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

FINAL BRIEF OF RESPONDENT

Joseph S McCue
Logan M Wells
Collins & Lacy, P C
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
(803) 771-4484 (f)

Attorneys for Respondent

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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 (R p 11, ¶ 9) (Compl , ¶ 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 (R p 11, ¶ 11) (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 (R p 11, ¶ 12) (Id at ¶ 12) Respondent Palmetto Home Inspection Services, LLC ("Palmetto") contracted with the Gladdens to perform a home inspection of the subject property (R p 12, ¶ 15, R p 255) (Id at ¶ 15, Real Estate Inspection Contract)

The Gladdens filed this lawsuit in the Kershaw County Court of Common Pleas on March 26, 2007 (R pp 10-28) (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 (R p 17, ¶ 50–R p 18, ¶ 56) (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 (R pp 54-61) (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 (R p 62, R pp 73-74) (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 (R pp 87-117) (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") (R pp 1-9) (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 (R p 134, lines 11-22, R p 138, line 16–R p 139, line 12) (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 (R p 118, line 15–R p 133, line 1, R p 140, lines 2-16, R p 141, line 23–R p 142, line 24) (Id at 9 15-24 1, 66 2-16, 67 23-68 24) One such home was the subject property, owned by Olivia Boykin (R p 141, line 23–R p 142, line 24) (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 (R p 143, line 14–R p 147, line 17) (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 (R p 143, line 14–R p 147, line 17) (Id)

The asking price of the subject property was $499,000 00 (R p 145, lines 1-10) (Id at 74 1-10) Mrs Gladden prepared a worksheet itemizing problems she noticed when she first looked at the subject property (R p 254) (Initial Offer Worksheet) The Gladdens made an initial offer of $434,630 00, based on deductions for the problems she listed (R p 254) (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

(R p 254) (Id) The Gladdens made their initial offer on September 21, 2006, which Ms Boykin rejected (R p 202, lines 22-24) (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 (R p 29, R p 202, lines 22-24) (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 (R p 31) (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 (R pp 30-31) (Id)

Ms Appleton provided Mrs Gladden the names of two home inspectors, Mr Outlaw and Mr Roberts (R p 207, lines 2-21) (V Gladden Dep , Vol 2, p 144 2-21) Ms Appleton described Mr Outlaw as the "hardest but best " (R p 207, lines 10-17) (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 (R p 208A, lines 9-14, R p 237, lines 10-20,) (Id at 165 9-14, Roberts Dep 15 10-20)

Mr Roberts inspected the subject property for the Gladdens on October 18, 2006 (R p 238, line 19–R p 239, line 5) (Roberts Dep 16 19-17 5) Mrs Gladden was present at the time of the inspection (R p 239, lines 10-16, R p 240, lines 4-6) (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") (R p 255, R p 211, line 13–R p 212, line 4) (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**

(R p 255 (emphasis added)) (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

(R p 255 (emphasis in original)) (Id (emphasis in original)) The Gladdens paid Palmetto $475 00 for the inspection and reports [1] (R p 279) (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** " (R p 264 (emphasis in original), R p 211, line 13–R p 212, line 4) (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 (R pp 277-278) (Home

[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 (R p 211, line 13–R p 212, line 1) (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 (R p 240, line 18–R p 242, line 19) (Roberts Dep 18 18-20 19), see (R p 280) (Roberts' Business Card)

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 (R pp 277-278) (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") (R pp 293-295, R p 162, line 21–R p 164, line 19) (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 that needed repairs be made " (R p 294) (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] (R p 295) (Id) The CL-100 also identified damage to the roof decking under the exhaust fan in some places where the roof changed angles (R p 295) (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 (R p 217, line 2–R p 222, line 6, R p 232, lines 9-21) (T Gladden, Vol 1, 37 2-42 6, 241 9-

[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 (R p 264) (Inspection Report) The CL-100 identified damages in the crawl space that were not disclosed in the Palmetto Report (R p 295) (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 (R p 162, line 21–R p 168, line 10) (V Gladden Dep , Vol 1, 122 21-128 10) The Gladden's chose to go forward with the closing (R p 223, line 18–R p 228, line 13) (T Gladden Dep , Vol 1, 167 18-172 13)

21) On the date of the closing, the Gladdens expressed concerns about whether or not the repairs were done properly and sufficiently (R p 162, line 21–R p 168, line 10) (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 (R p 162, line 21–R p 168, line 10) (Id) Ms Boykin responded to the Gladdens' concerns by offering to cancel the closing (R p 162, line 21–R p 168, line 10) (Id) Nonetheless, the Gladdens chose to move forward and close on the subject property (R p 223, line 18–R p 228, line 13) (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 (R p 168, lines 11-17) (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 (R p 169, line 12–R p 170, line 3, R p 171, line 12–R p 172, line 22) (Id at 130 12-131 3, 132 12-133 22) Mr Gladden's brother determined the repairs were not properly performed (R p 169, line 12–R p 170, line 3, R p 171, line 12–R p 172, line 22) (Id)

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 (R p 252, line 4–R p 253, line 13, R p 213, line 13–R p 216, line 13) (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 (R p 252, line 4–R p 253, line 13, R p 213, line 13–R p 216, line 13) (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 (R p 252, line 4–R p 253, line 13, R p 213, line 13–R

p 216, line 13) (Roberts Dep 38 4-39 13, V Gladden Dep , Vol 2, 211 13-214 13), see (R p 279) (Palmetto Invoice dated 10/18/06)

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

(R p 255 (emphasis in original)) (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 (R pp 63-72, R pp 87-117) (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' Final Br 9) As the Gladdens did not raise the Circuit Court's omission of those factors by way of a Rule 59, SCRCP 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 entity[3] 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 (R p 229, lines 4-18) (T Gladden Dep 238 4-18)

[3] Palmetto is a single member LLC (R p 235, lines 21-23) (Roberts Dep 7 21-23) Scot Roberts is the sole member of Palmetto as well as the sole employee (R p 235, line 24–R p 236, line 3) (Roberts Dep 7 24-8 3)

Additionally, "[u]nequal bargaining power is not a justification in and of itself to hold a provision of a contract invalid " 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' Final 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

[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 (R pp 281-292) (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 (R p 198, line 14–R p 200, line 25) (V Gladden Dep , Vol 2, 19 14-21 25)

Moreover, the Limit of Liability clause was conspicuously laid out in the Real Estate Inspection Contract See (R p 255) (Real Estate Inspection Contract) The contract is one page and the Limit of Liability clause is labeled in bold and capitalized font (R p 255) (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 (R p 255) (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 (R p 118, line 15–R p 133, line 1) (V Gladden Dep , Vol 1, 9 15-24 1) Mrs Gladden read the contract in its entirety before she signed and initialed it (R p 209, line 21–R p 210, line 10) (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 (R p 211, line 13–R p 212,

line 4) (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 (R p 229, lines 4-18) (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 (R p 207, lines 2-21, R p 208A, lines 9-14) (V Gladden Dep , Vol 2, 144 2-21, 165 9-14) Likewise, the Gladdens were not required to have the subject property inspected (R pp 29-34) (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 unconscionable[5] or so "oppressive" and one-sided that no

[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

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 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 (R p 255) (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 " (R p 255) (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 " (R p 255) (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 obsvered [*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

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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

other skilled professionals should be consulted (R p 255) (Id.) As the Circuit Court recognized, these terms are not so oppressive or one-sided that no reasonable person would accept them (R p 6) (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 841 A 2d at 910 Contrastingly, the Gladdens were represented by an attorney in the purchase of the subject property See, e g , (R p 162, line 21–R p 168, line 10 (describing negotiations between the Gladdens' attorney and the seller's attorney)) (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 (R p 255) (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, indicate 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' Final Br 11-17) As previously discussed, Lucier, 841 A 2d 907, is not applicable to the case sub judice See discussion supra p 18 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

[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
August 16, 2011

FINAL BRIEF OF RESPONDENT

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

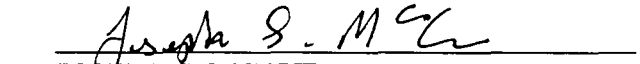
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings "

[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
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PROOF OF SERVICE

I hereby certify that I served a copy of the Final Brief of Respondent 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 August 16, 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

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