

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
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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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

MARK and ELIZABETH HEIL)

Plaintiffs,)

vs.)

STEWART and CHRISTINA)
HINES and SAM IMLER d/b/a)
SAM'S TREE SERVICE)

Defendants,)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2013-CP-07- 1231

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

2015 MAR 15 PM 2:58
CLERK OF COURT
J. PERRY M. BUCKNER, JR.
CLERK OF COURT

This matter comes before this Court by way of motion of the Defendants, Stewart and Christina Hines, for summary judgment pursuant to SC Rule Civil Procedure 56(c) as to all of the causes of action alleged against them by the Plaintiffs. The Plaintiffs have filed a Complaint in this matter against Stewart and Christina Hines and Sam Imler d/b/a Sam's Tree Service for property damage the Plaintiffs allege related to the removal of tree limbs from their property. The Amended Complaint alleges a claim for negligence and a claim of breach of fiduciary duty against Christina Hines and Stewart Hines.

#1
PMB
A hearing on this matter was held before Judge Perry M. Buckner on March 3, 2015, at the Beaufort County Courthouse. In attendance at the hearing for the parties was Brian McDaniel, counsel for the Defendants, Stewart Hines and Christina Hines, and Charles Thomson, counsel for the Plaintiffs, Mark Heil and Elizabeth Heil.

Rule 56, SCRCP, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming

v. Rose, 350 S.C. 488, 493 (2002). The nonmoving party must specifically set forth such facts, "as would be admissible in evidence," to show that a true jury issue exists. Rule 56, SCRCP. Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610 (1976).

The Court will first address the negligence claim and then move on to the claim for breach of fiduciary duty. In order to establish a claim for negligence, a party must prove the following elements: (1) a duty of care owed by one party to another; (2) a breach of that duty by negligent act or omission, and (3) damage proximately caused by the breach. Doe ex rel. v. Batson, 345 S.C. 316, 322 (2001).

First, the Plaintiff alleges that there was a duty as a landowner in a residential or urban area to others outside 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. Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 288 (Ct. App. 1986). The Plaintiff admitted photographs on the record, as Exhibit 14, from which an inference could be drawn that the subject tree was encroaching over the Plaintiff's roof in an unsound manner. In the light most favorable to the non-moving party, these photographs are evidence that the Defendants had a duty to their neighbors to exercise reasonable care of these allegedly unsound trees.

Next, the Plaintiffs argue that there was a breach of this duty because the Defendants improperly vetted the tree contractor Sam Imler and his company Sam's Tree Service, who the Defendants hired to remove the trees, and failed to inspect their work. The Defendants 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 the Defendants breached their duty by hiring Sam's Tree Service, a contractor specializing in tree removal, and therefore the Defendants are entitled to judgment as a matter of law, as to the negligence claim.

The Court now considers the breach of fiduciary duty claim. A fiduciary duty exists when "... one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." SSI Medical Services, Inc. v. Cox, 301 S.C. 493 (1990). A fiduciary relationship is not casual and as a general rule cannot be created unilaterally, but requires that the fiduciary must have actually accepted or induced the confidence placed in him or her: Steele v. Victory Savings Bank, 295 S.C. 290 (Ct.App. 1988). Fiduciary relationships have traditionally been reserved for legal or business settings—often where one person entrusts money to another such as with lawyers, brokers, corporate directors and corporate promoters. Hendricks v. Clemson University, 353 S.C. 449 (2003).

#3
PMB
The Defendants argued that an agreement for one neighbor to pay to remove some trees that encroach on another neighbor's property does not create a fiduciary duty. The Plaintiffs cite Steele, at 94 (Ct. App. 1988), to argue that whether a plaintiff reposed special confidence and trust in a defendant, and whether the defendant accepted that confidence and trust was a question of fact for a jury. However, in that case, the plaintiff had entrusted a 3rd party to buy a certificate of deposit from the defendant bank, who allowed the 3rd party to purchase the CD for himself. The question of fact for the jury was whether the defendant bank knew of the plaintiff's relationship to the 3rd party. Additionally, although whether a fiduciary relationship has been

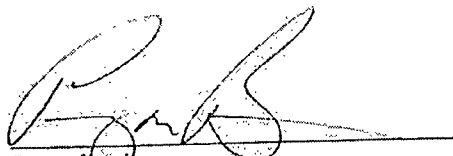
breached can be a question for the jury, the question of whether one should be imposed between two classes of people is a question for the court. Hendricks, at 459 (2003).

Here, there are only the two parties in which to consider a fiduciary duty, and there is not a question of one party's knowledge of the other's existence. Fiduciary relationships have traditionally been reserved for business or legal relationships. In this case, there is an agreement for one neighbor to pay to remove trees encroaching on another neighbor's property; there is no entrustment of money or property that both the Plaintiffs and Defendants have acknowledged at one point in time. Id., at 459 (2003). Therefore, there is no fiduciary relationship between the Plaintiffs and Defendants, and the Defendants Stewart and Christina Hines are entitled to judgment as a matter of law, as to the breach of fiduciary duty claim.

The Defendants Stewart and Christina Hines' Motion for Summary Judgment is granted as to both the negligence and breach of fiduciary duty causes of action. The case continues as to Sam Imler d/b/a Sam's Tree Service.

AND IT IS SO ORDERED

#4



Perry Buckner
Judge, Fourteenth Judicial Circuit

This 12th day of March, 2015

Walterboro, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2013-CP-07- 1231

MARK and ELIZABETH HEIL)

Plaintiffs,)

vs.)

STEWART and CHRISTINA)
HINES and SAM IMLER d/b/a)
SAM'S TREE SERVICE)

Defendants,)

**ORDER
DENYING MOTION TO
ALTER OR AMEND**

2015 AUG 13 11:11:58
CLERK OF COURT
JAMES H. BUCKNER, JR.
CLERK OF COURT

This matter comes before this Court by way of motion of the Plaintiffs, Mark and Elizabeth Heil, for reconsideration of the grant of summary judgment in favor of the Defendants, Stewart and Christina Hines as to all of the causes of action alleged against them by the Plaintiffs. The Plaintiffs have filed a Complaint in this matter against Stewart and Christina Hines and Sam Imler d/b/a Sam's Tree Service for property damage the Plaintiffs allege related to the removal of tree limbs from their property. The Amended Complaint alleges a claim for negligence and a claim of breach of fiduciary duty against Christina Hines and Stewart Hines.

A hearing on the Plaintiff's motion to Alter or Amend was held before Judge Perry M. Buckner on June 16, 2015. In attendance at the hearing for the parties was Defendant Stewart Hines, Brian McDaniel, counsel for the Defendants Stewart Hines and Christina Hines, and Charles Thomson, counsel for the Plaintiffs, Mark Heil and Elizabeth Heil.

4 /
Pm 28 The Plaintiffs contend that the record demonstrates that there exists evidence of breach of a duty of care owed by the Defendants, Stewart and Christina Hines, to "inspect and maintain" their trees. In the Order of March 12, 2015 this Court held that there is enough evidence to

support a finding of a duty for neighbors in the current case to exercise reasonable care to avoid an unreasonable risk of harm from encroaching trees. Upon review the court concludes that the Plaintiff failed to demonstrate the existence of admissible evidence that the duty, such as was held may exist, was breached in this case. "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008).

The Plaintiffs contacted the Defendants and requested that they pay for a tree trimmer to trim the remaining branch, to which the Defendants agreed. Though the Amended Complaint alleges that the work was completed by January 2012, other evidence presented, including the December 10, 2011 email from Sam Imler to Stewart Hines attached to Defendant's Motion for Summary Judgment, evidences that by December 10, 2011 the work had been completed. In either circumstance it is the finding of this court that the response by the Defendants in swiftly scheduling a tree trimmer, once they became aware of the concerns of their neighbors about the potential risk of the encroaching limb, was reasonable and supports the summary judgment ruling in favor of the Defendants.

#2
RB
The Plaintiffs cite deposition testimony of Sam Imler and Elizabeth Heil to argue that the trees were encroaching on the Plaintiffs' property. However, even in the light most favorable to the Plaintiffs, this testimony does not dispute that the Defendants acted without delay in hiring Sam's Tree Service when asked to do so. In other words, the Defendants did not fail in their duty to inspect and maintain the tree. In addition, the Plaintiffs' counsel did not argue at the hearing that any damage occurred during the time between the Defendants being asked to hire a tree trimmer and the tree trimming itself.

Finally, as to the granting of summary judgment as to the breach of fiduciary duty claim the Plaintiffs attempts to recast the parties in this case as "absentee neighbors" is not persuasive. The Plaintiffs fail to provide case law supporting a determination that this case presents such a new situation that it would justify finding a previously unrecognized fiduciary duty. Therefore, the previous ruling is unchanged on this matter. The motion to Alter or Amend is denied. The Order granting summary judgment in favor of the Defendants, Stewart Hines and Christina Hines as to the negligence and breach of fiduciary duty causes of action is unchanged.

AND IT IS SO ORDERED


Perry Buckner
Judge, Fourteenth Judicial Circuit

This 21st day of July, 2015
Walterboro, South Carolina

#3

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
MARK AND ELIZABETH HEIL)
Plaintiff,)
vs.)
STEWART AND CHRISTINA HINES)
and SAM IMLER d/b/a SAM'S TREE)
SERVICE)
Defendants)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No. 2013- CP-07-1231

AMENDED COMPLAINT
(Jury Trial Demanded)

13 OCT 2014 PM 3:52
CLERK OF COURT
JUDICIAL CIRCUIT
BEAUFORT COUNTY, S.C.

The Plaintiff, Mark and Elizabeth Heil ("Plaintiff"), complaining of the Defendant above named, would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff is the owner of real property located at 7 Bellhaven Way, Hilton Head Island, SC, Beaufort County, South Carolina ("Subject Property").
2. The Defendant, Stewart and Christina Hines ("Hines") are, upon information and belief, residents of the State of South Carolina and conducted business in whole or in part, at all times relevant hereto in Beaufort County, South Carolina.
3. The Defendant, Sam Imler d/b/a Sam's Tree Service ("Tree Company") is, upon information and belief, a corporation organized and existing in the State of South Carolina and conducted business in whole or in part, at all times relevant hereto in Beaufort County, South Carolina.
4. This Court has jurisdiction over the subject matter of this action and the parties to this action.

FACTUAL ALLEGATIONS

5. Upon information and belief, the Heils requested that the Hines remove unsafe, unsound and/or defective tree limbs from trees on the Hines property located next door to their 7 Bellhaven Way property in November, 2011. Hines retained Sam's Tree Service to do the limb removal and the work was completed in January 2012.

6. The Hines undertook to act for and on behalf of the Heils in removing the tree limb and ensuring its proper removal by hiring and coordinating the repairs at a time where the Heils were not present at their house. Such circumstances, the Heils entrusting their house and associated repairs to the Hines, gave rise to a relationship of trust and confidence

7. In May, 2012 the Heil's discovered substantial and severe water intrusion and damage by a hole in the roof that the tree limb had caused and that was not repaired or reported by Sam's Tree Service.

8. Sam's Tree Service, in the course of its work, negligently caused damage to the roof and/or failed to notice a hole or failed to repair and/or report it.

9. Upon information and belief, the negligence of Sam's Tree Service and the Hines have resulted in water intrusion and physical damages to property belonging to the Plaintiffs.

10. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs, prejudgment interest, and postjudgment interest.

FOR A FIRST CAUSE OF ACTION (Negligence/Gross Negligence – As to Hines)

11. Each and every allegation set forth above is fully incorporated herein.

12. The Hines owed a duty to Plaintiff to inspect the trees on their property to ensure they are safe and not unsound or defective and to remove/repair the tree limbs and damaged property.

13. The damage which exists at the Heil's property are the proximate and direct result of the negligence and/or gross negligence of the Hines, in one or more of the following particulars, by failing to properly remove the limbs and/or failing to supervise and hire a tree company to properly remove/repair the limb damage and by failing to report tree limb damage caused.

14. Hines knew, or should have known, that it was in breach of its duty owed to Plaintiff.

15. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs, prejudgment interest, and postjudgment interest.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty – As to Hines)

16. Each and every allegation set forth above is fully incorporated herein.

17. The Heils reposed special confidence in the Hines, by virtue of the Hines agreeing to undertake and pay for repairs as well as hire, retain, select, coordinate, supervise and oversee the repair contractor while the Heils were absent from their property. The Hines, in equity and good conscience, were bound to act in good faith with due regard to the interests of the Heils. As such, the Hines owed a fiduciary duty to the Heils.

18. The Hines actually accepted or induced the confidence placed in them.

19. The Heils had foundation for a belief that the Hines would not act in their own behalf, but in the interests of the Heils.

20. As set forth above, the Hines breached their fiduciary duty and have caused harm to the Heils by failing to adequately retain and supervise an adequate tree removal company to take the necessary actions to prevent harms to the Heil's property.

21. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs, prejudgment interest, and postjudgment interest.

FOR THIRD CAUSE OF ACTION
(Negligence/Gross Negligence - As to Sam's)

22. Each and every allegation set forth above is fully incorporated herein.

23. Sam's owed a duty to Plaintiff to exercise that degree of skill necessary to perform its work free of defects and in conformity with customary and ordinary standards of the industry, and to report/repair any damage it caused and/or observed to roof.

24. The deficiencies and defects which exist at the Subject Property are the proximate and direct result of the negligence and/or gross negligence of Sam's, as contractor, in one or more of the following particulars, by failing to remove and repair the tree limb's properly and by causing and/or failing to report substantial damage and holes in the roof.

25. Sam's knew, or should have known, that its work was in breach of its duty owed to Plaintiff.

26. As a direct and proximate result, Plaintiff has suffered injuries and continue to suffer injuries and are entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney's fees, consequential damages, including loss of use and

loss of value, punitive damages where applicable, plus costs, prejudgment interest, and postjudgment interest.

FOR A FOURTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanship – as to Sam’s)

27. Each and every allegation set forth above is fully incorporated herein.

28. Sam’s impliedly warranted that its work would be performed in a good and workmanlike manner, free of construction defects and in accordance with industry standards and applicable building codes.

29. As set forth more fully above, Sam’s breached its implied warranty.

30. As a direct and proximate result, Plaintiff has suffered injuries and continue to suffer injuries and are entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney’s fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs, prejudgment interest, and postjudgment interest.

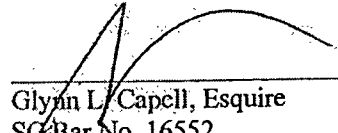
WHEREFORE, Plaintiff prays for judgment against the Defendants and is entitled to recover the cost to repair the defects and damages, consequential damages, punitive damages where applicable, loss of use and loss of value, plus costs, prejudgment interest and postjudgment interest.

JURY TRIAL DEMANDED.

SIGNATURE ON THE FOLLOWING PAGE

Respectfully submitted,

THE CAPELL LAW FIRM, LLC



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Attorney for the Plaintiff

October 29, 2013
Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2013-CP-07- 1231

MARK and ELIZABETH HEIL)
Plaintiffs,)

vs.)

**ANSWER AND MOTION TO DISMISS
TO PLAINTIFFS' AMENDED COMPLAINT**

STEWART and CHRISTINA)
HINES and SAM IMLER d/b/a)
SAM'S TREE SERVICE)
Defendants,)

COME NOW the Defendants, Stewart and Christina Hines, (hereinafter "the Hines") by and through their undersigned counsel, to Answer the Amended Complaint of the Plaintiffs (hereinafter "the Heils") and moving to dismiss the Plaintiffs' claim of breach of fiduciary duty against the Plaintiffs and state as follows:

1. Each and every allegation of the Complaint which is not specifically hereinafter specifically admitted, denied, qualified or explained, is denied.
2. The Defendants, the Hines, admit the allegations in paragraphs 1, 3, and 4 of the Amended Complaint.
3. The Defendants, the Hines, deny the allegations in paragraphs 2, 5, and 6 of the Amended Complaint.
4. The Defendants, the Hines, are without information or knowledge sufficient to form a belief as to the truth of Paragraphs 7 and 8 of the Plaintiffs' Amended Complaint, and those allegations are therefore denied.
5. The Defendants, the Hines, deny the allegations in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of the Amended Complaint.

6. The allegations in paragraphs 22 through 30 are not alleged against the Defendants, the Hines, and may not require a response, but in as much as they do require a response from these Defendants, the Hines are without information or knowledge sufficient to form a belief as to the truth or falsity of Paragraphs 22, 23, 24, 25, 26, 27, 28, 29, and 30 of the Plaintiffs' Amended Complaint, and those allegations are therefore denied.
7. All other allegations of the Plaintiff's Amended Complaint, not specifically admitted or denied herein are hereby denied.

FACTUAL ALLEGATIONS

8. The Defendants, the Hines, were not informed of any roof related issues on the property of the Plaintiffs until May 2012, approximately 5 months after Sam's Tree Service is alleged to have removed branches from the Plaintiff's property.
9. That the roof damage being claimed by the Plaintiffs on the subject property would not be visible to a person on the property of the Hines.
10. That the Hines do not reside on the property neighboring the Plaintiffs property.
11. That, upon information and belief, the Plaintiff, Elizabeth Heil, is (or was) the owner and broker-in-charge or a realty company that specializes in distressed properties.

FOR A FIRST AFFIRMATIVE DEFENSE
(Negligence of the Plaintiff/Gross Negligence)

12. The Defendants repeat and reallege the allegations contained in paragraphs 1 through 11 above as if repeated hereinafter verbatim.
13. That upon information and belief, the Plaintiff Elizabeth Heil may have specialized knowledge and experience in managing and inspecting property, such as the subject

property, such that she is held to a higher standard of care with regard to her duties to inspect and/or repair damage such as is being claimed by the Plaintiffs in this case.

14. That, upon information and belief, if the Plaintiffs property was in fact damaged in December 2011, then the Plaintiffs were contributorily negligent by failing to find and/or repair the damage in a reasonable time.
15. That the Plaintiffs' damages in this case, if any, must be reduced or denied as to the Hines because, even if the Defendants, the Hines, were negligent, which is specifically denied, the alleged negligence of the Hines must be measured against the negligence of the Plaintiffs in failing to oversee, maintain, inspect, and/or repair their property as evidenced by their own allegations that they waited more than four months to notice the claimed damage, which they describe as "substantial and severe," and which was likely significantly more damaged because of the Heils' failure to inspect and/or address the alleged damage in a timely manner.

FOR A SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate Losses)

16. The Defendants repeat and reallege the allegations contained in paragraphs 1 through 15 above as if repeated hereinafter verbatim.
17. That the Plaintiffs failed to mitigate their losses and therefore their damages, if any, should be denied or reduced due to, and in conformity with, this failure.

FOR A THIRD AFFIRMATIVE DEFENSE
(Failure to Allow Repairs)

18. The Defendants repeat and reallege the allegations contained in paragraphs 1 through 17 above as if repeated hereinafter verbatim.

19. That the Plaintiffs failed to notify the Defendants of the subject claims in a timely manner and failed to allow the Defendants the opportunity to inspect and/or make repairs as required prior to making a claim such as the subject claim.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Fellow Servant Doctrine)

20. The Defendants, the Hines, repeat and reallege the allegations contained in paragraphs 1 through 19 above as if repeated hereinafter verbatim.
21. That, if the Defendant Sam Imler or Sam's Tree Service is determined to be an employee or agent of the Hines, which is denied, then the Defendants are not liable to the Plaintiff under the Fellow Servant Doctrine.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations/ Laches)

22. The Defendants, the Hines, repeat and reallege the allegations contained in paragraphs 1 through 21 above as if repeated hereinafter verbatim.
23. That the claims of the Plaintiff should be denied because of the applicable Statute of Limitations and/or Laches.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Waiver)

24. The Defendants, the Hines, repeat and reallege the allegations contained in paragraphs 1 through 23 above as if repeated hereinafter verbatim.
25. That the actions, and omissions of the Plaintiffs have acted as a Waiver of their claims, if any, against the Hines in this matter.

FOR AN ADDITIONAL DEFENSE AND BY WAY OF MOTION
SC Rule 12(b)(6) Motion to Dismiss the Second Cause of Action of the Plaintiff
which alleges Breach of Fiduciary Duty – As to Hines
(Failure to State Facts Sufficient to Constitute a Cause of Action)

26. The Defendants, the Hines, repeat and reallege the allegations contained in paragraphs 1 through 25 above as if repeated hereinafter verbatim.
27. That the Defendants, the Hines, hereby motion the court to dismiss the claims for breach of fiduciary duty made against them by the Plaintiffs because, even if the Plaintiffs' allegations are taken as true, which is denied, there exists no factual basis to constitute a fiduciary relationship between the Hines and the Plaintiff.

WHEREFORE, having answered all claims of the Plaintiffs, the Defendants, the Hines, pray for denial and dismissal of the claims of the Plaintiffs, an award in favor of the Defendants of the costs of the action including reasonable attorney's fees and further and additional relief as the Court determined to be just and proper. A jury trial is hereby demanded.

Law Office of Brian McDaniel, LLC

BY: _____


BRIAN D. MCDANIEL
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Beaufort, South Carolina 29901
PHONE (843) 379-5117
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ATTORNEY FOR THE DEFENDANTS
STEWART and CHRISTINA HINES

Beaufort, South Carolina
November 8, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
MARK and ELIZABETH HEIL)
Plaintiffs,)
vs.)
STEWART AND CHRISTINA)
HINES, SAM'S TREE SERVICE)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No.: 2013-CP-07-1231

**NOTICE OF MOTION AND
MOTION FOR
SUMMARY JUDGMENT**

**TO: GLYNN L. CAPELL, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS, MARK
AND ELIZABETH HEIL:**

YOU WILL PLEASE TAKE NOTICE that as soon hereafter as counsel may be heard, the above named Defendants, Stewart and Christina Hines, by and through their undersigned attorney, will move the Court at Chambers at the Beaufort County Courthouse, Beaufort, South Carolina, for an Order, pursuant to the South Carolina Rules of Civil Procedure, granting the Defendants, Stewart Hines and Christina Hines summary judgment as to all claims and issues asserted in the Plaintiffs' Amended Complaint.

The Defendants, Stewart Hines and Christina Hines, are entitled to summary judgment for the reasons set for in the Memorandum in Support of Motion for Summary Judgment filed herewith.

2015 DEC 5 AM 9:51
CLERK OF COURT
BEAUFORT COUNTY
SOUTH CAROLINA

LAW OFFICE OF BRIAN McDANIEL, LLC

BY:



BRIAN D. MCDANIEL

Post Office Box 2085

2015 Boundary Street, Suite 216

Beaufort, South Carolina 29901

PHONE: (843) 379-5117

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**ATTORNEY FOR THE DEFENDANTS
STEWART AND CHRISTINA HINES.**

Beaufort, South Carolina
December 4, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2013-CP-27-1231

MARK AND ELIZABETH HEIL,)
Plaintiffs,)

DEFENDANTS, STEWART AND CHRISTINA
HINES, MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

STEWART AND CHRISTINA)
HINES and SAM IMLER d/b/a)
SAM'S TREE SERVICE)
Defendants)

Stewart and Christina Hines, Defendants, by and through their undersigned counsel,
submit the following Memorandum in Support of their Motion for Summary Judgment.

RELEVANT FACTUAL BACKGROUND

Plaintiffs, Mark and Elizabeth Heil ("Heils"), own a secondary residence located at 7 Bellhaven Way on Hilton Head Island ("property") which is the subject matter of this litigation. The Defendants, Stewart and Christina Hines ("Hines"), own an adjacent rental property. In late November of 2011 the Heils inspected their property upon a routine visit and discovered encroaching tree limbs from a healthy oak tree ("tree") on the Hines property, but did not observe any damage to their roof or property at that time. (Elizabeth Heil Deposition p.19-20). The Heils requested the Hines pay for removing the encroaching growth from their tree and the Hines paid Sam's Tree Service to perform tree trimming on December 7, 2011. (Imler deposition page 19-20& Hines Prod 1 & 2), Hines Sam's Tree Service ("Sam's") is a sole proprietorship created in 2003 and owned by Sam Imler ("Imler"). (Imler Deposition p. 5). 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. (Imler Deposition pp. 6 and 11). 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. (Imler Deposition p. 12, 22, 25). 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. (Imler Deposition p. 24, 25, 29-30 and 41). Imler did not make the Hines aware of the dent in the shingle as it posed no risk to the integrity of the home. (Imler Deposition p. 29, 30, 32). More than five months after Sam's Tree Service performed tree trimming services the Heils claimed to have discovered water damage to their home, in late May of 2012.

ISSUE

Whether the Defendants are entitled to summary judgment as to the negligence issue raised in the Plaintiff's Complaint because Defendants had no duty to inspect and report damage upon the roof of the Defendants' home from a healthy tree, and/or they exercised a reasonable duty of care to prevent foreseeable tree damage to the Plaintiff's home, or if it is determined that a duty is owed, that the Plaintiff's contributory negligence was so substantial as to negate any negligent liability of the Defendant's. In addition whether the Defendants are entitled to summary judgments as to fiduciary duty as there was never a fiduciary relationship created

among the parties and if there is determined to be a fiduciary relationship, the Defendants never breached their fiduciary duties.

LEGAL ANALYSIS

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).

- I. **The Plaintiffs fail to submit admissible evidence to support their allegations that the Defendants' failed "to inspect the trees on their property to ensure they are safe and not unsound or defective and to remove/repair the tree limbs and damaged property". (Amended Complaint Para 12)**

That not only did the Plaintiffs fail to provide evidence of the breach of any duty owed by the Hines to the Heils but that they in fact do not owe the legal duties claimed by the Plaintiffs, specifically, that there exists no duty, in this case, for the Hines to "report tree limb damage caused" if such occurs through no fault of the Defendants. (Amended Complaint Para 13)

The Heils' contributory negligence and failure to mitigate is so conclusively established that judgment should be granted in favor of the Hines.

In order to establish negligence a plaintiff must establish the breach of a duty of care owed to the plaintiff by the defendant. Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct.App. 1989). A plaintiff should not be called to suffer harm to his person or property which is foreseeable and which can be avoided by defendant's exercise of reasonable care. Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797, 803 (Ct.App. 1991).

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)). In this case, there simply is no relationship and no circumstances evidencing any recognized legal duty.

In fact, the Hines at all times diligently exercised reasonable care to prevent foreseeable damage to the Heil's home. In late November of 2011 the Heils inspected their property upon a routine visit and discovered encroaching tree limbs from a **healthy** oak tree ("tree") on the Hines property, but did not observe any damage to their roof or property at that time. (Elizabeth Heil Deposition p.19-20). Upon being notified in November 2011 that their tree was encroaching on the Heil's 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 Heil's home. The tree service company (Imler) then promptly performed the requested maintenance so that the tree trimming was scheduled and completed within an approximately 10 day period from the time it was requested. The tree trimming services provided were paid for by the defendants, though the law plainly allows the Heils to conduct such trimmings themselves.

The Defendants 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. Imler Deposition p.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. Imler Deposition pp.6 and 11. If Sam's is found to have been negligent in this case, (which is denied) that is through no fault of the Hines, as they had no evidence that would alert a

reasonable person to such likelihood of negligent performance or poor workmanship, and the Plaintiffs have put forth no evidence of that in this case.

While performing the tree trimming the tree climber noticed 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 water leakage into the home. (Imler Deposition p. 24, 25, 29-30 and 41). Imler did not make the Hines aware of the dent in the shingle as it posed no risk to the integrity of the home. (Imler Deposition p. 32 and Hines depositions). As the Hines could not observe the area of the roof that is in question at ground level, and as they were given no indication from Sam's that there was damage to the property, the Hines acted reasonably in assuming the roof was in sound condition at this time (see Heil deposition. In fact, there is no testimony in the case that the tree trimming service in fact caused any damage to the home of the Heils. At best, the Heils are claiming that a healthy tree caused damage to their home, and that Mr. Imler, had a duty to inform them of this damage even though he did not cause it. This is quite a burden to place upon a tree-trimmer, and is beyond any recognized legal duty owed in these situations, but regardless, it is undisputed that Mr. Imler did not inform the Hines of any damage to the Heils roof and they certainly have no duty in that regard.

In May of 2012, four months after tree the trimming took place, the Heils discovered internal water damage at their home. The Heils do *not* allege that new tree growth or tree decay after the tree trimming in December 2011 caused such damage. Rather, they allege that the damage had already occurred at the time or prior to the time that the tree trimming company performed their services at the property. If this is assumed to be true (which the defendant is not asserting this is true), then even under that scenario the Hines acted reasonably as they did not observe damage to

the property at any time, the tree company did not advise the Hines of damage to the property at any time, and the Heils did not advise the Hines of any damage to the property until May 2012 which was four months after the tree service work was performed. Based on the Hines knowledge of the property and their tree, the only foreseeable damage to the Heil's property was from the limbs that the Hines had trimmed and removed in December 2011. Neither the Heils who observed the limbs in November 2011, nor the tree service company that trimmed the limbs in December 2011, reported to the Hines that there was any damage to the roof caused by their oak tree. (E. Heil depo p 15-16, M. Heil depo p. 8-9) (Coincidentally, Mark Heil is a contractor specializing in cleaning property, repairing roofs and maintaining property -M Heil depo p 5-6, E Heil depo p 8) As such, the Hines reasonably performed their duty of care to the plaintiffs (if such exists at all, which is denied) by paying for a professional tree company to perform tree trimming that to their knowledge would preventatively protect the Heils from any foreseeable tree damage to their roof and home. The Hines acted under a duty of reasonable care and have already incurred the expense of the tree trimming. If there are any additional damages the Hines have no responsibility for those damages because they had no legal duty to protect an adjacent property from a healthy tree and because the no evidence exists which could establish any wrongdoing by any of the Defendants. Furthermore, the extensive internal damages to the home could only result from either the plaintiff's own contributory negligence in failing to inspect their own property, which they testified they had monitored monthly and sometimes weekly by property manager Connie Schwartz (E Heil depo p 6 & 22-24, 27). Inexplicably, despite this supposed weekly monitoring, the Heils are claiming that the tree damage from late November 2011 was responsible for extensive damages they only found in late April 2012 approximately 6 months later that was so bad that they knew "as soon as we walked into the house" that

something was wrong because of the “horrible smell” and there was mold and water in numerous locations which they projected was growing for months. Connie Schwartz has not been named as a Defendant in the case and when asked, Mrs. Heil in fact said that she can not remember even speaking to Connie about the problems found (E. Heil depo p 29-32).

II. If it found that the defendants did breach a duty of care (which they specifically deny), then the Plaintiff's contributory negligence was so substantial as to negate any negligent liability of the Defendant's.

The Heils visited their property in November 2011 and this is when they first noticed and advised the Hines that while the Hines oak tree had not caused any noticeable damage to the home it was encroaching on the Heil's roof. (Elizabeth Heil Deposition p. 19-20) The Heils 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 was determined to be the result of water damage. The Heils 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 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.” Elizabeth Heil Deposition p. 8. 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, . . .” (Mark Heil Deposition p. 5).

With the Heil's knowledge of foreseeable property issues that arise in a vacant property, it would be reasonable to expect that the Heils 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 Heils 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. (Elizabeth Heil Deposition p.29) 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 plaintiffs 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." (Elizabeth Heil Deposition. 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 plaintiff 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." (Elizabeth Heil Deposition p. 31-32). Ms. Heil's 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 Heil's lack of reasonable care in maintaining their secondary property while it was vacant for a period of six months.

In addition, 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. (Elizabeth Heil Deposition p. 24-25). 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." Mark Heil Deposition p. 7. When asked if he could hear them scratching he said, "[h]ear them scurrying around, yeah." (Mark Heil Deposition p. 7). 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 Heils 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 Heils 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 Heils were not vigilant in protecting their home from termites. When the plaintiff 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. Elizabeth Heil Deposition p.

36. The Heils did not exercise reasonable care in having their property inspected on a regular basis while it was unoccupied. The Heils also did not exercise reasonable care in having their home treated for pests. As a result of their own negligence the Heils have suffered significant damage to their home. Had the Plaintiffs 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

III. There was not a fiduciary relationship established between the Heils and the Hines and as such there cannot be a breach of fiduciary duty. If the court were to establish there was a fiduciary duty established there have been no specific allegations as to how this duty was breached and as such recovery should be denied under this claim.

A fiduciary duty exists when "... one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789, 794 (1990). A fiduciary relationship is not casual and as a general rule cannot be created unilaterally, but requires that the fiduciary must have actually accepted or induced the confidence placed in him or her. *Steele v. Victory Savings Bank*, 295 S.C. 290, 368 S.E.2d 91, 93 (Ct.App. 1988). In the facts at hand there is no allegation that the parties attempted to create a fiduciary relationship. When speaking about Mr. Hines in her deposition, Ms. Heil said, "He's never lived in the house. I've never met the man. That's just how we process, by before/during/after pictures." (Elizabeth Heil Deposition p. 12) When Mr. Heil was asked if he ever had a conversation with the Hines he said, "No. Q: So your wife handled pretty much all of the correspondence and communications regarding the damage to the roof? A: Correct." (Mark Heil Deposition p. 15) The relationship between the Heils and the Hines appears distant and very casual as they had never met in person, their only dealings were with regard to trimming a

tree, and neither plaintiffs nor defendants have shared any special conversations that would indicate a special bond or trust was created between the parties. Neither party has shared a communication in which the Hines agreed to take on the responsibility of *overseeing* the tree trimming. In addition, case law has found that the imposition of fiduciary duties is a question of law for the court and fiduciary relationships have traditionally been reserved for legal or business settings—often where one person entrusts money to another such as with lawyers, brokers, corporate directors and corporate promoters. Hendricks v. Clemson University, 353 S.C. 449, 578 S.E.2d 711, 715-716 (S.C. 2003). In the case at hand, the parties were neither in a legal setting or a business setting; rather they were neighbors working together in an attempt to prevent property damage. Additionally, there were not any items of confidence, money, or legal documents that were entrusted into the defendant's care. The relationship between the parties does not fit any definition of "fiduciary relationship" created under the law.

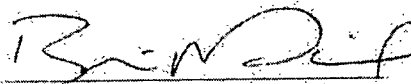
Even if the court were to find a fiduciary relationship between the parties there are no specific allegations as to what would constitute the breach of fiduciary duty under the facts of this case. As the Hines have no special knowledge or industry experience in the tree service business it would have been of little benefit to retain the Hines as supervisors over the tree trimming experience. Rather, as documented in this motion, the Hines used reasonable care in promptly employing a reputable tree trimming service to prevent their tree from causing damage to the Heils' home. It is important to note that the tort of negligent supervision is an action in which an employer may be held liable for the conduct of an employee outside the scope of employment. Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992). There is clearly not an employer/employee relationship between the Defendants and Sam's, and as such the tort of negligent supervision is inapplicable to the facts of this case.

Finally, the imposition of a fiduciary duty in this circumstance would present far too severe a penalty upon a friendly neighbor and send the signal to neighbors that they should not agree to assist in the quick and friendly resolution of bordering property issues but instead that they should refuse all accommodations for which they are not legally obligated.

CONCLUSION

For the reasons contained in the filed Motion for Summary Judgment, this Memorandum and Exhibits, as may be raised in any supplemental Memoranda, and as may be raised at oral arguments, the Motion for Summary Judgment must be granted since Defendants exercised a reasonable duty of care to prevent foreseeable tree damage to the Plaintiff's home, or if it is determined they did not exercise a reasonable duty of care the Plaintiff's contributory negligence was so substantial as to negate any negligent liability of the Defendant's. The Defendants are entitled to summary judgments as to the allegation of breach of fiduciary duty as there was never a fiduciary relationship created among the parties and if there is determined to be a fiduciary relationship, the Defendants did not breach their fiduciary duties.

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Page 1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS COUNTY OF BEAUFORT MARK and ELIZABETH HEIL, Plaintiffs, vs. CASE NO. 2013-CP-27-1231 STEWART and CHRISTINA HINES and SAM IMLER, d/b/a SAM'S TREE SERVICE, Defendants. DEPOSITION OF: ELIZABETH HEIL DATE: June 27, 2014 TIME: 10:14 AM LOCATION: 1901 Boundary Street Beaufort, SC TAKEN BY: Counsel for the Defendants REPORTED BY: MARIE H. BRUEGGER, Registered Professional Reporter, CRR A. WILLIAM ROBERTS, JR., & ASSOCIATES Fast, Accurate & Friendly Charleston, SC Hilton Head, SC Myrtle Beach, SC (843)722-8414 (843)785-3263 (843)839-3376 Columbia, SC Greenville, SC Charlotte, NC (803)731-5224 (864)234-7030 (704)573-3919	Page 3 1. STIPULATION 2. It is stipulated by and among Counsel 3. that this deposition is being taken in accordance 4. with the South Carolina Rules of Civil Procedure, 5. Rule 30; that all objections as to Notice of this 6. deposition are hereby waived; that all objections 7. except as to form are reserved until the time of 8. trial; and that the deponent waives reading and 9. signing of this deposition. 10. * * * * * 11. ELIZABETH HEIL 12. being first duly sworn, testified as follows: 13. EXAMINATION 14. BY MR. MCDANIEL: 15. Q. My name is Brian McDaniel. I'm 16. representing the defendants, the Hineses, Stewart 17. and Christina Hines, in the case that I believe 18. you and your husband have filed. 19. Could you please give us your name for 20. the record? 21. A. My full name's Elizabeth Heil. 22. Q. And have you ever had your deposition 23. taken before? 24. A. I have. 25. Q. In South Carolina?
Page 2 1. APPEARANCES OF COUNSEL: 2. ATTORNEYS FOR THE PLAINTIFFS 3. MARK and ELIZABETH HEIL: 4. THE CAPELL LAW FIRM, LLC 5. BY: GLYNN L. CAPELL 6. 17 Executive Park Road, Suite 5B 7. Hilton Head Island, SC 29928 8. (843)689-4280 9. gcapell@capelllaw.com 10. ATTORNEYS FOR THE DEFENDANTS 11. STEWART and CHRISTINA HINES and SAM 12. IMLER, d/b/a SAM'S TREE SERVICE: 13. LAW OFFICE OF BRIAN MCDANIEL, L.L.C. 14. BY: BRIAN D. MCDANIEL 15. 2015 Boundary Street 16. Beaufort, SC 29902 17. (843)379-5117 18. bmcDaniel@attorneymcdaniel.com 19. ALSO PRESENT: 20. Mark Heil 21. 22. (INDEX AT REAR OF TRANSCRIPT) 23. 24. 25.	Page 4 1. A. Yes. 2. Q. You're probably familiar with kind of 3. how it goes, but I will -- just so we have it 4. stated, once the deposition starts, you're to 5. answer the questions as best you're able to answer 6. them, without consulting with your attorney. Your 7. attorney can object from time to time, but unless 8. he's directing you not to answer, even if he 9. objects, you would still answer the question. 10. If there's anything confusing about 11. the question or you don't understand it, then 12. please ask me to clarify it, because if you answer 13. it, I will assume that you understood the 14. question. Is that fair enough? 15. A. That's fair. 16. Q. The other aspect of this, which you've 17. done great in just initial things, is giving a 18. verbal answer. The court reporter is obviously 19. writing it down, so even though we often nod our 20. head or say uh-huh or huh-uh, if you can say yes 21. or no, so it's more clear as to what answer you're 22. giving, for everybody's benefit, so the record's 23. clear, I'd just ask for you to do that as well. 24. A. I understand. 25. Q. Let me get just a little bit of

Page 5 1 background about you. 2 A. Sure. 3 Q. What is your current address? 4 A. 245 Wilkerson Drive, Mount Washington, 5 Kentucky, 40047. 6 Q. And how long have you lived there? 7 A. 2007 we purchased, and we moved there 8 July 2007. 9 Q. And prior to that, where did you live? 10 A. Seven Belhaven Way. 11 Q. And is that the property that the 12 litigation is involving? 13 A. It is. 14 Q. And that is on Hilton Head? 15 A. It is. 16 Q. And how long had you lived there 17 before July of 2007? 18 A. We had the house built in 1998, and we 19 made the full in 2000. 20 Q. It was completed in 2000? 21 A. Yes. 22 Q. And who built the house for you? 23 A. It was Bay Homes, Buddy Check, same 24 builder that our neighbors' home was built by. 25 Q. So after 2007, what was the status of	Page 7 1 and at that time, we decided we would just start 2 using it primarily, not rent it out anymore, and 3 just go down every once in a while when we wanted 4 to get away. 5 Q. So when you say you went and did the 6 once-over/look-over, was that in August, or was 7 that later? 8 A. It was at the end of August when she 9 moved out, just to verify the condition and shape 10 of the property. 11 Q. I'll come back to that in a second, 12 but let me ask you, so tell me your employment. 13 A. Well, I owned Preferred Realty Company 14 of Hilton Head Island when we were here from 2000. 15 I still have that license and company open here. 16 And since we moved back to Kentucky, I own 17 Preferred Realty Company of Metro Louisville. 18 While I was here, I worked with Bruce Belhrens, the 19 mayor of Bluffton, and I actually brought in 20 affordable housing, and I also worked with Billy 21 Keyserling here, to bring affordable housing here. 22 Q. Do you have any other occupations that 23 you -- 24 A. Well, I not only own/broker in charge 25 of these companies, but I also do new home
Page 6 1 the Seven Belhaven Way house? 2 A. It was our secondary home. 3 Q. Did you rent it out after that period? 4 A. Not during 2007 and 2008, but as of 5 2009, yes. 6 Q. And what kind of rental situation did 7 you have? Was this vacation rentals, or was it 8 more long term? 9 A. No. It was a long term. It was 10 actually a friend of Mark's and mine, Connie 11 Schwartz. Her husband had died unexpectedly and 12 kind of left them homeless. She's a property 13 manager for Diamond Realty Company, and part of 14 the agreement was that she was to maintain the 15 home. Any repairs and that that needed to be done 16 on it was performed by her. 17 Q. And how long was she in the home? 18 A. Connie moved in probably May of 2009, 19 and then she moved out August of 2011. 20 Q. After August of 2011, was there 21 anybody -- was it put back up for rental at that 22 point? 23 A. No, it wasn't. We actually went down 24 in 2011, after she moved out, just to do a 25 once-over/look-over, check on everything and that,	Page 8 1 construction, and I work a lot for Safeguard 2 Management -- it's an asset company -- along with 3 my husband. They are the property preservation 4 and maintenance companies for all the foreclosure 5 properties around the United States. 6 Q. And what is your position with 7 Safeguard? 8 A. Safeguard, my husband is the 9 contractor for them. He goes in, and he does the 10 property preservation and maintenance from the 11 time that the company first gets it that the 12 property's going into foreclosure. He goes in and 13 does a thorough investigation and inspection of 14 the property, notes any deficiencies or repairs. 15 He does the lock-outs. He does the trash-outs. 16 He'll do roof. He'll do whatever needs to be done 17 to this property to keep it in good physical 18 running shape. 19 Q. What's your part of that? 20 A. Part on that? I do the clerical for 21 him, so I'm having to input all of this into the 22 actual banks and to Safeguard. We deal with FHA, 23 VA, conventional, any type of loan product there 24 is. Each one of them has specific codes and 25 regulations that they have to abide by, so we have

2 (Pages 5 to 8)

Page 9 1 to do that. So I keep up the clerical work and 2 any new rulings and procedures that has to be 3 followed for that, where Mark does all of the 4 actual work on the properties. 5 Q. Do one or both of you have a 6 contractor's license? 7 A. In the state of Kentucky, there's not 8 a contractor's license, but we are licensed for 9 contractors, yes. So he actually has an EIN 10 number, he also has errors and omissions 11 insurance, and he also has general liability 12 insurance, and he was actually doing it here on 13 the island prior to moving back to Kentucky. 14 Q. So when doing it here in South 15 Carolina, was there a South Carolina licensing of 16 any kind? 17 A. For him, no, not to do that. 18 Q. What about for you? 19 A. For me? No. Well, for my real 20 estate, yes, of course. 21 Q. You're talking about the real estate 22 broker's license? 23 A. Yes. 24 Q. I mean, I'm talking about 25 construction, any sort of certifications or	Page 11 1 were doing her move-out inspection. 2 Q. After that, I think you said -- well, 3 let me ask you again, just to make sure I'm clear. 4 After Connie moved out in August of 5 2011 and you did the inspection at the end of that 6 month, what was the next thing that happened with 7 the property, if anything? 8 A. We went back down again in November of 9 2011 for Thanksgiving with the family, and at that 10 time, Mark had gotten up on the roof, you know, to 11 clean off the leaves, the pine needles, the oak 12 leaves, whatever that were up there, and the tree 13 limbs were laying on and over our roof at that 14 time, so we had taken pictures and that. 15 After he had come down and was talking 16 about those limbs being on the house, and it's 17 something that he could not physically do, because 18 of the size, I went next door to Jim's house, Jim 19 Fritz, who is Mr. Hines's tenant. I had asked Jim 20 for Mr. Hines's telephone number, because I wanted 21 him to address the tree situation for us. Jim 22 would not give us the telephone number. He said 23 he will call them himself. 24 So later that day, Jim came back over 25 to the house, said he had spoke with Mr. Hines,
Page 10 1 licensing for construction work. 2 A. Not for myself, no, because I didn't 3 actually physically do the construction part. 4 Q. And in South Carolina, not to your 5 knowledge for your husband either, right? 6 A. No, not for the type of work he was 7 doing. 8 Q. Well, for any type of work. Was he 9 doing any type of -- even if he wasn't doing the 10 work, let me just ask you, did he have any 11 licensing or certifications for construction work 12 in South Carolina? 13 A. No. 14 Q. Do you have any family that lives in 15 Beaufort County? 16 A. No. 17 Q. So tell me, you mentioned that at the 18 end of August that you came down and did a, you 19 said, look-over of the property at Belhaven. What 20 were your findings at that point about the 21 condition of the property? 22 A. Condition of the property was in good 23 shape, besides the trees were overhanging the 24 house, but at that point, we weren't looking for 25 anything. We didn't go down for that. We just	Page 12 1 and Mr. Hines said to -- for me to go and get 2 estimates from different tree companies and then 3 fax him the estimates and that, and he'd decide 4 which one he would go with. 5 So Jim gave me the telephone number. 6 I took the pictures, so I'd have copies of it for 7 Mr. Hines, in case he needed verification, since 8 he does not live here. He's never lived in the 9 house. I've never met the man. That's just how 10 we process, by before/during/after pictures. 11 And that was all of that. We did our 12 basic routine. We winterized the house and that 13 before we left, because we didn't know if we would 14 be back in January or February, and we went home. 15 Q. You say you took the phone number 16 from -- 17 A. The fax number was all I was given for 18 Mr. Hines, to contact him, and that was to send 19 any quotes that I got off the trees. 20 Q. And did you get quotes for the trees? 21 A. I called probably about four to five 22 contractors. I got two estimates that I did send 23 him. One was from Bob's Tree Service and one was 24 from Southeastern, and I don't remember which one 25 was which, but one was \$2,800 and the other one

1 was \$4,000 to do it.

2 Q. And then when did you get that faxed
3 to him?

4 A. I would say probably somewhere in
5 December to January, first part of January of
6 2012.

7 Q. And what happened then? What response
8 did you get on that?

9 A. I never got a response from Mr. Hines.
10 I never heard from him. I called him roughly
11 somewhere around April of that month to find out
12 where we were with the tree services and that,
13 because we were getting ready to go back down to
14 the house, and he said: We have had -- he says:
15 I had those trees done long ago. And I said: Oh,
16 well, I never heard from you. He said: Well,
17 they've been done long ago. You shouldn't have a
18 problem. So I was ecstatic, thinking, hey, the
19 trees are done. I don't have to go down and worry
20 about this.

21 Q. Let me back up to November, I guess
22 the end of November and Thanksgiving, when y'all
23 had come down there. Was there other family that
24 met you at the house?

25 A. Our daughter, our son-in-law, my

1 grandchildren. They came down with us.

2 Q. They came down -- they traveled down
3 with you?

4 A. Yes. They live in Covington,
5 Kentucky.

6 Q. Did anybody other than Mark go on the
7 roof?

8 A. I don't think -- I won't get up -- I
9 didn't get up all the way, but I got up on the
10 ladder. I did get up on it this week, though.

11 Q. At that time in November -- first let
12 me ask you, what did you observe as far as what
13 was the concern with the roof?

14 A. My main concern was how the tree had
15 engulfed my fireplace. We have a wood-burning
16 fireplace, and Connie had complained to us a year
17 prior that she could not use the fireplace because
18 of the trees. She was afraid if an ember went up,
19 that it could possibly catch the tree or something
20 on fire.

21 Q. So what did you see that -- when you
22 say it's engulfed, you mean the branches were
23 coming around the top of the tree?

24 A. Exactly, yes. The tree, it just
25 engulfed the whole top of our house there and the

1 fireplace right by the flue that comes out, around
2 it, and to the back of it.

3 Q. And that's something that Connie had
4 said to you prior to that?

5 A. That probably about a year prior, when
6 she could do the fireplace, that she wasn't going
7 to use it because of the tree limbs being so close
8 to it.

9 Q. Did you observe anything else that you
10 observed? And I know you said you didn't go --
11 well, tell me about how far. Did you just go up
12 to the edge of the roof, the bottom of the
13 roofline or --

14 A. Well, of course, the first floor of
15 our house is, what, 12 feet up for the garages,
16 and then Mark had -- we had built an addition onto
17 the back of the house, and on that third floor,
18 there's another deck that I could get up on that
19 way and just see so much of it. And you could
20 see, what I could see from where I was, that the
21 one branch was laying on top of the house. I how
22 far down, I could not tell, because I was not all
23 the way up there, but it was over the roof of the
24 house.

25 Q. Could you see it was touching the

1 roof?

2 A. I can't say, from where I was at,
3 definitely yes or no. That would be something to
4 address to Mark. It was a large -- it's a large
5 branch, so it would not be something we could
6 easily or readily pick up to examine. I just
7 noticed all the oak leaves, and I don't know what
8 this other stuff is that's little brown grainy
9 stuff from the trees that was just in the ridges
10 and that that he had to go out there and clean
11 out.

12 Q. You say you guys completed this house
13 in 2000. Is that right?

14 A. Well, we moved in in 2000. We had it
15 built in 1998.

16 Q. At that time, were there any trees
17 around the house?

18 A. Gosh, whatever trees that were
19 there -- the only trees were from Mr. Hines's
20 house, because I know they even cut out around his
21 house and built around those oak trees, because
22 here in South Carolina, you can't cut the oak
23 trees and that.

24 Q. So I guess what I'm asking is the
25 trees that you're talking about, these are

Page 17 1 full-grown, mature oak trees, the ones that you're 2 talking about the branches? 3 A. Uh-huh. 4 Q. That's a yes? 5 A. Yes. I'm sorry. 6 Q. That's all right. I'm not trying to 7 be rude; I'm just trying to clarify. 8 A. I know. I understand. I forgot. 9 We had an actual large -- very large 10 one in our backyard that died that we had to have 11 removed, so that was the only really tree we ever 12 had in our yard. The other ones are to the right 13 of our house, if you're looking at it, and 14 Mr. Hines's one, and there was one right by our 15 fence, and those limbs, just eventually over 14, 16 15 years, have grown over. 17 Q. But the limbs that have been of 18 concern or that are the subject of this case are 19 from the oak tree, you believe? 20 A. Yes, both of the oak trees that are 21 there. 22 Q. Two oak trees? 23 A. Yes, sir. 24 Q. And they're not from any other types 25 of trees that you're aware of?	Page 19 1 yesterday, I actually got up on there. 2 Q. Back in November of 2011, were you 3 able to see any damage to the roof from where you 4 were at that time? 5 A. No, sir. 6 Q. Did your husband report to you any 7 damage of the roof at that time? 8 A. He didn't report any damage that he 9 could see. I had a concern because of how the 10 tree limbs were, and he did not -- I don't 11 remember if he told me he felt that it was laying 12 on the roof. I don't remember. It's been almost 13 three years. 14 Q. But he got up there and looked at it? 15 A. Yes, and it was a concern to him. 16 Q. Did you make any observations about 17 the tree itself, other than it was over your 18 property? Did you notice anything of concern 19 about the tree? 20 A. Well, I had noticed that, apparently, 21 he had had other branches or trunk parts cut off 22 of it in the past. 23 Q. And were those parts that went towards 24 his property or towards your property? Do you 25 know?
Page 18 1 A. No, sir. 2 Q. You were telling me, and I don't know 3 if you got finished or if I didn't quite 4 understand, how far up the ladder you were, where 5 you think you were, and was your head at the 6 bottom of the roofline, or were you -- if you 7 could tell me more, if you can remember. 8 A. He had placed a ladder for me on the 9 new addition's deck, and it's actually -- here's 10 the back of our house originally. The new deck 11 was built, and it's like an L-shape. Let's put it 12 that way. And on that second floor, there is a 13 deck. Right above it is that roofline. He put 14 his five- or ten-foot ladder right there, and I 15 got up as high as I could tolerate to look up 16 there. So I was about -- here's the roofline, 17 here I am, so it was like this. All the way to 18 the pitch, I really couldn't tell you. 19 Q. And is it fair to say it's a steep 20 roof, or how would you characterize the roof? 21 A. After being on it yesterday, no. It's 22 a typical roof. You're up high in the air, 23 probably maybe 40 feet, because the house itself 24 is probably only about 30, 32 feet, and then with 25 the pitch of the roof, so about 40, 45, max. So	Page 20 1 A. There's one that was towards our 2 property. I couldn't tell you when it was done or 3 by whom. 4 Q. Did you see anything that indicated to 5 you that the tree was rotten? 6 A. That the tree was rotten, no. It's 7 alive. 8 Q. So do you have any independent 9 knowledge about when the limb work was actually 10 done? 11 A. I have no idea when Mr. Hines did it. 12 I was never told. I was never told he went with 13 somebody, and as to who he went with, I never 14 provided any estimate. I never even called a 15 Sam's. I went through the phone book, and I 16 looked for anybody that said licensed and insured, 17 and that's who I went with. 18 Q. And you sent him, you believe, two 19 estimates? 20 A. Yes. 21 Q. Do you know if you sent him just two? 22 Could you have sent him three or more? 23 A. No. I sent him only two; because I 24 know for a fact I had called four contractors, and 25 only two actually got back with me and went out to

Page 21 1 the property. 2 Q. Did anybody go out there -- did you 3 have anyone go out and meet the contractors out at 4 the property on your behalf? 5 A. No, because we were never told they 6 were going out. 7 Q. And I mean the ones that you 8 called, the estimates that you called. You said 9 they -- 10 A. Oh, no, no. 11 Q. And you were just saying this, but I 12 just want to be clear. So you don't believe 13 that -- you didn't contact Imler's Tree Service? 14 A. No. 15 Q. Had you ever done any work with Sam 16 Imler or Imler's Tree Service prior to December of 17 2011? 18 A. No, sir. 19 Q. Did you know who that is before this 20 case? 21 A. I have no idea. I was told by 22 Mr. Hines that supposedly I was at the property 23 when all this work was being done and that Mr. -- 24 the gentleman talked to me and described me and 25 that from a phone message that Mr. Hines left me	Page 23 1 of December 'til end of April of 2012? 2 A. No, but I had someone going by the 3 house once a month. 4 Q. Who was that? 5 A. Connie, Connie Schwartz. 6 Q. And what was she doing going by the 7 house once a month? 8 A. She'd go inside, check. She'd look on 9 the outside, see if there was any issues or 10 problems with the house. She was our previous 11 tenant, and since she's a property manager and one 12 of our best friends, I thought she was the best 13 one. 14 Q. And did you work that arrangement out 15 with her to do that for you? 16 A. Yes. And besides her, actually, 17 Mr. Hines' tenants, Jim and Jeff, also would look 18 over the property, call us if there's anything 19 wrong, also Mark and Toby across the street and 20 Raul. 21 Q. These are neighbors? 22 A. Yes, sir. 23 Q. Did you have a particular arrangement 24 with any of these -- other than Connie, the 25 Hineses, did you have an agreement or an
Page 22 1 when I contacted him. 2 Q. Did you have any renters in the home 3 after December of 2011? 4 A. No, sir, no, sir. 5 Q. So from December 2011 until what 6 period was the home vacant? 7 A. It was from December through probably 8 the end of April. 9 Q. And then at the end of April, who came 10 to the property? 11 A. Mark and myself, to vacation and to 12 do -- get the house ready and that for summer 13 vacation for the family. 14 Q. When was the last time that you 15 observed the property before April 2012? 16 A. It was after Thanksgiving that we 17 left, so probably I'd say December 1st, 2012. 18 Q. It was that same visit at the end of 19 November? 20 A. Correct. 21 Q. You didn't come back after that? 22 A. No, sir. 23 Q. And you didn't have anybody on your 24 behalf, a family member or anybody, a renter or 25 anybody like that, in the property from beginning	Page 24 1 arrangement with them to check on it at any given 2 intervals, or was just this kind of kindly 3 neighbors saying -- 4 A. It's a given as to they are very 5 protective of us, because we were all very close 6 there, and they know how we take care of our 7 property and how much the property means to us, 8 and even if people were to pull up in our 9 driveway, they would go over there and ask who 10 they are, what they're doing, and they would 11 contact us for verification. 12 Q. But again, this was done -- 13 A. It's continuously. 14 Q. -- at their discretion? 15 A. Correct. And I could tell you even if 16 Connie and them had a dog that was barking more 17 than they like, they would even call and contact 18 me, so -- 19 Q. So if they saw any kind of problems, 20 your belief is they would call you right away and 21 let you know? 22 A. Oh, most definitely. 23 We were out of town one year, and our 24 neighbor next door actually saw water coming out 25 of our top of our house, and then the neighbor

1 across the street, they both all got together.
 2 They actually broke into our house to find out
 3 that the hot water heater had -- I forget.
 4 Something had burst or whatever, and the water was
 5 coming through the pan that holds the water, and
 6 it was shooting out the house. So our hot water
 7 heater actually blew while we were away, and
 8 that's how perceptive that they are and attentive
 9 to anything of our house and --

10 Q. Who reported that to you?

11 A. That was our next-door neighbor at the
 12 time, that was Susan's son, Eric, and then Mark
 13 and Toby, who are across the street.

14 Q. And when did that happen, the hot
 15 water heater?

16 A. It was when we went back to Kentucky.
 17 It had to be probably like around 2002, 2004,
 18 somewhere around that time.

19 Q. So it's kind of early, not too long
 20 after you moved into the house?

21 A. Probably about four to five years
 22 after, yes.

23 Q. And you were on vacation?

24 A. We were back in Kentucky, yes.

25 Q. So you had moved out at that point,

1 Q. Was that part of the agreement to
 2 letting her stay there before was that she would
 3 help you out with the property as a property
 4 manager?

5 A. No. She and I are very close best
 6 friends, and I guess for all the things that we
 7 helped her at that time, she just -- she never
 8 questioned it. She knew where we were, and she
 9 wanted to make sure nothing happened.

10 Q. And did she talk to you every month at
 11 a particular interval, or was it just sometime
 12 during the month she would call you to update on
 13 the --

14 A. Typically, what she'd do, because she
 15 would be on the island and Bluffton and that,
 16 typically, she would go by the house at least once
 17 a week to check on it. She had a key, she knew
 18 how to get in, so --

19 Q. Did she report to you when the trees
 20 got trimmed?

21 A. No.

22 Q. Wouldn't that be something you would
 23 expect her to report on with that kind of checking
 24 on the property?

25 A. I have no idea. Like I said, I don't

1 all right.

2 A. No, we hadn't moved back. No, we
 3 hadn't moved out of this home. We were back there
 4 visiting our family and that. We were permanent
 5 residents still here in South Carolina.

6 Q. I guess I'm a little confused. So you
 7 moved out in 2007?

8 A. Correct.

9 Q. But you're saying this was 2004 or
 10 2005?

11 A. That this happened, yes. I'm just
 12 showing how attentive our neighbors are on paying
 13 attention to what goes on at our house.

14 Q. I understand. I'm just wondering --
 15 so were you living in the house in 2004, 2005?

16 A. Yes.

17 Q. So what were you doing at that time in
 18 Kentucky?

19 A. Our family is still there, our
 20 children and our grandchildren, and we went there
 21 either for a two-week visit or just for a holiday.

22 Q. I got you, okay. So Connie, was she
 23 being paid to check on the property once a month
 24 at that time?

25 A. No, no, she was not.

1 even know when he had it done.

2 Q. But couldn't she have told you when
 3 she had it done? I mean, isn't that -- that's
 4 kind of the --

5 A. Well, I think there wasn't that much
 6 of a noticeable change. That's the problem. And
 7 where these limbs were were further toward the
 8 back, because things that he should have had cut
 9 was not cut. They're still there. So I couldn't
 10 tell you -- I couldn't tell you, by standing
 11 outside on level ground, what was cut and what
 12 wasn't cut. She would have to -- actually have to
 13 get up on the roof to see this.

14 Q. Because you couldn't see the
 15 encroaching limbs from the ground?

16 A. You could see so many, but as to the
 17 roof, where it was on the roof pitch and all that,
 18 you can't see that. You can only see so much
 19 back.

20 Q. And you didn't see the tree limbs
 21 until the end of April 2012, correct?

22 A. Repeat the question. I didn't see
 23 them what?

24 Q. After they had been trimmed, you
 25 didn't see it until -- you didn't personally

Page 29 1 observe it until at least April of 2012? 2 A. I'll be quite honest with you, I don't 3 even see -- Mark had to point out to me yesterday 4 as to what limbs were even cut, because I could 5 not really tell a difference, except for where the 6 hole was now exposed to us when we got down there. 7 Q. And so tell me, in the end of April of 8 2012, what happened at that point when you came 9 for vacation? 10 A. When we came down. Well, as soon as 11 we walked into the house, we knew something was 12 wrong. The back wall had mold on it. It had a 13 horrible smell in the house. We had water stains 14 all over our ceilings. The family room closet was 15 wet and had mold growing on that. The dining room 16 area, it was wet and molded. Up on the third 17 floor, in the bedroom and the closets, down the 18 wall, the back part of the wall, was all wet and 19 molded. 20 And at that time, that's when Mark got 21 up on the roof and discovered the hole in the -- I 22 think it's called a ridge cap for the shingles and 23 that, and that's where it had -- the limbs had -- 24 originally had been laying, I guess, to do that. 25 I don't know.	Page 31 1 something gets wet. To have black mold, it has to 2 be there for a while for it to be black, and it 3 was growing, so by the shape of the condition of 4 the mold and how extensive it was, it had been 5 there and growing for a couple of months. This 6 was nothing that fungicide or bleach water was 7 going to take care of. 8 Q. And did you have the mold tested? 9 A. No, I did not. 10 Q. Do you know if anybody had the mold 11 tested? 12 A. I don't know if Service USA did or 13 not. I knew I couldn't let my family come down or 14 my grandchildren, because that's black mold. They 15 can't be around that. 16 Q. Did you contact Connie after finding 17 all this condition? 18 A. No. I contacted straight -- we 19 were -- we had to get a plan together, a plan of 20 action. We had to take care of this, because we 21 can't live in this. We didn't know what was going 22 on, so we called our insurance company. 23 Q. I guess what I'm wondering, if Connie 24 was checking on the property once or twice a week 25 or weekly or within every month, and the problem
Page 30 1 And at that time, we were just beside 2 ourselves with the mess in the house and not 3 knowing what to do and coming down for vacation 4 and now looking at maybe something potentially 5 really harmful to us with the mold and whatever 6 other problems that be, so we had called our 7 insurance agent. 8 Q. Could you tell, from looking at it, 9 how long that problem had been developing? 10 A. I actually never saw this, except by 11 pictures, because I wouldn't get up on the roof. 12 Q. I'm not talking about the roof. I'm 13 talking about the things you were talking about in 14 the house that you did see. 15 A. Repeat the question again. I'm sorry. 16 Q. Sure. You talked about there being 17 mold on several walls and water stains and wet 18 closets and all that, and I'm asking for the 19 things that you observed, did you get some sense 20 of how long those problems had been developing? 21 A. Well, just having to do mold 22 remediation and that, we know quite a bit about 23 mold and what we were looking at, and this just 24 wasn't regular mold, it was black mold. So mold 25 starts to form within three to five days after	Page 32 1 had been going on for two or three months, didn't 2 you question her as to why she hadn't told you 3 that there was this ongoing mold problem in the 4 house? 5 A. I couldn't tell you -- I mean, it was 6 two years ago -- if I did or I didn't. 7 Q. You don't recall speaking to Connie 8 about the problem? 9 A. Any of the mold or anything. And I 10 could have. Like I said, I just don't remember. 11 That was two years ago. 12 I do know that they told us because we 13 had painted the walls in semigloss paint, that's 14 what prevented the mold from coming out. It would 15 have come out sooner had we not used the semigloss 16 paint. 17 Q. So tell me when you began doing 18 repairs to the house. 19 A. Mr. Garwood had come out, and he's 20 with South Carolina Wind and Hail, the insurance 21 part. He had come out and observed it. He had 22 made the comment that by all means, the tree 23 rubbed this, and that we needed to contact an 24 attorney at this point. We didn't, because we had 25 other things that needed to be done first and

Page 33 1 foremost. 2 He scheduled Service USA to get out 3 there, and also -- I think it was just Service 4 USA, because they do the mold remediation and 5 things like that, to get the fans going, start 6 getting things cleaned up. 7 We didn't stay for the full time 8 because of the condition of the house. They 9 started in sometime in June, I believe. They went 10 in, and they gutted the house. That was Service 11 USA. And then I'm trying to think when All-Pro 12 went in there to do the roofing. And during that 13 time, Connie was going over there, and she was 14 reporting back to me, because I did not have any 15 way to find out what was going on and that. 16 Once they started tearing out the 17 walls, they found -- and I may pronounce this 18 wrong, I'm trying to remember, eastern 19 subterranean formosan termites that had made -- I 20 forget. It wasn't the word nest, but how they 21 form is because -- and we have this of record. 22 All-Pro had to come out to get these things. 23 They're big hives, I guess, for lack of better 24 terms, that were in the walls. 25 And what caused this was caused by the	Page 35 1 They tore out and gutted the loft upstairs, the 2 family room, its closet, the dining room. We had 3 Brazilian hardwood cherry with inlay in the family 4 room, the dining room, the hallway, and in the 5 living room, and we lost all of that except the 6 living room part. And when they pulled up the 7 floor, there was termites that actually had 8 already started coming across. 9 Let's see what else did they pay for, 10 the insurance. I think that was it. 11 Q. What did they not pay for, you're 12 saying the termite damage? 13 A. I guess, yes, all the internal 14 damages, which was, like I said, the structure of 15 the house became insecure because of how badly it 16 was eaten on the one side, and over on these -- we 17 had had -- when we had the -- when we built the 18 addition, we had had an architect draw it out, and 19 I can't remember the names, but anyway, there were 20 specially-formed beams that were made to go across 21 this area. They had even eaten through that 22 support beam, and it actually jeopardized our 23 steps going up to the loft because they had eaten 24 through that so much. So they were supposed to 25 have taken out some more of the hardwood flooring,
Page 34 1 moisture and the water coming in from the roof and 2 the inside of the wood getting wet, and that's the 3 only way these type of termites can inflict in the 4 house or inflict anything. It's caused by the 5 moisture, and this is the worst kind that you 6 could have. 7 So when they started opening the 8 walls, they started finding these hives and active 9 termites, and termites, because of all the water 10 that had gotten in the house, had eaten the 11 interior of the two-by-fours, the subfloors, floor 12 joists and that of our home, and nobody knew of 13 this damage until after they opened up the house. 14 And the insurance did not pay for any of that 15 damage that was on the inside of the wall. 16 Q. What did insurance pay for? 17 A. Insurance paid for the roof with the 18 deductible that we had to pay, because in South 19 Carolina, they give you so much of a percentage 20 and that. I couldn't tell you the figures 21 offhand. 22 Q. You're lucky to get anything out of 23 the insurance companies. 24 A. Exactly. We were just devastated to 25 see this. Then they had Service USA come in.	Page 36 1 but they didn't. 2 As Mark and I went in there, when we 3 got back down there, we started pulling it up, and 4 there was active termites, so we called the bug 5 man back in, because he had already basically, 6 lack of better terms, bombed the house with the 7 chemicals and that all the way around, and he came 8 back out, and we found from the damages the 9 termites had eaten their way all the way across 10 our house at that point. 11 Q. And that was after you had already 12 treated it to get rid of all the termites? 13 A. Yes. 14 Q. And did you get the house -- had you 15 ever had the house bonded for termites or termite 16 damage -- 17 A. Yes. 18 Q. -- prior to any of this happening? 19 A. Yes. 20 Q. Were you able to use that bond to -- 21 A. No, because we had -- we hadn't had 22 it -- we hadn't had the house serviced probably 23 for about a year or two. 24 Q. The additional work that you said the 25 bug man had to do, come back, was it at that point

1
2 IN THE COURT OF COMMON PLEAS
3 FOURTEENTH JUDICIAL CIRCUIT
4 STATE OF SOUTH CAROLINA
5 COUNTY OF BEAUFORT

6 MARK AND ELIZABETH HEIL,

7 Plaintiffs,

8
9
10 vs. CIVIL ACTION NUMBER
2013-CP-07-1231

11
12
13 STEWART AND CHRISTINA HINES
and SAM IMLER d/b/a SAM'S TREE
14 SERVICE,
15 Defendants.

16 -----/
17 The deposition of SAM IMLER, a witness
18 in the above-entitled cause, taken pursuant to
19 Notice and agreement, before Cathy M. Knoettner,
20 Certified Court Reporter and Notary Public, at
21 the Offices of Coastal Court Reporting, One
22 Corpus Christi Place, Executive Center, Suite
23 107, Hilton Head Island, South Carolina, on the
24 18th day of February, 2014, commencing at or
25 about the hour of 2:10 p.m.

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 Let me first ask you your full name for
3 the record.

4 A Samuel Paul, Imler, I-M-L-E-R.

5 Q What is the name of your business?

6 A It's Sam's Tree Company.

7 Q Is it incorporated?

8 A No.

9 Q Is it just a sole proprietorship?

10 A Sole proprietorship.

11 Q When did you start that company?

12 A 2003, approximately.

13 Q Okay. What's the address for that
14 company?

15 A It's Box 21728, Hilton Head, South
16 Carolina, 29925. Of course, that's a P.O. box.

17 Q Is there a physical address for that
18 company?

19 A No, I work out of my home.

20 Q Okay. Is your home in Sea Pines?

21 A It is.

22 Q And is that Sam's Tree Company, is that
23 still active in business today?

24 A Yes, it is, yes, sir.

25 Q What services does Sam's Tree Company

1 CAPELL - IMLER (DIRECT EXAMINATION)
2 provide?
3 A General pruning, removals, fertilizing,
4 consultation, permitting.
5 Q Are you the only owner of the company?
6 A I am.
7 Q Okay. Has there ever been any other
8 owner since the existence in 2003?
9 A No, there has not.
10 Q Do you mainly work on the Island?
11 A Yes, sir.
12 Q A hundred percent, 90 percent; can you
13 put a percentage?
14 A Ninety percent.
15 Q Do you have a business license on
16 Hilton Head?
17 A Yes, I do.
18 Q What about, are you required to have
19 any kind of license with the state of South
20 Carolina, whether it's a specialty license or
21 some kind of tree license or anything like that?
22 A You're not required but, of course, on
23 Hilton Head Island you're required to purchase a
24 business license, which I have.
25 Q Okay. Other than the business license,

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 A No, I have not.

3 Q Have you had any claims or lawsuits
4 brought against you since -- against the company
5 since 2003?

6 A I have not.

7 Q Okay. And has there ever been a
8 request from anybody you performed work for for
9 proof of liability insurance?

10 A Absolutely.

11 Q Okay. What have you done when people
12 have requested proof of liability insurance?

13 A I agree to -- if I do any damage, I
14 will pay for that damage.

15 Q Did you make any kind of agreement for
16 this house with the Hines?

17 A I did not discuss it with -- well, it's
18 not Hines's house. When he called me to look at
19 this, I immediately called him back and, after
20 observation, told him what I had witnessed and
21 what he explicitly wanted me to do.

22 Q All right. We'll get into that a
23 little bit more in a minute. I sent you the
24 summons and complaint originally when it was
25 originally filed, and you filed an answer or you

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 sent me an answer back, I think, via e-mail.

3 August 21, 2013 was the e-mail you sent back

4 back to me. And it says, In answering said

5 complaint we accessed the Heil property from the

6 adjoining tree on Mr. Hines' rental property

7 next door. I was hired to reduce and remove any

8 hazardous limbs encroaching the home. There

9 were several limbs visible that had fallen on

10 the roof prior to our arrival. I instructed my

11 tree climber to remove upon my direction three

12 to four small limbs within 4 to 5 feet of the

13 roof. It is our process to tie a rope to the

14 limb that is to be removed and lower it to the

15 ground then. We repeated this process numerous

16 times till I was satisfied with the limb

17 removals. We were not on the roof of where said

18 damage occurred. We are suspended above the

19 roof tied in with safety harnesses. Thank you

20 for your phone call, Tuesday, August 20, 2013,

21 and you got a phone number and your e-mail

22 address. Does that appear to be the letter you

23 sent me or the the e-mail you sent me responding

24 to the complaint?

25 A That's correct.

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 Q So the Bermuda Pointe rental, the house
3 near Gumtree rental and then this rental here in
4 Yacht Cove, are those the three rental
5 properties for Mr. Hines that you've worked on?

6 A That is correct.

7 Q Do you know where Mr. Hines lives?

8 A I do not.

9 Q Have you ever met him?

10 A I have not.

11 Q And his first contact with you was not
12 this house but one of the other ones?

13 A I believe so, yes.

14 Q Did you talk to the renters at Mr.
15 Hines house next door to the Heils' house at any
16 time?

17 A He advised me not to interrupt with his
18 renters.

19 Q Okay. Do you know the reason for that?

20 A I did not. I knock on the door of the
21 home that I'm going to work on because there was
22 a car parked in the driveway, and I knocked on
23 the door as business but there was no answer, no
24 response.

25 Q Okay. What month was this? Do you

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 remember what month it was? November-December
3 time frame, or was it spring? I can't remember.

4 A It was before Christmas, yes. I think
5 it was October-November.

6 Q Okay. There was a car in the driveway
7 but no answer when you knocked on the door?

8 A No answer.

9 Q All right. And then the tree -- the
10 limbs that you saw above the roof, that tree was
11 located on the Hines' property; is that right?

12 A Yes, that is correct. The tree was
13 growing over the adjacent property above the
14 chimney.

15 Q And so it sounds like the tree that was
16 on the Hines' property was growing over the
17 Heils' residence and some of the limbs had
18 already fallen to the ground, and some of the
19 limbs that you had removed were still above the
20 house?

21 A That's what I observed, yes.

22 Q Did you remove the dead limbs that were
23 on the ground?

24 A Yes.

25 Q Okay. And if you would, go through

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 the roof, the very top ridge line of the roof?

3 A Yes.

4 Q He did?

5 A Yes.

6 Q How far above the ridge line did he
7 get?

8 A He like communicated the whole thing,
9 and he was probably up 60 feet, and the ridge
10 line was just adjacent to him or maybe he was a
11 little bit higher than that.

12 Q Okay. And then once he's up in the
13 air, how does he cut that limb off?

14 A The line is attached to the limb that's
15 going to be removed, and it is attached to a
16 larger limb above him and then he holds the
17 rope. If it's not very big, he can manhandle
18 that. And he cuts that limb in small pieces --

19 Q Is it like when the saw is on a pole
20 that you see --

21 A No.

22 Q -- or how -- what's the cutting device?

23 A That's prehistoric.

24 Q Okay. It's a chainsaw?

25 A Yeah, he has the rope. If it's heavy,

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 company knew how to prune a tree.

3 Q Okay. So if we go out there and look
4 at that tree, we can see where your cuts are and
5 know that your cuts are proper --

6 A That's correct..

7 Q All right. Was there any evidence that
8 anybody else had done any kind of maintenance to
9 that tree that you're aware of?

10 A No. Upon examination by my climber, I
11 saw evidence on the ground -- the reason why
12 somebody called me to go look at the tree or the
13 house, because there was limbs on the ground.
14 So my climber advised me that there was a
15 shingle damaged, and we proceeded to remove
16 three or four more limbs to prevent that from
17 happening?

18 Q Okay. And the shingle that was damaged
19 that he saw, was it a shingle missing, what --

20 A Damaged.

21 Q Damaged. What kind of damage was it?

22 A A dent. He told me it had evidence of
23 a limb hitting that, which they're asphalt,
24 they're not hard. They will take a dent.

25 Q Was it on the ridge line or was it on

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 the slope of the roof, if you recall, the
3 shingle that was damaged that you saw?

4 A Normally it's on that ridge cap, if I
5 may use that term, if you're familiar with that.

6 Q I am.

7 A Okay. Because it's the highest point,
8 and a limb is not just alone; it has other
9 branches on it that tend to -- if it falls like
10 that, it will tend to cushion that. But this
11 was a dead limb.

12 Q Okay, and so he saw evidence of a
13 damaged shingle on the ridge cap. Any other
14 damage that he saw on the roof that you recall?

15 A No. And it probably came on from this
16 log that was lying on the ground next to the
17 house.

18 Q Is there any way you could tell when
19 that damage occurred or when that log fell?

20 A I could not. That's why people call,
21 to have tree work done, usually after something
22 happens.

23 Q All right.

24 A Very few call for preventative
25 maintenance, but there are a few that do that.

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 A I asked him if he wanted any other
3 services done.

4 Q Okay. What did he say?

5 A He had a few items around the --
6 between the houses that he wanted me to address,
7 which I did.

8 Q Okay. Do you remember what those were?

9 A Just light stucco removal, et cetera;
10 palm pruning, like palm trees that are on the
11 ground.

12 Q Between the houses, between --

13 A Yes.

14 Q -- between those two houses; the Hines
15 and the Heils?

16 A Yes.

17 Q Okay.

18 A Removing some ground debris; I do
19 remember doing some of that.

20 Q Did you do that at that visit or did
21 you come back later and do it?

22 A I did it at that visit.

23 Q All right. Did you tell Mr. Hines
24 about the damaged shingle that Javier saw?

25 A I don't believe I did. It didn't seem

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 significant to me at the time.

3 Q And why didn't it seem significant at
4 the time?

5 A My climber said it was a small dent.

6 Q I've got a picture here of some photos
7 that were taken from the Hines, and there's a
8 lot of photos here and they're not numbered so
9 they'll be hard to talk about exactly what
10 photos we're looking at. But there are some
11 photos here on the top, and I realize you didn't
12 see the dent so you may not know exactly what
13 we're looking at there but see the photo on the
14 bottom there with the --

15 A Yeah, let me try to -- yeah, this would
16 be -- yeah, here's the chimney and this would be
17 the general area where we pruned. Now, this
18 shingle here that has been dislodged was -- I
19 can only assume that was the one that was dented
20 because it broke apart.

21 Q Okay.

22 A And this is where the limb that was
23 encroaching the house was located.

24 Q Okay. So there were limbs that were on
25 the tree that were touching the actual roof?

1 CAPELL - IMLER (DIRECT EXAMINATION)

2 chimney that were about the size of my arm. I
3 wanted to be specific in knowing exactly how big
4 they were.

5 Q Did you see any evidence of shingles on
6 the ground or shingle material on the ground
7 when you were there?

8 A I don't recall that.

9 Q What's the normal procedure for you if
10 your worker or you do spot a damaged shingle; do
11 you normally report that to the owner?

12 A I do. However, in this case I did not
13 have any pertinent information of the owner. I
14 reported to Mr. Hines that -- I did not report
15 that there was a dent in the shingle. I
16 reported what we accomplished.

17 Q Did you make any attempt to -- other
18 than knocking on their door at the beginning --
19 the house door at the beginning of starting the
20 work; after your completion of the work and
21 after Javier noticed the dented shingle, did you
22 make any attempt to contact the Heils at all
23 after that?

24 A I did not know who the owner was.

25 Q All right. After your conversation

1 McDANIEL - IMLER (CROSS-EXAMINATION)

2 anyway; is that correct?

3 A That is my assumption, yes. Based on
4 what my climber observed, it was a damaged
5 shingle.

6 Q Okay. And did your climber indicate to
7 you that it was damage of the sort that would
8 put the roof's integrity in jeopardy?

9 A No, it was not. I asked him if it was
10 a potential to leak, and he said to me that it
11 did not appear serious.

12 Q Okay. Did Javier, did he give you any
13 other report about the condition of the roof
14 shingles as a whole?

15 A I asked him if there were other areas,
16 is there anything else you observed. He said
17 no, just what I told you, there was a dented
18 shingle.

19 Q Okay. Do you have any idea of the age
20 of the shingles at that time? I mean, did he
21 give you a sense that these were worn-down
22 shingles or these were brand-new, or did you --
23 I mean, maybe you don't know any information
24 about that. I guess I'm just wondering if you
25 have any information whether he told you or

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

MARK and ELIZABETH HEIL,

Plaintiffs,

vs.

CASE NO. 2013-CP-27-1231

STEWART and CHRISTINA HINES
and SAM IMLER, d/b/a SAM'S TREE
SERVICE,

Defendants.

DEPOSITION OF: MARK HEIL

DATE: June 27, 2014

TIME: 11:45 AM

LOCATION: 1901 Boundary Street
Beaufort, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: MARIE H. BRUEGGER, Registered
Professional Reporter, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 Q. And tell me your current employment.

2 A. I'm a contractor for Safeguard
3 Properties.

4 Q. And do you do work in South Carolina?

5 A. No. I started in South Carolina doing
6 this particular line of work I'm in, but not with
7 Safeguard Properties.

8 Q. Who were you with in South Carolina?

9 A. My wife was a realtor, and whenever
10 the mortgage company had a property -- there was
11 nobody specifically in charge -- I worked with the
12 mortgage company itself. I don't think Safeguard
13 Properties was down here at that time.

14 Q. And your job in that context was
15 securing foreclosure homes, that type of thing?

16 A. Correct, yeah.

17 Q. And that would include trying to
18 prevent damage, prevent -- what would that be? I
19 mean, give me a general description of what you
20 would be doing in that job.

21 A. Roof repair, any damages on the
22 outside of the property that would intrude into
23 the property, we had to repair stuff like that,
24 clean the properties out, which we call them
25 trash-outs, just get all the -- clean the property

1 up.

2 Q. But damage like in the photos that we
3 were looking at earlier, a leaky roof, that'd be
4 the kind of thing that you would try to patch up
5 or fix?

6 A. Correct.

7 Q. Tell me about the November 2011 visit
8 to the home.

9 And let me back up a little bit and
10 ask you: Do you recall the time before that that
11 you had last been to the home before November of
12 2011?

13 A. I have problems remembering timelines.
14 I can remember what happened; I just don't
15 remember exactly when it was. So, I mean, we try
16 to get down two, three, four times a year. I love
17 fishing, love offshore fishing, so I like to fish.
18 I don't remember when, prior to November, we were
19 there.

20 Q. Likely in the summer of 2011?

21 A. Yeah.

22 Q. In the previous times, had you done
23 any tree trimming yourself?

24 A. I trimmed the tree every time we'd go
25 down, because the trees -- the oak trees grow so

1 fast.

2 We have had problems with raccoons
3 getting in our attic, and I think they're coming
4 up the tree, over the limbs, onto the roof, and
5 then they go on. I don't know if you have a
6 picture of the front of the house, but we've got a
7 dormer on the front. They're getting up under the
8 overhang in the dormer where the dormer meets the
9 roof, and they're getting up in the attic. So
10 every time we go down, I'm trimming trees. I set
11 a trap on the roof, trying to catch a raccoon.

12 Q. Hear them scratching?

13 A. Hear them scurrying around, yeah.

14 Q. You say you're trimming trees. You're
15 trimming them away from the roof?

16 A. Correct.

17 Q. Why didn't you trim -- why did you
18 contact the Hineses in this situation and not trim
19 it yourself?

20 A. That's when we did. I've got a pair
21 of lopping shears. I don't have a chainsaw down
22 here, all I've got is lopping shears, because the
23 limbs were about a quarter size or smaller.

24 Q. You're doing like your index to your
25 thumb, kind of okay symbol?

1 A. Correct.

2 Q. That's the size of the limbs that
3 were --

4 A. Hanging.

5 Q. -- over your roof?

6 A. This one particular limb that caused
7 the damage was maybe eight-inch diameter, the main
8 tree limb with all the branches coming off of it.

9 Q. When you saw it in 2011, November,
10 what distance was it from the roof at that time?

11 A. If it wasn't sitting on the roof, it
12 was close, but like I said, this particular limb,
13 just like all the other limbs on an oak tree, it
14 has offshoots, and it was just so big of all the
15 offshoots, you couldn't see the main limb. But
16 the offshoots were laying on the roof, and the
17 main part of the limb, if it wasn't laying on the
18 roof, it was close, and that's when I told her.

19 She went next door and talked to Jim to get
20 Mr. Hines's number, and from there it --

21 Q. Did you try to trim any of the smaller
22 limbs at that time?

23 A. Yeah. I always trim all the smaller
24 limbs.

25 Q. So in November of 2011, you did do the

1 trimming of the smaller limbs and just left the
2 bigger one?

3 A. Yeah, because I don't have anything --
4 I didn't have anything down here big enough to cut
5 that kind of limb.

6 Q. When you were up there at that point,
7 did you see any damage to the roof?

8 A. No, because like I said, the smaller
9 branches coming off the main limb, it was just a
10 big wad of limbs, leaves.

11 Q. Are you saying you couldn't see the
12 roof, whether it was damaged or not damaged?

13 A. Correct.

14 Q. Even after you removed the smaller
15 limbs, you still couldn't tell whether there was
16 any damage to the roof at that time?

17 A. No, huh-uh.

18 Q. Let me make sure. You're saying no,
19 you couldn't tell?

20 A. No, you couldn't tell.

21 Q. So it's possible that the roof damage
22 was there before November, when you saw it the end
23 of November of 2011?

24 A. It's possible. I couldn't tell you.
25 Anything's possible.

1 Q. And did you speak to Connie at any
2 point? And I guess you know who Connie is,
3 correct?

4 A. I know Connie.

5 Q. Connie, when she checks on the
6 property, do you ever speak to her about that, or
7 does she usually talk to your wife?

8 A. She talks to my wife.

9 Q. And just to be sure, from any time
10 after November of 2011 to April of 2012, do you
11 recall having any conversations with Connie about
12 the condition of the property?

13 A. No, I did not.

14 Q. What about any conversations during
15 that time period with the neighbors, any of your
16 neighbors of this property?

17 A. No.

18 Q. With the Hineses?

19 A. No.

20 Q. So your wife handled pretty much all
21 of the correspondence and communications regarding
22 the damage to the roof?

23 A. Correct.

24 Q. Were you involved at all in the
25 gathering of estimates for the tree removal?

Hines Prod 1

Page 1 of 1

Print

Subject: T-Best Haver

From: Sam Hines (sahines@aol.com)

To: chris@hollister.com

Date: Saturday, December 10, 2011 1:18 PM

Hello Stuart We've completed the work we discussed. Much improvement!! In order for us to make room to take the brush to the river, I removed some of the dead palm fronds and other various dead material impeding our access. I apologized and tried to explain, but to little avail. Thank you for your understanding. My e-mail address is sam.hines@aol.com. My address is P.O. B. 21728 Hilton Head, SC 29925. This is your invoice for \$500. Thank you. Sam Hines

PAID ✓ SH

From 1960-1969 14,241,000

DATE: 1965 JUN 15 12:13 PM

Hello, Sam: On December 7, 2013 we successfully removed the basic information from the 1041-1042
 1041-1042 Cost account by deleting the account and the 1041-1042 account was not any more present. We
 accomplished this by using the other account 1041-1042 and by
 the time the 1041-1042 was closed. The 1041-1042 was closed as well as the 1041-1042
 which was the 1041-1042 account and the 1041-1042 account was not any more present. Thank you Sam.
 Dec 16, 2013 11:15 AM

We did not see any ^{offshore} puff-blowers on
anywhere, San Isidro (12/7/11)

CC: Steve Hiest

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No. 2013-CP-07-1231
	)	
Mark Heil and Elizabeth Heil,	)	
	)	
Plaintiffs,	)	PLAINTIFFS'
	)	MEMORANDUM IN
v.	)	OPPOSITION TO HINES'
	)	MOTION FOR SUMMARY
Stewart Hines, Christina Hines, and	)	JUDGMENT
Sam Imler d/b/a Sam's Tree Service,	)	
	)	
Defendants.	)	

TO: BRIAN MCDANIEL, ATTORNEY FOR STEWART AND CHRISTINA HINES

The Plaintiffs, by and through their undersigned attorneys, submit this Memorandum in the Defendants Stewart and Christina Hines' Motion for Summary Judgment.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. South Carolina Rules of Civil Procedure ("SCRCP"), Rule 56(c). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Summary judgment is a drastic remedy that should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Id.* Even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.* A mere scintilla of evidence is sufficient to defeat a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

FACTUAL BACKGROUND

Plaintiffs Heils and Defendants Hines own neighboring houses in the Yacht Cove neighborhood of Hilton Head Island. Plaintiffs reside in the Subject Property only part of the year. Defendants rent their neighboring property to two long-

term tenants. The word "Defendants" as used herein shall refer to the moving defendants only, and not to Defendant Sam Imler d/b/a Sam's Tree Service ("Imler").

Plaintiffs visited the Subject Property in November 2011 and noticed that a tree based on Defendants' property was encroaching onto Plaintiffs' property, specifically the roof. Plaintiffs did not observe any damages during that visit, but were concerned about the condition of the tree and thus notified Defendants of the condition. Pictures of the November 2011 tree condition are included as Exhibit "A."

The facts regarding the manner in which a tree service company was selected are disputed. However, it is undisputed that Defendants retained Imler to prune the problematic tree in December 2011.

Plaintiffs' next visit to the Subject Property, their secondary home, took place in April 2012. (Dep. of Elizabeth Heil, 29:7 – 30:7). Upon arrival, Plaintiffs noticed substantial damage throughout the house deriving from a hole in the roof. *Id.* Plaintiffs turned this matter over to their property insurance company, but the adjusters for the claim determined that the tree located on Defendants' property rubbing on the roof caused the damages. See Exhibit "B."

Plaintiffs already repaired the Subject Property at their own expense and are seeking reimbursement through this lawsuit. Plaintiffs filed this action against Defendants and Imler in May 2013, approximately one year after discovering the damages. Plaintiffs' claims against Defendants are in negligence, gross negligence, and breach of fiduciary duty.

ARGUMENT

This case is about Defendants' failure to take proper care of a tree in their yard such that the tree caused major damage to the house of their neighbors, the Plaintiffs. Defendants failed to take any action at all until prompted by the Plaintiffs. When they did act, Defendants first attempted to rely on Plaintiffs to

research tree companies and to provide Defendants with bids. Plaintiffs complied with this request and provided bids from two different licensed and insured tree companies, but Defendants chose to ignore these bids in an apparent attempt to save money. Defendants ultimately retained a tree removal service that was uninsured and used undocumented workers and that only charged a fraction of the cost in comparison to the insured companies referred by Plaintiffs. Damages to Plaintiffs' residence followed. Defendants saved substantial money in retaining the tree service company they did and left Plaintiffs with the substantial burden of repairing their home, all the while attempting to paint themselves as good neighbors for performing an obligation required on them by law, no matter how poorly that obligation was performed.

I. Defendants owed duties to Plaintiffs as a matter of law.

i. Residential Landowners' duty to maintain trees in safe condition.

The first duty that Defendants owed Plaintiffs arises from South Carolina caselaw regarding residential landowners. An owner of rural land is not required to inspect it to make sure that every tree is safe, and will not fall over into the public highway; however, when the tree is in a residential or urban area, the landowner has a duty of reasonable care, including inspection, to make sure that the tree is safe, including trees of purely natural origin. *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (S.C. App., 1986). The parties do not dispute that Defendants' property is in a residential neighborhood. Thus, Defendants had a duty to inspect and maintain its tree in a safe condition, and that duty certainly flowed to Plaintiffs', Defendants' next-door neighbor.

Defendants' attempt to argue around this duty by claiming that the subject tree was healthy. This argument fails on both legal and factual grounds. Although many cases involving tree damage arise from the falling of a dead tree limb, there is no authority stating that the duty of a residential property owner to maintain trees in a safe condition does not apply to healthy trees. Such a

position does not comport with caselaw or sound public policy. The condition of the tree on Defendants' property was unsound, as is shown in Exhibit "A." Arguing that the tree was healthy is of no consequence. Moreover, Defendants' argument that the tree was "healthy" fails to conform to the facts. Imler, the only tree professional who has testified in this case, stated that there were several dead limbs fallen on the roof and the ground prior to his arrival. (Dep. of Sam Imler, 12:8-10; 20:15-24).

Defendants had a duty to inspect and maintain the tree in their yard was in a safe condition, and as set forth below, Defendants breached this duty.

ii. Duty to perform voluntary acts with reasonable care.

Even if the residential landowner duty did not apply, Defendants still had a duty to use reasonable care in undertaking their voluntary act to retain a reputable tree service to maintain Defendants' tree in a safe condition. In South Carolina, "one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if . . . his failure to exercise such care increased the risk of such harm." *Russell v. City of Columbia*, 305 S.C. 86, 89-90, 406 S.E.2d 338, 340 (S.C., 1990). Here, Defendants voluntarily undertook the job of retaining a tree removal service upon request of Plaintiffs. Thus, Defendants had a duty to use reasonable care in carrying out this task. As set forth below, Defendants breached this duty of using reasonable care by failing to use reasonable care in engaging a tree removal service.

II. Questions of fact exist as to whether Defendants breached the duties owed to Plaintiffs, and such a statement is generous to Defendants.

The question of whether Defendants breached the duties owed to Plaintiffs in this case is the epitome of a "he said, she said" scenario, and the award of

summary judgment in such a case is wholly inappropriate. As set forth below, the evidence in the record to date weighs heavily in Plaintiffs' favor, showing a breach by Defendants. This is because upon direct contradiction of Plaintiffs' and Defendants' testimony, the testimony of Imler corroborates Plaintiffs' side of the story and further contradicts Defendants' testimony.

Plaintiff Elizabeth Heil testified that, upon request by Defendants, she gave two bids to Defendants from two different tree companies, one for \$2,800 and the other for \$4,000. (Dep. of Elizabeth Heil, 12:20 – 13:1). Both of these companies were licensed and insured. (*Id.*, 20:8-17). Defendants retained Imler, who performed the tree work for \$500. (Dep. of Stewart Hines, 42:2-17). Mrs. Heil further testifies that she had never heard of Imler before, nor had she suggested using him for this job. (Dep. of Elizabeth Heil, 20:8-17). However, Defendant Stewart Hines claims that Mrs. Heil referred Imler to him for this job and authorized his work. (Dep. of Stewart Hines, 39:17 – 40:11). Importantly, Imler's testimony corroborates Mrs. Heil's testimony and further contradicts Mr. Hines' testimony. (Dep. of Sam Imler, 7:22-25; 32:21-24; 48:6-10).

Imler's company was uninsured, and used an undocumented worker to perform the tree work for Defendants. (Dep. of Sam Imler, 8:6-9; 14:17 – 15:4; 15:22 – 16:5). Defendants failed to inquire about either of these issues prior to retaining Imler. (Dep. of Stewart Hines, 40:15-21; 42:22 – 43:5). A reasonable jury could determine that such constitutes a failure to use reasonable care in vetting and retaining a reputable tree service to perform the work.

Additionally, a reasonable jury could determine from pictures alone that Defendants breached their duty to reasonably inspect the tree on their property and ensure it was not in an unsound condition. Exhibit "A" is merely a few examples of many photographs documenting the conditions of the tree.

III. Defendants fail to show that comparative negligence bars Plaintiffs' claims as a matter of law.

The determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least when conflicting inferences may be drawn from the evidence. *Burnett v. Family Kingdom, Inc.*, Opinion No. 4656 (S.C. App. 3/11/2010) (S.C. App., 2010). In a comparative negligence case, the trial court should grant judgment as a matter of law only if a jury could draw no reasonable inference from the evidence other than that the non-moving party's negligence exceeded fifty percent. *Id.*

Defendants' comparative negligence argument is based upon the damages to the Subject Property being aggravated by Plaintiffs' absence from the Subject Property for several months after the damages arose. However, Defendants cannot show that this conduct constitutes negligence. Defendants never even informed Plaintiffs that Imler had performed the work and thus gave them no reason to travel from Plaintiffs' primary residence in Kentucky to inspect the manner in which the work was done. (Dep. of Elizabeth Heil, 13:9-20). Moreover, Defendants cannot show that this behavior by Plaintiffs of not visiting the property for a little over four months was a failure to use reasonable care.

A more appropriate application of the law is the eggshell plaintiff doctrine. In South Carolina, the defendant takes the plaintiff as he is found and the plaintiff is entitled to recover damages resulting from the aggravation of a pre-existing condition. *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 422 S.E.2d 98 (S.C. 1992). "As a general rule, liability for the consequences of one's tortious act is not lessened by reason of the fact that the injuries were aggravated by the plaintiff's unhealthy conditions due to his own bad habits." *Id.* (quoting 22 Am.Jur.2d Damages § 282 (1988)). Here, Plaintiffs used the Subject Property as a secondary home before and after they incurred damages from Defendants' tree. This was a pre-existing condition that might have aggravated the damages,

and it is not a condition on which Defendants can rely to absolve themselves of any liability. They must take Plaintiffs as they found them.

Regardless, Defendants cannot show that the only reasonable inference to be drawn from the facts in the record is that Plaintiffs are at least fifty-one percent negligent. As such, their comparative negligence argument must be denied.

RELIEF REQUESTED

Plaintiffs Heils hereby request that the Court deny Defendants Hines' Motion for Summary Judgment.

Respectfully submitted,

THE CAPELL LAW FIRM, LLC



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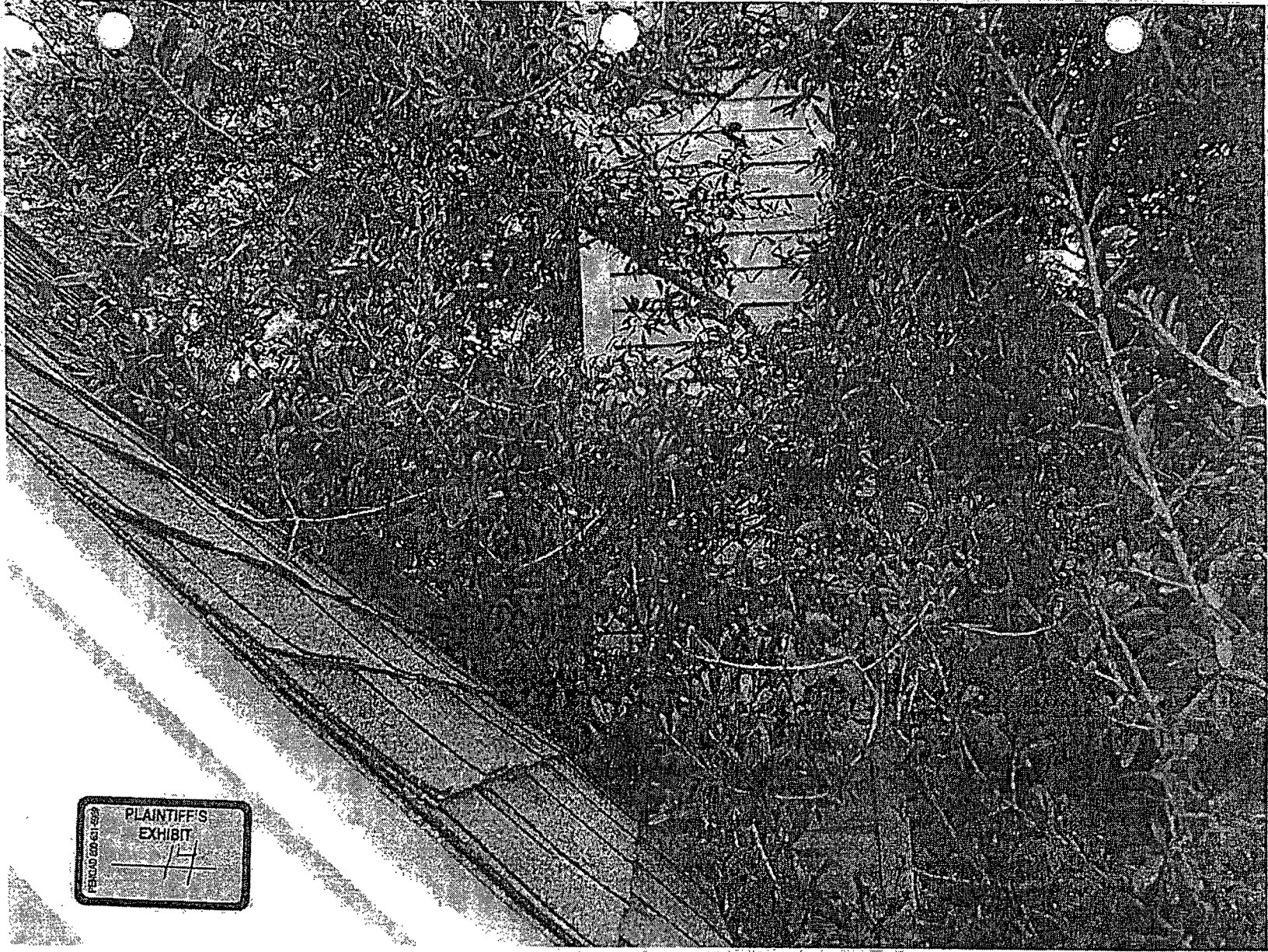
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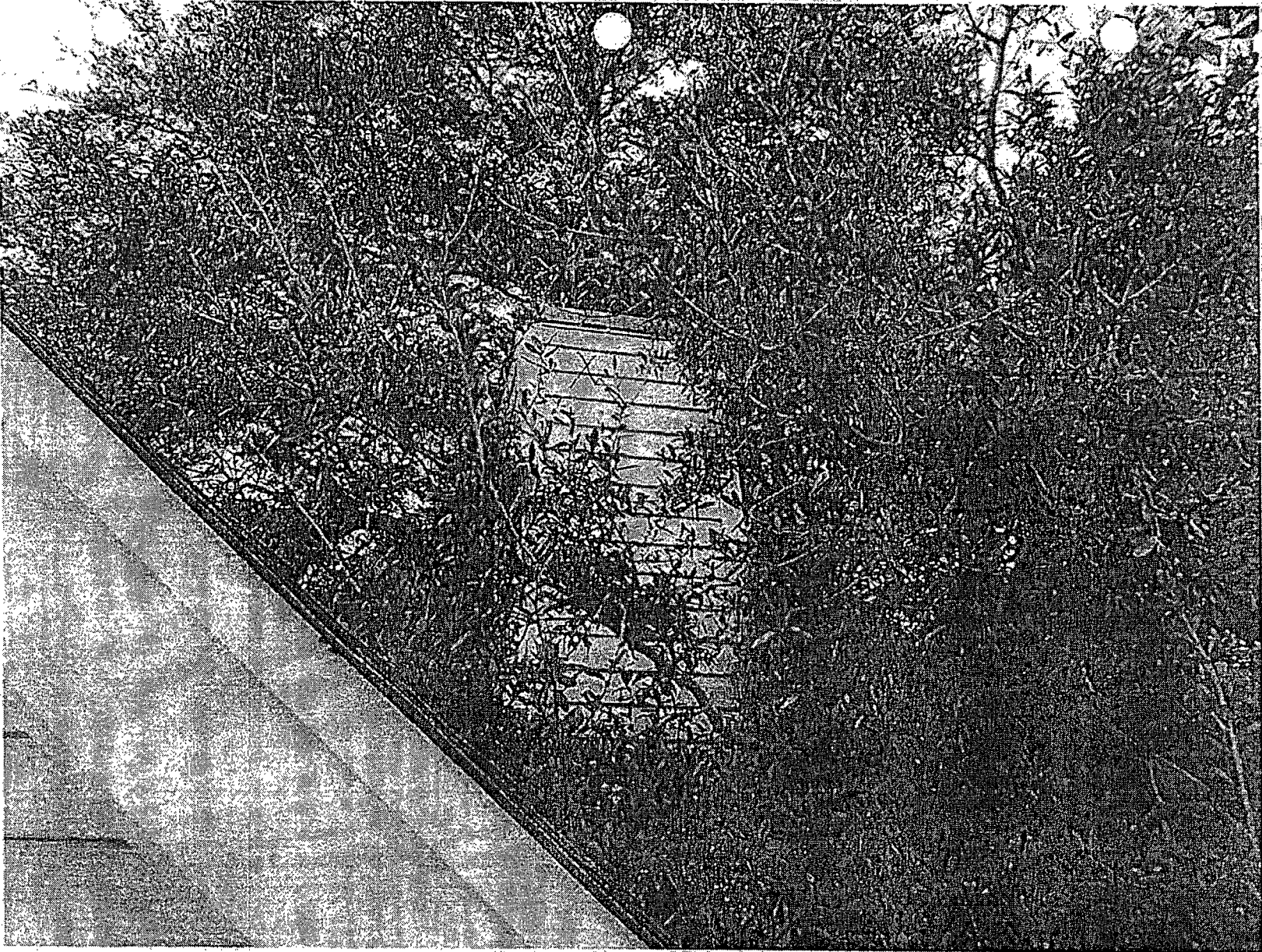
Attorneys for Plaintiffs

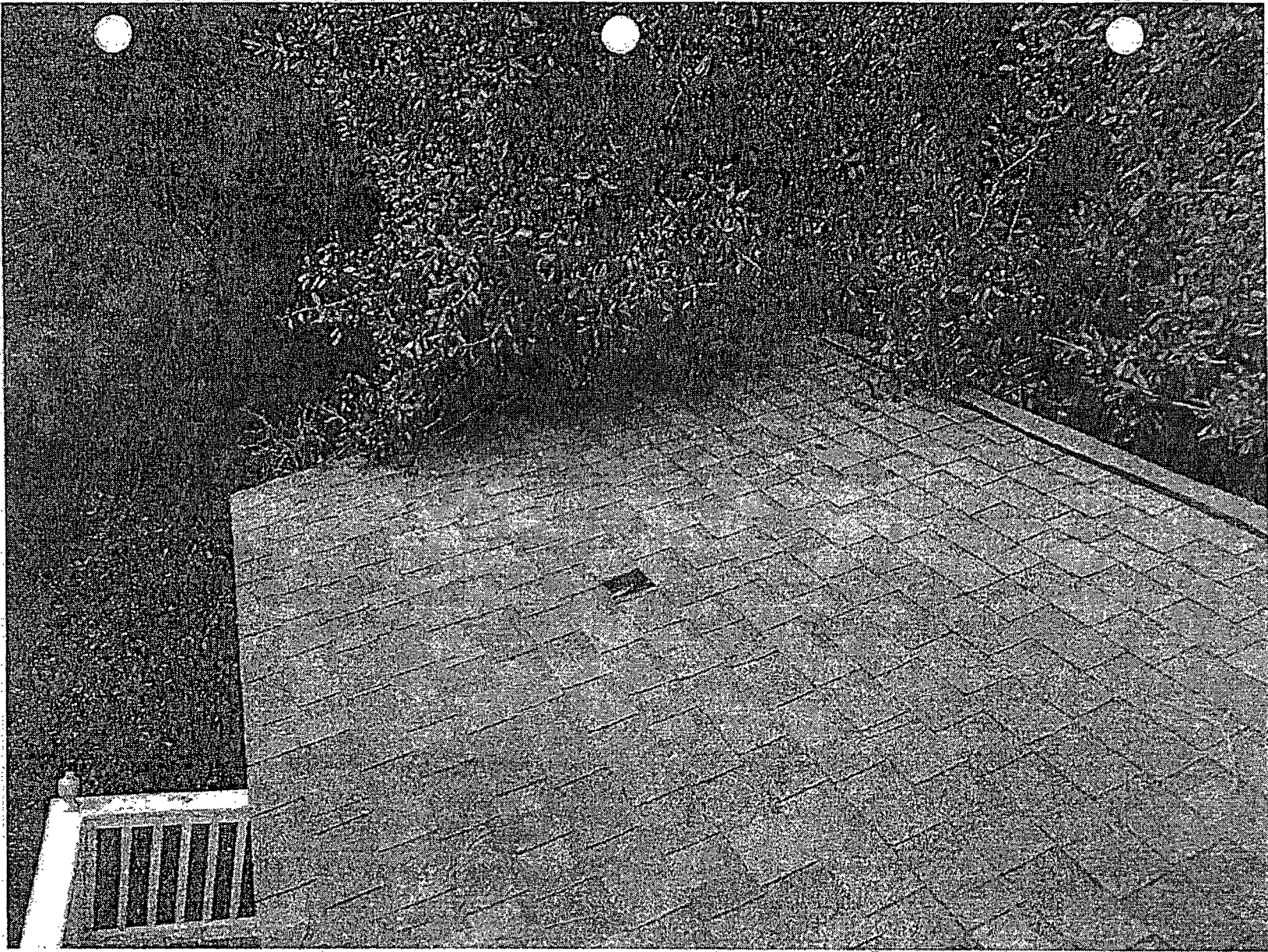
February 25, 2015
Hilton Head Island, South Carolina

EXHIBIT A

Photographs of tree encroachment







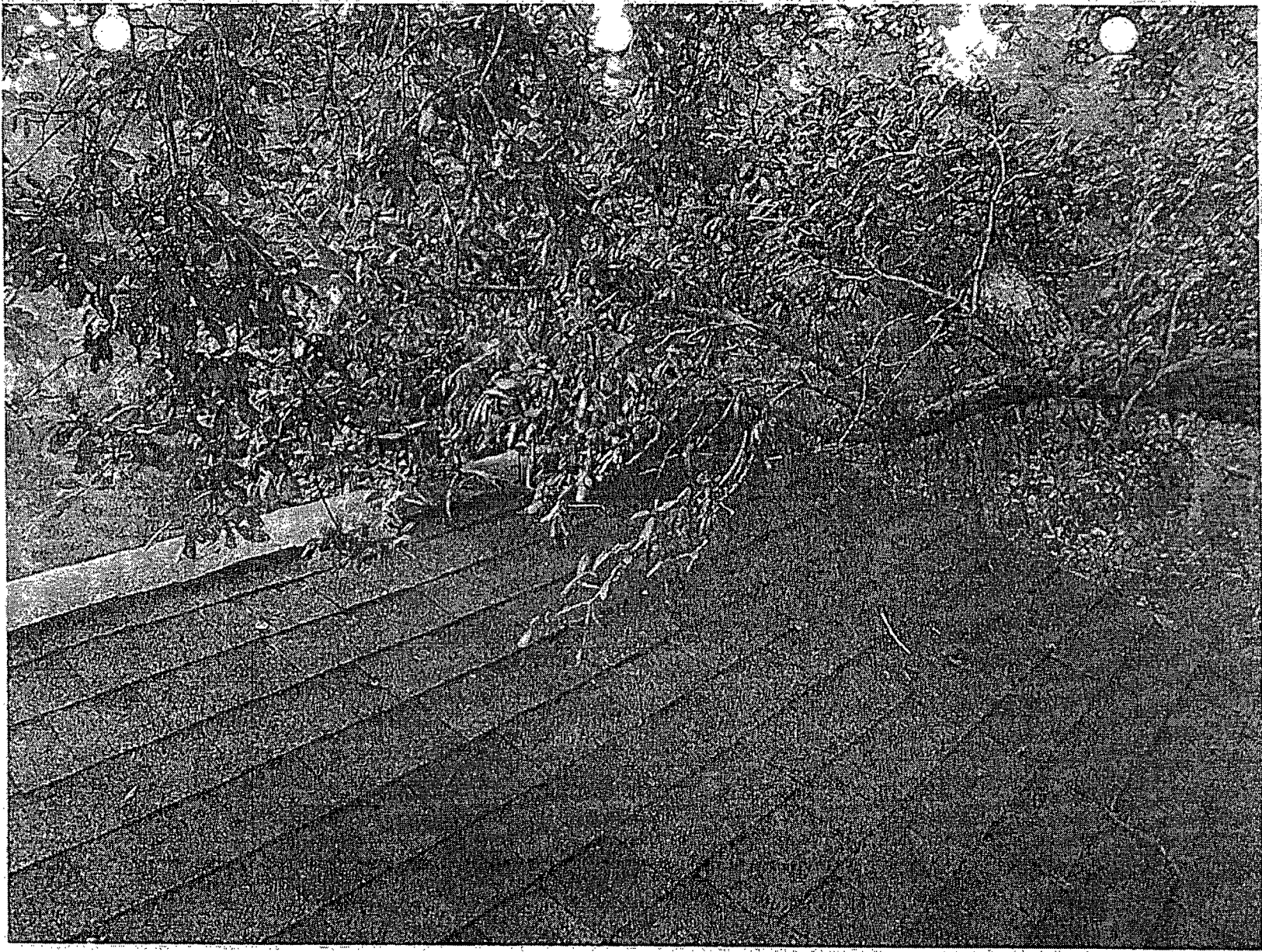


EXHIBIT B

Email correspondence between Defendant Christina
Hines and Plaintiffs' property insurance adjuster

bmcdaniel@attorneymcdaniel.com

From: Hines, Chris <Chris.Hines@occ.treas.gov>
Sent: Tuesday, June 19, 2012 5:05 PM
To: randy@scwind.com
Cc: Stewart Hines
Subject: RE: Claim # 5000576 / Beth Hail

As requested per our phone conversation on 6.19.12, this is to confirm that we do not carry liability insurance on the property located at 9 Bellhaven Way, Hilton Head Island, SC.

Christina and Stewart Hines

O Christina Hines

980-386-1715

From: Randy Mason <randy@scwind.com>
Date: June 19, 2012 10:30:55 AM EDT
To: shines33@yahoo.com
Subject: Claim # 5000576 / Beth Hail

Mr. Hines,

The SC Wind & Hail Association has settled the above claim with our insured Beth Hail, for damages to the roof at her residence located at 7 Bellhaven Way Hilton Head, SC.. Our adjuster's investigation of the claim indicates the damages to our insured's roof was a result of tree limbs from your property rubbing on the roof.

We understand you advised our adjuster that you did not carry liability insurance on the property. To confirm, we ask that you scan and email us a copy of your current "in-force" homeowners policy dec. sheet. If you are unwilling to provide that, then we ask that you provide the name of your homeowners carrier, policy number and their contact information.

We look forward to hearing from you.
Thanks.

Randy Mason, Claims Mgr.
SC Wind & Hail Association
PO Box 407
Columbia, SC 29202
Ph: 803-744-4302
Email: randy@scwind.com

EXHIBIT C

Relevant deposition transcript passages

1 observe it until at least April of 2012?

2 A. I'll be quite honest with you, I don't
3 even see -- Mark had to point out to me yesterday
4 as to what limbs were even cut, because I could
5 not really tell a difference, except for where the
6 hole was now exposed to us when we got down there.

7 Q. And so tell me, in the end of April of
8 2012, what happened at that point when you came
9 for vacation?

10 A. When we came down. Well, as soon as
11 we walked into the house, we knew something was
12 wrong. The back wall had mold on it. It had a
13 horrible smell in the house. We had water stains
14 all over our ceilings. The family room closet was
15 wet and had mold growing on that. The dining room
16 area, it was wet and molded. Up on the third
17 floor, in the bedroom and the closets, down the
18 wall, the back part of the wall, was all wet and
19 molded.

20 And at that time, that's when Mark got
21 up on the roof and discovered the hole in the -- I
22 think it's called a ridge cap for the shingles and
23 that, and that's where it had -- the limbs had --
24 originally had been laying, I guess, to do that.
25 I don't know.

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1 And at that time, we were just beside
2 ourselves with the mess in the house and not
3 knowing what to do and coming down for vacation
4 and now looking at maybe something potentially
5 really harmful to us with the mold and whatever
6 other problems that be, so we had called our
7 insurance agent.

8 Q. Could you tell, from looking at it,
9 how long that problem had been developing?

10 A. I actually never saw this, except by
11 pictures, because I wouldn't get up on the roof.

12 Q. I'm not talking about the roof. I'm
13 talking about the things you were talking about in
14 the house that you did see.

15 A. Repeat the question again. I'm sorry.

16 Q. Sure. You talked about there being
17 mold on several walls and water stains and wet
18 closets and all that, and I'm asking for the
19 things that you observed, did you get some sense
20 of how long those problems had been developing?

21 A. Well, just having to do mold
22 remediation and that, we know quite a bit about
23 mold and what we were looking at, and this just
24 wasn't regular mold, it was black mold. So mold
25 starts to form within three to five days after

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1 CAPELL - TMLER (DIRECT EXAMINATION)

2 sent me an answer back, I think, via e-mail.
3 August 21, 2013 was the e-mail you sent back
4 back to me. And it says, In answering said
5 complaint we accessed the Heil property from the
6 adjoining tree on Mr. Hines' rental property
7 next door. I was hired to reduce and remove any
8 hazardous limbs encroaching the home. There
9 were several limbs visible that had fallen on
10 the roof prior to our arrival. I instructed my
11 tree climber to remove upon my direction three
12 to four small limbs within 4 to 5 feet of the
13 roof. It is our process to tie a rope to the
14 limb that is to be removed and lower it to the
15 ground then. We repeated this process numerous
16 times till I was satisfied with the limb
17 removals. We were not on the roof of where said
18 damage occurred. We are suspended above the
19 roof tied in with safety harnesses. Thank you
20 for your phone call, Tuesday, August 20, 2013,
21 and you got a phone number and your e-mail
22 address. Does that appear to be the letter you
23 sent me or the the e-mail you sent me responding
24 to the complaint?

25 A That's correct.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 remember what month it was? November-December
3 time frame, or was it spring? I can't remember.

4 A It was before Christmas, yes. I think
5 it was October-November.

6 Q Okay. There was a car in the driveway
7 but no answer when you knocked on the door?

8 A No answer.

9 Q All right. And then the tree -- the
10 limbs that you saw above the roof, that tree was
11 located on the Hines' property; is that right?

12 A Yes, that is correct. The tree was
13 growing over the adjacent property above the
14 chimney.

15 Q And so it sounds like the tree that was
16 on the Hines' property was growing over the
17 Heils' residence and some of the limbs had
18 already fallen to the ground and some of the
19 limbs that you had removed were still above the
20 house?

21 A That's what I observed, yes.

22 Q Did you remove the dead limbs that were
23 on the ground?

24 A Yes.

25 Q Okay. And if you would, go through

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12

1 and Mr. Hines said to -- for me to go and get
2 estimates from different tree companies and then
3 fax him the estimates and that, and he'd decide
4 which one he would go with.

5 So Jim gave me the telephone number.
6 I took the pictures, so I'd have copies of it for
7 Mr. Hines, in case he needed verification, since
8 he does not live here. He's never lived in the
9 house. I've never met the man. That's just how
10 we process, by before/during/after pictures.

11 And that was all of that. We did our
12 basic routine. We winterized the house and that
13 before we left, because we didn't know if we would
14 be back in January or February, and we went home.

15 Q. You say you took the phone number
16 from --

17 A. The fax number was all I was given for
18 Mr. Hines, to contact him, and that was to send
19 any quotes that I got off the trees.

20 Q. And did you get quotes for the trees?

21 A. I called probably about four to five
22 contractors. I got two estimates that I did send
23 him. One was from Bob's Tree Service and one was
24 from Southeastern, and I don't remember which one
25 was which, but one was \$2,800 and the other one.

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1 was \$4,000 to do it.

2 Q. And then when did you get that faxed
3 to him?

4 A. I would say probably somewhere in
5 December to January, first part of January of
6 2012.

7 Q. And what happened then? What response
8 did you get on that?

9 A. I never got a response from Mr. Hines.
10 I never heard from him. I called him roughly
11 somewhere around April of that month to find out
12 where we were with the tree services and that,
13 because we were getting ready to go back down to
14 the house, and he said: We have had -- he says:
15 I had those trees done long ago. And I said: Oh,
16 well, I never heard from you. He said: Well,
17 they've been done long ago. You shouldn't have a
18 problem. So I was ecstatic, thinking, hey, the
19 trees are done. I don't have to go down and worry
20 about this.

21 Q. Let me back up to November, I guess
22 the end of November and Thanksgiving, when y'all
23 had come down there. Was there other family that
24 met you at the house?

25 A. Our daughter, our son-in-law, my

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1 A. There's one that was towards our
2 property. I couldn't tell you when it was done or
3 by whom.

4 Q. Did you see anything that indicated to
5 you that the tree was rotten?

6 A. That the tree was rotten, no. It's
7 alive.

8 Q. So do you have any independent
9 knowledge about when the limb work was actually
10 done?

11 A. I have no idea when Mr. Hines did it.
12 I was never told. I was never told he went with
13 somebody, and as to who he went with, I never
14 provided any estimate. I never even called a
15 Sam's. I went through the phone book, and I
16 looked for anybody that said licensed and insured,
17 and that's who I went with.

18 Q. And you sent him, you believe, two
19 estimates?

20 A. Yes.

21 Q. Do you know if you sent him just two?
22 Could you have sent him three or more?

23 A. No. I sent him only two, because I
24 know for a fact I had called four contractors, and
25 only two actually got back with me and went out to

1 the property.

2 Q. Did anybody go out there -- did you
3 have anyone go out and meet the contractors out at
4 the property on your behalf?

5 A. No, because we were never told they
6 were going out.

7 Q. And I mean the ones that you
8 called, the estimates that you called. You said
9 they --

10 A. Oh, no, no.

11 Q. And you were just saying this, but I
12 just want to be clear. So you don't believe
13 that -- you didn't contact Imler's Tree Service?

14 A. No.

15 Q. Had you ever done any work with Sam
16 Imler or Imler's Tree Service prior to December of
17 2011?

18 A. No, sir.

19 Q. Did you know who that is before this
20 case?

21 A. I have no idea. I was told by
22 Mr. Hines that supposedly I was at the property
23 when all this work was being done and that Mr. --
24 the gentleman talked to me and described me and
25 that from a phone message that Mr. Hines left me

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 Q Do you ever remember thinking it would
3 be a problem until Mrs. Heil contacted you?

4 A I do not recall.

5 Q Did you ever have any interaction with
6 Connie Schwartz, the Heils' tenant?

7 A Don't know a Connie Schwartz; don't
8 believe I've ever spoke to her.

9 Q Are you aware of any action between
10 Connie Schwartz and your tenants specifically
11 regarding the tree?

12 A No.

13 Q So once you knew there was a problem
14 with the tree, what did you do? Did you ask the
15 Heils to obtain estimates?

16 A As I said, Mrs. Heil called me, she
17 told me who she was, and she says, are you aware
18 there's a large live oak over in your yard
19 extending over my roof, we'd like for you to pay
20 to have it cut. I said okay. And all I
21 remember is that and that she recommending using
22 Sam's. And maybe Sam's called me or I called
23 Sam's, but that basically -- she called me
24 telling me of the problem and then within a week
25 Sam's came and cut it out, cut the tree limbs on

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 December 7th; that's a fact.

3 Q So you called Sam's yourself?

4 A I don't recall whether I called Sam or
5 Sam called me or my tenants called Sam. All I
6 know is I paid for Sam, an independent
7 contractor. Mrs. Heil authorized Sam and
8 recommended Sam. I just paid for him. I don't
9 recall how Sam's came about but, you know, I
10 read later that Ms. Heil had got some estimates
11 back, but I had never seen any of them.

12 Q Did you make contact with any tree
13 companies other than Sam's for this issue?

14 A No, I don't recall.

15 Q Did you make any inquiry as to whether
16 Sam's was insured?

17 A At that time, no. I assumed maybe he
18 probably was. I just thought he was just going
19 to go trim some limbs at the request of Ms. Heil
20 and that was her responsibility. I was just
21 paying as a good neighbor for it.

22 Q Do you think it would have been prudent
23 to have ensured that tree contractor had had
24 insurance?

25 A I think Ms. Heil should have determined

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 that. As I said, I was just paying for her
3 contractor to do the work that she recommended,
4 so that's between her and him; that's between
5 Sam and the Heils.

6 Q Did you discuss with Sam's the means
7 and methods he would use to cut the tree?

8 A No, no.

9 Q Do you think it would have been prudent
10 to have done that?

11 A No opinion. I would have left that
12 between the Heils and Sam. I live four hours
13 away. I was called to do this work. I said,
14 okay, I'll pay for it. It was done with no
15 problems, as I was told.

16 Q Have you used Sam's Tree Service
17 before?

18 A Not before, no, sir, never before.
19 Didn't even know him. I used him afterwards
20 twice and that was it, just to remove some
21 brush.

22 Q Okay. And you didn't contact any other
23 tree companies other than Sam's for this?

24 A No, no, sir. As I said, I didn't, and
25 I did not get any estimates.

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 Q Is it your testimony that the Heils
3 directed Sam's to get an estimate?

4 A The Heils directed Sam to do the work,
5 recommended me to use Sam's -- repeat the
6 question one more time.

7 Q I'll rephrase. Did you ask Sam's for
8 an estimate?

9 A I don't recall. I just said I'd pay
10 for it, and I did, like \$500.

11 Q How did Sam's --

12 A I never got an estimate from Sam, to
13 answer your question. A written estimate, no.
14 I would have a copy of it and I don't. He
15 called me the day it was done. He said,
16 Stewart, we finished the work, no problems,
17 \$500. I said okay. I mailed him a check.

18 Q You didn't discuss the means and
19 methods with him of how he was to do the work?

20 A No, sir. I assumed he knew what he was
21 doing.

22 Q Did you ask him to do the work
23 economically?

24 A No.

25 Q Did you tell him to do whatever it

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 takes to do it right?

3 A I don't recall. We didn't have much
4 discussion.

5 Q Do you have any discussion about a
6 bucket truck?

7 A No.

8 Q Or pulling ropes?

9 A He told me later in an an e-mail and
10 verbally that that's what they did; they climbed
11 up on a tree and lowered each branch one by one
12 using ropes and didn't get on the Heils' roof;
13 that's what he told me after he cut, you know.
14 He sent me an e-mail to that effect. I believe
15 that's what that e-mail that's blurred says.

16 Q Okay.

17 A But after the work was done.

18 Q Did you ever mention to the Heils that
19 Sam's used a bucket truck to do this work?

20 A No, because the only conversation I had
21 with Ms. Heil was one, like I said, in late
22 November or early December when she asked to do
23 the work, she authorized it. Then when she
24 called me back on May 24th or '5th -- I believe
25 it was May 25th -- to tell me that she believed

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 are there any other professional licenses you
3 hold, whether as a contractor or anything like
4 that?

5 A No, there's not.

6 Q For any of the work that you do, that
7 you're aware of, do you have to pull a permit,
8 like a building permit or any kind of permit?

9 A Yes, you do.

10 Q Okay. What kind of permits?

11 A You're required to purchase an ARB tree
12 removal permit, pruning permit prior to
13 beginning.

14 Q And that's typically for most
15 associations on the Island?

16 A Plantations, primarily.

17 Q Do you know the case that we're on here
18 today for Mark and Elizabeth Heil, are the
19 owners of the property, was there an ARB in that
20 neighborhood that you recall dealing with or
21 pulling a permit for?

22 A Not according to Mr. Hines who
23 contracted me. I had asked him that question if
24 we needed ARB approval or homeowners
25 association, and he was not aware of any.

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1 McDANIEL - IMLER (CROSS-EXAMINATION)

2 I don't have my agreement with me -- to observe
3 this. And, of course, I couldn't observe it
4 until I sent my climber up, and that was the
5 extent of it.

6 Q And I'm talking about the Heils; not
7 the Hines but the Heils. Do you believe you've
8 had some contact with Mr. or Mrs. Heil?

9 A I did not. I did not know who the
10 owner was until Mr. Hines.

11 Q Okay. Have you done any other work for
12 the Heils that you can recall?

13 A I did three projects for Mr. Hines.

14 Q Okay. And I understand that and I know
15 the names are similar; I'm probably confusing
16 you. But I'm talking about the owners of this
17 house that we looked at in the photo, the
18 Exhibit A photo, have you done any other work
19 for them --

20 A No.

21 Q -- the plaintiffs in this case, the
22 Heils?

23 A No. This evidence here, if I can make
24 an observation, this is --

25 Q And you're looking at Exhibit A.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 chimney that were about the size of my arm. I
3 wanted to be specific in knowing exactly how big
4 they were.

5 Q Did you see any evidence of shingles on
6 the ground or shingle material on the ground
7 when you were there?

8 A I don't recall that.

9 Q What's the normal procedure for you if
10 your worker or you do spot a damaged shingle; do
11 you normally report that to the owner?

12 A I do. However, in this case I did not
13 have any pertinent information of the owner. I
14 reported to Mr. Hines that -- I did not report
15 that there was a dent in the shingle. I
16 reported what we accomplished.

17 Q Did you make any attempt to -- other
18 than knocking on their door at the beginning --
19 the house door at the beginning of starting the
20 work; after your completion of the work and
21 after Javier noticed the dented shingle, did you
22 make any attempt to contact the Heils at all
23 after that?

24 A I did not know who the owner was.

25 Q All right. After your conversation

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 one company today; he might might work for me
3 tomorrow.

4 Q Okay, I got you. And so if you have a
5 job coming up in a month you may contact a
6 climber and say, look, I've got a job coming up,
7 can you come work for me for that week?

8 A That's correct.

9 Q Okay. And then how do you pay him;
10 just issue a check?

11 A I do checks and I do cash.

12 Q Okay. When you issue the check, do you
13 take out any taxes or do you just issue them
14 the --

15 A I do not. That's up to him to file his
16 own taxes.

17 Q Do you know who the climbers or
18 employees -- the climbers or the people that
19 worked on the house for you were for the Heil
20 residence; do you know their names?

21 A Yes, I do know his name, yes.

22 Q So it's just one person?

23 A Just one person.

24 Q Who was it; what was his name?

25 A His name was Javier -- (brief pause).

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 I'm not positive of his last name. He has
3 been -- he was not a documented, and I believe
4 he has left the area.

5 Q He was not documented and left the
6 area?

7 A When I found that information out, he,
8 of course, posed a risk and I do not deal with
9 illegals.

10 Q What made you believe or think that he
11 was illegal or not documented?

12 A I asked him.

13 Q Okay. How many times have you used him
14 before you asked him?

15 A Several times.

16 Q Okay. Do you know was the Heil
17 residence the last one he worked on, or did he
18 work on a couple more before he left?

19 A He worked on several more before he
20 left. I advised him to seek validation to
21 continue.

22 Q And he was -- other than Javier and
23 you, y'all were the only two people for Sam's
24 Tree Company that were out there at the Heil
25 residence?

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 Q So you went forward with the work under
3 the assumption there was no approval necessary
4 and did work?

5 A That's correct.

6 Q All right. What about insurance, do
7 you have any kind of workers' comp or liability
8 insurance?

9 A I do not. I only have one or two
10 employees, therefore I'm not required to secure.

11 Q There's no requirement for workers'
12 comp?

13 A No, based on revenue.

14 Q And then what about any kind of
15 liability insurance?

16 A No, I do not.

17 Q Have you ever carried it?

18 A No.

19 Q Okay. What about insurance for your
20 automobiles or equipment, do you have any
21 insurance for, you know, Sam's Tree truck or any
22 kind of equipment, or anything like that, you
23 have?

24 A I have general liability and stuff on
25 my vehicles, my personal vehicles, yes.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 I'm not positive of his last name. He has
3 been -- he was not a documented, and I believe
4 he has left the area.

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6 area?

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8 of course, posed a risk and I do not deal with
9 illegals.

10 Q What made you believe or think that he
11 was illegal or not documented?

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13 Q Okay. How many times have you used him
14 before you asked him?

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16 Q Okay. Do you know was the Heil
17 residence the last one he worked on, or did he
18 work on a couple more before he left?

19 A He worked on several more before he
20 left. I advised him to seek validation to
21 continue.

22 Q And he was -- other than Javier and
23 you, y'all were the only two people for Sam's
24 Tree Company that were out there at the Heil
25 residence?

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 A That's the only one I used, yes.

3 Q And you don't believe Javier had any
4 kind of liability insurance, do you?

5 A No, I don't believe, no.

6 Q All right. And I sent you another, you
7 know, kind of legal document called the -- we
8 call it discovery. It's called interrogatories
9 and requests for production. They're basically
10 questions that I've asked you on paper. I sent
11 those to you and I have not seen a response to
12 those. Do you know anything about those? Have
13 you looked at them or --

14 A I did look at them.

15 Q And you haven't responded to them yet?

16 A I have not.

17 Q Okay. Is there a reason why you
18 haven't retained an attorney yet?

19 A There is no reason, no.

20 Q Have you -- and I don't want to know
21 any conversations that you've had with an
22 attorney, but have you spoke to an attorney
23 about this matter?

24 A I have not.

25 Q Have you spoke to anyone about this

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1 was \$4,000 to do it.

2 Q. And then when did you get that faxed
3 to him?

4 A. I would say probably somewhere in
5 December to January, first part of January of
6 2012.

7 Q. And what happened then? What response
8 did you get on that?

9 A. I never got a response from Mr. Hines.
10 I never heard from him. I called him roughly
11 somewhere around April of that month to find out
12 where we were with the tree services and that,
13 because we were getting ready to go back down to
14 the house, and he said: We have had -- he says
15 I had those trees done long ago. And I said: Oh,
16 well, I never heard from you. He said: Well,
17 they've been done long ago. You shouldn't have a
18 problem. So I was ecstatic, thinking, hey, the
19 trees are done. I don't have to go down and worry
20 about this.

21 Q. Let me back up to November, I guess
22 the end of November and Thanksgiving, when y'all
23 had come down there. Was there other family that
24 met you at the house?

25 A. Our daughter, our son-in-law, my

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
) C.A. No. 2013-CP-07-1231
2015 MAR 30 AM 10:00
Mark Heil and Elizabeth Heil,)
Plaintiffs,)
v.) **MOTION TO ALTER OR**
Stewart Hines, Christina Hines, and) **AMEND JUDGMENT**
Sam Imler d/b/a Sam's Tree Service)
Defendants.)

TO: THE HONORABLE JUDGE PERRY M. BUCKNER

COMES NOW the Plaintiffs, Mark and Elizabeth Heil, moving pursuant to Rule 59(e), South Carolina Rules of Civil Procedure to alter or amend the Order Granting Defendants' Motion for Summary Judgment signed by Judge Buckner on March 12, 2015 ("the Order").

The Order does not rule on a number of important issues and does not address some key pieces of evidence. Most importantly, the Order does not distinguish between the two types of negligence claims that Plaintiffs brought: (I) ordinary negligence (i.e. Defendants' tree damaged Plaintiffs' residence), and (II) Defendants' negligent hiring and supervision of Sam's Tree Service. This Motion also addresses (III) breach of fiduciary duty.

I. Ordinary Negligence (Defendants' tree damaged Plaintiffs' Residence)

Plaintiffs may bring a valid negligence claim against Defendants regardless of whether Defendants acted reasonably in the hiring and supervising of Sam's Tree Service. There is evidence that Defendants' lack of inspection and maintenance of a tree on their yard caused damage to Plaintiffs' residence, and a jury could easily find Defendants liable for that damage.

1. Duty

The Order adequately addresses the issue of duty in Plaintiffs' ordinary negligence claim. It states that an inference can be drawn from the photographs on

the record (as Exhibit 14) that the subject tree was encroaching over Plaintiffs' roof in an unsound manner, thereby potentially triggering a duty to inspect and maintain the tree. *See Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 288 (Ct. App. 1986).

2. Breach

The Order ignores key evidence raising a question of fact as to the element of breach in Plaintiffs' ordinary negligence claim. The basic manner of breach in Plaintiffs' ordinary negligence claim should not be lost merely because Plaintiffs claim a separate, independent method of breach arising from Defendants' negligent hiring and supervision of Sam's Tree Service. The Court ignored ample other evidence of breach. On that end, **Plaintiffs request that the Court rule on whether each of the following items comprises at least a scintilla of evidence that could raise a question of fact as to breach of Defendants' alleged duty to inspect and maintain the subject tree:**

- a) Elizabeth Heil's testimony that there were limbs lying on and over their roof in November 2011. (Dep. of Elizabeth Heil 11:8 - 14).
- b) Sam Imler's testimony, on multiple different occasions, that there were several dead limbs fallen on Plaintiffs' roof and on Plaintiffs' yard prior to his arrival. (Dep. of Sam Imler, 12:8-10; 17:11-15; 17:21-22; 20:15-24).
- c) Sam Imler's testimony that there were three or four limbs the size of his arm hitting the roof. (*Id.*, 20:25 - 21:6).
- d) Sam Imler's testimony that there was a misplaced shingle on the roof in the area of the tree. (*Id.*, 17:20-21).
- e) Sam Imler's testimony that there was a damaged shingle on the roof that had evidence of a limb hitting it. (*Id.*, 24:14-24).
- f) Sam Imler's testimony that there was a roof cap damaged from a limb hitting it. (*Id.*, 31:14-17).

- g) **The photographs from which an inference could be drawn that the subject tree was encroaching onto Plaintiffs' roof in an unsound manner. (Dep. of Stewart Hines, Ex. 14).**
- h) **The insurance company's opinion that the subject tree rubbed on Plaintiffs' roof. (Hines prod 11).**
- i) **Mark Heil's testimony that the subject tree rubbed on Plaintiffs' roof. (Dep. of Mark Heil 14:7 – 21).**

The determination of breach is a question of fact for the jury, and the Order overreaches in finding that Plaintiffs submitted no evidence suggesting that Defendants breached their alleged duty to inspect and maintain the subject tree.

3. Causation

The Order does not reach the issue of causation and Plaintiffs request that the Court rule on this issue. Plaintiffs submitted two pieces of evidence that raise a question of fact on the issue of causation. One such piece of evidence is an insurance professional's opinion that the subject tree caused the hole. The insurance company's opinion was expressed in an email produced by Defendants. (Hines prod 11). The second piece of evidence is Mark Heil's testimony that the subject tree rubbing on the roof caused the hole in Plaintiffs' roof that led to the damages sought in this case. (Dep. of Mark Heil 14:7 – 21).

4. Damages

Damages were covered exhaustively throughout Plaintiffs' depositions. (*E.g.*, Dep. of Elizabeth Heil 29:7 – 30:7; Dep. of Mark Heil 14:7 – 21).

II. Defendants' Negligent Hiring and Supervision of Sam's Tree Service

In addition to an ordinary claim of negligence from the tree causing damage to Plaintiffs' residence, Plaintiffs have an independent negligence claim in that a jury could find Defendants' liable for their lack of exercising reasonable care in hiring and supervising Sam's Tree Service.

1. Duty

The Order does not specifically addresses whether a juror could infer that Defendants had a duty to use reasonable care in the hiring, vetting, and supervising of Sam's Tree Service. On that end, **Plaintiffs request that the Court rule on whether a juror could infer the following:**

- a) **that the alleged duty to inspect and maintain the subject tree could potentially include a duty to use reasonable care in hiring, vetting, and supervising the work of a tree contractor; and**
- b) **that Defendants undertook, gratuitously or for consideration, to render services to Plaintiffs, which Defendants should have recognized as necessary for the protection of Plaintiffs' person or things, thereby triggering a duty to exercise reasonable care in performing the undertaking. *See Russell v. City of Columbia*, 305 S.C. 86, 89-90, 406 S.E.2d 338, 340 (S.C., 1990); (Dep. of Elizabeth Heil 11:24 – 12:4; Dep. of Sam Imler 11:11 – 21; 26:2-6)**

2. Breach

Again, the Order overreaches in finding that there was not even a scintilla of evidence from which a juror could infer that Defendants did not reasonably vet or supervise Sam's Tree Service.

To recap the background info, Plaintiffs told Defendants' that the subject tree was problematic, and Defendants responding by asking Plaintiffs to provide bids from tree contractors. (Dep. of Elizabeth Heil, 12:1-4). Plaintiffs complied and gave Defendants bids from two different licensed and insured tree contractors, one for \$4,000 and the other for \$2,800. (*Id.*, 12:20 – 13:1; 20:8-17).

From there, there is copious evidence of negligent hiring and supervision. Defendants apparently ignored the bids from contractors vetted by Plaintiffs, and instead hired Sam's for \$500, less than one fifth of the price of the next lowest bid from the other contractors. (Dep. of Imler 26:2 – 28:7). The evidence suggests that Defendants made no inquiry as to how Sam's was able to perform

the tree services for such a substantially lower price. (Dep. of Stewart Hines, 41:6-15; 42:7-10; 46:3 - 47:2). Defendants' testimony suggests an inference that Defendants did not do anything whatsoever to vet Sam's prior to retaining them. (*Id.*, 37:6 - 48:4).

Instead, Defendant testified that Plaintiffs referred and authorized Sam's to do the work, thereby placing the onus on Plaintiffs to properly vet and supervise. (*Id.*, 37:9-10; 39:20-22; 40:7-8; 40:22-25). Not only does Plaintiffs' testimony directly contradict Defendant's testimony on this issue, but Sam Imler's testimony contradicts Defendant as well, on multiple occasions. (Dep. of Sam Imler, 7:22-25; 17:8-11; 32:17-24; 48:6-10). In an apparent attempt to reconcile Defendant's story that Plaintiffs authorized Sam's, Defendant testified that he had never heard of Sam's before this job. (Dep. of Stewart Hines, 41:16 - 19). However, Sam Imler testified that he had worked for Defendants on other houses prior to working at Plaintiffs' house. (Dep. of Sam Imler 18:6-10; 19:11-13). A jury could reasonably infer from the above evidence that Defendants are not credible and hired a company whose estimate was unreasonably too low compared to other qualified bidders.

The inferences of unreasonable vetting do not end there. A juror could infer that when a neighbor sends a worker to another person's house, that neighbor should ensure the worker at least is insured, especially for the type of work here, tree removal. The jury could also infer that a reasonable neighbor would ensure that the tree contractor used documented, experienced workers with adequate oversight. Defendants testified that they did no such things. (Dep. of Stewart Hines, 40:22 - 41:2; 44:19 - 45:5).

Additionally, the record includes evidence of unreasonable supervision. A juror could make an inference that Defendants should have checked Sam's work, if for no other reason to ensure that the tree no longer encroached onto Plaintiffs' property. Alternatively, a juror could infer that Defendants should have in-

formed Plaintiffs' that the work was complete so that Plaintiffs could check Sam's work. Defendants neither visited the property to check Sam's work, nor informed Plaintiffs that Sam's performed the work, until after the damages had badly exasperated. (Dep. of Stewart Hines 57:5 - 13; Dep. of Elizabeth Heil 13:9 - 20). Much like Defendants did nothing to vet Sam's, they did nothing to supervise or ensure the adequacy of Sam's work either.

The existence of breach is a question of fact, and if the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury. *Estate of Haley ex rel. Haley v. Brown*, 634 S.E.2d 62, 370 S.C. 240 (S.C. App., 2006). Plaintiffs have shown copious evidence suggesting both unreasonable actions and untruthful testimony by Defendants in retaining Sam's. At minimum, a scintilla of evidence shows an inference of breach on the issue of negligent hiring and/or supervision, especially when viewed in the light most favorable to Plaintiffs. As such, **Plaintiffs seek a revised ruling from the Court giving a more detailed explanation of how they failed to submit evidence suggesting breach of Defendants' alleged duty to use reasonable care in hiring and supervising a tree contractor.**

3. Causation and Damages

A juror could infer that a tree company reasonably hired to do all tasks required to remove limbs encroaching on a roof would have discovered a hole on that roof. Although Sam's found evidence of damage on Plaintiffs' roof (Dep. of Sam Imler, 24:14-24; 31:14-17), they did not report this damage to anyone because Sam's did not know Plaintiffs. (Dep. of Sam Imler, 32:17-24). A juror could infer that Plaintiffs would have learned of this damage but for Plaintiffs' unreasonable hiring and supervision of the tree contractor.

Plaintiffs' timely knowledge of the hole on their roof would have drastically decreased the damages they incurred. Instead, the hole remained unabated for months while the damages to Plaintiffs' residence continued to exacerbate.

III. Breach of Fiduciary Duty

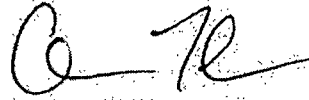
Plaintiffs argued at the hearing that the class of people comprising a fiduciary relationship here is not merely a class of one neighbor and another neighbor. Rather, the class should be framed as an absentee neighbor carrying out a task necessary for the protection of another absentee neighbor's home. There was an entrustment of property in this case, and that property was a substantial asset as well. Plaintiffs believe that this novel issue of law should be decided in finding a fiduciary relationship among the class as framed by Plaintiffs. As such, Plaintiffs respectfully request that the Court reconsider its position on fiduciary duty, and in the alternative, Plaintiffs wish to preserve this issue for appeal.

RELIEF REQUESTED

Plaintiffs respectfully request that the Court reconsider its Order Granting Defendants' Motion for Summary Judgment and issue a new order denying same. **Plaintiffs respectfully request a hearing for this Motion to Alter or Amend in the event that the Court upon reconsideration wishes to rule against Plaintiffs on any element of either of Plaintiffs' two types of negligence claims.**

Respectfully submitted,

THE CAPELL LAW FIRM, LLC



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Attorneys for Plaintiffs

March 28, 2015

Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2013-CP-27-1231

MARK AND ELIZABETH HEIL,)
)
Plaintiffs,)

DEFENDANTS, STEWART AND CHRISTINA
HINES, MEMORANDUM IN IN OPPOSITION
TO PLAINTIFFS' MOTION TO ALTER OR
AMEND THE GRANT OF SUMMARY
JUDGMENT

STEWART AND CHRISTINA)
HINES and SAM IMLER d/b/a)
SAM'S TREE SERVICE)
)
Defendants)

2015 APR 15 AM 11:32
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Stewart and Christina Hines, Defendants, by and through their undersigned counsel,
submit the following Memorandum in Opposition to the Hines' Motion to Alter or Amend
Judgment.

By Order dated March 12, 2015 and filed March 16, 2015 the Honorable Perry Buckner
granted summary judgment in favor of the Defendants, Stewart Hines and Christina Hines,
leaving only the Defendant, Sam Imler d/b/a Sam's Tree Service as a defendant in the case.

The Plaintiffs have filed a Motion to Alter that judgment making three specific claims.
First, the Plaintiffs allege that the order does not distinguish between ordinary negligence and
negligent hiring and that they presented evidence to meet all elements of ordinary negligence.
Second, the Plaintiff argues that the Court incorrectly held that the Plaintiff failed to present
admissible evidence of a breach of duty on the part of the Defendants, assuming such duty did in
fact exists. Finally the Plaintiffs contend that whether this situation presents a "fiduciary

relationship” is in fact a “novel issue of law” which should be decided by the court. This memo will respond to all three of those contentions.

INTRODUCTORY ISSUE

In responding to the pending Motion to Alter it is of note that the pending motion and the Plaintiffs action in this matter attempts in several regards to use evidence and arguments which they claim support their action for “negligent hiring” to support their claims for “ordinary negligence” and vice versa. A careful reading will reveal that critical required elements are missing for both claims causing them to fail and making the current grant of summary judgment proper.

ORDINARY NEGLIGENCE AND BREACH OF DUTY

In their Amended Complaint the Plaintiffs allege that the Defendants (Hines) 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.

The Court correctly ruled that there is simply no admissible evidence presented that would support a claim in any of these regards. Specifically, the Defendants did in fact remove the tree limbs and there was no evidence presented that it was done improperly. The Plaintiff's 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 Plaintiff, both Plaintiffs have testified to this fact (depo E. Heil p 19 ln 2 and M. Heil depo p. 13 ln 23- p 14 ln1). The Defendants 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 condition¹. In this case, the Hines 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, or any Defendant for that matter.

The Plaintiffs' attempts to characterize the testimony of Elizabeth Heil as supporting a breach of duty (p. 2 Motion to Alter 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. (E. Heil depo p 19 ln 2 and p15, ln 25- p 16, ln 4). The quotes from Sam Imler which are presented in the Plaintiffs memo are likewise unsupported in as much as his testimony invariably concludes that he did not observe the damage to the roof claimed in this case and that he did nothing improper (Imler depo p.29 ln 30; p 30 ln 5; p. 41. ln 8-9; p 42 ln 16). The Plaintiffs have the burden to put forth some evidence to prove this, and every element, and they have not presented evidence which would do so.

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. (Imler Deposition p.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. (Imler Deposition pp.6 and 11). If Sam's is found to have been negligent in this case, (which is denied) that is through no fault of the Hines, as they had no evidence that would alert a reasonable person to such likelihood of negligent performance or poor workmanship, and the Plaintiffs have put forth no evidence of that in this case. Because the Plaintiffs have the burden to set forth some evidence as to every element of

¹ The Defendants, Hines, maintain that the tree in this case was sound and not defective in any way.

their case, this failure alone is sufficient for the granting of summary judgment in favor of the Hines in this case.

However, the Defendants also demonstrated at the hearing that the Plaintiffs 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 Plaintiffs contend that the “insurance company’s opinion was expressed by email” which meets the causation requirement². This document (marked as Exhibit B to the Plaintiffs’ original memo in opposition) 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 would presumably have been available to the Plaintiffs but they have failed to try and determine whether testimony which might support the proximate cause element could in fact be obtained. This action has been pending for nearly two years and the Plaintiffs 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 Plaintiffs try to cast their negligence claim, the failure to provide an expert opinion is fatal.

BREACH OF FIDUCIARY DUTY

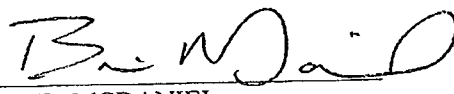
The Court held (p.3of the Order) correctly that the circumstances in this case do not create a fiduciary duty and rightly held that it is a matter for the court, not the jury to decide. The

² Motion to Alter p. 3 “Causation” paragraph

Plaintiff's attempt to revisit that matter based upon a supposed "entrustment of property" claim is not supportable. The relationship of the parties as neighbors with no business dealings does not support a finding and it does not present a novel issue with any recognized legal exception to the case law on this point. The Defendants would rely upon their original motion and supporting memorandum on this issue.

For these reasons and the reasons set forth in the Defendants Motion for Summary Judgment and as argued at the hearing, the Defendants requests that the court deny the Plaintiff's Motion to Alter the Summary Judgment motion granted in this case.

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April 13, 2015
Beaufort, South Carolina

1
2 IN THE COURT OF COMMON PLEAS
3 FOURTEENTH JUDICIAL CIRCUIT
4 STATE OF SOUTH CAROLINA
5 COUNTY OF BEAUFORT

6 MARK AND ELIZABETH HEIL,
7 Plaintiffs,

8
9
10 vs.

CIVIL ACTION NUMBER
2013-CP-07-1231

11
12
13 STEWART AND CHRISTINA HINES
14 and SAM IMLER d/b/a SAM'S TREE
SERVICE,

15 Defendants.

COPY

16 -----/

17 The deposition of SAM IMLER, a witness
18 in the above-entitled cause, taken pursuant to
19 Notice and agreement, before Cathy M. Knoettner,
20 Certified Court Reporter and Notary Public, at
21 the Offices of Coastal Court Reporting, One
22 Corpus Christi Place, Executive Center, Suite
23 107, Hilton Head Island, South Carolina, on the
24 18th day of February, 2014, commencing at or
25 about the hour of 2:10 p.m.

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1
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12 **HINES:**

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19 **ALSO PRESENT:**

20 **Charles W. Thomson**
21 **VIA TELEPHONE:**
22 **Stewart Hines**
23 **Christina Hines**

24 **I N D E X**

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 are there any other professional licenses you
3 hold, whether as a contractor or anything like
4 that?

5 A No, there's not.

6 Q For any of the work that you do, that
7 you're aware of, do you have to pull a permit,
8 like a building permit or any kind of permit?

9 A Yes, you do.

10 Q Okay. What kind of permits?

11 A You're required to purchase an ARB tree
12 removal permit, pruning permit prior to
13 beginning.

14 Q And that's typically for most
15 associations on the Island?

16 A Plantations, primarily.

17 Q Do you know the case that we're on here
18 today for Mark and Elizabeth Heil, are the
19 owners of the property, was there an ARB in that
20 neighborhood that you recall dealing with or
21 pulling a permit for?

22 A Not according to Mr. Hines who
23 contracted me. I had asked him that question if
24 we needed ARB approval or homeowners
25 association, and he was not aware of any.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 Q So you went forward with the work under
3 the assumption there was no approval necessary
4 and did work?

5 A That's correct.

6 Q All right. What about insurance, do
7 you have any kind of workers' comp or liability
8 insurance?

9 A I do not. I only have one or two
10 employees, therefore I'm not required to secure.

11 Q There's no requirement for workers'
12 comp?

13 A No, based on revenue.

14 Q And then what about any kind of
15 liability insurance?

16 A No, I do not.

17 Q Have you ever carried it?

18 A No.

19 Q Okay. What about insurance for your
20 automobiles or equipment, do you have any
21 insurance for, you know, Sam's Tree truck or any
22 kind of equipment, or anything like that, you
23 have?

24 A I have general liability and stuff on
25 my vehicles, my personal vehicles, yes.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 sent me an answer back, I think, via e-mail.
3 August 21, 2013 was the e-mail you sent back
4 back to me. And it says, In answering said
5 complaint we accessed the Heil property from the
6 adjoining tree on Mr. Hines' rental property
7 next door. I was hired to reduce and remove any
8 hazardous limbs encroaching the home. There
9 were several limbs visible that had fallen on
10 the roof prior to our arrival. I instructed my
11 tree climber to remove upon my direction three
12 to four small limbs within 4 to 5 feet of the
13 roof. It is our process to tie a rope to the
14 limb that is to be removed and lower it to the
15 ground then. We repeated this process numerous
16 times till I was satisfied with the limb
17 removals. We were not on the roof of where said
18 damage occurred. We are suspended above the
19 roof tied in with safety harnesses. Thank you
20 for your phone call, Tuesday, August 20, 2013,
21 and you got a phone number and your e-mail
22 address. Does that appear to be the letter you
23 sent me or the the e-mail you sent me responding
24 to the complaint?

25 A That's correct.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 Q Okay. Now, we filed an amended summons
3 and complaint based on some issues that happened
4 in a hearing with the Hines, and I think we
5 served that on you, and I don't think you filed
6 a response or an answer to the amended summons
7 and complaint. If the amended one didn't change
8 any allegations against you, would that response
9 that you sent in August '13 be the same to the
10 amended complaint?

11 A Yes, it would be, yeah.

12 Q Now, the employees that you have, you
13 reference an employee in here that was used in
14 the process. Are they actual employees or are
15 they 1099? Do you 1099 them or are they an
16 employee? Do you know what I'm talking about
17 when I say 1099?

18 A Yes.

19 Q In other words, are they employed, were
20 they getting paid wages or a salary, or are you
21 paying them that at the end of the year you
22 issue a 1099 to them?

23 A They are casual workers. In other
24 words, in the tree industry we interact with
25 different climbers per se. He might work for

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 one company today; he might might work for me
3 tomorrow.

4 Q Okay, I got you. And so if you have a
5 job coming up in a month you may contact a
6 climber and say, look, I've got a job coming up,
7 can you come work for me for that week?

8 A That's correct.

9 Q Okay. And then how do you pay him;
10 just issue a check?

11 A I do checks and I do cash.

12 Q Okay. When you issue the check, do you
13 take out any taxes or do you just issue them
14 the --

15 A I do not. That's up to him to file his
16 own taxes.

17 Q Do you know who the climbers or
18 employees -- the climbers or the people that
19 worked on the house for you were for the Heil
20 residence; do you know their names?

21 A Yes, I do know his name, yes.

22 Q So it's just one person?

23 A Just one person.

24 Q Who was it; what was his name?

25 A His name was Javier -- (brief pause).

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 I'm not positive of his last name. He has
3 been -- he was not a documented, and I believe
4 he has left the area.

5 Q He was not documented and left the
6 area?

7 A When I found that information out, he,
8 of course, posed a risk and I do not deal with
9 illegals.

10 Q What made you believe or think that he
11 was illegal or not documented?

12 A I asked him.

13 Q Okay. How many times have you used him
14 before you asked him?

15 A Several times.

16 Q Okay. Do you know was the Heil
17 residence the last one he worked on, or did he
18 work on a couple more before he left?

19 A He worked on several more before he
20 left. I advised him to seek validation to
21 continue.

22 Q And he was -- other than Javier and
23 you, y'all were the only two people for Sam's
24 Tree Company that were out there at the Heil
25 residence?

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 A That's the only one I used, yes.

3 Q And you don't believe Javier had any
4 kind of liability insurance, do you?

5 A No, I don't believe, no.

6 Q All right. And I sent you another, you
7 know, kind of legal document called the -- we
8 call it discovery. It's called interrogatories
9 and requests for production. They're basically
10 questions that I've asked you on paper. I sent
11 those to you and I have not seen a response to
12 those. Do you know anything about those? Have
13 you looked at them or --

14 A I did look at them.

15 Q And you haven't responded to them yet?

16 A I have not.

17 Q Okay. Is there a reason why you
18 haven't retained an attorney yet?

19 A There is no reason, no.

20 Q Have you -- and I don't want to know
21 any conversations that you've had with an
22 attorney, but have you spoke to an attorney
23 about this matter?

24 A I have not.

25 Q Have you spoke to anyone about this

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 matter?

3 A I have not.

4 Q All right. Let me ask you a little bit
5 then about kind of what you remember about this
6 project. Let's start from the top, take it from
7 the top. How did you get involved with this?

8 A Mr. Hines owns several real estate
9 properties on Hilton Head, and he called me and
10 asked me to respond to the address and give him
11 an evaluation of what I discovered. He had told
12 me there had been some limbs that had fallen on
13 the roof of this property, and upon examination
14 I got there and I saw those limbs that were
15 there on the ground. Very steep roof. You
16 can't climb onto it. You have to repel from a
17 tree down because of its pitch. And I asked my
18 climber who was there, I always ask him for an
19 observation and what you're seeing, for my
20 benefit as well as his, and he told me there was
21 a shingle misplaced and the evidence was on the
22 ground, this piece of 3- or 4-inch dead wood.
23 Typically if the roof hasn't been maintained by
24 a maintenance company, you're going to find
25 this. Trees have dead limbs and they drop those

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 limbs. So after I asked him what is the
3 situation, he said there's a limp or two hitting
4 the roof, and I instructed him to remove those,
5 which are only 3 or 4 feet above the roof.

6 Q All right. Mr. Hines that contacted
7 you, have you worked for him before this job?

8 A Yes, I have.

9 Q On other houses that he owns?

10 A Yes, I have.

11 Q Do you remember what other houses those
12 were?

13 A There is one in Bermuda Pointe which is
14 a rental home, and there is one down off Gumtree
15 Road. There's a project back -- I can't tell
16 you what it is; it's been years, been a couple
17 years. I haven't heard from him since.

18 Q That Gumtree, is that a rental, too, to
19 the best of your knowledge?

20 A It's not on Gumtree. It's a small
21 housing project off of Gumtree before you get to
22 Squire Pope Road.

23 Q Okay, I kind of know where you're
24 talking about. Was that a rental property, too?

25 A Yes, it was.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 Q So the Bermuda Pointe rental, the house
3 near Gumtree rental and then this rental here in
4 Yacht Cove, are those the three rental
5 properties for Mr. Hines that you've worked on?

6 A That is correct.

7 Q Do you know where Mr. Hines lives?

8 A I do not.

9 Q Have you ever met him?

10 A I have not.

11 Q And his first contact with you was not
12 this house but one of the other ones?

13 A I believe so, yes.

14 Q Did you talk to the renters at Mr.
15 Hines house next door to the Heils' house at any
16 time?

17 A He advised me not to interrupt with his
18 renters.

19 Q Okay. Do you know the reason for that?

20 A I did not. I knock on the door of the
21 home that I'm going to work on because there was
22 a car parked in the driveway, and I knocked on
23 the door as business but there was no answer, no
24 response.

25 Q Okay. What month was this? Do you

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 remember what month it was? November-December
3 time frame, or was it spring? I can't remember.

4 A It was before Christmas, yes. I think
5 it was October-November.

6 Q Okay. There was a car in the driveway
7 but no answer when you knocked on the door?

8 A No answer.

9 Q All right. And then the tree -- the
10 limbs that you saw above the roof, that tree was
11 located on the Hines' property; is that right?

12 A Yes, that is correct. The tree was
13 growing over the adjacent property above the
14 chimney.

15 Q And so it sounds like the tree that was
16 on the Hines' property was growing over the
17 Heils' residence and some of the limbs had
18 already fallen to the ground, and some of the
19 limbs that you had removed were still above the
20 house?

21 A That's what I observed, yes.

22 Q Did you remove the dead limbs that were
23 on the ground?

24 A Yes.

25 Q Okay. And if you would, go through

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 with me again how much of the limbs you removed
3 that were still attached to the tree that were
4 above the roof?

5 A There were three or four maybe the size
6 of my arm, to be descript, hitting the roof, and
7 we removed those by attaching a rope to them --
8 because of the severity of the roof, you can't
9 stand on it, we attached a rope to it, it was
10 proper procedure. My climber cuts them and then
11 he lowers them down to my ground man and me.

12 Q How does your climber get to the top of
13 the tree?

14 A The procedure is called repelling. You
15 simply throw a line or a rope up over a huge or
16 large limb and with his safety equipment, his
17 belt, he repels up the rope and then as needed,
18 he maneuvers around, throws a safety line up so
19 he can maneuver around and attach the rope to
20 the limbs that he's going to remove.

21 Q How high did he get in relation to the
22 roof when he was doing his work at the house?

23 A Probably 3 or 4 feet above the material
24 that he was cutting.

25 Q Did he ever get above the ridge line of

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 company knew how to prune a tree.

3 Q Okay. So if we go out there and look
4 at that tree, we can see where your cuts are and
5 know that your cuts are proper --

6 A That's correct.

7 Q All right. Was there any evidence that
8 anybody else had done any kind of maintenance to
9 that tree that you're aware of?

10 A No. Upon examination by my climber, I
11 saw evidence on the ground -- the reason why
12 somebody called me to go look at the tree or the
13 house, because there was limbs on the ground.
14 So my climber advised me that there was a
15 shingle damaged, and we proceeded to remove
16 three or four more limbs to prevent that from
17 happening?

18 Q Okay. And the shingle that was damaged
19 that he saw, was it a shingle missing, what --

20 A Damaged.

21 Q Damaged. What kind of damage was it?

22 A A dent. He told me it had evidence of
23 a limb hitting that, which they're asphalt,
24 they're not hard. They will take a dent.

25 Q Was it on the ridge line or was it on

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 branches?

3 A That's a very good question. In Sea
4 Pines or any other plantation that has an ARB,
5 the language is if your tree on your property
6 encroaches my home, I can legally remove that
7 limb, or limbs, without any repercussions from
8 you.

9 Q So if Sea Pines, if it's a live oak and
10 that branch is growing onto my property, I can
11 go cut it off?

12 A Absolutely.

13 Q Okay. Probably have to get an ARB
14 approval, I would think.

15 A It's best to let them know to prevent
16 any litigations.

17 Q Are there instances, though, where
18 you've been paid by the property owner to cut
19 the limbs on other property?

20 A No, they do not do that. It's the
21 responsibility of the homeowner that if he wants
22 that done, he agrees to pay for it.

23 Q Okay. Did you question anything about
24 Mr. Hines agreeing to pay for this limb removal
25 on the Heils' property?

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 A I did not. That's normal procedure.

3 Q Do you remember how much you were paid
4 for?

5 A I do.

6 Q How much?

7 A Five hundred.

8 Q How long were you out there for?

9 A Two or three hours. From the time we
10 arrived till we get our equipment, dressed, we
11 go up and look at the situation, discuss it
12 and -- it's a very tedious situation. It's just
13 not a bunch of chainsaw work. You have to put
14 yourself in position.

15 Q And you never did climb up there, did
16 you; only Javier?

17 A My climbing days are over, sir.

18 Q All right. After you removed the
19 limbs, what did you do next?

20 A After I removed the limbs, I load them
21 onto a truck and dispose of them.

22 Q Did you contact Mr. Hines and talk to
23 him at all after you had finished your work?

24 A I did.

25 Q Okay. Tell me about that conversation.

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 A Yes.

3 Q Okay. And the photo you're pointing
4 to, there was some damage; one of the limbs was
5 touching that area?

6 A Yes.

7 Q Okay. What about the other photo where
8 it has a hole in the ridge cap?

9 A My climber described to me that there
10 was a dent in the ridge cap shingle. This,
11 somebody has taken the initiative to remove
12 that.

13 Q What makes you say that?

14 A My climber advised me that there was a
15 dent in the roof cap from a limb hitting it.
16 This is subsequent work by somebody who probably
17 wanted to assess the damage.

18 Q Have you been out to the roof since
19 then, looked at the roof since your work there?

20 A Yes.

21 Q When did you go --

22 A I haven't been up on the roof; let me
23 clarify that. I've been there trying to
24 ascertain exactly what I said. You could see
25 the two cuts that we made right there by the

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1 CAPELL - IMLER (DIRECT EXAMINATION)

2 chimney that were about the size of my arm. I
3 wanted to be specific in knowing exactly how big
4 they were.

5 Q Did you see any evidence of shingles on
6 the ground or shingle material on the ground
7 when you were there?

8 A I don't recall that.

9 Q What's the normal procedure for you if
10 your worker or you do spot a damaged shingle; do
11 you normally report that to the owner?

12 A I do. However, in this case I did not
13 have any pertinent information of the owner. I
14 reported to Mr. Hines that -- I did not report
15 that there was a dent in the shingle. I
16 reported what we accomplished.

17 Q Did you make any attempt to -- other
18 than knocking on their door at the beginning --
19 the house door at the beginning of starting the
20 work; after your completion of the work and
21 after Javier noticed the dented shingle, did you
22 make any attempt to contact the Heils at all
23 after that?

24 A I did not know who the owner was.

25 Q All right. After your conversation

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1 McDANIEL - IMLER (CROSS-EXAMINATION)

2 I don't have my agreement with me -- to observe
3 this. And, of course, I couldn't observe it
4 until I sent my climber up, and that was the
5 extent of it.

6 Q And I'm talking about the Heils; not
7 the Hines but the Heils. Do you believe you've
8 had some contact with Mr. or Mrs. Heil?

9 A I did not. I did not know who the
10 owner was until Mr. Hines.

11 Q Okay. Have you done any other work for
12 the Heils that you can recall?

13 A I did three projects for Mr. Hines.

14 Q Okay. And I understand that and I know
15 the names are similar; I'm probably confusing
16 you. But I'm talking about the owners of this
17 house that we looked at in the photo, the
18 Exhibit A photo, have you done any other work
19 for them --

20 A No.

21 Q -- the plaintiffs in this case, the
22 Heils?

23 A No. This evidence here, if I can make
24 an observation, this is --

25 Q And you're looking at Exhibit A.

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1 STATE OF SOUTH CAROLINA
 2 COURT OF COMMON PLEAS
 3 COUNTY OF BEAUFORT
 4 MARK and ELIZABETH HEIL,
 5 Plaintiffs,
 6 vs. CASE NO. 2013-CP-27-1231
 7 STEWART and CHRISTINA HINES
 8 and SAM IMLER, d/b/a SAM'S TREE
 9 SERVICE,
 10 Defendants.

10 DEPOSITION OF: ELIZABETH HEIL
 11 DATE: June 27, 2014
 12 TIME: 10:14 AM
 13 LOCATION: 1901 Boundary Street
 14 Beaufort, SC
 15 TAKEN BY: Counsel for the Defendants.
 16 REPORTED BY: MARIE H. BRUEGGER, Registered
 17 Professional Reporter, CRR

18
 19
 20
 21 A. WILLIAM ROBERTS, JR., & ASSOCIATES
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 (803) 731-5224 (864) 234-7030 (704) 573-3919

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10 ATTORNEYS FOR THE DEFENDANTS
11 STEWART and CHRISTINA HINES and SAM
12 IMLER, d/b/a SAM'S TREE SERVICE:

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19 ALSO PRESENT:

20 Mark Heil

21 (INDEX AT REAR OF TRANSCRIPT)

22
23
24
25
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1 background about you.

2 A. Sure.

3 Q. What is your current address?

4 A. 245 Wilkerson Drive, Mount Washington,
5 Kentucky, 40047.

6 Q. And how long have you lived there?

7 A. 2007 we purchased, and we moved there
8 July 2007.

9 Q. And prior to that, where did you live?

10 A. Seven Belhaven Way.

11 Q. And is that the property that the
12 litigation is involving?

13 A. It is.

14 Q. And that is on Hilton Head?

15 A. It is.

16 Q. And how long had you lived there
17 before July of 2007?

18 A. We had the house built in 1998, and we
19 made the full in 2000.

20 Q. It was completed in 2000?

21 A. Yes.

22 Q. And who built the house for you?

23 A. It was Bay Homes, Buddy Cheek, same
24 builder that our neighbors' home was built by.

25 Q. So after 2007, what was the status of

Elizabeth Heil - June 27, 2014

6

1 the Seven Belhaven Way house?

2 A. It was our secondary home.

3 Q. Did you rent it out after that period?

4 A. Not during 2007 and 2008, but as of
5 2009, yes.

6 Q. And what kind of rental situation did
7 you have? Was this vacation rentals, or was it
8 more long term?

9 A. No. It was a long term. It was
10 actually a friend of Mark's and mine, Connie
11 Schwartz. Her husband had died unexpectedly and
12 kind of left them homeless. She's a property
13 manager for Diamond Realty Company, and part of
14 the agreement was that she was to maintain the
15 home. Any repairs and that that needed to be done
16 on it was performed by her.

17 Q. And how long was she in the home?

18 A. Connie moved in probably May of 2009,
19 and then she moved out August of 2011.

20 Q. After August of 2011, was there
21 anybody -- was it put back up for rental at that
22 point?

23 A. No, it wasn't. We actually went down
24 in 2011, after she moved out, just to do a
25 once-over/look-over, check on everything and that,

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1 were doing her move-out inspection.

2 Q. After that, I think you said -- well,
3 let me ask you again, just to make sure I'm clear.

4 After Connie moved out in August of
5 2011 and you did the inspection at the end of that
6 month, what was the next thing that happened with
7 the property, if anything?

8 A. We went back down again in November of
9 2011 for Thanksgiving with the family, and at that
10 time, Mark had gotten up on the roof, you know, to
11 clean off the leaves, the pine needles, the oak
12 leaves, whatever that were up there, and the tree
13 limbs were laying on and over our roof at that
14 time, so we had taken pictures and that.

15 After he had come down and was talking
16 about those limbs being on the house, and it's
17 something that he could not physically do, because
18 of the size, I went next door to Jim's house, Jim
19 Fritz, who is Mr. Hines's tenant. I had asked Jim
20 for Mr. Hines's telephone number, because I wanted
21 him to address the tree situation for us. Jim
22 would not give us the telephone number. He said
23 he will call them himself.

24 So later that day, Jim came back over
25 to the house, said he had spoke with Mr. Hines,

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12

1 and Mr. Hines said to -- for me to go and get
2 estimates from different tree companies and then
3 fax him the estimates and that, and he'd decide
4 which one he would go with.

5 So Jim gave me the telephone number.
6 I took the pictures, so I'd have copies of it for
7 Mr. Hines, in case he needed verification, since
8 he does not live here. He's never lived in the
9 house. I've never met the man. That's just how
10 we process, by before/during/after pictures.

11 And that was all of that. We did our
12 basic routine. We winterized the house and that
13 before we left, because we didn't know if we would
14 be back in January or February, and we went home.

15 Q. You say you took the phone number
16 from --

17 A. The fax number was all I was given for
18 Mr. Hines, to contact him, and that was to send
19 any quotes that I got off the trees.

20 Q. And did you get quotes for the trees?

21 A. I called probably about four to five
22 contractors. I got two estimates that I did send
23 him. One was from Bob's Tree Service and one was
24 from Southeastern, and I don't remember which one
25 was which, but one was \$2,800 and the other one

1 was \$4,000 to do it.

2 Q. And then when did you get that faxed
3 to him?

4 A. I would say probably somewhere in
5 December to January, first part of January of
6 2012.

7 Q. And what happened then? What response
8 did you get on that?

9 A. I never got a response from Mr. Hines.
10 I never heard from him. I called him roughly
11 somewhere around April of that month to find out
12 where we were with the tree services and that,
13 because we were getting ready to go back down to
14 the house, and he said: We have had -- he says:
15 I had those trees done long ago. And I said: Oh,
16 well, I never heard from you. He said: Well,
17 they've been done long ago. You shouldn't have a
18 problem. So I was ecstatic, thinking, hey, the
19 trees are done. I don't have to go down and worry
20 about this.

21 Q. Let me back up to November, I guess
22 the end of November and Thanksgiving, when y'all
23 had come down there. Was there other family that
24 met you at the house?

25 A. Our daughter, our son-in-law, my

1 yesterday, I actually got up on there.

2 Q. Back in November of 2011, were you
3 able to see any damage to the roof from where you
4 were at that time?

5 A. No, sir.

6 Q. Did your husband report to you any
7 damage of the roof at that time?

8 A. He didn't report any damage that he
9 could see. He had a concern because of how the
10 tree limbs were, and he did not -- I don't
11 remember if he told me he felt that it was laying
12 on the roof. I don't remember. It's been almost
13 three years.

14 Q. But he got up there and looked at it?

15 A. Yes, and it was a concern to him.

16 Q. Did you make any observations about
17 the tree itself, other than it was over your
18 property? Did you notice anything of concern
19 about the tree?

20 A. Well, I had noticed that, apparently,
21 he had had other branches or trunk parts cut off
22 of it in the past.

23 Q. And were those parts that went towards
24 his property or towards your property? Do you
25 know?

20

1 A. There's one that was towards our
2 property. I couldn't tell you when it was done or
3 by whom.

4 Q. Did you see anything that indicated to
5 you that the tree was rotten?

6 A. That the tree was rotten, no. It's
7 alive.

8 Q. So do you have any independent
9 knowledge about when the limb work was actually
10 done?

11 A. I have no idea when Mr. Hines did it.
12 I was never told. I was never told he went with
13 somebody, and as to who he went with, I never
14 provided any estimate. I never even called a
15 Sam's. I went through the phone book, and I
16 looked for anybody that said licensed and insured,
17 and that's who I went with.

18 Q. And you sent him, you believe, two
19 estimates?

20 A. Yes.

21 Q. Do you know if you sent him just two?
22 Could you have sent him three or more?

23 A. No. I sent him only two, because I
24 know for a fact I had called four contractors, and
25 only two actually got back with me and went out to

1 observe it until at least April of 2012?

2 A. I'll be quite honest with you, I don't
3 even see -- Mark had to point out to me yesterday
4 as to what limbs were even cut, because I could
5 not really tell a difference, except for where the
6 hole was now exposed to us when we got down there.

7 Q. And so tell me, in the end of April of
8 2012, what happened at that point when you came
9 for vacation?

10 A. When we came down. Well, as soon as
11 we walked into the house, we knew something was
12 wrong. The back wall had mold on it. It had a
13 horrible smell in the house. We had water stains
14 all over our ceilings. The family room closet was
15 wet and had mold growing on that. The dining room
16 area, it was wet and molded. Up on the third
17 floor, in the bedroom and the closets, down the
18 wall, the back part of the wall, was all wet and
19 molded.

20 And at that time, that's when Mark got
21 up on the roof and discovered the hole in the -- I
22 think it's called a ridge cap for the shingles and
23 that, and that's where it had -- the limbs had --
24 originally had been laying, I guess, to do that.
25 I don't know.

1 And at that time, we were just beside
2 ourselves with the mess in the house and not
3 knowing what to do and coming down for vacation
4 and now looking at maybe something potentially
5 really harmful to us with the mold and whatever
6 other problems that be, so we had called our
7 insurance agent.

8 Q. Could you tell, from looking at it,
9 how long that problem had been developing?

10 A. I actually never saw this, except by
11 pictures, because I wouldn't get up on the roof.

12 Q. I'm not talking about the roof. I'm
13 talking about the things you were talking about in
14 the house that you did see.

15 A. Repeat the question again. I'm sorry.

16 Q. Sure. You talked about there being
17 mold on several walls and water stains and wet
18 closets and all that, and I'm asking for the
19 things that you observed, did you get some sense
20 of how long those problems had been developing?

21 A. Well, just having to do mold
22 remediation and that, we know quite a bit about
23 mold and what we were looking at, and this just
24 wasn't regular mold, it was black mold. So mold
25 starts to form within three to five days after

1 solicit him for business, and they could not even
2 tell you what kind of tree and that that it was.

3 Q. Tell me what else in this case that
4 you brought against the Hineses that you believe
5 was damaged or a loss that you suffered, other
6 than the roof damage and the water damage that
7 we've discussed already.

8 A. Well, we have the \$15,000 -- over
9 \$15,000 of our own money that had to come out of
10 our account that we had, MMI, which is my
11 husband's company, to fix the house, the other
12 damages. So those damages were done, and there
13 was nothing that was charged for the labor. What
14 we paid for and charged for was just the materials
15 and that that we had to come out of pocket for on
16 that.

17 We also have loss of any use of the
18 property for all of this time. We have the loss
19 of any rental potential, which was \$1,800 a month.
20 We were also out my husband's income, which he
21 makes anywhere from 25- to \$3,500 a week, while we
22 were gone down here trying to get this taken care
23 of. We've got all of the expenses incurred for
24 coming down, trying to fix this.

25 Q. What work did MMI do?

1 Q. I understand. So you were nodding
2 your head yes?

3 A. Yes.

4 Q. I just wanted to be clear. So you're
5 saying that pretty much -- well, most years you'd
6 be down there about four times a year, once in the
7 spring, tell me again, twice in the fall?

8 A. No. Once in the spring, possibly up
9 to twice in the summer, then we'd go down in
10 November and December time frame.

11 Q. And then all those visits, you would
12 normally do maintenance to the house, including
13 cleaning off the roof?

14 A. Had to, yes.

15 Q. There's some claim in the course of
16 this case that the Hineses tried to use the least
17 expensive of the four estimates. Are you familiar
18 with that allegation or that claim?

19 A. All that I know is what he told me is
20 that Sam's Tree Service was the least expensive
21 company, and that's why he went with them.

22 Q. So who told you that, Mr. --

23 A. Mr. Hines.

24 Q. And when did he tell you that?

25 A. When he and I had the conversation

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1 when I called to tell him that we had the damages
2 on the roof.

3 Q. He told you that in April? I think
4 you said that was April?

5 A. 2012, yes.

6 Q. What other conversations have you had
7 with either Stewart or Christina Hines?

8 A. Never any with his wife.

9 Again, as I told you, the first time I
10 spoke with him was the time in April 2012 before
11 we went down to discuss if the trees had been
12 done, and that's when he told me they had already
13 been done.

14 And then the next time I spoke to him
15 is when we came down and we found the mess. I
16 actually called him and got him on the phone and
17 spoke to him and told him, and he said: I don't
18 know anything that you're talking about. That was
19 done a long time ago. And he said: I'm going to
20 get ahold of the tree service company.

21 He later called back. I did not
22 answer the phone. I took the message, and that
23 was the message that he told me that they're not
24 responsible for anything, that he used a bucket
25 truck, they were never on our roof, and that

1 Mr. -- I don't know Sam's name, had told him that
2 I was there, and I knew all about that.

3 Q. And he's relating to you what he says
4 he was told by Sam?

5 A. Correct.

6 Q. Other than being neighbors, do you
7 have any other dealings with the Hineses, either
8 Mr. Hines or Mrs. Hines?

9 A. Like I said, we've never even met
10 them. They've never lived in that house. I know
11 nothing of them.

12 But I'm very -- I'm very stunned to
13 know that Mr. Hines, being the gentleman that he
14 is and the rental properties they have, would not
15 find out before he hired someone to do any type of
16 work on his house or someone else's, that he
17 didn't ask that they were insured, licensed, or
18 bonded. To me, that's not a real smart thing. I
19 mean, any time we do a job, we have to provide our
20 insurances, everything. And the ones that I sent
21 him, which was Bob's and Southeastern, were,
22 again, all licensed, bonded, and insured
23 contractors.

24 Q. I didn't ask you this before, but I
25 wanted to. Have you been involved in any other

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1 litigation in the last ten years?

2 A. Yes.

3 Q. In Beaufort County?

4 A. Yes.

5 Q. Tell me generally what those cases
6 have been.

7 A. My company was sued for past-due
8 advertising bills with Sands Publishers that my
9 realtors did that I was held responsible for.

10 Q. Anything else?

11 A. That's it.

12 Q. Have you initiated any lawsuits in
13 Beaufort County in the last ten years?

14 A. In the last ten? No.

15 Q. Have you gotten an opinion from
16 anybody that you're aware of as to when the water
17 damage began?

18 A. An opinion?

19 Q. Yeah.

20 A.. Yes.

21 Q. And by that I mean anybody who did
22 work and has a basis for their opinion more
23 than -- anybody who did work on the property that
24 has given an opinion to you.

25 A. Yes.

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1 Q. And who is that that's given an
2 opinion?

3 A. Mr. Garwood, who was the insurance
4 adjustor that came out to the house, first time he
5 saw it. He was actually the one that told us that
6 that's what it was from.

7 Q. He said that the first day he saw it?

8 A. Yes, as soon as he got up on the roof.
9 He examined where the tree was, where they cut it
10 off. Also, Service USA --

11 Q. Let me go back to Mr. Garwood for just
12 a second. I'm sorry to interrupt you.

13 A. That's okay.

14 Q. He told you that the water damage
15 resulted from the tree limb damage to the roof?

16 A. Yes, sir, that that's what caused the
17 hole in our roof was the tree limb. He could tell
18 by being up on the roof and where the tree was cut
19 and how it was that that's definitely what caused
20 the hole.

21 Q. And did he give you a time frame as to
22 how long the roof damage had been ongoing?

23 A. He said probably a couple months, that
24 the limb had probably just sat on there for a
25 while and just rubbed back and forth with the

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1 wind, kept rubbing back, and that that year, 2012,
2 was -- I would say from January to the time he was
3 there in May, was the heaviest rain season that
4 Hilton Head had had up to date, and he said, he
5 quoted, it's from that tree limb, and that you
6 need to get an attorney.

7 Q. And so your understanding from him was
8 the damage was actually caused by the tree limb
9 blowing and rubbing against the roof itself?

10 A. Correct. That's what caused the hole
11 in the shingle.

12 Q. Who else have you gotten an opinion
13 from as to the cause of the damage?

14 A. Mr. Manning, with Service USA.

15 Q. And what was his opinion that he told
16 you?

17 A. Same thing, that the damages within
18 the inside of the house and that resulted from
19 water coming through the hole in our roof being
20 exposed for as long as it was. They could not
21 tell me as to how exposed -- how long it was
22 exposed, but it was for a period of time.

23 Q. And he wasn't able to give you a time
24 frame as to how long it would take for that water
25 damage to occur?

1 A. Well, common sense, I would think,
2 within the first one or two rainstorms, that's it,
3 for the house, but it would probably, as I said,
4 Mr. Garwood, probably months of it being open as
5 it was.

6 Q. But Mr. Manning, I was talking about
7 him specifically. And I understand you can draw
8 certain conclusions or assumptions, but I just
9 want to know what they told you specifically, if
10 anything, about how long it had been an ongoing
11 problem, how long it had been --

12 A. A date or time or anything specific,
13 Service USA couldn't tell me, only that it
14 resulted from this occurring, this being the hole
15 left over.

16 Q. A hole in the roof?

17 A. Exactly.

18 Q. But they couldn't tell you if it was a
19 hole there a month ago? Six months ago? They
20 didn't give you any time frame as to how long that
21 hole had been exposed and water had been coming
22 through? Based on the damage, they didn't tell
23 you that?

24 A. They didn't give a definite date and
25 time; they only said once the limb was removed.

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1 STATE OF SOUTH CAROLINA
 2 COURT OF COMMON PLEAS
 2 COUNTY OF BEAUFORT
 3 MARK and ELIZABETH HEIL,
 4 Plaintiffs,
 5 vs. CASE NO. 2013-CP-27-1231
 6 STEWART and CHRISTINA HINES
 7 and SAM IMLER, d/b/a SAM'S TREE
 7 SERVICE,
 8 Defendants.

9
 10 DEPOSITION OF: MARK HEIL
 11 DATE: June 27, 2014
 12 TIME: 11:45 AM
 13 LOCATION: 1901 Boundary Street
 14 Beaufort, SC
 15 TAKEN BY: Counsel for the Defendants
 16 REPORTED BY: MARIE H. BRUEGGER, Registered
 16 Professional Reporter, CRR

17
 18
 19
 20
 21 A. WILLIAM ROBERTS, JR., & ASSOCIATES
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14 BY: BRIAN D. MCDANIEL
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19 ALSO PRESENT:

20 Elizabeth Heil
21
22
23
24
25

(INDEX AT REAR OF TRANSCRIPT)

14

1 A. Correct.

2 Q. And you'd indicated before -- let me
3 ask you, do you know how the damage that you see
4 in Exhibit 4, and really all of the damage that
5 you see in Exhibits 4, 7, and 5, the mechanism of
6 how that would have occurred, that is, do you know
7 what caused that damage?

8 A. I know what caused it, but I can't --
9 how do you say it? In my mind, I know what caused
10 it.

11 Q. And what would that be?

12 A. The tree limb.

13 Q. And how did it cause it?

14 A. I think the limb was laying on the
15 ridge of the roof, and with the wind blowing, the
16 limb would sway back and forth and just rubbed a
17 hole in the roof.

18 Q. And would you agree with what your
19 wife testified to with regard to the damages that
20 you're seeking in this case?

21 A. Yes.

22 Q. And that is that the roof was
23 repaired, but there's internal termite-related
24 damage that you're seeking the Hineses to cover?

25 A. Yes.

1
2 IN THE COURT OF COMMON PLEAS
3 FOURTEENTH JUDICIAL CIRCUIT
4 STATE OF SOUTH CAROLINA
5 COUNTY OF BEAUFORT

6 MARK AND ELIZABETH HEIL,
7 Plaintiffs,
8

9
10 vs.

CIVIL ACTION NUMBER
2013-CP-07-1231

11
12
13 STEWART AND CHRISTINA HINES and SAM IMLER d/b/a
14 SAM'S TREE SERVICE,
15 Defendants.
16 -----/

COPY

17 The deposition of STEWART M. HINES, a
18 witness in the above-entitled cause, taken
19 pursuant to Notice and agreement, before Cathy
20 M. Knoettner, Certified Court Reporter and
21 Notary Public, at the Bluffton Magistrate
22 Courthouse, 4819 Bluffton Parkway, Bluffton,
23 South Carolina, on the 17th day of October,
24 2014, commencing at or about the hour of
25 12:50 p.m.

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ALSO PRESENT:

Christina Hines,
Elizabeth Heil (Appearing Via Telephone)

I N D E X

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 Q Right.

3 A -- buyers out there -- you know.

4 Q Well, I don't care if it's right on the
5 money, but it would be a fair statement that
6 it's not worth more than twice than that, nor is
7 it worth less than half of that?

8 A I honestly have no opinion.

9 Q Okay, that's fine.

10 And do you currently have tenants in
11 place at 9 Bellhaven?

12 A Yes, sir.

13 Q And what are their names?

14 A Jim Fritz and Jeff Holly.

15 Q Okay. They've been there for a while,
16 haven't they?

17 A Yes, sir.

18 Q How long have they been there?

19 A I believe since 1999, around there.

20 Q Oh wow. Were they the first people who
21 moved into it?

22 A Yes, sir.

23 Q How much rent do they pay?

24 A Right now?

25 Q Uh-huh (affirmative).

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 Q You said she authorized the work to be
3 done?

4 A Yes. She called me.

5 Q She authorized --

6 A She initiated it. She called me,
7 asking to cut the limbs and pay for it.

8 Q She authorized who to do the work?

9 A We recall that she recommended using
10 Sma's during that conversation.

11 Q Did she send you an estimate from
12 Sam's?

13 A No, I don't have a fax. I never
14 received any estimate from her, and I never got
15 any estimates.

16 Q You don't recall receiving an estimate
17 from Box Tree Service for Mrs. Heil?

18 A No, no, no. I don't have a fax.

19 Q You don't recall receiving an estimate
20 from Southeast Tree Service from Mrs. Heil?

21 A No, no. If I did, I'd have a copy of
22 it. I do not. I did not get any estimates. I
23 did not receive any from Ms. Heil, absolutely.
24 I mean, she may have thought she sent them. I
25 didn't receive any. Absolutely did not receive

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 any. And I absolutely did not get any. I just
3 paid for Sam's as a good neighbor.

4 Q Okay, we'll get back to that later.

5 Did your tenants ever contact you
6 regarding this tree?

7 A I don't recall. We have lots of
8 conversations over time over the years. I just
9 don't recall. It's been so many years ago.

10 Q Do you think it's possible that the
11 Heils contacted your tenants about the tree
12 being a problem and the tenants consequently
13 called you instead of Mrs. Heil contacting you
14 directly?

15 A Mrs. Heil absolutely called me. Hand
16 on my father's grave, she called me late
17 November-early December, swear to God; on my
18 life, swear to God, she called me. She may have
19 said she didn't but she called me; strike me
20 dead if that's a lie. I don't recall all the
21 conversations I had with Jim and Jeff, my
22 tenants.

23 Q Do you remember the status of that tree
24 the last time you visited the property in 2011?

25 A I do not remember the status of it, no.

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 Q Do you ever remember thinking it would
3 be a problem until Mrs. Heil contacted you?

4 A I do not recall.

5 Q Did you ever have any interaction with
6 Connie Schwartz, the Heils' tenant?

7 A Don't know a Connie Schwartz; don't
8 believe I've ever spoke to her.

9 Q Are you aware of any action between
10 Connie Schwartz and your tenants specifically
11 regarding the tree?

12 A No.

13 Q So once you knew there was a problem
14 with the tree, what did you do? Did you ask the
15 Heils to obtain estimates?

16 A As I said, Mrs. Heil called me, she
17 told me who she was, and she says, are you aware
18 there's a large live oak over in your yard
19 extending over my roof; we'd like for you to pay
20 to have it cut. I said okay. And all I
21 remember is that and that she recommending using
22 Sam's. And maybe Sam's called me or I called
23 Sam's, but that basically -- she called me
24 telling me of the problem and then within a week
25 Sam's came and cut it out, cut the tree limbs on

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 December 7th; that's a fact.

3 Q So you called Sam's yourself?

4 A I don't recall whether I called Sam or
5 Sam called me or my tenants called Sam. All I
6 know is I paid for Sam, an independent
7 contractor. Mrs. Heil authorized Sam and
8 recommended Sam. I just paid for him. I don't
9 recall how Sam's came about but, you know, I
10 read later that Ms. Heil had got some estimates
11 back, but I had never seen any of them.

12 Q Did you make contact with any tree
13 companies other than Sam's for this issue?

14 A No, I don't recall.

15 Q Did you make any inquiry as to whether
16 Sam's was insured?

17 A At that time, no. I assumed maybe he
18 probably was. I just thought he was just going
19 to go trim some limbs at the request of Ms. Heil
20 and that was her responsibility. I was just
21 paying as a good neighbor for it.

22 Q Do you think it would have been prudent
23 to have ensured that tree contractor had had
24 insurance?

25 A I think Ms. Heil should have determined

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 that. As I said, I was just paying for her
3 contractor to do the work that she recommended,
4 so that's between her and him; that's between
5 Sam and the Heils.

6 Q Did you discuss with Sam's the means
7 and methods he would use to cut the tree?

8 A No, no.

9 Q Do you think it would have been prudent
10 to have done that?

11 A No opinion. I would have left that
12 between the Heils and Sam. I live four hours
13 away. I was called to do this work. I said,
14 okay, I'll pay for it. It was done with no
15 problems, as I was told.

16 Q Have you used Sam's Tree Service
17 before?

18 A Not before, no, sir, never before.
19 Didn't even know him. I used him afterwards
20 twice and that was it, just to remove some
21 brush.

22 Q Okay. And you didn't contact any other
23 tree companies other than Sam's for this?

24 A No, no, sir. As I said, I didn't, and
25 I did not get any estimates.

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 Q Is it your testimony that the Heils
3 directed Sam's to get an estimate?

4 A The Heils directed Sam to do the work,
5 recommended me to use Sam's -- repeat the
6 question one more time.

7 Q I'll rephrase. Did you ask Sam's for
8 an estimate?

9 A I don't recall. I just said I'd pay
10 for it, and I did, like \$500.

11 Q How did Sam's --

12 A I never got an estimate from Sam, to
13 answer your question. A written estimate, no.
14 I would have a copy of it and I don't. He
15 called me the day it was done. He said,
16 Stewart, we finished the work, no problems,
17 \$500. I said okay. I mailed him a check.

18 Q You didn't discuss the means and
19 methods with him of how he was to do the work?

20 A No, sir. I assumed he knew what he was
21 doing.

22 Q Did you ask him to do the work
23 economically?

24 A No.

25 Q Did you tell him to do whatever it

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 takes to do it right?

3 A I don't recall. We didn't have much
4 discussion.

5 Q Do you have any discussion about a
6 bucket truck?

7 A No.

8 Q Or pulling ropes?

9 A He told me later in an an e-mail and
10 verbally that that's what they did; they climbed
11 up on a tree and lowered each branch one by one
12 using ropes and didn't get on the Heils' roof;
13 that's what he told me after he cut, you know.
14 He sent me an e-mail to that effect. I believe
15 that's what that e-mail that's blurred says.

16 Q Okay.

17 A But after the work was done.

18 Q Did you ever mention to the Heils that
19 Sam's used a bucket truck to do this work?

20 A No, because the only conversation I had
21 with Ms. Heil was one, like I said, in late
22 November or early December when she asked to do
23 the work, she authorized it. Then when she
24 called me back on May 24th or '5th -- I believe
25 it was May 25th -- to tell me that she believed

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 either Sam saw or caused the damage. But, no,
3 there was never a discussion in our phone
4 conversations about a bucket truck.

5 Q You don't recall leaving Mrs. Heil a
6 voice mail saying that Sam's used a bucket truck
7 to do the work?

8 A Voice mail. She's never left me a
9 recording that I recall.

10 Q I asked do you recall leaving her a
11 voice mail stating that Sam's using a bucket
12 truck.

13 A I did leave Ms. Heil a voice mail. I
14 don't know what -- I said whatever Sam told me
15 at the time. What happened was Ms. Heil called
16 me on May 25th. I said, okay, I didn't know
17 that. I called Sam. Sam told me what he told
18 me, and I relayed that to Ms. Heil.

19 Q Did Sam's mention the labor force that
20 he would use?

21 A No.

22 Q Did you inquire as to the labor force
23 that he would use?

24 A No.

25 Q Did you ensure that he used documented

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2 workers?

3 A I just paid for his work as authorized
4 and requested by and recommended by Heil. So,
5 no, it would have been her responsibility.

6 Q You don't think it would have been
7 prudent to ask Sam's about the type of workers
8 he used?

9 A No opinion.

10 Q Did Sam's ever represent to you that
11 he's insured?

12 A I do not know.

13 Q Did you inquire? I might have already
14 asked that.

15 A I do not know. I remember at one point
16 he did say -- I mean, he even said it in like an
17 e-mail that he was telling me something like the
18 Town of Hilton Head doesn't require licensing
19 for cutting limbs. And then one time I spoke to
20 the Town of Hilton Head and they said you just
21 need a permit for removal of a tree, for cutting
22 limbs; that's what the Town of Hilton Head told
23 me once later on. So that's about all I know.
24 You'd have to ask Sam. I don't know Sam's
25 business. I'm a professional geologist; if you

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 want to talk to me about soils or rocks.

3 Q So the only price you ever saw for this
4 job was the \$500 quoted by Sam's?

5 A I didn't see any prices. I was just
6 told -- Sam told me it was 500 on the phone, and
7 I paid it, I sent him a check. He called me
8 right when the work was done.

9 Q Before he worked on the job, you didn't
10 check to see how much it was going to cost?

11 A He may have verbally told me, but I
12 didn't get an estimate from him, no. I believe
13 it was verbally told that it was going to be 500
14 and then he reaffirmed that when he finished the
15 job. I wrote him a check. I did not see a
16 written estimate from Sam's no. I assumed that
17 Mrs. Heil would have that or maybe he just
18 didn't provide it. It was a small job. We just
19 felt, you know, he was going to cut some limbs
20 that Mr. Heil couldn't cut, I guess.

21 Q Does \$500 seem low to you?

22 A I have no opinion. I'm sure it could
23 be more expensive if you do bigger work, more
24 work. I mean, I just don't know. Different
25 people will charge different things. I have no

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1 THOMSON - S. HINES (DIRECT EXAMINATION)

2 opinion.

3 Q How many times have you retained a tree
4 contractor before?

5 A Not very many.

6 Q Is it more than three times?

7 A I don't think so. I've used Sam's
8 twice after he did mine, and all he did was just
9 clean some brush and maybe trim some small limbs
10 and that was it, so.

11 Q Have you ever used a tree contractor
12 other than Sam's?

13 A I have later, later on. I once used
14 ArborNature.

15 Q What about before Sam's?

16 A No, never.

17 Q Your testimony is that you chose Sam's
18 because it was the only one recommended to you?

19 A I didn't choose Sam's. I agreed to pay
20 for Sam's; that's how best to phrase it. As I
21 learned later, Ms. Heil had gotten some
22 estimates and she recommended Sam's to us;
23 that's all I can tell you. And we figured she's
24 the one asking for the work, we'll be good
25 neighbors and pay for it.

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2 Q You never represented to Mrs. Heil that
3 you chose Sam's because the cost was the lowest?

4 A I don't recall, no.

5 (Whereupon, a short break
6 ensued.)

7 MR. THOMSON: Let's mark this as
8 the next exhibit, please.

9 (Whereupon, Plaintiffs' Exhibit
10 Number 15 was marked for
11 identification.)

12 BY MR. THOMSON:

13 Q Exhibit 15, will you please explain
14 what e-mail is to me?

15 A Okay. This is an e-mail from Sam
16 Imler, subject tree pruning. This is when he
17 cut the limbs on 12/7/2011. Hello, Stewart. On
18 December 7, 2011, we carefully accessed the
19 house adjacent to yours at Bellhaven in Yacht
20 Cove complex by climbing and and roping off the
21 limbs that are growing past property lines.

22 Do you want me to read the rest?

23 Q Yes, please.

24 A We accomplished this by my climber
25 lowering a limb, one by one, under my direction

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2 lady who looks on it. So, I mean, what they
3 know, I don't know. I mean, I assume that they
4 knew.

5 Q When was the first time that you
6 observed the work done by Sam's? When was the
7 next time you visited the property after he did
8 it?

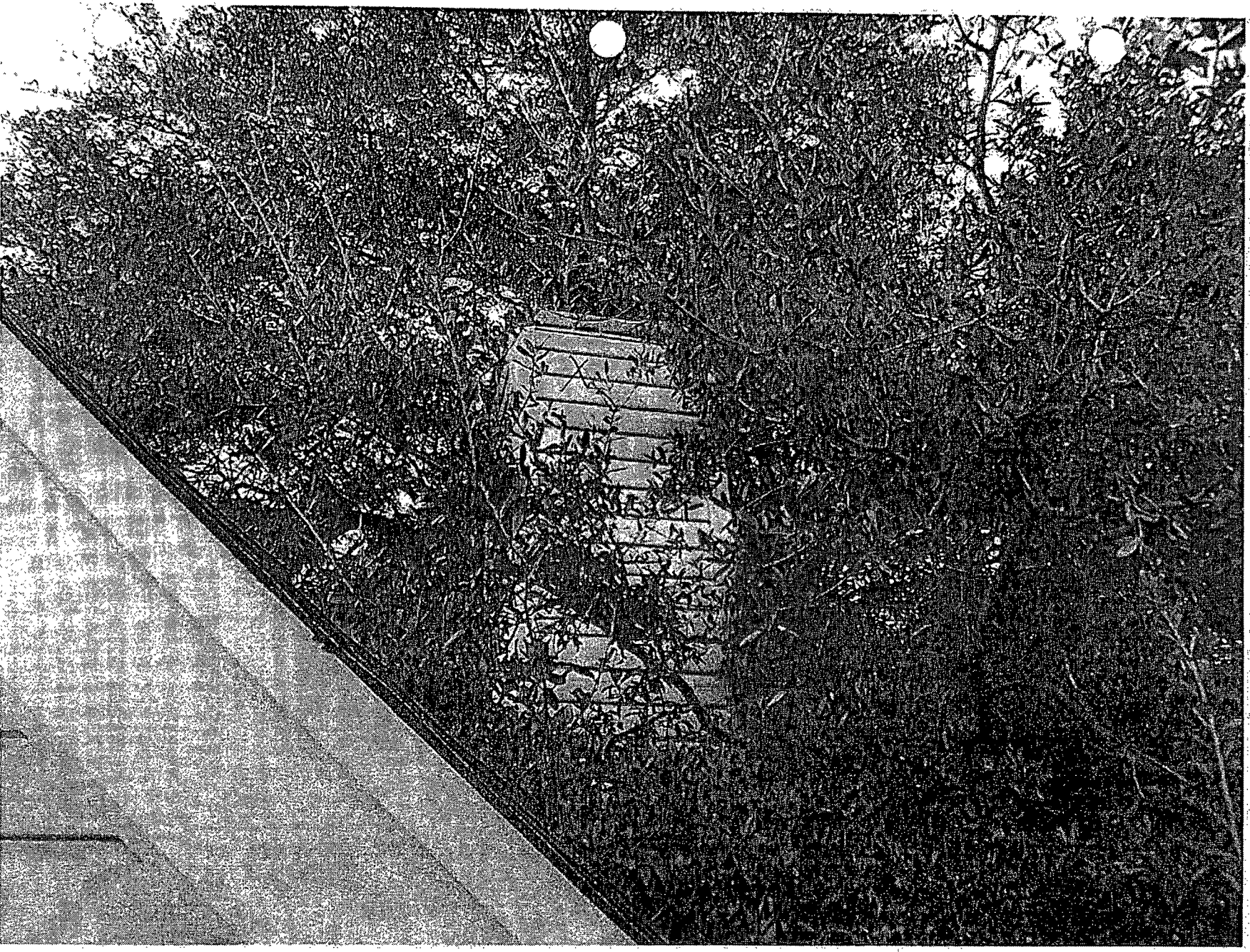
9 A It was probably -- actually, it was
10 probably just forgotten about it, you know, it
11 was paid for, forgotten about. And then I may
12 have gone down to Hilton Head between, you know,
13 first or second quarter of 2012. I can't
14 recall; I don't know. I wasn't made aware of a
15 problem until Ms. Heil told me on 5/24. That
16 was the first time she told me of any problem.

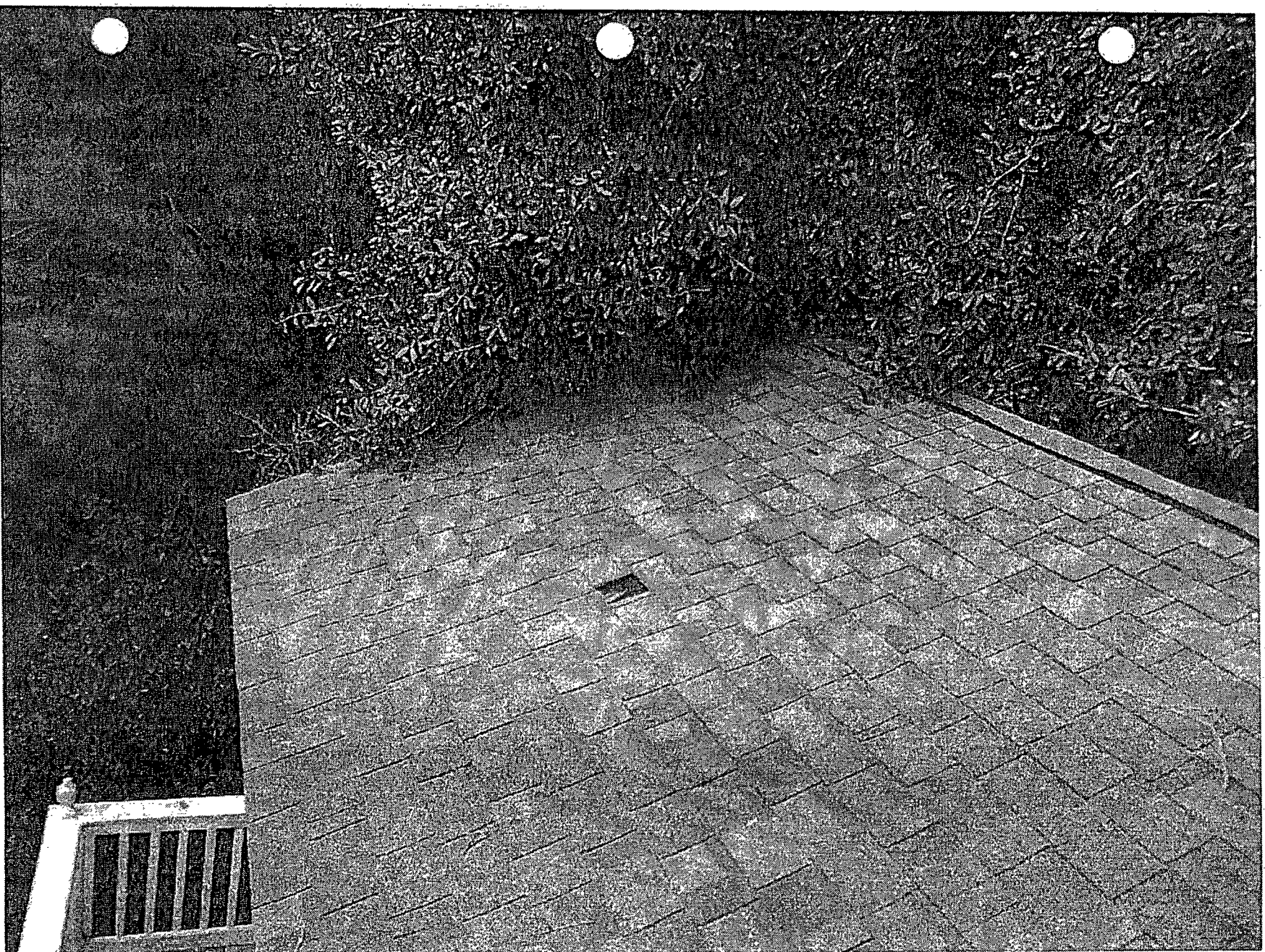
17 Q So the next time you went to the
18 property you didn't think to check and see --

19 A I don't know. I've been down there
20 since, and I went in the backyard and I looked
21 at it probably shortly thereafter, maybe in
22 June, you know, and it looked good to me because
23 the limbs were at least 10 foot away from their
24 roof; it looked like Sam's had done a good job
25 as far as I knew. It's 30 foot up in the air.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CASE NO.: 2013-CP-07-1231

MARK AND ELIZABETH HEIL,)
PLAINTIFFS,)
v.) TRANSCRIPT OF RECORD
STEWART AND CHRISTINA HINES, AND)
SAM IMLER, d/b/a SAM'S TREE SERVICE,)
DEFENDANTS.)

JUNE 3RD, 2015 AND JUNE 16TH, 2015
COMMENCING AT
BEAUFORT, SOUTH CAROLINA
BEFORE THE HONORABLE PERRY M. BUCKNER, JUDGE.

APPEARANCES:

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NONE.

1 THE COURT: This is 2013 at 1231. Give me a moment to
2 review the motion.

3 (Brief pause.)

4 THE COURT: All right. I've read the motion in this
5 case. It's a motion for summary judgment. I'd ask that
6 counsel identify themselves and who they represent,
7 beginning with counsel for the moving party.

8 MR. MCDANIEL: Your Honor, Brian McDaniel, for the
9 defendants, Stewart Hines and Christina Hines.

10 THE COURT: Very well. Counsel for the plaintiff.

11 MR. THOMSON: Your Honor, I'm Charlie Thomson. I
12 represent the plaintiffs. I don't think we've met before,
13 but I'm Glynn Capell's associate.

14 THE COURT: It's a pleasure to have you, Mr. Thomson.
15 Are you with Glynn's office?

16 MR. THOMSON: Yes, Your Honor.

17 THE COURT: Mr. McDaniel, all I've done was read your
18 motion. I know a little bit about the facts. You asked me
19 for 15 minutes. Your 15 minutes begin now.

20 MR. MCDANIEL: Thank you, Your Honor. Just to give you
21 the picture of what happened with this ---

22 THE COURT: I know it's a tree limb and I've got
23 neighboring property, and I've got a rental on one side and
24 an owner on the other, and there was a limb that apparently
25 encroached on the property as an overhang, and there's an

1 allegation of water damage, and beyond that, I do not know
2 anymore.

3 MR. MCDANIEL: Okay. Your Honor, the property -- they
4 are actually -- both had previously been rental properties.
5 They're in Bellhaven Way in Hilton Head. They're
6 approximately .1 of an acre, each lot. The Heils, who have
7 sued my clients, built their home in 2000 and the testimony
8 is that when they built the house, these trees were there at
9 the time they built the house. These aren't new trees that
10 are in contention.

11 THE COURT: The trees were there; was the encroachment
12 of the tree limbs also there?

13 MR. MCDANIEL: Yes. The evidence is this encroachment
14 issue has been going on for years and, in fact, the Heils
15 testified that they trimmed the encroachment for years. Mr.
16 Heil is actually a foreclosure renovator. So he goes in and
17 he trims trees and fixes roofs and he does this kind of
18 maintenance. They are both in the real estate business, or
19 construction-related fields, and they testified that for
20 years they trimmed these trees. The only difference this
21 time was Mr. Heil claimed in November of 2011, they came
22 down for Thanksgiving, and they were going to stay there.
23 They had long-term rented it until August of that year.

24 They came down in August of that year, 2011, and he
25 trimmed the trees, and then they decided they would continue

1 to use the property. They came back in November of 2011 and
2 he got up and trimmed the trees and said he saw no damage to
3 the roof, but the one limb, he said was eight inches in
4 diameter, was too big for him to cut at that time in
5 November. At the end of November, they called my clients,
6 the Hines. They weren't living there either. They rent
7 their property out, but they were able to get in touch with
8 them.

9 By December 10th, the Hines had paid for a tree
10 service, Sam's Tree Service, who is also independent, to
11 have this tree removed. All of the evidence is undisputed
12 that he did that work and there are really no allegations
13 that he did anything improper, although they've named him.
14 All of the testimony has been that somehow limbs rubbing the
15 roof, the live, healthy limbs rubbing the roof damaged their
16 property.

17 THE COURT: Has the deposition been taken of any expert
18 that has established that as a causative fact in this case?

19 MR. MCDANIEL: No, there has not. The plaintiff's
20 evidence of that at this point has been their client, Mr.
21 Heil, who said he went up there and that's what he thinks
22 happened was that it rubbed ---

23 THE COURT: Well, that's the opinion of the plaintiff
24 as to how he thinks the damaged occurred when it began to
25 leak.

1 MR. MCDANIEL: That's right. And let me just clarify
2 one thing, they didn't even find this out until May 28th or
3 30th of 2012.

4 THE COURT: I understand.

5 MR. MCDANIEL: So six months later.

6 THE COURT: There's four months difference between the
7 time the work was performed and the time it was discovered
8 as far as damage is concerned.

9 MR. MCDANIEL: Right. But at that time, he says there
10 is -- he believes that's how it was done. That's what he
11 says now. They have identified in their response to this,
12 an e-mail in which they indicate there is an insurance
13 adjuster who has told them that the tree limbs ---

14 THE COURT: Don't say "they". The record is never
15 clear when you use pronouns, "those people," "they," "them,"
16 "him," "her". Tell us who you're talking about.

17 MR. MCDANIEL: I apologize, Your Honor. The Heils, the
18 plaintiffs, had submitted an e-mail from their claims
19 manager, and in that e-mail from this Randy Mason, he
20 discusses another adjuster of theirs who said there might
21 have been some tree damage that resulted from the tree limbs
22 rubbing the roof. There is no testimony from whoever that
23 is. And there's no admissible evidence in this case from
24 this expert that supposedly says this. Given that, there
25 are really two claims that have been made. One is they have

1 also made a claim of breach of fiduciary duty. As a matter
2 of law, there's no fiduciary duty between property owner and
3 their neighboring property owner. We actually made a motion
4 to dismiss, because they had also alleged nuisance, and
5 Judge Dukes allowed them to amend the complaint to try to
6 add allegations of this fiduciary duty. All that they came
7 back with on that was that the Hines agreed to undertake and
8 pay for repairs, as well as hire, retain, select,
9 coordinate, supervise, and oversee the repair contractor
10 while the Heils were absent from the property.

11 My clients, again, are the Hines; it's a little
12 confusing. But even if that's true, that doesn't create a
13 fiduciary duty, but it's not true. There is no evidence in
14 the record that they agreed to oversee repairs of any kind.
15 They agreed to pay for the tree guy to come out, Sam's Tree
16 Removal, and cut the trees, and they did that. So as a
17 matter of law, the fiduciary duty claim should be -- we
18 should be granted summary judgment on that. They haven't
19 presented any facts.

20 THE COURT: Who represents Sam's Tree Service?

21 MR. MCDANIEL: He's pro se, Your Honor.

22 THE COURT: All right. So you just represent Stewart
23 and Christina Hines?

24 MR. MCDANIEL: Yes, I do.

25 THE COURT: All right.

1 MR. MCDANIEL: In this case, the allegations in the
2 depositions that we have taken indicate that they're
3 claiming also that there was a duty for my clients to at
4 best, I guess, warn them of conditions on their roof. All
5 the testimony -- both Mr. and Mrs. Heil admit you cannot see
6 the roof or whether the limbs are touching the roof from the
7 ground. From the property, there is no way to view that.
8 There has been no testimony to contradict that. The leading
9 case on this, the Israel v. Carolina Bar-B-Que case, which
10 I'll be glad to hand up to Your Honor.

11 THE COURT: Give the site for the record.

12 MR. MCDANIEL: It's 356, S.E. 2d 123; 292 S.C. 282
13 (1987). And what that case discusses is that there can be
14 liability, but the general common law rule had been you're
15 not liable for -- an adjoining property owner is not liable
16 for damage that their tree causes and natural conditions was
17 the common law rule. This case put into common law the
18 exception to that which is if it's an unreasonably dangerous
19 condition ---

20 THE COURT: You're talking about a decayed tree as
21 opposed to a healthy tree?

22 MR. MCDANIEL: That's right. And that's the exception
23 they mark out. If there is decay, all the testimony is
24 there is nobody who says there was decay. And even if there
25 was, the expert -- nobody has claimed that decay caused this

1 problem. They have said it's a rubbing of a healthy tree.
2 That's always been the testimony. No one has put up any
3 evidence that a decaying tree caused the problems that they
4 are suing my clients for. They may say -- Mr. Imler said
5 there were some dead branches on the ground, but his
6 testimony, and that is the tree service, was that when he
7 saw the roof, there was only a single little dent in the
8 roof that was not a structural issue. There was no damage
9 to the roof is what Mr. Imler has testified to.

10 The Carolina Bar-B-Que case basically has two aspects
11 to it that says it's partially decayed. They're talking
12 about they had a duty to make sure the tree is safe and the
13 encroaching trees are not unsafe. And the second part is
14 that it could have been observed by a reasonable inspection.
15 And there's no evidence in this case that that's the case.

16 So, really, for those two principle reasons, as a
17 matter of law, my client should be removed from the case.
18 There simply is no fiduciary duty and the law does not
19 impose this duty that they're claiming.

20 I'd like to just also mention that there is, like I
21 said, this is the natural growth of the tree. The question
22 I had asked to Ms. Heil, the plaintiff, with regard to that
23 is she said, "Yes, these were full grown mature oaks." The
24 husband indicated that he could not see any damage when he
25 went up there in November, and he actually looked at it and

1 trimmed them back. They had a property manager who was
2 going out to the property twice a week they testified and he
3 didn't indicate there were any problems with this all the
4 way through until they caught it at the end of May in 2012.

5 THE COURT: Thank you, Mr. McDaniel.

6 MR. MCDANIEL: Thank you, Your Honor.

7 THE COURT: Mr. Thomson, I'll be happy to hear from
8 you.

9 MR. THOMSON: Yes, Your Honor. Obviously, we have a
10 different view of this case. The Hines were legally
11 obligated to inspect and maintain that tree, and it's black
12 letter law in Israel v. Bar-B-Que. It states that the
13 common law says that it didn't impose a duty, but that case
14 imposes a duty for residential landowners. A rural
15 landowner still does not have a duty to inspect and maintain
16 trees and make sure they're safe, but a residential
17 landowner does.

18 THE COURT: You can't be a residential, rural
19 landowner? How is that any difference? You mean you have
20 to be in the city as a residential landowner?

21 MR. THOMSON: Right. Well, Israel v. Bar-B-Que's -- I
22 can quote the language, if you want.

23 THE COURT: Did you hand me a copy of the case?

24 MR. THOMSON: Yes, I briefed it. It's in my memo.

25 THE COURT: I haven't had a chance to read it. I just

1 wanted to make sure we have a copy. Go ahead, counsel.

2 MR. THOMSON: But anyhow, it's black letter law that
3 there's a duty there. And as far as we have questions of
4 fact all over the place as far as how these repairs were
5 maintained. The Hines asked my client to give them
6 recommendations for a tree removal service, and my client
7 testified that they gave two quotes: one was for \$4,000 and
8 one was for \$2800, and neither was from the tree service
9 company that did the work.

10 The tree service company did the work for \$500. And
11 both of the quotes from my client were licensed, insured
12 tree companies, and they hired an insured tree company that
13 did the work with an undocumented worker. So we would say
14 that they were negligent in the way they went about hiring
15 the tree service.

16 Now, they claim that my client recommended Sam's to
17 them, but Mr. Imler, Sam Imler's testimony is contrary to
18 that. Mr. Imler's side of the story corroborates my
19 client's side of the story that they had never talked
20 before. So I'm just not seeing how we can get summary
21 judgment when you've got questions of fact all over the
22 place, and the only corroborating testimony supports my
23 client's version of the story.

24 And I don't think -- Israel v. Bar-B-Que clearly states
25 there's a duty. So I just think he's misinterpreted that

1 case, and also, it doesn't say that the duty doesn't flow to
2 healthy trees; that's just not a holding in that case, so I
3 think that's legally wrong. And it's also factually wrong,
4 because Sam Imler, the tree service guy, testified that
5 there were dead limbs on the roof and dead limbs on the
6 ground. So that argument fails factually and legally.

7 And they had a separate duty outside of this
8 residential landowner duty to inspect and maintain trees.
9 The Good Samaritan Negligence Law, when you take on a
10 voluntary act to protect someone, once you take on that act
11 voluntarily, you have a duty to use reasonable care, and
12 that applies here, too. And that's just another duty above
13 and beyond the residential landowner duty.

14 So as to whether that's breached, it's pretty cut and
15 dry there's a hole in the roof and water got in. Mr.
16 McDaniel didn't get into comparative negligence in his oral
17 argument; that's in his brief. I think that argument fails,
18 too. There's just an extraordinary burden there. He has to
19 show there's no reasonable inference other than the fact
20 that my clients were more than 50 percent liable for those
21 damages, and the evidence in the record just doesn't show
22 that. The evidence in the record doesn't even show that
23 they are negligent. This was their secondary home.

24 Moreover, there's an important distinction that I think
25 the eggshell plaintiff law apply instead of comparative

1 a half minutes, Mr. McDaniel.

2 MR. MCDANIEL: Thank you. All of the points that they
3 make primarily are on a couple of issues, and that is
4 they're claiming that somehow it's unreasonable for this
5 tree service to be hired. That was the issue of fact that
6 he talked about. There's issue of fact about who hired the
7 service; it doesn't matter. There's no claim, there's
8 nothing in the record that says the tree service did
9 anything wrong. There's no evidence that -- and they had
10 the duty to put that evidence in, to establish that there
11 was something negligently done by this tree service. Did
12 they use reasonable care? The two facts that they say he
13 wasn't insured and that he was ---

14 THE COURT: Whether he was insured has nothing to do
15 with this matter. I understand he argued that, but that has
16 nothing to do with whether or not I should grant or not
17 grant summary judgment.

18 MR. MCDANIEL: Thank you, Your Honor. The cases, I
19 haven't seen them, the fiduciary duty cases, I do not
20 believe you're going to find those to be applicable to this
21 case. A developer is certainly different than a landowner.
22 There's just simply no duty of care for neighboring
23 landowners to stop an encroaching tree when the owner that
24 it encroaches on has every right to go up and take care of
25 that tree themselves. My clients agreed to do that. This

1 is kind of the case that no good deed goes unpunished. Said
2 he would pay for it, and now they want to sue him because
3 six months later they find water damage. We just ask that
4 the court not establish a duty, or recognize that there is
5 no duty for just a neighboring tree, or at least not a
6 fiduciary duty, and certainly there's no duty breached.

7 THE COURT: Thank you very much. Both sides please
8 submit proposed Orders to me. Please submit them to me at
9 P.O. Drawer 470, Walterboro, 29488. Please copy opposing
10 counsel on your transmittal of your proposed Order to the
11 Court. I'll expect your Orders within seven days of today.
12 You may e-mail me your Orders. If so, please send it to me
13 at pbucknerj@sccourts.org. Please copy opposing counsel on
14 any e-mail transmittal. I also insist that you give my law
15 clerk a working copy. You can send him your proposed Order
16 at pbucknerlc@sccourts.org.

17 Whether you e-mail me your Orders or you mail them to
18 me, you must include a self-addressed, stamped envelope with
19 sufficient postage affixed thereto for the return of your
20 Order. Any question about the proposed Order procedure from
21 counsel for the moving party, Mr. McDaniel?

22 MR. MCDANIEL: No, sir.

23 THE COURT: Any question about the proposed Order
24 procedure from counsel for the responding party, Mr.
25 Thomson?

1 MR. THOMSON: No, Your Honor.

2 THE COURT: I look forward to getting your Orders
3 within seven days of today. Thank you very much.

4 (The end of hearing on March 3, 2015, in Beaufort, SC.)
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1 THE COURT: This is 2013 at 1231. This is a motion to
2 alter or amend, pursuant to Rule 59(e); I'm bound by the
3 record, obviously, before me. I remember it very well,
4 because I just heard it in March and I remember the case
5 very well. Let the record reflect that this is Mark and
6 Elizabeth Heil v. Stewart Hines, Christina Hines, and Sam
7 Imler, d/b/a Sam's Tree Service, defendants. I'd ask that
8 counsel identify themselves and who they represent,
9 beginning with counsel for the moving party.

10 MR. THOMSON: Your Honor, I'm Charles Thomson. I
11 represent the plaintiffs.

12 THE COURT: And counsel for the responding party.

13 MR. MCDANIEL: Brian McDaniel, representing Christina
14 and Stewart Hines.

15 THE COURT: Very well. Mr. Thomson, happy to hear from
16 you. I know all about this case. This is the neighbor in
17 which they hired a person to cut a limb that was overhanging
18 the property. You sued both Sam's Tree Service and you also
19 had Stewart and Christine Hines, and you wanted me to hold
20 that there was a fiduciary relationship, which I
21 specifically declined to do so in my Order, which I have
22 reviewed prior to this hearing. Happy to hear from you.
23 Tell me why I should reconsider it.

24 MR. THOMSON: Your Honor, the Order held that there was
25 no evidence of breach.

1 THE COURT: No, the Order held that there was no
2 evidence of duty, but go ahead.

3 MR. THOMSON: Your Honor, I believe the Order did find
4 that there's a duty. In South Carolina, Israel v. Bar-B-Que
5 says that in a residential suburban neighborhood, one
6 neighbor has the duty to maintain a tree so as not to cause
7 damage on the other neighbor's yard, and the Order held
8 that. That's what we spent the entire last motion arguing
9 whether or not there was a duty. And I thought that's what
10 the whole case revolved around. I didn't receive much grief
11 on the other side.

12 THE COURT: Well, your motion says that you're asking
13 me to reconsider -- it doesn't address the separate claims
14 for ordinary negligent and negligent hiring. However,
15 according to the amended complaint, there was only one cause
16 of action for negligence against the Hines.

17 In paragraph 13 of the complaint, they alleged breach
18 by failing to properly remove the limbs and by failing to
19 supervise and hire a tree company to properly remove or
20 repair limb damage. The second part of your motion says the
21 Order doesn't address causation and damages of the
22 negligence claim, which is true. But once a claim failed as
23 to breach of duty, there was no point in addressing
24 causation and damages. So tell me what it is that you think
25 I need to reconsider.

1 MR. THOMSON: Your Honor, there's tons of evidence of
2 breach, and I'll rest on my written motion. I have a
3 laundry list of evidence of breach where the tree contractor
4 found dead limbs lying around. The very picture that was
5 the basis for finding duty shows the tree overhanging the
6 roof. They have a duty to inspect and it's touching the
7 roof in a major way. If they have a duty to inspect and
8 maintain that tree so as not to cause damage to the other
9 yard, how is that not evidence of breach? And although
10 there is only one cause of action drafted for negligence, if
11 you read it, it alleges two duties. It says the Hines owed
12 a duty to plaintiff to inspect the trees on the property to
13 ensure their safe and non-defective and to remove and repair
14 the tree limbs and damaged property. It alleges that they
15 fail to supervise and hire a tree company to properly remove
16 the limbs and damage. So paragraphs 12 and 13 reach on both
17 parts of that.

18 THE COURT: Anything else?

19 MR. THOMSON: Your Honor, I want to point out a
20 Scribner's error in the proposed Order I sent after the
21 first hearing. I thought what I had was a bullet-proof
22 Order on negligence; that there was no way there was
23 anything wrong with it. I did notice later that there was a
24 Scribner's error in it.

25 THE COURT: This is the Order you sent me originally?

1 MR. THOMSON: Yes, Your Honor.

2 THE COURT: And why do you need to point out your
3 Scribner's error?

4 MR. THOMSON: Because it's just a page number on a
5 transcript excerpt -- well, on a tab on the top. I
6 basically pointed out the breach of causation and I cited
7 the site for the record, and I said, deposition mark out
8 page 42, and it's actually page 14. And I just wanted to
9 point that out. I still defer to my previous Order. I
10 don't there's -- on the negligence issue, I don't think
11 there's any argument that could be a non-defective Order and
12 now that the Scribner's error pointed out, I mean, that
13 could have been what the issue was; I don't know. But I
14 have tons of evidence of breach.

15 THE COURT: Anything else?

16 MR. THOMSON: I would argue in my proposed Order I
17 would have done differently after I saw your Order. I tried
18 to stir it away as finding a scintilla of evidence raising a
19 question of fact, so it would be as least offensive as
20 possible, but in looking back, I think I should have hit it
21 head on and made a more bold finding that it is a question
22 of law. And the question of law is, is there a fiduciary
23 relationship among the two classes of people? And it all
24 comes down to how you classify, how you frame that class.
25 So if you frame that class of two neighbors, is there a

1 fiduciary duty among two neighbors? Well, no. But if you
2 narrow the class down, you have one neighbor taking on
3 repairs that is essential to the protection of the other
4 neighbor's home. They're entrusting them to protect a major
5 asset, and there is some similarity to that in entrusting
6 someone with their money and I think that gives rise to not
7 only negligence duty, but a heightened fiduciary duty.

8 So on the issue of fiduciary duty, some appellate
9 judges might agree, some might not, and some humility is
10 warranted there. But on a negligence claim, it's clear as
11 day to me, and they don't have it. I can't see that Order
12 standing up, Your Honor.

13 THE COURT: Thank you, Mr. Thomson. Happy to hear from
14 you now, Mr. McDaniel.

15 MS. MCDANIEL: Thank you, Your Honor. I want to
16 address a couple of points that Mr. Thomson made. He
17 indicated just briefly the tree contractor found dead limbs.
18 Those were not limbs that were on the tree itself, these
19 were limbs on the ground. He admitted he did not know where
20 they came from. And just to back up and make sure Your
21 Honor recalls that the plaintiffs themselves said that in
22 August of 2011 and in November of 2011, Mr. Heil, the
23 plaintiff, climbed up on the roof and trimmed the trees
24 himself. He knew about these trees. He was trimming them
25 himself. And that would certainly explain why there might

1 be dead limbs on the ground.

2 The tree service testimony was that Mr. Imler, the
3 owner, he didn't actually see anything. He wasn't up there.
4 His worker was on the roof. We don't have any testimony
5 from his worker. What he testified to was that his worker
6 told him there was no damage to any sort of would go to the
7 integrity of the roof. And that is corroborated fully by
8 the plaintiff.

9 They said when they were up in there in November, and
10 the work was done in December of that same year, they could
11 see no damage to the roof at all; so December, no damage to
12 the roof at all. My client simply paid for that roofer to
13 come up there and trim that one additional branch after the
14 others had been trimmed.

15 The plaintiffs have said they came back in April or May
16 of the next year, found that the trees were still trimmed
17 back fine, but now there's a hole that they claim is from
18 sort of tree damage. They had termite damage, they had
19 other things. It's simply unreasonable to find that there
20 was some negligence that my clients did. And the original
21 claim was they failed to supervise, but the fact is there is
22 no evidence that the tree removal person did anything
23 incorrectly. The evidence that they put in there was ---

24 THE COURT: Was there any evidence in this case, Mr.
25 Thomson that -- my recollection is there wasn't, but I want

1 to ask you because I want to take another look at it, that
2 the defendants, once notified of the encroaching tree limbs
3 ---

4 (Mr. Thomson stands.)

5 THE COURT: Sit down. One lawyer stands in my
6 courtroom at a time; one lawyer speaks. I don't let him
7 interrupt you; you're not going to interrupt him. When I
8 ask a question, you'll get a chance in reply.

9 Was there any evidence that once there was notification
10 of the encroaching limbs that damage was caused by waiting
11 an unnecessary amount of time to hire Sam's Tree Service?

12 MR. MCDANIEL: No, Your Honor. The evidence is that it
13 was done -- the call was made immediately ---

14 THE COURT: The amended complaint alleges that Sam's
15 was notified in November of 2011, and Sam's Tree Service
16 removed the limbs in January of 2012; is that your
17 understanding of the facts in the case?

18 MR. MCDANIEL: No, actually, we have evidence it was
19 done in early December, December 11th, and that was one of
20 the ---

21 THE COURT: Whether it was December after notification
22 to Sam's in November, the latest would be January of 2012?

23 MR. MCDANIEL: Yes, that's their -- the plaintiff's
24 position is it was done by that period. We have evidence it
25 was actually done by early December.

1 THE COURT: Now, I've had Mr. Thomson tell me about an
2 affidavit of Mr. Imler in which he allegedly says there was
3 tree damage already when he removed the limbs; is that
4 right?

5 MR. MCDANIEL: That is not the case, Your Honor. He
6 indicated the only damage -- and I can find those deposition
7 excerpts for you, Your Honor, is that when I cross-examined
8 him about that, he saw no damage to the roof that would
9 threaten the integrity of the roof at all. That he saw a
10 single dented shingle. He didn't actually see it. That it
11 was reported to him from his worker. There was a single
12 dented shingle. He didn't really know where that shingle
13 was. He was assuming it was in the area where the tree was,
14 but he really didn't know that. And that he saw no damage
15 and that his worker reported zero damage to him that would
16 threaten the integrity of the roof, a single dented shingle
17 that he said was not an issue, nor was it, as he said, a
18 normal type of dent. If I could just point out one thing,
19 in the memo, or the motion that we're here for, to alter or
20 amend, the evidence on page five of the motion is really
21 three things that they cite. That he did the work at a
22 substantially lower price, that he was uninsured, and that
23 he possibly did not have any documented worker. Thus, the
24 evidence that this was a -- that's presented, if it's
25 evidence at all, that this was an improper hire of Sam's

1 Tree Service, and we would submit to the Court that none of
2 those things evidence negligence on the part of my client in
3 hiring this tree service to do it, that he offered a better
4 price, and that the worker wasn't documented. Sam's Tree
5 Service has an unblemished record of work. They have a work
6 permit, and they've been doing the work in Hilton Head for,
7 I think he said 12 years.

8 THE COURT: Thank you very much. All right, now's your
9 turn, Mr. Thomson. You wanted to stand up. And let me tell
10 you this, most lawyers don't read the rules like they ought
11 to, but we have a rule that says a lawyer cannot interrupt
12 another lawyer. One of the rudest things you can do, even
13 though lawyers want to be advocates, and I understand that,
14 is this, while the other lawyer is arguing. That doesn't
15 give you the right to interrupt.

16 MR. THOMSON: Your Honor, I apologize.

17 THE COURT: I'm not going to let him interrupt you, and
18 you're not going to interrupt him. When I ask a question,
19 I'm not asking it to both of you. I'm asking it to the
20 person who is arguing to me. Now, you get the chance. The
21 question I asked was this, was there any evidence that the
22 -- and I told you what I thought the complaint alleged. He
23 argues that it was December, but I thought that it was
24 January of 2012, but the amended complaint alleges that the
25 defendants were notified in November of 2011, and that the

1 amended complaint says Sam's Tree Service removed the limbs
2 in January of 2012. Is there any evidence that the
3 defendants, once notified of the tree limbs, caused damage
4 by waiting an unnecessary amount of time to hire Sam's Tree
5 Service?

6 MR. THOMSON: Your Honor, that's certainly one
7 inference that can be drawn.

8 THE COURT: What evidence is there of it? Is that time
9 deadline, or time parameters, that I just put on the record
10 your understanding of the parameters?

11 MR. THOMSON: Well, Your Honor, before I answer that
12 question, do you mind if I address ---

13 THE COURT: No, sir. Answer my question before you
14 move on, Mr. Thomson.

15 MR. THOMSON: Okay. We don't have it to a forensic
16 degree of certainty when the hole was formed.

17 THE COURT: I didn't ask that question. I asked when
18 they were notified first --- counsel, listen to my question,
19 now. I'm not asking you to go off on another tangent. My
20 question is very simple. The amended complaint that you
21 drew alleges that the defendants were notified in November
22 of 2011; do you agree with that?

23 MR. THOMSON: Yes, Your Honor.

24 THE COURT: And that Sam's Tree Service removed the
25 limbs -- he disputes this -- in January 2012. Do you agree

1 that that's in there?

2 MR. THOMSON: Your Honor, as far as the exact date that
3 they did it, whether it was December or January, I'd have to
4 look it up.

5 THE COURT: But it's no later than January?

6 MR. THOMSON: Correct, Your Honor.

7 THE COURT: All right. So my question is, other than
8 those parameters, is there any evidence that the defendants,
9 once notified of the tree limbs, caused damage by waiting an
10 unnecessary amount of time to hire Sam's?

11 MR. THOMSON: Your Honor, is there conclusive evidence?
12 No. But certainly, I think an inference can be drawn. We
13 have pictures of November where the tree ---

14 THE COURT: I recall.

15 MR. THOMSON: Yeah, where the tree is encroaching on
16 the roof and then there's a hole in the roof after that. I
17 just -- we had insurance professionals come out to the
18 property and they said -- this isn't in the record, so --
19 but the insurance professionals said that the tree caused
20 the hole. As for what's in the record, we have ---

21 THE COURT: Insurance professionals, all right.

22 MR. THOMSON: Right.

23 THE COURT: But it certainly wasn't before me before,
24 but anyway.

25 MR. THOMSON: All right, Your Honor. Well, there's an

1 e-mail from them.

2 THE COURT: Insurance professionals are qualified to
3 give opinions on what causes damage to a roof?

4 MR. THOMSON: Yes, Your Honor. They were the insurance

5 ---

6 THE COURT: Other than the fact that they controlled
7 the payment under the policy, you think you can qualify one
8 to give an opinion on what causes damage?

9 MR. THOMSON: Yes, Your Honor.

10 THE COURT: Anything else you want to tell me, Mr.
11 Thomson? You're 10 minutes are up.

12 MR. THOMSON: Your Honor, I just want to qualify, when
13 I stood up earlier, I thought you addressed that question to
14 me. I thought you said, "Mr. Thomson, is there any --"
15 that's why I stood up.

16 THE COURT: I'll call on you when it's time for you to
17 speak. It's discourteous to interrupt another lawyer.

18 MR. THOMSON: Yes, Your Honor. I thought you were
19 calling my name. I apologize.

20 THE COURT: All right. I'm going to take another look
21 at it for you. I want you to both submit proposed Orders
22 within seven days of today. Please submit them to P.O.
23 Drawer 470, Waltherboro, 29488. Please copy opposing counsel
24 on your transmittal. Please include a self-addressed,
25 stamped envelope with sufficient postage affixed thereto for

1 the return of the Orders. If you e-mail me your Orders, to
2 comply with the seven day time requirement, you will still
3 need to snail mail me an envelope with sufficient postage.
4 My e-mail address is pbucknerj@sccourts.org. My law clerk
5 will need a working copy and he's pbucknerlc@sccourts.org.
6 Any e-mail transmittal or United States Mail transmittal to
7 the Court, you must copy opposing counsel on any transmittal
8 whatsoever. I'll expect your Orders within seven days. Any
9 questions about the proposed Order procedure from counsel
10 for the moving party?

11 MR. THOMSON: No, Your Honor.

12 THE COURT: Any questions about the proposed Order
13 procedure from counsel for the responding party?

14 MR. MCDANIEL: No, Your Honor.

15 THE COURT: Thank y'all very much for your patience. I
16 look forward to getting your Orders.

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COPIES OF THIS ORDER
TO BE FORWARDED TO THE
CLERK OF THE COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas Non-Jury for Beaufort County, South Carolina, on the 3rd day of March, 2015 and the 16th day of June, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 5th, 2015

Rebecca H. Hill

Rebecca H. Hill,
 Official Court Reporter

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 SC Court of Appeals

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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