004 their hot water heater leaked and was observed by neighbors to be shooting water from the roof. (R. p. 38 at depo p. 24 – R. p. 39 at depo p. 25). As a current problem, Mr. Heil indicated that one of the reasons he is vigilant in either trimming tree limbs away from his home, or having the Hines remove the limbs is because of raccoons entering their attic area. Specifically, Mr. Heil noted that, "[w]e have had problems with raccoons getting in our attic, and I think they're coming up the tree, over the limbs, onto the roof, and then they go on . . . They're getting up under the overhang in the dormer where the dormer meets the roof, and they're getting up in the attic." (R. p. 59). When asked if he could hear them scratching he said, "[h]ear them scurrying around, yeah." (R. p. 59). A previously leaking hot water heater and burglarizing raccoons are both areas of concern when the goal is to maintain an undamaged and secure home. The water, mold, and termite damage that the Appellants claim to have suffered may have been a result of either of these issues, but whether that is the case or not a previously leaky hot water heater and intruding raccoons should have put the Appellants on notice that in order to keep their property from being damaged they would need to exercise a reasonable amount of care in having their property inspected and maintained in their absence. In addition, the Appellants were not vigilant in protecting their home from termites. When

the Appellant was asked in her deposition if the home had been bonded for termites she said it had but they were unable to use the bond because they had not had their home serviced within the last year or two. (R. p. 41 at depo p. 36, ln 14- 23). The Appellants did not exercise reasonable care in having their property inspected on a regular basis while it was unoccupied. The Appellants also did not exercise reasonable care in having their home treated for pests. As a result of their own negligence the Appellants may have suffered significant damage to their home. Had the Appellants reasonably cared for their property they would have detected damage to their home prior to it causing internal damage to their home and certainly prior to it escalating into a substantial and severe condition which they now claim. Due to the undisputed evidence of their own negligence the grant of summary judgment in this case was proper.

## CONCLUSION

For these reasons and as may be presented in oral arguments, the Order of March 12, 2015 granting summary judgment and the Order of July 21, 2015 denying the motion to Alter or Amend should be affirmed.

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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

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.

**CERTIFICATE OF COUNSEL**

The undersigned certified that the submitted Brief of the Respondents complies with Rule 211(b), SCACR..

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Case No. 2013-CP-07-1231
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PROOF OF SERVICE

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I certify that I have served the Respondents' Final Brief by depositing a copy in the United States mail, postage prepaid, on February 24, 2016, addressed to the Appellants' 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.

February 24, 2016

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