

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

Thomas W Gladden and
Vera H Gladden,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s)

07 - CP -

vs

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendant(s)

2 007 CP 28 288

(Please Print)

Submitted By B Michael Brackett, Esquire

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings on other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

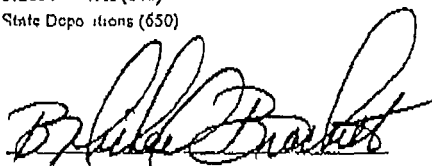
*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint ☐ NON-JURY TRIAL demanded in complaint
- ☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules
- ☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules
- ☐ This case is exempt from ADR (certificate attached)

NATURE OF ACTION (Check One Box Below)

☐ Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	☐ Torts Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Notice/ File Med Mal (230) ☐ Other (299)	☒ Torts - Personal Injury ☐ Assault/Slander/Label (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☒ Personal Injury (350) ☐ Other (399)	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
☐ Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	☐ Administrative Law/Relief ☐ Reinstatement Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate Civil (910) ☐ Magistrate Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
☐ Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out of State Depositions (650)		

Submitting Party Signature



Date March 22, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act S.C. Code Ann. §15-36-10 et seq.

SCCA / 234 (4/06)

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EXHIBIT

tabbles

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FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT

You are required to take the following action(s)

- 1 The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
- 2 The initial ADR conference must be held within 300 days after the filing of the action.
- 3 Cases are exempt from ADR only upon the following grounds:
 - a Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition,
 - b Cases which are appellate in nature such as appeals or writs of certiorari,
 - c Post Conviction relief matters,
 - d Contempt of Court proceedings,
 - e Forfeiture proceedings brought by the State,
 - f Cases involving mortgage foreclosures, and
 - g Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
- 4 Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note **You must comply with the Supreme Court Rules regarding ADR.**
Failure to do so may affect your case or may result in sanctions.

Received on 3-28-07

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

Olivia M Boykin, Elizabeth
A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell
& Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

Defendants

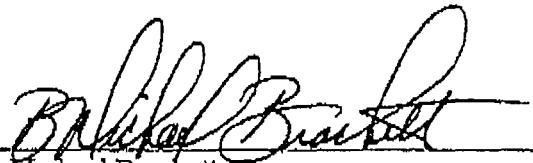
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SUMMONS

07 MAR 26 4 10 22
CLERK OF COURT
KERSHAW COUNTY

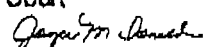
TO THE DEFENDANTS ABOVE-NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint upon the subscribers at their offices, 1441 Main Street, Fourth Floor, Post Office Box 100261, Columbia, South Carolina 29202 3261, within thirty (30) days after the service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint



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Attorneys for Plaintiffs

ATTEST True, Correct & Certified
Copy of Original on File in this
Court


Clerk of Court Kershaw County

March 22, 2007

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

Olivia M Boykin, Elizabeth
A Board, Deborah Appleton,
Bob Capes Realty, Inc , Russell
& Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

Defendants

2007CP28288

COMPLAINT

(Fraud, Negligent Misrepresentation,
Breach of Contract and Negligence)

(Jury Trial Demanded)

FILED
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CLERK OF COURT

Plaintiffs, complaining of the Defendants, allege that

GENERAL ALLEGATIONS

- 1 Plaintiffs (hereinafter "Buyers") are citizens and residents of Kershaw County
- 2 Defendant Olivia Boykin (hereinafter "Seller") is a citizen and resident of Kershaw County
- 3 Defendant Elizabeth Beard is a licensed real estate agent who is an agent and/or employee
of Defendant Russell & Jeffcoat Realtors, Inc Upon information and belief, Defendant
Beard is a citizen and resident of Kershaw County
- 4 Defendant Deborah Appleton is a licensed real estate agent who is an agent and/or employee
of Defendant Bob Capes Realty, Inc Upon information and belief, Defendant Appleton is
a citizen and resident of Kershaw County
- 5 Defendant Russell & Jeffcoat Realtors, Inc is a corporation organized and existing pursuant

to the laws of the State of South Carolina which maintains agents and conducts business in Kershaw County

6 Defendant Bob Capes Realty, Inc is a corporation organized and existing pursuant to the laws of the State of South Carolina which maintains agents and conducts its real estate brokerage business in Kershaw County

7 Defendant Palmetto Home Inspection Services, LLC is a limited liability company organized and existing pursuant to the laws of the State of South Carolina which maintains agents and conducts business in Kershaw County

8 All causes of action alleged herein are related to a contract for the sale and purchase of real property located in Kershaw County

9 On October 12, 2006, Seller was the owner of certain real property known as 10 Hunt Cup Lane in Kershaw County (hereinafter "the Property")

10 On October 12, 2006, Buyers entered into a contract with Seller for the purchase of the Property for the price of \$495,000.00. A copy of said contract is attached hereto and incorporated herein as Exhibit A.

11 Seller was represented in the transaction by Defendant Russell & Jeffcoat Realtors, Inc. and its agent/employee Defendant Beard.

12 Buyers were represented in the transaction by Defendant Bob Capes Realty, Inc. and its agent/employee Defendant Appleton.

13 As an inducement to enter into the contract (Exhibit A), Seller provided to Buyers a Residential Property Condition Disclosure Statement dated September, 16, 2006. A copy of said disclosure statement is attached hereto and incorporated herein as Exhibit B.

- 14 Pursuant to section 9 of the contract (Exhibit A) Buyers had the right to have the property inspected and to offer a repair addendum to the Seller
- 15 Buyers entered into a contract with the Defendant Palmetto Home Inspection Services, LLC to inspect the Property for the purpose of discovering defects or other conditions which might adversely affect the value or habitability of the Property
- 16 Defendant Palmetto provided to the Buyers a written report dated October 18, 2006 which purported to disclose all reasonably discoverable defects and conditions with respect to the Property. A copy of said report is attached hereto and incorporated herein as Exhibit C
- 17 In reliance on the Defendant Palmetto's report, Buyers submitted a repair addendum, dated October 20, 2006, to the Seller on and by which Buyers required the repair of 14 numbered and described defects and/or conditions. The particular conditions were identified by reference to Defendant Palmetto's report
- 18 Seller agreed to accept the repair addendum on October 24, 2006 thereby agreeing to make the required repairs and completing the formation of the contract. A copy of the agreed-upon repair addendum is attached hereto and incorporated herein as Exhibit D
- 19 With respect to the repair or replacement of the irrigation pump and the window repairs, Seller agreed to a cash payment or credit adjustment in lieu of the actual repair of the pump and windows, in the amount of \$500 for the pump and \$2,500 for the windows
- 20 Seller, personally or through her agent Defendant Beard, represented to Buyers, and their agent Defendant Applton, that Seller had priced the replacement of the windows and that \$2,500 was sufficient for the repair or replacement of the damaged windows
- 21 In reliance on the representations of Seller with respect to the cost of repairing the damaged

windows, Buyers agreed to take the cash adjustment for the pump and window items on the
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repair addendum

- 22 Pursuant to the terms of the contract, Seller agreed to obtain a CL100 letter a/k/a an Official Wood Infestation Report and to correct or repair any damage or infestation which the inspector deemed to be necessary
- 23 The closing was scheduled, and in fact occurred, on November 22, 2006 Seller did not personally attend the closing but was represented at the closing by Defendants Russell & Jeffcoat Realtors, Inc and Beard
- 24 Seller's CL100 letter was dated October 30, 2006 Said letter disclosed the existence of significant water damage at several locations Notwithstanding the date of and the disclosures in the CL100 letter, Seller did not provide a copy to Buyers agent, Defendant
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Appleton, until four days before the closing
- 25 Notwithstanding the date of and the disclosures in the CL100 letter, Defendant Appleton, as agent, did not provide a copy to Buyers, as principals, until the day of closing
- 26 At the closing, Seller, by and through her agents Defendants Russell & Jeffcoat Realtors, Inc and Beard, represented that all repairs required by the repair addendum and by the CL100 letter had been satisfactorily repaired or replaced
- 27 Defendant Bob Capes Realty, Inc and its agent Defendant Appleton, as agents of and for the Buyers, also represented to Buyers that the required repairs had been made and that the Buyers should proceed with the closing and take title to the Property
- 28 In reliance on the representations of Seller and her agents and on the representations of Buyers own agents, Buyers closed the transaction

- 29 Without Buyers' consent, Seller held over in the Property and did not vacate the Property until several days after the closing. Although this was a breach of the contract, Buyers did not make an issue of the hold-over.
- 30 Soon after Buyers moved into the Property they discovered that numerous defects and conditions which Seller was required to repair and/or replace had not been remedied and that the representations made to the Buyers at closing by Seller, and by Seller's agents, and by Buyers' agents, were false and misleading.
- 31 Buyers also discovered that Defendant Palmetto had not discovered and disclosed adverse conditions with respect to the property which were material and significant and which would have caused the Buyers not to purchase the Property if the true state of the facts had been disclosed to them.

**FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD, and
RUSSELL & JEFFCOAT REALTORS, Inc**

(Actual or Constructive Fraud)

(Damages for Undisclosed and Undiscovered Mold and Mildew)

- 32 The allegations of paragraphs 1 through 31 hereinabove are restated herein.
- 33 After moving into the Property in November, 2006, Buyers discovered the existence of mold and mildew throughout the house, including, without limitation, in ceilings, walls and crawlspace.
- 34 The mold and mildew existed prior to the contract of sale, and Seller and her agents Beard and Russell & Jeffcoat Realtors knew, or had sufficient reason to know, of the existence and locations of the mold and mildew, and despite such knowledge, failed and omitted to declare and disclose such knowledge to the Buyers, realizing that Buyers might not purchase the

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Property knowing of the existence and severity of the mold and mildew

35 The failure of the Seller and of her agents Beard and Russell & Jeffcoat Realtors to disclose the existence of mold and mildew amounted to a representation that mold and mildew did not exist

36 Seller and her agents Beard and Russell & Jeffcoat Realtors had a duty to disclose the true condition of the property to the Buyers

36 The representation made with respect to the nonexistence of mold and mildew was dishonest, unfair and false and constitutes fraudulent concealment

37 The said representation was material to the Buyers because it played a role in Buyers' ¹ decision to purchase the Property

38 Seller and her agents Beard and Russell & Jeffcoat Realtors knew the representation was false or was made with reckless disregard for its truth

39 Seller and her agents Beard and Russell & Jeffcoat Realtors intended, or had reason to expect, that Buyers would act in reliance on the representation

40 Buyers had no knowledge that the subject representation was false

41 Buyers had the right to rely on Seller's and her agents' representation with respect to the absence of mold and mildew and did in fact rely on the representation

42 As a proximate result of the Seller's and her agents' fraud, as described above, Buyers have been damaged in the amount of \$25,000, that being the cost of testing, abatement, and repairs associated with the removal of the mold and mildew

43 Buyers are informed and believe that they are entitled to judgment against Seller and against her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$25,000 for

the damages related to mold and mildew

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD,
and RUSSELL & JEFFCOAT REALTORS, Inc

(Negligent Misrepresentation)

¹ (Damages for Undisclosed and Undiscovered Mold and Mildew)

- 44 The allegations of paragraphs 1 through 43 hereinabove are restated herein
- 45 Alternatively, if it is found that Seller and her agents Beard and Russell & Jeffcoat Realtors
did not make a knowingly false representation with respect to the absence of mold and
mildew, their representation was nevertheless made negligently
- 46 Seller and her agents had a pecuniary interest in making the representation
- 47 Seller had a duty to see that only accurate information was communicated to the Buyers
- 48 Seller breached her duty by not accurately disclosing the existence and extent of mold and
mildew
- 49 Buyers justifiably relied on the representation of the Seller and her agents
- 50 As a proximate result of the Seller's and her agents' negligent misrepresentation, as
described above, Buyers have been damaged in the amount of \$25,000, that being the cost
of testing, abatement, and repairs associated with the removal of the mold and mildew
- 49 Buyers are informed and believe that they are entitled to judgment against Seller and against
her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$25,000 for
the damages related to mold and mildew

**FOR A THIRD CAUSE OF ACTION AGAINST PALMETTO HOME INSPECTION
SERVICES, LLC**

(Damages for Breach of Contract)

- 50 The allegations of paragraphs 1 through 49 hereinabove are restated herein
- 51 Defendant Palmetto contracted with Buyers to make an inspection of the Property for the
purpose of discovering and reporting on the condition of the Property to the Buyers who
Defendant Palmetto knew would rely on the report in their dealings with the Seller
- 52 By express or implied terms of its contract with the Buyers, Defendant Palmetto agreed to
conduct its inspection in a thorough and workmanlike manner and to report any conditions
which would adversely affect the value and/or habitability of the home
- 53 Defendant Palmetto did not report the existence of
- A mold and mildew in the home,
 - B the fact that the pool house roof was deteriorated and in need of replacement,
 - C decayed back door,
 - D general window decay on upstairs bedroom with leaks due to open mortar joints, sill
damage and open head joint,
 - E brick patio deterioration due to open mortar joints and water infiltration,
 - F damage to interior garage door,
 - G failed to report the full extent of hardwood flooring condition and the existing "blind
nailing" and absence of subfloor sheathing and underlayment,
 - H water damage to Florida room ceiling around chimney and corner wall,
 - I water damage in the crawl space and existence of construction debris,
 - J open masonry joints,

K defects in and around the skylight

54 Defendant Palmetto conducted its inspection in a negligent manner and in so doing failed to discover and report the existence of the conditions described in the preceding paragraph, thereby breaching its contract with the Buyers

55 As a result of the aforesaid breach of contract by Defendant Palmetto, Buyers have been damaged in the amount of \$79,000

56 Buyers are informed and believe that they are entitled to judgment against Defendant Palmetto Home Inspection Services, LLC , jointly and severally with the Seller and Defendants Beard and Russell and Jeffcoat Realtors, Inc , for \$25,000 in damages related to removal of mold and mildew and against Defendant Palmetto, solely, for \$54,000 for repairs identified in paragraph 53B through K above

**FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD,
and RUSSELL & JEFFCOAT REALTORS, Inc.**

(Actual or Constructive Fraud)

1 (Damages for Fraudulent Concealment of HVAC Age and Condition)

57 The allegations of paragraphs 1 through 56 hereinabove are restated herein

58 In her Residential Property Condition Disclosure Statement, Seller and her agents Beard and Russell & Jeffcoat Realtors made representations about the age and condition of the HVAC equipment

59 The representation made with respect to the age and condition of the HVAC equipment was dishonest, unfair and false and constitutes fraudulent concealment

60 The said representation was material to the Buyers because it played a role in Buyers' decision to purchase the Property

- 61 Seller and her agents Beard and Russell & Jeffcoat Realtors knew the representation was
false or was made with reckless disregard for its truth
- 62 Seller and her agents Beard and Russell & Jeffcoat Realtors intended, or had reason to
expect, that Buyers would act in reliance on the representation
- 63 Buyers had no knowledge that the subject representation was false
- 64 Buyers had the right to rely on Seller's and her agents' representation with respect to the age
and condition of the HVAC equipment and did in fact rely on the representation
- 65 As approximate result of the Seller's and her agents' fraud, as described above, Buyers have
been damaged in the amount of \$14,000, that being the cost of replacing the old and
defective HVAC equipment
- 66 Buyers are informed and believe that they are entitled to judgment against Seller and against
her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$14,000 for
the damages related to the HVAC equipment

**FOR A FIFTH CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD, and
RUSSELL & JEFFCOAT REALTORS, Inc**

(Damages for Negligent Misrepresentation Regarding HVAC Age and Condition)

- 67 The allegations of paragraphs 1 through 66 hereinabove are restated herein
- 68 Alternatively, if it is found that Seller and her agents Beard and Russell & Jeffcoat Realtors
did not make a knowingly false representation with respect to the age and condition of the
HVAC equipment, their representation was nevertheless made negligently
- 69 Seller and her agents had a pecuniary interest in making the representation
- 70 Seller had a duty to see that only accurate information was communicated to the Buyers

- 71 Seller breached her duty by not accurately disclosing the age and condition of the HVAC
equipment
72 Buyers justifiably relied on the representation of the Seller and her agents
73 As a proximate result of the Seller's and her agents' negligent misrepresentation, as
described above, Buyers have been damaged in the amount of \$14,000, that being the cost
of replacing the old and defective HVAC equipment
74 Buyers are informed and believe that they are entitled to judgment against Seller and against
her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$14,000 for
the damages related to the HVAC equipment

FOR A SIXTH CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD, and
RUSSELL & JEFFCOAT REALTORS, Inc
(Damages for Actual or Constructive Fraud Regarding CL100 Repairs)

- 75 The allegations of paragraphs 1 through 74 hereinabove are restated herein
76 At the closing on November 22 2007, Seller, by and through her agents Beard and Russell
& Jeffcoat Realtors, represented to Buyers that all of the water damage disclosed in the
CL100 letter had been repaired
77 After moving into the Property in November, 2006, Buyers discovered that the water damage
noted in the CL100 letter had not been fully repaired
78 Unrepaired water damage remained with respect to sills, joists, subfloors and roof decking
in the areas of the laundry room, front porch, brick patio, master bedroom and roof decking
79 Seller and her agents Beard and Russell & Jeffcoat Realtors had a duty to disclose the true

status of CL100 repairs to the Buyers

80 The representation made with respect to the CL100 repairs was dishonest, unfair and false

81 The said representation was material to the Buyers because it played a role in Buyers' decision to go forward with the closing

82 Seller and her agents Beard and Russell & Jeffcoat Realtors knew the representation was false or was made with reckless disregard for its truth

83 Seller and her agents Beard and Russell & Jeffcoat Realtors intended, or had reason to expect, that Buyers would act in reliance on the representation

84 Buyers had no knowledge that the subject representation was false

85 Buyers had the right to rely on Seller's and her agents' representation with respect to the CL100 repairs and did in fact rely on the representation

86 As a proximate result of the Seller's and her agents' actual and/or constructive fraud, as described above, Buyers have been damaged in the amount of \$21,400, that being the cost of completing the repairs called for in the CL100 letter

87 Buyers are informed and believe that they are entitled to judgment against Seller and against her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$21,400 for the damages related to CL100 repairs

FOR A SEVENTH CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD,
and RUSSELL & JEFFCOAT REALTORS, Inc
(Damages for Negligent Misrepresentation Regarding CL100 Repairs)

88 The allegations of paragraphs 1 through 87 hereinabove are restated herein

89 Alternatively, if it is found that Seller and her agents Beard and Russell & Jeffcoat Realtors

did not make a knowingly false representation with respect to the CL100 repairs, their representation was nevertheless made negligently

90 Seller and her agents had a pecuniary interest in making the representation

91 Seller had a duty to see that only accurate information was communicated to the Buyers

92 Seller breached her duty by not accurately disclosing the extent of CL100 repairs actually made

93 Buyers justifiably relied on the representation of the Seller and her agents

94 As a proximate result of the Seller's and her agents' negligent misrepresentation, as described above, Buyers have been damaged in the amount of \$21,400, that being the cost of completing the repairs called for in the CL100 letter

95 Buyers are informed and believe that they are entitled to judgment against Seller and against her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$21,400 for the damages related to the CL100 repairs

FOR AN EIGHTH CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD, and RUSSELL & JEFFCOAT REALTORS, Inc.

(Damages for Actual or Constructive Fraud Regarding Repair Addendum Items)

96 The allegations of paragraphs 1 through 95 hereinabove are restated herein

97 At the closing on November 22, 2007, Seller, by and through her agents Beard and Russell & Jeffcoat Realtors, represented to Buyers that all of the items on the repair addendum to the contract had been repaired or replaced and that \$2,500 was sufficient for the repair and/or replacement of the deteriorated windows

98 After moving into the Property in November, 2006, Buyers discovered that certain items on

the repair addendum had not been fully repaired or replaced.

- 99 Seller was to make the following roof/cornice repairs (a) install flashing or extend shingles to cover the open areas of the fascia of the returns, and (b) repair a small area of water damage (decay) on the soffit on the right side of the chimney, and (c) repair squirrel damage to fascia above master bedroom. None of these was repaired.
- 100 Seller was to repair or replace decayed window shutters. This was not done.
- 101 Seller was to repair an area of decay at the bottom of the stationary window above the front porch. This was not done.
- 102 Seller agreed to repair decayed areas at the bottom of the brick mold and door jambs on the right rear doors. This was not properly completed.
- 103 Seller agreed to repair decayed areas on the dormer siding boards and dormer corner trim boards. This repair was attempted but was not satisfactorily completed.
- 104 With respect to the attic, Seller agreed (a) to repair or replace sheathing in an area above the soffit on the right side of the sky light, and one area in the middle of the left side, and (b) to install bracing where the roof vents were removed, between the rafters, to add further support to these areas. This was not properly completed.
- 105 Regarding the water heater, Seller agreed to perform the work necessary to pipe the t& p valve to the exterior. This was not satisfactorily done, and Seller's workman damaged electrical conduit when working on the pipe to the exterior.
- 106 With respect to the HVAC unit, Seller agreed to seal the duct and gas line at the foundation wall penetration. This was not done.
- 107 With respect to the crawl space, Seller agreed (a) to repair duct work which was

disconnected from the front floor register in the sun room and (b) to pipe the condensate line for the attic air handler to the exterior. This was not done.

108 Buyers also discovered that \$2,500 was grossly insufficient to repair and/or replace the deteriorated windows.

109 Seller and her agents Beard and Russell & Jeffcoat Realtors had a duty to disclose the true status of the repair addendum repairs/replacements.

110 The representation made with respect to the repair addendum repairs was dishonest, unfair and false.

111 The said representation was material to the Buyers because it played a role in Buyers' decision to go forward with the closing.

112 Seller and her agents Beard and Russell & Jeffcoat Realtors knew the representation was false or was made with reckless disregard for its truth.

113 Seller and her agents Beard and Russell & Jeffcoat Realtors intended, or had reason to expect, that Buyers would act in reliance on the representation.

114 Buyers had no knowledge that the subject representation was false.

115 Buyers had the right to rely on Seller's and her agents' representation with respect to the repair addendum repairs and did in fact rely on the representation.

116 As a proximate result of the Seller's and her agents' actual and/or constructive fraud, as described above, Buyers have been damaged in the amount of \$35,500, that being the cost of completing the repairs called for in the repair addendum, including the windows.

117 Buyers are informed and believe that they are entitled to judgment against Seller and against her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$35,500 for

the damages related to the repair addendum repairs

**FOR A SEVENTH CAUSE OF ACTION AGAINST DEFENDANTS BOYKIN, BEARD,
and RUSSELL & JEFFCOAT REALTORS, Inc**
(Damages for Negligent Misrepresentation Regarding Repair Addendum Repairs)

- 118 The allegations of paragraphs 1 through 117 hereinabove are restated herein
- 119 Alternatively, if it is found that Seller and her agents Beard and Russell & Jeffcoat Realtors
did not make a knowingly false representation with respect to the repair addendum repairs,
their representation was nevertheless made negligently
- 120 Seller and her agents had a pecuniary interest in making the representation
- 121 Seller had a duty to see that only accurate information was communicated to the Buyers
- 122 Seller breached her duty by not accurately disclosing the extent of repair addendum repairs
actually made
- 123 Buyers justifiably relied on the representation of the Seller and her agents
- 124 As a proximate result of the Seller's and her agents' negligent misrepresentation, as
described above, Buyers have been damaged in the amount of \$35,500, that being the cost
of completing the repairs called for in the repair addendum, including the windows
- 125 Buyers are informed and believe that they are entitled to judgment against Seller and against
her agents Beard and Russell & Jeffcoat Realtors, both jointly and severally, for \$35,500 for
the damages related to the repair addendum repairs

**FOR AN EIGHTH CAUSE OF ACTION AGAINST DEFENDANTS APPLETON AND
BOB CAPES REALTY, INC**
(Damages for Negligence in Performance of Agent Duties owed to Plaintiffs)

- 126 The allegations of paragraphs 1 through 125 hereinabove are restated herein
- 127 Plaintiffs/Buyers employed Defendant Bob Capes Realty, Inc and its agents to act as their
real estate agent in purchasing a home in the Camden - Lugoff area of South Carolina
- 128 Defendant Bob Capes Realty Inc accepted said employment and agreed to act as Buyers'
real estate agent Defendant Appleton was the agent of Defendant Bob Capes Realty, Inc
who was responsible for carrying out the real estate agent agreement with the Buyers
- 129 Pursuant to the agency agreement between them, Defendants Bob Capes Realty, Inc and
Appleton owed duties to the Buyers as follows
- A to act in compliance with the instructions of their principal (the Buyers),
 - B to discover all material information which could affect the Buyers' interests in the
real estate transaction with the Seller,
 - C to disclose all material facts to the Buyers which are relevant and material to the
transaction with Seller, and
 - D to protect the Buyers by exercising reasonable skill and diligence in the transaction
of the business entrusted to them (Defendants Capes and Appleton) by the Buyers
- 130 Defendants Bob Capes Realty, Inc and Appleton breached the duties they owed to Buyers
and were negligent and careless in the following particulars
- A by failing to inspect and confirm that the repairs required by the CL100 letter had
been satisfactorily completed prior to the closing,
 - B by failing to inspect and confirm that the repairs required by the repair addendum
had been satisfactorily completed prior to the closing,
 - C by failing to investigate and confirm that the cash offered by the Seller in lieu of the

window repair item in the repair addendum was sufficient to satisfy the Seller's repair/replacement obligation,

D by recommending and advising Buyers to go forward with the closing notwithstanding that they (Defendants Capes and Appleton) had not confirmed that Seller had satisfied her repair obligations under the contract,

E by placing their own interests (the commission) ahead of the interests of the Buyers in the transaction, and

E in failing to use the degree of care and caution and diligence that a reasonable person acting as a real estate agent would have used under the circumstances then prevailing

131 As a proximate result of said negligence on the part of Defendants Capes and Appleton, Buyers have been damaged by having purchased a house with numerous and significant defects which will cost approximately \$150,000 to correct

132 By reason of the acts of Defendants Capes and Appleton as set forth above, Plaintiffs-Buyers are informed and believe that they are entitled to an award of actual damages in the amount of \$150,000

WHEREFORE, Plaintiffs pray for judgments as follows

a Against Defendants Boykin, Beard, Russell & Jeffcoat Realtors, Inc , and Palmetto Home Inspection Services, LLC, jointly and severally, in the amount of \$25,000 for failure to report and disclose the existence of the mold and mildew

b Against Defendants Boykin, Beard, Russell & Jeffcoat Realtors, Inc , Bob Capes Realty,

Inc , and Appleton, jointly and severally, in the amount of \$21,400 for the deficient CL100 repairs,

c Against Defendants Boykin, Beard, Russell & Jeffcoat Realtors, Inc , Bob Capes Realty, Inc , and Appleton, jointly and severally, in the amount of \$35,500 for the deficient repair addendum repairs, including windows,

d Against Defendants Boykin, Beard, and Russell & Jeffcoat Realtors, Inc , in the amount of \$14,000 for the misrepresentation of the age and condition of the HVAC equipment,

e Against Defendant Palmetto Home Inspection Services, LLC, in the amount of \$54,000 for its negligent performance of its inspection and reporting duties (for items other than mold and mildew),

f for the costs of this action



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803 461 2309 (F)
mbrackett@mkb-law.com
Attorneys for Plaintiffs

March 22, 2007

**COVER NOTE****INSURED J Scot Roberts****MAILING ADDRESS** 707 Boykin Road
Camden, Sc 29020

This is to certify that the undersigned has procured insurance coverage as hereafter specified from certain companies and/or underwriters

EFFECTIVE 09/01/2006 TERM 12 Months**COVERAGE** Professional Liability for Specified Professions

- Profession Real Estate Inspector
- Claims Made Form MPL#26901 (9/87)
- Retroactive Date 09/01/2002
- Limits Per Occurrence \$300,000 Annual Aggregate \$300,000
- \$1,000 Deductible

CONDITIONS

- Real Estate Agent/ Broker Referral Indemnity
- Knowledge of Wrongful Act Exclusion
- Pending and/or Prior Litigation Exclusion
- Defense within Policy Limit
- Deductible includes Loss Adjustment Expenses
- Radon Exclusion
- Wood Destroying Organism Exclusion
- Wood Destroying Insects Exclusion

COMPANIES PARTICIPATING

National Union Fire Insurance Company of Pittsburgh, PA

ASSIGNED COVER NOTE # Z FREI 02-2323**Issued at** 4907 Morena Blvd, Suite 1415
San Diego, CA 92117**DATE** September 7, 2006**BY***K Carpenter*

Insurance, when effected shall be subject to all terms and conditions of policy (ies) which will be issued, and in the event of any inconsistency herewith, the terms and provisions of the policy prevail



OFFER TO PURCHASE
Revised 07/06

(Standard Form of The Greater Columbia Association of REALTORS®) This form is available for use by the entire real estate industry. The use of the form is not intended to identify the user as a REALTOR®. REALTOR® is the registered collective membership mark which may be used only by real estate licensees who are members of the NATIONAL ASSOCIATION OF REALTORS® and who subscribe to its Code of Ethics and Standards of Practice.

BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM

THE [] BUYER [] SELLER IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

1. DATE

An offer to purchase is written this 12th day of October year 2006
by THOMAS W. Gladden & Vera H. Gladden Purchaser(s)
to Olivia M. Boykin Seller(s)

2. PROPERTY DESCRIPTION

Purchaser agrees to buy and Seller agrees to sell all that lot or parcel of land with the buildings and improvements thereon, if any located in Kershaw County South Carolina and being described as follows:

Address 10 Hunt Cup Ln City Camden Zip 29020
TMS# _____ Subdivision Hunt Cup

3. PRICE

The purchase price is \$ 495,000.00

4. EARNEST MONEY

A. \$ 1500.00 Earnest money is paid by [] cash, [X] check [] other
held in trust by Century 21
B. \$ _____ Additional earnest money to be deposited with _____
prior to _____

5. FINANCING

- A. Financing type shall be [] FHA, [] VA (see addendum for FHA/VA), [X] CONVENTIONAL, [] SELLER, [] CASH (No Financing Required) [] LOAN ASSUMPTION (see addendum for loan assumption), OTHER Comb
- B. Loan amount shall be a maximum _____ % of the purchase price
- C. If Seller financing is included in the financing of this property Selling Broker and/or Listing Broker and their Agents in this transaction make no representation as to the credit worthiness of Purchaser and suggest that Seller determine for himself that Purchaser's credit is satisfactory
- D. In a cash transaction, Purchaser agrees to provide Seller or Seller's Agent, within five (5) business days of acceptance of the contract, written verification of sufficient and available funds for the specified date of closing. Purchaser's failure to comply shall constitute a default under this contract.
- E. This contract is contingent on the lot or parcel with building and improvements thereon. If any appraising according to the lender's appraisal or other appraisal, as agreed by Purchaser and Seller, for the selling price or more. If the lot or parcel with building and improvements thereon appraises for less than the selling price, the Seller may elect to sell for the appraised value. In such case, the Purchaser agrees to proceed with the consummation of this sale at the reduced price.

However, if Seller does not agree to sell at the appraised value the Purchaser shall have the option of proceeding with the consummation of the contract without regard to the amount of the appraised valuation terminate the agreement without penalty or, with agreement of both parties, renegotiate the contract.



Purchaser's Initials [Signature] Date 10/10/06 have read this page Seller's Initials [Signature] Date 10/10/06 have read this page.

6. TRANSACTION COSTS

Unless otherwise agreed, loan transaction costs including but not limited to closing costs, prepaid expenses, discount points, survey, title examination and appraisal shall be paid as follows:

☒ Purchaser to pay all costs of obtaining the loan for the closing of the transaction

☐ Seller shall pay Purchaser's costs of obtaining the loan for closing the transaction, including allowable and non-allowable costs, not to exceed \$_____. Purchaser is responsible for any costs exceeding this amount.

7 LOAN PROCESSING APPLICATION FINANCING CONTINGENCIES

Time is of the essence Purchaser agrees to apply for financing as stated in Section 5, from the lender of his choice within five (5) business days from the date of contract acceptance and any required funds advanced for credit report and appraisal. Purchaser to furnish Lender any documentation required for the processing of this loan in a timely manner. Purchaser's failure to apply as required above shall constitute a default under this contract. Purchaser further hereby gives permission to Lender to disclose pertinent information concerning the Purchaser's loan to the Listing or Selling Brokers or Agents. If loan is rejected by initial lender, Purchaser or Purchaser's Agent must notify the Listing Agent immediately, and Seller shall then have the option to void contract. Contract is contingent upon financing (Section 5) up to and until five (5) business days prior to the closing date as set forth in this contract (Section 11). If loan is denied prior to this date, earnest money will be released to Purchaser after earnest money has cleared the bank. After this date the contract is no longer contingent upon financing. If Purchaser fails to comply with the above requirements, Purchaser shall be in default of this agreement subject to the terms of Section 17.

8. ADDITIONAL CONTINGENCIES

☐ Complete the sale and closing of Purchaser's property located at _____ It is further agreed that Seller will continue to market the property as long as the contingency relating to the sale and closing of Purchaser's property in accordance with this contract, remains in effect. Should Seller be presented another offer and if accepted, this contract will be voided without notification to the Purchaser or Purchaser's Agent and all earnest money refunded after earnest money check has cleared the bank. Purchaser or Purchaser's Agent will be notified of this contract being voided as soon as possible. For Purchaser to remove this contingency, Purchaser must provide documentation to Seller or Seller's Agent that any financing required under this agreement will be granted without the sale or lease of the aforementioned property and the financing contingency is removed. Upon the Purchaser's acceptance of a bona fide contract clear of contingencies other than financing, the Seller agrees to remove his property from the market and this sale will be contingent upon the close of the Purchaser's property. Any documentation regarding the sale of Purchaser's property to be furnished upon request.

☐ Complete the closing of the sale of Purchaser's property, currently under contract, on or before _____.

Property is located at _____

Seller agrees to remove his property from the market and this sale will be contingent upon the closing of the Purchaser's property. Any documentation pertaining to this sale will be provided by Purchaser upon request.

☐ Other _____

9 INSPECTIONS**A. Home Inspection**

The Listing and Selling Broker(s) recommend that Purchaser obtain a home inspection. Purchaser has the right within ten (10) business days after acceptance of contract to have home inspected by licensed professional inspectors of his choice. Fees for home inspections to be paid by Purchaser. If Seller does not receive Purchaser's written response to the inspection(s) and a copy of the inspection report(s) within the same ten (10) business day period, Section 9A is nullified in its entirety.

(1) Purchaser has the option of accepting the property in current condition as referenced by the inspection report(s). Otherwise, Purchaser must notify the Seller or Seller's Agent in writing by signed addendum specifying the defects or conditions Purchaser requests the Seller to remedy. Addendum must be accompanied by a copy of the home inspection report.

(2) Seller has three (3) business days to accept, reject or modify Purchaser's home inspection repair addendum. If Seller modifies addendum, Purchaser has two (2) business days from receipt of Seller's written counterproposal to provide written notice to the Seller or Seller's Agent of his acceptance or rejection of Seller's counterproposal.

(a) If Purchaser accepts the counterproposal - Purchaser agrees to complete the sale according to the terms and conditions of this contract.

- (b) If Purchaser rejects the counterproposal, he may elect to void the contract by providing written notice to the Seller or Seller's Agent within two (2) business days that the contract is voided or he may continue negotiations on repairs by submitting a counterproposal to the Seller. In all subsequent negotiations on the addendum, each party will be given two (2) business days to respond to any further counterproposals until final agreement on the addendum is reached or the Purchaser elects to void the contract.

Should either party fail to respond in the time frame indicated above, the other party has the option of voiding the contract by written notice. In the event the contract is voided by either party, the earnest money will be refunded to the Purchaser.

B Wood Infestation Report

Notwithstanding the provisions of Section 9A, the Purchaser may, at his expense or as required by Purchaser's lender, obtain an Official Wood Infestation Report (CL100 Letter) from a licensed and bonded exterminator. If any damage or infestation is found and Inspector recommends treatment and/or repairs, the Seller agrees to have such conditions corrected at his expense, by a licensed contractor prior to the closing.

C Heating & Air Inspection

Notwithstanding the provisions of Section 9A, the Purchaser may, at his expense or as required by Purchaser's lender, obtain a letter from a heating and air company stating that heating and air conditioning (if applicable) systems are in satisfactory working order. Seller agrees to have any required repairs corrected at his expense prior to closing. *Aforementioned not guaranteed for any period of time after closing*

D Lead-Based Paint Inspection

If this home was built prior to 1978, it may contain lead-based paint. This contract is contingent upon a risk assessment or inspection of the property for the presence of lead-based paint and/or lead based paint hazards at the Purchaser's expense until midnight on the tenth (10th) business day after acceptance of this contract. This contingency will terminate at the above predetermined deadline unless the Purchaser or Purchaser's Agent delivers to the Seller or Seller's Agent a written contract addendum listing the specific existing deficiencies, corrections needed, and the inspection and/or risk assessment report within the above time limits. The Seller may, at the Seller's option, elect in writing whether to correct the condition(s) prior to settlement. If the Seller does not elect to make the repairs, the Purchaser may remove this contingency and take the property in inspection report(s) condition within the above time limits or this contract will become void. The Purchaser may remove this contingency at any time without cause.

If this home was built prior to 1978 a Disclosure of Information and Acknowledgement Lead-Based Paint and/or Lead-Based Paint Hazards is hereby made an addendum to this contract and must be signed by both Purchaser and Seller.

18. CONDITIONS OF PROPERTY

- A Except as a new home being sold by the builder, the Purchaser acknowledges that Seller, except as provided in below paragraphs of this section, gives no guarantee or warranty of any kind, express or implied and has made no representation as to the physical condition of the property, or the existence of improvements, services, appliances or systems thereof or as to merchantability or fitness for a particular purpose as to the property or improvements thereof and any implied warranty is hereby disclaimed by the Seller.
- B The Seller warrants the heating, air conditioning, plumbing and electrical systems, well and/or septic systems and all appliances to be in operative condition on the day of closing or the day possession is given, whichever occurs first.
- C After any inspection by Purchaser and after repairs, if any made as a result of any such inspection, the Seller agrees to maintain the property including yard maintenance, heating and air conditioning, plumbing, electrical systems, and all appliances to be conveyed, in proper operative condition, normal wear and tear excepted, until the day of closing or the day possession is given, whichever occurs first. Seller warrants that to the best of his knowledge, information, and belief there are no conditions in the property which would adversely affect the value when conditions are hidden by furniture, fixtures or window treatments currently in place in the property.
- D The Listing and Selling Broker(s) and their Agent(s) recommend that Purchasers perform their due diligence as far as the property sewer system, water source and system, flood zone status, mandatory association fees, homeowner's association/regime fees and property covenants and restrictions.
- E ☐ Purchaser and Seller agree that a Seller's Property Condition Disclosure statement, as required by South Carolina Code of Laws, has been provided to Purchaser by Seller prior to the acceptance of this contract.
☐ Property is exempt from disclosure requirement in accordance with South Carolina Code of Laws

11. CONVEYANCE
DATE OF
CLOSING

Conveyance shall be made subject to all easements and covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and to have prepared a proper statutory warranty deed free of encumbrances except as herein stated. All statutory deed transfer fees shall be the responsibility of Seller. Purchaser shall pay for recording of deed. The deed shall be prepared in the name of THOMAS W. CLARDEN

and delivered to stipulated place of closing.

This transaction shall be closed on or before March 11, 2006, unless extended pursuant to Section 22.

12. POSSESSION

The Seller will be obligated to give possession and vacate the herein described property to the Purchaser ☒ at closing ☐ 24 hours after closing ☐ in accordance with attached rental agreement. Seller agrees to deliver the property free of debris and in a clean condition with landscaping maintained. Seller shall give Purchaser access to the herein described property for the purposes of a walk through inspection within twenty-four (24) hours prior to closing.

13. FIXTURES AND
PERSONAL
PROPERTY

This sale includes all fixtures, equipment and improvements of any kind which now exist and are attached to or planted on the premises, such as, but not limited to shrubbery, trees, fences, shutters, blinds, lamp posts, mail boxes, garage door openers and remotes, satellite dishes, seller-owned security systems, landscape lighting, curtain/drapery rods, ceiling fans and remotes, attached mirrors, light bulbs, switch plates, duct covers, and built ins, such as equipment, appliances, cabinets, furniture and shelves unless otherwise agreed herein. (Other items may be sold separately by bill of sale.)

14. REMARKS

Other conditions Subject to home inspection & well & pump inspections.

Home Warranty to be paid by listing and selling agents.

15. ADJUSTMENTS

Taxes, water, sewer charges, fuel oil, propane, electricity, natural gas, rents when applicable and all other assessments, including homeowners association fees, regime fees or the like shall be adjusted as of the date of closing. Tax proration pursuant to this contract are to be based on the tax information available or projected on the date of closing and are to be prorated on that basis unless otherwise stipulated in this contract.

16. FIRE OR
CASUALTY

In case this property is damaged wholly or partially by fire or other casualty prior to delivery of deed, Purchaser or Seller shall have the right for ten (10) business days after notice of such damage to terminate this contract. Upon such termination, the earnest money deposit of Purchaser shall be returned to Purchaser and neither party shall have any further rights hereunder. If neither Purchaser nor Seller elects to terminate the contract, the parties shall proceed according to the terms of the contract.

17. DEFAULT

If the Purchaser shall default under this contract, the Seller shall have the option of suing for damages or rescinding this contract. In the event the contract is rescinded, one-half of the earnest money shall then be paid to the Broker(s), not to exceed the commission due such Broker, and the remaining balance of earnest money shall be paid to the Seller. Upon default by the Seller, the Purchaser shall have the option of suing for damages or specific performance or rescinding this contract. If the Purchaser elects to rescind this contract, upon default by Seller, Purchaser will be refunded all sums paid hereunder and in addition shall be reimbursed by the Seller for actual costs incurred including but not limited to credit report, appraisal fee, survey and cost of title examination. In any action to enforce the provisions of this contract, the prevailing party and Broker(s) shall be entitled to the award of their costs including reasonable attorney's fees.

18. MEDIATION

Any dispute or claim arising out of or relating to this contract, the breach of this contract or the services provided in relation to this contract shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Purchaser(s) Seller(s) or any real estate broker or other person or entity in connection with the sale purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation negligence and/or fraud. Any contract signed by the parties pursuant to the mediation conference shall be binding. South Carolina Code Ann. Section 15-48-10 et seq. shall not apply to this contract.

**19. ENTIRE CONTRACT
BINDING
CONTRACT**

The parties agree that this written contract expresses the entire agreement between the parties, and that there is no other agreement, oral or otherwise, modifying the terms hereunder and that the contract shall be binding on both parties their principals heirs, personal representatives, successors and assigns as state law permits.

**20. BROKERS
ESCROW
ACCOUNT**

Broker does not guarantee payment of check or checks accepted as earnest money. Earnest money is to be promptly deposited in Broker's escrow account, upon acceptance by both parties of contract. In the event of any action wherein Broker is made a party by virtue of acting as escrow agent, or in any action wherein the funds, held in escrow by Broker are subject to an action in the nature of Interpleader, and Broker is made a party, Broker shall be entitled to recover reasonable Attorney's fees and court cost, the same to be charged and assessed against the Purchaser(s) or Seller(s) or both as the court may decide.

"The South Carolina Real Estate Practices Act allows the Broker holding the earnest money to deposit it into an interest bearing account. Purchaser agrees to and understands that he has been informed of his right to ownership of the interest but relinquishes to the broker by this written agreement said right of ownership. The earnest money so noted ☒ will ☐ will not be deposited into an interest bearing account with the interest accruing to the benefit of the Broker."

**21. SURVEY, TITLE
EXAMINATION,
INSURANCE**

The Listing and Selling Broker(s) and their Agent(s) recommend that Purchaser have a survey of the subject property made, that Purchaser select an attorney to examine the title to the property and that Purchaser obtain all appropriate insurance coverage including that required by the lender, to be effective at the time of closing.

**22. EXTENSION
AGREEMENT**

Time is of the essence. If Purchaser or Purchaser's Agent has provided written loan commitment but not closed within the stipulated time limit of this contract, both parties agree to extend this contract for a period not to exceed five (5) business days from the original closing date. In a cash transaction, if terms and conditions of (Section 5D) have been met, both parties agree to extend this contract for a period not to exceed five (5) business days from the original closing date.

**23. BROKERAGE
FEE**

All real estate brokerage fees as specified in the Listing Agreement and in the Buyer's Brokerage Agreement, if applicable, are earned upon the acceptance of this offer and are due and payable at the time of closing subject to any contingencies specified herein.

**24. NON-RESIDENT
TAX**

Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

**25. HOME
WARRANTY
COVERAGE**

Both parties understand that a home warranty ☒ will ☐ will not be provided at closing. If applicable, the warranty premium will be paid at closing by the _____ in the amount of \$ _____ and provided by _____.

Home Warranty Company and written through the _____ Broker.
 Brokers may receive a fee for issuance of a home warranty.
 10-11-06 ☒
 10-11-06 ☒

**26. EXPIRATION
OF OFFER**

This offer from Purchaser shall be withdrawn at 5:00 o'clock P m (ET) on, 10-11-06 unless accepted or countered by Seller in written form prior to such time.

**27. FAX
ELECTRONIC
MEANS**

The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

28. SURVIVAL

If any provision herein contained which by its nature and effect is required to be observed kept or performed after the closing it shall survive the closing and remain binding upon and for the parties hereto until fully observed, kept or performed.

29. DEFINITIONS

A. In this contract, a single business day is defined as a twenty-four (24) hour period, beginning at the time of acceptance of this contract, excluding Saturdays, Sundays and South Carolina legal holidays. In the contract, notice is deemed to be delivery.

B In this contract closing is defined as the time and date that the Closing Attorney or Closing Agent disburses funds

**30. HUD/CLOSING
STATEMENT
RELEASE**

Seller and Purchaser authorize the Closing Attorney to furnish to Listing Broker and Selling Broker copies of the HUD settlement statement for the transaction

31 MEGAN S LAW

The Purchaser and Seller agree that the Listing and Selling Broker and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Purchaser and Seller agree that no course of action may be brought against the Listing and Selling Broker and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Purchaser agrees that the Purchaser has the sole responsibility to obtain any such information. The Purchaser understands that Sex Offender Registry Information may be obtained from the appropriate law enforcement officials

**32. NON-RELIANCE
CLAUSE**

Both Purchaser and Seller hereby acknowledge that they have not received or relied nor could have relied upon any statements or representations or promises or agreements or inducements by either Broker or their agents which are not expressly stipulated herein. If not contained herein, such statements, representations, promises, or agreements shall be of no force or effect. This general non-reliance clause shall not prevent recovery in tort for fraud or negligent misrepresentation or intentional misrepresentation unless specific non-reliance language is included in this agreement. This is a non-reliance clause and is neither a merger clause nor an extension of a merger clause. The parties execute this agreement freely and voluntarily without reliance upon any statements or representations by parties or agents except as set forth herein. Parties have fully read and understand this Agreement and the meaning of its provisions. Parties are legally competent to enter into this agreement and to fully accept responsibility. Parties have been advised to consult with counsel before entering into this agreement and have had the opportunity to do so.

33. DISCLAIMER

The parties acknowledge that the Listing and Selling Broker(s) and their Agent(s) (A) Give no warranty of any kind, express or implied, as to the physical condition of the property or as to condition of or existence of improvements, services or systems, thereto, including but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage/septic, electrical systems, or to the structure, (B) Give no warranty, express or implied, concerning the condition of the property, any matters which would be reflected by a current survey of the property, or the accuracy of the square footage heated or unheated, (C) Give no warranty, express or implied, as to title (D) Give no warranty, express or implied, as to the fitness for a particular purpose of the property or improvements thereto, (E) Give no warranty express or implied, that the property being purchased is in compliance with all necessary zoning ordinances and restrictions, (F) Give no warranty, express or implied, as to projected income, value or other possible benefits to the Purchaser

This is a legally binding contract. Purchaser and Seller should seek legal advice if the contents are not understood. Both Purchaser and Seller acknowledge the receipt of a copy of this contract

IN WITNESS THEREOF, this contract has been duly executed by the parties hereto

Witness <u>Deborah I. Appleton</u>	Purchaser <u>Thomas W. Hadden</u>	Date <u>3-21-07</u>
Witness <u>Deborah I. Appleton</u>	Purchaser <u>Jeff Hadden</u>	Date <u>3/21/07</u>
Witness <u>Liz Beard</u>	Seller <u>Thomas W. Hadden</u>	Date <u>10/12/06</u>
Witness <u>K & J Liz Beard</u>	Seller <u>Thomas W. Hadden</u>	Date <u>4-9-07</u>
Listing Agent/Company <u>C-21 Deborah I. Appleton</u>	acknowledges Seller(s) is a ☒ Client or ☐ Customer	Telephone # <u>803-243-2921</u>
Selling Agent/Company <u>C-21 Deborah I. Appleton</u>	acknowledges Purchaser(s) is a ☒ Client or ☐ Customer	Telephone # <u>803-243-2921</u>

FINAL CONTRACT ACCEPTED BY BOTH PARTIES AT _____ O'CLOCK _____ M (ET) ON _____ DATE



STATE OF SOUTH CAROLINA RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT

INSTRUCTIONS TO PROPERTY OWNERS

- 1 South Carolina Code of Laws Title 27 Chapter 50 Article I requires that beginning January 1, 2003 an owner of residential real estate (single-family homes and buildings with up to four dwelling units) shall provide to a purchaser this property condition disclosure statement which must be completed prior to signing a contract of sale. This disclosure statement must be provided in connection with the sale, exchange, option and sale under a lease with an option to purchase. This disclosure statement is not required for some transactions, including the first sale of a dwelling which has never been inhabited. A complete list of exemptions may be found in Section 27 50-30.
- 2 You must check one of the boxes for each of the 24 questions on pages 2 and 3 of this form.
 - a. If you check "Yes" for any question, you must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator or other expert or public agency. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in the report as long as you were not grossly negligent in obtaining or transmitting the information.
 - b. If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misrepresentation.
 - c. If you check "No Representation" for any question, you are stating that you are making no representation regarding the conditions or characteristics of the property, but you may have a duty to disclose even if you know or should have known of them. Please consult with an attorney to determine any potential liability you may have for checking this answer.
 - d. If you check Yes or No for any question and subsequently something happens to the property to render your statement incorrect or inaccurate (for example, the roof begins to leak) you must promptly provide the purchaser a corrected statement or you may correct the problem.
- 3 If you are assisted in the sale of your property by a licensed real estate broker or salesperson, you remain solely responsible for completing and delivering this statement to the purchaser. The broker or salesperson must disclose any material facts about your property which he/she knows or reasonably should know, regardless of your responses on this statement. You are to complete this form yourself and answer all questions truthfully and as fully as possible. By signing below you acknowledge that the failure to disclose known material information about the property may result in liability.
- 4 You must provide the completed statement to the purchaser prior to the time you and the purchaser sign a contract to purchase your property or as otherwise agreed to in the contract. You should provide the purchaser a copy of this statement containing your signature and keep a copy signed by the purchaser for your records.

Initials _____
Rev 1/03
Form # 112

Seller OK Date 4/13/06
Buyer OK Date 4/13/06

Page 1 of 4



AS SELLER OF THE PROPERTY HEREIN IDENTIFIED, DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING

	Yes*	No	Representation
1 Foundation, slab fireplaces/chimneys, floors, windows (including storm windows and screens), doors, ceilings, interior and exterior walls, attached garage, patio, deck or other structural components including any modifications? a. Siding: masonry ___ wood ___ composition/hardwood ___ vinyl ___ synthetic stucco ___ <u>all brick</u> b. Approximate age of structure <u>22 yr</u>	☐	☒	☐
2 Roof (leakage or other problem)? a. Approximate age of roof covering <u>new</u>	☐	☒	☐
3. Water seepage, leakage, dampness or standing water or water intrusion from any source in any area of the structure?	☐	☒	☐
4 Electrical system (outlets, wiring, panel, switches fixtures, etc)?	☐	☒	☐
5 Plumbing system (pipes, fixtures, water heater, etc)?	☐	☒	☐
6 Heating and/or air conditioning <u>(new components replaced due to leak)</u> a. Heat source: furnace ___ heat pump ___ baseboard ___ <u>gas</u> b. Cooling source: central ___ wall/window unit(s) ___ c. Fuel source: electricity ___ natural gas ___ propane ___ oil ___ d. Approximate age of heating unit ___/cooling unit <u>new in last 10 yr</u>	☐	☒	☐
7 Water supply (including water quality, quantity and water pressure?) a. water supply is city/county, community system, private well ___ b. water pipes are copper ___ galvanized ___ PVC/CPVC ___ polybutylene ___	☐	☒	☐
8 Septic system? a. Type system: septic tank ___ community system ___ connected to city/county system ___ city/county system available ___ b. Does the system require a pump? Yes ___ No ___ <u>2</u> c. Has the septic system been serviced/pumped during your ownership? <u>yes</u>	☐	☐	☐
9 Appliances (range/oven, attached microwave, hood/fan, dishwasher, disposal, etc)?	☐	☒	☐
10 Present infestation, or damage WHICH HAS NOT BEEN REPAIRED from past infestation of wood destroying insects or organisms? a. Is there a transferable termite bond? Yes ___ No ___ <u>termite</u>	☐	☒	☐
11 Drainage, grading or stability of soil or retaining structure?	☐	☒	☐
12 Other built in systems and fixtures? central vacuum ___ pool ___ hot tub ___ spa ___ attic fan ___ exhaust fan ___ ceiling fan ___ sump pump ___ irrigation system ___ cable tv wiring or satellite dish ___ security system ___ or other systems ___	☐	☒	☐

Initials BME Seller 9/16 Date 4/9 Buyer WJ Date 4/9

REGARDING THE PROPERTY HEREBY IDENTIFIED, ANY IMPROVEMENTS, AND FIXTURES LOCATED THEREON, DOES ANY

	Yes*	No	No Representation
13 Room additions or other structural changes?	☐	☒	☐
14 Environmental hazards (substances, materials or products) including asbestos, formaldehyde, radon gas, methane gas, lead-based paint, underground storage tank, toxic mold or other hazardous or toxic material (whether buried or covered), contaminated soil or water or other environmental contamination?	☐	☒	☐
15 Nuisances (noise, odor, smoke, etc.) affecting the property?	☐	☒	☐
16 Previous damage caused by fire?	☐	☒	☐
17 Violations or variances of building codes or zoning ordinances?	☐	☒	☐
18 Restrictions to property use? (covenants or deed)	☒	☐	☐
19 Utility or other easements, shared driveways, party walls or encroachments from or on adjacent property?	☐	☒	☐
20 Lawsuits, foreclosures, bankruptcy, tenancies, judgments, tax or other liens, proposed assessments or notice from any governmental agency that could affect title to the property?	☐	☒	☐
21 Owners' association fees or "common area" expenses or assessments?	☐	☒	☐
22 Flood hazards or that the property is in a federally-designated flood plain?	☐	☒	☐
23 Rental, rental management, vacation rental or other lease contracts in place on the property at the time of closing?	☐	☒	☐
24 Any outstanding charges owed by the tenant for gas, electric, water, sewerage, or garbage services provided to the property?	☐	☒	☐

***IF YOU ANSWERED "YES" TO ANY OF THE ABOVE QUESTIONS, PLEASE PROVIDE THE FOLLOWING SPACE FOR YOUR EXPLANATION AND ATTACH ANY AVAILABLE PROFESSIONAL REPORTS.**

Initials SK Seller AK Date 4/4 Buyer JB Date 4/4

4 "Yes" explanations continued:

Owner(s) Acknowledgement

Property Address 10 Hunt Cup Lane

The property is currently owner-occupied ☒ leased ☐ in an estate ☐ in foreclosure ☐
vacant ☐ (If vacant, how long?) _____

Owner's Name(s) Olivia M. Baykin

Owner(s) acknowledge having examined this statement before signing and that all information is true and correct as of the date signed.

Owner Signature ☒ Olivia M. Baykin Date 9/16/06

Owner Signature _____ Date: _____

Purchaser(s) Acknowledgement

Purchaser(s) acknowledge receipt of a copy of this disclosure statement; that he/she has examined it before signing; that he/she understands that this is not a warranty by owner or owner's agent; that it is not a substitute for any inspections he/she may wish to obtain, and that the representations are made by the owner and not the owner's agent(s) or subagent(s). Purchaser(s) are encouraged to obtain his/her own inspection by a licensed home inspector or other professional.

Purchaser Signature *[Signature]* Date: 12/18/06

Purchaser Signature _____ Date: _____

(This form is approved by the South Carolina Real Estate Commission.)



Proudly Serving the Palmetto State

PALMETTO HOME INSPECTION SERVICES, LLC.
P O BOX 176 CAMDEN, SC 29020
PH 803-424-1948

INSPECTION REPORT

FOR VERA & TOMMY GLADDEN

LOCATION 10 HUNT CUP LANE CAMDEN, SC 29020

DATE 10-18-06

INSPECTION # 6104

REALTOR / AGENT DEBBIE APPLETON

INSPECTOR. SCOT ROBERTS / LICENSE #1036

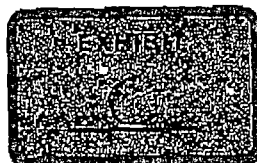
WEATHER. OVERCAST

TEMP 71-F @ 9 00 am

ROOF DESIGN HIP & GABLE

CONSTRUCTION TYPE BRICK

FOUNDATION TYPE CRAWL SPACE



OVERALL EVALUATION

**THE OVERALL EVALUATION OF THIS HOME IS GOOD SEE THE SUMMARY REPORT
FOLLOWING THE MAIN INSPECTION REPORT FOR DETAILS & PHOTOS**

ATTENTION

**HOME INSPECTORS ARE NOT CONSIDERED HEATING AND COOLING EXPERTS IT IS
STRONGLY RECOMMENDED TO HAVE A LICENSED HEATING & AIR CONTRACTOR
EVALUATE THE CONDITION OF YOUR HVAC UNIT(S) OUR INSPECTORS DO NOT
REMOVE ANY PANELS FROM THE UNIT AND DO NOT CHECK FREON LEVELS OUR
INSPECTION OF THE UNIT IS ONLY A VISUAL ONE. WE DO HOWEVER CHECK THE
OPERATION OF THE THERMOSTAT, FILTERS, AND CONDITION OF THE DUCT WORK IF
ACCESSIBLE**

**WE ALSO RECOMMEND THAT YOUR HOME IS INSPECTED BY A LICENSED PEST
CONTROL (TERMITE) EXPERT**

PALMETTO HOME INSPECTION SERVICES, LLC

707 BOYKIN RD

CAMDEN, SC 29020

PH 803-424-1948 FAX 803-424-0074

Main Inspection Report

10/18/2006

Grounds & Landscaping

*Shrubbery clearances **REFER TO SUMMARY REPORT***

Walkway # 1 located Front

Brck Walkway appears acceptable

Porch located Front

Concrete Porch appears acceptable

Patio # 1 located Rear

Brick Patio appears acceptable

Stairs/Landing # 1 located Front

Brck Stairs/Landing appear acceptable

Chimney # 1 located Rear

Masonry Chimney appears acceptable

Roofing Material for Main House/Garage

Medium pitch roof with Asphalt Shingles Roof covering appears acceptable

Roof Mounted Structures

Plumbing Vents appear acceptable

Skylights appear acceptable

Ridge Vents appear acceptable

Exterior Siding Finish is Horizontal Lap/ Wood Fiber

*Siding ** REFER TO SUMMARY REPORT ***

Exterior Masonry Finish is Brick with Mortar Joints

Masonry finish appears acceptable

Exterior Cornice

*(Wooden) Fascia ** REFER TO SUMMARY REPORT ***

*(Wooden) Eaves ** REFER TO SUMMARY REPORT ***

(Continuous) Eaves vents appear acceptable

Exterior Trim

*(Wooden) Window trim ** REFER TO SUMMARY REPORT ***

*(Wooden) Louvered Shutters ** REFER TO SUMMARY REPORT ***

(Wooden) Porch ceiling appears acceptable

(Wooden) Columns & Posts appear acceptable

(Metal) Rail System appears acceptable

Windows And Screens -- Glazing is Insulated

*Double Hung Wooden Window Extenors ** REFER TO SUMMARY REPORT ***

Solid Brick Foundation Walls (Exterior Observations)

Foundation wall appears acceptable

Under Floor Observations

*No Insulation ** REFER TO SUMMARY REPORT ***

1/2 " Copper Water Distribution Piping appears acceptable

3" PVC Drainage Piping appears acceptable

Black Steel gas piping material appears acceptable.

*METAL & FLEX Ducting Material -- ** REFER TO SUMMARY REPORT ***

Wiring installation appears acceptable

PALMETTO HOME INSPECTION SERVICES, LLC

707 BOYKIN RD.

CAMDEN, SC 29020

PH 803-424-1948 FAX. 803-424-0074

Crawl Space Floor Type is Dirt.

Access Access is located IN GARAGE Access appears to be adequate

Ventilation appears to be adequate

General Conditions of Crawl Space appear to be acceptable

Garage is 2 Car Attached

Floor Type is Concrete Flooring appears acceptable

Both Garage Doors

Door Material is Metal(Insulated) Type is Rollup Vehicle door appears acceptable

Door Opener is Chain Driven (1/2 HP) With Electronic Light safety Switch Appears acceptable

Main House Attic Area

Attic Access is Stairway Appears acceptable

Insulation Material is Fiberglass Batt. Estimated R-Value is R 25 Appears acceptable

Ventilation appears adequate.

Decking **** REFER TO SUMMARY REPORT ****

Electrical components in attic appear to be acceptable

Duct work in attic appears to be acceptable

General conditions appear to be acceptable

Living Room

Hardwood Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

Receptacle Outlets Appears acceptable

Windows **** REFER TO SUMMARY REPORT ****

Air Supply Appears acceptable

Den

Hardwood Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

Switched lighting, Controls Overhead lighting/Ceiling fan appears acceptable

Receptacle Outlets Appears acceptable

Entry Door Appears acceptable

Closets Appears acceptable

Air Supply Appears acceptable

Dining Room

Hardwood Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

Switched lighting, Controls Overhead lighting appears acceptable

Receptacle Outlets Appears acceptable

Windows **** REFER TO SUMMARY REPORT ****

Entry Door Appears acceptable

Air Supply Appears acceptable

Sun Room

Ceramic Tile Floor Covering appears acceptable

Wall covering appears to be acceptable

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Ceiling Material appears to be acceptable

Switched lighting, Controls Overhead lighting/Ceiling fan appears acceptable

Receptacle Outlets Appears acceptable

Windows Appears acceptable

Entry Door Appears acceptable

Air supply **** REFER TO SUMMARY REPORT ******FROG**

Carpet Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable.

Switched lighting Controls Overhead lighting/Ceiling fan **** REFER TO SUMMARY REPORT ****

Receptacle Outlets Appears acceptable

Entry Door Appears acceptable

Air Supply Appears acceptable

Master Bedroom-UPSTAIRS

Hardwood Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

Switched lighting Controls Overhead lighting/Ceiling fan, appears acceptable

Receptacle outlets **** REFER TO SUMMARY REPORT ****Windows **** REFER TO SUMMARY REPORT ****

Entry Door Appears acceptable

Closets Appears acceptable

Air Supply Appears acceptable

Bedroom #2-(UPSTAIRS-RIGHT FRONT)

Carpet Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

Switched lighting, Controls Overhead lighting/Ceiling fan, appears acceptable

Receptacle Outlets Appears acceptable

Windows **** REFER TO SUMMARY REPORT ****

Entry Door Appears acceptable

Closets Appears acceptable

Air Supply Appears acceptable

Bedroom #3-(UPSTAIRS-RIGHT REAR)

Carpet Floor Covering appears acceptable

Wall covering appears to be acceptable.

Ceiling Material appears to be acceptable

Switched lighting, Controls Overhead lighting/Ceiling fan, appears acceptable

Receptacle Outlets Appears acceptable

Windows **** REFER TO SUMMARY REPORT ****

Entry Door Appears acceptable

Closets Appears acceptable

Air Supply Appears acceptable

Master Bedroom-DOWN STAIRS

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Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting, Controls Overhead lighting/Ceiling fan, appears acceptable
Receptacle Outlets Appears acceptable
Windows Appears acceptable
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable

Kitchen

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
*Switched lighting, Controls Overhead lighting/Ceiling fan, ** REFER TO SUMMARY REPORT ***
Receptacle Outlets Appears acceptable
*Windows ** REFER TO SUMMARY REPORT ***
Entry Door Appears acceptable
Pantry Appears acceptable
Air Supply Appears acceptable

Kitchen Cabinets

(PAINTED) Kitchen cabinets appear to be acceptable

Kitchen Counter Tops

(Ceramic) Kitchen counter tops *** REFER TO SUMMARY REPORT ***

Kitchen Sinks (Double Sink)(Porcelain)

Kitchen sink appears acceptable
Kitchen sink faucets appear acceptable
Kitchen sink drainage appears acceptable

Kitchen Appliances

Disposal appears acceptable
(Electric) Cook top appears acceptable
(Electric) Oven is deficient *** REFER TO SUMMARY REPORT ***
Range Hood is deficient *** REFER TO SUMMARY REPORT ***
Dishwasher appears acceptable

Master Bathroom-Upstairs

Ceramic Tile Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
*Switched lighting, Controls Overhead lighting ** REFER TO SUMMARY REPORT ***
Receptacle Outlets Appears acceptable
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable.
Toilet appears acceptable
*Lavatory ** REFER TO SUMMARY REPORT ***
Bathroom cabinets appear to be acceptable

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Bathroom counter tops appear to be acceptable

*Whirlpool Style CAST RESIN Bathtub ** REFER TO SUMMARY REPORT ***

TILE Shower stall appears acceptable

BATHROOM #2-(UPSTAIRS-JACK & JILL)

Ceramic Tile Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting, Controls Overhead lighting, ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

*Windows ** REFER TO SUMMARY REPORT ***

Entry Door Appears acceptable

Air Supply Appears acceptable

Toilet appears acceptable.

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

Standard Style, Steel Bathtub appears acceptable

TILE Shower stall appears acceptable

BATHROOM #3-(FROG)

Sheet Vinyl Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting, Controls Overhead lighting, ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

Entry Door Appears acceptable

Air Supply Appears acceptable

Toilet appears acceptable

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

Fiberglass Shower stall appears acceptable

MASTER BATHROOM #2-DOWN STAIRS

Ceramic Tile Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting, Controls Overhead lighting, ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

Windows Appears acceptable

Entry Door Appears acceptable

Closets Appears acceptable

Air Supply Appears acceptable

Toilet appears acceptable.

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

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Standard Style, Steel Bathhub appears acceptable
TILE Shower stall appears acceptable

1/2 BATHROOM-DOWN STAIRS-KITCHEN AREA

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
*Switched lighting, Controls Overhead lighting, ** REFER TO SUMMARY REPORT ***
Receptacle Outlets Appears acceptable
Windows Appears acceptable
Entry Door Appears acceptable
Toilet appears acceptable
Lavatory appears acceptable
Bathroom cabinets appear to be acceptable
Bathroom counter tops appear to be acceptable

Masonry Fireplace located in Den.

Damper appears acceptable
Mortar Joints appear acceptable
*Hearth ** REFER TO SUMMARY REPORT ***
Mantel appears acceptable

Gas Water Heater STATE 40000 BTUs Located Garage

50 Gallon Capacity water heater appears to be acceptable
All associated Plumbing and Piping appear to be acceptable

1- GAS PACKAGE UNIT-FOR DOWN STAIRS HEIL 3 5 tons & 90-k BTUs Located OUTSIDE ON LEFT

Service switch appears to be acceptable
Filters appear to be acceptable
Thermostats appear to be functional

2-GAS FURNANCE G E. 60-K BTUs Located Attic

Filters appear to be acceptable
Thermostats appear to be functional
Overall Operation appears to be within normal limits

Air Conditioning Unit # 1 HEIL 3 Ton Unit. Condensing Unit located Left side of House

*Air conditioning unit ** REFER TO SUMMARY REPORT ***

Plumbing Main Service Main Cutoff Valve located FRONT YARD

Supply Line is 3/4" PVC Water service line appears acceptable.

Main Electrical Service 120/240 volt, 200 Amp, 4/0 Aluminum Wiring

UNDERGROUND Electrical service appears acceptable
Main Service Panel located in DEN-CLOSET (Breakers) appears acceptable
Electric Meter located Left Side. Electric Meter & Grounding Electrode (Copper) appears acceptable

Branch Circuits

120 volt, 20 amp circuits (Copper Conductors) appear acceptable
240 volt, 30 amp circuits (Copper Conductors) appear acceptable
240 volt, 40 amp circuits (Copper Conductors) appear acceptable
240 volt, 50 amp circuits (Copper Conductors) appear acceptable
240 volt, 20 & 100 amp circuits (Aluminum and Copper Conductors) appear acceptable

Electrical Sub Panels

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*Sub panel #1 located POOL HOUSE (8) 120 volt Circuits ** REFER TO SUMMARY REPORT ***

Smoke Detector # 1 Located In Upstairs Hallway

Smoke Detector (Battery Powered) appears acceptable

Smoke Detector # 2 Located In MASTER BEDROOM-DOWN STAIRS

Smoke Detector (Battery powered) appears acceptable

Smoke Detector # 3 Located In KITCHEN

Smoke Detector (Battery powered) appears acceptable

Outdoor lighting Fixtures – All

Wall Switched Lighting Fixtures appears acceptable

Outdoor Receptacles All

NOT GFCI PROTECTED Outdoor Receptacles appears acceptable

*****INSPECTION SUMMARY REPORT*****

10 HUNT CUP LANE CAMDEN SC 29020

EXTERIOR

ROOF: (a) RECOMMEND INSTALLING FLASHINGS, OR EXTENDING THE SHINGLES TO COVER THE OPEN AREAS OF THE FASCIA OF THE RETURNS (SEE EXAMPLE PHOTO #3)

CORNICE: (a) THERE IS A SMALL AREA OF WATER DAMAGE (DECAY) ON THE SOFFIT ON THE RIGHT SIDE OF THE CHIMNEY

(b) IT APPEARS THAT A SQUIRREL HAS CHEWED ON THE BOTTOM OF THE FASCIA (DENTAL MOLD) ON THE FRONT ABOVE THE MASTER BEDROOM.

(c) THERE ARE A COUPLE SMALL BEE HOLES IN THE WOODEN FASCIA ON THE REAR OF THE HOUSE

WINDOWS: (a) SOME OF THE WOODEN WINDOW SHUTTERS HAVE DECAY PRESENT AND SOME HAVE MISSING LOUVERS

(b) THE LEFT REAR PATIO AND THE LEFT FRONT WINDOW SCREENS ARE TORN

(c) A SMALL AREA OF WATER DAMAGE (DECAY) IS PRESENT AT THE BOTTOM OF THE STATIONARY WINDOW ABOVE THE FRONT PORCH.

DOORS: (a) SURFACE RUST IS PRESENT AT THE BOTTOM OF THE RIGHT REAR METAL DOORS. THE WEATHER STRIPPING IS DETERIORATING AROUND THESE DOORS

(b) SMALL AMOUNTS OF DECAY ARE PRESENT AT THE BOTTOM OF THE BRICK MOLD, AND DOOR JAMBS ON THE RIGHT REAR DOORS (SEE PHOTO #2).

SIDING: (a) THERE ARE SMALL AMOUNTS OF DECAY PRESENT AT THE BOTTOM ON THE DORMER SIDING BOARDS, AND DORMER CORNER TRIM BOARDS (SEE PHOTO #1)

GENERAL: (a) RECOMMEND CUTTING THE SHRUBBERY BACK FROM THE STRUCTURE.

(b) THE PAINT IS PEELING FROM THE EXTERIOR TRIM WORK IN SEVERAL AREAS

(c) THE CLOTHES DRYER DUCT NEEDS CLEANING

GARAGE: (a) THE GLOBE IS MISSING FROM ONE OF THE LIGHT FIXTURES.

(b) THE FRONT WINDOW PANE IS CRACKED

(c) THERE IS A SMALL STAIN ON THE CEILING WHERE THE FROG BATHROOM DRAIN PENETRATES THE CEILING

ATTIC AREA

SHEATHING: (a) THE SHEATHING IS DAMAGED IN TWO SMALL AREAS OF THE MAIN ATTIC (SEE PHOTO #5). ONE AREA IS ABOVE THE SOFFIT ON THE RIGHT SIDE OF THE SKY LIGHT AND ONE AREA IS IN THE MIDDLE ON THE LEFT SIDE.

(b) THE AREAS WHERE THE ROOF VENTS WERE REMOVED (SEE PHOTO #6) NEED TO HAVE BRACING INSTALLED BETWEEN THE RAFTERS TO SUPPORT THESE AREAS. ONE AREA IS ABOVE THE DOWN STAIRS MASTER BEDROOM, AND THE OTHER IS TOWARDS THE REAR OF THE MAIN ATTIC ON THE LEFT SIDE.

(c) THERE ARE SEVERAL WATER STAINS ON THE SHEATHING THROUGHOUT THE ATTIC AREA. THESE STAINS APPEAR TO BE FROM THE PAST

ELECTRICAL: (a) THE SWITCH PLATE COVER IS MISSING

GENERAL: (a) THE SCREEN IS LOOSE ON THE LEFT SIDE ROOF EXHAUST FAN

(b) THE AREA ABOVE THE FROG WAS NOT ACCESSIBLE DUE TO PERSONAL ITEMS BLOCKING THE ACCESS.

GENERAL INTERIOR: (a) THE GAS SEALS ARE BROKEN ON SEVERAL OF THE WINDOWS THROUGHOUT THE HOME GIVING THEM A FOGGED-UP APPEARANCE. THE UPSTAIRS WINDOWS, SOME OF THE SUNROOM WINDOWS, LIVING ROOM WINDOWS, AND KITCHEN WINDOWS APPEAR FOGGED-UP

(b) THE GLOBE IS MISSING FROM THE LIGHT FIXTURE IN THE STAIRCASE FROM THE KITCHEN

(c) SOME OF THE GROUT IS MISSING FROM THE FIREPLACE HEARTH.

(d) THE HARDWOOD FLOORING SQUEAKS IN SOME AREA. THIS IS TYPICAL IN AN OLDER HOME.

MASTER BEDROOM- (UPSTAIRS): (a) THERE IS A WATER STAIN AROUND THE RECEPTACLE UNDERNEATH THE LEFT SIDE WINDOW

BEDROOM #2- (UPSTAIRS- RIGHT FRONT): (a) THE LEFT SIDE WINDOW WILL NOT SUPPORT ITSELF WHEN OPENED

MASTER BATHROOM- (UPSTAIRS): (a) THE AIR SWITCH BUTTON IS MISSING FROM THE WHIRLPOOL TUB. THE TUB MOTOR COULD NOT BE OPERATED

(b) THE EXHAUST FAN IS MAKING NOISE.

(c) THERE IS A COSMETIC SETTLEMENT CRACK IN THE SHEETROCK CEILING BELOW THE SKYLIGHT

(d) THERE ARE SMALL SURFACE CRACKS IN THE BOTTOM OF THE RIGHT SIDE SINK.

UPSTAIRS-JACK & JILL BATHROOM: (a) THE AREA BETWEEN THE TOP OF THE TUB, AND THE WALL TILES NEEDS TO BE RE-CAULKED

(b) THE WATER PROOF LIGHT PICTURE GLOBE IS MISSING ABOVE THE SHOWER STALL.

BATHROOM #3 (FROG): (a) THE LIGHT FIXTURE ABOVE THE SHOWER DOES NOT APPEAR TO BE A WET LOCATION TYPE FIXTURE. IT APPEARS TO BE A RECESSED FIXTURE WITH A FLOOD LIGHT BULB.

(b) THERE IS NO DOOR STOP AND THERE IS A VERY SMALL HOLE IN THE SHEETROCK WALL BEHIND THE DOOR.

(c) THE SHEETROCK TAPE IS SEPARATING ABOVE THE SHOWER STALL.

MASTER BATHROOM (DOWN STAIRS): (a) THE EXHAUST FAN IS MAKING NOISE.

(b) THERE IS A SMALL AMOUNT OF WATER HAMMER PRESENT WHEN THE VALVES ARE SUDDENLY TURNED OFF

1/2 BATHROOM (KITCHEN AREA): (a) THE EXHAUST FAN IS MAKING NOISE.

FROG: (a) A LIGHT BULB IS BROKEN OFF INSIDE ONE OF THE RECESSED LIGHT FIXTURES.

KITCHEN: (a) THE RANGE HOOD IS MAKING NOISE.

(b) COULD NOT CHECK THE OVEN BELOW THE STOVE TOP IT IS FULL OF PERSONAL ITEMS

(c) THE DEN SIDE CEILING FAN WOBBLES ON HIGH SPEED

(d) TWO OF THE FLORESCENT LIGHT FIXTURES ARE NOT ENERGIZING (BULB?)

(e) A COUPLE OF THE COUNTER TOP TILES ARE CRACKED

(f) THE LIGHT INSIDE THE STAND ALONE OVEN DID NOT RESPOND (BULB?)

WATER HEATER: (a) IT IS RECOMMENDED TO PIPE THE T&P VALVE TO THE EXTERIOR.

HVAC UNIT: (a) RECOMMEND SEALING THE DUCT AND GAS LINE AT THE FOUNDATION WALL PENETRATION (SEE PHOTO #4)

CRAWL SPACE: (a) THERE IS NO INSULATION UNDERNEATH THE FLOOR. THIS IS TYPICAL OF A HOME THIS AGE.

(b) THE DUCT WORK IS DISCONNECTED FROM THE FRONT FLOOR REGISTER IN THE SUNROOM

(c) A SMALL SECTION OF THE DUCT INSULATION IS TORN BACK FROM THE DUCT WORK UNDERNEATH THE MASTER BATHROOM, AND THE KITCHEN

(d) THE CLOTHES DRYER DUCT IS MADE OF VINYL MATERIAL. RECOMMEND CHANGING TO AN UPDATED TYPE MATERIAL.

(e) THE CONDENSATE LINE FOR THE ATTIC AREA AIR HANDLER IS PIPED INTO THE CRAWL SPACE ALONG THE LEFT SIDE DEN WALL. THE CONDENSATE LINE NEEDS TO BE PIPED TO THE EXTERIOR.

(f) SOME AREAS WERE NOT ACCESSIBLE BECAUSE OF LOW CLEARANCES OF THE DUCT WORK, AND PLUMBING PIPES. THE AREAS UNDERNEATH THE DOWN BEDROOM, AND THE SUNROOM WERE NOT FULLY ACCESSIBLE.

POOL HOUSE.

ELECTRICAL: (a) SEVERAL RECEPTACLE COVERS, AND SWITCH PLATES ARE MISSING COVERS

(b) THE 30amp SINGLE POLE BREAKER ON THE RIGHT SIDE HAS A #12 WIRE ATTACHED TO IT. #12 WIRE IS ONLY RATED FOR 20amps.

(c) RECOMMEND CHANGING THE TWO SINGLE POLE 20amp BREAKERS ON THE LEFT SIDE (THAT ARE USED TO FORM A 240v CIRCUIT) WITH A DOUBLE POLE 20amp MOLDED CASE BREAKER.

(d) THE SPARE WIRES INSIDE THE PANEL NEEDS TO BE CAPPED OFF

(e) THERE IS NO BUSHING (ROMEX CONNECTOR) ON THE SUPPLY WIRE OF THE WATER HEATER.

ATTIC: (a) THERE ARE WATER STAINS ON THE SHEATHING IN THE ATTIC AREA. THESE STAINS APPEAR TO BE FROM THE PAST, AND THE WOOD APPEARS SOLID IN THIS AREA.

BATHROOM: (a) THE BATHROOM CABINET IS DAMAGED (DECAYED AT BOTTOM).

(b) THE WALL AREA BEHIND THE TOILET IS INCOMPLETE.

(c) THE OVERHEAD LIGHT FIXTURE DID NOT RESPOND (BULB?).

(d) THE EXHAUST FAN IS MAKING NOISE.

GENERAL: (a) SOME OF THE VINYL FLOOR TILES ARE LOOSE.

(b) THE WATER HEATER WAS NOT FULLY ACCESSIBLE.

ALWAYS USE LICENSED CONTRACTORS FOR REPAIRS.

ITEMS NOT MENTIONED IN THIS REPORT WERE NOT INSPECTED

NOTE: IF THE HOME INSPECTED IS FURNISHED, ALL WALLS, FLOORS, WINDOWS, RECEPTACLES, ETC. WILL NOT BE ACCESSIBLE.

1-1600
copy

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

07-CP-28-288

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

Olivia M Boykin, Elizabeth A
Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell &
Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

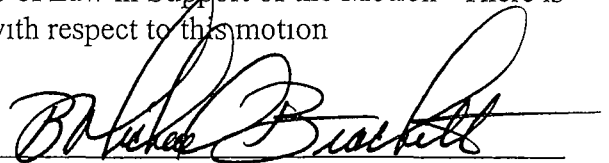
Defendants

PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT ON THE
UNENFORCEABILITY OF PHIS'S
LIMIT OF LIABILITY CLAUSE

TO The Defendants and their Attorneys

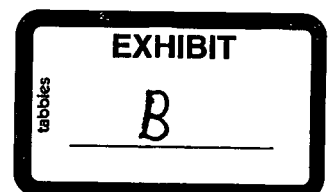
Please take notice that the Plaintiffs, through their undersigned attorney, move the Court for an Order granting summary judgment in favor of the Plaintiffs on the legal issue of the unenforceability of Defendant Palmetto Home Inspection Services LLC's limit of liability provision in its contract with the Plaintiffs. This motion is made pursuant to Rule 56 on the ground that the matter presented is a question of law and that there is no genuine issue of material fact which would entitle Defendant PHIS to enforce the limit of liability provision in this case.

This motion will be supported by all matters of record herein, including the deposition of Defendant PHIS through its owner Scot Roberts, by all other pretrial discovery, by legal authorities of this and other jurisdictions and by Plaintiffs' Memo of Law in Support of the Motion. There is no duty of prior consultation with opposing counsel with respect to this motion.



B. Michael Brackett, Esquire
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(803) 461-2312
Attorney for Plaintiffs

Columbia, South Carolina
June 18, 2008



STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
07-CP-28-288

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

Olivia M Boykin, Elizabeth A
Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell &
Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

Defendants

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT ON THE
UNENFORCEABILITY OF PHIS'S
LIMIT OF LIABILITY PROVISION

ISSUE PRESENTED

May the Defendant Palmetto Home Inspection Services LLC, a professional home inspector, limit its liability to its client- home buyer, the Plaintiffs, by the inclusion of a "limit of liability" provision in its pre-printed adhesion contract? Plaintiffs' contention that the limit of liability provision at issue is unenforceable because it is unconscionable and, alternatively, because it violates public policy is supported by the authorities identified and examined hereinbelow

FACTS

(Citations are to Defendant PHIS's deposition testimony given by Scot Roberts)

Defendant Palmetto Home Inspection Services, LLC seeks to enforce a limitation of liability provision in its contract with its clients, the Plaintiffs. The provision at issue reads

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report (Deposition Exhibit 4)

Other relevant facts include

- Plaintiffs were under contract to pay \$495,000 for a house which they eventually purchased, in significant part on reliance of PHIS's inspection report, Defendant PHIS held itself out to the Plaintiffs, and to the public in general, as a professional service (Deposition Exhibit 3, p 20, line 20 to p 24, line 7),
 - PHIS held itself out as being "licensed-bonded- insured (Deposition Exhibit 3, p 20, line 20 to p 24, line 7),"
 - and having 30+ years of experience (Deposition Exhibit 3, p 20, line 20 to p 24, line 7),
 - its contract with the Plaintiffs was presented to Plaintiffs and signed after the inspection had been made (p 34, lines 15-20),
- (the contract itself was a pre-printed form with blanks to be filled in - it was not prepared specifically for the Plaintiffs (p 25, line 8 to p 26, line 12),
- if Plaintiffs had not signed the contract as presented, PHIS would not have delivered the inspection report, meaning the contract was a take-it-or-leave-it contract (p 34, line 15 to p 35, line 10),
- the limit of liability provision was not conspicuously set out in the agreement (Deposition Exhibit 4),
- home inspectors, including PHIS, are subject to licensure and regulation by the state¹ (p 21,

¹ S C Code Ann §40-59 500 (Supp 2007) and S C Code Ann Regs 106-4 (Supp 2007)

lines 13-25)

- Plaintiffs purchased a house for \$495,000, have alleged damages in excess of \$150,000, at least \$54,000 of which is alleged to be PHIS's responsibility, for which defendant PHIS claims its liability is limited to the return of the \$475 fee paid by Plaintiffs for the inspection and report (p 37, line 10 to p 39, line 3, deposition exhibit 5)

LAW

Plaintiffs contend that the limit of liability provision is unenforceable because it is unconscionable and because it is in violation of public policy

1 General Contract Law

In South Carolina, the law generally provides that contracts will be enforced as written and that it is not the function of the courts to rewrite contracts for the parties Ellis v Taylor, 449 S E 2d 447 (S C 1994), Somerset v Reyner, 104 S E 2d 344 (S C 1958) However, if a court finds any provision of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause or so limit its application so as to avoid any unconscionable result Simpson v MSA of Myrtle Beach, 644 S E 2d 663 (S C 2007) And, it is the general rule in South Carolina that courts will not enforce a contract which is violative of public policy Id

2 Unconscionability

There is no South Carolina appellate court opinion addressing the issue of the unconscionability of a "limit of liability" provision in a home inspection contract There are cases on point from other jurisdictions that will be examined below In Simpson v MSA of Myrtle

Beach, supra unconscionability in relation to an arbitration provision was reviewed ‘ In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them ’ Id , Fanning v Fritz’s Pontiac-Cadillac-Buick, 472 S E 2d 242 (S C 1996) ²

With respect to the absence of meaningful choice, factors to consider are

- the nature of the injuries suffered by the Plaintiffs,
whether the Plaintiffs are a substantial business concern,
- the relative disparity in the parties’ bargaining power,
- the parties’ relative sophistication,
whether there is an element of surprise in the inclusion of the challenged clause,
- the conspicuousness of the clause Simpson, supra

To begin, the court should determine if the contract is an adhesion contract, recognizing, however, that adhesion contracts are not per se unconscionable Id An adhesion contract is a standard form contract offered on a “take-it-or-leave-it” basis with terms that are not negotiable Id By this definition, the contract herein was an adhesion contract (p 25, line 8 to p 26, line 12, p 34, line 15 to p 35, line 10)

With respect to oppressive and one-sided terms, Simpson is the only South Carolina opinion which specifically addresses substantive “oppressiveness” in terms of unconscionability, and it primarily concentrates on an arbitration provision’s denial of statutory remedies It has little, if any, application to a limit of liability provision in a home inspection contract Other jurisdictions have

² S C Code Ann §36-2 302 contains statutory unconscionability considerations in the context of a contract for the sale of goods There is no reason why the same policies and principles of law cannot apply to a contract for the sale of services

addressed this issue, and those cases are examined below

3 Public Policy

As stated above, it is the general rule in South Carolina that courts will not enforce a contract which is violative of public policy Simpson, supra. Public policy is broadly defined as the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society Black's Law Dictionary 1245 (7th ed 1999). It is more narrowly defined as the principle that a person should not be allowed to do anything that would tend to injure the public at large. Id. “ for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions ” Brown v. Drake, 270 S E 2d 130 (S C 1980)

4 Other Jurisdictions

Application of unconscionability and public policy principles to limit of liability provisions in home inspection contracts is fully and persuasively demonstrated in Lucier v. Williams, 841 A 2d 907 (N J Super 2004) and in Pitts v. Watkins, 905 So 2d 553 (Miss 2005)

In Lucier, the trial court granted partial summary judgment to the home inspector, thereby limiting the homeowners to a recovery of one-half of the fee paid to the home inspection service, namely \$192.50 (as specified in the contract), notwithstanding that the landowners were claiming repair damages of \$8,000 to \$10,000. The appellate court reversed the trial court after concluding that the limitation of liability provision in the home inspection service contract was unconscionable and violated public policy. The Court's conclusion was based on

- (1) it was an adhesion contract,
- (2) the parties, a professional expert and a consumer, had grossly unequal bargaining status,
- (3) the substance of the limit of liability provision “eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional’s negligence ”

With respect to unconscionability, the Court noted that the contract was a classic contract of adhesion, presented on a standardized pre-printed form, on a take-it-or-leave-it basis, without opportunity for negotiation or modification of terms

The inspector was an experienced professional. The homeowner was unsophisticated in matters of home construction and placed his trust in the expert.

To “foist” a contract of this type on an inexperienced consumer demonstrates a lack of fair dealing by the professional. The cost of a home is substantial, and is commonly a major financial undertaking. Home inspectors conduct a volume business, and possess knowledge of the cost of repairing major defects. Discovery of such defects so that necessary repairs can be factored into the consumer’s decision about buying a home is a major selling point of the inspector’s services. If the only consequence to the inspector for professional dereliction is the refund of a few hundred dollars, “there is no meaningful incentive to act diligently in the performance of home inspection contracts.” The excessively restricted damages provided by the limit of liability provision is grossly disproportionate to the potential loss to the home buyer if a substantial defect is negligently overlooked. To cap the inspector’s exposure to such a small amount effectively immunizes the inspector from the consequence of his negligence and is tantamount to an exculpation clause.

With respect to public policy, the Lucier opinion also found that the limit of liability clause violated public policy because

(1) it allows the home inspector to circumvent the state's public policy of holding professional service providers to certain industry standards,

(2) exculpation provisions are antithetical to the relationship of a client with a professional service provider, and

(3) home inspectors are licensed and regulated by the State in the interest of protecting the home-buying public, and this protection cannot be contracted away Id

In Pitts v Watkins, 905 So 2d 553 (Miss 2005) the Mississippi Supreme Court reversed the trial court's grant of summary judgment in favor of the home inspector by holding that substantive unconscionability existed with respect to a limit of liability provision in the home inspection contract. Substantive unconscionability is proved by showing that the terms of the contract are oppressive. Id. The Court in Pitts was influenced in its decision by (1) the role of the inspection report in the customer's decision to invest "thousands of dollars" in the purchase of a house, (2) the limit of liability provision "would allow home inspectors to walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct" (stated otherwise, it amounted to an exculpation clause), (3) the great disparity between the amount of alleged damages suffered by the client and the nominal amount of damages provided for in the limit of liability provision, and (4) the fact that it limits the amount of compensatory damages recoverable but absolutely precludes the client's ability to recover punitive damages if the facts warrant such an award.

5 Exculpation Clauses

The Lucier and Pitts opinions found that the limitation of liability provisions at issue therein effectively immunized the inspector from the consequences of his own negligence and was therefore

“tantamount to an exculpation clause” and should be reviewed by employing the same policy considerations governing outright exculpation provisions Id

Contracts that seek to exculpate a party from liability for the party’s own negligence are not favored by the law and are strictly construed against the party relying thereon McCune v Myrtle Beach Indoor, 612 S E 2d 462 (S C App 2005) An exculpatory clause will never be construed to exempt a party from liability for his own negligence in the absence of explicit language clearly indicating that such was the intent of the parties Id South Carolina appellate courts have addressed exculpation clauses in agreements not involving professional services, but have not addressed the enforceability of exculpation provisions in professional service contracts Other jurisdictions have

The enforceability of an exculpation clause depends in part on the nature of the contract Courts will more readily enforce exculpation clauses in contracts involving customary transactions in the market place South Carolina has enforced such provisions in agreements not involving professional services See McCune, supra and cases cited therein However, in Olsen v Molzen, 558 S W 2d 429 (Tenn 1977), the Tennessee Supreme Court acknowledged the different standards governing contracts involving professional services, as contrasted with a contract with a tradesman, and concluded that a stricter standard is called for contracts “involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state ” Id Cases following Olsen have held that it is not necessary that all six criteria be present for an exculpation clause to be found unenforceable, Russell v Bray, 116 S W 3d 1 (Tenn App 2003) Olsen adopted the criteria laid down in the seminal case on the subject, Tunkl v Regents of University of California, 383 P 2d 441 (Cal 1963) which held an exculpation clause or “release from future liability” clause invalid Olsen and Tunkl considered the following characteristics of

the contract as controlling

- it concerns a business of a type generally thought suitable for public regulation,
- the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public,

the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards,
- in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services,

in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence,
- as a result of the transaction, the person is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents

Application of these factors to the contract herein leads to the inescapable conclusion that the limit of liability provision is tantamount to an unenforceable exculpation clause

CONCLUSION

For the reasons set out above, the limit of liability provision in Defendant Palmetto Home Inspection Services LLC's contract is unenforceable and of no effect in this case

Columbia, South Carolina
June 18, 2008

A handwritten signature in black ink, appearing to read "B. Michael Brackett", written over a horizontal line.

B. Michael Brackett, Esquire
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Post Office Box 100261
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(803) 461-2312
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
07-CP-28-288

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

CERTIFICATE OF SERVICE

Olivia M Boykin, Elizabeth A
Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell
& Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

Defendants

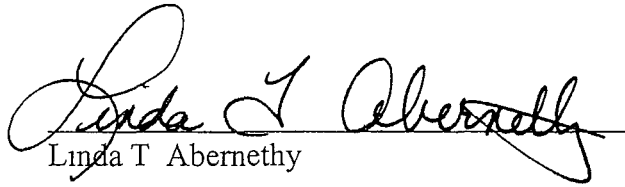
I, Linda T Abernethy, Legal Assistant to B Michael Brackett, Esquire, attorney for the
Plaintiffs in the above-captioned matter, do hereby certify that I have served counsel for the
Defendants with a copy of the **Plaintiffs' Motion for Summary Judgment and Supporting
Memorandum of Law** by United States Mail, postage prepaid and return address clearly indicated
on said envelope, on this 18th day of June, 2008, at the following addresses

William S Tetterton, Esquire
P O Box 530
Camden, SC 29020
Attorney for Defendant Boykin

Joseph S McCue, Esquire
P O ox 12487
Columbia, SC 29211
Attorney for Defendant Palmetto
Home Inspection Services

Catharine Garbee Griffin, Esquire
P O Box 8057
Columbia, South Carolina 29202
Attorney for Defendants Appleton and
Bob Capes Realty, Inc

W Jonathan Harling, Esquire
P O Box 11208
Columbia, SC 29211
Attorney for Defendants Beard and
Russell & Jeffcoat Realtors, Inc



Linda T Abernethy

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No 07-CP-28-0288

)

)

) **DEFENDANT PALMETTO HOME**
) **INSPECTION SERVICES, LLC'S**
) **MEMORANDUM IN SUPPORT OF ITS**
) **MOTION FOR SUMMARY JUDGMENT**

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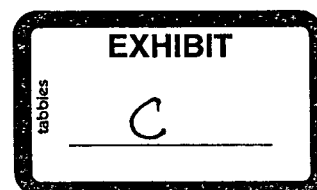
ISSUE

Are the Plaintiffs bound by the clear terms of the Palmetto Home Inspection contract which Mrs. Gladden read and signed after interviewing two home inspectors?

STATEMENT OF THE CASE

This action arises out of the Plaintiffs' purchase of a home located at 10 Hunt Cup Lane in Camden, South Carolina ("subject property") from the Defendant Olivia M. Boykin. The Defendant Elizabeth A. Beard is a real estate agent with Russell Jeffcoat Realtors, Inc. who represented Ms. Boykin in the sale of the subject property to the Plaintiffs. The Defendant Deborah Appleton is a real estate agent with Bob Capes Realty, Inc. who represented the Plaintiffs in the purchase of the subject property. Palmetto Home Inspection Services, LLC ("Palmetto") contracted with Plaintiffs to perform a home inspection on the subject property.

On March 26, 2007, the Plaintiffs filed this lawsuit. Plaintiffs assert causes of action against Ms. Boykin, Ms. Beard and Russell & Jeffcoat for actual and construction fraud and negligent misrepresentation. Plaintiffs' cause of action against Ms. Appleton and Bob Capes



Realty alleges negligent performance of an agent's duty to the Gladdens. The sole cause of action against Palmetto is for breach of contract.

Palmetto has moved for summary judgment and this memorandum is submitted in support of that motion and in opposition to Plaintiffs' Motion for Summary Judgment.

FACTS

In the Fall of 2006 the Plaintiffs were relocating from Winnsboro, South Carolina to Camden, South Carolina. Mrs. Gladden had prior experience as a real estate agent in Winnsboro. When Mrs. Gladden looked for a house in Camden, she initially drove around different neighborhoods and put cards in mailboxes of homes that she found appealing. One such home was the subject property owned by Olivia Boykin. Mr. and Mrs. Gladden attempted to negotiate the purchase of this home directly with Ms. Boykin in an effort to avoid paying real estate agent commissions. Ms. Boykin refused to negotiate with the Gladdens unless they went through a real estate agent. The Plaintiffs then approached Deborah Appleton of Bob Capes Realty, Inc. about representing them in this transaction.

The asking price for the property was \$499,000. Mrs. Gladden prepared a worksheet from which she determined to make an offer for the house for \$434,630 based on various deductions. The items listed to justify the low offer included the following items:

There were six houses on the market on Hunt Club Lane at the time, Realtor fees, Landscaping, Exterior paint/scrape, Clean, Replace rot, Paint, Shutters – replace front, Gutters – lack of, Age of HVAC, Dated – no updating since built (except surface seat in kitchen, mantle, stove), Hardwood floors not kept up (especially kitchen), No changes to bedroom or kitchen, Kitchen cabinets rough – need repainting, countertops replaced, Paint, painted wallpaper, Rotted wood – dormers and around door off den to patio, Average quality building materials used.

On September 21, 2006, the Plaintiffs made an offer to Ms. Boykin in the amount of \$434,630. Ms. Boykin rejected that offer and through a series of counter offers, the Plaintiffs

agreed on October 12, 2006 to pay \$495,000 for the purchase of this home. Under the terms of the Offer to Purchase, Plaintiffs had the option to have a home inspection conducted. The contract also required the Seller to provide a South Carolina Wood Infestation Report along with a heating and air conditioning inspection.

Ms. Appleton provided Mrs. Gladden the names of two home inspectors, Mr. Outlaw and Mr. Roberts. Ms. Appleton described Mr. Outlaw as the "hardest but best" (see Exhibit 1 Vera Gladden depo. March 10, 2008 p. 144 L. 9-17). Ms. Gladden contacted Mr. Roberts, owner of Palmetto and interviewed him over the phone. She then interviewed Mr. Outlaw (Exhibit 1 p. 165, ll. 9-14). After interviewing Mr. Roberts and Mr. Outlaw, Mrs. Gladden decided to hire Mr. Roberts.¹

Mr. Roberts inspected the home for the Plaintiffs on October 18, 2006. Mrs. Gladden was present at the time of the inspection. At the end of the inspection, but prior to discussing the inspection results, Mrs. Gladden read and signed the Palmetto Home Inspection Services, LLC Real Estate Inspection contract (Exhibit 1 p. 206-207, ll. 13-4) (see Palmetto Contract attached as Exhibit 2). An important provision in that contract is titled 'Limit of Liability'. That section reads as follows:

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including, but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

The Gladdens paid Palmetto \$475.00 for the inspection.

Following the receipt of the Palmetto Inspection Report, the Plaintiffs prepared and addendum to the contract asking the Seller to repair certain items identified in the inspection.

report. The Plaintiffs and the homeowner negotiated various items and ultimately reached a resolution as to what items would be repaired and which items the seller would provide a credit to the Plaintiffs for. The Plaintiffs also received a South Carolina Wood Infestation Report (CL-100) prepared by Terminix Services, Inc.

The CL-100 was dated October 30, 2006. The Plaintiffs acknowledged receiving the CL-100 on the date of closing November 22, 2006. The CL-100 report identified evidence of damage and indicated that the damage “will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by qualified building expert, licensed or registered with the South Carolina Department of Labor, Licensing and Regulation, Residential Builders Commission and that needed repairs be made.” The report specifically listed water damage to portions of the sill, sub-floor and floor joist near the dirt-filled porch in the front, the brick patio in the back, and under the laundry room. There was also some damage to the roof decking under the exhaust fan in some places where the roof changed angles. Despite Terminix’s recommendation that the Plaintiffs’ have the home inspected by a licensed, qualified building expert, the Plaintiffs proceeded to close on the house without such an inspection.

The Seller retained Ski Construction to make repairs to the sub-structure identified by Terminix as well as the items identified in the Palmetto Report which the Plaintiffs and Seller agreed to repair. Unfortunately, Ski Construction is not a licensed builder, has no insurance, and either did not perform the repairs sufficiently or did not repair them at all.

On the date of closing, the Plaintiffs expressed concerns about whether or not the repairs were done properly and sufficiently. Plaintiffs allege both Ms. Appleton and Ms. Beard assured them the repairs were done. Plaintiffs’ concerns were relayed through their attorney, Thomas

¹ After interviewing two home inspectors and selecting one, Plaintiffs cannot legitimately claim they had no option other than agree to the terms of the Palmetto contract.

Sprott, to Ms Boykin's attorney in Camden Neither Ms Boykin nor her attorney were present at closing When the Plaintiffs continued to express concerns, Ms Boykin told the Plaintiffs she was willing to cancel the closing However, the Plaintiffs chose to move forward with the closing

Following the closing, the Plaintiffs moved into the residence over Thanksgiving weekend 2006 Mr Gladden's brother is in the construction business and he assisted Mr Gladden in moving some of his furniture While at the house, Mr Gladden asked him to inspect the crawl space repairs Mr Gladden's brother determined that the repairs to the crawl space were not properly performed

On November 29, 2006, Mrs Gladden contacted Mr Roberts to express her concerns about items she perceived to have been not disclosed or under-disclosed in the Palmetto Report During that conversation Mr Roberts offered to refund the Plaintiff's the amount they paid for the inspection Mr Roberts then met with Mrs Gladden and gave her a check for \$475 00 Plaintiffs cashed that check

STANDARD OF REVIEW

Rule 56(c) provides "Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law " Dawkins v Fields, 354 S C 58, 69, 580 S E 2d 438 39 (2003), (citing Boughman v American Tel and Tel Co, 306 S C 101, 410 S E 2d 537, 545 (1991)) In determining whether Summary Judgment is appropriate, the evidence in its reasonable inferences must be viewed in the light most favorable to the non-moving party Id at 115, 410 S E 2d at 545 The moving party is entitled to Summary Judgment when the non-moving party has failed to make a sufficient showing on an essential element of their case with respect to which they have the burden of proof Id

Analysis

THE PLAINTIFFS ARE BOUND BY THE TERMS OF THE CONTRACT BETWEEN PLAINTIFFS AND PALMETTO

It is well established in South Carolina that parties to a contract have a duty to read the contract and learn its contents before signing it. “As early as 1924, this Court recognized that every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.” Burwell v. South Carolina Nat’l Bank, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986). The Court deems a party’s failure “to do so [as] inexplicable.” Id. It is undisputed that Plaintiff Vera Gladden signed the contract with Palmetto. It is also undisputed that Ms. Gladden read the contract prior to signing it and agreed to the terms of the contract. The following exchange took place with Ms. Gladden at her deposition:

Q So you read the contract and after reading it, you signed it?

A Yes

Q And agreed to the terms of that contract, correct?

A I signed it, yes

Q And by signing it, you agreed to the terms of that contract, correct?

A Yes

(Exhibit 1 p. 204, ll. 2-7)

Mr. Gladden testified that his wife reads contracts before she signs them (see Exhibit 3 Thomas Gladden Deposition January 22, 2008 p. 238, ll. 7-9). Indeed, he testified as follows with regard to his wife’s practice of negotiating and reading contracts:

Q And she --- does she just outright accept every contract or does she question issues she doesn’t understand?

A Sir, I think you will find her very discriminating

Q Alright So she would -- if she had a question, she would raise it She would negotiate with someone on a contract?

A Yes (Exhibit 3 p 238, ll 10-15)

It is further undisputed that Palmetto gave the Plaintiffs a sum equal to the amount of the fee charged to the home inspection (Exhibit 3 p 240, ll 9-22) (Exhibit 1 p 212, l 5-8)

Another contract provision reads as follows

AGREEMENT

This contract represents the entire agreement between Palmetto Home Inspection Services, LLC and the client, PHIS, LLC is not responsible for the repair, replacement or alteration of any item within or upon the inspected property **The client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms and exclusions contained within this contract** (See Exhibit 2) emphasis added

- -
The contract with Palmetto was signed by Ms Gladden and must be enforced See Jaffe v Gibbons, 290 S C 468, 351 S E 2d 343, 346 (1986), Peddler, Inc v Rykerd, 266 S C 28, 221 S E 2d 115, 117 (1975)

ENFORCEABILITY OF THE LIABILITY PROVISION OF THE CONTRACT

Agreements limiting or exempting liability are enforceable 17a C J S Contracts §271 (2007) South Carolina Law enforces exculpatory clauses when clear language indicates the intent of the parties South Carolina Electric & Gas Company v Combustion Engineering, Inc, 283 S C 182, 191, 322 S E 2d 453, 458 (Ct App 1984) In Combustion Engineering, Inc , the South Carolina Court of Appeals enforced the language of an exculpatory clause which exempted the Defendant for liability for negligent manufacturing

In a case squarely on point, Pride v Southern Bell Telephone and Telegraph Company, 244 S C 615, 138 S E 2d 144 (1964), the Supreme Court enforced a contract which limited

liability arising out of the publication of paid advertisements in the yellow pages to only the amount paid for the advertisement. In Pride, the contract for services contained a provision whereby the parties agreed that the liability of the telephone company “on account of errors in or omissions from such advertisement, should in no event exceed the amount of the charges for such advertisement which was omitted, or in which the error occurred in the then current issue.” Id. at 619, 138 S.E.2d at 156. The Supreme Court explained that exposure to liability is “wholly a matter of private contract” and that exculpatory clauses between private parties do not violate public policy. Id. at 621, 138 S.E.2d at 157. In this case, the Supreme Court enforced a contract which limited liability to the amount provided for in the contract. This Court must hold likewise.

Recently, the Court of Appeals in McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005) held that an exculpatory clause was sufficient to release the Defendant from all liability arising out of injuries a patron sustained while participating in a paintball game. In McCune, the Court held that exculpatory clauses in contracts also barred actions for negligence resulting in personal injuries. The Court of Appeals recognized that even though exculpatory clauses may be disfavored by the law, such clauses are enforceable in South Carolina. The Court further reaffirmed that exculpatory clauses between private parties do not violate public policies.

OTHER STATES ENFORCE EXCULPATORY CLAUSES IN HOME INSPECTION CONTRACTS

Courts routinely enforce exculpatory clauses involving contracts or home inspection services. In Baker v. Roy H. Haas Assoc., Inc., 629 A.2d 1317 (MD 1993), the Court upheld a limitation of liability clause in a contract limiting damages to the amount of \$250. In Baker, the

Court quoted Dean Prosser who pronounced that public policy allows parties to contract away liability as they see fit Id at 1320 (Citing Prosser, Law of Torts, 3rd Ed (1964) §67, P 456))

The Supreme Court of New York in two cases, recently affirmed that a homebuyer's damages are limited to the amount provided for in the contract In Netti v Le Frois, 303 A D 2d 971 (N Y 2003), the Court held at a homebuyer was limited to \$250, based on the terms of the agreement, for any alleged faulty or negligent inspection of the home inspector In Rector v Calamus Group, Inc., 17 A D 3d 960, (N Y 2005), the Supreme Court held that a home inspector was only liable for the amount provided for in the contract, which limited liability to \$205

These Court's limited damages to the amount set forth in the inspection contract, regardless of whether the Plaintiff asserted causes of action based in tort or in contract See Baker, supra, Netti, supra, Rector, supra In the case at bar, the agreement provided "It is understood and agreed should PHIS, LLC and/or its agents or employs be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract, or otherwise, the only liability of PHIS, LLC and/or its agents or employees should be limited to a sum equal to the amount of the fee paid by the client for this inspection and report" (See Exhibit 2) This language is clear and explicit The Plaintiffs paid \$475 for this home inspection It is undisputed that Palmetto issued a check to the Plaintiffs in the amount of \$475 and that the Plaintiffs cashed that check

SOUTH CAROLINA STATUTORY LAW ALLOWS
DEFENDANT PALMETTO TO CONTRACTUALLY LIMIT
THE SCOPE OF ITS RESIDENTIAL HOME INSPECTION

South Carolina expressly allows a licensed home inspector, such as Palmetto, to contractually limit the scope of its home inspection South Carolina Code Annotated §40-59-500(4) defines a "home inspection" to mean

The rendering of a written or oral report in exchange for compensation of any sort, regarding the condition of the construction or improvements to a residence including, but not limited to, structural problems or conditions, damage, safety problems, deterioration, equipment and systems that are **visible and readily accessible**. Home inspection does not include a contract or proposal for repair, renovation, or remodeling of the improvements to a residence. **The parties to a home inspection may limit or expand the scope of the inspection by agreement**

(Emphasis added)

In this case, the Plaintiffs signed the contract which defined and limited the scope of the home inspection including Palmetto's liability for any claims arising from the home inspection

SOUTH CAROLINA LAW AND PUBLIC POLICY FAVOR
THE ENFORCEABILITY OF CONTRACTS

Well established law and public policy of South Carolina requires this Court to enforce the language of the contract between the Plaintiffs and Palmetto. "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, (1994)

"A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals." Romanus v. Biggs, 214 S.C. 145, 51 S.E.2d 503 (1949). As former Chief Justice Littlejohn so eloquently stated

The Court should exercise judicial restraint and stay out of the field of legislation as it relates to contracts unless the agreement is manifestly injurious to the public welfare, since it is the policy of the law to hold persons to contracts to which they are voluntary parties Almers v South Carolina National Bank of Charleston, 265 S C 48, 60, 217 S E 2d 135, 141 (1975)

In this case, the South Carolina General Assembly has expressly allowed a licensed home inspector in South Carolina to limit the scope of an inspection. The General Assembly does not preclude home inspectors from limiting its liability through contract. South Carolina law routinely enforces exculpatory clauses in contracts between businesses and individuals and this Court should do the same. See McCune v Myrtle Beach Indoor Shooting Range, Inc., 364 S C 242, 612 S E 2d 462 (Ct App 2005), Pride v Southern Bell Telephone and Telegraph Company, 244 S C 615, 138 S E 2d 144 (1964), South Carolina Electric & Gas Company v Combustion Engineering, Inc., 283 S C 182, 191, 322 S E 2d 453, 458 (Ct App 1984)

CONCLUSION

This Court should enforce the contractual relationship between the parties as set forth in the agreement. No provision in the agreement is 'manifestly injurious to the public welfare' such that this Court could declare it void as a matter of law. The language of the agreement clearly defines the scope on home inspection and clearly limits Plaintiffs' damages to the amount paid for the home inspection. An amount which is undisputedly been paid to the Plaintiffs. It is this Court's duty to enforce the language of the agreement. Courts are not in the business of undoing contracts. Justice and freedom of contract would require this Court to honor the written, signed and executed agreement between the parties. Because the terms of the contract are clear,

unambiguous and not in contravention of any public policy, this Court should grant Palmetto's Motion for Summary Judgment

Respectfully submitted

COLLINS & LACY, P C

By Joseph S McCue
Joseph S McCue, Esquire
Christopher M Adams, Esquire
1330 Lady Street - Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

ATTORNEYS FOR DEFENDANT PALMETTO
HOME INSPECTION SERVICE, LLC

Columbia, South Carolina

December 1, 2009

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P C , Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Suite 601, Columbia South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below by mailing a copy of same to them in the United States mail with sufficient postage affixed thereto and return address clearly marked on the date indicated below

COUNSEL SERVED

B Michael Brackett, Esquire
Moses, Koon & Brackett, PC
Post Office Box 100261
Columbia, South Carolina 29202
Attorney for Plaintiff

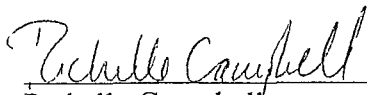
Catharine Garbee Griffin, Attorney
Baker Ravenel & Bender, LLP
Post Office Box 8057
Columbia, South Carolina 29202
*Attorney for Deborah Appleton and Bob
Capes Realty, Inc*

W Jonathan Harling, Esquire
Lewis & Babcock, LLP
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Columbia, South Carolina 29211
*Attorney for Defendants Beard and
Russell & Jeffcoat Realtors*

William S Tetterton, Esquire
Law Offices of William S Tetterton
Post Office Box 530
Camden, South Carolina 29020
Attorney for Defendant Boykin

PLEADING

**PALMETTO HOME INSPECTION SERVICES, LLC'S MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**



Richelle Campbell

Columbia, South Carolina

November 1, 2009

2009-11-02 PM 1:40
FILED
CLERK OF COURT
JUDICIAL DISTRICT
OF CLAY COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) FIFTH JUDICIAL CIRCUIT
CA NO 07-CP-28-288

COPY

Thomas W Gladden and Vera)
H Gladden,) DEPOSITION OF
Plaintiffs,) VERA H GLADDEN
vs) MARCH 10, 2008
Olivia M Boykin, Elizabeth) VOLUME 2
A Beard, Deborah Appleton,)
Bob Capes Realty, Inc ,)
Russell & Jeffcoat Realtors,)
Inc , and Palmetto Home)
Inspection Services, LLC,)
Defendants)

Deposition on oral examination of Vera H Gladden,
reported by Patricia G Bachand, Court Reporter and Notary
Public in and for the State of South Carolina, pursuant to
Rule 30 of the South Carolina Rules of Civil Procedure,
said deposition taken at the law offices of Moses, Koon &
Brackett, PC, 1441 Main Street, Suite 400, Columbia, South
Carolina, on Monday, the 10th day of March, 2008, scheduled
for ten o'clock a m and commencing at the hour of 10 17
o'clock a m

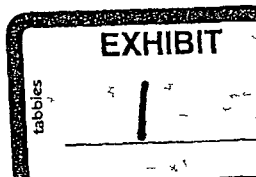
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Columbia South Carolina 29211

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1 that you saw

2 A I don't remember that But there was a
3 sheet in there -- that was what I was going to go to next
4 when we finished talking about this sheet we were talking
5 about There was another handwritten sheet of hers that
6 went down -- and she wrote one by one by one, of obviously
7 she was looking, from my best guess, at the home inspection
8 she had done in May

9 Because she wrote a list of all the things that
10 needed to be done per that home inspection And up at the
11 top she had two electricians listed, she had the name of
12 the other home inspector that was the one -- other one tha
13 Debbie had given me the name of, she had written the name
14 of the company and Mr Outlaw, and had written out to the
15 side "hardest but best," or something like that, in
16 reference to I guess what kind of work he did That was a
17 the top of it

18 And then it went one by one and she numbered
19 them And then over to the side, she had checked off all
20 of the ones that she had, had an electrician do, and the
21 electrician's bill was attached to the back

22 Q And you saw that the day before closing?

23 A No -

24 Q You didn't see that until after you closed

25 A Correct When she left me the packet in t

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1 Q She was standing right next to you?

2 A We were walking sort of in a line through --
3 you know, following --

4 Q Where was Debbie?

5 A I can't remember who was first or second I
6 may have been last, Debbie second -- I can't remember that
7 We were all together And then when Mrs Boykin told me
8 the other time, it was just Ms Boykin and myself

9 Q Did you talk to the other home inspector
10 about Ms Boykin's house before you eliminated him as a
11 potential person to inspect the house?

12 A Mr Outlaw?

13 Q Is that who it was, Mr Outlaw?

14 A Yes, I did I interviewed two people

15 Q But did you talk particularly about Ms
16 Boykin's house?

17 A No

18 Q He had no specific knowledge about the house
19 --

20 A No, ma'am

21 Q -- he gave to you When you testified last,
22 you said you went to see Ms Boykin yourself, is that
23 right?

24 A Yes

25 Q Did you call her up to tell her you were

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1 I had read the contract, yes

2 Q Okay All right So you read -- you read
3 the contract, and after reading it you signed it

4 A Yes

5 Q All right And agreed to the terms of that
6 contract, correct?

7 A I signed it, yes

8 Q All right And by signing it you agreed to
9 the terms of the contract, correct?

10 A Yes

11 Q All right Did you read the Standards of
12 Practice for the South Carolina Residential Home Inspectors
13 --

14 A No, sir

15 Q -- that are referenced in the contract?

16 A No, sir

17 Q You understood from reading the contract
18 that it's a visual inspection

19 A I noted that when I did get it

20 Q Right That didn't surprise you, did it?

21 A Not really

22 Q Okay 'Cause you didn't want him to go and
23 do destructive testing on your house, did you? Or on Ms
24 Boykin's house at that time

25 A No

1 Q -- for his inspection You didn't expect
2 him to go into the crawlspace and remove crawlspace
3 insulation, did you?

4 A No

5 Q All right You didn't expect him to take
6 out the AC ducts to get into areas that he couldn't get
7 into

8 A No

9 Q All right You didn't expect him to take
10 any of the furnishings or any of the items that were in any
11 of the closets out, did you?

12 A No

13 Q All right All right Did you have any
14 conversations with Mr Roberts on the date of the
15 inspection?

16 A Not until the end of it when I went out with
17 him and Debbie to meet him And that's when he gave me the
18 contract to sign -- read and sign, he gave me the invoice,
19 I think

20 And I gave him the -- wrote him the check for the
21 amount -- and a business -- I think he gave me a business
22 card in case of referral, I think If I -- I'm trying to
23 remember -

24 But then he went over, verbally, what he sort of
25 had -- what he thought about the house And that's the

1 contact I had with him

2 Q All right You said he went over, verbally
3 what he thought about the house

4 A Well, what his findings were

5 Q Okay He wasn't giving you advice on
6 whether to buy the house or not, was he?

7 A No

8 Q Was he expressing any opinion as to the
9 value of the house?

10 A No

11 Q Or whether you should purchase the house?

12 A No

13 Q And you weren't looking to him for any of
14 that

15 A No

16 Q Okay He went over his findings, is that
17 right?

18 A Yes

19 Q Did he go over anything that's not listed
20 his report?

21 A No He showed me the pictures he had taken
22 He mentioned that a few things had been done since he had
23 been there, so I think he said some electrical things had
24 been done and the garage doors had been changed to new
25 garage doors

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1 A I'm trying to get the dates But that's the
2 day I -- the day I called him and spoke with him is the day
3 that's dated So that's what I was trying to identify
4 exactly And I called him that day

5 Q All right And that's the check that he
6 returned to you for the full amount of the contract --
7 contract price?

8 A Yes

9 Q Okay And he did that the date that you
10 called and expressed concerns about the closing?

11 A I expressed concern not specifically about
12 the closing, just about his missing the -- all of the water
13 damage from the CL-100 And that was what I mainly called
14 him and asked him, if he wanted to come look to see what he
15 had missed

16 Q All right And the check that you're
17 referring to is what was marked as Exhibit 26?

18 A Yes

19 Q Okay Did Mr Roberts tell you he was going
20 to do anything in response to your call the week after
21 closing? That's a bad question Let me rephrase that

22 Before I get to that one, though, did you have
23 any other conversations with Mr Roberts after that date on
24 the 28th or 29th, when that check was written?

25 A The phone conversation and the conversation

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PALMETTO HOME INSPECTION SERVICES LLC
CAMDEN SC 29020 / PH 803 424 1948 FAX 803 424 0074
REAL ESTATE INSPECTION CONTRACT

PALMETTO HOME INSPECTION SERVICES LLC (PHIS LLC) is hereby employed by Client(s) to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. General accepted professional inspection standards and methods shall be used. This home inspection is being performed in accordance with the standards of practice of the South Carolina Home Inspector Licensing Board. Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. PHIS LLC is not liable for any defects or deficiencies which cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

1. STRUCTURAL COMPONENTS including foundation, floors, walls, columns, ceilings, and roofs. Excluding _____
2. EXTERIOR OF STRUCTURE including wall cladding, entryway doors, decks, steps, eaves, driveways, and a representative number of windows. Excluding _____
3. ROOFING including roof coverings, roof drainage systems, flashing, skylights, and chimneys. Excluding _____
4. PLUMBING including interior water supply and distribution systems, interior drain waste and vent systems, hot water system, and sump pump. Excluding _____
5. ELECTRICAL including service entrance conductors, main distribution panels, a representative number of installed ceiling fans, lighting fixtures, switches, and receptacles, ground fault circuit interrupters, and smoke detectors. Excluding _____
6. SYSTEM HEATING including permanently installed heating system and its controls, chimneys, heat distribution system, including fans, pumps, and ducts. Excluding _____
7. CENTRAL AIR CONDITIONING including normal operating control of the central air conditioning system and the distribution system. Excluding _____
8. INTERIOR including walls, ceilings, floors, steps, a representative number of cabinets, and a representative number of doors and windows. Excluding _____
9. INSULATION AND VENTILATION including insulation, vapor barriers, ventilation of attic and foundation, kitchen and bathroom venting systems. Excluding _____
10. BUILT IN KITCHEN APPLIANCES including the observation and operation of dishwasher, range, trash compactor, garbage disposal, ventilation equipment, permanently installed oven, and microwave oven. Excluding _____

EXCLUSIONS AND LIMITATIONS The parties acknowledge and agree that this inspection is limited to visual observation of apparent conditions existing at the time of the inspection only. This inspection is not intended to provide the purchaser with information regarding the advisability of this purchase, the market value of the property, the compliance or non-compliance with codes, ordinances, and statutes, the suitability of this property for specialized uses, the life expectancy of any component or system in the property, the presence or absence of pest or insects, or cosmetic or underground items or items that are not permanently installed. Reference is specifically made to the standards of practice and the code of ethics of the South Carolina Home Inspection Licensing Board for a comprehensive listing of those items which are not required and unless specifically included, will not be a part of this inspection.

This inspection report does not address and is not intended to address the possible presence of any danger from any potentially harmful substance and environmental hazards including but not limited to radon gas, lead paint, asbestos, urea formaldehyde (UFFI), toxic or chemical analysis, airborne hazards, polluted water, or underground oil tanks. Further, PHIS LLC is not responsible for any misleading information provided by seller or for any matter concealed or hidden from the inspector.

ARBITRATION Should the client believe that PHIS LLC be liable for any issues arising out of this inspection, then the client shall communicate said issues in writing to PHIS LLC within ten (10) days of the day of inspection. If the issues cannot be resolved between the parties, both parties agree to submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association.

ACKNOWLEDGMENT This inspection is performed for the sole confidential and exclusive use and possession of the client. Neither the contents of this report nor any representation made herein are assignable without the express written permission of PHIS LLC, and any reliance thereon by any party other than the client named is prohibited.

* *JS* _____
initial initial

* *JS* _____
initial initial

This inspection and report are not intended to be used as a guaranty or warranty expressed or implied regarding the adequacy, performance, or condition of any inspected structure, item, or system, and any visual problems observed. Should be verified with the appropriate contractor, electrician, plumber, or skilled professional for cost estimates and code compliance.

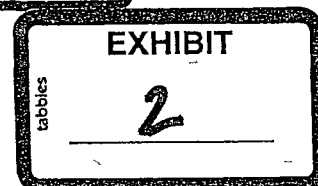
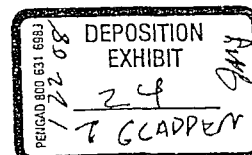
LIMIT OF LIABILITY It is understood and agreed that should PHIS LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract, or otherwise, the liability of PHIS LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

AGREEMENT This contract represents the entire agreement between Palmetto Home Inspection Services LLC and the Client. PHIS LLC is not responsible for the repair, replacement, or alteration of any item within or upon the inspected property. The Client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms, and exclusions contained within this contract.

* Client's Signature *John H. Gadden* Printed Name *JOHN H. GADDEN* Date *10/15/06*

* Client's Signature _____ * Printed Name _____ * Date _____

Inspector *SCOT ROBERTS* License Number *1036*



1 State of South Carolina) Court of Common Pleas
2 County of Kershaw) Fifth Judicial Circuit
3 No 07-CP-28-288

4 Thomas W Gladden and)
5 Vera H Gladden,)
6 Plaintiff,)
7 vs) Deposition of
8 Olivia M Boykin,) THOMAS W GLADDEN
9 Elizabeth A Beard,)
10 Deborah Appleton, Bob)
11 Capes Realty, Inc ,)
12 Russell & Jeffcoat)
13 Realtors, Inc , and)
14 Palmetto Home Inspection)
15 Services, LLC,)
16 Defendant) January 22, 2008
17)
18)
19)
20)
21)
22)
23)
24)
25)

14 Deposition on oral examination of Thomas W
15 Gladden, reported by Jeffrey M Thomas, Registered
16 Professional Reporter and Notary Public in and for
17 the State of South Carolina, said deposition taken
18 pursuant to agreement and in accordance with the
19 South Carolina Rules of Civil Procedure, at the
20 Offices of Moses Koon & Brackett, PC, 1441 Main
21 Street, Suite 400, Columbia, South Carolina, on
22 January 22, 2008, at the hour of 10 00 a m

23
24 GARBER REPORTING SERVICE, INC
25 POST OFFICE BOX 12348
COLUMBIA, SOUTH CAROLINA 29211
(803) 256-4500

EXHIBIT

3

THOMAS W GLADDEN

1 contracting between service people?

2 A Does she handle all of them? That is
3 not -- not necessarily

4 Q Is she the primary person as it relates to
5 contracting for service at your house?

6 A Yes, she is

7 Q All right Does she -- to your knowledge,
8 does she read contracts before she signs them?

9 A Yes

10 Q And she -- does she just outright accept
11 every contract or does she question issues she
12 doesn't understand?

13 A Sir, I think you will find her very
14 discriminating

15 Q All right So she would -- if she had a
16 question she would raise it She would negotiate
17 with somebody on a contract?

18 A Yes

19 Q All right Now, if you would look at the
20 contract which we marked as Exhibit 24?

21 A I've still got it here

22 Q Okay I'd like you to identify for me the
23 signature at the bottom if you would

24 A The signature is my wife's

25 Q All right And the initials there, are

THOMAS W GLADDEN

1 inspection fee of \$475, correct?

2 A Yes, sir

3 Q All right So under the terms of the
4 contract you would agree that Mr --

5 MR BRACKETT Objection Calls for
6 a legal conclusion The contract speaks for itself

7 MR MCCUE Yes, it does

8 BY MR MCCUE

9 Q You would agree that Palmetto Home
10 Inspections Services has tendered to you and your
11 wife an amount that is equal to the amount of the
12 fee paid by the client for this inspection and
13 report?

14 A Sir, that is what the contract says

15 Q All right And he, in fact, did that? He
16 gave you that fee back, correct?

17 A Sir, we didn't ask for that fee back

18 Q Without regard to whether you asked for it
19 or not, my question was he gave you a sum equal to
20 the amount of the fee you and your wife paid for the
21 inspection and report, correct?

22 A That is correct

23 Q All right Bear with me just a minute
24 You didn't expect Mr Roberts or his company to make
25 any of the repairs to the house, did you?

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2007-CP-28-0288

THOMAS W GLADDEN AND VERA)
GLADDEN,)

PLAINTIFFS,)

VS)

OLIVIA M BOYKIN, ELIZABETH A)
BEARD, DEBORAH APPLETON, BOB)
CAPES REALTY, INC , RUSSELL)
AND JEFFCOAT REALTY, INC , AND)
PALMETTO HOMES INSPECTION)
SERVICES, LLC,)

DEFENDANTS)

TRANSCRIPT OF RECORD

DECEMBER 3, 2009
COLUMBIA, SOUTH CAROLINA

B E F O R E

THE HONORABLE ALISON RENEE LEE, JUDGE

A P P E A R A N C E S

B MICHAEL BRACKETT, ESQUIRE
ATTORNEY FOR THE PLAINTIFFS

JOSEPH S McCUE, ESQUIRE
ATTORNEY FOR DEFENDANT PALMETTO HOME INSPECTION

CATHARINE H GARBEE GRIFFIN, ESQUIRE
ATTORNEY FOR DEFENDANTS APPLETON, BOB CAPES REALTY

WILLIAM JONATHAN HARLING, ESQUIRE
ATTORNEY FOR DEFENDANTS BEARD, RUSSELL AND JEFFCOAT

WILLIAM S TETTERTON, ESQUIRE
ATTORNEY FOR DEFENDANT BOYKIN

ELIZABETH B HARRIS, CVR
CIRCUIT COURT REPORTER

EXHIBIT

tabbies

D

I N D E XWITNESS/DESCRIPTIONPAGE NO

PRESENTATION BY MR BRACKETT

5

PRESENTATION BY MR McCUE

12

CERTIFICATE PAGE

32

E X H I B I T SNODESCRIPTIONI DEV

NO EXHIBITS INTRODUCED

1 THE COURT Good afternoon This is a Kershaw County
2 case, docket number 2007-CP-28-288, *Thomas W Gladden and*
3 *Vera Gladden vs Olivia Boykin, Elizabeth Beard, Deborah*
4 *Appleton, Bob Capes Realty, Incorporated, Russell and*
5 *Jeffcoat Realtors, and Palmetto Home Inspection Services,*
6 *LLC* The plaintiffs are represented by Michael Brackett
7 The defendant Palmetto Home Inspections is represented by?

8 MR McCUE Joey McCue

9 THE COURT And Bob Capes and Deborah Appleton are
10 represented by Catharine Griffin

11 MS GRIFFIN Yes, Your Honor

12 THE COURT Olivia Boykin is represented Mr
13 Tetterton, William Tetterton, and that leaves Elizabeth
14 Beard and Russell and Jeffcoat as represented by -- there
15 you go

16 MR HARLING John Harling Good to see you, Your
17 Honor

18 THE COURT Good to see you

19 Counsel, I knew that this case was on the roster I
20 did not know the number of motions that were involved until
21 I picked up the file yesterday And so there is no way I
22 can hear all five of the summary judgement motions that are
23 out there, and so basically I made a list The two that I
24 picked were basically the first two that were filed And
25 they also happen to be related, and that would be Mr

1 Brackett's motion for partial summary judgment on a legal
2 liability issue, and Palmetto Homes' motion for summary
3 judgment

4 And those two, from what I could tell by reading the
5 documents, seen to be related in issue, and I figure it
6 made more sense to do those And to the extent that my
7 office called and asked that you all send briefs, I
8 appreciate the fact that you sent them as quickly as you
9 did It was only after I realized that none of them had
10 been heard that I had to whittle them down

11 I have asked both -- I've notified Ms McDonald over
12 in Kershaw because I know because of the budget nobody's
13 travelling over there And I know that Judge Cooper has
14 recused himself, so that means anybody who hears this case
15 from this circuit is going -- you either have to come over
16 here, or some point the court, the Supreme Court will have
17 to allow a judge to travel to Kershaw

18 So, I have notified her that I could not get all the
19 motions heard I've notified our clerk's office, because
20 they'll have to coordinate with scheduling, that I could
21 not hear all of them

22 There is a term in January the 11th, and I've asked
23 them to try to schedule that then I suspect, and I know I
24 shouldn't say it out loud I suspect that if it's not
25 heard that week, it will fall to me the following week

1 So, I have a nonjury week It's a short, it's a short
2 week It's also the week of the Bar, so there are only two
3 days that I can hear nonjury that week of the Bar meeting
4 And so if it doesn't fall during the week of the 11th, it
5 will probably fall the week of the 18thI

6 And I know there is a common pleas jury term in
7 Kershaw County in February, of which I'm supposed to be the
8 judge there I think that's the first term So, I may end
9 up seeing this case more than once

10 But anyway, I just wanted to tell you how much I
11 appreciate your pulling everything together so quickly
12 And I'll do what I can to move as promptly as possible

13 Having said all that then, I'll turn to Mr Brackett
14 for your motion

15 MR BRACKETT Thank you You may it please the
16 court? I represent Tommy and Vera Gladden Mr Gladden is
17 the principal at Lugoff-Elgin High School

18 Very briefly, in the fall of 2006, the Gladdens
19 entered into a contract to purchase a house over in Camden
20 from Defendant Boykin And for purposes of this particular
21 summary judgement motion, after the contract was entered,
22 the contract provided for the Gladdens to have the
23 opportunity to do,an inspection The Gladdens retained the
24 defendant Palmetto Home Inspection Services to conduct the
25 home inspection

1 The facts related to that home inspection are set out
2 on page, essentially on page 2 of the memorandum of law
3 that was actually filed with the motion It was clocked in
4 June the 20th, 2008

5 THE COURT Yes I have that

6 MR BRACKETT And all of that information came from
7 the deposition of Mr Roberts, who is the owner of
8 Defendant Palmetto

9 THE COURT And I have the original of his deposition,
10 was in the Kershaw County file

11 MR BRACKETT Yes, ma'am I filed it, along with the
12 motion Exhibit 4 to that deposition is the contract at
13 issue for this motion

14 There is a limit of liability paragraph set out in
15 that exhibit It's the second to the last paragraph, and
16 it purports to limit any damages to my clients that would
17 stem from, resulting from the failure of the inspection
18 company to perform any of its obligations, including
19 negligent breach of contract or otherwise, regardless of
20 the nature of the liability It purports to limit the
21 remedy to a refund of the fee paid for the inspection In
22 this case \$475

23 The evidence that we've established in the record is
24 that, based upon what we view, what we allege the defendant
25 inspection company's liability to be is probably in excess

1 of 50, maybe upwards of \$70,000 for damages that were, that
2 were later discovered that my clients were not told about
3 So, Palmetto has raised the limit of liability issue as a
4 defense in the case, seeking to get out upon payment of a
5 refund of the money

6 I filed a summary judgement motion asking that the
7 court rule as a matter of law on the matters of the
8 unenforceability of that limit of liability provision
9 because I believe it is a matter of law for the court to
10 determine whether this contract is unconscionable, or
11 whether it's in violation of the public policy

12 Mr McCue filed a cross-summary judgement motion
13 asking that the court rule that the limit of liability
14 provision is enforceable as it reads And that the only
15 responsibility of his client would be to refund the fee
16 So, that's the posture, I guess, of these cross-summary
17 judgement motions

18 Now, so the precise issue in this case, Your Honor, is
19 whether or not a limit of liability provision in a home
20 inspection contract is enforceable Or whether, under the
21 circumstances of this case, to enforce that provision would
22 be unconscionable, or it would violate public policy

23 There is no case in South Carolina that addresses the
24 question There are cases that deal with similar issues
25 having to do with purely commercial transactions, and I

1 think both Mr McCue and I both cite those cases There's
2 the paint ball case from Myrtle Beach, and there was a
3 Yellow Pages case I think that's the Price case that said
4 exculpatory agreements are enforceable, at least in those
5 contexts, but not -- none of them address the context of
6 this particular case where we have a personal service
7 professional contract signed under conditions we have here

8 Now, I would point out to the court that we take the
9 position that this was an adhesion contract If you look
10 at the facts as they are set out in Mr Roberts's
11 deposition, this was a preprinted form He filled in the
12 blanks The form was not signed until after the inspection
13 was done And by his own admission, if you don't pay your
14 fee, you don't get the report So, it's obviously a
15 take-it-or-leave-it contract

16 The damages, the potential damage that a homeowner
17 could suffer by way of a failure of an inspector to pick up
18 on things is grossly disproportionate to what the remedy
19 provided by this provision would be \$475 versus damages
20 that run well up into the tens of thousands of dollars
21 And the cases say that that is, you know, that is a factor
22 in determining adhesion contracts and whether or not a
23 contract is unconscionable

24 Whether or not this sort of contract violates public
25 policy is also a novel question in this state Home

1 inspections are deemed by South Carolina law to be
2 something a little bit special, and we know that because
3 there's a whole section in the code that governs the
4 licensing and the regulation of the home inspectors And
5 they are deemed to be, these particular home inspections
6 are deemed to be a risk to the home-buying public, so much
7 so that our legislation deemed it appropriate to regulate
8 them

9 They are, inspectors are deemed by law to be
10 professional service providers who, according to the case,
11 cases that I've cited in my memorandum, are held to higher
12 standard of care than just any old person out there who
13 assists a home buyer

14 Now, Defendant Palmetto argues that, well, this was a
15 contract Contracts are contracts The language is clear,
16 and so it ought to be enforced without regard to any
17 considerations of unconscionability or public policy
18 South Carolina law holds, though, Your Honor, that any
19 contract in South Carolina, any provision in any contract
20 in South Carolina that is it deemed to be unconscionable or
21 against public policy will not be enforced It is an
22 exception, these are exceptions to the general rule of the
23 ability to contract in South Carolina So, if it's
24 unconscionable, it's against public policy -- regardless of
25 what the contract says -- it's not enforceable

1 Defendant Palmetto cites cases from Maryland and New
2 York dealing with the enforceability of either limited
3 liability clauses or exculpatory clauses in home inspection
4 contracts I've cited two other cases, also outside
5 jurisdiction One's a Mississippi case That's *Pitts*, and
6 the other is *Lucier*, which is a New Jersey case The
7 difference between the two sets of cases, Your Honor, is
8 that those cases cited by Defendant Palmetto make no
9 mention of home inspectors being licensed and regulated in
10 those states It just seems to be a different, a different
11 level, I guess, of the protection of the public in those
12 states than we have here in South Carolina Those, those
13 cases are merely silent

14 And I would point out that in the *Baker* case, the
15 Maryland case that Mr McCue cites, the opinion says that
16 Home inspection services do not fall under
17 the realm of a public duty or concern the
18 public interest

19 Now, I take the position that, based upon our
20 licensing and regulatory statutes, our legislature says, in
21 effect, home inspections fall under the realm of public
22 duty, and they are concerned with the public interest The
23 *Netti*, N-e-t-t-i, case out of New York that they cite, that
24 opinion specifically said that

25 The plaintiff in that case failed to raise

1 an issue of fact concerning enforceability
2 of the limited liability provision

3 Although that provision in that case was enforced, the
4 court said, well, we really didn't have any reason not to
5 enforce it because the plaintiff didn't raise that issue to
6 us And there was no issue of fact placed on the record,
7 so it wasn't considered It wasn't addressed It wasn't
8 decided in that case

9 And the same is true of the *Rector* case, also from New
10 York, where that court specifically said that the plaintiff
11 had failed to present any of these particular arguments for
12 making -- to present these particular issues to the court
13 for a decision

14 On the flip side, Your Honor, the two cases I've
15 cited, *Lucier* and *Pitts*, they deal extensively and
16 explicitly with issues of unconscionability and public
17 policy, the exact issues I'm raising in this case In each
18 of those cases, I would point out the trial court enforced
19 the provision and was going to limit the homeowner, the
20 home buyer to a miniscule recovery of a returned fee In
21 both cases, the appellate courts reversed the trial court
22 and held that those provisions were unconscionable and in
23 violation of public policy and could not be enforced and
24 would not be forced That is precisely the decision I'm
25 seeking from this court because of the factors that I've

1 just mentioned I'm happy to answer any questions you
2 might have

3 THE COURT Thank you

4 Mr McCue

5 MR McCUE Yes, Your Honor When we were preparing
6 for this and I sent my memo in, I was anticipating all the
7 arguments would be heard at one time, and then the court
8 would get a flavor of the overall case and the nature of
9 the transactions as they occurred Since we're breaking
10 them up, I want to do a couple of things I want to
11 incorporate the statement of facts there were provided on
12 behalf of Russell and Jeffcoat and Bob Capes to the extent
13 my memo, I referenced facts in the case that aren't
14 specifically cited with exhibit references in my memo

15 Let me, let me step back for just a minute and give
16 you a background, Your Honor Ms Gladden and Mr Gladden
17 lived in Winnsboro During that period of time, Ms
18 Gladden was a licensed real-estate agent, at least for a
19 period of time This -- they have owned, I believe, three
20 homes, this being their third Mr Gladden took the job as
21 principal at Lugoff-Elgin High School, at which time Ms
22 Gladden, whose, whose background in education is in nursing
23 but who was not working in the field, she had the time to
24 come over the Winnsboro -- to Camden and look for houses
25 And she undertook to go around people's houses, in the

1 homes, and look and try and make a determination as to
2 where they ought to live

3 They -- part of her effort included putting cards in
4 peoples' houses or, you know, doors or mailboxes for houses
5 that she found attractive that essentially said we're
6 moving to Camden Your house is attractive If you're
7 interested in selling your house, please contact me They
8 were doing this in an effort in part, Your Honor, to avoid
9 paying real-estate fees

10 As a result of a card left in Ms Appleton's mailbox,
11 Ms Appleton, who is a real-estate agent in the Camden
12 area, contacted Ms Gladden and said I'm not interested in
13 selling my house But there is a house in the neighborhood
14 that's not yet on the market, but it's about to go on the
15 market And if you're interested, maybe we can work
16 something out with the owner and see the house Ms
17 Gladden figured out which house that was, and she contacted
18 Ms Boykin, the seller, in an effort to deal directly with
19 her without the benefit of a real-estate agent

20 At that time, Ms Boykin said I'm not going to sell my
21 house without going through my real-estate agent, Ms
22 Beard So, if you want to deal with -- you know, want an
23 opportunity to go look at the house, you need to go through
24 a real-estate agent, go through Ms Beard, and then that
25 process was set up

1 The asking price for the house initially was \$499,000
2 Mr and Ms Gladden looked at the house, and they prepared
3 a list of items which they felt devalued or detracted from
4 the value of the house And they determined, as a result
5 of that inspection, that they would make an offer for
6 \$430,000 for the house The items were listed in my memo
7 After a series of negotiations, plaintiffs agreed on a
8 price of \$495,000, and they entered into a contract on
9 October 12th

10 The contract in provision 9(a), paragraph 9(a)
11 provides the option for the plaintiffs to have the home
12 inspected by a home inspector or anybody of their choosing
13 9(b) requires the seller provide a South Carolina wood
14 infestation report which is on a form called CL-100,
15 commonly known in the industry as a termite letter

16 Ms Gladden asked her real-estate agent for
17 suggestions as to -- or people who could come and do an
18 inspection in the area She was given the names of two
19 people, Mr Outlaw and Mr Roberts Mr Roberts is the
20 owner of Palmetto

21 Ms Gladden contacted Mr Roberts, interviewed him on
22 the phone about his inspection services Then she
23 contacted Mr Outlaw, interviewed him about the inspection
24 services And as a result of conversations of
25 conversations with them and her real-estate agent, she

1 decided to select Mr Roberts to do the inspection

2 The inspection was scheduled and set up Excuse me
3 Excuse me, Your Honor It was scheduled and set up for
4 October the 18th When Mr Roberts arrived, there were a
5 number of parties there Ms Boykin was there I believe
6 both real-estate agents were there, and Ms Gladden was
7 there Mr Roberts was there for about three or four hours
8 doing his inspection, during which time the other parties
9 were essentially sitting in the living room and talking

10 At the end of Mr Roberts's inspection but before he
11 related the results of his inspection, Ms Gladden, who had
12 -- who was not there when he started his inspection, was
13 given the contract She read it She signed it, she
14 initialed it in two places She paid him \$475, and then he
15 verbally told her what he had found and showed her some
16 digital pictures of things he had seen during his
17 inspection

18 It's undisputed that prior to signing the contract,
19 Ms Gladden read it, considered it, and signed it Now,
20 it's interesting that, and important to note, there was
21 nothing compelling Ms Gladden to agree to the terms of the
22 contract with Mr Roberts and Palmetto She knew of at
23 least one other inspector in the Camden area who was
24 willing to come out and do the inspection Mr Outlaw
25 Undoubtedly, there are numerous others in the Camden,

1 Kershaw, Richland County area who would have been -- who
2 would have willingly gone and inspected this house So, in
3 a way she's like a child in front of a candy counter, and
4 she picks out which one she wants She chose Mr Roberts
5 to do the inspection

6 He prepared an inspection report Provided it to the
7 plaintiffs As a result of their review of the inspection
8 report, he and the plaintiffs prepared to an addendum to
9 the contract asking Ms Boykin to repair a list of items
10 identified by Mr Roberts, some of, some of which the
11 plaintiffs were going to take care of themselves or found
12 insignificant But other ones, they wanted Ms Boykin to
13 take care of They negotiated and ultimately reached a
14 resolution on that issue

15 Now, a couple of interesting things about the home
16 inspection and the contract with Palmetto, both of which
17 say if there's damage

18 We recommend that if there are any visual
19 problems observed, they should be verified
20 with the appropriate contractor or
21 electrician, plumber, or skilled
22 professional for cost estimates and code
23 compliance

24 And that's important because ---

25 THE COURT Is that, that's a provision in the

1 contract?

2 MR McCUE Yes, ma'am, that's a provision in the
3 contract, Your Honor It is on the -- it's a one-page
4 contract, and it is the paragraph right above the bolded
5 writing that says limit of Liability in all caps

6 THE COURT I see

7 MR McCUE Okay, and those are Ms Gladden's initials
8 beside that provision, Your Honor So, clearly they knew
9 this is not an exhaustive inspection This is an
10 inspection, as it reads in the first paragraph A visual,
11 limited visual inspection of the property

12 Now, we've addressed two other provisions in the
13 contract that are important One is the liability
14 provision As you'll note, Your Honor, that provision, the
15 title of that provision is in all caps and bold It's,
16 it's clear, unambiguous, and it's not hidden

17 There's another bold heading below limits of liability
18 that reads agreement And that paragraph reinforces the
19 fact that Ms Gladden, or anyone signing this contract, has
20 read the contract, understands the terms of the contract,
21 and agrees to it

22 The case law in South Carolina, Your Honor, is clear
23 that people are bound by the contracts they've read The
24 *Burwell* case cited in my memo, there's a quote that says

25 As early as 1924, this court recognized that

1 every contracting party owes a duty to the
2 other party to the contract and to the
3 public to learn the contents of the document
4 before he signs it

5 Mr Gladden, in his deposition, testified that his
6 wife would read contracts before she signed them She
7 wouldn't outright accept them unless she liked them, and
8 she would negotiate items that she felt needed to be
9 negotiated She's not an unsophisticated party, nor is her
10 husband She was a licensed real-estate agent in South
11 Carolina She contacted and interviewed two home
12 inspectors before selecting Palmetto She read the
13 contract, and she signed it prior to receiving the results
14 from Palmetto, and she and her husband should be bound by
15 the terms of the agreement they had reached

16 Let me address the two issues that are raised in the
17 plaintiffs' argument, and that's unconscionability and
18 public policy Unconscionability under South Carolina law
19 is

20 Characterized by the absence of meaningful
21 choice on the part of one party due to the
22 one-sided contract provisions, together with
23 the terms which are so oppressive that no
24 reasonable person would make them, and no
25 fair and honest person would accept them

1 Your Honor, and that comes from the *Lackey vs Green*
2 *Tree Financial* case that's cited in my memo

3 This case is not -- the facts of this case in this
4 contract do not lend themselves to a finding of
5 unconscionability of this contract This contract was not
6 tainted by the absence of any meaningful choice on the part
7 of the Gladdens As I said, she was a real-estate agent
8 She chose Palmetto after reviewing other home inspectors
9 There's no evidence in the record -- one of the factors,
10 Your Honor, is whether the parties are substantial business
11 concerns There's no evidence in the record either way as
12 to either party being a substantial business concern

13 Ms Boykin -- excuse me, Ms Gladden, after reading
14 the contract, had the choice to say no, at which point this
15 would have happened She would have contacted Mr Outlaw
16 or somebody else Mr Roberts would have gone home, having
17 learned the lesson get the contract signed before he spent
18 four hours looking at a house But there was nothing that
19 compelled her to sign that contract or agreement

20 The clause which limits liability is clear,
21 conspicuous, and unambiguous, and the terms are not so
22 oppressive that no reasonable person would make them, no
23 fair and honest person would accept them There's no
24 evidence from the plaintiff that this contract is any
25 different than any other contract offered by a home

1 inspector There's been no evidence that Ms Gladden was
2 under duress or undue influence to sign this contract
3 There's no evidence in the record that this home inspection
4 was necessary and essential in purchasing the home There
5 is no evidence the home inspector had not -- another home
6 inspector could not have been obtained to inspect

7 As it relates to public policy, Your Honor, let's step
8 back from where the plaintiffs jumped in and look at the
9 overarching public policy that holds that freedom of
10 contract in the United States to be a bedrock that's
11 fundamental to our society, not only in our personal
12 dealings with each other, but with our business dealings
13 with each other

14 The Supreme Court in the *Pride* case explained that
15 exposure to liability is, quote

16 Wholly a matter of private contract, and
17 that exculpatory clauses between private
18 parties do not violate public policy

19 This is not a contract, Your Honor, impacting the
20 public as a whole This is a contract between Palmetto and
21 the Gladdens for the inspection of one home in Camden,
22 South Carolina Sound public policy requires the
23 enforcement of contracts deliberately made which do not
24 clearly contravene some positive law or rule of public
25 morals

1 Your Honor, there is -- plaintiffs haven't pointed to
2 any law, statute, or policy of the state of South Carolina
3 that's violated by this contract The relationship between
4 Palmetto and the Gladdens arose by reason of private
5 contract and not by virtue of any duty Palmetto owes to the
6 public at large They weren't compelled to contract with
7 him, and was an arms-length transaction

8 Now, it's interesting there are no cases involving
9 home inspectors at the appellate court level or at the, or
10 at the appellate court level, but I did come across an
11 order of Judge James Johnson dealing with -- Your Honor,
12 may I approach?

13 THE COURT Yes, sir

14 MR McCUE Dealing with this very issue It's *Fred*
15 *Deans vs Preferred Home Inspection, Inc* And in that
16 order, Your Honor, Judge James ---

17 MR BRACKETT Your Honor, for the record, and pardon
18 the interruption For the record, I would object Your
19 Honor, these, you know, circuit court orders are not
20 precedent

21 THE COURT I understand it's not I understand it's
22 not precedent, yes, sir

23 MR McCUE This order, Your Honor, stands for the
24 proposition that such -- that these limits of liability
25 clauses and professional service contracts, and in

1 particular in home inspection contracts, are valid and not
2 unconscionable or working against public policy

3 As it relates to public policy, Your Honor, I found an
4 interesting case that was decided in August of this year
5 And in that case, it arises out of divorce proceedings
6 The husband and the wife entered into a written agreement,
7 under the terms of which neither party would -- may I
8 approach?

9 THE COURT Yes, sir

10 MR McCUE Neither party would raise the issue of
11 adultery as a bar to alimony in divorce proceedings And
12 it's interesting, Your Honor, because the wife in that
13 case, when she subsequently filed for divorce, the husband
14 moved during a point in the proceedings to block her
15 recovery of alimony or her entitlement to alimony because
16 under the laws of South Carolina, a spouse guilty of
17 alimony -- adultery is not entitled to alimony So, the
18 marriage contract as you know, Your Honor, marriage under
19 South Carolina law is a contract that's covered by the
20 statutes of South Carolina, not unlike the professional
21 services rendered by Palmetto

22 In that case, Your Honor, the court, as it has in
23 other cases involving similar clauses in agreements, upheld
24 the right of private parties to enter into contracts and
25 provisions in contracts that limited liability even though

1 the act of adultery would have normally under the laws of
2 the state prohibited the recovery of alimony

3 Your Honor, the contract is one that was entered into
4 by people engaged in a business in an arms-length
5 transaction Ms Gladden could have selected who she
6 wanted to do the home inspection She chose to do business
7 with Palmetto They presented no evidence that the terms
8 of this contract were unreasonable, were unconscionable
9 That no reasonable person' would offer them, or no
10 fair-minded person would accept them

11 Your Honor, we're entitled to summary judgment on this
12 issue We have paid the plaintiff \$475 They have cashed
13 that check, and that is undisputed in the record Thank
14 you, Your Honor

15 THE COURT Let me ask you this Does it make any
16 difference at all if -- and I thought I read it some place,
17 I may have read it very quickly -- that the company is
18 licensed or bonded or is otherwise insured in the
19 performance of the work? Would that make a difference in
20 terms of whether or not that clause would -- I understand
21 that it's there to provide basic protection to the company
22 But the fact -- and if someone's considering that they're
23 licensed and bonded and insured, would that have any effect
24 upon whether or not that clause would be against public
25 policy or unconscionable?

1 MR McCUE No, Your Honor

2 THE COURT And why is that? I guess I'm not going to
3 let you off with just ---

4 MR BRACKETT Because if it is, he loses That's
5 why

6 MR McCUE Thank you

7 Your Honor, licensed, bonded, and insured speaks not
8 to the right of recovery Licensed, bonded, and insured
9 speaks to there being sufficient funds to satisfy a
10 recovery In this case, Palmetto satisfied any entitlement
11 that the plaintiffs had to recover So, licensed, bonded,
12 and insured does not comply

13 THE COURT Say that again, say it one more time

14 MR McCUE Being licensed, bonded, and insured speaks
15 to the recovery of judgement, Your Honor It does not
16 speak to the entitlement to judgment The limited
17 liability clause states if they are entitled to judgement,
18 this is what they're entitled to, \$475

19 Mr Roberts has insurance, and if he is outside the
20 jurisdiction of the United States, and he is served by
21 publication, and his carrier is put on notice, his carrier
22 would have to appear in the courts of South Carolina Hire
23 an attorney to appear on his behalf And if there was a
24 finding of liability, they would have to pay the plaintiffs
25 \$475 That speaks to the source of recovery, not to the

1 entitlement

2 THE COURT Okay

3 MR BRACKETT Your Honor, that, that goes to the
4 basic fairness of this particular provision you've pointed
5 out And, by the way, Mr Roberts admitted in his
6 deposition testimony -- and that's set out here on page 2
7 of the memorandum -- that he held himself out as being
8 licensed, bonded, and insured His card that he gave to
9 Ms Gladden is Exhibit 3 to the Palmetto deposition

10 So, in essence, he comes around and says please hire
11 me I'm licensed, bonded, and insured And here, sign
12 this agreement where I only have to pay you \$400 if I screw
13 up the inspection and I'm about to cost you \$70,000 Now,
14 if that's not unconscionable, I mean, I'm at a loss to
15 determine what might be

16 Now, if you look at the terms of the contract, limit
17 of liability is not conspicuously set out in there It is
18 no more conspicuous than any other paragraph It's not in
19 bold It's not underlined It's not in italics It is a
20 provision just like any other provision in that contract
21 So, there is no conspicuous let me call your attention to
22 the fact that I'm only going to pay you \$475 if I do
23 everything wrong

24 The fact that the clients had the chance to say no --
25 I'd be willing to bet that in every reported case where a

1 contract has been challenged and held to be unconscionable
2 or against public policy, somebody in that contract, in
3 that situation read the contract and agreed to it And
4 then later the court said, well, we're not going to, we're
5 not going to hold you to that We're not going to hold you
6 to this bedrock of American jurisprudence that once you
7 sign a contract, you're bound by that contract No, there
8 are situations where contracts are not enforceable because
9 of unconscionability in violation of public policy That's
10 the law of South Carolina The *Simpson* case says that

11 So, every contract is subject to being challenged on
12 those grounds And the fact that somebody could have said
13 no and could have hired somebody else doesn't matter If
14 you sign a particular contract and that contract is later
15 determined to be unconscionable, then it's not enforceable,
16 regardless of what all the other options you may have had
17 at the time

18 The *Pride* case, freedom of contract, again that's a
19 Yellow Pages case That's, that's your standard, garden
20 variety commercial you pay me, I'll put your, I'll put your
21 ad in the Yellow Pages And then suddenly the ad doesn't
22 get there, and the business doesn't have an advertisement
23 until the next phone book is published Has nothing to do
24 with a professional service contract That's just a
25 standard business contract

1 Now, the law that governs these kinds of cases are
2 found, that law is found and fully analyzed in *Pitts* and
3 *Lucier* Those courts went over it item by item
4 unconscionability, violation of public policy And
5 basically it's a homeowner who gets stuck in a situation
6 like this and has suffered 70, \$80,000 worth of damages
7 Should not be limited to \$475 when it turns out that the
8 inspector just did a lousy job

9 THE COURT Mr Brackett, besides the deposition of
10 Mr Roberts, is there other information I need to consider
11 from your point of view, other than the case law, of
12 course Are there any other factual issues I need to
13 consider? Any other deposition excerpts or exhibits?

14 MR BRACKETT I won't -- whatever I have cited in the
15 -- there may be some in the memorandum I filed yesterday or
16 the day before makes reference to the general background
17 facts Makes reference to testimony in Ms Gladden's
18 deposition I'll be happy -- that deposition is three
19 volumes, and it's, you know, a couple thousand pages long
20 It's pretty, pretty long I'll be happy to try to pull out
21 the, the particular pages and get that to you

22 But most, most of my argument, Your Honor, rests with
23 -- on the admissions, quite frankly, of Mr Roberts

24 THE COURT Okay

25 MR BRACKETT In his deposition

1 THE COURT And I'm flipping through what was provided
2 to me yesterday And the only thing I see is just, besides
3 the legal argument, are references to Roberts's deposition
4 is what I see

5 Mr McCue

6 MR McCUE Yes, Your Honor Briefly in response, Mr
7 Brackett has made some wild statements as to 50, 60, 80,
8 100, maybe make it a billion dollars, whatever he wants I
9 want to point out to the court there's no evidence in the
10 record before the court or anywhere else where any expert
11 has testified that any of the damages are attributable to
12 Palmetto So, when you take into -- I'd like you to factor
13 that in your analysis, Your Honor

14 That's no evidence as to the standard of care that he
15 referenced And really what he's doing is blending tort
16 theories and contract theories We're here on a contract
17 issue, Your Honor It's clear we're entitled to summary
18 judgement

19 THE COURT Are there any, other than I see in your
20 memorandum, Mr McCue, that you make some references to Ms
21 Gladden's deposition for factual background information
22 But is there anything other than Mr Roberts's deposition,
23 and of course the case law, that I need to consider in
24 determining the issues?

25 MR McCUE Your Honor, there's, there's some facts

1 set out and that are cited, specific ---

2 THE COURT I think in your introductory materials,
3 there are some

4 MR McCUE Yes, ma'am, and there's some in the
5 memorandum submitted by Bob Capes and Russell and Jeffcoat
6 that are referenced at the beginning of my

7 THE COURT Right, and I think those might be the ones
8 that I'm referring to It's under the factual, the factual
9 statement It references page 144, page 165

10 MR McCUE Yes, ma'am Those are, those are
11 references specific to my memorandum

12 THE COURT Okay

13 MR McCUE But, Your Honor, Russell and Jeffcoat and
14 Bob Capes also have memorandum

15 THE COURT I see

16 MR McCUE And I incorporated factual recitations to
17 the extent they had more specific cites to the record than
18 I had in mine

19 THE COURT Was there, was there anything in the
20 plaintiff's deposition, particularly Ms Gladden's,
21 relating to the signing of the contract with Palmetto Home
22 Inspection?

23 MR McCUE Yes, ma'am, and that's cited in
24 memorandum Let me give you a page cite to that, Your
25 Honor

1 (A PAUSE)

2 MR McCUE Your Honor, on line -- on page 6 of my
3 memorandum, and I'll read it in the record here so that
4 it's clear The following exchange took place with Ms
5 Gladden

6 Question So, you read the contract, and
7 after reading it, you signed it?

8 Yes

9 And you agreed to the terms the contract,
10 correct?

11 She says yes

12 She said I signed it, yes

13 And by signing it, you agreed to the terms
14 of that contract, correct?

15 Answer Yes

16 And then Mr Gladden testifies when I asked him

17 Does she just outright accept every
18 contract, or does she question issues she
19 doesn't understand?

20 The answer is Sir, I think you will find
21 her very discriminating

22 Question All right, so she would -- if
23 she had a question, she would raise it? She
24 would negotiate with someone on a contract?

25 Answer Yes

1 THE COURT And I believe that those portions of the
2 deposition are attached?

3 MR McCUE Yes, ma'am

4 THE COURT Okay Anything else?

5 MR BRACKETT No, Your Honor

6 THE COURT Counsel, I will review this I have not
7 had the chance to read the case law yet, and so I will do
8 that and try to do that quickly and get you an answer as
9 soon as possible And it will probably, most likely end up
10 that I will request that someone prepare an order And I
11 will notify everyone about that as well And then I'll
12 double-check with the clerk's office again if I get any
13 other motions scheduled Thank you

14 (OFF THE RECORD)

15 THE COURT And just to let you all -- I do have the
16 file from Kershaw County So, if you all want to look at
17 the file, there's no need in going to Kershaw County
18 because I have it Thank you

19 **--- END OF TRANSCRIPT OF RECORD ---**

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 3RD DAY OF DECEMBER, 2009

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO

ELIZABETH B HARRIS, CVR

COLUMBIA, SOUTH CAROLINA

AUGUST 30TH, 2010

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mbk law.com

December 8, 2009

VIA EMAIL aleesc@sccourts.org

The Honorable Alison R Lee
Circuit Judge
Fifth Judicial Circuit

RE Gladden v Boykin et al
07-CP-28 288
My File No 011574 1

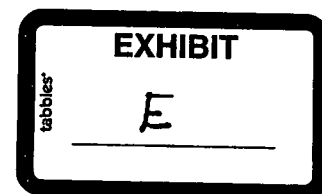
Dear Judge Lee

During oral arguments last Thursday on the cross motions for summary judgment of Defendant Palmetto Home Inspection Services, Inc (PHIS) and the Plaintiffs, two things happened that I must respond to

First, in support of his argument on the law, Mr McCue handed up a Circuit Court Order from another case The Order was issued in 2007 I objected, but you nevertheless took a copy from Mr McCue It is clear that such an Order should play no role in deciding the motions that were argued on Thursday and that you have under advisement Rule 239(d)(2) SCACR, provides that unpublished opinions and orders [of appellate courts] have no precedential value and ' **should not be cited** except in proceedings in which they are directly involved (Emphasis added) Obviously, the principle of law and procedure behind that rule applies even more so with respect to unpublished **trial court** orders Handing up the Order is in effect no different than Mr McCue having cited the Order in his Memorandum of Law If is impermissible to formally cite the Order in a written submission to the Court, it is equally impermissible to informally cite the Order by handing a copy directly to the Court I respectfully renew my objection and request that you not consider the Order for any purpose

Second, you asked me if there were matters of record, other than the deposition of Mr Roberts on behalf of PHIS, that you should consider I direct your attention to the following materials

- 1 The Complaint alleges several deficiencies/particulars of breach of contract in the work and report of PHIS (Complaint ¶ 53)



Page 2
December 8, 2009

- 2 The attached page 19 of 22 is that portion of Plaintiffs' Answers to Defendant PHIS's Interrogatories where the damages attributable to PHIS's report, per Plaintiffs' evidence, are identified. I have also attached the following deposition exhibits that speak to the alleged damages sought against PHIS:

VG depo Exhibits 32 and 37,
Haskins depo Exhibit 1, pp 3, 4, 5 and 6,
ARM Environmental Services, Inc estimate produced by Plaintiffs in discovery as document 'gg'.

This evidence is relevant to the element of the unconscionability analysis regarding the disparity between the amount of alleged damages suffered by the Plaintiffs/home buyers and the nominal amount of damages provided for in the challenged limit of liability provision, \$475.00 v \$80,000+/- In Lucier v Williams, 841 A.2d 907 (N.J. Super. 2004) the Court found the limit of liability provision therein unconscionable and unenforceable in part on the disparity of a \$192.50 refund and alleged damages of \$8,000 to 10,000. In Pitts v Watkins, 905 So.2d 553 (Miss. 2005) the Court found the limit of liability provision therein unconscionable and unenforceable in part on the disparity of a \$265 refund and alleged damages of \$30,000 to \$40,000. (These are the cases cited in my Memorandum of Law.)

I am contemporaneously emailing this communication to the other attorneys of record.
Thank you for your consideration of this information.

Very truly yours,

S/ Mike Brackett

B. Michael Brackett

BMB/bmb

Enclosure

cc Mr and Mrs Thomas Gladden (by email)
W. Jonathan Harling, Esquire (by email)
Catharine Garbee Griffin, Esquire (by email)
William S. Tetterton, Esquire (by email)
Joseph S. McCue, Esquire (by email)
Jacqueline Flemons, Esquire (by email)

PALMETTO HOME INSPECTION SERVICES LLC
CAMDEN S C 29020 / PH 803 424 1948 FAX 803 424 0074
REAL ESTATE INSPECTION CONTRACT

PALMETTO HOME INSPECTION SERVICES LLC (PHIS,LLC) is hereby employed by Client(s) to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. General accepted professional inspection standards and methods shall be used. **This home inspection is being performed in accordance with the standards of practice of the South Carolina Home Inspector Licensing Board.** Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. **PHIS,LLC** is not liable for any defects or deficiencies which cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

- 1 STRUCTURAL COMPONENTS including foundation floors walls columns ceilings and roofs **Excluding** _____
- 2 EXTERIOR OF STRUCTURE including wall cladding entryway doors decks steps eaves driveways and a representative number of windows **Excluding** _____
- 3 ROOFING including roof coverings roof drainage systems flashing skylights and chimneys **Excluding** _____
- 4 PLUMBING including interior water supply and distribution systems interior drain waste and vent systems hot water system and sump pump **Excluding** _____
- 5 ELECTRICAL including service entrance conductors main distribution panels a representative number of installed ceiling fans lighting fixtures switches and receptacles ground fault circuit interrupters and smoke detectors **Excluding** _____
- 6 SYSTEM HEATING including permanently installed heating system and its controls chimneys heat distribution system including fans pumps and ducts **Excluding** _____
- 7 CENTRAL AIR CONDITIONING including normal operating control of the central air conditioning system and the distribution system **Excluding** _____
- 8 INTERIOR including walls ceilings floors steps a representative number of cabinets and a representative number of doors and windows **Excluding** _____
- 9 INSULATION AND VENTILATION including insulation vapor barriers ventilation of attic and foundation kitchen and bathroom venting systems **Excluding** _____
- 10 BUILT IN KITCHEN APPLIANCES including the observation and operation of dishwasher range trash compactor garbage disposal ventilation equipment permanently installed oven and microwave oven **Excluding** _____

EXCLUSIONS AND LIMITATIONS The parties acknowledge and agree that this inspection is limited to visual observation of apparent conditions existing at the time of the inspection only. This inspection is not intended to provide the purchaser with information regarding the advisability of this purchase, the market value of the property, the compliance or non-compliance with codes, ordinances and statutes, the suitability of this property for specialized uses, the life expectancy of any component or system in the property, the presence or absence of pest or insects or cosmetic or underground items or items that are not permanently installed. Reference is specifically made to the standards of practice and the code of ethics of the South Carolina Home Inspection Licensing Board for a comprehensive listing of those items which are not required and unless specifically included will not be a part of this inspection.

- This inspection report does not address and is not intended to address the possible presence of any danger from any potentially harmful substance and environmental hazards including but not limited to radon gas, lead paint, asbestos, urea formaldehyde (UFFI), toxic or chemical analysis, airborne hazards, polluted water or underground oil tanks. Further, PHIS LLC is not responsible for any misleading information provided by seller or for any matter concealed or hidden from the inspector.

ARBITRATION Should the client believe that PHIS LLC be liable for any issues arising out of this inspection, then the client shall communicate said issues in writing to PHIS LLC within ten (10) days of the day of inspection. If the issues cannot be resolved between the parties, both parties agree to submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association.

ACKNOWLEDGMENT This inspection is performed for the sole confidential and exclusive use and possession of the client. Neither the Contents of this report nor any representation made herein are assignable without the express written permission of PHIS LLC, and any reliance thereon by any party other than the client named is prohibited.

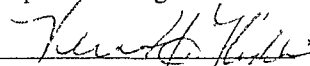
*  _____
initial initial

*  _____
initial initial

- This inspection and report are not intended to be used as a guaranty or warranty expressed or implied regarding the adequacy, performance or condition of any inspected structure, item or system, and any visual problems observed.
- Should be verified with the appropriate contractor, electrician, plumber or skilled professional for cost estimates and code compliance.

- **LIMIT OF LIABILITY** It is understood and agreed that should PHIS LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract or otherwise, the liability of PHIS LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

AGREEMENT This contract represents the entire agreement between Palmetto Home Inspection Services LLC and the Client. PHIS LLC is not responsible for the repair, replacement or alteration of any item within or upon the inspected property. The Client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms and exclusions contained within this contract.

* Client's Signature  * Printed Name VERA CHIDDEN * Date 10/18/06

* Client's Signature _____ * Printed Name _____ * Date _____

Inspector SCOT ROBERTS

License Number 1036

PALMETTO HOME INSPECTION SERVICES LLC
CAMDEN SC 29020 / PH 803 424 1948 FAX 803 424 0074
REAL ESTATE INSPECTION CONTRACT

PALMETTO HOME INSPECTION SERVICES LLC (PHIS, LLC) is hereby employed by Client(s) to perform a limited visual inspection of apparent conditions in readily accessible areas existing at the time of inspection. General accepted professional inspection standards and methods shall be used. **This home inspection is being performed in accordance with the standards of practice of the South Carolina Home Inspector Licensing Board.** Absolutely no warranties or guarantees are given or implied for any latent or concealed defects. Additionally, any repairs after the inspection may reveal defects that are not accessible at the time of inspection. **PHIS, LLC** is not liable for any defects or deficiencies which cannot be reasonably discovered during the limited visual inspection. As part of your home inspection the inspector will inspect and report on the following areas unless that area has been marked for exclusion from our services:

1. **STRUCTURAL COMPONENTS** including foundation, floors, walls, columns, ceilings, and roofs. **Excluding** _____
2. **EXTERIOR OF STRUCTURE** including wall cladding, entryway, doors, decks, steps, eaves, driveways, and a representative number of windows. **Excluding** _____
3. **ROOFING** - including roof coverings, roof drainage systems, flashing, skylights, and chimneys. **Excluding** _____
4. **PLUMBING** including interior water supply and distribution systems, interior drain, waste, and vent systems, hot water system, and sump pump. **Excluding** _____
5. **ELECTRICAL** including service entrance conductors, main distribution panels, a representative number of installed ceiling fans, lighting fixtures, switches, and receptacles, ground fault circuit interrupters, and smoke detectors. **Excluding** _____
6. **SYSTEM HEATING** including permanently installed heating system and its controls, chimney's heat distribution system, including fans, pumps, and ducts. **Excluding** _____
7. **CENTRAL AIR CONDITIONING** including normal operating control of the central air conditioning system and the distribution system. **Excluding** _____
8. **INTERIOR** including walls, ceilings, floors, steps, a representative number of cabinets, and a representative number of doors and windows. **Excluding** _____
9. **INSULATION AND VENTILATION** including insulation, vapor barriers, ventilation of attic and foundation, kitchen and bathroom venting systems. **Excluding** _____
10. **BUILT IN KITCHEN APPLIANCES** including the observation and operation of dishwasher, range, trash compactor, garbage disposal, ventilation equipment, permanently installed oven, and microwave oven. **Excluding** _____

EXCLUSIONS AND LIMITATIONS The parties acknowledge and agree that this inspection is limited to visual observation of apparent conditions existing at the time of the inspection only. This inspection is not intended to provide the purchaser with information regarding the advisability of this purchase, the market value of the property, the compliance or non-compliance with codes, ordinances, and statutes, the suitability of this property for specialized uses, the life expectancy of any component or system in the property, the presence or absence of pest or insects, or cosmetic or underground items or items that are not permanently installed. Reference is specifically made to the standards of practice and the code of ethics of the South Carolina Home Inspection Licensing Board for a comprehensive listing of those items which are not required and unless specifically included will not be a part of this inspection.

This inspection report does not address and is not intended to address the possible presence of any danger from any potentially harmful substance and environmental hazards including but not limited to radon gas, lead paint, asbestos, urea formaldehyde (UFFI), toxic or chemical analysis, airborne hazards, polluted water, or underground oil tanks. Further, **PHIS, LLC** is not responsible for any misleading information provided by seller or for any matter concealed or hidden from the inspector.

ARBITRATION Should the client believe that **PHIS, LLC** be liable for any issues arising out of this inspection, then the client shall communicate said issues in writing to **PHIS, LLC** within ten (10) days of the day of inspection. If the issues cannot be resolved between the parties, both parties agree to submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association.

ACKNOWLEDGMENT This inspection is performed for the sole confidential and exclusive use and possession of the client. Neither the Contents of this report nor any representation made herein are assignable without the express written permission of **PHIS, LLC**, and any reliance thereon by any party other than the client named is prohibited.

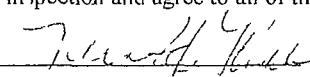
*  _____
initial initial

This inspection and report are not intended to be used as a guaranty or warranty expressed or implied regarding the adequacy, performance, or condition of any inspected structure, item, or system, and any visual problems observed. Should be verified with the appropriate contractor, electrician, plumber, or skilled professional for cost estimates and code compliance.

*  _____
initial initial

LIMIT OF LIABILITY It is understood and agreed that should **PHIS, LLC** and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract, or otherwise, the liability of **PHIS, LLC** and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

AGREEMENT This contract represents the entire agreement between Palmetto Home Inspection Services LLC and the Client. **PHIS, LLC** is not responsible for the repair, replacement, or alteration of any item within or upon the inspected property. The Client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms, and exclusions contained within this contract.

Client's Signature  * Printed Name VERA CUDEN * Date 11/18/06

* Client's Signature _____ Printed Name _____ Date _____

Inspector SCOT ROBERTS

License Number 1036

ANSWER

Inspection Items

v	pool house roof and squirrel damage	1,730
w	brick patio damage	4,100
x	Florida room water damage	600
y	open exterior masonry joints	3,600
z	substandard existing hardwood flooring	37,830 to 44,891
aa	mold/mildew	25,000
bb	skylight-open joint	900
cc	garage interior door	750
dd	remove construction debris	1,250

EXTERIORS UNLIMITED & WOOD WORKS

SC Home Builders License #011892

Richard Truesdale, Jr. (803) 425-5008

Toll Free: 866-290-5532 Cell: (803) 427 5295



Proposal Submitted To:

Name: VOAK, B/A DDEN
 Street: 10 Hunt Cup
 City: CAMPN
 State: GA Zip: 30010 Telephone No: 405-0317

Work To Be Performed At:

Street: _____
 City: _____ State: _____
 Date of Plans: _____ Architect: _____

We hereby propose to furnish all the materials and perform all the labor necessary for the completion _____

REPLACE 3 PAINT DOOR & PAINT	46.50.00
REPLACE 1 WINE LITE DOOR & PAINT	14.50.00
SEAL POINT CRACK IN MASONRY ON/AT SID	7.50.00
BRICK PAINT - PRESSURE WASH, CLEAN UP	
PAINT MORTAR, PAINT PATCH TSC	92.50.00
INTERIOR OF GARAGE DOOR REPLACE	7.50.00
REMOVE DEBRIS UNDER HOUSE	12.50.00
SILL JOIST SUBFLOOR PARCH HARDWOOD FLOORS	
LAUNDRY AREA BACK DOOR	3170.00
DEN WALL AREA	45.20.00
PASCH BRD ROOM	35.80.00
FRONT WALL	3110.00
POOL HOUSE ROOF	1730.00
REPAIR SKY LIGHT SHRAPING	1750.00
REPAIR SHRAPING ON JOIST SID	7.50.00
REPAIR SHRAPING ON RAILING	7.50.00
REPAIR SHRAPING AT DOOR	42.90.00
PAINT DOOR	1.80.00
REPAIR ROOF SHINGLES AT PASCH	13.00.00
SQUIREL DAMAGE	12.80.00
PITTED WINDOW	77.00.00

Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance upon above work. Workmen's Compensation and Public Liability Insurance on above work to be taken out by _____

TOTAL
 ALL MATERIALS WARRANTED BY MANUFACTURER

Per _____

NOTE: This proposal may be withdrawn by us if not accepted within _____ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature: _____
 Date: _____

DEFENDANT'S
 EXHIBIT

37

00357

Write Original Yellow Customer

3

EXTERIOR REVIEW CONT'D

E BRICK PATIOS

- MORTAR JOINTS DETERIORATED W/ OPEN JOINTS ALLOWING SUBGRADE TO TAKE ON RAIN AND ALL WATER COMING OFF OF ROOF. BAD MORTAR JOINTS TO BE REMOVED POINTED, PATCHED AFTER ENTIRE AREA IS PRESSURE WASHED. SEAL ALL W/ CLEAR CONCRETE/MASONRY SEALER.

ESTIMATE

\$ 4080.00

- ### F. HVAC UNIT SHEET METAL NEEDS TO BE SECURED TO BRICK WALL AND OPEN HOLES IN MASONRY SEALED PROPERLY & PERIMETER CAULKED

ESTIMATE

\$ 80.00

G MASONRY WALL (MASTER BEDROOM)

- MORTAR JOINTS AT UPSTAIRS WINDOW COMPLETELY OPEN TO RAIN. HEAD JOINTS $\approx 1"$ TO $1\frac{1}{2}"$ WIDE COMPLETELY OPEN, SOME JOINTS AT SILL OF WINDOW HAS OPEN CRACKS WITH WHAT APPEARED TO BE A WHITE LATEX CAULK SMEARED ON IT THE JOINTS ARE STILL OPEN

4

EXTERIOR REVIEW CONT'D

THE EXTERIOR WALL IN THE BEDROOM HAS ACTIVE
MOLD GROWING. THE ENTIRE MASONRY WALL
ON THIS END OF THE HOUSE NEEDS TO BE
PRESSURE WASHED AND ALL MORTAR JOINTS
INSPECTED, CHASED IF NECESSARY AND
POINTED AND PATCHED.

ESTIMATE

\$ 3578⁰⁰

H. GUTTERS NEED TO BE INSTALLED EVERYWHERE

RAIN WATER IS DUMPING ON PATIOS AT
CL100 DOORWAYS AND AT MAIN ENTRANCE TO HOUSE

ESTIMATE

\$ 7.00 TO 8.00 / LF

DID NOT MEASURE

(IN CLOVER DS)

AT 185 LF @ 7.00

\$ 1395⁰⁰

I WATER LTR PIPING EXTENDED (POP OFF VALVE) TO

EXTERIOR & DAMAGED ELECTRICAL CONDUIT

TO HVAC UNIT LEAVING ELECTRICAL WIRING

EXPOSED REPAIR CONDUIT AND INSTALL 90°

FITTING ON DRAIN LINE TO DIRECT WATER AWAY FROM
ELECTRICAL LINES

ESTIMATE

\$ 50⁰⁰

(4)

EXTERIOR REVIEW CONT'D

THE EXTERIOR WALL IN THE BEDROOM HAS ACTIVE
MOLD GROWING. THE ENTIRE MASONRY WALL
ON THIS END OF THE HOUSE NEEDS TO BE
PRESSURE WASHED AND ALL MORTAR JOINTS
INSPECTED, CHASED IF NECESSARY AND
POINTED AND PAINTED.

ESTIMATE

\$ 3578⁰⁰

H. GUTTERS NEED TO BE INSTALLED EVERYWHERE
RAIN WATER IS DUMPED ON PATIOS AT
CL100 DOORWAYS AND AT MAIN ENTRANCE TO HOUSE

ESTIMATE

\$ 7.00 TO 8.00/LF

DID NOT MEASURE

(INCLUDES D.S.)

AT 185 LF @ 7.00

\$ 1395⁰⁰

I. WATER LINE PIPING EXTENDED (POP OFF VALVE) TO
EXTERIOR & DAMAGED ELECTRICAL CONDUIT
TO HVAC UNIT LEAVING ELECTRICAL WIRING
EXPOSED REPAIR CONDUIT AND INSTALL 90°
FITTING ON DRAIN LINE TO DIRECT WATER AWAY FROM

ESTIMATE

\$ 50⁰⁰

ELECTRICAL
LINE

INTERIOR REVIEW: ①

5

A. WOOD FLOORING THROUGHOUT IS LOOSE, POPPING AND CRACKING. SUBFLOOR IS 5/8" SHEATHING NOT 3/4" T&G, APPEARS THAT NO UNDERLAYMENT (FELT, ETC) WAS INSTALLED UNDER WOOD FLOORING; ALSO FROM NAIL PATTERNS EXTENDING THEN SUBFLOOR VISIBLE FROM UNDERNEATH ITS QUESTIONABLE IF ENOUGH FASTENERS WERE USED. THIS COULD ^{POSSIBLY} BE DETERMINED AS A LATEST DEFECT. MY OPINION IS TO REMOVE ALL 3/4" x 2 1/8" WOOD FLOORING AND REWORK SHEATHING & REINSTALL.

B. MASTER BEDROOM EXTERIOR WALL HAS ACTIVE MOLD GROWING AROUND WINDOW (EVEN BEHIND WALL COVERING); AROUND TWO RECEPTACLES; SPOT OVER BED IN CENTER OF WALL. CONCERNED THAT ENTIRE EXTERIOR WALL HAS MOLD GROWING INSIDE. RE THIS IS THE MASONRY WALL NOTED WITH OPEN MORTAR JOINTS. SUGGEST HAVING AN ABATEMENT PERFORMED BY ENVIRONMENTAL FIRM.

⑥

INTERIOR REVIEW CONT'D ②

C. FOLLOW UP TO MOLD ISSUE - SEVERAL OTHER
AREAS NOTED 1) BATHROOM @ ENTRY / SHEETROCK
ACTUALLY LOOSE W/ MOLD SPORES BEHIND
SHEETROCK TAPE THAT WAS COME LOOSE 2)
LINEN CLOSET @ MASTER BATH ON WALL AND
BACK SIDE OF DOOR STAMPS COVERED IN MOLD

D. ATTIC

1. SKYLIGHT - OPEN JOINT FROM MUD/TAPE
FAIRFAX (OPEN HOLE TO BATHROOM BELOW)
ALSO ROT/DEGRADATION @ TOP PERIMETER
OF SKYLIGHT - WOULD HAVE TO STRIP
& REFLASH

ESTIMATE

841

2. ON BOTH SIDES OF THE SKYLIGHT CHASE
≈ 3 RAFTERS OVER ON EAST SIDE THERE
ARE AREAS OF ROTTEN ROOF SHEATHING. THE
ONE ON THE RIGHT OF THE CHASE IS LARGE ENOUGH
TO SPAN OVER ONE RAFTER ON THE LEFT ITS
BETWEEN RAFTERS. VERY CONFINED SPACE
WILL HAVE TO COME FROM TOP

March 8, 2006

Ms Vera Gladden
10 Hunt Cup Lane
Camden, S C

3/8/07
B. B. B. B.
copy
a

Re Estimated Cost – Microbial Abatement Services
Residential Home, 10 Hunt Cup Lane, Camden, South Carolina

Dear Ms Gladden,

ARM Environmental Services, Inc (ARM) has prepared the proposed scope of services and cost estimate for the removal and disposal of microbial/mold contaminated building materials in various areas of your home located in Camden, S C. Our recent site visit determined that an active mold growth is located on the sheetrock walls, wallpaper and wood floor boards of your home. Proper cleaning procedures and proper engineering controls shall be used to remove the microbial growth and spore fallout from surfaces and building materials to minimize the further release of microbial spores. ARM will provide all necessary manpower, materials and equipment to conduct this microbial remediation work.

MATERIALS TO BE ABATED

The microbial/mold containing building materials are estimated based on visual observations. The exact amount of mold-contaminated materials will be verified during abatement. Additional materials contaminated with mold may be discovered during removal of the building materials thus increasing the amount of materials to be removed from the home.

- Wood floor joist in crawl space under house, approximately 1,500 square feet
- Hardwood floors on first floor near doors to den, kitchen and media room, approximately 100 square feet
- Master bedroom on second floor, sheetrock walls and wallpaper, approximately 250 square feet
- Master bedroom bath on second floor, sheetrock walls around bathtub, approximately 25 square feet
- Back bedroom on second floor, sheetrock walls, approximately 100 square feet
- Front bedroom on second floor, sheetrock walls wallpaper and ceiling, approximately 100 square feet
- Staircase to attic on second floor sheetrock walls approximately 250 square feet

SCOPE OF WORK

- The work areas will be defined using barrier tape and appropriate signage
- The work areas will be provided partial or full containment that includes negative pressure enclosures. Air filtration units (AFUs) with high efficiency particulate air

Vera Gladden
10 Hunt Cup Lane Camden SC
March 8, 2007

(HEPA) filtered vacuum and /or exhaust ventilation equipment will be installed and utilized during this project

- All workers will don appropriate personnel protection equipment that includes protective clothing and respirators when entering the enclosed area
- Porous building materials (sheetrock) that are supporting microbial growth in the work area will be removed for disposal Polyethylene bags or sheeting will be used to containize and transport waste from work area in a manner that does not release fungal spores into the air
- All affected hard surfaces in the work area, including wood floor joist or wood trim will be cleaned with disinfectant, sanitizer or biocide

SIGNIFICANT ASSUMPTIONS

This proposal assumes that all sources of moisture intrusion have been eliminated from the building If excess moisture is present in the building, mold re-growth will occur regardless of remediation efforts Our cost does not include replacement of sheetrock walls ceiling wallpaper or wood flooring after removal and disposal

COST ESTIMATE AND SCHEDULE

Based on our understanding of the scope of work desired, it is estimated that the activities associated with this project can be completed within 15 to 20 days from the start of work (air monitoring time not included), for an estimated cost of **\$15,500 00**

Schedule ARM can begin work in March or April 2007

In closing we appreciate the opportunity to provide you with this scope of work and cost estimate and look forward to the successful completion of this project If you have any questions or comments regarding the enclosed information, please do not hesitate to contact me

Sincerely,
ARM Environmental Services Inc



Sid Havird
Project Manager

Authorized by _____
Signature

_____ Date

Print Name / Title _____

Attachment

Vera Gladden
10 Hunt Cup Lane, Camden, SC
March 8, 2007

GENERAL CONDITIONS

- 1 This Document will serve as a contract for the proposed services
- 2 The attached proposal is valid for a period of 60 days, after which ARM Environmental Services Inc reserves the right to revise the schedule, fees and other terms specified herein
- 3 The client agrees to pay ARM Environmental Services Inc for all work performed in accordance with the terms of this contract, without regard to the outcome of the project. Payment to ARM Environmental Services, Inc is expressly not conditioned upon the client receiving payment from any third party
- 4 Client agrees to pay each invoice within thirty (30) days upon receipt. Client further agrees to pay interest on all amounts invoiced and not paid within said thirty day period at the maximum rate allowed by law, until paid. The client will be responsible for all collection costs, including reasonable attorney's fees
- 5 Services conducted under this contract will be performed in accordance with that degree of care and skill ordinarily exercised under similar conditions by members of our profession practicing in the same locality. This warranty is in lieu of all other warranties or representations expressed or implied. Client agrees to limit any and all liability for damage resulting from error or negligence to a sum not to exceed the amount of the actual fee. In the event of any lawsuit or claim against ARM Environmental Services, Inc to the extent that ARM Environmental Services Inc shall prevail, the party initiating such action shall pay all costs incurred by ARM Environmental Services Inc to answer or defend itself
- 6 Client will provide access to each site upon which it will be necessary for ARM Environmental Services Inc to perform its work. In the event that work is requested on any site not owned by client, client represents and warrants that all necessary permissions for site entry have been secured. The client also agrees to assume all risks associated with the services conducted on said properties. Other than any disposal services specified in the attached proposal ARM Environmental Services, Inc will not be responsible for any costs associated with the disposal of contaminated or hazardous materials detected in the course of these services

Rob Sheorn Construction, Inc

315 Scenic Drive
Camden, SC 29020-1928

PROPOSAL

Proposal submitted to

Date 1-31 07

Mr & Mrs Gladden
10 Hunt Cup Lane
Camden, SC 29020

We hereby submit specifications and estimate for the following building repairs

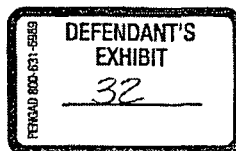
• Roof ext /Shingles (4)	2100 00
• Soffit damage (rt of chimney)	250 00
• Shutters (14) Install, prime, & paint wood shutters	1850 00
• Dormers-Replace damaged siding & corner stiles with like material	5250 00
• Skylight Repair damage, paint ceiling	925 00
• HVAC- Repair hole @ gas line	50 00
• Condenser line-Route new line	300 00
• Patio door- Replace unit & paint	1825 00

Total \$12,550 00

We hereby propose to furnish labor and materials-complete in accordance with the above specifications, for the sum of
Twelve thousand five hundred fifty dollars (\$12,550.00) with payment to be made as follows

In full upon completion

All material is guaranteed to be as specified. All work is to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involve extra cost will be executed only upon written orders and will become an extra charge over and above the



00341

W

Rob Sheorn Construction, Inc.

315 Scenic Drive
Camden, SC 29020-1928

PROPOSAL

Proposal submitted to

Date 1-31-07

Mr & Mrs Gladden
10 Hunt Cup Lane
Camden, SC 29020

We hereby submit specifications and estimate for the following building repairs

- Laundry room exterior door-
install new unit & paint 1775 00
 - Den-exterior door
install new unit & paint 1775 00
 - Bedroom (2) exterior doors- ① NOT 2
install new unit & paint ~~3550 00~~ 1775.00
 - Sills & joist repair in below locations (Repairs will be made by cutting
through oak flooring & sub floor to access areas Flooring will then be
repaired & entire room sanded & finished)
 - 1) Master bedroom under (2) ext. doors 17500 00
 - 2) Under den door at patio
- Total $\$24,600.00 - 1775.00 = 22825$

We hereby propose to furnish labor and materials-complete in accordance with the above specifications for the sum of
Twenty four thousand six hundred dollars (\$24,600 00) with payment to be made as follows.

In full upon completion

All material is guaranteed to be as specified. All work is to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accident, or delays beyond our control. This proposal subject to acceptance 60 days and it is void

EXTRA $\left\{ \begin{array}{l} 3) \text{ LAUNDRY ROOM / MUD AREA } \approx 1500.00 \\ \text{Verify c} \\ \text{Rob on this} \end{array} \right.$ 22825

00342

Rob Sheorn Construction, Inc

315 Scenic Drive
Camden, SC 29020-1928

PROPOSAL

Proposal submitted to

Date 1-31-07

Mr & Mrs Gladden
10 Hunt Cup Lane
Camden, SC 29020

We hereby submit specifications and estimate for the following building repairs

• Upstairs bedrooms (2)-remove carpet & add 2 1/4 oak flooring, sand & finish	7035 00
• Florida room-repair leak damage & paint	600 00

Total

\$7,635 00

We hereby propose to furnish labor and materials-complete in accordance with the above specifications, for the sum of
Eight thousand eight hundred eighty five dollars (\$8,885 00) with payment to be made as follows

In full upon completion

All material is guaranteed to be as specified. All work is to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accident, or delays beyond our control. This proposal subject to acceptance 60 days and it is void thereafter at the option of the undersigned.

Authorized Signature _____

00343



Proudly Serving the Palmetto State

PALMETTO HOME INSPECTION SERVICES, LLC
P O BOX 176 CAMDEN, SC 29020
PH 803-424-1948

INSPECTION REPORT

FOR VERA & TOMMY GLADDEN

LOCATION 10 HUNT CUP LANE CAMDEN, SC 29020

DATE 10-18-06

INSPECTION # 6104

REALTOR / AGENT DEBBIE APPLETON

INSPECTOR SCOT ROBERTS / LICENSE #1036

WEATHER OVERCAST

TEMP 71-F @ 9 00 am

ROOF DESIGN HIP & GABLE

CONSTRUCTION TYPE BRICK

FOUNDATION TYPE CRAWL SPACE

Main Inspection Report

10/18/2006

Grounds & Landscaping

*Shrubby clearances **REFER TO SUMMARY REPORT***

Walkway # 1 located Front

Brick Walkway appears acceptable

Porch located Front

Concrete Porch appears acceptable

Patio # 1 located Rear

Brick Patio appears acceptable

Stairs/Landing # 1 located Front

Brick Stairs/Landing appear acceptable

Chimney # 1 located Rear

Masonry Chimney appears acceptable

Roofing Material for Main House/Garage

Medium pitch roof with Asphalt Shingles Roof covering appears acceptable

Roof Mounted Structures

Plumbing Vents appear acceptable

Skylights appear acceptable

Ridge Vents appear acceptable

Exterior Siding Finish is Horizontal Lap/ Wood Fiber

*Siding ** REFER TO SUMMARY REPORT ***

Exterior Masonry Finish is Brick with Mortar Joints

Masonry finish appears acceptable

Exterior Cornice

*(Wooden) Fascia ** REFER TO SUMMARY REPORT ***

*(Wooden) Eaves ** REFER TO SUMMARY REPORT ***

(Continuous) Eaves vents appear acceptable

Exterior Trim

*(Wooden) Window trim ** REFER TO SUMMARY REPORT ***

*(Wooden) Louvered Shutters ** REFER TO SUMMARY REPORT ***

(Wooden) Porch ceiling appears acceptable

(Wooden) Columns & Posts appear acceptable

(Metal) Rail System appears acceptable

Windows And Screens -- Glazing is Insulated

*Double Hung Wooden Window Exteriors ** REFER TO SUMMARY REPORT ***

Solid Brick Foundation Walls (Exterior Observations)

Foundation wall appears acceptable

Under Floor Observations

*No Insulation ** REFER TO SUMMARY REPORT ***

1/2" Copper Water Distribution Piping appears acceptable

3' PVC Drainage Piping appears acceptable

Black Steel gas piping material appears acceptable

*METAL & FLEX Ducting Material - ** REFER TO SUMMARY REPORT ***

Wiring installation appears acceptable

Crawl Space Floor Type is Dirt

Access Access is located IN GARAGE Access appears to be adequate
Ventilation appears to be adequate
General Conditions of Crawl Space appear to be acceptable

Garage is 2 Car Attached

Floor Type is Concrete Flooring appears acceptable

Both Garage Doors

Door Material is Metal(Insulated) Type is Rollup Vehicle door appears acceptable
Door Opener is Chain Driven (1/2 HP) With Electronic Light safety Switch Appears acceptable

Main House Attic Area

Attic Access is Stairway Appears acceptable
Insulation Material is Fiberglass Batt Estimated R-Value is R-25 Appears acceptable
Ventilation appears adequate
*Decking ** REFER TO SUMMARY REPORT ***
Electrical components in attic appear to be acceptable
Duct work in attic appears to be acceptable
General conditions appear to be acceptable

Living Room

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Receptacle Outlets Appears acceptable
*Windows ** REFER TO SUMMARY REPORT ***
Air Supply Appears acceptable

Den

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting/Ceiling fan appears acceptable
Receptacle Outlets Appears acceptable
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable

Dining Room

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting appears acceptable
Receptacle Outlets Appears acceptable
*Windows ** REFER TO SUMMARY REPORT ***
Entry Door Appears acceptable
Air Supply Appears acceptable

Sun Room

Ceramic Tile Floor Covering appears acceptable
Wall covering appears to be acceptable

PALMETTO HOME INSPECTION SERVICES, LLC
707 BOYKIN RD
CAMDEN, SC 29020
PH 803-424-1948 FAX 803-424-0074

Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting/Ceiling fan appears acceptable
Receptacle Outlets Appears acceptable
Windows Appears acceptable
Entry Door Appears acceptable
*Air supply ** REFER TO SUMMARY REPORT ***

FROG

Carpet Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
*Switched lighting Controls Overhead lighting/Ceiling fan ** REFER TO SUMMARY REPORT ***
Receptacle Outlets Appears acceptable
Entry Door Appears acceptable
Air Supply Appears acceptable

Master Bedroom-UPSTAIRS

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting/Ceiling fan appears acceptable
*Receptacle outlets ** REFER TO SUMMARY REPORT ***
*Windows ** REFER TO SUMMARY REPORT ***
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable

Bedroom #2-(UPSTAIRS-RIGHT FRONT)

Carpet Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting/Ceiling fan appears acceptable
Receptacle Outlets Appears acceptable
*Windows ** REFER TO SUMMARY REPORT ***
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable

Bedroom #3-(UPSTAIRS-RIGHT REAR)

Carpet Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting/Ceiling fan appears acceptable
Receptacle Outlets Appears acceptable
*Windows ** REFER TO SUMMARY REPORT ***
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable

Master Bedroom-DOWN STAIRS

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
Switched lighting Controls Overhead lighting/Ceiling fan appears acceptable
Receptacle Outlets Appears acceptable
Windows Appears acceptable
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable

Kitchen

Hardwood Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
*Switched lighting Controls Overhead lighting/Ceiling fan ** REFER TO SUMMARY REPORT ***
Receptacle Outlets Appears acceptable
*Windows ** REFER TO SUMMARY REPORT ***
Entry Door Appears acceptable
Pantry Appears acceptable
Air Supply Appears acceptable

Kitchen Cabinets

(PAINTED) Kitchen cabinets appear to be acceptable

Kitchen Counter Tops

*(Ceramic) Kitchen counter tops ** REFER TO SUMMARY REPORT ***

Kitchen Sinks (Double Sink)(Porcelain)

Kitchen sink appears acceptable
Kitchen sink faucets appear acceptable
Kitchen sink drainage appears acceptable

Kitchen Appliances

Disposal appears acceptable
(Electric) Cook top appears acceptable
*(Electric) Oven is deficient ** REFER TO SUMMARY REPORT ***
*Range Hood is deficient ** REFER TO SUMMARY REPORT ***
Dishwasher appears acceptable

Master Bathroom-Upstairs

Ceramic Tile Floor Covering appears acceptable
Wall covering appears to be acceptable
Ceiling Material appears to be acceptable
*Switched lighting Controls Overhead lighting ** REFER TO SUMMARY REPORT ***
Receptacle Outlets Appears acceptable
Entry Door Appears acceptable
Closets Appears acceptable
Air Supply Appears acceptable
Toilet appears acceptable
*Lavatory ** REFER TO SUMMARY REPORT ***
Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

*Whirlpool Style CAST RESIN Bathtub ** REFER TO SUMMARY REPORT ***

TILE Shower stall appears acceptable

BATHROOM #2-(UPSTAIRS-JACK & JILL)

Ceramic Tile Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting Controls Overhead lighting ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

*Windows ** REFER TO SUMMARY REPORT ***

Entry Door Appears acceptable

Air Supply Appears acceptable

Toilet appears acceptable

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

Standard Style Steel Bathtub appears acceptable

TILE Shower stall appears acceptable

BATHROOM #3-(FROG)

Sheet Vinyl Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting Controls Overhead lighting ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

Entry Door Appears acceptable

Air Supply Appears acceptable

Toilet appears acceptable

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

Fiberglass Shower stall appears acceptable

MASTER BATHROOM #2-DOWN STAIRS

Ceramic Tile Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting Controls Overhead lighting ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

Windows Appears acceptable

Entry Door Appears acceptable

Closets Appears acceptable

Air Supply Appears acceptable

Toilet appears acceptable

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

Standard Style Steel Bathtub appears acceptable

TILE Shower stall appears acceptable

1/2 BATHROOM-DOWN STAIRS-KITCHEN AREA

Hardwood Floor Covering appears acceptable

Wall covering appears to be acceptable

Ceiling Material appears to be acceptable

*Switched lighting Controls Overhead lighting ** REFER TO SUMMARY REPORT ***

Receptacle Outlets Appears acceptable

Windows Appears acceptable

Entry Door Appears acceptable

Toilet appears acceptable

Lavatory appears acceptable

Bathroom cabinets appear to be acceptable

Bathroom counter tops appear to be acceptable

Masonry Fireplace located in Den

Damper appears acceptable

Mortar Joints appear acceptable

*Hearth ** REFER TO SUMMARY REPORT ***

Mantel appears acceptable

Gas Water Heater STATE 40000 BTUs Located Garage

50 Gallon Capacity water heater appears to be acceptable

All associated Plumbing and Piping appear to be acceptable

1- GAS PACKAGE UNIT-FOR DOWN STAIRS HEIL 3 5 tons & 90-k BTUs Located OUTSIDE ON LEFT

Service switch appears to be acceptable

Filters appear to be acceptable

Thermostats appear to be functional

2-GAS FURNANCE G E 60-K BTUs Located Attic

Filters appear to be acceptable

Thermostats appear to be functional

Overall Operation appears to be within normal limits

Air Conditioning Unit # 1 HEIL 3 Ton Unit Condensing Unit located Left side of House

*Air conditioning unit ** REFER TO SUMMARY REPORT ***

Plumbing Main Service Main Cutoff Valve located FRONT YARD

Supply Line is 3/4" PVC Water service line appears acceptable

Main Electrical Service 120/240 volt, 200 Amp, 4/0 Aluminum Wiring

UNDERGROUND Electrical service appears acceptable

Main Service Panel located in DEN-CLOSET (Breakers) appears acceptable

Electric Meter located Left Side Electric Meter & Grounding Electrode (Copper) appears acceptable

Branch Circuits

120 volt 20 amp circuits (Copper Conductors) appear acceptable

240 volt 30 amp circuits (Copper Conductors) appear acceptable

240 volt 40 amp circuits (Copper Conductors) appear acceptable

240 volt 50 amp circuits (Copper Conductors) appear acceptable

240 volt 20 & 100 amp circuits (Aluminum and Copper Conductors) appear acceptable

Electrical Sub Panels

PALMETTO HOME INSPECTION SERVICES, LLC
707 BOYKIN RD
CAMDEN, SC 29020
PH 803-424-1948 FAX 803-424-0074

*Sub panel #1 located POOL HOUSE (8) 120 volt Circuits ** REFER TO SUMMARY REPORT ***

Smoke Detector # 1 Located in Upstairs Hallway

Smoke Detector (Battery Powered) appears acceptable

Smoke Detector # 2 Located in MASTER BEDROOM-DOWN STAIRS

Smoke Detector (Battery powered) appears acceptable

Smoke Detector # 3 Located in KITCHEN

Smoke Detector (Battery powered) appears acceptable

Outdoor lighting Fixtures -- All

Wall Switched Lighting Fixtures appears acceptable

Outdoor Receptacles All

NOT GFCI PROTECTED Outdoor Receptacles appears acceptable

*****INSPECTION SUMMARY REPORT*****

10 HUNT CUP LANE CAMDEN SC 29020

EXTERIOR

ROOF (a) RECOMMEND INSTALLING FLASHINGS OR EXTENDING THE SHINGLES TO COVER THE OPEN AREAS OF THE FASCIA OF THE RETURNS (SEE EXAMPLE PHOTO #3)

CORNICE (a) THERE IS A SMALL AREA OF WATER DAMAGE (DECAY) ON THE SOFFIT ON THE RIGHT SIDE OF THE CHIMNEY

(b) IT APPEARS THAT A SQUIRREL HAS CHEWED ON THE BOTTOM OF THE FASCIA (DENTAL MOLD) ON THE FRONT ABOVE THE MASTER BEDROOM

(c) THERE ARE A COUPLE SMALL BEE HOLES IN THE WOODEN FASCIA ON THE REAR OF THE HOUSE

WINDOWS (a) SOME OF THE WOODEN WINDOW SHUTTERS HAVE DECAY PRESENT AND SOME HAVE MISSING LOUVERS

(b) THE LEFT REAR PATIO AND THE LEFT FRONT WINDOW SCREENS ARE TORN

(c) A SMALL AREA OF WATER DAMAGE (DECAY) IS PRESENT AT THE BOTTOM OF THE STATIONARY WINDOW ABOVE THE FRONT PORCH

DOORS (a) SURFACE RUST IS PRESENT AT THE BOTTOM OF THE RIGHT REAR METAL DOORS THE WEATHER STRIPPING IS DETERIORATING AROUND THESE DOORS

(b) SMALL AMOUNTS OF DECAY ARE PRESENT AT THE BOTTOM OF THE BRICK MOLD AND DOOR JAMBS ON THE RIGHT REAR DOORS (SEE PHOTO #2)

SIDING (a) THERE ARE SMALL AMOUNTS OF DECAY PRESENT AT THE BOTTOM ON THE DORMER SIDING BOARDS AND DORMER CORNER TRIM BOARDS (SEE PHOTO #1)

GENERAL (a) RECOMMEND CUTTING THE SHRUBBERY BACK FROM THE STRUCTURE

(b) THE PAINT IS PEELING FROM THE EXTERIOR TRIM WORK IN SEVERAL AREAS

(c) THE CLOTHES DRYER DUCT NEEDS CLEANING

GARAGE (a) THE GLOBE IS MISSING FROM ONE OF THE LIGHT FIXTURES

(b) THE FRONT WINDOW PANE IS CRACKED

(c) THERE IS A SMALL STAIN ON THE CEILING WHERE THE FROG BATHROOM DRAIN PENETRATES THE CEILING

ATTIC AREA

SHEATHING (a) THE SHEATHING IS DAMAGED IN TWO SMALL AREAS OF THE MAIN ATTIC (SEE PHOTO #5) ONE AREA IS ABOVE THE SOFFIT ON THE RIGHT SIDE OF THE SKY LIGHT AND ONE AREA IS IN THE MIDDLE ON THE LEFT SIDE

(b) THE AREAS WHERE THE ROOF VENTS WERE REMOVED (SEE PHOTO #6) NEED TO HAVE BRACING INSTALLED BETWEEN THE RAFTERS TO SUPPORT THESE AREAS ONE AREA IS ABOVE THE DOWN STAIRS MASTER BEDROOM AND THE OTHER IS TOWARDS THE REAR OF THE MAIN ATTIC ON THE LEFT SIDE

(c) THERE ARE SEVERAL WATER STAINS ON THE SHEATHING THROUGHOUT THE ATTIC AREA THESE STAINS APPEAR TO BE FROM THE PAST

ELECTRICAL (a) THE SWITCH PLATE COVER IS MISSING

GENERAL (a) THE SCREEN IS LOOSE ON THE LEFT SIDE ROOF EXHAUST FAN

(b) THE AREA ABOVE THE FROG WAS NOT ACCESSIBLE DUE TO PERSONAL ITEMS BLOCKING THE ACCESS

GENERAL INTERIOR (a) THE GAS SEALS ARE BROKEN ON SEVERAL OF THE WINDOWS THROUGHOUT THE HOME GIVING THEM A FOGGED UP APPEARANCE THE UPSTAIRS WINDOWS SOME OF THE SUNROOM WINDOWS LIVING ROOM WINDOWS AND KITCHEN WINDOWS APPEAR FOGGED UP

(b) THE GLOBE IS MISSING FROM THE LIGHT FIXTURE IN THE STAIRCASE FROM THE KITCHEN

(c) SOME OF THE GROUT IS MISSING FROM THE FIREPLACE HEARTH

(d) THE HARDWOOD FLOORING SQUEAKS IN SOME AREA THIS IS TYPICAL IN AN OLDER HOME

MASTER BEDROOM (UPSTAIRS) (a) THERE IS A WATER STAIN AROUND THE RECEPTACLE UNDERNEATH THE LEFT SIDE WINDOW

BEDROOM #2 (UPSTAIRS RIGHT FRONT) (a) THE LEFT SIDE WINDOW WILL NOT SUPPORT ITSELF WHEN OPENED

MASTER BATHROOM (UPSTAIRS) (a) THE AIR SWITCH BUTTON IS MISSING FROM THE WHIRLPOOL TUB THE TUB MOTOR COULD NOT BE OPERATED

(b) THE EXHAUST FAN IS MAKING NOISE

(c) THERE IS A COSMETIC SETTLEMENT CRACK IN THE SHEETROCK CEILING BELOW THE SKYLIGHT

(d) THERE ARE SMALL SURFACE CRACKS IN THE BOTTOM OF THE RIGHT SIDE SINK

UPSTAIRS JACK & JILL BATHROOM (a) THE AREA BETWEEN THE TOP OF THE TUB AND THE WALL TILES NEEDS TO BE RE CAULKED

(b) THE WATER PROOF LIGHT FIXTURE GLOBE IS MISSING ABOVE THE SHOWER STALL

BATHROOM #3-(FROG) (a) THE LIGHT FIXTURE ABOVE THE SHOWER DOES NOT APPEAR TO BE A WET LOCATION TYPE FIXTURE IT APPEARS TO BE A RECESSED FIXTURE WITH A FLOOD LIGHT BULB
(b) THERE IS NO DOOR STOP AND THERE IS A VERY SMALL HOLE IN THE SHEETROCK WALL BEHIND THE DOOR
(c) THE SHEETROCK TAPE IS SEPARATING ABOVE THE SHOWER STALL

MASTER BATHROOM- (DOWN STAIRS) (a) THE EXHAUST FAN IS MAKING NOISE
(b) THERE IS A SMALL AMOUNT OF WATER HAMMER PRESENT WHEN THE VALVES ARE SUDDENLY TURNED OFF

½ BATHROOM (KITCHEN AREA) (a) THE EXHAUST FAN IS MAKING NOISE

FROG (a) A LIGHT BULB IS BROKEN OFF INSIDE ONE OF THE RECESSED LIGHT FIXTURES

KITCHEN (a) THE RANGE HOOD IS MAKING NOISE
(b) COULD NOT CHECK THE OVEN BELOW THE STOVE TOP IT IS FULL OF PERSONAL ITEMS
(c) THE DEN SIDE CEILING FAN WOBBLER ON HIGH SPEED
(d) TWO OF THE FLORESCENT LIGHT FIXTURES ARE NOT ENERGIZING (BULB?)
(e) A COUPLE OF THE COUNTER TOP TILES ARE CRACKED
(f) THE LIGHT INSIDE THE STAND ALONE OVEN DID NOT RESPOND (BULB?)

WATER HEATER (a) IT IS RECOMMENDED TO PIPE THE T&P VALVE TO THE EXTERIOR

HVAC UNIT(s) (a) RECOMMEND SEALING THE DUCT AND GAS LINE AT THE FOUNDATION WALL PENETRATION (SEE PHOTO #4)

CRAWL SPACE (a) THERE IS NO INSULATION UNDERNEATH THE FLOOR THIS IS TYPICAL OF A HOME THIS AGE
(b) THE DUCT WORK IS DISCONNECTED FROM THE FRONT FLOOR REGISTER IN THE SUNROOM
(c) A SMALL SECTION OF THE DUCT INSULATION IS TORN BACK FROM THE DUCT WORK UNDERNEATH THE MASTER BATHROOM AND THE KITCHEN
(d) THE CLOTHES DRYER DUCT IS MADE OF VINYL MATERIAL RECOMMEND CHANGING TO AN UPDATED TYPE MATERIAL
(e) THE CONDENSATE LINE FOR THE ATTIC AREA AIR HANDLER IS PIPED INTO THE CRAWL SPACE ALONG THE LEFT SIDE DEN WALL THE CONDENSATE LINE NEEDS TO BE PIPED TO THE EXTERIOR
(f) SOME AREAS WERE NOT ACCESSIBLE BECAUSE OF LOW CLEARANCES OF THE DUCT WORK AND PLUMBING PIPES THE AREAS UNDERNEATH THE DOWN BEDROOM AND THE SUNROOM WERE NOT FULLY ACCESSIBLE

POOL HOUSE

ELECTRICAL (a) SEVERAL RECEPTACLE COVERS AND SWITCH PLATES ARE MISSING COVERS
(b) THE 30amp SINGLE POLE BREAKER ON THE RIGHT SIDE HAS A #12 WIRE ATTACHED TO IT #12 WIRE IS ONLY RATED FOR 20amps
(c) RECOMMEND CHANGING THE TWO SINGLE POLE 20amp BREAKERS ON THE LEFT SIDE (THAT ARE USED TO FORM A 240v CIRCUIT) WITH A DOUBLE POLE 20amp MOLDED CASE BREAKER
(d) THE SPARE WIRES INSIDE THE PANEL NEEDS TO BE CAPPED OFF
(e) THERE IS NO BUSHING (ROMEX CONNECTOR) ON THE SUPPLY WIRE OF THE WATER HEATER

ATTIC (a) THERE ARE WATER STAINS ON THE SHEATHING IN THE ATTIC AREA THESE STAINS APPEAR TO BE FROM THE PAST AND THE WOOD APPEARS SOLID IN THIS AREA

BATHROOM (a) THE BATHROOM CABINET IS DAMAGED (DECAYED AT BOTTOM)

(b) THE WALL AREA BEHIND THE TOILET IS INCOMPLETE
(c) THE OVERHEAD LIGHT FIXTURE DID NOT RESPOND (BULB?)
(d) THE EXHAUST FAN IS MAKING NOISE

GENERAL (a) SOME OF THE VINYL FLOOR TILES ARE LOOSE

(b) THE WATER HEATER WAS NOT FULLY ACCESSIBLE

ALWAYS USE LICENSED CONTRACTORS FOR REPAIRS

ITEMS NOT MENTIONED IN THIS REPORT WERE NOT INSPECTED

NOTE IF THE HOME INSPECTED IS FURNISHED ALL WALLS, FLOORS WINDOWS RECEPTACLES ETC WILL NOT BE ACCESSIBLE



Joseph S McCue | Direct Dial 803 255 0412 | E Mail jmcue@collinsandlacy.com

December 9 2009

VIA E-MAIL

The Honorable Alison R Lee
5th Judicial Circuit
1701 Main Street, Room 214
Columbia SC 29201

RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A Bead,
Deborah Appleton, Bob Capes Realty Inc , Russell & Jeffcoat Realtors Inc and
Palmetto Home Inspection Services, LLC
Civil Action No 07 CP 28-0288
Claim No 295-044423
C&L No 1-1608

Dear Judge Lee

I am in receipt of Mr Brackett's e-mail to you dated December 8, 2009 In Mr Brackett's letter, he provided the Court with various exhibits and pleadings in the case which Plaintiffs argue the Court should consider in determining whether or not the contract between Plaintiffs and Palmetto Home Inspection Services LLC is unconscionable In response to this submittal, Palmetto offers the following remarks

None of the materials provided by Plaintiffs in the December 8 letter should be considered by the Court because these documents are not the proper evidence before the Court

There is no evidence properly before the Court that any of these damages are attributable to the inspection performed by Palmetto Indeed, it is unclear from this compilation of documents submitted by Plaintiffs, which damages they allege are the responsibility of Palmetto

Plaintiffs Exhibits fall generally into two categories, an excerpt of Plaintiffs Answers to Interrogatories and various documents which purport to be estimates related to the property at 10 Hunt Cup Lane, Camden, South Carolina

With regards to page 19 of 22 submitted by Plaintiffs in which they itemize damages which Plaintiffs attribute to Palmetto, we would note that the two largest items "substandard existing hardwood flooring 3783244891 and mold/mildew \$25,000" are items which in no way, can be attributable to Palmetto With regard to the "substandard existing hardwood flooring this issue relates to whether the flooring meets code The contract with Palmetto specifically excludes issues which are related to code compliance Ms Gladden testified at her deposition as follows

Q All right You understood that the inspection was not going to report to you on the compliance or non compliance of any codes, ordinances or statutes, didn't you?

A Correct

EXHIBIT

tabbles

F

Under the Exclusions and Limitations section of the contract it reads in part This inspection is not intended to provide the purchaser with information regarding the advisability of this purchase the market value of the property the compliance or non-compliance with the codes ordinances and statutes the suitability of this property for specialized uses,

Mold is also excluded from the contract The Exclusion of Limitations section of the contract also reads This inspection report does not address and is not intended to address the possible presence of danger from any potential harmful substance and environmental hazard including but not limited to

Mr Gladden was asked in his deposition the following question

Q Show me in the contract between you and Mr Roberts where he tells you that he is going to inspect for mold?

A There is nothing

(Deposition of Thomas Gladden, Page 233, Line 25 – Page 234, Line 3)

As with the above examples, there is evidence in the record much of which is Plaintiffs own testimony, which establishes Plaintiffs should not be entitled to recovery from this Defendant for these items even in the absence of the limitation of liability revision in the contract

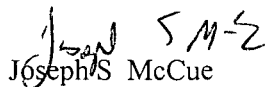
Palmetto did not raise issues related to Plaintiffs alleged damages and their lack of evidentiary support at the hearing on the Motions for Summary Judgment because the issue before the Court is whether or not Plaintiffs will be held to the terms of the contract which they entered into after negotiating with at least two home inspection companies, and which they read prior to signing

If the Court is inclined to consider the materials submitted by Plaintiffs in their December 8, 2009 letter, we would request a hearing so that Defendant Palmetto may respond in detail to each of the issues raised by Plaintiffs related to damages

By copy of this letter, I am providing Mr Brackett with a copy of my correspondence to the Court

With warmest regards,

Sincerely,


Joseph S. McCue

JSM rc

Attachments

cc B Michael Brackett, Esquire
W Jonathan Harling, Esquire
William S Tetterton, Esquire
Catharine Garbee Griffin, Attorney

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

FILED FOR RECORD
2010 MAY -7 AM 10 43

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Thomas W Gladden and Vera H Gladden,
Plaintiffs,

vs. OLIVIA M BOYKIN
ET AL
KERSHAW COUNTY SC

DOCKET NO 07-CP-28-288

v

Olivia M Boykin, Elizabeth A
Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell &
Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,
Defendants

ORDER GRANTING
SUMMARY JUDGMENT TO
PALMETTO HOME INSPECTION
SERVICES

STATEMENT OF THE CASE

This action arises out of the Plaintiffs' purchase of a home located at 10 Hunt Cup Lane in Camden, South Carolina ("subject property") from the Defendant Olivia M Boykin The Defendant Elizabeth A Beard is a real estate agent with Russell Jeffcoat Realtors, Inc who represented Ms Boykin in the sale of the subject property to the Plaintiffs The Defendant Deborah Appleton is a real estate agent with Bob Capes Realty, Inc who represented the Plaintiffs in the purchase of the subject property Palmetto Home Inspection Services, LLC ('Palmetto') contracted with Plaintiffs to perform a home inspection on the subject property

On March 26, 2007, the Plaintiffs filed this lawsuit asserting causes of action against Ms Boykin, Ms Beard and Russell & Jeffcoat for actual and constructive fraud and negligent misrepresentation Plaintiffs' cause of action against Ms Appleton and Bob Capes Realty alleges negligent performance of an agent's duty to the Gladdens The sole cause of action against Palmetto is for breach of contract Plaintiffs and Defendant PHIS have cross motions for summary judgment, each directed at the enforceability of a limit of liability provision in their written contract

FACTS

In the fall of 2006, the Plaintiffs were relocating from Winnsboro, South Carolina to Camden, South Carolina Mrs Gladden had prior experience as a real estate agent, in Winnsboro When Mrs Gladden looked for a house in Camden, she initially drove around different neighborhoods and put cards in mailboxes of homes that she found appealing

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

Jayme McDaniel
Clerk of Court Kershaw County

EXHIBIT

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such home was the subject property owned by Olivia Boykin Mr and Mrs Gladden attempted to negotiate the purchase of this home directly with Ms Boykin in an effort to avoid paying real estate agent commissions Ms Boykin refused to negotiate with the Gladdens unless they went through a real estate agent The Plaintiffs then approached Deborah Appleton of Bob Capes Realty, Inc about representing them in this transaction

The asking price for the property was \$499,000 Mrs Gladden prepared a worksheet from which she determined to make an offer for the house for \$434,630 based on various deductions On September 21, 2006, the Plaintiffs made an offer to Ms Boykin in the amount of \$434,630 Ms Boykin rejected that offer and through a series of counter offers, the Plaintiffs agreed on October 12, 2006 to pay \$495,000 to purchase the home Under the terms of the Offer to Purchase, Plaintiffs had the option to have a home inspection The contract also required the Seller (Mrs Boykin) to provide a South Carolina Wood Infestation Report along with a heating and air conditioning inspection

Ms Appleton provided Mrs Gladden the names of two home inspectors, Mr Outlaw and Mr Roberts Ms Appleton described Mr Outlaw as the "hardest but best" Ms Gladden contacted Mr Roberts, owner of Palmetto and interviewed him over the phone The specific substance of these conversations was not disclosed She then interviewed Mr Outlaw After interviewing Mr Roberts and Mr Outlaw, Mrs Gladden decided to hire Mr Roberts

Mr Roberts inspected the home for the Plaintiffs on October 18, 2006 Mrs Gladden was present at the time of the inspection At the end of the inspection, but prior to discussing the inspection results, Mrs Gladden read and signed the Palmetto Home Inspection Services, LLC Real Estate Inspection contract The Gladdens paid Palmetto \$475.00 for the inspection Included in the contract is a provision titled "Limit of Liability" That section reads

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including, but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report

Mr Roberts provided a brief verbal report of his findings and prepared a written report Following the receipt of the written Inspection Report, the Plaintiffs prepared an addendum to

the contract asking Boykin to repair certain items identified in the inspection report. They negotiated various items and ultimately reached a resolution as to what items would be repaired and for what items the seller would provide a credit to the Plaintiffs.

The Plaintiffs also received a South Carolina Wood Infestation Report (CL-100) prepared by Terminix Services, Inc. dated October 30, 2006. The Plaintiffs acknowledged receiving the CL-100 on the date of closing November 22, 2006. The CL-100 report identified evidence of damage and indicated that the damage "will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by qualified building expert, licensed or registered with the South Carolina Department of Labor, Licensing and Regulation, Residential Builders Commission and that needed repairs be made."¹ The report specifically listed water damage to portions of the sill, sub-floor and floor joist near the dirt-filled porch in the front, the brick patio in the back, and under the laundry room. There was also some damage to the roof decking under the exhaust fan in some places where the roof changed angles. The Plaintiffs proceeded with the closing on the purchase of the home without an inspection by a licensed, qualified building expert.

On the date of closing, the Plaintiffs expressed concerns about whether or not the repairs were done properly and sufficiently. Plaintiffs allege both Ms. Appleton and Ms. Beard assured them the repairs were done. Plaintiffs' concerns were relayed through their attorney to Ms. Boykin's attorney in Camden. Neither Ms. Boykin nor her attorney was present at closing. When the Plaintiffs continued to express concerns, Ms. Boykin told the Plaintiffs she was willing to cancel the closing. However, the Plaintiffs chose to move forward with the closing.

Following the closing, Mr. Gladden's brother assisted Mr. Gladden in moving some of his furniture. While at the house, Mr. Gladden asked him to inspect the crawl space repairs. Mr. Gladden's brother, who works in the construction industry, determined that the repairs to the crawl space were not properly performed.

On November 29, 2006, Mrs. Gladden contacted Mr. Roberts to express her concerns about items she perceived that were either not disclosed or not fully disclosed in the Palmetto Report. During that conversation, Mr. Roberts offered to refund the amount Plaintiffs paid for

¹ The Seller retained Ski Construction to make repairs to the sub structure identified by Terminix as well as the items identified in the Palmetto Report which the Plaintiffs and Seller agreed to repair. Ski Construction is not a licensed builder and either did not perform the repairs sufficiently or did not repair them at all.

the inspection Mr Roberts then met with Mrs Gladden and gave her a check for \$475 00
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STANDARD OF REVIEW

Rule 56, SCRCP, provides that a party is entitled to judgment as a matter of law when there is no genuine dispute of material fact. Thus, "summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland School District One, 341 S.C. 307, 311, 534 S.E.2d 275 (2000). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "The pleadings and documents on file must be liberally construed in favor of the nonmoving party who must be given the benefit of all favorable inferences that might reasonably be drawn from the record." Bates v. City of Columbia, 301 S.C. 320, 321, 391 S.E.2d 733 (Ct. App. 1990). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. See, e.g., Baughman v. A.T. & T. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 547 (1991) (bare allegations deemed insufficient to create a genuine issue of fact). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009).

Defendant Palmetto seeks summary judgment on the basis that the contract limits Palmetto's liability to a refund of the \$475 fee paid by Plaintiffs for the inspection and report. Plaintiffs' motion for summary judgment seeks judgment on the basis that the limit of liability provision is unenforceable because the provision is both unconscionable and violates public policy.

DISCUSSION

Courts only have the authority to specifically enforce contracts that the parties themselves have made. Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008). However, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson v. MSA of Myrtle

Beach, Inc., 373 S C 14, 29-30, 644 S E 2d 663, 671 (2007) Plaintiffs argue that the contract is an adhesion contract and the provision limiting liability is unconscionable and unenforceable Defendant argues that the parties to a contract may agree to limit liability and therefore the provision is not unenforceable

The contract at issue here is an adhesion contract Adhesion contracts are generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms Lackey v Green Tree Fin Corp., 330 S C 388, 394, 498 S E 2d 898, 901 (Ct App 1998) Nevertheless, adhesion contracts are not per se unconscionable Herron v Century BMW, Op No 26805 (S C Sup Ct filed April 19, 2010) (Shearouse Adv. Sh No 15) at 18 citing Simpson, supra, 373 S C at 27, 644 S E 2d at 669 The testimony of Scot Roberts of Palmetto Home Inspection was that Roberts would not provide any type of report, oral or written, if the contract was not signed The contract was a pre-printed standard form utilized by Palmetto On only one occasion could Roberts recall any modification to the form contract While Plaintiff interviewed and questioned Roberts before deciding to hire him, there was no evidence presented about the nature and substance of the discussion by either party Despite those discussions, Roberts presented the contract to Mrs Gladden after he had conducted the inspection because she was not available when the inspection started Gladden read the contract before signing it

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them Simpson, supra 373 S C at 25, 644 S E 2d at 668 Plaintiff bears the burden of proving the contract unconscionable E Allen Farnsworth, Contracts § 4 28 at 299 (2004) Plaintiff has failed in that burden

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue Simpson, supra In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether

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there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause Id

The contract was one for the "limited visual inspection of apparent conditions in readily accessible areas existing at the time of the inspection" While there was some disparity in the bargaining power of the parties, Mrs Gladden was a trained real estate agent who previously worked in the business She had the opportunity to interview home inspectors before she selected Palmetto The provision at issue was cited near the end of the contract There is no requirement for a home inspection Plaintiffs chose to have a home inspection and specifically chose Palmetto to perform that service Plaintiffs had the option not to consent to the terms of the contract or, if desired, to chose another home inspector The contract contained conspicuous clauses in which the titles are capitalized, bold font letters The clause which limits liability is located directly below the "ACKNOWLEDGEMENT" section where Mrs Gladden placed her initials The clause was not hidden or ambiguous As stated earlier, Mrs Gladden read the contract before she initialed and signed it Based upon these findings, there does not appear to be an absence of meaningful choice

The contract states that Palmetto will perform a limited visual inspection of the readily accessible areas in conformity with the generally accepted inspection standards and methods in accordance with the standards of practice of the South Carolina Home Inspector Licensing Board The contract specifically listed the areas that would be inspected and contained the limitations and exclusions The inspection is not intended to advise the purchaser concerning the advisability of purchase, compliance or non-compliance with applicable codes and ordinances Specifically, Mrs Gladden acknowledged that the inspection is not a guaranty or warranty regarding the performance or condition of any structure or item and "any visual problem observed should be verified with the appropriate contractor, electrician, plumber, or skilled professional for cost estimated and code compliance" The terms of the contract were not so oppressive or one-sided that no reasonable person would accept them If she was not satisfied with the terms, a home inspection could have been procured through another person or company And, a more detailed inspection could have been performed by a licensed professional other than a home inspector There is no evidence of any duress or undue influence

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Plaintiff also claims the provision limiting liability is unenforceable as against public policy. Agreements limiting or exempting liability are enforceable. 17a C.J.S. Contracts § 271 (2007). South Carolina law enforces exculpatory clauses when clear language indicates the intent of the parties. South Carolina Electric & Gas Company v. Combustion Engineering, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984). In Combustion Engineering, Inc., the South Carolina Court of Appeals enforced the language of an exculpatory clause which exempted the Defendant for liability for negligent manufacturing.

In a case squarely on point, Pride v. Southern Bell Telephone and Telegraph Company, 244 S.C. 615, 138 S.E.2d 144 (1964), the Supreme Court enforced a contract which limited liability arising out of the publication of paid advertisements in the yellow pages to only the amount paid for the advertisement. In Pride, the contract for services contained a provision whereby the parties agreed that the liability of the telephone company "on account of errors in or omissions from such advertisement, should in no event exceed the amount of the charges for such advertisement which was omitted, or in which the error occurred in the then current issue." Id. at 619, 138 S.E.2d at 156. The Supreme Court explained that exposure to liability is "wholly a matter of private contract" and that exculpatory clauses between private parties do not violate public policy. Id. at 621, 138 S.E.2d at 157; McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005).

In McCune, the Court of Appeals recognized that even though exculpatory clauses may be disfavored by the law, such clauses are enforceable in South Carolina. The agreements must be entered into voluntarily and contain explicit language clearly indicating the intent of the parties to exempt a party from liability. The Court further reaffirmed that exculpatory clauses between private parties do not violate public policies. This Court must hold likewise.

In this case, the Plaintiffs signed the contract which defined and limited the scope of the home inspection including Palmetto's liability for any claims arising from the home inspection. "This contract represents the entire agreement between Palmetto Home Inspection Services, LLC and the Client. PHIS, LLC is not responsible for the repair, replacement or alteration of any item within or upon the inspected property. **The Client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms and exclusions contained within this contract**" (Emphasis added).

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“When the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect. The Court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” Ellis v Taylor, 316 S C 245, 248, 449 S E 2d 487 (1994)

Additionally, South Carolina expressly allows a licensed home inspector, such as Palmetto, to contractually limit the scope of its home inspection. S C Code Ann § 40-59-500(4) defines a “home inspection” to mean

The rendering of a written or oral report in exchange for compensation of any sort, regarding the condition of the construction or improvements to a residence including, but not limited to, structural problems or conditions, damage, safety problems, deterioration, equipment and systems that are **visible and readily accessible**. Home inspection does not include a contract or proposal for repair, renovation, or remodeling of the improvements to a residence. **The parties to a home inspection may limit or expand the scope of the inspection by agreement** (Emphasis added)

In this case, the South Carolina General Assembly has expressly allowed a licensed home inspector in South Carolina to limit the scope of an inspection. The General Assembly does not preclude a home inspector from limiting its liability through contract. The public policy outlined by the legislature and the Residential Builders Commission in licensing home inspectors is to assure that there are uniform standards applicable to all inspectors and to “establish a uniform guide for performing an inspection of buildings and equipment.” Standards of Practice for Residential Home Inspector. The standards provide the minimum contents of a written report and outlines what the residential home inspector should observe, identify, and describe. “The purpose of a residential inspection is to disclose general conditions of the building, improvements, mechanical systems and appliances as they exist on the day of the inspection.” Id. The contract between Plaintiffs and Palmetto meets the requirements set forth by the legislature and the licensing board. “A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals.” Romanus v Biggs, 214 S C 145, 51 S E 2d 503 (1949). The contract is not against public policy.

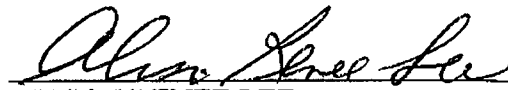
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Both parties have referred to cases from other jurisdictions to support their respective positions. Specifically, the cases relating to exculpatory clauses cited by the parties conform to South Carolina law, that exculpatory clauses are valid as long as they do not contravene public policy. In this state, the public policy regarding home inspections has been discussed above. No further reference to other jurisdictions is necessary.

ORDER

Based upon the foregoing discussion, there is no genuine issue of material fact and Defendant, Palmetto Home Inspection Services, LLC is entitled to judgment as a matter of law. Therefore, **IT IS ORDERED** that Defendant Palmetto Home Inspection Services' Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Summary Judgment as to this Defendant's contract is DENIED.

AND IT IS SO ORDERED


ALISON RENEE LEE
Circuit Court Judge

May 4, 2010
Columbia, South Carolina

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

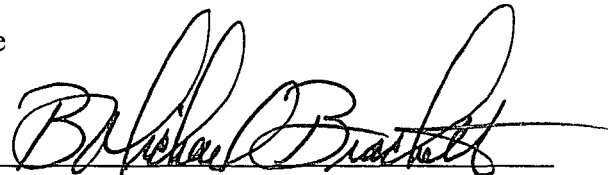
Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

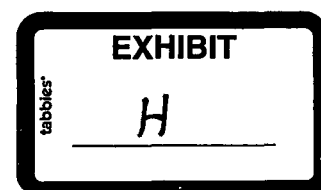
NOTICE OF APPEAL

Plaintiffs-Appellants appeal the Order of the Honorable Alison Renee Lee dated May 4, 2010 Appellants received written notice of the Order on May 7, 2010 A copy of said Order is attached and incorporated by reference



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Moses Koon & Brackett, PC
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Attorney for Appellants

Columbia, South Carolina
May 10, 2010



Other Counsel of Record
Joseph S. McCue, Esquire
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(803) 256-2660

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

FILED FOR RECORD IN THE COURT OF COMMON PLEAS
2010 May 7 AM 10:43 FIFTH JUDICIAL CIRCUIT

Thomas W Gladden and Vera H Gladden)
Plaintiffs)

v

Olivia M Boykin, Elizabeth A)
Beard, Deborah Appleton,)
Bob Capes Realty, Inc , Russell &)
Jeffcoat Realtors, Inc , and)
Palmetto Home Inspection Services,)
LLC ,)
Defendants)

DOCKET NO 07-CP-28-288

ORDER GRANTING
SUMMARY JUDGMENT TO
PALMETTO HOME INSPECTION
SERVICES

STATEMENT OF THE CASE

This action arises out of the Plaintiffs' purchase of a home located at 10 Hunt Cup Lane in Camden, South Carolina ("subject property") from the Defendant Olivia M Boykin. The Defendant Elizabeth A Beard is a real estate agent with Russell Jeffcoat Realtors, Inc who represented Ms Boykin in the sale of the subject property to the Plaintiffs. The Defendant Deborah Appleton is a real estate agent with Bob Capes Realty, Inc who represented the Plaintiffs in the purchase of the subject property. Palmetto Home Inspection Services, LLC ("Palmetto") contracted with Plaintiffs to perform a home inspection on the subject property.

On March 26, 2007, the Plaintiffs filed this lawsuit asserting causes of action against Ms Boykin, Ms Beard and Russell & Jeffcoat for actual and constructive fraud and negligent misrepresentation. Plaintiffs' cause of action against Ms Appleton and Bob Capes Realty alleges negligent performance of an agent's duty to the Gladdens. The sole cause of action against Palmetto is for breach of contract. Plaintiffs and Defendant PHIS have cross motions for summary judgment, each directed at the enforceability of a limit of liability provision in their written contract.

FACTS

In the fall of 2006, the Plaintiffs were relocating from Winnsboro, South Carolina to Camden, South Carolina. Mrs Gladden had prior experience as a real estate agent in Winnsboro. When Mrs Gladden looked for a house in Camden, she initially drove around different neighborhoods and put cards in mailboxes of homes that she found appealing. One

such home was the subject property owned by Olivia Boykin. Mr. and Mrs. Gladden attempted to negotiate the purchase of this home directly with Ms. Boykin in an effort to avoid paying real estate agent commissions. Ms. Boykin refused to negotiate with the Gladdens unless they went through a real estate agent. The Plaintiffs then approached Deborah Appleton of Bob Capes Realty, Inc. about representing them in this transaction.

The asking price for the property was \$499,000. Mrs. Gladden prepared a worksheet from which she determined to make an offer for the house for \$434,630 based on various deductions. On September 21, 2006, the Plaintiffs made an offer to Ms. Boykin in the amount of \$434,630. Ms. Boykin rejected that offer and through a series of counter offers, the Plaintiffs agreed on October 12, 2006 to pay \$495,000 to purchase the home. Under the terms of the Offer to Purchase, Plaintiffs had the option to have a home inspection. The contract also required the Seller (Mrs. Boykin) to provide a South Carolina Wood Infestation Report along with a heating and air conditioning inspection.

Ms. Appleton provided Mrs. Gladden the names of two home inspectors: Mr. Outlaw and Mr. Roberts. Ms. Appleton described Mr. Outlaw as the "hardest but best." Mrs. Gladden contacted Mr. Roberts, owner of Palmetto and interviewed him over the phone. The specific substance of these conversations was not disclosed. She then interviewed Mr. Outlaw. After interviewing Mr. Roberts and Mr. Outlaw, Mrs. Gladden decided to hire Mr. Roberts.

Mr. Roberts inspected the home for the Plaintiffs on October 18, 2006. Mrs. Gladden was present at the time of the inspection. At the end of the inspection, but prior to discussing the inspection results, Mrs. Gladden read and signed the Palmetto Home Inspection Services, LLC Real Estate Inspection contract. The Gladdens paid Palmetto \$475.00 for the inspection. Included in the contract is a provision titled "Limit of Liability." That section reads:

LIMIT OF LIABILITY It is understood and agreed that should PIHS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations including, but not limited to negligence, breach of contract or otherwise, the liability of PIHS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

Mr. Roberts provided a brief verbal report of his findings and prepared a written report. Following the receipt of the written Inspection Report, the Plaintiffs prepared an addendum to

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The Plaintiffs also received a South Carolina Wood Infestation Report (CL 100) prepared by Terminix Services, Inc. dated October 30, 2006. The Plaintiffs acknowledged receiving the CL-100 on the date of closing November 22, 2006. The CL-100 report identified evidence of damage and indicated that the damage 'will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by qualified building expert, licensed or registered with the South Carolina Department of Labor, Licensing and Regulation, Residential Builders Commission and that needed repairs be made''¹. The report specifically listed water damage to portions of the sill, sub-floor and floor joist near the dirt-filled porch in the front, the brick patio in the back and under the laundry room. There was also some damage to the roof decking under the exhaust fan in some places where the roof changed angles. The Plaintiffs proceeded with the closing on the purchase of the home without an inspection by a licensed, qualified building expert.

On the date of closing, the Plaintiffs expressed concerns about whether or not the repairs were done properly and sufficiently. Plaintiffs allege both Ms. Appleton and Ms. Beard assured them the repairs were done. Plaintiffs' concerns were relayed through their attorney to Ms. Boykin's attorney in Camden. Neither Ms. Boykin nor her attorney was present at closing. When the Plaintiffs continued to express concerns, Ms. Boykin told the Plaintiffs she was willing to cancel the closing. However, the Plaintiffs chose to move forward with the closing.

Following the closing, Mr. Gladden's brother assisted Mr. Gladden in moving some of his furniture. While at the house, Mr. Gladden asked him to inspect the crawl space repairs. Mr. Gladden's brother, who works in the construction industry, determined that the repairs to the crawl space were not properly performed.

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STANDARD OF REVIEW

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Beach, Inc., 373 S C 14, 29-30, 644 S E 2d 663, 671 (2007) Plaintiffs argue that the contract is an adhesion contract and the provision limiting liability is unconscionable and unenforceable Defendant argues that the parties to a contract may agree to limit liability and therefore the provision is not unenforceable

The contract at issue here is an adhesion contract Adhesion contracts are generally thought of as a standard form contract, offered on a take it or-leave-it basis, containing non-negotiable terms Lackey v. Green Tree Fin Corp., 330 S C 388, 394, 498 S E 2d 898, 901 (Ct App 1998) Nevertheless, adhesion contracts are not per se unconscionable Herron v Century BMW, Op No 26805 (S C Sup Ct filed April 19, 2010) (Shearouse Adv Sh No 15) at 18 citing Simpson, supra, 373 S C at 27, 644 S E 2d at 669 The testimony of Scot Roberts of Palmetto Home Inspection was that Roberts would not provide any type of report, oral or written, if the contract was not signed The contract was a pre-printed standard form utilized by Palmetto On only one occasion could Roberts recall any modification to the form contract While Plaintiff interviewed and questioned Roberts before deciding to hire him, there was no evidence presented about the nature and substance of the discussion by either party Despite those discussions Roberts presented the contract to Mrs Gladden after he had conducted the inspection because she was not available when the inspection started Gladden read the contract before signing it

In South Carolina unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them Simpson, supra 373 S C at 25, 644 S E 2d at 668 Plaintiff bears the burden of proving the contract unconscionable E Allen Larnsworth, Contracts § 4 28 at 299 (2004) Plaintiff has failed in that burden

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue Simpson, supra In determining whether there is an absence of a meaningful choice courts consider the relative disparity in the parties' bargaining power the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether

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there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause Id

The contract was one for the "limited visual inspection of apparent conditions in readily accessible areas existing at the time of the inspection." While there was some disparity in the bargaining power of the parties, Mrs. Gladden was a trained real estate agent who previously worked in the business. She had the opportunity to interview home inspectors before she selected Palmetto. The provision at issue was cited near the end of the contract. There is no requirement for a home inspection. Plaintiffs chose to have a home inspection and specifically chose Palmetto to perform that service. Plaintiffs had the option not to consent to the terms of the contract or, if desired, to choose another home inspector. The contract contained conspicuous clauses in which the titles are capitalized, bold font letters. The clause which limits liability is located directly below the "ACKNOWLEDGEMENT" section where Mrs. Gladden placed her initials. The clause was not hidden or ambiguous. As stated earlier, Mrs. Gladden read the contract before she initialed and signed it. Based upon these findings, there does not appear to be an absence of meaningful choice.

The contract states that Palmetto will perform a limited visual inspection of the readily accessible areas in conformity with the generally accepted inspection standards and methods in accordance with the standards of practice of the South Carolina Home Inspector Licensing Board. The contract specifically listed the areas that would be inspected and contained the limitations and exclusions. The inspection is not intended to advise the purchaser concerning the advisability of purchase, compliance or non-compliance with applicable codes and ordinances. Specifically, Mrs. Gladden acknowledged that the inspection is not a guaranty or warranty regarding the performance or condition of any structure or item and "any visual problem observed should be verified with the appropriate contractor: electrician, plumber, or skilled professional for cost estimated and code compliance." The terms of the contract were not so oppressive or one-sided that no reasonable person would accept them. If she was not satisfied with the terms, a home inspection could have been procured through another person or company. And, a more detailed inspection could have been performed by a licensed professional other than a home inspector. There is no evidence of any duress or undue influence.

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Plaintiff also claims the provision limiting liability is unenforceable as against public policy. Agreements limiting or exempting liability are enforceable. 17a C.J.S. Contracts § 271 (2007). South Carolina law enforces exculpatory clauses when clear language indicates the intent of the parties. South Carolina Electric & Gas Company v. Combustion Engineering, Inc., 283 S.C. 182, 191 S.E.2d 453, 458 (Ct. App. 1984). In Combustion Engineering, Inc., the South Carolina Court of Appeals enforced the language of an exculpatory clause which exempted the Defendant for liability for negligent manufacturing.

In a case squarely on point, Pride v. Southern Bell Telephone and Telegraph Company, 244 S.C. 615, 138 S.E.2d 144 (1964), the Supreme Court enforced a contract which limited liability arising out of the publication of paid advertisements in the yellow pages to only the amount paid for the advertisement. In Pride, the contract for services contained a provision whereby the parties agreed that the liability of the telephone company "on account of errors in or omissions from such advertisement should in no event exceed the amount of the charges for such advertisement which was omitted, or in which the error occurred in the then current issue." Id. at 619, 138 S.E.2d at 156. The Supreme Court explained that exposure to liability is "wholly a matter of private contract" and that exculpatory clauses between private parties do not violate public policy. Id. at 621, 138 S.E.2d at 157. McCune v. Myrtle Beach Indoor Shooting Range, Inc. 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005).

In McCune, the Court of Appeals recognized that even though exculpatory clauses may be disfavored by the law, such clauses are enforceable in South Carolina. The agreements must be entered into voluntarily and contain explicit language clearly indicating the intent of the parties to exempt a party from liability. The Court further reaffirmed that exculpatory clauses between private parties do not violate public policies. This Court must hold likewise.

In this case the Plaintiffs signed the contract which defined and limited the scope of the home inspection including Palmetto's liability for any claims arising from the home inspection. "This contract represents the entire agreement between Palmetto Home Inspection Services, LLC and the Client. PHIS, LLC is not responsible for the repair, replacement or alteration of any item within or upon the inspected property. **The Client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms and exclusions contained within this contract.**" (Emphasis added).

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“When the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect. The Court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” Ellis v. Taylor, 316 S C 245, 248, 449 S E 2d 487 (1994)

Additionally, South Carolina expressly allows a licensed home inspector, such as Palmetto, to contractually limit the scope of its home inspection. S C Code Ann § 40-59-500(4) defines a ‘home inspection’ to mean

The rendering of a written or oral report in exchange for compensation of any sort, regarding the condition of the construction or improvements to a residence including but not limited to, structural problems or conditions, damage, safety problems, deterioration, equipment and systems that are **visible and readily accessible**. Home inspection does not include a contract or proposal for repair, renovation, or remodeling of the improvements to a residence. **The parties to a home inspection may limit or expand the scope of the inspection by agreement** (Emphasis added)

In this case, the South Carolina General Assembly has expressly allowed a licensed home inspector in South Carolina to limit the scope of an inspection. The General Assembly does not preclude a home inspector from limiting its liability through contract. The public policy outlined by the legislature and the Residential Builders Commission in licensing home inspectors is to assure that there are uniform standards applicable to all inspectors and to “establish a uniform guide for performing an inspection of buildings and equipment.” Standards of Practice for Residential Home Inspector. The standards provide the minimum contents of a written report and outlines what the residential home inspector should observe, identify, and describe. “The purpose of a residential inspection is to disclose general conditions of the building improvements, mechanical systems and appliances as they exist on the day of the inspection.” Id. The contract between Plaintiffs and Palmetto meets the requirements set forth by the legislature and the licensing board. “A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals.” Romanus v. Biggs, 214 S C 145, 51 S E 2d 503 (1949). The contract is not against public policy.

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Both parties have referred to cases from other jurisdictions to support their respective positions. Specifically, the cases relating to exculpatory clauses cited by the parties conform to South Carolina law, that exculpatory clauses are valid as long as they do not contravene public policy. In this state, the public policy regarding home inspections has been discussed above. No further reference to other jurisdictions is necessary.

ORDER

Based upon the foregoing discussion, there is no genuine issue of material fact and Defendant, Palmetto Home Inspection Services, LLC is entitled to judgment as a matter of law. Therefore, **IT IS ORDERED** that Defendant Palmetto Home Inspection Services' Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Summary Judgment as to this Defendant's contract is DENIED.

AND IT IS SO ORDERED


ALISON R. F. F.
Circuit Court Judge

May 4, 2010
Columbia, South Carolina

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

J MICHELLE CHILDS, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC,

Defendants,

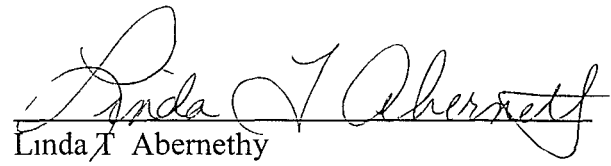
of whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

I, Linda T Abernethy, Legal Assistant to B Michael Brackett, Esquire, attorney for the Appellants in the above-captioned matter, do hereby certify that I have served counsel for the Respondent with a copy of **Appellants' Notice of Appeal** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 10th day of May, 2010, at the following address

Joseph S McCue, Esquire
P O ox 12487
Columbia, SC 29211
Attorney for Respondent



Linda T Abernethy

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

INITIAL BRIEF OF APPELLANTS

RECEIVED

NOV 02 2010

SC Court of Appeals

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Statement of Issues on Appeal

- 1 The trial court erred in deciding that under the facts of this case the home inspection contract, an adhesion contract, is not unconscionable and is therefore enforceable
- 2 The trial court erred in deciding that under the facts of this case the home inspection contract, an adhesion contract, does not violate the public policy of South Carolina and is therefore enforceable

Standard and Scope of Review

Respondent's motion for summary judgment on the question of the enforceability of a limit of liability provision in a home inspection contract was granted, and Appellants' motion for summary judgment on the same question was denied. The granting of summary judgment is immediately appealable. Hon. Jean Hofer Toal et al., Appellate Practice in South Carolina 97 (2d ed. 2002). An order denying summary judgment is not appealable. Id. at 98.

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Id. at 196. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC, Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party. Watters v. Terminix, 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008). Summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from such facts. Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).

Statement of the Case

This is an appeal of an Order of the Kershaw County Court of Common Pleas which decided cross motions for summary judgment by granting Respondent's motion and denying Appellants' motion (Order dated May 4, 2010) The result was that the trial court held that the home inspection contract limit of liability provision is not unconscionable and that it does not violate public policy and is therefore enforceable

Appellants filed their Summons and Complaint on March 26, 2007 (S & C) Respondent's Answer was served on May 25, 2007 (PHI Answer) Following considerable pretrial discovery, Appellants served their Motion for Summary Judgment on June 18, 2008 (Appellants' Motion for SJ) Respondent served its Motion for Summary Judgment on September 4, 2008 (Respondent's Motion for SJ) The central issue in the cross motions was and is the enforceability of a Limit of Liability provision in the Respondent's real estate inspection contract (Contract dated October 18, 2006) The cross motions for summary judgment were argued on December 3, 2009 By written Order dated May 4, 2010, Judge Alison Renee Lee granted Respondent's motion and denied Appellants' motion (Order)

Appellants served their Notice of Appeal on May 10, 2010

Statement of the Facts

Appellants purchased a house from Defendant Boykin Defendants Beard and Russell & Jeffcoat Realtors, Inc were the realtor-agents of Boykin (seller) Defendants Appleton and Bob Capes Realty, Inc were the realtor-agents for Appellants (buyers) Respondent Palmetto Home Inspection Services, LLC was hired by Appellants to inspect and report on the condition of the seller's house (real estate inspection contract dated October 18, 2006) After the closing of the

transaction between Appellants and Defendant Boykin, numerous and serious problems were discovered that Appellants claimed had not been disclosed on the seller's disclosure form or in Respondent's report. When none of the Defendants made any serious effort to remedy the discovered problems, this action followed.

The following evidence was available to the trial court with respect to the cross motions for summary judgment.

General Chronology of Events

Appellants knew a realtor acquaintance who, in the summer of 2006, helped with the search for a home (VG depo p 60, l 19 to p 64, l 5),¹

Appellants had their first conversation with Defendant Appleton in late August 2006 (VG depo p 62, l 14 to p 64, l 25),

Appellants first met Defendant Boykin (seller) in late August or early September 2006 (VG depo p 72, l 14 to p 74, l 10),

1st walk-through of Seller's house (maybe 20 minutes), (VG depo , p 79-83)

2^d walk-through the next weekend (maybe 20 minutes), (VG depo , p 84-87)

Seller's condition disclosure statement dated Sept 16, 2006 was delivered to Appellants prior to October 12, 2006, (Beard depo , exhibit 2, Beard depo , p 34, l 11-17),

Conditions later discovered that were either not disclosed or were misrepresented in seller's disclosure statement

mold, (Beard depo , exhibit 2, VG depo , exhibit 6, VG depo , p 196)

condition/age of hvac, (Beard depo , exhibit 2, VG depo , exhibit 6 and p 211-215)

Purchase contract signed October 12, 2006 (including right to inspect), (Boykin depo , exhibit 2),

Plaintiff Vera Gladden had walk-through with her sister on or about October 17, 2006 (VG depo p 87, l 20 to p 88, l 10, and p 90, l 15-19),

¹ "VG" refers to Appellant Vera Gladden

On October 18, 2006, the inspection was made by Respondent, taking four to five hours, after the inspection was made the Respondent presented the written inspection contract to Mrs Gladden (inspection contract), after the inspection contract was signed the Respondent provided an abbreviated oral report to Mrs Gladden followed by the more formal written report (inspection report), (Respondent depo p 15, l 10 to p 18, l 13, and VG depo Vol 2, p 203, l 11-15 and p 206, l 13 to p 208, l 14),

there was no mention that mold, or even that what might be mold, was observed (inspection report),

there was no problem noted about the hvac equipment,(VG depo , exhibit 6),

Appellants paid \$475 00 to the Respondent for the inspection and report,

Appellants submitted a repair addendum to Boykin (seller) dated October 20, 2006, accepted by Boykin on October 24, 2006,(Beard depo , exhibit 4),

Plaintiff Vera Gladden visited the house to look at items of personal property Defendant Boykin was going to sell,(VG depo , p 109-111),

Plaintiff Vera Gladden and Appleton had walk-through on Nov 21, 2006 (spoke with Defendant Boykin's contractor Grecheski),(VG depo , p 122 and Vol 2, p 126-128),

Appellants closed on the sale of their former residence on November 20, 2006 (VG deop, vol 2, p 76, l 18-23) ,

The closing with Boykin occurred on November 22, 2006 (saw CL-100 for the first time), the CL-100 disclosed existing water damage,(VG depo , exhibit 10 and p 122-123),

After moving into the home on or about November 25, 2006, the conditions at issue were discovered and notice was immediately given to Defendant Boykin (the seller) and to her agents (Defendants Beard and Russell & Jeffcoat Realtors, Inc),(VG depo , p 132-147),

Respondent was notified of the problems discovered in the house and returned to the Appellants' the \$475 00 that had been paid for the inspection and the report, (Respondent depo Ex 5),

Defendants' failure to remedy the conditions and breaches resulted in the commencement of this action on March 26, 2007 (Complaint)

Facts Specific to Respondent Home Inspector

Respondent is a single member LLC owned by Scot Roberts (Resp depo p 7, l 21-25),

Mr Roberts is a licensed home inspector (Resp depo p 5, l 3-17),

Mr Roberts has performed approximately 1,000 home inspections (Resp depo p 6, l 10-16),

Mr Roberts considers himself to be a professional (Resp depo p 22, l 1-3),

according to the Respondent, the value of the home inspection service to a client is in the “trained eyes” and the “experience” (Resp depo p 7, l 5-12),

on Respondent’s business card the Respondent touts its 30+ years of experience and represents that it is “Licensed-Bonded-Insured” (Resp depo ex 3),

Respondent gave a business card to Mrs Gladden in September or October 2006, generally like deposition ex 3 (Resp depo p 19, l 15 to p 20, l 19 and Resp depo Ex 3)

the Respondent has insurance coverage in the amount of \$300,000 (Resp depo , p 23, l 2-5),

the real estate inspection contract presented to the Appellants was a preprinted generic form that described the inspector’s scope of work as a “limited visual inspection of apparent conditions in readily accessible areas ”, (Resp depo Ex 4, and p 25, l 8 to p 27, l 15),

the inspection contract does not define “limited visual inspection” or “apparent conditions” or “readily accessible areas” (Resp depo Ex 4),

the inspection contract represents to the client that the inspection will be done according to “the standards of practice of the South Carolina Home Inspector Licensing Board (Resp Depo Ex 4, 1st para), there is no entity named the South Carolina Home Inspector Licensing Board and Respondent (Scot Roberts) was unaware of that fact (Resp depo p 27, l 16 - 25),

the inspection contract was presented to Mrs Gladden after the inspection was completed on October 18, 2006 (Resp depo , p 34, l 15 to p 35, l 10),

Respondent could not explain why, in light of the limit of liability provision that he is relying on in this case, it carries \$300,000 of insurance coverage (Resp depo p 36, l 19 to p 38, l 3)

Evidence produced during pretrial discovery would support the claim that Appellants suffered damages well in excess of \$50,000 due to conditions that Respondent did not report in his inspection report, generally described as mold, pool house roof condition, rotted siding, shingle/flashing problems, mortar joint deficiencies, skylight deterioration, rotted sub-flooring, and general water infiltration (ARM Environmental Services estimate, Nathan Knotts paid invoice, Haskins depo Ex 1 listing problems and estimated repair costs)

Causes of Action

As to Defendants Boykin (Seller) and her realtor agents (Defendants Beard and Russell & Jeffcoat Realtors, Inc) the following causes of action were directed against them(Complaint)

- 1st Actual and Constructive Fraud for failure to disclose mold and mildew,
- 2nd Negligent Misrepresentation with respect to presence of mold and mildew,
- 4th Actual and Constructive Fraud for misleading disclosure with respect to HVAC,
- 5th Negligent Misrepresentation with respect to disclosures about HVAC,
- 6th Actual and Constructive Fraud for representations made about CL 100 repairs,
- 7th Negligent Misrepresentation with respect to representations made about CL 100 repairs,
- 8th Actual and Constructive Fraud for representations made about Addendum Items repairs,
- 9th (misnumbered in Complaint as 7th) Negligent Misrepresentation with respect to Addendum Items repairs

As to Defendants Appleton and Bob Capes Realty, Inc (Appellants’/Buyers’ realtor agents)

- 10th (misnumbered in complaint as 8th) Negligence in performance of agent duties owed to Appellants

As to Respondent herein, Palmetto Home Inspection Services, LLC (Appellants’ contracted home inspector)

- 3rd Breach of Contract for failure to conduct proper inspection and failure to report serious problems and deficiencies with the property

Appellants have settled their claims against the seller and the realtor-agents Only the claim against the Respondent home inspector (this appeal) is still pending

Argument

The limit of liability provision in the Respondent’s adhesion contract² reads

² The trial court found the home inspection contract at issue to be an adhesion contract (Order)

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report (Inspection Contract)

General contract law in South Carolina says that contracts will be enforced as written and that it is not the function of the courts to rewrite contracts for the parties Ellis v Taylor, 316 S C 245, 449 S E 2d 487 (1994), Somerset v Reyner, 233 S C 324, 104 S E 2d 344 (1958) However, if a court finds any provision of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause or so limit its application so as to avoid any unconscionable result Simpson v MSA of Myrtle Beach, 373 S C 14, 644 S E 2d 663 (2007) And, it is the general rule in South Carolina that courts will not enforce a contract that violates public policy Id

1 Under the facts of this case, the Limit of Liability provision is unconscionable and, therefore, unenforceable, and it was error for the trial court to grant summary judgment in favor of the Respondent (Issue on Appeal no 1)

There is no South Carolina appellate court opinion addressing the issue of the unconscionability of a “limit of liability” provision in a home inspection contract, but there are cases on point from other jurisdictions They will be analyzed hereinbelow In Simpson v MSA of Myrtle Beach, supra unconscionability in relation to an arbitration provision was reviewed “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them ” Id , Fanning

v Fritz's Pontiac-Cadillac-Buick, 322 S C 399, 472 S E 2d 242 (1996) ³

With respect to the absence of meaningful choice, factors to consider are

- the nature of the injuries suffered by the Plaintiffs,
- whether the Plaintiffs are a substantial business concern,
- the relative disparity in the parties' bargaining power,
- the parties' relative sophistication,
- whether there is an element of surprise in the inclusion of the challenged clause,
- the conspicuousness of the clause Simpson, supra

The trial court found the home inspection contract at issue to be an adhesion contract ⁴ That finding has not been appealed As the trial court noted, adhesion contracts are not per se unconscionable Herron v Century BMW, 387 S C 525, 693 S E 2d 394 (2010)

In its consideration of the meaningful choice factors, the trial court did not consider the nature of the injuries allegedly suffered by the Appellants (evidence of mold and HVAC repair damages estimated at approximately \$25,000), nor the relationship of those damages to the limit of liability amount (\$475) The trial court noted that there was disparity of bargaining power between the parties but then discounted the disparity because Mrs Gladden had once worked as a real estate agent The implication, as erroneous as it is, is that with respect to home inspection contracts a real estate agent cannot be a regular "consumer" and that a home inspection contract cannot be unconscionable when the party hiring the inspector is a real estate agent There was no evidence

³ S C Code Ann §36-2-302 contains statutory unconscionability considerations in the context of a contract for the sale of goods There is no reason why the same policies and principles of law should not apply to a contract for the sale of services

⁴ An adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable Simpson v MSA of Myrtle Beach, supra

presented to the trial court or mentioned by the court in its Order that in Mrs Gladden's limited work as a real estate agent she had ever been involved in a breach of contract dispute regarding a limit of liability provision in a home inspection report. The trial court noted that the limit of liability provision was not "hidden or ambiguous."

But, on the other hand, the trial court did not think it important to mention that the Appellants are not a substantial business concern⁵ and are not especially sophisticated in matters of home inspection reports and the detection and remediation of mold. The trial court did not mention the element of surprise with respect to the manner in which the Respondent presented the inspection contract, with its limit of liability provision, to the Appellants. It was presented after the inspection had been conducted (Resp depo, p 34, l 15 to p 35, l 10). Of the six meaningful choice factors, only the three that were favorable to the Respondent were considered and relied upon by the trial court as evidenced by the fact that they were mentioned in the Order. The other three factors were apparently ignored because they are not mentioned in the Order. (Order)

Application of unconscionability and public policy principles to limit of liability provisions in home inspection contracts is fully and persuasively demonstrated in Lucier v Williams, 841 A 2d 907 (N J Super 2004) and in Pitts v Watkins, 905 So 2d 553 (Miss 2005). In Lucier, the trial court granted partial summary judgment to the home inspector, thereby limiting the homeowners to a recovery of one-half of the fee paid to the home inspection service, namely \$192.50 (as specified in the contract), notwithstanding that the homeowners were claiming repair damages of \$8,000 to

⁵ Mr Gladden is a high school principal, and Mrs Gladden is now a homemaker. Mrs Gladden earned a realtor license in approximately 1996 and worked in a realtor's office for 2 to 3 months. She did very little realtor work and earned a small commission on one sale. Since 1997 she has worked primarily as a nurse, choosing to leave nursing in approximately 2004 and to take care of house and family.

\$10,000 The appellate court reversed the trial court after concluding that the limitation of liability provision in the home inspection service contract was both unconscionable and violated public policy The Court's conclusion was based on the facts that

- (1) it was an adhesion contract,
- (2) the parties, a professional expert and a consumer, had grossly unequal bargaining status,
- (3) the substance of the limit of liability provision "eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence "

With respect to unconscionability, the Court in Lucier noted that the contract was a classic contract of adhesion, presented on a standardized pre-printed form, on a take-it-or-leave-it basis, without opportunity for negotiation or modification of terms The inspector was an experienced professional The homeowner was unsophisticated in matters of home construction and placed his trust in the expert

The Lucier court further noted that to "foist" a contract of this type on an inexperienced consumer demonstrates a lack of fair dealing by the professional The cost of a home is substantial, and is commonly a major financial undertaking Home inspectors conduct a volume business, and possess knowledge of the cost of repairing major defects Discovery of such defects so that necessary repairs can be factored into the consumer's decision about buying a home is a major selling point of the inspector's services If the only consequence to the inspector for professional dereliction is the refund of a few hundred dollars, "there is no meaningful incentive to act diligently in the performance of home inspection contracts " The excessively restricted damages provided by the limit of liability provision is grossly disproportionate to the potential loss to the home buyer if a substantial defect is negligently overlooked To cap the inspector's exposure to such

a small amount effectively immunizes the inspector from the consequence of his negligence and is tantamount to an exculpation clause

With respect to the three facts that the Lucier court found to be dispositive on the question of unconscionability in a home inspection contract, all three are supportive of the Appellants' position in the case *sub judice*. The third factor, that the limit of liability provision eviscerates the contract and its fundamental purpose, was not considered by the trial court herein in its unconscionability analysis

In Pitts v Watkins, 905 So 2d 553 (Miss 2005) the Mississippi Supreme Court reversed the trial court's grant of summary judgment in favor of the home inspector by holding that substantive unconscionability existed with respect to a limit of liability provision in the home inspection contract. Substantive unconscionability is proved by showing that the terms of the contract are oppressive. Id. The Court in Pitts was influenced in its decision by (1) the role of the inspection report in the customer's decision to invest "thousands of dollars" in the purchase of a house, (2) the limit of liability provision "would allow home inspectors to walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct" (stated otherwise, it amounted to an exculpation clause), (3) the great disparity between the amount of alleged damages suffered by the client and the nominal amount of damages provided for in the limit of liability provision, and (4) the fact that it limits the amount of compensatory damages recoverable but absolutely precludes the client's ability to recover punitive damages if the facts warrant such an award

2 Under the facts of this case, the Limit of Liability provision violates public policy and, therefore, is unenforceable, and it was error for the trial court to grant summary judgment in favor of the Respondent (Issue on Appeal no 2)

As stated above, it is the general rule in South Carolina that courts will not enforce a contract that violates public policy Simpson, supra. Public policy is broadly defined as the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society Black's Law Dictionary 1245 (7th ed 1999). It is more narrowly defined as the principle that a person should not be allowed to do anything that would tend to injure the public at large. Id. “ for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions ” Brown v Drake, 275 S C 299, 270 S E 2d 130 (1980)

There is no South Carolina appellate court opinion addressing the issue of whether a “limit of liability” provision in a home inspection contract violates public policy. But, the Lucier opinion addresses that issue.

With respect to public policy, the Lucier opinion, having already found that the limit of liability clause was unconscionable, proceeded to hold that it also violated public policy because

(1) it allows the home inspector to circumvent the state’s public policy of holding professional service providers to certain industry standards,

(2) exculpation provisions are antithetical to the relationship of a client with a professional service provider, and

(3) home inspectors are licensed and regulated by the State in the interest of protecting the home-buying public, and this protection cannot be contracted away. Id. ⁶

In Lucier the Court found that the limitation of liability provisions at issue therein effectively

⁶ In South Carolina, home inspectors are licensed and regulated by the State S C Code Ann §40-59-500 et seq (Supp 2009) and 27 S C Code Ann Regs R 106-4 (Supp 2009)

immunized the home inspector from the consequences of his own negligence and was therefore “tantamount to an exculpation clause” and should be reviewed by employing the same policy considerations governing outright exculpation provisions

South Carolina cases have spoken on exculpation clauses but not in cases involving professional service contracts. In general, contracts that seek to exculpate a party from liability for the party’s own negligence tend to induce a want of care and are not favored by the law and are strictly construed against the party relying thereon. McCune v Myrtle Beach Indoor Shooting Range, Inc, 364 S C 242, 612 S E 2d 462 (Ct App 2005). The enforceability of an exculpation clause depends in part on the nature of the contract. Courts will more readily enforce exculpation clauses in contracts involving customary transactions in the market place. South Carolina has enforced such provisions in agreements not involving professional services. Id (recreational paint ball activity with inherent risks), and Pride v Southern Bell Telephone and Telegraph Company, 244 S C 615, 138 S E 2d 144 (1964) (yellow page advertisements). The trial court ruled that Pride was “squarely on point,” notwithstanding that it did not involve a limit of liability provision in a professional service contract between a licensed professional and a consumer. In relying on Pride as controlling precedent to enforce the limit of liability provision in the professional service contract now at issue, the trial court erred.

With respect to exculpation clauses in professional service contracts, the Tennessee Supreme Court in Olsen v Molzen, 558 S W 2d 429 (Tenn 1977), acknowledged the different standards governing contracts involving professional services, as contrasted with a contract with a tradesman, and concluded that a stricter standard is called for in contracts “involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state.” Id. Olsen adopted the criteria laid down in the seminal case on the subject, Tunkl v Regents of

University of California, 383 P 2d 441 (Cal 1963) which held an exculpation clause or “release from future liability” clause invalid Olsen (agreement for medical treatment) and Tunkl (agreement for hospital admission) considered the following characteristics of the contract as controlling

- it concerns a business of a type generally thought suitable for public regulation,
- the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public,
- the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards,
- in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services,
- in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence,
- as a result of the transaction, the person is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents

Cases following Olsen have held that exculpation clauses in home inspection contracts are not enforceable, and it is not necessary that all six criteria be present for an exculpation clause to be found unenforceable Russell v Bray, 116 S W 3d 1 (Tenn App 2003) In Russell the Court refused to enforce an exculpatory contract between home buyers and the home inspectors based upon

the Court's conclusion that the exculpatory contracts were offensive to public policy because the Olsen factors established that the home inspectors were professionals whose services affected the public interest. In Carey v. Merritt, 148 S.W.3d 912 (Tenn. App. 2004) the Court found additional reasons to declare the exculpation clause in a home inspector's contract void as against public policy. The court found the defendant was “engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.” Id. at 917 (quoting Olson, 558 S.W.2d at 431). The court went on to note that “the purchase of a home is, perhaps, the largest investment an average person will make” and, therefore, “such inspections by the Defendant are of great importance to the public and a matter of practical necessity for most members of the public.” Id. The court also found it significant that the plaintiff “was under the control of Defendant [the home inspector] and subject to the risk of his carelessness.” Id. For these reasons, the court held that “the exculpatory clause between the Plaintiffs and Defendant is contrary to public policy and void.” Id. at 918. Of further and possibly greater significance, the court emphasized the fact that not all of the factors had to be present in order to invalidate an exculpatory agreement. Carey, 148 S.W.3d at 916 (citing Olson, 558 S.W.2d at 431). Carey also reiterated that not all of the factors had to be present in order to invalidate an exculpatory agreement, but generally, the factors were limited to circumstances involving “a contract with a profession, as opposed to tradesmen in the marketplace.”⁷

Application of these professional service factors to the home inspection contract herein leads to the inescapable conclusion that the limit of liability provision is tantamount to an unenforceable exculpation clause in violation of the public policy of this state. This case law and these factors were

⁷ In Carey, the exculpatory clause in a home inspection contract was found to be invalid where three of the six Olsen criteria were present.

presented to the trial court herein, but they were not specifically addressed by the court in its Order. Instead, the trial court brushed them aside with a brief and erroneous declaration that “Both parties have referred to cases from other jurisdictions to support their respective positions. Specifically, the cases relating to exculpatory clauses cited by the parties conform to South Carolina law, ” (Order). Well, no, that is not accurate. The cases cited hereinabove involve the enforceability of exculpation provisions in professional service agreements, including, specifically, in home inspection contracts. There is no South Carolina decisional law on this particular subject.

There are decisions from other courts that have upheld limit of liability provisions in home inspection contracts. In Baker v. Roy Haas Associates, 629 A.2d 1317 (Md. App. 1993) a limit of liability provision was enforced to limit the homeowner to a refund of the \$250 fee. This decision can be explained as the result of Maryland’s more relaxed view of exculpation contracts. Citing other Maryland precedent, the Baker court began its consideration of the issue by stating “Maryland law is quite clear on the matter of exculpatory clauses. ‘In the absence of legislation to the contrary, there is ordinarily no public policy which prevents the parties from contracting as they see fit.’” This is not the policy of South Carolina with respect to exculpation provisions.

In Rector v. Calamus Group, Inc., 17 A.D.3d 960 (N.Y. 3d Dept. 2005) a limit of liability provision was enforced by summary judgment in the trial court and was affirmed on appeal because the homeowners failed to demonstrate in their pleadings or in their summary judgment submissions either a special relationship between the parties, a statutory prohibition or an overriding public policy. This decision was driven by the case-specific absence of evidence.

Finally, the trial court herein cited S.C. Code Ann. §40-59-500(4) to call attention to the fact that it allows the parties to a home inspection to limit the scope of the inspection. That is true. But the trial court then leaps to the conclusion that by expressly allowing the parties to limit the scope

of the inspection, the home inspector may limit its liability through contract because the licensing and regulatory statutes do not expressly preclude such. This conclusion is inconsistent and disingenuous. The statute expressly permits limitation of the scope of inspection, but, according to the trial court, because the statute is silent on the home inspector limiting its liability, that too is permitted. Whether the statute speaks or is silent, everything is allowed pursuant to this analysis. The trial court erred in this conclusion.

Conclusion

South Carolina courts have expressed pride over the years for being in the forefront of the evolution of consumer protection policies. From C Ray Miles Construction v Weaver, 296 S C 466, 373 S E 2d 905 (Ct App 1988)

The issue of whether the implied warranty alleged can arise under the circumstances is another matter. At one time, many, if not most, common law jurisdictions did not recognize any implied warranty of quality and, where there was no express warranty and no fraud by the seller, applied the doctrine expressed in the maxim, *caveat emptor* ("let the buyer beware"). 67A Am Jur 2d Sales § 701 (1985) [fn2]. South Carolina, unique among all the states, rejected the common law maxim and, as early as 1793, recognized an implied warranty of soundness, based on the civil law maxim, a sound price warrants a sound commodity.

This has been described as the common law precursor to the UCC implied warranty of fitness for a particular purpose. Id

In Rutledge v Dodenhoff, 254 S C 407, 175 S E 2d 172 (1970) the South Carolina Supreme Court, in the evolution of the law away from *caveat emptor* and toward *caveat venditor*, recognized that a builder-vendor of a new house gives his purchaser an implied warranty of fitness. The result of this holding was to establish this implied warranty as an independent covenant which survives delivery of the deed, thereby abrogating the doctrine of merger by deed.

This case is another opportunity to advance that policy. In the professional service context

presented, the trial court erred in holding that the limit of liability provision is not unconscionable
And, the trial court erred in holding that the limit of liability provision does not violate public policy
Either of the two errors standing alone is sufficient to reverse the grant of summary judgment and
to remit the matter back to the trial court for further proceedings according to applicable law and
procedure

A handwritten signature in black ink, appearing to read "B. Michael Brackett", written over a horizontal line.

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November / , 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

AMENDED INITIAL BRIEF OF APPELLANTS

RECEIVED

APR 04 2011

SC Court of Appeals

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Statement of Issues on Appeal

- 1 The trial court erred in deciding that under the facts of this case the home inspection contract, an adhesion contract, is not unconscionable and is therefore enforceable
- 2 The trial court erred in deciding that under the facts of this case the home inspection contract, an adhesion contract, does not violate the public policy of South Carolina and is therefore enforceable

Standard and Scope of Review

Respondent's motion for summary judgment on the question of the enforceability of a limit of liability provision in a home inspection contract was granted, and Appellants' motion for summary judgment on the same question was denied. The granting of summary judgment is immediately appealable. Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 97 (2d ed. 2002). An order denying summary judgment is not appealable. Id. at 98.

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Id. at 196. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC, Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party. Watters v. Terminix, 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008). Summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from such facts. Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).

Statement of the Case

This is an appeal of an Order of the Kershaw County Court of Common Pleas which decided cross motions for summary judgment by granting Respondent's motion and denying Appellants' motion (Order dated May 4, 2010) The result was that the trial court held that the home inspection contract limit of liability provision is not unconscionable and that it does not violate public policy and is therefore enforceable

Appellants filed their Summons and Complaint on March 26, 2007 (S & C) Respondent's Answer was served on May 25, 2007 (PHI Answer) Following considerable pretrial discovery, Appellants served their Motion for Summary Judgment on June 18, 2008 (Appellants' Motion for SJ) Respondent served its Motion for Summary Judgment on September 4, 2008 (Respondent's Motion for SJ) The central issue in the cross motions was and is the enforceability of a Limit of Liability provision in the Respondent's real estate inspection contract (Contract dated October 18, 2006) The cross motions for summary judgment were argued on December 3, 2009 By written Order dated May 4, 2010, Judge Alison Renee Lee granted Respondent's motion and denied Appellants' motion (Order)

Appellants served their Notice of Appeal on May 10, 2010

Statement of the Facts

Appellants purchased a house from Defendant Boykin Defendants Beard and Russell & Jeffcoat Realtors, Inc were the realtor-agents of Boykin (seller) Defendants Appleton and Bob Capes Realty, Inc were the realtor-agents for Appellants (buyers) Respondent Palmetto Home Inspection Services, LLC was hired by Appellants to inspect and report on the condition of the seller's house (real estate inspection contract dated October 18, 2006) After the closing of the

transaction between Appellants and Defendant Boykin, numerous and serious problems were discovered that Appellants claimed had not been disclosed on the seller's disclosure form or in Respondent's report. When none of the Defendants made any serious effort to remedy the discovered problems, this action followed.

The following evidence was available to the trial court with respect to the cross motions for summary judgment.

General Chronology of Events

Appellants knew a realtor acquaintance who, in the summer of 2006, helped with the search for a home (VG depo p 60, l 19 to p 64, l 5),¹

Appellants had their first conversation with Defendant Appleton in late August 2006 (VG depo p 62, l 14 to p 64, l 25),

Appellants first met Defendant Boykin (seller) in late August or early September 2006 (VG depo p 72, l 14 to p 74, l 10),

1st walk-through of Seller's house (maybe 20 minutes), (VG depo , p 79-83)

2d walk-through the next weekend (maybe 20 minutes), (VG depo , p 84-87)

Seller's condition disclosure statement dated Sept 16, 2006 was delivered to Appellants prior to October 12, 2006, (Beard depo , exhibit 2),

Conditions later discovered that were either not disclosed or were misrepresented in seller's disclosure statement

mold, (Beard depo , exhibit 2, VG depo , exhibit 6, VG depo , p 196)

condition/age of hvac, (Beard depo , exhibit 2, VG depo , exhibit 6 and p 211-215)

Purchase contract signed October 12, 2006 (including right to inspect), (Boykin depo , exhibit 2),

Plaintiff Vera Gladden had walk-through with her sister on or about October 17, 2006 (VG depo p 87, l 20 to p 88, l 10, and p 90, l 15-19),

¹ "VG" refers to Appellant Vera Gladden

On October 18, 2006, the inspection was made by Respondent, taking four to five hours, after the inspection was made the Respondent presented the written inspection contract to Mrs Gladden (inspection contract), after the inspection contract was signed the Respondent provided an abbreviated oral report to Mrs Gladden followed by the more formal written report (inspection report), (Respondent depo p 15, l 10 to p 18, l 13, and VG depo Vol 2, p 203, l 11-15 and p 206, l 13 to p 208, l 14),

there was no mention that mold, or even that what might be mold, was observed (inspection report),

there was no problem noted about the hvac equipment,(VG depo , exhibit 6),

Appellants paid \$475 00 to the Respondent for the inspection and report,

Appellants submitted a repair addendum to Boykin (seller) dated October 20, 2006, accepted by Boykin on October 24, 2006,(Beard depo , exhibit 4),

Plaintiff Vera Gladden visited the house to look at items of personal property Defendant Boykin was going to sell,(VG depo , p 109-111),

Plaintiff Vera Gladden and Appleton had walk-through on Nov 21, 2006 (spoke with Defendant Boykin's contractor Grecheski),(VG depo , p 122 and Vol 2, p 126-128),

Appellants closed on the sale of their former residence on November 20, 2006 (VG deop, vol 2, p 76, l 18-23) ,

The closing with Boykin occurred on November 22, 2006 (saw CL-100 for the first time), the CL-100 disclosed existing water damage,(VG depo , exhibit 10 and p 122-123),

After moving into the home on or about November 25, 2006, the conditions at issue were discovered and notice was immediately given to Defendant Boykin (the seller) and to her agents (Defendants Beard and Russell & Jeffcoat Realtors, Inc),(VG depo , p 132-147),

Respondent was notified of the problems discovered in the house and returned to the Appellants' the \$475 00 that had been paid for the inspection and the report, (Respondent depo Ex 5),

Defendants' failure to remedy the conditions and breaches resulted in the commencement of this action on March 26, 2007 (Complaint)

Facts Specific to Respondent Home Inspector

Respondent is a single member LLC owned by Scot Roberts (Resp depo p 7, l 21-25),

Mr Roberts is a licensed home inspector (Resp depo p 5, l 3-17),

Mr Roberts has performed approximately 1,000 home inspections (Resp depo p 6, l 10-16),

Mr Roberts considers himself to be a professional (Resp depo p 22, l 1-3),

according to the Respondent, the value of the home inspection service to a client is in the “trained eyes” and the “experience” (Resp depo p 7, l 5-12),

on Respondent’s business card the Respondent touts its 30+ years of experience and represents that it is “Licensed-Bonded-Insured” (Resp depo ex 3),

Respondent gave a business card to Mrs Gladden in September or October 2006, generally like deposition ex 3 (Resp depo p 19, l 15 to p 20, l 19 and Resp depo Ex 3)

the Respondent has insurance coverage in the amount of \$300,000 (Resp depo , p 23, l 2-5),

the real estate inspection contract presented to the Appellants was a preprinted generic form that described the inspector’s scope of work as a “limited visual inspection of apparent conditions in readily accessible areas ”, (Resp depo Ex 4, and p 25, l 8 to p 27, l 15),

the inspection contract does not define “limited visual inspection” or “apparent conditions” or “readily accessible areas” (Resp depo Ex 4),

the inspection contract represents to the client that the inspection will be done according to “the standards of practice of the South Carolina Home Inspector Licensing Board (Resp Depo Ex 4, 1st para), there is no entity named the South Carolina Home Inspector Licensing Board and Respondent (Scot Roberts) was unaware of that fact (Resp depo p 27, l 16 - 25),

the inspection contract was presented to Mrs Gladden after the inspection was completed on October 18, 2006 (Resp depo , p 34, l 15 to p 35, l 10),

Respondent could not explain why, in light of the limit of liability provision that he is relying on in this case, it carries \$300,000 of insurance coverage (Resp depo p 36, l 19 to p 38, l 3)

Evidence produced during pretrial discovery would support the claim that Appellants suffered damages well in excess of \$50,000 due to conditions that Respondent did not report in his inspection report, generally described as mold, pool house roof condition, rotted siding, shingle/flashing problems, mortar joint deficiencies, skylight deterioration, rotted sub-flooring, and general water infiltration (Haskins depo Ex 1, listing problems and estimated repair costs)

Causes of Action

As to Defendants Boykin (Seller) and her realtor agents (Defendants Beard and Russell & Jeffcoat Realtors, Inc) the following causes of action were directed against them(Complaint)

- 1st Actual and Constructive Fraud for failure to disclose mold and mildew,
- 2nd Negligent Misrepresentation with respect to presence of mold and mildew,
- 4th Actual and Constructive Fraud for misleading disclosure with respect to HVAC,
- 5th Negligent Misrepresentation with respect to disclosures about HVAC,
- 6th Actual and Constructive Fraud for representations made about CL 100 repairs,
- 7th Negligent Misrepresentation with respect to representations made about CL 100 repairs,
- 8th Actual and Constructive Fraud for representations made about Addendum Items repairs,
- 9th (misnumbered in Complaint as 7th) Negligent Misrepresentation with respect to Addendum Items repairs

As to Defendants Appleton and Bob Capes Realty, Inc (Appellants'/Buyers' realtor agents)

- 10th (misnumbered in complaint as 8th) Negligence in performance of agent duties owed to Appellants

As to Respondent herein, Palmetto Home Inspection Services, LLC (Appellants' contracted home inspector)

- 3rd Breach of Contract for failure to conduct proper inspection and failure to report serious problems and deficiencies with the property

Appellants have settled their claims against the seller and the realtor-agents Only the claim against the Respondent home inspector (this appeal) is still pending

Argument

The limit of liability provision in the Respondent's adhesion contract² reads

² The trial court found the home inspection contract at issue to be an adhesion contract (Order)

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report (Inspection Contract)

General contract law in South Carolina says that contracts will be enforced as written and that it is not the function of the courts to rewrite contracts for the parties Ellis v Taylor, 316 S C 245, 449 S E 2d 487 (1994), Somerset v Reyner, 233 S C 324, 104 S E 2d 344 (1958) However, if a court finds any provision of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause or so limit its application so as to avoid any unconscionable result Simpson v MSA of Myrtle Beach, 373 S C 14, 644 S E 2d 663 (2007) And, it is the general rule in South Carolina that courts will not enforce a contract that violates public policy Id

1 Under the facts of this case, the Limit of Liability provision is unconscionable and, therefore, unenforceable, and it was error for the trial court to grant summary judgment in favor of the Respondent (Issue on Appeal no 1)

There is no South Carolina appellate court opinion addressing the issue of the unconscionability of a “limit of liability” provision in a home inspection contract, but there are cases on point from other jurisdictions They will be analyzed hereinbelow In Simpson v MSA of Myrtle Beach, supra unconscionability in relation to an arbitration provision was reviewed “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them ” Id , Fanning

v Fritz's Pontiac-Cadillac-Buick, 322 S C 399, 472 S E 2d 242 (1996) ³

With respect to the absence of meaningful choice, factors to consider are

- the nature of the injuries suffered by the Plaintiffs,
- whether the Plaintiffs are a substantial business concern,
- the relative disparity in the parties' bargaining power,
- the parties' relative sophistication,
- whether there is an element of surprise in the inclusion of the challenged clause,
- the conspicuousness of the clause Simpson, supra

The trial court found the home inspection contract at issue to be an adhesion contract ⁴ That finding has not been appealed As the trial court noted, adhesion contracts are not per se unconscionable Herron v Century BMW, 387 S C 525, 693 S E 2d 394 (2010)

In its consideration of the meaningful choice factors, the trial court did not consider the nature of the injuries allegedly suffered by the Appellants (evidence of mold and HVAC repair damages estimated at approximately \$25,000), nor the relationship of those damages to the limit of liability amount (\$475) The trial court noted that there was disparity of bargaining power between the parties but then discounted the disparity because Mrs Gladden had once worked as a real estate agent The implication, as erroneous as it is, is that with respect to home inspection contracts a real estate agent cannot be a regular "consumer" and that a home inspection contract cannot be unconscionable when the party hiring the inspector is a real estate agent There was no evidence

³ S C Code Ann §36-2-302 contains statutory unconscionability considerations in the context of a contract for the sale of goods There is no reason why the same policies and principles of law should not apply to a contract for the sale of services

⁴ An adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable Simpson v MSA of Myrtle Beach, supra

presented to the trial court or mentioned by the court in its Order that in Mrs Gladden's limited work as a real estate agent she had ever been involved in a breach of contract dispute regarding a limit of liability provision in a home inspection report. The trial court noted that the limit of liability provision was not "hidden or ambiguous."

But, on the other hand, the trial court did not think it important to mention that the Appellants are not a substantial business concern⁵ and are not especially sophisticated in matters of home inspection reports and the detection and remediation of mold. The trial court did not mention the element of surprise with respect to the manner in which the Respondent presented the inspection contract, with its limit of liability provision, to the Appellants. It was presented after the inspection had been conducted (Resp depo, p 34, l 15 to p 35, l 10). Of the six meaningful choice factors, only the three that were favorable to the Respondent were considered and relied upon by the trial court as evidenced by the fact that they were mentioned in the Order. The other three factors were apparently ignored because they are not mentioned in the Order (Order).

Application of unconscionability and public policy principles to limit of liability provisions in home inspection contracts is fully and persuasively demonstrated in Lucier v Williams, 841 A 2d 907 (N J Super 2004) and in Pitts v Watkins, 905 So 2d 553 (Miss 2005). In Lucier, the trial court granted partial summary judgment to the home inspector, thereby limiting the homeowners to a recovery of one-half of the fee paid to the home inspection service, namely \$192.50 (as specified in the contract), notwithstanding that the homeowners were claiming repair damages of \$8,000 to

⁵ Mr Gladden is a high school principal, and Mrs Gladden is now a homemaker. Mrs Gladden earned a realtor license in approximately 1996 and worked in a realtor's office for 2 to 3 months. She did very little realtor work and earned a small commission on one sale. Since 1997 she has worked primarily as a nurse, choosing to leave nursing in approximately 2004 and to take care of house and family.

\$10,000 The appellate court reversed the trial court after concluding that the limitation of liability provision in the home inspection service contract was both unconscionable and violated public policy The Court's conclusion was based on the facts that

- (1) it was an adhesion contract,
- (2) the parties, a professional expert and a consumer, had grossly unequal bargaining status,
- (3) the substance of the limit of liability provision "eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence "

With respect to unconscionability, the Court in Lucier noted that the contract was a classic contract of adhesion, presented on a standardized pre-printed form, on a take-it-or-leave-it basis, without opportunity for negotiation or modification of terms The inspector was an experienced professional The homeowner was unsophisticated in matters of home construction and placed his trust in the expert

The Lucier court further noted that to "foist" a contract of this type on an inexperienced consumer demonstrates a lack of fair dealing by the professional The cost of a home is substantial, and is commonly a major financial undertaking Home inspectors conduct a volume business, and possess knowledge of the cost of repairing major defects Discovery of such defects so that necessary repairs can be factored into the consumer's decision about buying a home is a major selling point of the inspector's services If the only consequence to the inspector for professional dereliction is the refund of a few hundred dollars, "there is no meaningful incentive to act diligently in the performance of home inspection contracts " The excessively restricted damages provided by the limit of liability provision is grossly disproportionate to the potential loss to the home buyer if a substantial defect is negligently overlooked To cap the inspector's exposure to such

a small amount effectively immunizes the inspector from the consequence of his negligence and is tantamount to an exculpation clause

With respect to the three facts that the Lucier court found to be dispositive on the question of unconscionability in a home inspection contract, all three are supportive of the Appellants' position in the case *sub judice*. The third factor, that the limit of liability provision eviscerates the contract and its fundamental purpose, was not considered by the trial court herein in its unconscionability analysis

In Pitts v Watkins, 905 So 2d 553 (Miss 2005) the Mississippi Supreme Court reversed the trial court's grant of summary judgment in favor of the home inspector by holding that substantive unconscionability existed with respect to a limit of liability provision in the home inspection contract. Substantive unconscionability is proved by showing that the terms of the contract are oppressive. Id. The Court in Pitts was influenced in its decision by (1) the role of the inspection report in the customer's decision to invest "thousands of dollars" in the purchase of a house, (2) the limit of liability provision "would allow home inspectors to walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct" (stated otherwise, it amounted to an exculpation clause), (3) the great disparity between the amount of alleged damages suffered by the client and the nominal amount of damages provided for in the limit of liability provision, and (4) the fact that it limits the amount of compensatory damages recoverable but absolutely precludes the client's ability to recover punitive damages if the facts warrant such an award

2 Under the facts of this case, the Limit of Liability provision violates public policy and, therefore, is unenforceable, and it was error for the trial court to grant summary judgment in favor of the Respondent (Issue on Appeal no 2)

As stated above, it is the general rule in South Carolina that courts will not enforce a contract that violates public policy Simpson, supra. Public policy is broadly defined as the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society Black's Law Dictionary 1245 (7th ed 1999). It is more narrowly defined as the principle that a person should not be allowed to do anything that would tend to injure the public at large. Id. “ for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions ” Brown v Drake, 275 S C 299, 270 S E 2d 130 (1980).

There is no South Carolina appellate court opinion addressing the issue of whether a “limit of liability” provision in a home inspection contract violates public policy. But, the Lucier opinion addresses that issue.

With respect to public policy, the Lucier opinion, having already found that the limit of liability clause was unconscionable, proceeded to hold that it also violated public policy because

(1) it allows the home inspector to circumvent the state’s public policy of holding professional service providers to certain industry standards,

(2) exculpation provisions are antithetical to the relationship of a client with a professional service provider, and

(3) home inspectors are licensed and regulated by the State in the interest of protecting the home-buying public, and this protection cannot be contracted away. Id. ⁶

In Lucier the Court found that the limitation of liability provisions at issue therein effectively

⁶ In South Carolina, home inspectors are licensed and regulated by the State S C Code Ann §40-59-500 et seq (Supp 2009) and 27 S C Code Ann Regs R 106-4 (Supp 2009)

immunized the home inspector from the consequences of his own negligence and was therefore “tantamount to an exculpation clause” and should be reviewed by employing the same policy considerations governing outright exculpation provisions

South Carolina cases have spoken on exculpation clauses but not in cases involving professional service contracts. In general, contracts that seek to exculpate a party from liability for the party’s own negligence tend to induce a want of care and are not favored by the law and are strictly construed against the party relying thereon McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005). The enforceability of an exculpation clause depends in part on the nature of the contract. Courts will more readily enforce exculpation clauses in contracts involving customary transactions in the market place. South Carolina has enforced such provisions in agreements not involving professional services Id. (recreational paint ball activity with inherent risks), and Pride v. Southern Bell Telephone and Telegraph Company, 244 S.C. 615, 138 S.E.2d 144 (1964) (yellow page advertisements). The trial court ruled that Pride was “squarely on point,” notwithstanding that it did not involve a limit of liability provision in a professional service contract between a licensed professional and a consumer. In relying on Pride as controlling precedent to enforce the limit of liability provision in the professional service contract now at issue, the trial court erred.

With respect to exculpation clauses in professional service contracts, the Tennessee Supreme Court in Olsen v. Molzen, 558 S.W.2d 429 (Tenn. 1977), acknowledged the different standards governing contracts involving professional services, as contrasted with a contract with a tradesman, and concluded that a stricter standard is called for in contracts “involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state.” Id. Olsen adopted the criteria laid down in the seminal case on the subject, Tunkl v. Regents of

University of California, 383 P 2d 441 (Cal 1963) which held an exculpation clause or “release from future liability” clause invalid Olsen (agreement for medical treatment) and Tunkl (agreement for hospital admission) considered the following characteristics of the contract as controlling

- it concerns a business of a type generally thought suitable for public regulation,
- the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public,
- the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards,
- in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services,
- in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence,
- as a result of the transaction, the person is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents

Cases following Olsen have held that exculpation clauses in home inspection contracts are not enforceable, and it is not necessary that all six criteria be present for an exculpation clause to be found unenforceable Russell v Bray, 116 S W 3d 1 (Tenn App 2003) In Russell the Court refused to enforce an exculpatory contract between home buyers and the home inspectors based upon

the Court's conclusion that the exculpatory contracts were offensive to public policy because the Olsen factors established that the home inspectors were professionals whose services affected the public interest. In Carey v. Merritt, 148 S.W.3d 912 (Tenn. App. 2004) the Court found additional reasons to declare the exculpation clause in a home inspector's contract void as against public policy. The court found the defendant was “engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.” Id. at 917 (quoting Olson, 558 S.W.2d at 431). The court went on to note that “the purchase of a home is, perhaps, the largest investment an average person will make” and, therefore, “such inspections by the Defendant are of great importance to the public and a matter of practical necessity for most members of the public.” Id. The court also found it significant that the plaintiff “was under the control of Defendant [the home inspector] and subject to the risk of his carelessness.” Id. For these reasons, the court held that “the exculpatory clause between the Plaintiffs and Defendant is contrary to public policy and void.” Id. at 918. Of further and possibly greater significance, the court emphasized the fact that not all of the factors had to be present in order to invalidate an exculpatory agreement. Carey, 148 S.W.3d at 916 (citing Olson, 558 S.W.2d at 431). Carey also reiterated that not all of the factors had to be present in order to invalidate an exculpatory agreement, but generally, the factors were limited to circumstances involving “a contract with a profession, as opposed to tradesmen in the marketplace.”⁷

Application of these professional service factors to the home inspection contract herein leads to the inescapable conclusion that the limit of liability provision is tantamount to an unenforceable exculpation clause in violation of the public policy of this state. This case law and these factors were

⁷ In Carey, the exculpatory clause in a home inspection contract was found to be invalid where three of the six Olsen criteria were present.

presented to the trial court herein, but they were not specifically addressed by the court in its Order. Instead, the trial court brushed them aside with a brief and erroneous declaration that “Both parties have referred to cases from other jurisdictions to support their respective positions. Specifically, the cases relating to exculpatory clauses cited by the parties conform to South Carolina law, ” (Order). Well, no, that is not accurate. The cases cited hereinabove involve the enforceability of exculpation provisions in professional service agreements, including, specifically, in home inspection contracts. There is no South Carolina decisional law on this particular subject.

There are decisions from other courts that have upheld limit of liability provisions in home inspection contracts. In Baker v. Roy Haas Associates, 629 A.2d 1317 (Md. App. 1993) a limit of liability provision was enforced to limit the homeowner to a refund of the \$250 fee. This decision can be explained as the result of Maryland’s more relaxed view of exculpation contracts. Citing other Maryland precedent, the Baker court began its consideration of the issue by stating “Maryland law is quite clear on the matter of exculpatory clauses. ‘In the absence of legislation to the contrary, there is ordinarily no public policy which prevents the parties from contracting as they see fit.’” This is not the policy of South Carolina with respect to exculpation provisions.

In Rector v. Calamus Group, Inc., 17 A.D.3d 960 (N.Y. 3d Dept. 2005) a limit of liability provision was enforced by summary judgment in the trial court and was affirmed on appeal because the homeowners failed to demonstrate in their pleadings or in their summary judgment submissions either a special relationship between the parties, a statutory prohibition or an overriding public policy. This decision was driven by the case-specific absence of evidence.

Finally, the trial court herein cited S.C. Code Ann. §40-59-500(4) to call attention to the fact that it allows the parties to a home inspection to limit the scope of the inspection. That is true. But the trial court then leaps to the conclusion that by expressly allowing the parties to limit the scope

of the inspection, the home inspector may limit its liability through contract because the licensing and regulatory statutes do not expressly preclude such. This conclusion is inconsistent and disingenuous. The statute expressly permits limitation of the scope of inspection, but, according to the trial court, because the statute is silent on the home inspector limiting its liability, that too is permitted. Whether the statute speaks or is silent, everything is allowed pursuant to this analysis. The trial court erred in this conclusion.

Conclusion

South Carolina courts have expressed pride over the years for being in the forefront of the evolution of consumer protection policies. From C. Ray Miles Construction v. Weaver, 296 S.C. 466, 373 S.E.2d 905 (Ct. App. 1988)

The issue of whether the implied warranty alleged can arise under the circumstances is another matter. At one time, many, if not most, common law jurisdictions did not recognize any implied warranty of quality and, where there was no express warranty and no fraud by the seller, applied the doctrine expressed in the maxim, *caveat emptor* ("let the buyer beware"). 67A Am. Jur.2d Sales § 701 (1985) [fn2]. South Carolina, unique among all the states, rejected the common law maxim and, as early as 1793, recognized an implied warranty of soundness, based on the civil law maxim, a sound price warrants a sound commodity.

This has been described as the common law precursor to the UCC implied warranty of fitness for a particular purpose. Id.

In Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 172 (1970) the South Carolina Supreme Court, in the evolution of the law away from *caveat emptor* and toward *caveat venditor*, recognized that a builder-vendor of a new house gives his purchaser an implied warranty of fitness. The result of this holding was to establish this implied warranty as an independent covenant which survives delivery of the deed, thereby abrogating the doctrine of merger by deed.

This case is another opportunity to advance that policy. In the professional service context

presented, the trial court erred in holding that the limit of liability provision is not unconscionable
And, the trial court erred in holding that the limit of liability provision does not violate public policy
Either of the two errors standing alone is sufficient to reverse the grant of summary judgment and
to remit the matter back to the trial court for further proceedings according to applicable law and
procedure

A handwritten signature in black ink, appearing to read "B. Michael Brackett", written over a horizontal line.

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March 31, 2011

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- 1 Did the Circuit Court properly find that the Real Estate Inspection Contract is not unconscionable and is therefore enforceable?
- 2 Did the Circuit Court properly find that the Real Estate Inspection Contract does not contravene the public policy of South Carolina and is therefore enforceable?

STATEMENT OF THE CASE

This action arises out of Appellants Thomas W Gladden and Vera H Gladden's (collectively, the "Gladdens") purchase of a home located at 10 Hunt Cup Lane in Camden, South Carolina ("subject property") from Defendant Olivia M Boykin (Compl , at ¶ 9) Defendant Elizabeth A Beard is a real estate agent with Defendant Russell Jeffcoat Realtors, Inc , who represented Ms Boykin in the sale of the subject property to the Gladdens (Id at ¶ 11) Defendant Deborah Appleton is a real estate agent with Defendant Bob Capes Realty, Inc , who represented the Gladdens in the purchase of the subject property (Id at ¶ 12) Respondent Palmetto Home Inspection Services, LLC ("Palmetto") contracted with the Gladdens to perform a home inspection of the subject property (Id at ¶ 15, Real Estate Inspection Contract)

The Gladdens filed this lawsuit in the Kershaw County Court of Common Pleas on March 26, 2007 (Compl) As to Palmetto, the Gladdens asserted a cause of action for breach of contract arising out of Palmetto's alleged failure to perform a home inspection in accordance with the Real Estate Inspection Contract (Id at ¶¶ 50-56) Palmetto answered, denying liability for the Gladdens' alleged damages and asserting the Limit of Liability provision in the Real Estate Inspection Contract as a complete bar to the Gladdens' action as against Palmetto (Answer)

Thereafter, the Gladdens and Palmetto filed cross-motions for summary judgment, each directed at the enforceability of the Limit of Liability provision in the Real Estate Inspection Contract (Pls ' Mot for Summ J , Def Palmetto's Mot for Summ J) Argument on these cross-motions was heard on December 3, 2009 before the Honorable Alison Renee Lee (Hr'g Tr dated 12/03/09) By Order dated May 4, 2010, Judge Lee granted summary judgment in favor of Palmetto and denied the Gladdens' Motion for Summary Judgment ("Order") (Order dated

05/04/10) The Gladdens did not move to alter or amend the Circuit Court's Order. The Gladdens filed a Notice of Appeal on May 10, 2010.

STATEMENT OF THE FACTS

In the fall of 2006, the Gladdens were in the process of relocating from Winnsboro, South Carolina to Camden, South Carolina (V Gladden Dep , Vol 1, 30 11-22, 63 16-64 12) Mrs Gladden, who had prior experience as a real estate agent in Winnsboro, began her search for a home in Camden by driving around different neighborhoods and putting cards in the mailboxes of homes that she found appealing (Id at 9 15-24 1, 66 2-16, 67 23-68 24) One such home was the subject property, owned by Olivia Boykin (Id at 67 23-68 24) The Gladdens attempted to negotiate the purchase of the subject property directly with Ms Boykin in an effort to avoid paying real estate commissions, however, Ms Boykin refused to negotiate with the Gladdens without a real estate agent (Id at 72 14-76 17) Therefore, the Gladdens approached Deborah Appleton of Bob Capes Realty, Inc about representing them in the purchase of the subject property (Id)

The asking price of the subject property was \$499,000 00 (Id at 74 1-10) Mrs Gladden prepared a worksheet itemizing problems she noticed when she first looked at the subject property (Initial Offer Worksheet) The Gladdens made an initial offer of \$434,630 00, based on deductions for the problems she listed (Id) The items listed to justify the Gladdens' initial offer included the following

Six houses on Hunt Cup Lane on the market at the time, realtor fees, landscaping, exterior paint/scrape, clean, replace rot, paint, shutters – replace front, gutters – lack of, age of the HVAC, dated – no updating since home built (except surface seats in kitchen, mantle, stove), hardwood floors not kept up (especially kitchen), no changes to bedroom or kitchen, kitchen cabinets rough – need repainting, countertops replaced, paint, painted wallpaper, rotted wood – dormers and around door off den to patio, average quality building materials used

(Id) The Gladdens made their initial offer on September 21, 2006, which Ms Boykin rejected (V Gladden Dep , Vol 2, 87 22-24) After a series of counter offers, on October 12, 2006, the

Gladdens agreed to pay \$495,000 00 to purchase the subject property (Offer to Purchase, Id.) Under the terms of the Offer to Purchase, Ms Boykin was required to provide the Gladdens with a South Carolina Wood Infestation Report, along with a heating and air conditioning inspection (Offer to Purchase) The Offer to Purchase further provided that the Gladdens had the option, but were not required, to have a home inspection performed on the subject property (Id.)

Ms Appleton provided Mrs Gladden the names of two home inspectors, Mr Outlaw and Mr Roberts (V Gladden Dep , Vol 2, 144 2-21) Ms Appleton described Mr Outlaw as the “hardest but best ” (Id. at 144 10-17) Mrs Gladden interviewed both Mr Outlaw and Mr Roberts by phone, and chose Mr Roberts of Palmetto to inspect the subject property (Roberts Dep 15 10-20, Id. at 145 9-14)

Mr Roberts inspected the subject property for the Gladdens on October 18, 2006 (Roberts Dep 16 19-17 5) Mrs Gladden was present at the time of the inspection (Id. at 17 10-16, 18 4-6) At the end of the inspection, but prior to discussing the inspection results, Mrs Gladden read and signed the Palmetto Real Estate Inspection Contract, dated October 18, 2006 (“Real Estate Inspection Contract”) (Real Estate Inspection Contract, V Gladden Dep , Vol 2, 206 13-207 4) In addition to signing the contract, Mrs Gladden initialed next to an acknowledgment provision which reads

This inspection and report are not intended to be used as a guaranty or warranty, expressed or implied, regarding the adequacy, performance or condition of any inspected structure, item or system and **any visual problems [observed] [s]hould be verified with the appropriate contractor, electrician, plumber or skilled professional for costs estimates and code compliance**

(Real Estate Inspection Contract (emphasis added)) Also included in the contract is a provision titled “Limit of Liability,” which reads as follows

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC [Palmetto] and/or its agents or employees be found liable for any loss or damages

resulting from a failure to perform any of its obligations, including, but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC [Palmetto] and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report

(Id (emphasis in original)) The Gladdens paid Palmetto \$475 00 for the inspection and reports ¹
(Palmetto Invoice dated 10/18/06)

Mr Roberts provided a brief verbal report of his findings to Mrs Gladden and also provided her with a written inspection report, dated October 18, 2006 (“Inspection Report”), which specifically stated, “ALWAYS USE LICENSED CONTRACTORS FOR REPAIRS” (Inspection Report (emphasis in original), V Gladden Dep , Vol 2, 206 13-207 4) Following receipt of the written Palmetto Inspection Report, the Gladdens prepared an addendum to the Offer to Purchase asking Ms Boykin to repair certain items identified in the Inspection Report (Home Inspection Repairs Request) Mrs Boykin and the Gladdens negotiated various items and ultimately reached a resolution as to what items would be repaired and for what items Ms Boykin would provide a credit to the Gladdens (Id)

In addition, on the date of the closing, November 22, 2006, the Gladdens received a South Carolina Wood Infestation Report prepared by Terminix Services, Inc , dated October 30, 2006 (“CL-100”) (CL-100, V Gladden Dep , Vol 1, 122 21-124 19) The CL-100 identified evidence of damage to the subject property and indicated that the damage “[would] not be corrected by this company, [and] recommend[ed] that [the] structure be thoroughly and completely evaluated by [a] qualified building expert, licensed or registered with the South Carolina Department of Labor, Licensing and Regulation, Residential Builder’s Commission and

¹ After Mrs Gladden read and signed the Real Estate Inspection Contract, Mr Roberts gave her a copy of his business card in case of referral (V Gladden Dep , Vol 2, 206 13-207 1) The business card Mrs Gladden received on the date of the inspection is not the same as the business card Mr Roberts was questioned about during his deposition (Roberts Dep 18 18-20 19), see (Roberts’ Business Card)

that needed repairs be made ” (CL-100) The CL-100 specifically listed water damage to portions of the sill, sub-floor and floor joist near the dirt-filled porch in the front, the brick patio in the back and under the laundry room ² (Id.) The CL-100 also identified damage to the roof decking under the exhaust fan in some places where the roof changed angles (Id.)

Despite the words of warning in the Real Estate Inspection Contract, the Inspection Report and the CL-100, the Gladdens proceeded with the closing on the purchase of the subject property without an inspection by a licensed qualified building expert or appropriate contractor (T Gladden, Vol 1, 37 2-42 6, 241 9-21) On the date of the closing, the Gladdens expressed concerns about whether or not the repairs were done properly and sufficiently (V Gladden, Vol 1, 122 21-128 10) The Gladdens’ concerns were relayed through their attorney to Ms Boykin’s attorney in Camden, neither Ms Boykin, nor her attorney was present at the closing (Id.) Ms Boykin responded to the Gladdens’ concerns by offering to cancel the closing (Id.) Nonetheless, the Gladdens chose to move forward and close on the subject property (T Gladden, Vol 1, 167 18-172 13)

After the closing, the Gladdens began to move into the subject property with the help of Mr Gladden’s brother (V Gladden, Vol 1, 128 11-17) While at the house, Mr Gladden asked his brother, who works in the construction industry, to inspect the repairs made in the crawl space of the subject property (Id. at 130 12-131 3, 132 12-133 22) Mr Gladden’s brother determined the repairs were not properly performed (Id.)

² The Palmetto Report identified some damage in the crawl space of the subject property, but also noted some areas of the crawl space were inaccessible (Inspection Report) The CL-100 identified damages in the crawl space that were not disclosed in the Palmetto Report (CL-100) At closing, the Gladdens, through their attorney, raised concerns about these newly disclosed damages and other issues and Mrs Boykin offered to postpone the closing (V Gladden Dep , Vol 1, 122 21-128 10) The Gladden’s chose to go forward with the closing (T Gladden Dep , Vol 1, 167 18-172 13)

On November 29, 2006, Mrs Gladden contacted Mr Roberts to express her concerns about items she perceived were either not disclosed or not fully disclosed in the Inspection Report (Roberts Dep 38 4-39 13, V Gladden Dep , Vol 2, 211 13-214 13) During that conversation, Mr Roberts offered to refund the amount the Gladdens paid for the inspection (Roberts Dep 38 4-39 13, V Gladden Dep , Vol 2, 211 13-214 13) Thereafter, Mr Roberts met with Mrs Gladden and gave her a check for \$475 00, which the Gladdens cashed (Roberts Dep 38 4-39 13, V Gladden Dep , Vol 2, 211 13-214 13), see (Palmetto Invoice dated 10/18/06)

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SCOPE OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court George v Fabri, 345 S C 440, 548 S E 2d 868 (2001) Summary judgment is appropriate when it is clear that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law S C R Civ P 56(c) In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party Simmons v Tuomey Reg'l Med Ctr, 341 S C 32, 533 S E 2d 312 (2000) Nonetheless, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one Saluda Motorlines v Crouch, 300 S C 43, 46, 386 S E 2d 290, 292 (Ct App 1989) The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial Bray v Marathon Corp., 347 S C 189, 553 S E 2d 477 (Ct App 2001)

ARGUMENT

In general, parties may bind themselves by contract as they see fit, unless the contract would violate the law or is contrary to public policy S C Dep't of Transp v M&T Enters of Mt Pleasant, LLC, 379 S C 645, 657, 667 S E 2d 7, 14 (Ct App 2008) (quoting Lexington Ins Co v Tires Into Recycled Energy & Supplies, Inc., 522 S E 2d 798, 800 (N C App 1999)) "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully " Ellis v Taylor, 316 S C 245, 248, 449 S E 2d 487, 488 (1994) Thus, in recognition of the freedom of private parties to contract as they choose, South Carolina courts have generally accepted exculpatory

contracts even though such contracts are not favored by the law Fisher v. Stevens, 355 S. C. 290, 294-95, 584 S. E. 2d 149, 152 (Ct. App. 2003)

The exculpatory provision contained in the Real Estate Inspection Contract provides as follows

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC [Palmetto] and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including, but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC [Palmetto] and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report

(Real Estate Inspection Contract (emphasis in original)) The Gladdens allege this provision is unenforceable. However, the Limit of Liability provision is wholly a matter of private contract, and the Gladdens were afforded a meaningful choice as to whether or not to accept the terms of the Real Estate Inspection Contract, including the Limit of Liability provision. Accordingly, the Real Estate Inspection Contract is neither unconscionable nor against public policy, and was properly enforced by the Circuit Court.

I The Limit of Liability Provision Is Not Unconscionable

“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” Simpson v. MSA of Myrtle Beach, Inc., 373 S. C. 14, 25, 644 S. E. 2d 663, 669 (2007) (quoting Holler v. Holler, 364 S. C. 256, 269, 612 S. E. 2d 469, 476 (Ct. App. 2005)). The Real Estate Inspection Contract is not per se unconscionable simply because it is an adhesion contract. Herron v. Century BMW, 387 S. C. 525, 532, 693 S. E. 2d 394, 397 (2010). Rather, determining whether a contract is one of adhesion “is merely the beginning point in the analysis of whether the contract is unconscionable.” Id. at 532, 693 S. E. 2d at 397. “Unconscionability requires a greater showing.” Lackey v. Green Tree Fin. Corp., 330 S. C. 388, 395, 498 S. E. 2d 898, 902 (Ct. App. 1998). “The doctrine is not one to be applied to disturb

the agreed allocation of risk, even if it should result from superior bargaining power of one party, but rather to prevent oppression and surprise ” Coker Int’l, Inc v Burlington Indus , Inc., 747 F Supp 1168, 1172 (D S C 1990) To be found unconscionable a contract must be characterized by (1) the absence of meaningful choice on the part of one party, due to one-sided contract provisions, *together with* (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them Herron, 387 S C at 532, 693 S E 2d at 398

A The Gladdens Had a Meaningful Choice in Accepting the Terms of the Real Estate Inspection Contract

Initially, Palmetto notes that the Gladdens have failed to preserve the issue regarding the Circuit Court’s application of the meaningful choice factors for appellate review See Simpson, 373 S C at 25, 644 S E 2d at 669 (listing six meaningful choice factors) In order to preserve an issue for appellate review, the issue must be raised to and ruled upon by the lower court Wilder Corp v Wilke, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved Great Games, Inc v S C Dep’t of Revenue, 339 S C 79, 85, 529 S E 2d 6, 9 (2000), S C Farm Bureau Mut Ins Co v S E C U R E Underwriters Risk Retention Grp., 347 S C 333, 343, 554 S E 2d 870, 875 (Ct App 2001) Although the Gladdens listed the meaningful choice factors in their argument against Palmetto’s Motion for Summary Judgment, they failed to apply those factors to the facts and circumstances of the case sub judice See (Pls ’ Mem in Support of Mot for Summ J , Hr’g Tr dated 12/03/09), see also Lapp v S C Dep’t of Motor Vehicles, 387 S C 500, 507, 692 S E 2d 565, 569 (Ct App 2010) (finding issue was not preserved for appeal where it was not specifically raised to the trial court) Moreover, the Gladdens failed to obtain a ruling from the Circuit Court with regard to three (3) of the six (6)

meaningful choice factors, which the Gladdens note “were apparently ignored because they are not mentioned in the Order ” (Appellants’ Am Initial Br 9) As the Gladdens did not raise the Circuit Court’s omission of those factors by way of a Rule 59, SCRCF motion, the issue of their application is not preserved for appeal See Great Games, 339 S C at 85, 529 S E 2d at 9, see also Cowburn v Leventis, 366 S C 20, 41, 619 S E 2d 437, 449 (Ct App 2005) (“When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal ”)

Even assuming arguendo that the Gladdens preserved the issue regarding the application of the meaningful choice factors, the Gladdens’ argument as to the unconscionability of the Limit of Liability provision still fails on the merits The Gladdens had a meaningful choice in signing the Real Estate Inspection Contract In determining whether a contract is “tainted by the absence of meaningful choice,” courts consider the following factors

[T]he relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause

Simpson, 373 S C at 25, 644 S E 2d at 669, see also Herron, 387 S C at 532, 693 S E 2d at 398

At first glance there may appear to be some disparity in bargaining power between the parties to the Real Estate Inspection Contract, as this was a transaction between a commercial entity³ and a consumer of services, not a substantial business concern See Herron, 387 S C at 532, 693 S E 2d at 398 However, as Mr Gladden testified, his wife is “very discriminating” and would negotiate over contract terms (T Gladden Dep 238 4-18) Additionally, “[u]nequal bargaining power is not a justification in and of itself to hold a provision of a contract invalid ”

³ Palmetto is a single member LLC (Roberts Dep 7 21-23) Scot Roberts is the sole member of Palmetto as well as the sole employee (Roberts Dep 7 24-8 3)

Atl Floor Servs., Inc v Wal-Mart Stores, Inc., 334 F Supp 2d 875, 877-78 (D S C 2004), see also Coker Int'l, Inc., 747 F Supp at 1172, Herron, 387 S C at 532-33, 693 S E 2d at 398, cf S C Code Ann § 36-2-302 cmt 1

The remaining factors weigh in favor of enforcing the Limit of Liability clause. The Gladdens' alleged injuries are entirely economic in nature and do not involve personal injury.⁴ Contrary to the Gladdens' assertion, (Appellants' Am Initial Br 8), the "nature of injuries factor" does not concern the amount of damages alleged. Myrtle Beach Pipeline Corp v Emerson Elec Corp, 843 F Supp 1027, 1046 (D S C 1993). Rather, "nature of injuries" refers to the type of alleged injury for which a plaintiff seeks damages and is primarily an issue directed to contracts for the sale of goods under the Uniform Commercial Code. Id. (explaining that the fact that no personal injury is alleged is "significant under the [Uniform Commercial] Code because while limitations on damages for personal injuries are not favored no such prejudice applies to property losses") (internal quotations omitted), see S C Code Ann § 36-2-719(3). Nonetheless, the fact remains that the Gladdens' alleged injuries are purely commercial.

Moreover, the Limit of Liability clause was conspicuously laid out in the Real Estate Inspection Contract. See (Real Estate Inspection Contract). The contract is one page and the

⁴ In attempting to address the "nature of their claims" the Gladdens allege they incurred an estimated twenty five thousand dollars (\$25,000.00) in damages from mold and HVAC repair. Respondent notes there is no evidence in the record supporting the figure which the Gladdens quote. See Rule 208(b)(4), SCACR ("The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may properly be included in the Record on Appeal to support the salient facts alleged"), Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal"), Forner v Butler, 319 S C 275, 276 n 1, 460 S E 2d 425, 426 n 1 (Ct App 1995) (If a party "consider[s] a fact relevant and worthy of mention in the brief, [the party] should includ[e] matter in the record to support that factual assertion"). Indeed, the only document the Gladdens have cited to which sets forth any estimate of their alleged damages is Eugene Haskins' Estimate for Repairs. See (Haskins' Estimate dated 2/5/07). There is no evidence that Mr. Haskins, Vera Gladden's brother, is qualified to perform estimates for repairs to property. See (V. Gladden Dep., Vol. 2, 19:14-21:25).

Limit of Liability clause is labeled in bold and capitalized font (Id.), see S C Code Ann § 36-1-201(10) (“A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it A printed heading in capitals (as NONNEGOTIABLE BILL OF LADING) is conspicuous ” (emphasis in original)), cf Jones v Gen Elec Co, 331 S C 351, 503 S E 2d 173 (Ct App 1998) (recognizing that the Uniform Commercial Code is not applicable to the case, but finding that S C Code Ann § 36-1-201(10) provided guidance in determining whether a disclaimer in a contract is conspicuous) The Limit of Liability clause is also located directly below the acknowledgement section where Mrs Gladden twice signed her initials (Id.), see Herron, 387 S C at 533, 693 S E 2d at 398

Furthermore, the Limit of Liability provision cannot be said to have been a surprise to the Gladdens The Gladdens are relatively sophisticated parties, Mrs Gladden is a trained real estate agent who previously worked in the real estate business (V Gladden Dep , Vol 1, 9 15-24 1) Mrs Gladden read the contract in its entirety before she signed and initialed it (V Gladden Dep , Vol 2, 203 21-204 10), see also Regions Bank v Schmauch, 354 S C 648, 663, 582 S E 2d 432, 440 (Ct App 2003) (“A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it ”) (citing Sims v Tyler, 276 S C 640, 643, 281 S E 2d 229, 230 (1981)) Moreover, though the Gladdens claim surprise arising out of the presentation of the Real Estate Inspection Contract to Mrs Gladden following the inspection, they fail to note that Mrs Gladden had not yet paid when she received the contract (Id. at 206 13-207 4) Mrs Gladden was therefore free to reject the contract and employ a different home inspecting company to perform the inspection of the subject property if she so chose See (T Gladden Dep 238 4-18) Indeed, Mrs Gladden was fully aware that there were a number of home inspectors in the area available to her and had interviewed at least one other

home inspecting company prior to selecting Palmetto (V Gladden Dep , Vol 2, 144 2-21) Likewise, the Gladdens were not required to have the subject property inspected (Offer to Purchase), see Clark v Goldline Int'l, Inc., No 6 10-cv-01884-JMC, 2010 WL 4929438, at *4 (D S C Nov 30, 2010) (finding the plaintiff failed to establish an absence of meaningful choice because, inter alia, the items contracted for were not “necessities” like the automobile described in Simpson, 373 S C at 26, 644 S E 2d at 669) The Gladdens chose to have the subject property inspected and chose Palmetto to perform that service See Clark, 2010 WL 4929438, at *4 (noting that the plaintiffs were “not forced to transact business” with Goldline), see also Hardee v Hardee, 355 S C 382, 585 S E 2d 501 (2003) (discussing alleged unconscionability of a disputed pre-nuptial contract and finding, “Clearly, Wife here had a meaningful choice she could have refused to sign the agreement and opted against marrying Husband if he insisted on a prenuptial agreement ”)

B The Terms of the Real Estate Inspection Contract Are Not Oppressive

The terms of the Real Estate Inspection Contract, including the Limit of Liability provision, are not substantively unconscionable⁵ or so “oppressive” and one-sided that no reasonable person would make them and no fair and honest person would accept them See Herron, 387 S C at 532, 693 S E 2d at 398, see also Carlson v Gen Motors Corp., 883 F 2d 287, 296 n 12 (4th Cir 1989) (applying South Carolina law and describing substantive unconscionability as the inclusion of “objectively harsh contract terms”) Rather, the Limit of

⁵ A contract is unconscionable if it was both procedurally and substantively unconscionable when made 8 Williston on Contracts § 18 10 (4th ed West 2010) Procedural unconscionability relates to procedural deficiencies in the contract formation process, and is often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction Id Substantive unconscionability relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy Id

Liability provision is reasonable and appropriate given the limited scope of the inspection it concerns

The contract provides for “a limited visual inspection of apparent conditions in readily accessible areas existing at the time of the inspection” and specifically lists those areas which would be inspected (Real Estate Inspection Contract), see S C Code Ann § 40-59-500(4) (“The parties to a home inspection may limit or expand the scope of the inspection by agreement”) The contract further advised that the inspection was “not intended to provide the purchaser with information regarding the advisability of this purchase, [or] the market value of the property” (Id.) Additionally, the contract makes clear that the “inspection and report are not intended to be used as a guaranty or warranty, expressed or implied, regarding the adequacy, performance or condition of any inspected structure, item or system ” (Id.) Thus, the Real Estate Inspection Contract expressly delineates the limited scope of the inspection and advises the client that the Inspection Report is not intended to convey advice regarding advisability of a purchase of the subject property The Real Estate Inspection Contract also advises that “any visual problems observed [*sic*] Should [*sic*] be verified with the appropriate contractor, electrician, plumber, or skilled professional for cost estimates and code compliance,” making clear that in the event a more comprehensive inspection is desired then other skilled professionals should be consulted (Id.) As the Circuit Court recognized, these terms are not so oppressive or one-sided that no reasonable person would accept them (Order dated 05/04/10, 6)

In support of their contention that the terms of the Real Estate Inspection Contract are oppressive, Appellants cite two cases from outside this jurisdiction, Lucier v Williams, 841 A 2d 907 (N J Super Ct App Div 2004), and Pitts v Watkins, 905 So 2d 553 (Miss 2005) These cases are readily distinguishable from the case at bar In Lucier, 841 A 2d 907, a New Jersey

Court overturned a limit of liability provision in a home inspection contract. In so doing, the court heavily relied upon a New Jersey statutory provision that required home inspectors to maintain errors-and-omissions insurance of at least \$500,000 per year. Id. at 914-15 (citing N.J. Stat. Ann. 45:8-76a), see Zerjal v. Daech & Bauer Const., Inc., 939 N.E.2d 1067 (Ill. App. 2010) (rejecting the holding in Lucier and distinguishing Illinois law from that of New Jersey). Unlike New Jersey, South Carolina does not require home inspectors to have errors-and-omissions insurance. See generally S.C. Code Ann. §§ 40-59-500 to -620, S.C. Code Ann. Regs. 106-1 to -15. The court in Lucier also found it significant that the plaintiff explicitly stated that he was not represented by an attorney in any aspect of the real estate transaction and relied on the home inspection report in going through with the home purchase. Id. at 910. Contrastingly, the Gladdens were represented by an attorney in the purchase of the subject property. See, e.g., (V. Gladden, Vol. 1, 122-21-128-10 (describing negotiations between the Gladdens' attorney and the seller's attorney)). Further, as previously discussed, the Real Estate Inspection Contract specifically advised the Gladdens that the Inspection Report was not intended to convey advice regarding advisability of a purchase of the subject property (Real Estate Inspection Contract).

Likewise, in Pitts, 905 So.2d 553, there is no indication that the home inspection at issue was limited in nature or that the home inspection contract informed the plaintiff that the report was not intended to convey advice regarding the advisability of purchasing the property being inspected. Furthermore, as in New Jersey, Mississippi requires home inspectors to carry general liability insurance and errors-and-omissions insurance of at least \$250,000.00. Miss. Stat. Ann. § 73-60-13. As previously noted, South Carolina has no such requirement. See generally S.C. Code Ann. §§ 40-59-500 to -620, S.C. Code Ann. Regs. 106-1 to -15.

Moreover, although there are no South Carolina cases directly on point, numerous courts in other jurisdictions have found that similar agreements entered into between potential home purchasers and a home inspection company, pursuant to which the company's liability for any loss or damages arising out of the inspection and report would be limited to the fee paid for those services, were enforceable and not unconscionable See, e.g., Moler v Melzer, 942 P 2d 643 (Kan App 1997) (Clause in contract between home purchaser and building inspector, limiting inspector's liability to cost of inspection, was not unconscionable, though contract was on a preprinted form and despite purchaser's contention that he was not in a position to negotiate for different contract provisions, as clause was not hidden, and record gave no indication of an inequality of bargaining or economic power, nor any indication that purchaser could not have sought a different inspection company), Schietinger v Tauscher Cronacher Prof'l Eng'rs, P C., 838 N Y S 2d 95 (N Y App Div 2007) (finding a clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy), Head v U S Inspect DFW, Inc , 159 S W 3d 731 (Tex App 2005) (Limitation of liability clause in home inspection contract, which limited home inspector's liability to the amount of the fee paid for the limited visual inspection, was not unconscionable, and thus, inspector's liability in home purchaser's breach of contract claim was limited to the \$348 27 paid for the inspection services, where the clause was conspicuously set apart in the contract, enclosed in a box, and separately initialed by home purchaser, purchaser was free to choose another inspection service, she was represented by a real estate attorney in the transaction, and without the limitation clause, the inspector was subject to significant risk, which would likely cause the cost for inspection services to increase)

In short, the Real Estate Inspection Contract is not characterized by either an absence of meaningful choice or oppressive terms. Accordingly, the contract is not unconscionable and was properly enforced by the Circuit Court.

II The Real Estate Inspection Contract Does Not Contravene South Carolina Public Policy

Exculpatory contracts, although strictly construed, are generally accepted in South Carolina. McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (citing Pride v. S. Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964)). Accordingly, South Carolina courts enforce exculpatory clauses when clear language indicates the intent of the parties. S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984).

The Gladdens do not contend that the Real Estate Inspection Contract is ambiguous, but rather, that it is unenforceable on public policy grounds. “A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals.” Romanus v. Biggs, 214 S.C. 145, 51 S.E.2d 503 (1949). In deciding whether an exculpatory contract is contrary to the public policy of this State, courts typically consider whether the limitation of liability is a matter of private contract, and if so, whether the contract is connected with a duty of public service or where the public interest is involved. Pride, 244 S.C. at 619-20, 138 S.E.2d at 157.

In Pride v. Southern Telephone and Telegraph Co., 244 S.C. 615, 138 S.E.2d 155 (1964), the South Carolina Supreme Court enforced a contract which limited liability arising out of the publication of paid advertisements in the yellow pages to only the amount paid for the advertisement. The contract for services in Pride contained a provision whereby the parties agreed that the liability of the telephone company “on account of errors in or omissions from

such advertisement, should in no event exceed the amount of the charges for such advertisement which was omitted, or in which the error occurred in the then current issue” Id at 619, 138 S E 2d at 156 The court found the publication of the plaintiff’s ad was wholly a matter of private contract, explaining that “[t]he subject matter of the contract did not relate to any duty owed or assumed by the defendant in the performance of its service as a public utility” Id at 621, 138 S E 2d at 157 Rather, “[t]he relationship of the parties arose in connection with the publication of the ad solely by reason of the contract and not by virtue of any duty owed by the defendant to the public” Id at 621, 138 S E 2d at 157 See also McCune, 364 S C 242, 612 S E 2d 462 (finding exculpatory contract relieving indoor playground from liability for injuries to patron enforceable and not against public policy), Huckaby v Confederate Motor Speedway, Inc., 276 S C 629, 281 S E 2d 223 (1981) (finding plaintiff’s action against speedway for injuries sustained during a race was barred by “waiver and release” voluntarily signed by plaintiff prior to entering the race track), S C Elec & Gas Co., 283 S C 182, 322 S E 2d 453 (finding exculpatory clause in contract for sale of boiler, providing, among other things, that liability of seller manufacturer arising out of negligent manufacture would not exceed the cost of correcting the defect in the boiler was not void as against public policy where relationship between seller and buyer, a public utility, arose by reason of their private contract and not by virtue of any duty owed by either party to the public)

Like in Pride, in this case, the Real Estate Inspection Contract is a contract between two private parties affecting only private rights The relationship between the Gladdens and Palmetto arose solely by reason of the Real Estate Inspection Contract and not by virtue of any duty owed by Palmetto to the public Indeed, the laws and regulations governing home inspection explicitly allow a licensed home inspector to contractually limit the scope of its home inspection See S C

Code Ann § 40-59-500(4) Furthermore, as recognized by the Circuit Court, the Standards of Practice recognized by the South Carolina Residential Builders Commission, see S C Code Ann § 40-59-610, the policy behind the regulation of residential home inspectors is to assure that there are uniform standards applicable to all inspectors and “to establish a uniform guide for performing an inspection of buildings and equipment” Standards of Practice for Residential Home Inspector Those standards further provide that “[t]he purpose of a residential inspection is to disclose the general conditions of the building, improvements, mechanical systems and appliances as they exist on the day of the inspection” Id Neither the standards of practice, nor the statutes or regulations governing the licensing of a residential home inspector preclude the inspector from limiting his liability via contract See generally S C Code Ann §§ 40-59-500 to -620, S C Code Ann Regs 106-1 to -15, Standards of Practice for Residential Home Inspector They do not require a residential home inspector to carry insurance See generally S C Code Ann §§ 40-59-500 to -620, S C Code Ann Regs 106-1 to -15, Standards of Practice for Residential Home Inspector Thus, it is apparent that the Real Estate Inspection Contract does not violate South Carolina public policy

In support of their contention that the Real Estate Inspection Contract violates South Carolina public policy, the Gladdens again relied entirely on authority from outside of this jurisdiction See (Appellants’ Am Initial Br 11-17) As previously discussed, Lucier, 841 A 2d 907, is not applicable to the case sub judice See discussion supra pp 16-17 The other extra-jurisdictional cases which the Gladdens cite, Russell v Bray, 116 S W 3d 1 (Tenn App 2003), and Carey v Merritt, 148 S W 3d 912 (Tenn App 2004), are also inapposite to the facts and circumstances of this case First and foremost, Tunkl v Regents of University of California, 383 P 2d 441 (Cal 1963), which outlines the factors relied on by Tennessee courts, is not the

standard by which South Carolina courts evaluate exculpatory contracts Cf Pride, 244 S C 615, 138 S E 2d 155. Indeed, Tunkl has never been cited by a South Carolina court or by the Fourth Circuit Court of Appeals. Furthermore, unlike South Carolina, Tennessee does not specifically allow a residential home inspector to contractually limit the scope of a residential home inspection, but rather, requires the home inspector to provide justifications for not inspecting the items delineated in the statute Compare S C Code Ann § 40-59-500, with Tenn Code Ann § 62-6-302. Correspondingly, neither Russell, 116 S W 3d 1 (Tenn App 2003), nor Carey, 148 S W 3d 912 (Tenn App 2004), indicate the inspections at issue were limited in scope. Furthermore, Tennessee's public policy with regards to home inspection is entirely different than South Carolina. As both Russell and Carey noted, Tennessee law requires that a residential property disclosure statement in that state "contain a notice to prospective purchasers and owners that [they] may wish to obtain professional advice or inspections of the property," Tenn Code Ann § 66-5-202(1), and contain a statement indicating "[t]his is not a warranty, or a substitute for any professional inspections or warranties that the purchasers may wish to obtain." Tenn Code Ann § 66-5-210. South Carolina does not require that any similar statement be included in a residential property condition disclosure statement. See S C Code Ann § 27-50-40. Accordingly, the Tennessee Court of Appeals' decisions in Russell and Carey are in no way instructive in this case.

In the case sub judice no considerations of public policy are present which would override the fundamental right of freedom of contract. See Pride, 244 S C at 619, 138 S E 2d at 157. "A sound public policy requires the enforcement of contracts deliberately made, which do not clearly contravene some positive law or rule of public morals. Courts should not annul contracts on doubtful grounds of public policy. In such matters it is better that the legislature

should first speak ” Wilson v Builders Transp., Inc., 330 S C 287, 297, 498 S E 2d 674, 679 (Ct App 1998) (quoting Rice v Multimedia, Inc., 318 S C 95, 100, 456 S E 2d 381, 384 (1995)) (alteration in original)

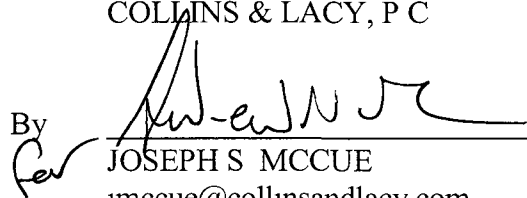
CONCLUSION

Thus, for the foregoing reasons, Respondent Palmetto respectfully requests this Court affirm the decision of the Circuit Court and find that the Real Estate Inspection Contract is not unconscionable and does not violate South Carolina public policy

Respectfully submitted

COLLINS & LACY, P C

By

A handwritten signature in black ink, appearing to read "Joe McCue", is written over a horizontal line.

JOSEPH S MCCUE

jmccue@collinsandlacy.com

LOGAN M WELLS

lwells@collinsandlacy.com

1330 Lady Street - Suite 601 (29201)

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 29, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

RECEIVED

MAY 19 2011

SC Court of Appeals

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

Appellants' Initial Reply Brief

B Michael Brackett, SC Bar No 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellants

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This case is about the general public policy to be adopted by the decision herein with respect to enforceability of limit of liability provisions in home inspection contracts under South Carolina law	
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TABLE OF AUTHORITIES

CASES

<u>Gartside v Gartside</u> , 383 S C 35, 677 S E 2d 621 Ct App 2009)	1
<u>State v Oglesby</u> , 384 S C 289, 681 S E 2d 620 (Ct App 2009)	1
<u>Wilder Corp v Wilkie</u> , 330 S C 71, 497 S E 2d 731 (1998)	1

STATUTES

None

OTHER

None

ARGUMENT

I The issue of the trial court’s application of the meaningful choice factors is preserved for appellate review

Respondent argues that the trial court’s application of the meaningful choice factors was not preserved for appellate review (Respondent’s Initial Brief, Argument Section IA) It is the general rule that an appellate court may not consider “an issue” unless it was presented to and ruled upon by the trial court Wilder Corp v Wilkie, 330 S C 71, 497 S E 2d 731 (1998) A ruling by implication is sufficient to preserve an issue for appellate review State v Oglesby, 384 S C 289, 681 S E 2d 620 (Ct App 2009), Gartside v Gartside, 383 S C 35, 677 S E 2d 621 Ct App 2009)

The trial court herein identified the meaningful choice factors in its Order (Order, p 5, l 25 to p 6, l 2), thereby exhibiting its understanding of the factors The court thereafter expressly considered some of the factors in its analysis of meaningful choice, but not all (Order, p 6, l 3-15) Under these circumstances there was an implicit rejection of Appellants’ argument that the factors favored Appellants and were sufficient to conclude that the limit of liability provision was unconscionable Id According to Gartside, the issue was presented and ruled upon sufficiently to have preserved the matter for appellate court review

II There is evidence in the record supporting the Appellants’ estimate of the damages they incurred

In footnote 4 of Respondent’s brief, it is argued that there is no evidence in the record to

support the Appellants' estimated damages of \$25,000 from mold and HVAC repair and that there is no evidence that witness Eugene Haskins is qualified to perform estimates for repairs to property

The Eugene Haskins deposition exhibit no 1, designated to be included in the record on appeal, includes the following on p 1 of the exhibit

“B S Civil Engineering 1984
22 years as construction manager
Currently working as a senior project manager for a Chas Contractor ”

The Haskins deposition exhibit/estimate identifies various damages totaling well over \$50,000 as stated in Appellants' Brief in the “Statement of Facts” section, and more particularly in the sub-section headed “Facts Specific to Respondent Home Inspector ” (Appellant's Initial Brief, p 4) Respondent is correct that the amended record on appeal does not break down the damages into an amount associated only with mold and HVAC repair

III The case is about the general policy to be expressed by the decision herein of South Carolina law with respect to limit of liability provisions in home inspection contracts

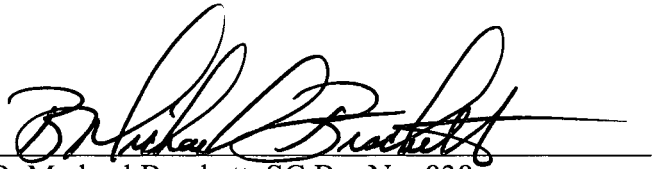
This is an issue of first impression in South Carolina There is nothing to be gained now by continuing to parse the precedent cited by the parties in support of their respective positions There is sufficient precedent for either position depending on the policy the court decides to adopt The governing consideration in this case is what public policy course South Carolina courts will chart on the subject of the enforceability of limit of liability provisions in home inspection contracts, when home inspection is a state regulated profession

On the one hand is the policy advocated by the Respondent home inspector that parties are free to contract as they choose and that there are no public policy considerations that would override the right of freedom of contract

On the other hand is the policy advocated by the Appellants that the limit of liability provision at issue is tantamount to an exculpation clause that, if enforced, will allow a regulated, professional service provider to immunize himself/itself from his/its own negligence to the prejudice of the home-buying public

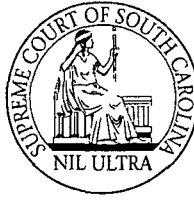
Conclusion

The trial court's summary judgment order in favor of Respondent, grounded on the trial court's conclusion that the limit of liability provision at issue is not unconscionable and does not violate public policy and is therefore enforceable, should be reversed and the case remanded to the trial court

A handwritten signature in black ink, appearing to read "B. Michael Brackett", is written over a horizontal line.

B. Michael Brackett, SC Bar No. 838
Moses Koon & Brackett, PC
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Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellants

May 18, 2011



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

January 31, 2012

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Joseph Scott McCue, Esquire
Logan M. Wells, Esquire
Collins & Lacy
P O Box 12487
Columbia, SC 29211

Re: Gladden, Thomas v. Boykin, Olivia

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellants	15 minutes
Respondent	15 minutes
Appellants in Reply	5 minutes

This case is scheduled for hearing on Wednesday, February 8, 2012 at 9:30 a.m.

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins

Administrative Assistant

DES/dmh



RECEIVED

DEC 21 2011

Joseph S McCue | Direct Dial 803 255 0412 | E-Mail jmccue@collinsandlacy.com

RECEIVED
DEC 21 2011

S.C. SUPREME COURT

December 19, 2011

VIA UNITED STATES MAIL

The Honorable Daniel E Shearouse
Clerk of Court
South Carolina Supreme Court
PO Box 1130
Columbia, SC 29211

S.C. SUPREME COURT
pm 12-19-11

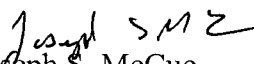
RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A
Bead, Deborah Appleton, Bob Capes Realty, Inc , Russell & Jeffcoat Realtors,
Inc and Palmetto Home Inspection Services, LLC
Civil Action No 07-CP-28-0288
Claim No 295-044423
C&L 1-1608

Dear Mr Shearouse

This will confirm my receipt of your letter of December 12, 2011 advising this case is on the preliminary list of cases to be heard by the Court during the February term Please allow this letter to advise the Court I have a Magistrate's Court trial on February 7, 2012 I am currently scheduled to participate in an expert's deposition on February 22 and 23, 2012 and have mediation in a separate case scheduled for February 22, 2012 Please let me know at your earliest convenience which date this matter will be heard so that I can make arrangements to either cancel or arrange for coverage of these conflicts

With warmest regards,

Sincerely,


Joseph S McCue

JSM lcc

cc B Michael Brackett, Esquire
David Hau
J Scot Roberts

MOSES & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
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B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law.com

December 13, 2011

RECEIVED

DEC 14 2011

S.C. SUPREME COURT

The Honorable Daniel E Shearouse
Clerk of Court
South Carolina Supreme Court
P O Box 11330
Columbia SC 29211

Re Gladden v Boykin, et al (Respondent is Palmetto Home Inspection Services, LLC)

Dear Mr Shearouse

This will confirm my receipt of the February Preliminary List I have a date-certain trial in the Richland County Probate Court already set for February 7-9, 2012 This trial involves numerous parties, many from out of state Both February 22 and 23 are presently open on my calendar, and I will reserve those dates until I hear from the court

Very truly yours,



B Michael Brackett

BMB/bmb

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Joseph Scott McCue Esquire
Logan M. Wells Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Gladden, Thomas v. Boykin, Olivia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To B Michael Brackett Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Gladden, Thomas v. Boykin, Olivia

The Supreme Court of South Carolina

Thomas W Gladden and Vera
H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth
Beard, Deborah Appleton, Bob
Capes Realty, Inc , Russell &
Jeffcoat Realtors, Inc , and
Palmetto Home Inspection
Services, LLC,

Defendants,

Of Whom Palmetto Home
Inspections Services, LLC is
the,

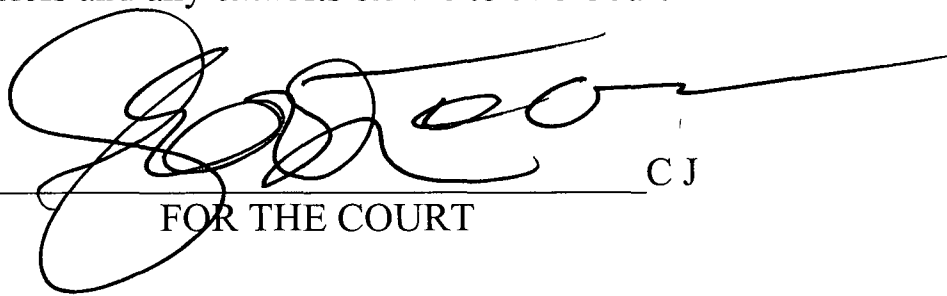
Respondent

The Honorable Alison Renee Lee
Kershaw County
Trial Court Case No 2007-CP-28-00288

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
appeal is hereby certified for review by the South Carolina Supreme Court
Upon receipt of this order, the Court of Appeals is hereby directed to forward
the case file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED



FOR THE COURT

C J

Columbia, South Carolina

November 14, 2011

cc B Michael Brackett, Esquire
Joseph Scott McCue, Esquire
Logan M Wells, Esquire
The Honorable Tanya Gee



Joseph S McCue | Direct Dial 803 255 0412 | E Mail jmccue@collinsandlacy.com

August 16, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A
Bead, Deborah Appleton, Bob Capes Realty, Inc , Russell & Jeffcoat Realtors,
Inc and Palmetto Home Inspection Services, LLC
Civil Action No 07-CP-28-0288
Claim No 295-044423
C&L 1-1608

Dear Ms Gee

Please find enclosed for filing the original and fifteen (15) copies of the Final Brief of
Respondent in the above-referenced case Please return a clocked copy to me via my courier

By copy of this letter, I am serving a copy of same upon all counsel

With warmest regards,

Sincerely,


Joseph S McCue

JSM lcc
Enclosures
cc/enc B Michael Brackett, Esquire
David Hau
J Scot Roberts

RECEIVED
AUG 16 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

July 29, 2011

B Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Mr Brackett

We have received the Amended Record on Appeal in the above case. However, within ten days of the date of this letter, you must provide a Certificate of Counsel according to Rule 210 of the South Carolina Appellate Court Rules.

Furthermore, according to Rule 267 of the South Carolina Appellate Court Rules, all counsel of record shall be listed on the record.

Within ten days of the date of this letter, please arrange for a representative from your office to come to the Court of Appeals filing desk on the 1st floor of the Edgar A. Brown Building, 1205 Pendleton, Columbia, SC to place the appropriate labels on the cover of the original and all copies of the record to add Logan M. Wells to the record.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc Joseph Scott McCue, Esquire
Logan M. Wells, Esquire

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

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Email mbrackett@mkb law com

July 27, 2011

VIA HAND DELIVERY

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE Gladden v Boykin et al
07-CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

RECEIVED
JUL 27 2011
SC Court of Appeals

Dear Ms Gee

Since the filing of the original Record on Appeal, and the filing of Appellants' Brief and Reply Brief, it was determined that an Amended Record on Appeal was necessary

Enclosed for filing please find the original (unbound) and 14 bound copies of the Amended Record on Appeal By copy of this letter, a copy of the Amended Record on Appeal is being served by mail on Respondent's attorney, Joseph McCue A certificate of service is enclosed confirming the service on Mr McCue

Because the Amended Record on Appeal does not change any of my cites to the record in Appellants' Brief and Reply Brief, I do not intend to file Amended Briefs

Please allow my courier to return with a clocked copy of the Amended Record on Appeal

Thank you for our courtesy and assistance

Very truly yours,



B Michael Brackett

BMB/Ita

Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
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FAX (803) 734 1839
www.sccourts.org

July 26, 2011

B Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Joseph Scott McCue, Esquire
Logan M Wells, Esquire
Collins & Lacy
P O Box 12487
Columbia, SC 29211

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Counsel

The following Order has been endorsed on your Consent Order for Amended Record on Appeal in the above entitled case on appeal

“Granted

John Cannon Few C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

July 26, 2011 ”

Please be advised the Amended Record on Appeal must be served and filed no later than August 2, 2011

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUL 22 2011

SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

CONSENT ORDER FOR AMENDED RECORD ON APPEAL

The parties have discovered the need to file and serve an Amended Record on Appeal to include, among other things, an additional designation made by the Respondent. With the consent of the attorneys appearing below, it is ordered that Respondent's designation is amended to include Volume II, page 165 of Appellant Vera Gladden's deposition. The Amended Record on Appeal shall be served no later than Wednesday, July 27, 2011, with Final Briefs to be filed and served within 20 days thereafter.

July ____, 2011

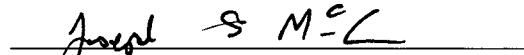
Judge

I Consent



B Michael Brackett, SC Bar No 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellants

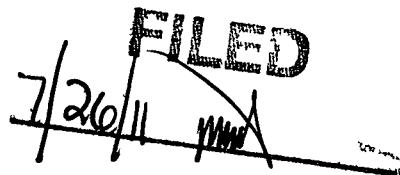
I Consent



Joseph S McCue, Esquire
Collins & Lacy, PC
P O Box 12487
Columbia, South Carolina 29211
(803) 256-2660
Attorney for Respondent

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By 
(Clerk) (Deputy Clerk)



MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

July 22, 2011

VIA HAND DELIVERY

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

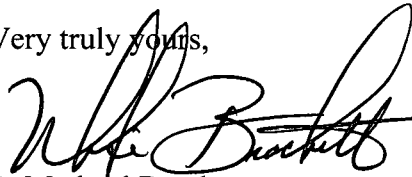
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JUL 22 2011
SC Court of Appeals

RE Gladden v Boykin et al
07-CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

Dear Ms Gee

Enclosed please find a proposed Consent Order permitting the parties to file and serve an Amended Record on Appeal in lieu of the Record previously filed My check in the amount of \$25 00 is enclosed for the motion fee

Very truly yours,


B Michael Brackett

BMB/lta

Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
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B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkblaw.com

July 6, 2011

VIA HAND DELIVERY

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
JUL 06 2011
SC Court of Appeals

RE Gladden v Boykin et al
07-CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

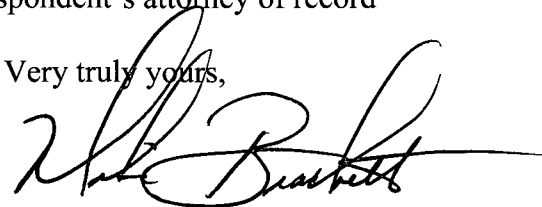
Dear Ms Gee

Enclosed for filing please find the following

- 1) Fifteen copies of Appellants' Final Brief, including the original which is unbound,
- 2) Fifteen copies of Appellants' Final Reply Brief, including the original which is unbound,
- 3) Appellants' Rule 211 Certificate of Counsel, and
- 4) Proof of Service

By copy of this letter, copies of Appellants' Final Brief, Appellants' Final Reply Brief, and the Certificate of Counsel are being served upon Respondent's attorney of record

Very truly yours,



B Michael Brackett

BMB/Ita

Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire

The South Carolina Court of Appeals

Thomas W Gladden and Vera H
Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth Beard,
Deborah Appleton, Bob Capes Realty,
Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection
Services, LLC,

Defendants,

Of Whom Palmetto Home Inspections
Services, LLC is the,

Respondent

The Honorable Alison Renee Lee
Kershaw County
Trial Court Case No 2007-CP-28-00288

ORDER

For good cause having been shown, the time for Respondent's Final Brief to be served and
filed in the above entitled matter is hereby extended until July 26, 2011

IT IS SO ORDERED

V. Claire Allen, Deputy CLERK
For the Court

Columbia, South Carolina
cc B Michael Brackett, Esquire
Joseph Scott McCue, Esquire
Logan M Wells, Esquire

FILED
Re 7/18/11

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

**RESPONDENT'S MOTION FOR AN
EXTENSION OF TIME TO FILE
RESPONDENT'S FINAL BRIEF**

TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

Pursuant to Rules 240 and 263(b), SCACR, Respondent Palmetto Home Inspection Services, LLC respectfully moves this Court for an extension of time in which to file and serve its Final Brief

Joseph S McCue, Esquire, lead counsel for Respondent, has been on vacation with his family out of the country since June 15, 2011 Mr McCue is expected to return to the office on July 5, 2011 Counsel for Respondent received the Record on Appeal on June 17, 2011 The current deadline for Respondent to file its Final Brief is July 7, 2011 Therefore, Respondent

RECEIVED
JUN 29 2011
SOUTH CAROLINA
COURT OF APPEALS

7-6-11 1st
7-26-11

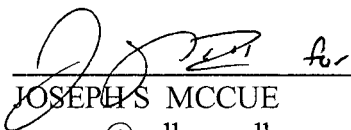
respectfully requests a twenty (20) day extension, which would place the new deadline at July 27, 2011

Counsel for Appellant has been consulted regarding this request for an extension and has consented to the same

Respectfully submitted

COLLINS & LACY, P C

By



JOSEPH S MCCUE
jmccue@collinsandlacy.com
LOGAN M WELLS
lwells@collinsandlacy.com
1330 Lady Street - Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
June 29, 2011

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

I hereby certify that I served Respondent's Motion for an Extension of Time to File Respondent's Final Brief upon counsel of record, by placing a copy in the United States mail, postage prepaid, to B Michael Brackett, Esquire, Post Office Box 100261, Columbia, South Carolina 29202, on June 29, 2011

[SIGNATURE PAGE TO FOLLOW]

RECEIVED

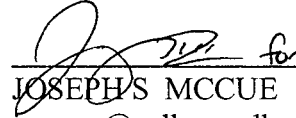
JUN 29 2011

SC Court of Appeals

Respectfully submitted

COLLINS & LACY, P C

By

A handwritten signature in black ink, appearing to read "Joseph S. McCue", is written over a horizontal line.

JOSEPH S MCCUE

jmccue@collinsandlacy.com

LOGAN M WELLS

lwells@collinsandlacy.com

1330 Lady Street - Suite 601 (29201)

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina

June 29, 2011



Logan M Wells | Direct Dial 864 282 9108 | E Mail lwells@collinsandlacy.com

June 29, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A
Bead, Deborah Appleton, Bob Capes Realty, Inc, Russell & Jeffcoat Realtors,
Inc and Palmetto Home Inspection Services, LLC
Civil Action No 07-CP-28-0288
Claim No 295-044423
C&L 1-1608

Dear Ms Gee

Please find enclosed for filing the original and eight (8) copies of Respondent's Motion for an Extension of Time to File Respondent's Final Brief in the above-referenced matter I am also enclosing a check in the amount of \$25 for the required filing fee Please return the clocked copy to me via my courier

By copy of this letter, I am serving a copy of same upon counsel for Appellant

With kind regards,

Sincerely,


Logan M Wells

LMW lcc
Enclosures

cc B Michael Brackett, Esquire

RECEIVED
JUN 29 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

B Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Mr Brackett

We have received the Record on Appeal in the above case. However, according to Rule 267 of the South Carolina Appellate Court Rules, all counsel of record shall be listed on the record.

Please arrange for a representative from your office to come to the Court of Appeals filing desk on the 1st floor of the Calhoun Building to place the appropriate labels on the cover of the original and all copies of the record to add Logan M Wells to the record.

We request that you have all corrections completed within ten (10) days of the date of this letter and that you notify this office when someone will be arriving to make the corrections so the documents will be available without delay.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/af

cc Joseph Scott McCue, Esquire
Logan M Wells, Esquire

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law.com

June 16, 2011

VIA HAND DELIVERY

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE Gladden v Boykin et al
07-CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

RECEIVED

JUN 16 2011

SC Court of Appeals

Dear Ms Gee

Enclosed for filing please find the original (unbound) and 14 bound copies of the Record on Appeal. By copy of this letter a copy of the Record on Appeal is being served by mail on Respondent's attorney, Joseph McCue. A certificate of service is enclosed confirming the service on Mr McCue.

Please allow my courier to return with a clocked copy of the Record on Appeal.

Very truly yours,



B Michael Brackett

BMB/Ita

Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

May 20, 2011

B Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Joseph Scott McCue, Esquire
Logan M Wells, Esquire
Collins & Lacy
P O Box 12487
Columbia, SC 29211

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

J MICHELLE CHILDS, CIRCUIT COURT JUDGE

Case No 2007-CP-28-0288

RECEIVED

MAY 19 2011

SC Court of Appeals

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC,

Defendants,

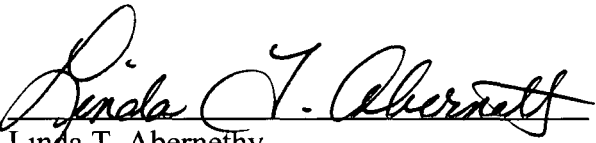
of whom Palmetto Home Inspection Services, LLC is

Respondent

CERTIFICATE OF SERVICE

I, Linda T Abernethy, Legal Assistant to B Michael Brackett, Esquire, attorney for the Appellants in the above-captioned matter, do hereby certify that I have served counsel for the Respondent, Palmetto Home Inspection Services, LLC, with a copy of Appellants' Initial Reply Brief by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 18th day of May, 2011, at the following address

Joseph S McCue, Esquire
P O Box 12487
Columbia, SC 29211
Attorney for Respondent


Linda T Abernethy

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

May 18, 2011

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RECEIVED
MAY 19 2011
SC Court of Appeals

RE Gladden v Boykin et al
07-CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

Dear Ms Gee

Enclosed for filing please find Appellants' Initial Reply Brief By copy of this letter, a copy of the enclosed Initial Reply Brief is being served on Respondent's Attorney, Joseph S McCue

Please return a clocked copy of the Initial Reply Brief using the envelope provided

Very truly yours,



B Michael Brackett

BMB/lta

Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire

The South Carolina Court of Appeals

Thomas W Gladden and Vera H
Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth Beard,
Deborah Appleton, Bob Capes Realty,
Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection
Services, LLC,

Defendants,

Of Whom Palmetto Home Inspections
Services, LLC is the,

Respondent

The Honorable Alison Renee Lee
Kershaw County
Trial Court Case No 2007-CP-28-00288

ORDER

For good cause having been shown, the time for the Appellants' Initial Reply Brief to be served and filed in the above entitled matter is hereby extended until May 18, 2011

IT IS SO ORDERED

V. Claire Allen, Deputy CLERK
For the Court

Columbia, South Carolina
cc B Michael Brackett, Esquire
Joseph Scott McCue, Esquire
Logan M Wells, Esquire

5/11/11 **FILED**

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

May 9, 2011

VIA HAND DELIVERY

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
MAY 09 2011
SC Court of Appeals

RE Gladden v Boykin et al
07-CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

Dear Ms Gee

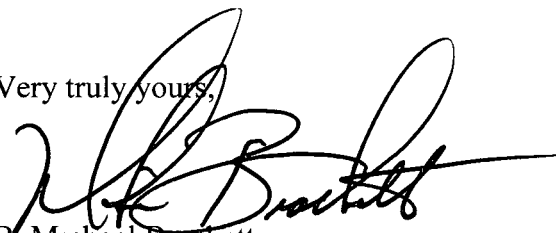
As attorney for Appellants, I hereby request an extension of 5 days for the filing and service of Appellants' Reply Brief. The requested extension would run through, and include, Friday, May 13.

I have spoken with opposing counsel, Joseph McCue, and he has no objection. I have not heretofore requested an extension with respect to submission of the Reply Brief.

Enclosed is my check in the amount of \$25.00 for the required motion fee.

Thank you for your attention to this matter.

Very truly yours,


B. Michael Brackett

BMB/lta
Enclosures

cc Mr. and Mrs. Tommy Gladden
Joseph S. McCue, Esquire
(Via fax 771-4484 and U.S. Mail)

5/9/11 1st 2nd
5/16/11

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

**RESPONDENT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following be included in the Record on Appeal

- 1 Order of May 4, 2010,
- 2 Complaint,
- 3 Answer of Palmetto Home Inspection Services, LLC,
- 4 Plaintiffs' Motion for Summary Judgment,
- 5 Plaintiffs' Memorandum in Support of Motion for Summary Judgment,
- 6 Defendant Palmetto Home Inspection Services, LLC's Motion for Summary Judgment,
- 7 Hearing Transcript of December 3, 2009,
- 8 Real Estate Inspection Contract, dated October 18, 2006,
- 9 Deposition Transcript Excerpts

Vera Gladden, Volume 1, 9 15-24 1, 30 11-22, 63 16-64 12, 66 2-16, 67 23-68 24,
72 14-76 17, 122 21-128 17, 130 12-131 3, 132 12-133 22,

Vera Gladden, Volume 2, 19 14-21 25, 87 22-24, 144 2-21, 145 9-14, 203 21-204 10,
206 13-207 4, 211 13-214 13,

J Scot Roberts 7 21-8 3, 15 10-20, 16 19-17 5, 17 10-16, 18 4-6, 18 18-20 19, 38 4-
39 13, and

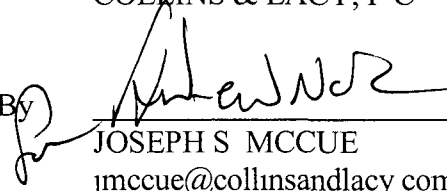
RECEIVED
APR 29 2011
SC COURT OF APPEALS

- Thomas Gladden, Volume 1, 37 2-42 6, 167 18-172 13, 238 4-18, 241 9-21,
- 10 Initial Offer Worksheet,
 - 11 Offer to Purchase,
 - 12 Real Estate Inspection Contract,
 - 13 Palmetto Invoice, dated October 18, 2006,
 - 14 Inspection Report, dated October 18, 2006,
 - 15 Home Inspection Repairs Request,
 - 16 CL-100, dated October 30, 2006,
 - 17 J Scot Roberts' Business Card,
 - 18 Eugene Haskins' Estimate, dated February 5, 2007

I certify that this designation contains no matter which is irrelevant to this appeal

Respectfully submitted

COLLINS & LACY, P C

By 
JOSEPH S MCCUE
jmccue@collinsandlacy.com
LOGAN M WELLS
lwells@collinsandlacy.com
1330 Lady Street - Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 29, 2011

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

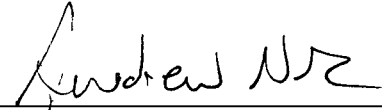
PROOF OF SERVICE

I hereby certify that I served Respondent's Designation of Matter to be Included in the Record on Appeal upon counsel of record, by placing a copy in the United States mail, postage prepaid, to B Michael Brackett, Esquire, Post Office Box 100261, Columbia, South Carolina 29202, on April 29, 2011

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted

COLLINS & LACY, P C

By 
 JOSEPH S MCCUE
jmccue@collinsandlacy.com
LOGAN M WELLS
lwells@collinsandlacy.com
1330 Lady Street - Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 29, 2011

**PROOF OF SERVICE – RESPONDENT’S
DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

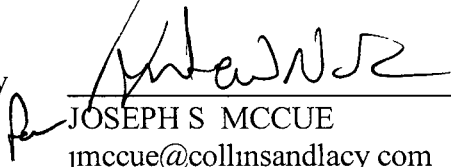
I hereby certify that I served Respondent's Initial Brief upon counsel of record, by placing a copy in the United States mail, postage prepaid, to B Michael Brackett, Esquire, Post Office Box 100261, Columbia, South Carolina 29202, on April 29, 2011

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted

COLLINS & LACY, P C

By


JOSEPH S MCCUE

jmccue@collinsandlacy.com

LOGAN M WELLS

lwells@collinsandlacy.com

1330 Lady Street - Suite 601 (29201)

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 29, 2011

**PROOF OF SERVICE – RESPONDENT’S
INITIAL BRIEF**



Joseph S McCue | Direct Dial 803 255 0412 | E Mail jmccue@collinsandlacy.com

April 29, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A
Bead, Deborah Appleton, Bob Capes Realty, Inc, Russell & Jeffcoat Realtors,
Inc and Palmetto Home Inspection Services, LLC
Civil Action No 07-CP-28-0288
Claim No 295-044423
C&L 1-1608

Dear Ms Gee

Please find enclosed for filing the original and one (1) copy of Respondent's Initial Brief
and Respondent's Designation of Matter for Inclusion in the Record on Appeal in the above case
Also, enclosed is the Proof of Service with regard to the service of each upon counsel Please
return a clocked copy of each to me via my courier

By copy of this letter, I am serving a copy of same upon all counsel

With warmest regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Joe McCue".

Joseph S McCue

JSM lcc
Enclosures
cc/enc B Michael Brackett, Esquire
David Hau
J Scot Roberts

RECEIVED

APR 29 2011

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

APPELLANTS' DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal

- 1 Order dated May 4, 2010,
- 2 Complaint,
- 3 PHI Answer,
- 4 Appellants' Motion for Summary Judgment,
- 5 Respondent's Motion for Summary Judgment,
- 6 Deposition transcript excerpts

RECEIVED
APR 04 2011
SC Court of Appeals

Appellant Vera Gladden

Vol 1

p 60, l 19 to p 64, l 5
p 62, l 14 to p 64, l 25
p 72, l 14 to p 74, l 10
p 79 to p 88, l 10
p 90, l 15-19
p 109-111
p 196, l 6 to p 197, l 16
p 203, l 11-15
p 206, l 13 to p 208, l 14
p 211, l 11 to p 215, l 25
p 122, l 23 to p 123, l 24
p 132, l 12 to p 147, l 7

Vol 2

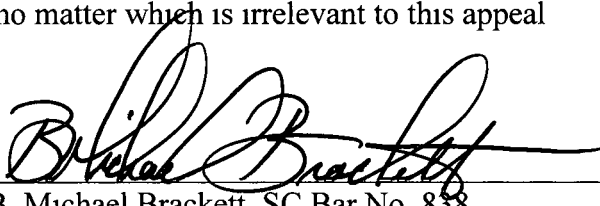
p 76, l 18-23
p 126, l 25 to p 129, l 7

Respondent (Scot Roberts)

p 5, l 3-17
p 6, l 10-16
p 7, l 5-12
p 7, l 21-25
p 15, l 10 to p 18, l 13
p 19, l 15 to p 20, l 19
p 22, l 1-3
p 23, l 2-5
p 25, l 8 to p 27, l 25
p 34, l 15 to p 35, l 10
p 36, l 19 to p 38, l 3

- 7 Offer to Purchase/Contract (Gladden/Boykin) dated October 12, 2006 (exhibit to Complaint),
- 8 Roberts' depo Ex 4 (PHI real estate inspection contract dated October 18, 2006),
- 9 Roberts depo Ex 2 (PHI Inspection Report to Appellants dated October 18, 2006),
- 10 Beard depo , Ex 2 (Seller condition disclosure statement),
- 11 Beard depo , Ex 4 (repair addendum),
- 12 VG depo , Ex 10 (CL-100),
- 13 Respondent depo Ex 5 (Respondent invoice with refund memo),
- 14 Respondent depo Ex 3 (Respondent's business card),
- 15 Gene Haskins depo Ex 1 (estimates for repairs of various conditions)

I certify that this designation contains no matter which is irrelevant to this appeal

A handwritten signature in black ink, appearing to read "Michael Brackett", is written over a horizontal line.

B Michael Brackett, SC Bar No 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellants

March 31, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 04 2011
SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

J MICHELLE CHILDS, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC,

Defendants,

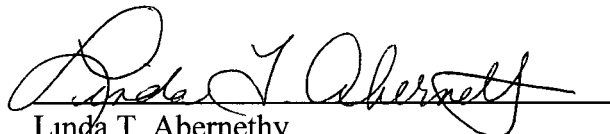
of whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

I, Linda T Abernethy, Legal Assistant to B Michael Brackett, Esquire, attorney for the Appellants in the above-captioned matter, do hereby certify that I have served counsel for the Respondent with a copy of **Appellants' Amended Initial Brief and Appellant's Amended Designation of Matter** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 31st day of March, 2011, at the following address

Joseph S. McCue, Esquire
P O Box 12487
Columbia, SC 29211
Attorney for Respondent



Linda T. Abernethy

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

March 31, 2011

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RECEIVED
APR 04 2011
SC Court of Appeals

RE Gladden v Boykin et al
07- CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

Dear Ms Gee

Pursuant to the Court's Order filed March 1, 2011, and your office's transmittal letter dated March 1, 2011, I enclose for filing the following

- 1) Appellants' Amended Initial Brief, and
- 2) Appellant's Amended Designation of Matter to be Included in the Record on Appeal

By copy of this letter, copies of these enclosures are being served on Respondent's attorney, Joseph S McCue Please return clocked copies using the envelope provided

Very truly yours,



B Michael Brackett

BMB/Ita
Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLLN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

March 1, 2011

Joseph Scott McCue, Esquire
Collins & Lacy, PC
P O Box 12487
Columbia, SC 29211

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Mr McCue

Enclosed is a copy of an Order of the Court regarding your Motion in the above case

Please be advised the Appellants' Amended Initial Brief and Designation of Matter must be served and filed no later than March 31, 2011

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/laf

cc B Michael Brackett, Esquire

The South Carolina Court of Appeals

Thomas W Gladden and Vera H
Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth Beard,
Deborah Appleton, Bob Capes Realty,
Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection
Services, LLC,

Defendants,

Of Whom Palmetto Home Inspections
Services, LLC are,

Respondents

The Honorable Alison Renee Lee
Kershaw County
Trial Court Case No 2007-CP-28-00288

ORDER

Respondents have moved to strike several items designated in Appellants' Designation of Matter and referenced in Appellants' Initial Brief After careful consideration of the motion and Appellants' return, we strike the following items from the Record on Appeal (1) ARM Environmental Services, Inc estimate produced during discovery as document "gg," (2) Deposition excerpts, Elizabeth Beard, p 34, ll 11-17, and (3) Nathan Knotts deposition, Ex 1 Appellants shall serve and file an amended initial brief, which excludes all references to the items, within twenty days Respondents shall file their initial brief within thirty days after Appellants serve their amended initial brief

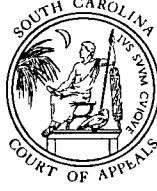
IT IS SO ORDERED

Jaqueline Cerezo A.J.

Columbia, South Carolina

cc B Michael Brackett, Esquire
Joseph Scott McCue, Esquire

3/1/11
FILED
~~WMA~~



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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www.sccourts.org

January 21, 2011

MEMORANDUM

To Tanya / Claire
From Laurie Field
Re Case No 2010-160789, Gladden, Thomas v Boykin, Olivia

Attached for your consideration Respondent's Motion to Strike and Hold deadlines in Abeyance
Return and Reply received

Please advise

To SA

1/24/11

Respondent moves to strike

- 1) ARM cost estimate — this was sent to trial ct the week after the summary judgment hearing (judge had asked during the hearing if there was anything else she needed to consider + mentioned in memo provided before the hearing)
- 2) Beard deposition excerpts + exhibits 2 + 4
excerpts referenced in memo (+ exhibits)
exhibits were part of another deposition transcript that was before the ct
- 3) Nathan Knots depo — Appellant concedes this should be stricken

Respondent argues - all materials relied on ~ 55 hearing must be filed Rule 56(c)

Appellant shall serve & file an amended designation & an amended initial brief excluding all references to the items stricken within 20 days

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

RECEIVED

JAN 21 2011

The Honorable Alison Renee Lee, Circuit Court Judge

SC Court of Appeals

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

**RESPONDENT'S REPLY IN SUPPORT OF MOTION TO STRIKE & HOLD
DEADLINES IN ABEYANCE**

Pursuant to Rule 240(f), SCACR, Respondent Palmetto Home Inspection Services, LLC ("Palmetto") files this reply in support of Respondent's Motion to Strike and Hold Deadlines in Abeyance

Appellants Thomas W Gladden and Vera H Gladden generally argue that the materials pertaining to Appellants' December 8, 2009, letter and Memorandum in Opposition to the other Defendants' Motions for Summary Judgment are properly included in their Designation of Matter, however, those materials were not on file at the time of the December 3, 2009, hearing. Accordingly, those materials do not form a part of the record on Palmetto's Motion for Summary

Judgment and should be stricken from Appellants' Designation of Matter See Rules 209(b), 210(c), SCACR

Rule 56(c), SCRCP requires "summary judgment motions and, inferentially, supporting materials to be on file when they are to be relied upon at a summary judgment motion hearing" Loyd's Inc v Good, 306 S C 450, 453, 412 S E 2d 441, 443 (Ct App 1991), see also S C R Civ P 26(g)(1) (providing that discovery materials must be filed with the court prior to use at a hearing), S C Civ P 30(f)(1) (providing that deposition transcripts must be filed with the court prior to use at a hearing) Thus, documents or materials merely identified in a party's memorandum or referred to at a hearing, but not filed with the court, do not form part of the record on summary judgment See, e.g., Cobb v Benjamin, 325 S C 573, 581 n 2, 482 S E 2d 589, 593 n 2 (Ct App 1997) (discussing motion to strike insurance policy from record on appeal which was granted by the South Carolina Supreme Court where at the hearing before the lower court counsel for the insurer depicted the relevant language in the policy, but the insurance policy was not filed with the court, and finding that "where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record"), Gilmore v Ivey, 290 S C 53, 348 S E 2d 180 (Ct App 1986) (finding depositions relied on by plaintiff were not filed or published and therefore not in the record, trial judge properly disregarded the testimony that plaintiff's counsel, during his argument, claimed was reflected by those depositions) The materials included in Appellants' Designation of Matter and pertaining to Appellants' December 8, 2009, letter and Memorandum in Opposition to the other Defendants' Motions for Summary Judgment were not on file at the time of the December 3, 2009, hearing See (Resp't's Mot to Strike at 4 (discussing the meaning of "on file" as used in Rule 56, SCRCP)) Accordingly,

despite Appellants' reference to those materials in their memoranda and in oral argument, the materials are not part of the record on Palmetto's Motion for Summary Judgment and are not properly included in Appellants' Designation of Matter

The documents at issue were not filed with the Court until after the December 3, 2009, hearing. However, the Court did not request the documents, (Ex D to Resp't's Mot to Strike at 27 9-28 4), and Appellants did not move for a continuance to permit additional argument or to supplement the record. See S C R Civ P 56(f). Thus, Appellants cannot meet the "on file" requirement of Rule 56, SCRCRCP by submitting documents to the Court following the hearing on summary judgment. See S C R Civ P 26(g)(1), 30(f)(1).

Appellants allege Palmetto failed to object to make a timely objection to the presentation of the challenged documents and materials. However, it is Appellants' late submission of those materials that deprived Palmetto of the opportunity to object. See Black v Lexington Sch Dist No 2, 327 S C 55, 60, 488 S E 2d 327, 329 (1997) (finding a court may refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response), Loyd's Inc, 306 S C at 453, 412 S E 2d at 443 (finding documents may be filed with trial court judge at the summary judgment hearing, rather than with the clerk of court prior to the hearing, only where their receipt does not prejudice the opposing party). Appellants cannot expect Palmetto to preemptively object to Appellants' unforeseen actions following a hearing. Indeed, as recognized in the cases cited by Appellants, objections must be made **at trial** or **at the hearing**. See, e.g., Catrett v Johns-Manville Sales Corp., 826 F 2d 33, 37 (2d Cir 1987) (discussing the consideration of documents which are arguably inadmissible at trial but presented for purposes of summary judgment where the defendant failed to object to the admissibility of document and the document at issue was "discussed in detail" **at the hearing** and "was handed

in open court to the District Judge”), Parr v Gaines, 309 S C 477, 481, 424 S E 2d 515, 518 (Ct App 1992) (“Although limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal”) ¹ Nonetheless, out of an abundance of caution, by letter dated December 9, 2009, Palmetto informed the Court of its objection to Appellants’ submission of materials attached to their December 8, 2009, letter (Ex F to Resp’t’s Mot to Strike, Palmetto’s Letter, Dec 9, 2009) Moreover, Palmetto specifically requested a hearing in the event the Court chose to consider those materials See (id.) The Court did not notice a hearing and there is no indication that Judge Lee considered the challenged materials and documents See (Ex G to Resp’t’s Mot to Strike, Order, May 4, 2010)

In short, documents and materials must be “on file” to be considered on summary judgment, general reference to the contents of those materials is insufficient Moreover, Appellants’ submissions subsequent to the hearing were made outside the record and without the permission of the Circuit Court The late submission of the challenged materials prejudiced Palmetto by depriving it of an adequate opportunity to respond Therefore, the following items do not form part of the record on Palmetto’s motion for summary judgment and should be stricken from Appellants’ Designation of Matter and all references thereto removed from Appellants’ Initial Brief

- ARM Environmental Services, Inc estimate produced during discovery as document “gg”,

¹ Palmetto notes that all of the cases cited by Appellants regarding timeliness of objections concern objections to the admissibility of the document itself and not whether the document was part of the record on summary judgment or on file at the time of the hearing on summary judgment See Catrett v Johns-Manville Sales Corp., 826 F 2d 33, 37 (2d Cir 1987), Auto Drive-Away Co., Inc. of Hialeah, Inc v I C C., 360 F 2d 446 (5th Cir 1966), Old S Life Ins Co v Bank of N C., 244 S E 2d 264 (N C App 1978), Parr v Gaines, 309 S C 477, 424 S E 2d 515 (Ct App 1992)

- Deposition transcript excerpts, Elizabeth Beard, p 34, ll 11-17, and
- Nathan Knotts depo Ex 1 (paid invoice for the pool house roof repair)

Additionally, the following items should be correctly designated in Appellants' Designation of Matter and correctly referenced in Appellants' Initial Brief

- Beard depo , Ex 2 (Seller condition disclosure statement), and
- Beard depo , Ex 4 (repair addendum)

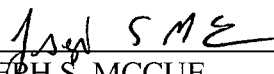
CONCLUSION

Appellants have included items in their Designation of Matter and Initial Brief that were not presented to the Circuit Court and do not form part of the record on Palmetto's summary judgment motion Pursuant to Rules 209(b) and 210(c), SCACR, Palmetto respectfully requests the above-listed items be stricken from the Record on Appeal and Appellants be ordered to revise their Initial Brief to omit all references to them Palmetto additionally requests the Court hold the briefing deadlines in abeyance during the pendency of this motion

Respectfully submitted

COLLINS & LACY, P C

By



 JOSEPH S MCCUE
 jmccue@collinsandlacy.com
 LOGAN M WELLS
 lwells@collinsandlacy.com
 1330 Lady Street - Suite 601 (29201)
 Post Office Box 12487
 Columbia, South Carolina 29211
 (803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
 January 21, 2011

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

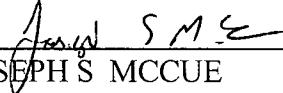
I hereby certify that I served Respondent's Reply in Support of Motion to Strike & Hold Deadlines in Abeyance upon counsel of record, by placing a copy in the United States mail, postage prepaid, to B Michael Brackett, Esquire, Post Office Box 100261, Columbia, South Carolina 29202, on January 21, 2011

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted

COLLINS & LACY, P C

By



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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
January 21, 2011

PROOF OF SERVICE – REPLY IN
SUPPORT OF MOTION TO STRIKE



Joseph S McCue | Direct Dial 803 255 0412 | E Mail jmccue@collinsandlacy.com

January 21, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A
Bead, Deborah Appleton, Bob Capes Realty, Inc, Russell & Jeffcoat Realtors,
Inc and Palmetto Home Inspection Services, LLC
Civil Action No 07-CP-28-0288
Claim No 295-044423
C&L 1-1608

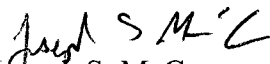
Dear Ms Gee

Please find enclosed for filing the original and eight (8) copies of Respondent's Reply In
Support of Motion to Strike & Hold Deadlines in Abeyance in the above-referenced matter
Please return the clocked copy to me via my courier

By copy of this letter, I am serving a copy of same upon all counsel

With warmest regards,

Sincerely,


Joseph S McCue

RECEIVED

JAN 21 2011

SC Court of Appeals

JSM lcc

Enclosures

cc/enc B Michael Brackett, Esquire

David Hau

J Scot Roberts

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

RECEIVED

JAN 18 2011

SC Court of Appeals

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

Appellants' Return to Respondent's Motion to Strike

Pursuant to Rule 240(e), SCACR, Appellants file this Return in opposition to the Respondent's Motion to Strike certain of Appellants' designations for the Record on Appeal

Background

Five summary judgment motions were scheduled to be heard on December 3, 2009 one summary judgment motion each by Defendants Boykin, Beard/Russell & Jeffcoat Realty and Appleton/Bob Capes Realty Plaintiffs and Defendant Palmetto Home Inspection had filed cross

motions for summary judgment The Court requested that briefs be filed prior to the hearing (Hearing transcript, p 4, l 4-10)¹ [Exhibit A] In response to the Court's request for briefs, on December 2, 2009 the undersigned emailed two memoranda of law to Judge Lee, copied to the other attorneys of record, including Mr McCue as attorney for the Respondent herein (Exhibit B is the transmittal email) The first Memorandum of Law (Memo no 1) had been filed and served with the Appellants' Motion for Summary Judgment in September 2008 (Exhibit B-1) The second Memorandum of Law (Memo no 2) [Exhibit B-2] was an updated, but incomplete, memorandum, as disclosed to the Judge in the transmittal email ² (Exhibit B)

At the conclusion of the December 3, 2009 hearing, the judge asked the undersigned "Mr Brackett, other than the deposition of Mr Roberts, is there other information I need to consider from your point of view, other than the case law, of course Are there any other factual issues I need to consider? Any other deposition excerpts or exhibits?" (Hearing transcript, p 27, l 9-13) [Exhibit C] The response to the Court was that " whatever I have cited in the – there may be some in the memorandum I filed yesterday or the day before makes [sic] reference to the general background facts " Respondent made no objection at the December 3, 2009 hearing to the Appellants' identification, orally and in Memo no 2, of cited discovery materials for the Court's consideration Respondent made no motion at the hearing, or thereafter, to suppress or to strike those materials from the court's consideration Memo no 2 clearly identified pretrial discovery as source materials

¹ The full hearing transcript is attached as Exhibit D to Respondent's Motion Only the cited pages are attached hereto

² Memo no 2 was captioned as "Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment Against Defendant PHIS, Inc [sic] " It addressed issues in all pending motions for summary judgment

for the summary judgment motions on the issue of Plaintiffs' damages (Memo no 2, p 4, sixth paragraph at Exhibit B-2)

On December 8, 2009, the undersigned followed up on the discovery materials referred to at the hearing and put before the Court in Memo no 2 (Exhibit D - transmittal email and attached cover letter) The ARM estimate document was included in this communication (Exhibit E)

Respondent emailed a letter to the Court, dated December 9, 2009, voicing an objection to Appellants' December 8 email and attachments/exhibits (Exhibit F to Respondent's motion) In its objection letter Respondent argued only that "these documents are not the proper evidence before the Court" because the damages reflected on the exhibits have not been shown to be "attributable to the inspection performed by Palmetto [the Respondent]," and that the issue of Appellants' alleged damages was not before the Court as a part of the summary judgment motions

In its Motion to Strike, Respondent appears to now advance three objections to the particular materials that Appellants have designated for the Record on Appeal (1) That Appellants' December 8, 2009 email/letter to the Court, with attachments, contained "unsolicited supplemental argument and attaching additional material that was not provided to the Court prior to or at the time of the hearing " (Respondent's Motion, p 2, l 14-15), (2) that "Appellants have included the following materials that were submitted to the Circuit Court only in opposition to the other Defendants' Motions " (Respondent's Motion, p 3, l 5-7), and (3) that the challenged materials "were not presented to the Circuit Court and do not form part of the record on Palmetto's summary judgment motion " (Respondent's Motion, p 6, l 12-14) These grounds were not made to or ruled upon by the trial court As addressed above, the only objections voiced to the trial court **at the time** were that "these documents are not the proper evidence before the Court" because the damages reflected on

the exhibits have not been shown to be “attributable to the inspection performed by Palmetto [the Respondent],” and that the issue of Appellants’ alleged damages was not before the Court as a part of the summary judgment motions (Respondent’s Motion, exhibit F)

1 **The ARM Environmental Services, Inc cost estimate produced in pretrial discovery as document “gg ”** This exhibit, as a pretrial discovery document, was identified in Appellants’ Memo no 2 as evidence for the court’s consideration

2 **Beard deposition transcript excerpts and Beard deposition exhibits 2 and 4** These materials were placed before the Court, by reference, in Appellants’ Memo no 2, delivered to the Court prior to the December 3, 2009 hearing, again without an objection from the Respondent at the hearing (Exhibit B-2) On page 3 of Memo no 2, in the section of the Memo addressing the evidence establishing the chronology of events, the Beard deposition excerpt from page 34 of the deposition transcript and the Beard deposition exhibit no 2 were identified and placed before the Court ³

On page 4 of Memo no 2, the first full paragraph, Beard deposition exhibit 4 was identified and placed before the Court ⁴

Additionally, Appellants agree that the Beard deposition exhibits 2 and 4 were also before the Court as part of Appellant Vera Gladden’s deposition transcript

³ The cited materials were described in Memo no 2 (Exhibit B-2) as follows “Seller’s condition disclosure statement dated Sept 16, 2006 was delivered to Plaintiffs prior to October 12, 2006,(Beard depo , exhibit 2, Beard depo , p 34, l 11-17),”

⁴ “Plaintiffs submitted [sic] a repair addendum to Boykin (seller) dated October 20, 2006, accepted by Boykin on October 24, 2006,(Beard depo , exhibit 4) ” (Exhibit B-2)

3 **Nathan Knotts deposition exhibit no 1** Appellants agree that this exhibit should be removed from Appellants' designation

Law

Even if the challenged documents/materials were not presented to the trial court in full compliance with the rules of civil procedure, a circumstance not admitted by the Appellants herein, they may be considered by the court in the absence of a timely objection from the Respondent Catrett v Johns-Manville Sales Corp , 826 F 2d 33 (2d Cir 1987), *cert den* 484 U S 1066 (at a summary judgment motion hearing otherwise inadmissible documents may be considered by the trial court if not challenged), Auto Drive-Away Co of Hialeah, Inc v I C C , 360 F 2d 446 (5th Cir 1966) (in the absence of a timely motion to strike or other objection, defects in materials placed before the court at a summary judgment hearing are waived), Old Southern Life Insurance Co v Bank of North Carolina, 244 S E 2d 264 (N C App 1978) (as is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection) Objections to evidence and arguments in the trial court must be objected to at the time it is offered or made or else the objection is waived for purposes of an appeal Parr v Gaines, 309 S C 477, 424 S E 2d 515 (Ct App 1992) In addition to raising the issue to the trial court, issue preservation requires that the trial court must also have ruled on the objection South Carolina Farm Bureau Mut Ins Co v S E C U R E Underwriters Risk Retention Group, 347 S C 333, 554 S E 2d 870 (Ct App 2001) (even if an issue is raised to the trial court, if the trial court does not rule on the issue, and the party does not file a motion to alter or amend, the issue is waived)

None of the objections now made by Respondent were made to the trial court during the December 3, 2009 hearing. There was no motion made by Respondent at any time, during or after the hearing, to suppress or to strike the materials delivered to the court that are now being challenged. The only objection made by Respondent was in the December 9, 2009 letter in which two objections (being different objections than are now being advanced) were stated (Respondent's Motion, exhibit F). The trial court did not rule on, or respond, to the Respondent's objections. Addressing the three objections now made by Respondent in its Motion to Strike, the first is that the December 8 email and attachments contained "unsolicited supplemental argument and attaching additional material that was not provided to the Court prior to or at the time of the hearing" (Respondent's Motion, p. 2, l. 14-15). This ground/argument was not made to the trial court, it is being made for the first time now in this appeal. Consequently, it is not a timely objection. FDIC v. Lauterbach, 626 F.2d 1327 (7th Cir. 1980) (court of appeals will not entertain, for the first time on appeal, an objection to summary judgment evidence considered by the trial court that was not objected to in the trial court), Michigan State Podiatry Ass'n v. Blue Cross & Blue Shield of Michigan, 681 F. Supp. 1239 (D.C. Mich. 1987) (objections to supplementary materials submitted to the trial court after the summary judgment hearing were waived because the objections were not raised until after the summary judgment was granted).⁵

The second ground now advanced by Respondent, that "Appellants have included the following materials that were submitted to the Circuit Court only in opposition to the other Defendants' Motions," is likewise without merit for two reasons. First, this ground/argument was

⁵ The same situation now existing, the particulars grounds now being advanced after the summary judgment order has been issued were not made to the trial court.

not presented to the trial court, was therefore waived, and is now untimely presented, and second, Appellants' Memo no 2 to the trial court clearly linked the discovery materials identified therein to **all** of the pending summary judgment motions ⁶

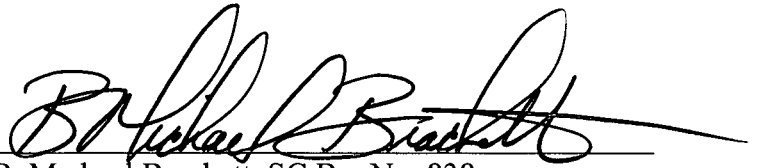
The third ground, that the challenged materials "were not presented to the Circuit Court and do not form part of the record on Palmetto's summary judgment motion," questions the mode of presentment of the materials to the trial court. Again, this ground/argument was not made to the trial court, and is being made for the first time now in this appeal. This ground has been waived. FDIC v Lauterbach, supra, Michigan State Podiatry Ass'n v Blue Cross & Blue Shield of Michigan, supra. If it found to have been raised to the trial court, it was not ruled upon, and no Rule 59(e) motion was filed. South Carolina Farm Bureau Mut Ins Co v S E C U R E Underwriters Risk Retention Group, supra

Conclusion

With respect to the ARM estimate and the Beard deposition excerpt and exhibits, Respondent's motion should be denied. With respect to the Knotts deposition exhibit no 1, the motion should be granted.

Appellants request a reasonable time to file and serve an amended designation and an amended initial brief from which references to the Knotts deposition exhibit no 1 will be removed.

⁶ See footnote 2 above

A handwritten signature in black ink, appearing to read "B. Michael Brackett", written over a horizontal line.

B Michael Brackett, SC Bar No 838

Moses Koon & Brackett, PC

1333 Main Street, Suite 650

Post Office Box 100261

Columbia, South Carolina 29202-3261

(803) 461-2312

Attorney for Appellants

January 14, 2011

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) FIFTH JUDICIAL CIRCUIT
2007-CP-28-0288

THOMAS W GLADDEN AND VERA)
GLADDEN,)

PLAINTIFFS,)

VS)

TRANSCRIPT OF RECORD

OLIVIA M BOYKIN, ELIZABETH A)
BEARD, DEBORAH APPLETON, BOB)
CAPES REALTY, INC , RUSSELL)
AND JEFFCOAT REALTY, INC , AND)
PALMETTO HOMES INSPECTION)
SERVICES, LLC,)

DEFENDANTS)

DECEMBER 3, 2009
COLUMBIA, SOUTH CAROLINA

B E F O R E

THE HONORABLE ALISON RENEE LEE, JUDGE

A P P E A R A N C E S

B MICHAEL BRACKETT, ESQUIRE
ATTORNEY FOR THE PLAINTIFFS

JOSEPH S McCUE, ESQUIRE
ATTORNEY FOR DEFENDANT PALMETTO HOME INSPECTION

CATHARINE H GARBEE GRIFFIN, ESQUIRE
ATTORNEY FOR DEFENDANTS APPLETON, BOB CAPES REALTY

WILLIAM JONATHAN HARLING, ESQUIRE
ATTORNEY FOR DEFENDANTS BEARD, RUSSELL AND JEFFCOAT

WILLIAM S TETTERTON, ESQUIRE
ATTORNEY FOR DEFENDANT BOYKIN

ELIZABETH B HARRIS, CVR
CIRCUIT COURT REPORTER



1 Brackett's motion for partial summary judgment on a legal
2 liability issue, and Palmetto Homes' motion for summary
3 judgment

4 And those two, from what I could tell by reading the
5 documents, seen to be related in issue, and I figure it
6 made more sense to do those And to the extent that my
7 office called and asked that you all send briefs, I
8 appreciate the fact that you sent them as quickly as you
9 did It was only after I realized that none of them had
10 been heard that I had to whittle them down

11 I have asked both -- I've notified Ms McDonald over
12 in Kershaw because I know because of the budget nobody's
13 travelling over there And I know that Judge Cooper has
14 recused himself, so that means anybody who hears this case
15 from this circuit is going -- you either have to come over
16 here, or some point the court, the Supreme Court will have
17 to allow a judge to travel to Kershaw

18 So, I have notified her that I could not get all the
19 motions heard I've notified our clerk's office, because
20 they'll have to coordinate with scheduling, that I could
21 not hear all of them

22 There is a term in January the 11th, and I've asked
23 them to try to schedule that then I suspect, and I know I
24 shouldn't say it out loud I suspect that if it's not
25 heard that week, it will fall to me the following week

EXHIBIT B

Mike Brackett

From Mike Brackett
Sent Wednesday, December 02, 2009 5:02 PM
To aleelc@sccourts.org
Cc Jonathan Harling; Griffin, Catharine G.; Joey McCue; wstmail@bellsouth.net
Subject Gladden v. Boykin summary judgment motions
Attachments B Michael Brackett vcf; memo of law re unconscionability and public policy.pdf; PGS 1-8 MEMO OF LAW.doc

Ms. Clemens,

You asked that I email to you that portion of my memorandum that addresses my clients' motion for summary judgment. The balance of the memorandum is not yet finished because I have not received all submissions by the defendants in support of their motions.

Attached are the following:

The memo of law I filed with my motion,

That portion of my memo of law (pages 1-8) that speaks to the limit of liability issue.

I am copying the other attorneys on this email. Thank you.

B. Michael Mike Brackett
Moses Koon & Brackett, P.C.
Post Office Box 100261
1333 Main Street, Suite 650
Columbia, SC 29202-3261
803.461.2312 (direct dial)
803.461.2309 (fax)



**MOSES
KOON &
BRACKETT, PC**

Confidentiality Notice: This message (including any attachments) is intended exclusively for the individual or entity to which it is addressed. This message may contain information that is legally privileged, confidential, or otherwise exempt from disclosure. If you are not the intended recipient, please note that any use, dissemination, distribution, or copying of this message is strictly prohibited and may be unlawful. Please notify the sender immediately by return email and delete all copies of this message.

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EXHIBIT B-1

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
07-CP-28-288

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

Olivia M Boykin, Elizabeth A
Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell &
Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

Defendants

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT ON THE
UNENFORCEABILITY OF PHIS'S
LIMIT OF LIABILITY PROVISION

ISSUE PRESENTED

May the Defendant Palmetto Home Inspection Services LLC, a professional home inspector, limit its liability to its client- home buyer, the Plaintiffs, by the inclusion of a "limit of liability" provision in its pre-printed adhesion contract? Plaintiffs' contention that the limit of liability provision at issue is unenforceable because it is unconscionable and, alternatively, because it violates public policy, is supported by the authorities cited hereinbelow

FACTS

(Citations are to Defendant PHIS's deposition testimony given by Scot Roberts)

Defendant Palmetto Home Inspection Services, LLC seeks to enforce a limitation of liability provision in its contract with its clients, the Plaintiffs. The provision at issue reads

LIMIT OF LIABILITY It is understood and agreed that should PHIS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract or otherwise, the liability of PHIS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report (Deposition Exhibit 4)

Other relevant facts include

- Plaintiffs were under contract to pay \$495,000 for a house which they eventually purchased, in significant part on reliance of PHIS's inspection report,
- Defendant PHIS held itself out to the Plaintiffs, and to the public in general, as a professional service (Deposition Exhibit 3, p 20, line 20 to p 24, line 7),
- PHIS held itself out as being "licensed-bonded- insured (Deposition Exhibit 3, p 20, line 20 to p 24, line 7)," and having 30+ years of experience (Deposition Exhibit 3, p 20, line 20 to p 24, line 7),
- its contract with the Plaintiffs was presented to Plaintiffs and signed after the inspection had been made (p 34, lines 15-20),
- the contract itself was a pre-printed form with blanks to be filled in - it was not prepared specifically for the Plaintiffs (p 25, line 8 to p 26, line 12),
- if Plaintiffs had not signed the contract as presented, PHIS would not have delivered the inspection report, meaning the contract was a take-it-or-leave-it contract (p 34, line 15 to p 35, line 10),
- the limit of liability provision was not conspicuously set out in the agreement (Deposition Exhibit 4),
- home inspectors, including PHIS, are subject to licensure and regulation by the state¹ (p 21,

¹ S C Code Ann §40-59-500 (Supp 2007) and S C Code Ann Regs 106-4 (Supp 2007)

lines 13-25)

- Plaintiffs purchased a house for \$495,000, have alleged damages in excess of \$150,000, at least \$54,000 of which is alleged to be PHIS's responsibility, for which defendant PHIS claims its liability is limited to the return of the \$475 fee paid by Plaintiffs for the inspection and report (p 37, line 10 to p 39, line 3, deposition exhibit 5)

LAW

Plaintiffs contend that the limit of liability provision is unenforceable because it is unconscionable and because it is in violation of public policy

1 General Contract Law

In South Carolina, the law generally provides that contracts will be enforced as written and that it is not the function of the courts to rewrite contracts for the parties Ellis v Taylor, 449 S E 2d 447 (S C 1994), Somerset v Reyner, 104 S E 2d 344 (S C 1958) However, if a court finds any provision of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause or so limit its application so as to avoid any unconscionable result Simpson v MSA of Myrtle Beach, 644 S E 2d 663 (S C 2007) And, it is the general rule in South Carolina that courts will not enforce a contract which is violative of public policy Id

2 Unconscionability

There is no South Carolina appellate court opinion addressing the issue of the unconscionability of a "limit of liability" provision in a home inspection contract There are cases on point from other jurisdictions that will be examined below In Simpson v MSA of Myrtle

Beach, supra unconscionability in relation to an arbitration provision was reviewed “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them ” Id , Fanning v Fritz’s Pontiac-Cadillac-Buick, 472 S E 2d 242 (S C 1996) ²

With respect to the absence of meaningful choice, factors to consider are

- the nature of the injuries suffered by the Plaintiffs,
- whether the Plaintiffs are a substantial business concern,
- the relative disparity in the parties’ bargaining power,
- the parties’ relative sophistication,
- whether there is an element of surprise in the inclusion of the challenged clause,
- the conspicuousness of the clause Simpson, supra

To begin, the court should determine if the contract is an adhesion contract, recognizing, however, that adhesion contracts are not per se unconscionable Id An adhesion contract is a standard form contract offered on a ‘ take-it-or-leave-it ’ basis with terms that are not negotiable Id By this definition, the contract herein was an adhesion contract (p 25, line 8 to p 26, line 12, p 34, line 15 to p 35, line 10)

_____With respect to oppressive and one-sided terms, Simpson is the only South Carolina opinion which specifically addresses substantive “oppressiveness” in terms of unconscionability, and it primarily concentrates on an arbitration provision’s denial of statutory remedies It has little, if any, application to a limit of liability provision in a home inspection contract Other jurisdictions have

² S C Code Ann §36-2-302 contains statutory unconscionability considerations in the context of a contract for the sale of goods There is no reason why the same policies and principles of law cannot apply to a contract for the sale of services

addressed this issue, and those cases are examined below

3 Public Policy

As stated above, it is the general rule in South Carolina that courts will not enforce a contract which is violative of public policy Simpson, supra. Public policy is broadly defined as the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society Black's Law Dictionary 1245 (7th ed 1999). It is more narrowly defined as the principle that a person should not be allowed to do anything that would tend to injure the public at large Id “ for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions ” Brown v Drake, 270 S E 2d 130 (S C 1980)

4 Other Jurisdictions

Application of unconscionability and public policy principles to limit of liability provisions in home inspection contracts is fully and persuasively demonstrated in Lucier v Williams, 841 A 2d 907 (N J Super 2004) and in Pitts v Watkins, 905 So 2d 553 (Miss 2005)

In Lucier, the trial court granted partial summary judgment to the home inspector, thereby limiting the homeowners to a recovery of one-half of the fee paid to the home inspection service, namely \$192.50 (as specified in the contract), notwithstanding that the landowners were claiming repair damages of \$8,000 to \$10,000. The appellate court reversed the trial court after concluding that the limitation of liability provision in the home inspection service contract was unconscionable and violated public policy. The Court's conclusion was based on

- (1) it was an adhesion contract,
- (2) the parties, a professional expert and a consumer, had grossly unequal bargaining status,
- (3) the substance of the limit of liability provision “eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional’s negligence ”

With respect to unconscionability, the Court noted that the contract was a classic contract of adhesion, presented on a standardized pre-printed form, on a take-it-or-leave-it basis, without opportunity for negotiation or modification of terms

The inspector was an experienced professional The homeowner was unsophisticated in matters of home construction and placed his trust in the expert

The Court further noted that to “foist” a contract of this type on an inexperienced consumer demonstrates a lack of fair dealing by the professional The cost of a home is substantial, and is commonly a major financial undertaking Home inspectors conduct a volume business, and possess knowledge of the cost of repairing major defects Discovery of such defects so that necessary repairs can be factored into the consumer’s decision about buying a home is a major selling point of the inspector’s services If the only consequence to the inspector for professional dereliction is the refund of a few hundred dollars, “there is no meaningful incentive to act diligently in the performance of home inspection contracts ” The excessively restricted damages provided by the limit of liability provision is grossly disproportionate to the potential loss to the home buyer if a substantial defect is negligently overlooked To cap the inspector’s exposure to such a small amount effectively immunizes the inspector from the consequence of his negligence and is tantamount to an exculpation clause

With respect to public policy, the Lucier opinion also found that the limit of liability clause violated public policy because

(1) it allows the home inspector to circumvent the state's public policy of holding professional service providers to certain industry standards,

(2) exculpation provisions are antithetical to the relationship of a client with a professional service provider, and

(3) home inspectors are licensed and regulated by the State in the interest of protecting the home-buying public, and this protection cannot be contracted away Id

In Pitts v Watkins, 905 So 2d 553 (Miss 2005) the Mississippi Supreme Court reversed the trial court's grant of summary judgment in favor of the home inspector by holding that substantive unconscionability existed with respect to a limit of liability provision in the home inspection contract. Substantive unconscionability is proved by showing that the terms of the contract are oppressive. Id. The Court in Pitts was influenced in its decision by (1) the role of the inspection report in the customer's decision to invest "thousands of dollars" in the purchase of a house, (2) the limit of liability provision "would allow home inspectors to walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct" (stated otherwise, it amounted to an exculpation clause), (3) the great disparity between the amount of alleged damages suffered by the client and the nominal amount of damages provided for in the limit of liability provision, and (4) the fact that it limits the amount of compensatory damages recoverable but absolutely precludes the client's ability to recover punitive damages if the facts warrant such an award.

5 Exculpation Clauses

The Lucier and Pitts opinions found that the limitation of liability provisions at issue therein effectively immunized the inspector from the consequences of his own negligence and was therefore “tantamount to an exculpation clause” and should be reviewed by employing the same policy considerations governing outright exculpation provisions Id

Contracts that seek to exculpate a party from liability for the party’s own negligence are not favored by the law and are strictly construed against the party relying thereon McCune v Myrtle Beach Indoor, 612 S E 2d 462 (S C App 2005) An exculpatory clause will never be construed to exempt a party from liability for his own negligence in the absence of explicit language clearly indicating that such was the intent of the parties Id South Carolina appellate courts have addressed exculpation clauses in agreements not involving professional services, but have not addressed the enforceability of exculpation provisions in professional service contracts Other jurisdictions have

The enforceability of an exculpation clause depends in part on the nature of the contract Courts will more readily enforce exculpation clauses in contracts involving customary transactions in the market place South Carolina has enforced such provisions in agreements not involving professional services See McCune, supra and cases cited therein However, in Olsen v Molzen, 558 S W 2d 429 (Tenn 1977), the Tennessee Supreme Court acknowledged the different standards governing contracts involving professional services, as contrasted with a contract with a tradesman, and concluded that a stricter standard is called for contracts “involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state” Id Cases following Olsen have held that it is not necessary that all six criteria be present for an exculpation clause to be found unenforceable, Russell v Bray, 116 S W 3d 1 (Tenn App 2003)

Olsen adopted the criteria laid down in the seminal case on the subject, Tunkl v Regents of University of California, 383 P 2d 441 (Cal 1963) which held an exculpation clause or “release from future liability” clause invalid. Olsen and Tunkl considered the following characteristics of the contract as controlling

- it concerns a business of a type generally thought suitable for public regulation,
- the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public,
- the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards,
- in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services,
- in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence,
- as a result of the transaction, the person is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents

Application of these factors to the contract herein leads to the inescapable conclusion that the limit of liability provision is tantamount to an unenforceable exculpation clause

CONCLUSION

For the reasons set out above, the limit of liability provision in Defendant Palmetto Home Inspection Services LLC's contract is unenforceable and of no effect in this case

Columbia, South Carolina
September , 2008

B Michael Brackett, Esquire
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(803) 461-2312
Attorney for Plaintiffs

EXHIBIT B-2

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

07-CP-28-288

Thomas W Gladden and
Vera H Gladden,

Plaintiffs,

v

Olivia M Boykin, Elizabeth A
Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell &
Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services,
LLC ,

Defendants

Plaintiffs' Memorandum of Law in
Opposition to Defendants' Motions for
Summary Judgment and in Support of
Plaintiffs' Motion for Summary Judgment
Against Defendant PHIS, Inc

Summary Judgment Standard

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law Rule 56, SCRPC, Osborne v Adams, 550 S E 2d 319 (S C 2001), South Carolina Elec & Gas v Town of Awendaw, 570 S E 2d 542 (S C App 2002) In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party Osborne v Adams, *supra*, Cunningham v Helping Hands, Inc., 575 S E 2d 549 (S C 2003), Faile v South Carolina Dep't of Juvenile Justice, 566 S E 2d 536 (S C 2002) Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party Watters v Terminix, 658 S E 2d 110 (S C App 2008) Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be

improperly deprived of a trial of the disputed factual issues Thomas Sand Co v Colonial Pipeline Co, 563 S E 2d 109 (S C App 2002), Fleming v Rose, 526 S E 2d 732 (S C App 2000) Summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from such facts Wade v Berkeley County, 498 S E 2d 684 (S C App 1998)

A fact is material if it is “outcome determinative” under the applicable law, that is, if its existence in a case will have some impact in deciding the facts of the case Big O Tire Dealers, Inc v Big O Warehouse, 741 F 2d 160 (7th Cir 1984), PPG Indus V Orangeburg Paint & Decorating Center, 375 S E 2d 331, 332 (S C App 1988) When the facts, and all reasonable inferences to be drawn from the underlying facts, are viewed in a light most favorable to the non-moving party, and the record nevertheless reveals that the opposing party would not prevail under any discernable circumstances, summary judgment is appropriate Kreuzer v American Academy of Periodontology, 735 F 2d 1479 (D C Cir 1984)

Nature of the Case¹

Plaintiffs purchased a house from Defendant Boykin Defendants Beard and Russell & Jeffcoat Realtors, Inc were the realtor-agents of Boykin (seller) Defendants Appleton and Bob Capes Realty, Inc were the realtor-agents for Plaintiffs (buyers) Defendant Palmetto Home Inspection Services, LLC was hired by Plaintiffs to inspect and report on the condition of the

¹ Much pretrial discovery has occurred Citations to evidence are not intended to be exhaustive but rather sufficient to demonstrate the existence of evidence of material facts and reasonable inferences that support Plaintiffs’ causes of action

seller's house After the closing of the transaction between Plaintiffs and Defendant Boykin, numerous and serious problems were discovered that had not been disclosed on the seller's disclosure form or in the inspector's report When none of the Defendants made any serious effort to remedy the discovered problems, this action followed

There is evidence, as cited, supporting the following chronology

Plaintiffs knew a realtor acquaintance who, in the summer of 2006, helped with the search for a home (VG depo p 60, l 19 to p 64, l 5),²

Plaintiffs had their first conversation with Defendant Appleton in late August 2006 (VG depo p 62, l 14 to p 64, l 25),

Plaintiffs first met Defendant Boykin (seller) in late August or early September 2006 (VG depo p 72, l 14 to p 74, l 10),

1st walk-through of Seller's house (maybe 20 minutes),(VG depo , p 79-83)

2d walk-through the next weekend (maybe 20 minutes),(VG depo , p 84-87)

Seller's condition disclosure statement dated Sept 16, 2006 was delivered to Plaintiffs prior to October 12, 2006,(Beard depo , exhibit 2, Beard depo , p 34, l 11-17),

Conditions later discovered that were either not disclosed or were misrepresented in seller's disclosure statement

mold,(Beard depo , exhibit 2, VG depo , exhibit 6, VG depo , p 196)

condition/age of hvac,(Beard depo , exhibit 2, VG depo , exhibit 6 and p 211-215)

Contract signed October 12, 2006 (including right to inspect),(Boykin depo , exhibit 2),

Plaintiff Vera Gladden had walk-through with her sister on or about October 17, 2006,

Inspection was made by Defendant PHIS, LLC, and report provided, on October 18, 2006,

no mention that mold, or even that what might be mold, was observed,

² "VG" refers to Plaintiff Vera Gladden

no problem noted about hvac,(VG depo , exhibit 6),

Plaintiffs submitted a repair addendum to Boykin (seller) dated October 20, 2006, accepted by Boykin on October 24, 2006,(Beard depo , exhibit 4)

Plaintiff Vera Gladden visited the house to look at items of personal property Defendant Boykin was going to sell,(VG depo , p 109-111),

Plaintiff Vera Gladden and Appleton had walk-through on Nov 21, 2006 (spoke with Defendant Boykin's contractor Grecheski),(VG depo , p 122 and Vol II, p 126-128),

Closing occurred on November 22, 2006 (saw CL-100 for the first time), the CL-100 disclosed existing water damage,(VG depo , exhibit 10 and p 122-123),

After moving into the home on or about November 25, 2006, the conditions at issue were discovered and notice was immediately given to Defendant Boykin (the seller) and to her agents (Defendants Beard and Russell & Jeffcoat Realtors, Inc),(VG depo , p 132-147),

Defendants' failure to remedy the conditions and breaches resulted in the commencement of this action on March 26, 2007 (Complaint)

Evidence produced during pretrial discovery would support the claim that Plaintiffs suffered damages well in excess of \$160,000 (documents produced by Plaintiffs to Defendants in discovery)

Causes of Action

As to Defendants Boykin (Seller) and her realtor agents (Defendants Beard and Russell & Jeffcoat Realtors, Inc) the following causes of action are directed against them

- 1st Actual and Constructive Fraud for failure to disclose mold and mildew,
- 2nd Negligent Misrepresentation with respect to presence of mold and mildew,
- 4th Actual and Constructive Fraud for misleading disclosure with respect to HVAC,
- 5th Negligent Misrepresentation with respect to disclosures about HVAC,
- 6th Actual and Constructive Fraud for representations made about CL 100 repairs,
- 7th Negligent Misrepresentation with respect to representations made about CL 100 repairs,

8th Actual and Constructive Fraud for representations made about Addendum Items repairs,

9th (misnumbered in Complaint as 7th) Negligent Misrepresentation with respect to Addendum Items repairs

As to Defendants Appleton and Bob Capes Realty, Inc (Plaintiffs'/Buyers' realtor agents)

10th (misnumbered in complaint as 8th) Negligence in performance of agent duties owed to Plaintiffs,

As to Defendant Palmetto Home Inspection Services, LLC (Plaintiffs' contractual home inspector

3rd Breach of Contract for failure to conduct proper inspection and failure to report serious problems and deficiencies with the property

Pending Motions for Summary Judgment

(Analysis and Arguments follow in the next section of the Memo of Law)

1 Plaintiffs and Defendant Palmetto Home Inspection Services, LLC have cross motions for

summary judgment, each directed at the enforceability of a limit of liability provision in their written contract Plaintiff Motion is dated June 18, 2008 and Defendant Palmetto's Motion is dated September 4, 2008 Defendant Palmetto seeks a summary judgment to the effect that the contract limits Palmetto's liability to a refund of the \$475 fee paid by Plaintiffs for the inspection and report Plaintiffs' motion for summary judgment seeks judgment as a matter of law that the limit of liability provision is unenforceable because the provision is both unconscionable and violates public policy

Plaintiffs have filed a separate Memorandum of Law with respect to their motion, and it is incorporated herein by reference

2 Defendants Appleton's and Bob Capes Realty, Inc 's (Plaintiffs'/Buyers' realtor agents)

Motion for Summary Judgment, dated September 11, 2008, seeks judgment as a matter of law on the grounds that

- no evidence that Appleton knew or should have known of a material fact and failed to disclose it to her principals,
- no evidence that Appleton knew or should have known of a latent condition in the house and failed to disclose it to her principals,
- no duty for a real estate agent to discover and disclose latent defects in a home,
- no duty for a real estate agent to inspect the condition of a property and its improvements,
- no evidence that Appleton made a representation to the Plaintiffs that was false,
- no evidence of justifiable reliance by Plaintiffs on any representation made by Appleton,
- real estate agents for buyers are not liable to their principals if a seller provides a disclosure form that itself contains incomplete or misleading information,
- no evidence of damages proximately caused by conduct of Appleton

3 Defendants Beard's and Russell & Jeffcoat Realtors, Inc 's (Sellers' realtor agents)

Motion

for Summary Judgment, dated September 12, 2008, seeks judgment as a matter of law on the grounds that

- no evidence that they engaged in fraud or negligent misrepresentation with respect to presence of mold or mildew,
- no evidence that they engaged in fraud or negligent misrepresentation with respect to the CL 100 repairs,
- no evidence that they engaged in fraud or negligent misrepresentation with respect to the condition of HVAC units,
- no evidence that they engaged in fraud or negligent misrepresentation with respect to repair addendum repairs,
- no evidence that plaintiffs relied on representations made by Beard and Russell & Jeffcoat Realtors, Inc ,
- no evidence of damages proximately caused by conduct of Beard,
- Section 40-57-137(f),
- Section 27-50-70(B),
- Section 27-50-80,
- Section 40-57-137

4 Defendant Boykin's (the Seller) Motion for Summary Judgment, dated September 12, 2008,

seeks judgment as a matter of law on the grounds that

- the Plaintiffs closed on the property purchase with knowledge, or the opportunity of knowing, of previously undisclosed and unrepaired defects,
- Plaintiffs agreed to escrow sums at closing to complete any repairs that were

needed

Arguments

1 Re Defendant Palmetto As to the cross motions for summary judgment filed by
Plaintiffs

and Defendant Palmetto, Plaintiffs adopt and incorporate by reference their separately filed Memorandum of Law dated June 18, 2008 (copy attached hereto)

The question of whether a limit of liability provision in a professional service contract is unenforceable as being unconscionable or being in violation of public policy is a novel question in South Carolina law. Although all issues of novel impression do not require a trial, summary judgment is inappropriate where further inquiry into the facts is desirable to clarify application of the law. Shadwell v Craige, 605 SE 2d 567 (S C App 2004)

The South Carolina cases cited in Defendant Palmetto's Memo of Law do not address limit of liability or exculpation clauses in the context of a professional service contract, they speak to such provisions appearing in general, commercial transaction contracts. Pride v Southern Bell, 138 SE 2d 144 (SC 1964)(yellow page advertisements), McCune v Myrtle Beach Indoor Shooting Range, 612 SE 2d 462(S C App 2005)(paint ball entertainment)

Defendant Palmetto cites Baker v Roy Haas Associates, 629 A 2d 1317 (Md App 1993) as authority for in support of enforcing a limit of liability provision in a home inspection contract, The Baker case makes no mention of home inspectors in Maryland being licensed and regulated by the State, which is relevant to the public policy argument made by Plaintiffs herein

Likewise, with regard to the two New York opinions cited by Defendant Palmetto, those

opinions did not analyze the home inspection agreements in the context of home inspectors being licensed and regulated by the State and thereby being subject to public policy considerations

2 Re Defendants Appleton and Bob Capes Realty, Inc (Plaintiffs'/Buyers' realtor agents)

As of the writing of this memo or law, the undersigned has not received a memo or written argument from Appleton/Bob Capes. Plaintiffs reserve the right to respond to whatever may be submitted by those Defendants. Only one cause of action is directed to these Defendants, and it

EXHIBIT C

1 Now, the law that governs these kinds of cases are
2 found, that law is found and fully analyzed in *Pitts* and
3 *Lucier* Those courts went over it item by item
4 unconscionability, violation of public policy And
5 basically it's a homeowner who gets stuck in a situation
6 like this and has suffered 70, \$80,000 worth of damages
7 Should not be limited to \$475 when it turns out that the
8 inspector just did a lousy job

9 THE COURT Mr Brackett, besides the deposition of
10 Mr Roberts, is there other information I need to consider
11 from your point of view, other than the case law, of
12 course Are there any other factual issues I need to
13 consider? Any other deposition excerpts or exhibits?

14 MR BRACKETT I won't -- whatever I have cited in the
15 -- there may be some in the memorandum I filed yesterday or
16 the day before makes reference to the general background
17 facts Makes reference to testimony in Ms Gladden's
18 deposition I'll be happy -- that deposition is three
19 volumes, and it's, you know, a couple thousand pages long
20 It's pretty, pretty long I'll be happy to try to pull out
21 the, the particular pages and get that to you

22 But most, most of my argument, Your Honor, rests with
23 -- on the admissions, quite frankly, of Mr Roberts

24 THE COURT Okay

25 MR BRACKETT In his deposition

EXHIBIT D

Mike Brackett

From Mike Brackett
Sent Tuesday, December 08, 2009 2:57 PM
To aleesc@sccourts.org; aleelc@sccourts.org
Cc vgladden@bellsouth.net; Jonathan Harling; wstmail@bellsouth.net; Griffin, Catharine G.; Joey McCue
Subject Gladden v. Boykin et al. 07-CP 28-288
Attachments B Michael Brackett vcf; Judge Lee 12 08 09 pdf; Inspection Items pdf; Vera Depo Exhibit 37 pdf; Haskins depo #1 page 3 pdf; Haskins depo #1 page 4 pdf; Haskins depo #1 page 5 pdf; Haskins depo #1 page 6 pdf; ARM Estimated Cost 3 8 06 pdf; Vera Depo Exhibit 32 pdf

Judge Lee,

Please see my attached letter and exhibits. Thank you.

Mike Brackett

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MOSES
KOON &
BRACKETT, PC

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December 8, 2009

VIA EMAIL aleesc@sccourts.org
The Honorable Alison R Lee
Circuit Judge
Fifth Judicial Circuit

RE Gladden v Boykin et al
07-CP-28-288
My File No 011574 1

Dear Judge Lee

During oral arguments last Thursday on the cross motions for summary judgment of Defendant Palmetto Home Inspection Services, Inc (PHIS) and the Plaintiffs, two things happened that I must respond to

First, in support of his argument on the law, Mr McCue handed up a Circuit Court Order from another case. The Order was issued in 2007. I objected, but you nevertheless took a copy from Mr McCue. It is clear that such an Order should play no role in deciding the motions that were argued on Thursday and that you have under advisement. Rule 239(d)(2), SCACR, provides that unpublished opinions and orders [of appellate courts] have no precedential value and ‘**should not be cited** except in proceedings in which they are directly involved’ (Emphasis added). Obviously, the principle of law and procedure behind that rule applies even more so with respect to unpublished **trial court** orders. Handing up the Order is in effect no different than Mr McCue having cited the Order in his Memorandum of Law. If it is impermissible to formally cite the Order in a written submission to the Court, it is equally impermissible to informally cite the Order by handing a copy directly to the Court. I respectfully renew my objection and request that you not consider the Order for any purpose.

Second, you asked me if there were matters of record, other than the deposition of Mr Roberts on behalf of PHIS, that you should consider. I direct your attention to the following materials:

- 1 The Complaint alleges several deficiencies/particulars of breach of contract in the work and report of PHIS (Complaint ¶ 53.)

December 8, 2009

- 2 The attached page 19 of 22 is that portion of Plaintiffs' Answers to Defendant PHIS's Interrogatories where the damages attributable to PHIS's report, per Plaintiffs' evidence, are identified. I have also attached the following deposition exhibits that speak to the alleged damages sought against PHIS:

VG depo Exhibits 32 and 37,
Haskins depo Exhibit 1, pp 3, 4, 5 and 6,
ARM Environmental Services, Inc estimate produced by Plaintiffs in discovery as document "gg"

This evidence is relevant to the element of the unconscionability analysis regarding the disparity between the amount of alleged damages suffered by the Plaintiffs/home buyers and the nominal amount of damages provided for in the challenged limit of liability provision, \$475.00 v \$80,000+/- In Lucier v Williams, 841 A 2d 907 (N J Super 2004) the Court found the limit of liability provision therein unconscionable and unenforceable in part on the disparity of a \$192.50 refund and alleged damages of \$8,000 to 10,000. In Pitts v Watkins, 905 So 2d 553 (Miss 2005) the Court found the limit of liability provision therein unconscionable and unenforceable in part on the disparity of a \$265 refund and alleged damages of \$30,000 to \$40,000. (These are the cases cited in my Memorandum of Law.)

I am contemporaneously emailing this communication to the other attorneys of record.
Thank you for your consideration of this information.

Very truly yours,

S/ Mike Brackett

B Michael Brackett

BMB/bmb

Enclosure

cc Mr and Mrs Thomas Gladden (by email)
W Jonathan Harling, Esquire (by email)
Catharine Garbee Griffin, Esquire (by email)
William S Tetterton, Esquire (by email)
Joseph S McCue, Esquire (by email)
Jacqueline Flemons, Esquire (by email)

EXHIBIT E



ASSESSMENT & REMEDIAL SERVICES

armenv.com

March 8, 2006

Ms. Vera Gladden
10 Hunt Cup Lane
Camden, S.C.

3/8/07
B. Gladden
Copy

Re: Estimated Cost – Microbial Abatement Services
Residential Home, 10 Hunt Cup Lane, Camden South Carolina

Dear Ms. Gladden,

ARM Environmental Services Inc (ARM) has prepared the proposed scope of services and cost estimate for the removal and disposal of microbial/mold contaminated building materials in various areas of your home located in Camden, S.C. Our recent site visit determined that an active mold growth is located on the sheetrock walls, wallpaper and wood floor boards of your home. Proper cleaning procedures and proper engineering controls shall be used to remove the microbial growth and spore fallout from surfaces and building materials to minimize the further release of microbial spores. ARM will provide all necessary manpower, materials and equipment to conduct this microbial remediation work.

MATERIALS TO BE ABATED

The microbial/mold containing building materials are estimated based on visual observations. The exact amount of mold-contaminated materials will be verified during abatement. Additional materials contaminated with mold may be discovered during removal of the building materials thus increasing the amount of materials to be removed from the home.

- Wood floor joist in crawl space under house approximately 1,500 square feet
- Hardwood floors on first floor near doors to den, kitchen and media room, approximately 100 square feet
- Master bedroom on second floor, sheetrock walls and wallpaper, approximately 250 square feet
- Master bedroom bath on second floor, sheetrock walls around bathtub, approximately 25 square feet
- Back bedroom on second floor, sheetrock walls, approximately 100 square feet
- Front bedroom on second floor, sheetrock walls, wallpaper and ceiling, approximately 100 square feet
- Staircase to attic on second floor, sheetrock walls, approximately 250 square feet

SCOPE OF WORK

- The work areas will be defined using barrier tape and appropriate signage
- The work areas will be provided partial or full containment that includes negative pressure enclosures. Air filtration units (AFUs) with high efficiency particulate air

1210 1ST STREET SOUTH EXTENSION / COLUMBIA, SC 29209 / phone 803-783-3314 fax 803-783-2587

99

Vera Gladden
10 Hunt Cup Lane Camden SC
March 8, 2007

(HEPA) filtered vacuum and/or exhaust ventilation equipment will be installed and utilized during this project

- All workers will don appropriate personnel protection equipment that includes protective clothing and respirators when entering the enclosed area
- Porous building materials (sheetrock) that are supporting microbial growth in the work area will be removed for disposal. Polyethylene bags or sheeting will be used to containerize and transport waste from work area in a manner that does not release fungal spores into the air
- All affected hard surfaces in the work area, including wood floor joist or wood trim will be cleaned with disinfectant, sanitizer or biocide

SIGNIFICANT ASSUMPTIONS

This proposal assumes that all sources of moisture intrusion have been eliminated from the building. If excess moisture is present in the building, mold re-growth will occur regardless of remediation efforts. Our cost does not include replacement of sheetrock walls, ceiling, wallpaper or wood flooring after removal and disposal.

COST ESTIMATE AND SCHEDULE

Based on our understanding of the scope of work desired, it is estimated that the activities associated with this project can be completed within 15 to 20 days from the start of work (air monitoring time not included), for an estimated cost of **\$15,500.00**

Schedule ARM can begin work in March or April 2007

In closing we appreciate the opportunity to provide you with this scope of work and cost estimate and look forward to the successful completion of this project. If you have any questions or comments regarding the enclosed information, please do not hesitate to contact me.

Sincerely,
ARM Environmental Services, Inc.



Sid Havird
Project Manager

Authorized by _____
Signature

_____ Date

Print Name / Title _____

Attachment _____

Vera Gladden
10 Hunt Cup Lane, Camden SC
March 8, 2007

GENERAL CONDITIONS

- 1 This Document will serve as a contract for the proposed services
- 2 The attached proposal is valid for a period of 60 days, after which ARM Environmental Services, Inc. reserves the right to revise the schedule, fees, and other terms specified herein
- 3 The client agrees to pay ARM Environmental Services, Inc. for all work performed in accordance with the terms of this contract, without regard to the outcome of the project. Payment to ARM Environmental Services, Inc. is expressly not conditioned upon the client receiving payment from any third party
- 4 Client agrees to pay each invoice within thirty (30) days upon receipt. Client further agrees to pay interest on all amounts invoiced and not paid within said thirty day period at the maximum rate allowed by law, until paid. The client will be responsible for all collection costs, including reasonable attorney's fees
- 5 Services conducted under this contract will be performed in accordance with that degree of care and skill ordinarily exercised under similar conditions by members of our profession practicing in the same locality. This warranty is in lieu of all other warranties or representations expressed or implied. Client agrees to limit any and all liability for damage resulting from error or negligence to a sum not to exceed the amount of the actual fee. In the event of any lawsuit or claim against ARM Environmental Services, Inc. to the extent that ARM Environmental Services, Inc. shall prevail the party initiating such action shall pay all costs incurred by ARM Environmental Services, Inc. to answer or defend itself
- 6 Client will provide access to each site upon which it will be necessary for ARM Environmental Services, Inc. to perform its work. In the event that work is requested on any site not owned by client, client represents and warrants that all necessary permissions for site entry have been secured. The client also agrees to assume all risks associated with the services conducted on said properties. Other than any disposal services specified in the attached proposal, ARM Environmental Services, Inc. will not be responsible for any costs associated with the disposal of contaminated or hazardous materials detected in the course of these services

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

RECEIVED

JAN 18 2011

SC Court of Appeals

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

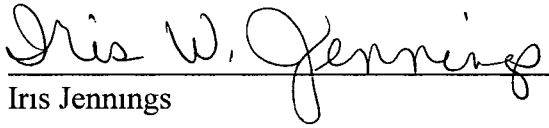
of whom Palmetto Home Inspection Services, LLC is

Respondent

CERTIFICATE OF SERVICE

I, Iris Jennings, Legal Assistant to B Michael Brackett, Esquire, attorney for the Appellants in the above-captioned matter, do hereby certify that I have served counsel for the Respondent Palmetto Home Inspection Services, LLC with a copy of **Appellants' Return to Respondent's Motion to Strike** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 14th day of January, 2011, at the following address

Joseph S McCue, Esquire
P O Box 12487
Columbia, SC 29211


Iris Jennings

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

January 14, 2011

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RE Gladden v Boykin et al
07- CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

RECEIVED
JAN 18 2011
SC Court of Appeals

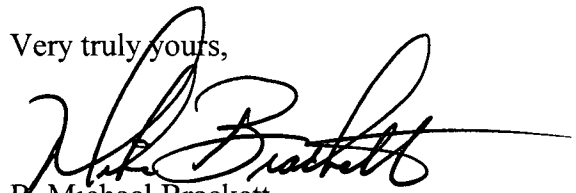
Dear Ms Gee

Enclosed for filing please find the original and six copies of Appellants' Return to Respondent's Motion to Strike certain of Appellants' designations for the Record on Appeal Also enclosed is a copy of the first page of the Return which I request that you clock in and return to me using the envelope provided

By copy of this letter, I am serving a copy of the enclosed Return on Respondent's counsel as reflected on the enclosed Certificate of Service

Thank you for your courtesy and assistance

Very truly yours,



B Michael Brackett

BMB/bmb
Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire

The South Carolina Court of Appeals

Thomas W Gladden and Vera H
Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth Beard,
Deborah Appleton, Bob Capes Realty,
Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection
Services, LLC,

Defendents,

Of Whom Palmetto Home Inspections
Services, LLC are,

Respondents

The Honorable Alison Renee Lee
Kershaw County
Trial Court Case No 2007-CP-28-00288

ORDER

For good cause having been shown, the time for Extension Request to serve and file the
Return to Respondent's Motion to Strike in the above entitled matter is hereby extended until
January 14, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc B Michael Brackett, Esquire
Joseph Scott McCue, Esquire

FILED

1/7/11

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkblaw.com

December 29, 2010

VIA FACSIMILE & US MAIL

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211
Fax 734-1839

Attn: Monica

RE: Gladden v. Boykin et al
07-CP-28-0288
Tracking No. 2010-160-789
Our File No. 11574.1

CL# 15843
25 RECEIVED

DEC 30 2010

SC Court of Appeals

Dear Monica,

This will confirm our telephone conversation earlier today. I represent the Appellant in the above referenced matter. On December 23, 2010, Respondent's attorney, Joey McCue, served by mail the Respondent's Motion to Strike.

I am requesting a ten-day extension of the period in which I may file a return to the motion. By my calculation, the extension will run through, and include, January 12, 2011. I have consulted with Mr. McCue, and he has no objection to the extension.

My check in the amount of \$25.00 for the required motion fee is enclosed.

Very truly yours,


B. Michael Brackett

BMB/Ita
Enclosure

cc: Mr. and Mrs. Tommy Gladden
Joseph S. McCue, Esquire (by fax 771-4484)

1/4/11
1/14/11



Joseph S McCue | Direct Dial 803 255 0412 | E Mail jmccue@collinsandlacy.com

December 23, 2010

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

ck# 74544

RE Thomas W Gladden and Vera H Gladden v Olivia M Boykin, Elizabeth A
Bead, Deborah Appleton, Bob Capes Realty, Inc , Russell & Jeffcoat Realtors,
Inc and Palmetto Home Inspection Services, LLC
Civil Action No 07-CP-28-0288
Claim No 295-044423
C&L 1-1608

Dear Ms Gee

Please find enclosed for filing the original and eight (8) copies of Palmetto Home
Inspection Services, LLC's Motion to Strike and Hold Deadlines in Abeyance in the above-
referenced matter I am also enclosing a check in the amount of \$25 for the required filing fee
Please return the clocked copy to me via my courier

By copy of this letter, I am serving a copy of same upon all counsel

With warmest regards,

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph S McCue", with the word "for" and a small mark below it.

Joseph S McCue

JSM rc

Enclosures

cc/enc B Michael Brackett, Esquire
David Hau
J Scot Roberts

RECEIVED
DEC 23 2010
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

RESPONDENT'S MOTION TO STRIKE & HOLD DEADLINES IN ABEYANCE

TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

Pursuant to Rule 209(b) and Rule 210(c), SCACR, Respondent Palmetto Home Inspection Services, LLC ("Palmetto"), respectfully moves this Court for an order striking from Appellants' Designation of Matter certain materials designated by Appellants and requiring Appellants to file an amended initial brief omitting all references to the disputed items Palmetto additionally requests that all deadlines be held in abeyance until the Court issues its ruling on this motion to strike

This action arises out of Appellants Thomas W Gladden and Vera H Gladden's purchase of a home located at 10 Hunt Cup Lane in Camden, South Carolina ("subject property") from the Defendant Olivia M Boykin (Ex A, Summons & Compl , at ¶ 9) Defendant Elizabeth

RECEIVED
DEC 23 2010
SC Court of Appeals

A Beard is a real estate agent with Defendant Russell Jeffcoat Realtors, Inc , who represented Ms Boykin in the sale of the subject property to Appellants (Ex A at ¶ 11) Defendant Deborah Appleton is a real estate agent with Defendant Bob Capes Realty, Inc , who represented Appellants in the purchase of the subject property (Ex A at ¶ 12) Palmetto contracted with Appellants to perform a home inspection on the subject property (Ex A at ¶ 15) As to Palmetto, Appellants asserted a cause of action for breach of contract arising out of Palmetto's alleged failure to perform a home inspection in accordance with the Real Estate Inspection Contract (Ex A at ¶¶ 50-56)

Following substantial discovery, Palmetto and Appellants filed Cross-motions for Summary Judgment and Memoranda in Support (Ex B, Pls ' Mem in Supp of Mot for Summ J , Ex C , Def Palmetto's Mem in Supp of Mot for Summ J) A hearing on those Motions was held before the Honorable Alison Renee Lee on December 3, 2009 (Ex D, Hr'g Tr , Dec 3, 2009) Following the December 3, 2009, hearing, Appellants sent a letter to Judge Lee containing unsolicited supplemental argument and attaching additional material that was not provided to the Court prior to or at the time of the hearing Appellants now include one of these items in their Designation of Matter

- ARM Environmental Services, Inc estimate produced during discovery as document "gg"

(Ex E, Appellants' Letter, Dec 8, 2009) Palmetto informed the Court of its objection to Appellants' supplemental argument and submissions via letter dated December 9, 2009 (Ex F, Palmetto's Letter, Dec 9, 2009) Judge Lee ultimately granted summary judgment in favor of Palmetto based on the Limitation of Liability provision in the Real Estate Inspection Contract, which Appellants have appealed (Ex G, Order, May 4, 2010, Ex H, Notice of Appeal)

Defendants Olivia M Boykin, Elizabeth A Beard, Deborah Appleton, Bob Capes Realty, Inc , and Russell & Jeffcoat Realtors, Inc (collectively “other Defendants”) also filed Motions for Summary Judgment Appellants opposed those Motions in a separate Memorandum, dated March 10, 2010, and filed subsequent to the hearing on the Cross-motions filed by Appellants and Palmetto, however, in their Designation of Matter, Appellants have included the following materials that were submitted to the Circuit Court only in opposition to the other Defendants’ Motions

- Deposition transcript excerpts, Elizabeth Beard, p 34, ll 11-17,
- Beard depo , Ex 2 (Seller condition disclosure statement), and
- Beard depo , Ex 4 (repair addendum)

The deposition transcript of Elizabeth Beard was not presented to the Circuit Court for purposes of ruling on Appellants and Palmetto’s Cross-motions for Summary Judgment However, the Beard deposition exhibits 2 and 4 were before the Circuit Court as exhibits 5 and 8, respectively, to the deposition of Vera Gladden Counsels for Palmetto and Appellants have conferred and are in agreement the Appellants’ Designation of Matter and Initial Brief must be amended to properly identify the aforementioned deposition exhibits

Appellants have included other material which was not presented to the Circuit Court on Appellants and Palmetto’s Cross-motions for Summary Judgment

- Nathan Knott’s depo Ex 1 (paid invoice for pool house roof repair)

Counsels for Palmetto and Appellants have conferred and agree that the Nathan Knott deposition exhibit was not before the Circuit Court and Appellants’ Designation of Matter and Initial Brief must be amended to exclude any references to the Knott deposition exhibit Although the parties have reached an agreement with regard to the Beard deposition exhibits 2 and 4, as well as the

Knott deposition exhibit, Palmetto now raises these issues out of an abundance of caution in light of the Holiday schedules of counsels and the Court

The South Carolina Appellate Court Rules prohibit a party from including any matter in his designation of matter which may not be properly included in the record on appeal Rule 209(b), SCACR The record on appeal may not include matters which were not presented to the lower court Rule 210(c), SCACR The materials pertaining to Appellants' December 8, 2009, letter and Memorandum in Opposition to the other Defendants' Motions for Summary Judgment, as well as the Knott deposition exhibit, were not presented to the Circuit Court at the time of the hearing on Appellants and Palmetto's Cross-motions for Summary Judgment Therefore, those materials are not properly included in Appellants' Designation of Matter

Pursuant to Rule 56(c), SCRCP, "summary judgment motions and, inferentially, supporting materials [are required] to be on file when they are to be relied upon at a summary judgment motion hearing " Loyd's Inc v Good, 306 S C 450, 453, 412 S E 2d 441, 443 (Ct App 1991) The "on file" requirement is satisfied when (1) the document is filed with the clerk of court prior to the hearing, or (2) the document is delivered to and received by the trial judge at the time of the hearing Id The materials included in Appellants' Designation of Matter and pertaining to Appellants' December 8, 2009, letter and Memorandum in Opposition to the other Defendants' Motions for Summary Judgment, as well as the Knott deposition exhibit, were neither filed with the clerk of court nor delivered to the trial judge at the time of the December 3, 2009, hearing Therefore, those materials were not "on file" at the time of the summary judgment hearing and do not comprise part of the record on Palmetto's summary judgment motion S C R Civ P 56(c) See Gilmore v Ivey, 290 S C 53, 58, 348 S E 2d 180, 184 (Ct App 1986) (finding that the depositions relied on appellant either had not been filed or had not been

published and therefore were not in the record on summary judgment motion and were properly disregarded by the trial court), see also Associates Discount Corp v Hiers, 248 S C 430, 150 S E 2d 611 (1966), State v White, 372 S C 364, 387, 642 S E 2d 607, 619 (Ct App 2007)

In addition, Appellants failed to move for a continuance to permit additional argument or to supplement the record See S C R Civ P 56(f) Indeed, the December 3, 2009, hearing transcript reveals Judge Lee provided Appellants ample opportunity to request that the record remain open, however, Appellants neglected to make such a request

THE COURT Mr Brackett, besides the deposition of Mr Roberts, is there other information I need to consider from your point of view, other than the case law, of course Are there any other factual issues I need to consider? Any other deposition excerpts or exhibits?

MR BRACKETT I won't – whatever I have cited in the – there may be some in the memorandum I filed yesterday or the day before makes reference to the general background facts Makes reference to testimony in Ms Gladden's deposition I'll be happy – that deposition is three volumes, and it's, you know, a couple thousand pages long It's pretty, pretty long I'll be happy to try to pull out the, the particular pages and get that to you¹ But most, most of my argument, Your Honor, rests with – on the admissions, quite frankly, of Mr Roberts

THE COURT Okay

MR BRACKETT In his deposition

THE COURT And I'm flipping through what was provided to me yesterday And the only thing I see is just, besides the legal argument, are references to Roberts's deposition is what I see

(Ex D at 27 9-28 4)

Accordingly, Appellants' submissions subsequent to the hearing were made outside the record and without the permission of the Circuit Court Therefore, the following items do not form part of the record on Palmetto's motion for summary judgment and must be stricken from

¹ Palmetto does not object to the inclusion of Ms Vera Gladden's deposition testimony in Appellants' Designation of Matter Judge Lee requested and received copies of Ms Gladden's deposition

Appellants' Designation of Matter and all references thereto removed from Appellants' Initial Brief

- ARM Environmental Services, Inc estimate produced during discovery as document "gg",
- Deposition transcript excerpts, Elizabeth Beard, p 34, ll 11-17, and
- Nathan Knotts depo Ex 1 (paid invoice for the pool house roof repair)

Additionally, the following items must be correctly designated in Appellants' Designation of Matter and correctly referenced in Appellants' Initial Brief

- Beard depo , Ex 2 (Seller condition disclosure statement), and
- Beard depo , Ex 4 (repair addendum)

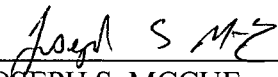
CONCLUSION

Appellants have included items in their Designation of Matter and Initial Brief that were not presented to the Circuit Court and do not form part of the record on Palmetto's summary judgment motion Pursuant to Rules 209(b) and 210(c), SCACR, Palmetto respectfully requests the above-listed items be stricken from the Record on Appeal and Appellants be ordered to revise their Initial Brief to omit all references to them Palmetto additionally requests the Court hold the briefing deadlines in abeyance during the pendency of this motion

[Signature Page to Follow]

Respectfully submitted

COLLINS & LACY, P C

By 

JOSEPH S MCCUE
jmccue@collinsandlacy.com
LOGAN M WELLS
lwells@collinsandlacy.com
1330 Lady Street - Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
December 23, 2010

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No 2007-CP-28-288

Thomas W Gladden and Vera H Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth A Beard, Deborah Appleton,
Bob Capes Realty, Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection Services, LLC, Defendants,

Of Whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

I hereby certify that I served Respondent Palmetto Home Inspection Services, LLC s
Motion to Strike & Hold Deadlines in Abeyance upon counsel of record, by placing a copy in the
United States mail, postage prepaid, to B Michael Brackett, Esquire, Post Office Box 100261
Columbia, South Carolina 29202, on December 23, 2010

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DEC 23 2010

SC Court of Appeals

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted

COLLINS & LACY, P C

By 
JOSEPH S MCCUE
jmccue@collinsandlacy.com
LOGAN M WELLS
lwells@collinsandlacy.com
1330 Lady Street - Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
December 23, 2010



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

November 30, 2010

Joseph Scott McCue, Esquire
Collins & Lacy, PC
P O Box 12487
Columbia, SC 29211

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Mr. McCue

The following Order has been endorsed on your Extension Request in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ Tonya A. Gee
Clerk

November 30, 2010 "

Please be advised Respondent's Initial Brief and Designation of Matter must be served and filed no later than December 31, 2010

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc B Michael Brackett, Esquire



Joseph S McCue | Direct Dial 803 255 0412 | E Mail jmccue@collinsandlacy.com

November 22, 2010

The Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE Gladden v Boykin, et al
Civil Action No 07-CP-28-0288
Tracking No 2010-160-789
C&L No 1-1608

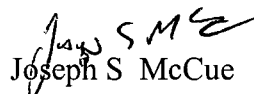
Dear Ms Gee

I represent the Respondent in the above referenced Appeal. According to my records, Respondent's Initial Brief and Record Designations are due to be filed and served no later than Wednesday, December 1, 2010. Pursuant to a procedure employed by the Court, I respectfully requests a 30 day extension for the service and filing of the Respondent's Initial Brief and Record Designation, through and including Tuesday, January 4, 2011. Counsel for Appellants, B Michael Brackett, has consented to this request. I have not previously requested an extension. My check in the amount of \$25.00 is enclosed for the required Motion fee.

Thank you for your attention to this matter.

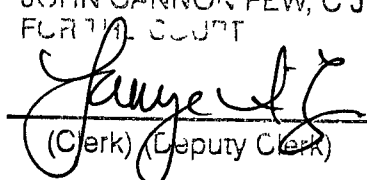
With warmest regards,

Yours very truly,


Joseph S. McCue

JSM/dw

cc B Michael Brackett, Esquire

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT
By 
(Clerk) (Deputy Clerk)

12/1/10
12/31/10
RECEIVED

NOV 23 2010

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

APPELLANTS' DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal

- 1 Order dated May 4, 2010,
- 2 Complaint,
- 3 PHI Answer,
- 4 Appellants' Motion for Summary Judgment,
- 5 Respondent's Motion for Summary Judgment,
- 6 Deposition transcript excerpts

Appellant Vera Gladden

Vol 1

p 60, l 19 to p 64, l 5
p 62, l 14 to p 64, l 25
p 72, l 14 to p 74, l 10
p 79 to p 88, l 10
p 90, l 15-19
p 109-111
p 196, l 6 to p 197, l 16
p 203, l 11-15
p 206, l 13 to p 208, l 14
p 211, l 11 to p 215, l 25
p 122, l 23 to p 123, l 24
p 132, l 12 to p 147, l 7

Vol 2

p 76, l 18-23
p 126, l 25 to p 129, l 7

Respondent (Scot Roberts)

p 5, l 3-17
p 6, l 10-16
p 7, l 5-12
p 7, l 21-25
p 15, l 10 to p 18, l 13
p 19, l 15 to p 20, l 19
p 22, l 1-3
p 23, l 2-5
p 25, l 8 to p 27, l 25
p 34, l 15 to p 35, l 10
p 36, l 19 to p 38, l 3

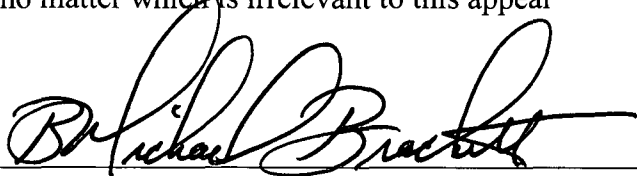
Elizabeth Beard

p 34, l 11-17

7 Offer to Purchase/Contract (Gladden/Boykin) dated October 12, 2006 (exhibit to Complaint),
8 Roberts' depo Ex 4 (PHI real estate inspection contract dated October 18, 2006),
9 Roberts depo Ex 2 (PHI Inspection Report to Appellants dated October 18, 2006),
10 Beard depo , Ex 2 (Seller condition disclosure statement),
11 Beard depo , Ex 4 (repair addendum),
12 VG depo , Ex 10 (CL-100),

- 13 Respondent depo Ex 5 (Respondent invoice with refund memo),
- 14 Respondent depo Ex 3 (Respondent's business card),
- 15 ARM Environmental Services estimate produced during discovery as document "gg,"
- 16 Nathan Knotts depo Ex 1 (paid invoice for pool house roof repair),
- 17 Gene Haskins depo Ex 1 (estimates for repairs of various conditions)

I certify that this designation contains no matter which is irrelevant to this appeal



B. Michael Brackett, SC Bar No 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellants

November / , 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

RECEIVED

NOV 02 2010

ALISON RENEE LEE, CIRCUIT COURT JUDGE

SC Court of Appeals

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

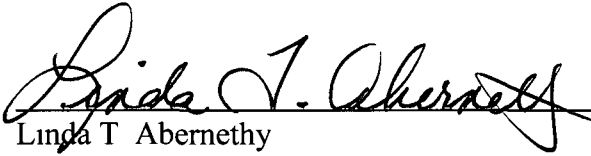
of whom Palmetto Home Inspection Services, LLC is

Respondent

PROOF OF SERVICE

I, Linda T Abernethy, Legal Assistant to B Michael Brackett, Esquire, attorney for the Appellants in the above-captioned matter, do hereby certify that I have served counsel for the Respondent Palmetto Home Inspection Services, LLC with copies of **Appellants' Initial Brief and Appellants' Designation of Matter to be Included in the Record on Appeal** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 1st day of November, 2010, at the following address

Joseph S McCue, Esquire
P O Box 12487
Columbia, SC 29211
Attorney for Respondent
Palmetto Home Inspection Services, LLC


Linda T Abernethy

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkblaw.com

November 1, 2010

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RE Gladden v Boykin et al
07- CP-28-0288
Tracking No 2010-160-789
Our File No 11574 1

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NOV 02 2010
SC Court of Appeals

Dear Ms Gee

Enclosed for filing please find the following

- 1 Appellants' Initial Brief, and
- 2 Appellants' Designation of Matter to be Included in the Record on Appeal

By copy of this letter, copies of these enclosures are being served on Respondent's Attorney,
Joseph S McCue

Please return clocked copies using the envelope provided

Very truly yours,



B Michael Brackett

BMB/Ita
Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

JOHN C. CALHOUN BUILDING
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 734-1890
FAX (803) 734-7373
E MAIL jfew@sccourtsc.org

October 6, 2010

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Joseph Scott McCue, Esquire
Collins & Lacy, PC
P O Box 12487
Columbia, SC 29211

Re Gladden, Thomas v. Boykin, Olivia
2010160789

Dear Counsel,

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until November 1, 2010. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 9:30 a.m. on Tuesday, October 12, 2010, to discuss an overall approach to setting due dates for all filings in this appeal. **The Appellant is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Tuesday, October 12, 2010.

Sincerely yours,

John Cannon Few
John Cannon Few
Larry D. G...
Clerk

JCF/laf

FILED

10/7/10

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
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B Michael Brackett
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Email mbrackett@mkblaw.com

September 29, 2010

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RECEIVED

SEP 30 2010

SC Court of Appeals

RE Gladden v Boykin et al
07- CP-28-0288
Tracking No 2010-160-789
Our File Number - 11574 1

Dear Ms Gee

I represent the Appellants in the above referenced appeal. According to my records, Appellant's Initial Brief and Record Designation are due to be served and filed no later than Friday, October 1. Pursuant to a procedure employed by the Court, I respectfully request a 30 day extension for the service and filing of the Appellant's Initial Brief and Record Designation, through and including Monday, November 1, 2010. I have not heretofore requested an extension. My check in the amount of \$25.00 is enclosed for the required motion fee.

Thank you for your attention to this matter.

Very truly yours,



B Michael Brackett

BMB/lt

Enclosures

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire

10/1/10 1st motion
11/1/10

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
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Columbia, South Carolina 29202 3261

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B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

September 1, 2010

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RECEIVED
SEP 02 2010
SC Court of Appeals

RE Gladden v Boykin et al
07- CP-28-0288
Tracking No 2010-160-789
Our File Number - 11574 1

Dear Ms Gee

This will confirm that I have this date received the transcript of hearing from the court reporter, Elizabeth Harris

Very truly yours,



B Michael Brackett

BMB/Ita

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire
Ms Elizabeth Harris
South Carolina Court Administration

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

August 27, 2010

RECEIVED

AUG 30 2010

SC Court of Appeals

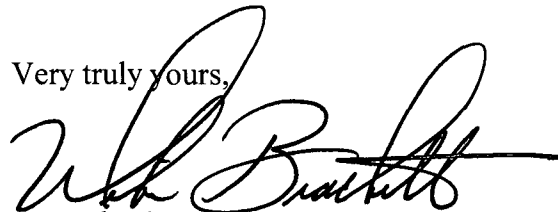
The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RE Gladden v Boykin et al
07- CP-28-0288
Tracking No 2010-160-789
Our File Number - 11574 1

Dear Ms Gee

I ordered the hearing transcript by letter to the court reporter, Ms Elizabeth Harris, dated June 18, 2010 To date I have not received the transcript nor have I received notification of an extension for its delivery Pursuant to Rule 207(b), SCACR, I am notifying your office of this circumstance

Very truly yours,



B Michael Brackett

BMB/bmb

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire
Ms Elizabeth Harris
South Carolina Court Administration

The South Carolina Court of Appeals

Thomas W Gladden and Vera H
Gladden,

Appellants,

v

Olivia M Boykin, Elizabeth Beard,
Deborah Appleton, Bob Capes Realty,
Inc , Russell & Jeffcoat Realtors, Inc ,
and Palmetto Home Inspection
Services, LLC Defendants,

Of Whom Palmetto Home Inspections
Services, LLC is the

Respondent

The Honorable Alison Renee Lee
Kershaw County
Trial Court Case No 2007-CP-28-00288

ORDER

The Appellants' filed a motion for an extension to serve and file their Appellants' Initial Brief Pursuant to a telephone conference with the parties, Respondent indicated that the transcript, which had not been ordered, was necessary Appellants agreed to order the transcript out of time, a request that is hereby granted After the transcript is received, the briefing schedule will begin according to the Appellate Court Rules

AND IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

BY James A. G.
Clerk

Columbia, South Carolina

6/17/2010

cc B Michael Brackett, Esquire
Joseph Scott McCue, Esquire

FILED
6/21/10 



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

JOHN C. CALHOUN BUILDING
POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
TELEPHONE (803) 734 1890
FAX (803) 734 7373
E MAIL jfew@sccourts.org

June 11, 2010

B Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Joseph Scott McCue, Esquire
Collins & Lacy, PC
P O Box 12487
Columbia, SC 29211

Re Gladden, Thomas v Boykin, Olivia
2010160789

Dear Counsel

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until July 9, 2010. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 11:45 a.m. on Thursday June 17, 2010 to discuss an overall approach to setting due dates for all filings in this appeal. **The Appellant is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Thursday.

Sincerely yours,

John Cannon Few, by [Signature]
John Cannon Few

JCF/dw

6/11/10
FILED
CLERK OF COURT

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

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Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

COPY

June 18, 2010

RECEIVED

JUN 21 2010

SC Court of Appeals

Ms Elizabeth Harris
3008 Barnes Springs Road
Columbia, SC 29204

RE Gladden v Boykin et al
07- CP-28-0288
Appellate Case Tracking # 2010-160-789
Our File Number - 11574 1

Dear Ms Harris

On December 3, 2009, Summary Judgment Motions in the above referenced case were argued before The Honorable Alison R Lee in the Richland County courthouse Although this case is a Kershaw County case, these motions were being argued to Judge Lee in Richland County Court administration advises that you were the court reporter for Judge Lee on that day

I request that you provide me with a transcript of the motion hearing conducted that day Please transcribe the entire record of the December 3, 2009 hearing

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR

Very truly yours,



B Michael Brackett

BMB/lta

cc Mr and Mrs Tommy Gladden
Joseph S McCue, Esquire
South Carolina Court Administration
South Carolina Court of Appeals

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202 3261

Telephone (803) 461 2300
Facsimile (803) 461 2309

B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkblaw.com

June 4, 2010

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RE Gladden v Boykin et al
Case Tracking Number 2010 160 789
Our File Number - 11574 1

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SC Court of Appeals

Dear Ms Gee

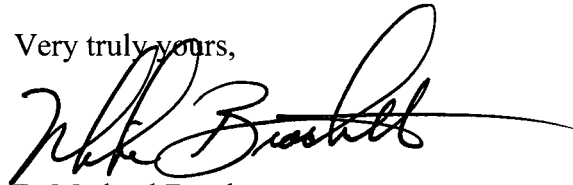
I represent the Appellants in the above referenced appeal. The deadline for filing and serving Appellants' Initial Brief and Designation of Matter to be included in the record on appeal is June 9, 2010.

Because of other court commitments, I respectfully request a 30-day extension for the filing and service of Appellants' Initial Brief and Designation of Matter. By my calculation, the new deadline for service of the Initial Brief and Designation will be July 9, 2010.

I called opposing counsel to ask if he has an objection, but learned that he is on vacation and will not return until approximately June 14.

The required \$25.00 motion fee is enclosed. Thank you for your attention to this request.

Very truly yours,


B Michael Brackett

BMB/Ita
Enclosures

cc Mr. and Mrs. Tommy Gladden
Joseph S. McCue, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

May 19, 2010

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
P.O. Box 100261
Columbia, SC 29202

Re: Gladden, Thomas v. Boykin, Olivia
Case Tracking # 2010160789

Dear Mr. Brackett:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements on Rule 207(a)(5), SCACR, also please advise the Court in writing upon receipt of the transcript

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,



Tanya A. Gee
CLERK

TAG/mw

cc Joseph S. McCue, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

May 19, 2010

B Michael Brackett, Esquire
Moses Koon & Brackett, PC
P O Box 100261
Columbia, SC 29202

Re Gladden, Thomas v Boykin, Olivia
Case Tracking # 2010160789

Dear Mr Brackett

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mw



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

June 3, 2010

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
P.O. Box 100261
Columbia, SC 29202

Re: Gladden, Thomas v. Boykin, Olivia
Case Tracking # 2010160789

Dear Mr. Brackett:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

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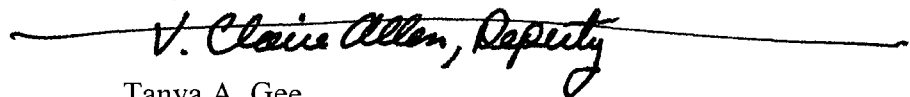
PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

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upon receipt of the transcript

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- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,

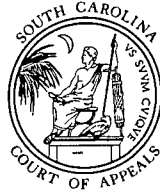


Tanya A. Gee
CLERK

TAG/mw

cc Catherine Garbee Griffin, Esquire
Joseph S. McCue

*please add as he is
designated the person
sewed.*



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
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June 3, 2010

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
P.O. Box 100261
Columbia, SC 29202

Re: Gladden, Thomas v. Boykin, Olivia
Case Tracking # 2010160789

Dear Mr. Brackett:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mw

cc: Catherine Garbee Griffin, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC ,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

Respondent

NOTICE OF APPEAL

Plaintiffs-Appellants appeal the Order of the Honorable Alison Renee Lee dated May 4, 2010 Appellants received written notice of the Order on May 7, 2010 A copy of said Order is attached and incorporated by reference



B Michael Brackett, SC Bar No 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellants

Columbia, South Carolina
May 10, 2010

PM 05/10/2010
POS 05/10/2010
RECEIVED
MAY 11 2010
SC Court of Appeals

Other Counsel of Record

Joseph S. McCue, Esquire
Collins & Lacy, PC
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

J MICHELLE CHILDS, CIRCUIT COURT JUDGE

Case No 2007-CP-28-288

Thomas W Gladden and
Vera H Gladden

Appellants,

v

Olivia M Boykin, Elizabeth A Beard,
Deborah Appleton, Bob Capes Realty, Inc ,
Russell & Jeffcoat Realtors, Inc , and
Palmetto Home Inspection Services, LLC,

Defendants,

of whom Palmetto Home Inspection Services, LLC is

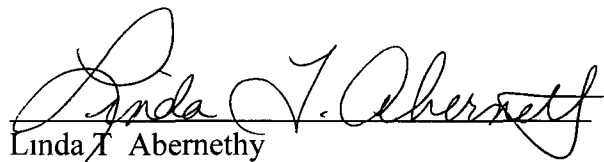
Respondent

PROOF OF SERVICE

I, Linda T Abernethy, Legal Assistant to B Michael Brackett, Esquire, attorney for the Appellants in the above-captioned matter, do hereby certify that I have served counsel for the Respondent with a copy of **Appellants' Notice of Appeal** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 10th day of May, 2010, at the following address

RECEIVED
MAY 11 2010
SC Court of Appeals

Joseph S. McCue, Esquire
P O ox 12487
Columbia, SC 29211
Attorney for Respondent


Linda T. Abernethy

MOSES KOON & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
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Columbia, South Carolina 29202 3261

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B Michael Brackett
Direct Dial (803) 461 2312
Email mbrackett@mkb law com

May 10, 2010

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RECEIVED
MAY 11 2010
SC Court of Appeals

RE Gladden v Boykin et al
07- CP-28-0288
Our File Number - 11574 1

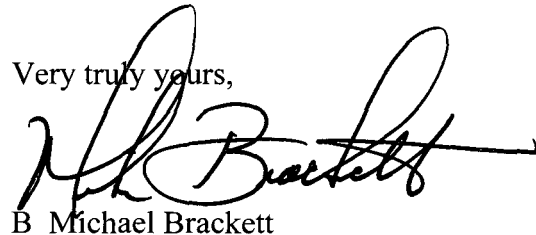
Dear Ms Gee

Enclosed for filing is a Notice of Appeal (Re Palmetto Home Inspection Services) in the above referenced case Also enclosed are the following

- 1 Proof of Service of the Notice of Appeal on the Defendants,
- 2 A copy of my letter to the Kershaw County Clerk of Court confirming that the Notice of Appeal has been filed with the Circuit Court,
- 3 A check in the amount of \$100 00 for the filing fee, and
- 4 A copy of the written order being appealed

Please return a clocked copy of the Notice of Appeal and Proof of Service in the pre-stamped envelope enclosed for your convenience

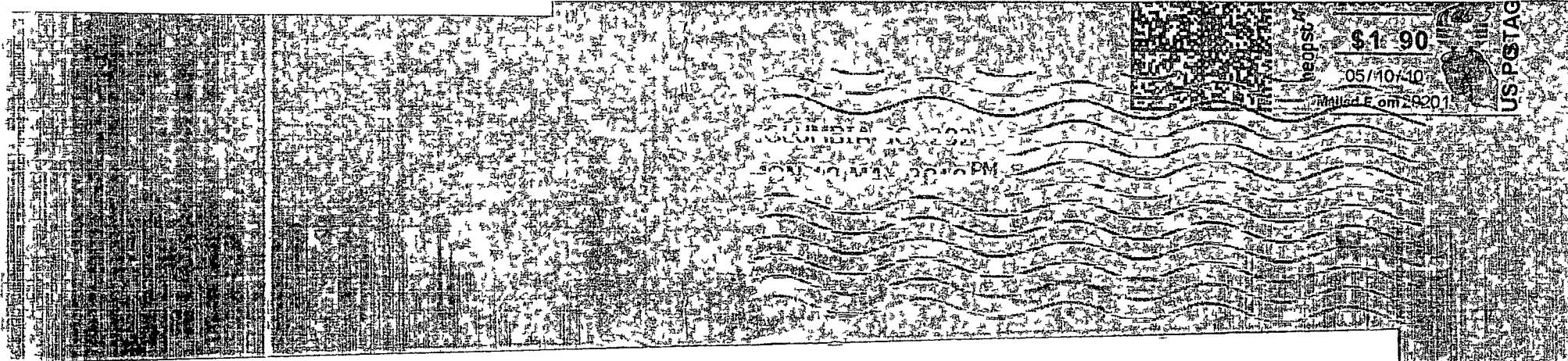
Very truly yours,



B Michael Brackett

BMB/lta
Enclosures

cc Mr and Mrs Tommy Gladden
Catharine Garbee Griffin, Esquire
Jonathan Harling, Esquire
Joseph S McCue, Esquire
William S Tetterton, Esquire



Moses Koon & Brackett, PC
1333 Main Street, Suite 650
P O Box 100261
Columbia, SC 29202-3261
11574 1

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211



STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

FILED FOR RECORD

2010 May 7 AM 10 43

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Thomas W Gladden and Vera H Gladden)

Plaintiffs)

v)

Olivia M Boykin, Elizabeth A)

Beard, Deborah Appleton,)

Bob Capes Realty, Inc , Russell &)

Jeffcoat Realtors, Inc , and)

Palmetto Home Inspection Services,)

LLC ,)

Defendants)

DOCKET NO 07-CP-28-288

ORDER GRANTING
SUMMARY JUDGMENT TO
PALMETTO HOME INSPECTION
SERVICES

STATEMENT OF THE CASE

This action arises out of the Plaintiffs' purchase of a home located at 10 Hunt Cup Lane in Camden, South Carolina ("subject property") from the Defendant Olivia M Boykin. The Defendant Elizabeth A Beard is a real estate agent with Russell Jeffcoat Realtors, Inc who represented Ms Boykin in the sale of the subject property to the Plaintiffs. The Defendant Deborah Appleton is a real estate agent with Bob Capes Realty, Inc who represented the Plaintiffs in the purchase of the subject property. Palmetto Home Inspection Services, LLC ("Palmetto") contracted with Plaintiffs to perform a home inspection on the subject property.

On March 26, 2007, the Plaintiffs filed this lawsuit asserting causes of action against Ms Boykin, Ms Beard and Russell & Jeffcoat for actual and constructive fraud and negligent misrepresentation. Plaintiffs' cause of action against Ms Appleton and Bob Capes Realty alleges negligent performance of an agent's duty to the Gladdens. The sole cause of action against Palmetto is for breach of contract. Plaintiffs and Defendant PHIS have cross motions for summary judgment, each directed at the enforceability of a limit of liability provision in their written contract.

FACTS

In the fall of 2006, the Plaintiffs were relocating from Winnsboro, South Carolina to Camden, South Carolina. Mrs Gladden had prior experience as a real estate agent in Winnsboro. When Mrs Gladden looked for a house in Camden, she initially drove around different neighborhoods and put cards in mailboxes of homes that she found appealing. One

such home was the subject property owned by Olivia Boykin. Mr. and Mrs. Gladden attempted to negotiate the purchase of this home directly with Ms. Boykin in an effort to avoid paying real estate agent commissions. Ms. Boykin refused to negotiate with the Gladdens unless they went through a real estate agent. The Plaintiffs then approached Deborah Appleton of Bob Capes Realty, Inc. about representing them in this transaction.

The asking price for the property was \$499,000. Mrs. Gladden prepared a worksheet from which she determined to make an offer for the house for \$434,630 based on various deductions. On September 21, 2006, the Plaintiffs made an offer to Ms. Boykin in the amount of \$434,630. Ms. Boykin rejected that offer and through a series of counter offers, the Plaintiffs agreed on October 12, 2006 to pay \$495,000 to purchase the home. Under the terms of the Offer to Purchase, Plaintiffs had the option to have a home inspection. The contract also required the Seller (Mrs. Boykin) to provide a South Carolina Wood Infestation Report along with a heating and air conditioning inspection.

Ms. Appleton provided Mrs. Gladden the names of two home inspectors: Mr. Outlaw and Mr. Roberts. Ms. Appleton described Mr. Outlaw as the "hardest but best." Ms. Gladden contacted Mr. Roberts, owner of Palmetto and interviewed him over the phone. The specific substance of these conversations was not disclosed. She then interviewed Mr. Outlaw. After interviewing Mr. Roberts and Mr. Outlaw, Mrs. Gladden decided to hire Mr. Roberts.

Mr. Roberts inspected the home for the Plaintiffs on October 18, 2006. Mrs. Gladden was present at the time of the inspection. At the end of the inspection, but prior to discussing the inspection results, Mrs. Gladden read and signed the Palmetto Home Inspection Services, LLC Real Estate Inspection contract. The Gladdens paid Palmetto \$475.00 for the inspection. Included in the contract is a provision titled "Limit of Liability." That section reads:

LIMIT OF LIABILITY It is understood and agreed that should PIHS, LLC and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract or otherwise, the liability of PIHS, LLC and/or its agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

Mr. Roberts provided a brief verbal report of his findings and prepared a written report. Following the receipt of the written Inspection Report, the Plaintiffs prepared an addendum to

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the contract asking Boykin to repair certain items identified in the inspection report. They negotiated various items and ultimately reached a resolution as to what items would be repaired and for what items the seller would provide a credit to the Plaintiffs.

The Plaintiffs also received a South Carolina Wood Infestation Report (CL 100) prepared by Terminix Services, Inc. dated October 30, 2006. The Plaintiffs acknowledged receiving the CL-100 on the date of closing November 22, 2006. The CL-100 report identified evidence of damage and indicated that the damage "will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by qualified building expert, licensed or registered with the South Carolina Department of Labor, Licensing and Regulation, Residential Builders Commission and that needed repairs be made."¹ The report specifically listed water damage to portions of the sill, sub-floor and floor joist near the dirt-filled porch in the front, the brick patio in the back and under the laundry room. There was also some damage to the roof decking under the exhaust fan in some places where the roof changed angles. The Plaintiffs proceeded with the closing on the purchase of the home without an inspection by a licensed, qualified building expert.

On the date of closing, the Plaintiffs expressed concerns about whether or not the repairs were done properly and sufficiently. Plaintiffs allege both Ms. Appleton and Ms. Beard assured them the repairs were done. Plaintiffs' concerns were relayed through their attorney to Ms. Boykin's attorney in Camden. Neither Ms. Boykin nor her attorney was present at closing. When the Plaintiffs continued to express concerns, Ms. Boykin told the Plaintiffs she was willing to cancel the closing. However, the Plaintiffs chose to move forward with the closing.

Following the closing, Mr. Gladden's brother assisted Mr. Gladden in moving some of his furniture. While at the house, Mr. Gladden asked him to inspect the crawl space repairs. Mr. Gladden's brother, who works in the construction industry, determined that the repairs to the crawl space were not properly performed.

On November 29, 2006, Mrs. Gladden contacted Mr. Roberts to express her concerns about items she perceived that were either not disclosed or not fully disclosed in the Palmetto Report. During that conversation, Mr. Roberts offered to refund the amount Plaintiffs paid for

¹ The Seller retained Ski Construction to make repairs to the sub-structure identified by Terminix as well as the items identified in the Palmetto Report which the Plaintiffs and Seller agreed to repair. Ski Construction is not a licensed builder and either did not perform the repairs sufficiently or did not repair them at all.

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the inspection Mr Roberts then met with Mrs Gladden and gave her a check for \$475 00
Plaintiffs cashed that check

STANDARD OF REVIEW

Rule 56, SCRPC, provides that a party is entitled to judgment as a matter of law when there is no genuine dispute of material fact. Thus "summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland School District One, 341 S.C. 307, 311, 534 S.E.2d 275 (2000). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "The pleadings and documents on file must be liberally construed in favor of the nonmoving party who must be given the benefit of all favorable inferences that might reasonably be drawn from the record." Bates v. City of Columbia, 301 S.C. 320, 321, 391 S.E.2d 733 (Ct. App. 1990). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleadings but must set forth or point to specific facts showing that there is a genuine issue of material fact. See, e.g., Baughman v. A.T. & T. Co., 306 S.C. 101, 117, 410 S.F.2d 537, 547 (1991) (bare allegations deemed insufficient to create a genuine issue of fact). "In cases applying the preponderance of the evidence burden of proof the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009).

Defendant Palmetto seeks summary judgment on the basis that the contract limits Palmetto's liability to a refund of the \$475 fee paid by Plaintiffs for the inspection and report. Plaintiffs' motion for summary judgment seeks judgment on the basis that the limit of liability provision is unenforceable because the provision is both unconscionable and violates public policy.

DISCUSSION

Courts only have the authority to specifically enforce contracts that the parties themselves have made. Lowcountry Open I and Trust v. Charleston Southern University, 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008). However, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson v. MSA of Myrtle

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Beach, Inc., 373 S C 14, 29-30, 644 S E 2d 663, 671 (2007) Plaintiffs argue that the contract is an adhesion contract and the provision limiting liability is unconscionable and unenforceable. Defendant argues that the parties to a contract may agree to limit liability and therefore the provision is not unenforceable.

The contract at issue here is an adhesion contract. Adhesion contracts are generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms. Lackey v. Green Tree Fin. Corp., 330 S C 388, 394, 498 S E 2d 898, 901 (Cl. App. 1998). Nevertheless, adhesion contracts are not per se unconscionable. Herron v. Century BMW, Op. No. 26805 (S C. Sup. Ct. filed April 19, 2010) (Shearouse Adv. Sh. No. 15) at 18, citing Simpson, supra, 373 S C at 27, 644 S E 2d at 669. The testimony of Scot Roberts of Palmetto Home Inspection was that Roberts would not provide any type of report, oral or written, if the contract was not signed. The contract was a pre-printed standard form utilized by Palmetto. On only one occasion could Roberts recall any modification to the form contract. While Plaintiff interviewed and questioned Roberts before deciding to hire him, there was no evidence presented about the nature and substance of the discussion by either party. Despite those discussions, Roberts presented the contract to Mrs. Gladden after he had conducted the inspection because she was not available when the inspection started. Gladden read the contract before signing it.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Simpson, supra, 373 S C at 25, 644 S E 2d at 668. Plaintiff bears the burden of proving the contract unconscionable. E. Allen Farnsworth, Contracts § 4.28 at 299 (2004). Plaintiff has failed in that burden.

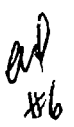
Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson, supra. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether

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there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause. Id.

The contract was one for the "limited visual inspection of apparent conditions in readily accessible areas existing at the time of the inspection." While there was some disparity in the bargaining power of the parties, Mrs. Gladden was a trained real estate agent who previously worked in the business. She had the opportunity to interview home inspectors before she selected Palmetto. The provision at issue was cited near the end of the contract. There is no requirement for a home inspection. Plaintiffs chose to have a home inspection and specifically chose Palmetto to perform that service. Plaintiffs had the option not to consent to the terms of the contract or, if desired, to choose another home inspector. The contract contained conspicuous clauses in which the titles are capitalized, bold font letters. The clause which limits liability is located directly below the "ACKNOWLEDGEMENT" section where Mrs. Gladden placed her initials. The clause was not hidden or ambiguous. As stated earlier, Mrs. Gladden read the contract before she initialed and signed it. Based upon these findings, there does not appear to be an absence of meaningful choice.

The contract states that Palmetto will perform a limited visual inspection of the readily accessible areas in conformity with the generally accepted inspection standards and methods in accordance with the standards of practice of the South Carolina Home Inspector Licensing Board. The contract specifically listed the areas that would be inspected and contained the limitations and exclusions. The inspection is not intended to advise the purchaser concerning the advisability of purchase, compliance or non-compliance with applicable codes and ordinances. Specifically, Mrs. Gladden acknowledged that the inspection is not a guaranty or warranty regarding the performance or condition of any structure or item and "any visual problem observed should be verified with the appropriate contractor, electrician, plumber, or skilled professional for cost estimated and code compliance." The terms of the contract were not so oppressive or one-sided that no reasonable person would accept them. If she was not satisfied with the terms, a home inspection could have been procured through another person or company. And, a more detailed inspection could have been performed by a licensed professional other than a home inspector. There is no evidence of any duress or undue influence.



Plaintiff also claims the provision limiting liability is unenforceable as against public policy. Agreements limiting or exempting liability are enforceable. 17a C.J.S. Contracts § 271 (2007). South Carolina law enforces exculpatory clauses when clear language indicates the intent of the parties. South Carolina Electric & Gas Company v. Combustion Engineering, Inc., 283 S.C. 182, 191 S.E.2d 453, 458 (Ct. App. 1984). In Combustion Engineering, Inc., the South Carolina Court of Appeals enforced the language of an exculpatory clause which exempted the Defendant for liability for negligent manufacturing.

In a case squarely on point, Pride v. Southern Bell Telephone and Telegraph Company, 244 S.C. 615, 138 S.E.2d 144 (1964), the Supreme Court enforced a contract which limited liability arising out of the publication of paid advertisements in the yellow pages to only the amount paid for the advertisement. In Pride, the contract for services contained a provision whereby the parties agreed that the liability of the telephone company "on account of errors in or omissions from such advertisement, should in no event exceed the amount of the charges for such advertisement which was omitted, or in which the error occurred in the then current issue." Id. at 619, 138 S.E.2d at 156. The Supreme Court explained that exposure to liability is "wholly a matter of private contract" and that exculpatory clauses between private parties do not violate public policy. Id. at 621, 138 S.E.2d at 157. McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005).

In McCune, the Court of Appeals recognized that even though exculpatory clauses may be disfavored by the law, such clauses are enforceable in South Carolina. The agreements must be entered into voluntarily and contain explicit language clearly indicating the intent of the parties to exempt a party from liability. The Court further reaffirmed that exculpatory clauses between private parties do not violate public policies. This Court must hold likewise.

In this case, the Plaintiffs signed the contract which defined and limited the scope of the home inspection including Palmetto's liability for any claims arising from the home inspection. **This contract represents the entire agreement between Palmetto Home Inspection Services, LLC and the Client. PHIS, LLC is not responsible for the repair, replacement or alteration of any item within or upon the inspected property. The Client acknowledges that they have read and understood the extent and limitations of this inspection and agree to all of the limitations, terms and exclusions contained within this contract.** (Emphasis added).

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“When the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect. The Court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487 (1994).

Additionally, South Carolina expressly allows a licensed home inspector, such as Palmetto, to contractually limit the scope of its home inspection. S.C. Code Ann. § 40-59-500(4) defines a home inspection to mean

The rendering of a written or oral report in exchange for compensation of any sort, regarding the condition of the construction or improvements to a residence including but not limited to, structural problems or conditions, damage, safety problems, deterioration, equipment and systems that are **visible and readily accessible**. Home inspection does not include a contract or proposal for repair, renovation, or remodeling of the improvements to a residence. **The parties to a home inspection may limit or expand the scope of the inspection by agreement** (Emphasis added.)

In this case, the South Carolina General Assembly has expressly allowed a licensed home inspector in South Carolina to limit the scope of an inspection. The General Assembly does not preclude a home inspector from limiting its liability through contract. The public policy outlined by the legislature and the Residential Builders Commission in licensing home inspectors is to assure that there are uniform standards applicable to all inspectors and to “establish a uniform guide for performing an inspection of buildings and equipment.” Standards of Practice for Residential Home Inspector. The standards provide the minimum contents of a written report and outlines what the residential home inspector should observe, identify, and describe. “The purpose of a residential inspection is to disclose general conditions of the building, improvements, mechanical systems and appliances as they exist on the day of the inspection.” Id. The contract between Plaintiffs and Palmetto meets the requirements set forth by the legislature and the licensing board. “A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals.” Romanus v. Biggs, 214 S.C. 145, 51 S.E.2d 503 (1949). The contract is not against public policy.

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Both parties have referred to cases from other jurisdictions to support their respective positions. Specifically, the cases relating to exculpatory clauses cited by the parties conform to South Carolina law, that exculpatory clauses are valid as long as they do not contravene public policy. In this state, the public policy regarding home inspections has been discussed above. No further reference to other jurisdictions is necessary.

ORDER

Based upon the foregoing discussion, there is no genuine issue of material fact and Defendant, Palmetto Home Inspection Services, LLC is entitled to judgment as a matter of law. Therefore, **IT IS ORDERED** that Defendant Palmetto Home Inspection Services' Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Summary Judgment as to this Defendant's contract is DENIED.

AND IT IS SO ORDERED


ALISON RENNIE F. F.
Circuit Court Judge

May 4 2010
Columbia, South Carolina

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