

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' REPLY BRIEF

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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
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<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 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 (R-5, l 25 to R-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 (R-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 ” (R-281)

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 ” (Appellants' 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



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