

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Circuit Court Case No. 2013-CP-07-1231

Appellate Case No. 2015-001988

**Mark Heil and Elizabeth  
Heil,**

Appellants,

v.

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

Defendants,

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

Respondents.

**APPELLANTS' PETITION FOR REHEARING**

The Appellants Mark and Elizabeth Heil, by and through their undersigned counsel, pursuant to Rule 240, SCACR, submit this Petition for Rehearing and for reconsideration of the order affirming the lower court's grant of summary judgment to Respondents.

There are four errors in the order affirming the lower court that merit reconsideration (labeled I to IV below). Two relate to the duty to inspect and maintain the subject tree. The other two relate to the duty to use reasonable care in vetting and hiring a tree contractor.

## Breach of Duty to Inspect and Maintain the Tree

Errors I and II relate to Respondents' breach of their duty to inspect and maintain the tree in their yard.

### I

The order affirming the lower court states:

Here, the subject tree was a live, healthy tree and Appellants presented no evidence that Respondents could have observed, by reasonable inspection, the damage possibly caused by the tree limb. *Cf. Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App.1987)

Contrary to this holding, Appellants' submitted testimony describing that the dangerous conditions of the tree were easily observable from the ground. (R. p. 36, 14:11–15:24). Appellants also presented pictures of Respondents' tree encroaching and resting on Appellants' roof. (R. pp. 182–185). The order affirming the lower court essentially holds that no reasonable inference can be drawn from those pictures that Respondents could have discovered the dangerous condition of the tree. At the summary judgment level, it is improper to view inferences in Respondents' favor to begin with, and the testimony cited above indicates that those inferences are not only improper, but also incorrect.

### II

The order affirming the lower court also states:

Appellants did not allege the delay between notice and action caused the damage.

In their briefs, Appellants did not specifically address the inference that the damage occurred between the time of notice to Respondents and the time the work was complete—because that should not be a

prerequisite of whether Respondents breached the duty to inspect and maintain the tree. Appellants did, however, argue to the lower court that such an inference could be drawn, and the lower court ignored it. (*Compare* R. p. 211, lines 7–12 *with* R. p. 6, final three lines).

Appellants' testimony suggests that the hole was not present at the time they notified Respondents of the problem in November 2011. (R. p. 149, lines 2–9). Evidence in the record also indicates that the hole was caused by the tree rubbing against the roof. (R. p. 158, line 11 – p. 159, line 6; R. p. 163, lines 7 – 21; R. pp. 182–185). If there is evidence suggesting the hole was not present when Respondents were informed, and evidence suggesting the tree rubbing the roof caused the hole, then the most reasonable inference is that the damage was caused during the time period between when Respondents were informed and Respondents trimmed the tree.

This analysis is not even necessary because such a timing constraint does not exist at law. Respondents would still be liable if their tree caused the hole earlier. But even if the Court wishes to apply that timing constraint, it cannot discard the reasonable inferences that the damage occurred during the target time period. This is especially true considering Appellants are to receive every inference in their favor.

### **Breach of Duty to Reasonably Vet and Hire the Contractor**

Errors III and IV relate to Respondents' breach of their duty to use reasonable care in vetting and hiring a tree contractor.

### **III**

The order affirming states:

Appellants do not explain how . . . the comparatively low fee Sam's Tree Service charged equate to a breach of Respondents' duty.

Hiring the lowest bidder may not be evidence of breach in and of itself. But the above holding, in the face of the evidence presented and where causation is not even at issue, is tantamount to a holding that a person may hire a contractor to perform an unreasonable scope of work, and that it can never be evidence of breach. The facts here show that Imler's bid was one-eighth of the highest bid and one-fifth of the next lowest bid. (R. p. 147, line 20 – p. 148, line 1; R. p. 154, lines 15–23). That is an exorbitant discrepancy. The facts further show Respondents made **no inquiry** whatsoever as to what services the contractor might be failing to perform to achieve such a substantially lower fee. (R. p. 173, lines 6–15; R. p. 174, lines 7–10)<sup>1</sup>. A reasonable person would at least inquire. The exorbitant difference in cost should have been an alarming sign that the tree company hired might have planned to perform an inadequate scope with an inadequate crew and equipment.

This lack of inquiry not only is evidence of Appellants' breach of carrying out the duty to use reasonable care in hiring a tree contractor. It is evidence that Appellants recklessly breached that duty.

#### IV

Finally, the order affirming the lower court states:

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<sup>1</sup> In reviewing Respondents' testimony in this cite to the record, the Court must recall that Respondents' claim that Appellants selected Imler was refuted by the testimony of Imler himself (R. p. 124, lines 22-25; R. p. 131, lines 8-11; R. p. 140, lines 17-24; R. p. 141, lines 6-23), and by Appellants (R. p. 150, lines 8-17). By choosing to give untruthful testimony, Respondents are stuck with their testimony that they did nothing to vet Imler, or to determine the scope of services he offered or performed.

Appellants did not present evidence . . . that another tree service company would have known or communicated that a single dented shingle was cause for structural concern.

The tree contractor Imler himself alluded that it would have been proper to report the damaged shingle. Imler's testimony is as follows:

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

A: I do. However, in this case I did not have any pertinent information of the owner.

(R. p. 140, lines 9–24). A jury could infer from that testimony that a tree contractor who had been reasonably vetted, hired, and informed would have reported the damaged shingle. Had a contractor reported the damage, Appellants could have prevented months of water infiltration and termite infestation.

Examining the negligent hiring aspect is important, but should not take focus away from the fact that the law places liability for damage caused by unreasonable tree encroachment on the owner of the land where the tree is based.

In applying the law of this case, the lower court and order affirming it have ignored the appropriate legal standard. "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." *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). "Even when 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.* "All ambiguities, conclusions,

and inferences arising from the evidence must be construed most strongly against” Respondents. *Id.*

Some of the errors noted above show that the lower court and order affirming it failed to resolve all inferences in Appellants’ favor. Other errors reach so far as to making every inference in Respondents’ favor. A correction of any one of the errors I through IV above provides independent grounds to reverse the lower court. Appellants respectfully request that the Court rehear this matter and reverse the lower court.

Respectfully submitted,

**THE CAPELL LAW FIRM, LLC**



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

November 26, 2016  
Hilton Head Island, SC

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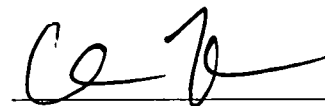
**Stewart Hines, Christina  
Hines, and Sam Imler d/b/a  
Sam's Tree Service,** Defendants,

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

**PROOF OF SERVICE**

I certify that I have served the **Appellants' Petition for Rehearing** on Stewart Hines and Christina Hines by depositing a copy of it in the United States Mail, postage prepaid, on November 26, 2015, addressed to their attorney of record, Brian McDaniel, P.O. Box 2085, Beaufort, SC 29901.

November 26, 2015



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

# The Capell Law Firm, LLC

Hilton Head Office

(843) 689-4280

Glynn L. Capell

GCapell@CapellLaw.com

Charleston Office

(843) 501-0423

Charles W. Thomson

CThomson@CapellLaw.com

November 26, 2016

**VIA FEDEX OVERNIGHT**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate State Street  
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

Enclosed for filing in the above case are as follows:

- 1) An original and seven copies of Appellants' Petition for Rehearing; and
- 2) An original and one copy of the Proof of Service of the Appellants' Petition for Rehearing to Respondents.

Please return one clocked copy of each of the above items to me in the self-addressed, stamped return envelope also enclosed. Thank you for your attention to this matter.

Sincerely yours,

**THE CAPELL LAW FIRM, LLC**



Charles W. Thomson, Esq.

Enclosures

cc: Brian McDaniel, Attorney for Respondents

*\$25.00 check also enclosed*

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