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**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas**

**Jocelyn Newman, Circuit Court Judge**

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**Appellate Case No. 2024-000995**

**Trial Case No. 2022CP4002713**

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Elizabeth Ray and Melvin Ray,

Appellants,

v.

Sunsetter Properties and  
Home Inspection One,

Respondents.

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**FINAL BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES ON APPEAL**

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BEFORE THE COMPLETION OF DISCOVERY, INCLUDING AN IMPENDING DEPOSITION MATERIAL TO THE CASE IN CONTRAVENTION OF RULE 56'S PURPOSE?
2. DID THE TRIAL COURT ERR IN STRIKING APPELLANTS' AFFIDAVIT AS UNTIMELY FILED DESPITE NO PREJUDICE TO RESPONDENTS?
3. DID THE TRIAL COURT ERR IN DISMISSING CLAIMS AGAINST SUNSETTER PROPERTIES FOR ALLEGED IMPROPER SERVICE, AS RESPONDENTS WAIVED THE DEFENSE BY PARTICIPATING IN LITIGATION?
4. DID THE TRIAL COURT ERR IN DENYING APPELLANTS' REQUEST TO AMEND THE COMPLAINT TO ADDRESS ANY DEFICIENCIES IDENTIFIED BY THE COURT?
5. DID THE TRIAL COURT ERR IN APPLYING THE ECONOMIC LOSS RULE TO DISMISS APPELLANTS' CLAIMS?

## **STATEMENT OF THE CASE**

Appellants, Elizabeth and Melvin Ray, filed suit against Respondents, Home Inspection One, LLC, and Sunsetter Properties, LLC, alleging negligence and other claims related to a property inspection and undisclosed property defects. The trial court granted summary judgment in favor of Home Inspection One and dismissed claims against Sunsetter Properties due to alleged improper service and application of the economic loss rule. At the time of the summary judgment hearing, Appellants had not completed discovery, including a key deposition scheduled to provide evidence critical to their case. Appellants also requested leave to amend the complaint to address any deficiencies identified by the court, but this request was denied. Appellants now appeal the trial court's rulings on summary judgment, service dismissal, affidavit exclusion, and denial of leave to amend the complaint.

## **STANDARD OF REVIEW**

In civil appeals, the appellate court reviews errors of law only, with factual findings sustained unless unsupported by evidence. A trial court's grant of summary judgment is reviewed de novo, requiring that no genuine issue of material fact exists. Rule 56, SCRPC mandates that summary judgment is appropriate only when the movant shows entitlement as a matter of law, and the nonmoving party has had a full and fair opportunity to complete discovery on material issues. Whether service was proper and whether to grant leave to amend a complaint are also questions of law, reviewed de novo. See *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 635 S.E.2d 97 (2006).

## **FACTUAL BACKGROUND**

Appellants contracted with Home Inspection One, LLC, to conduct a property inspection before purchasing a home from Sunsetter Properties, LLC. After moving in, Appellants discovered several defects that were allegedly concealed or not disclosed, including unpermitted additions to the property. They subsequently filed suit, alleging that Home Inspection One failed to disclose these issues and that Sunsetter Properties, as the seller, failed to inform them of known defects.

During pre-trial proceedings, Appellants requested additional discovery, including a deposition of a housing inspector who could testify to building code violations and other structural issues affecting the property. This deposition was scheduled and intended to provide material evidence substantiating their claims. Nonetheless, the trial court granted summary judgment in favor of Home Inspection One and dismissed the claims against Sunsetter Properties for improper service

without permitting this crucial deposition to take place. Additionally, the court struck Appellants' affidavit, filed two days before the hearing, based on a narrow interpretation of the timing rule, despite a lack of prejudice to Respondents. Appellants also requested leave to amend their complaint to address any perceived deficiencies, but the court denied this request.

## **ARGUMENTS**

### **I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BEFORE THE COMPLETION OF DISCOVERY, INCLUDING A PENDING DEPOSITION MATERIAL TO THE CASE, IN CONTRAVENTION OF RULE 56'S PURPOSE.**

Rule 56, SCRCP allows for summary judgment only when "there is no genuine issue as to any material fact" and when the moving party is entitled to judgment as a matter of law. Summary judgment aims to avoid unnecessary trials on baseless claims, but it is not intended as a substitute for trial where genuine issues of material fact remain. The purpose of Rule 56 is to prevent the misuse of judicial resources while protecting the nonmoving party's right to fully develop their case through discovery.

In this case, the trial court prematurely granted summary judgment, depriving Appellants of a fair opportunity to conduct discovery on material issues. Specifically, Appellants' counsel argued during the April 16, 2024 hearing that a pending deposition of a housing inspector would yield critical information regarding unpermitted additions and code violations—facts directly relevant to their negligence claim. Without this deposition, Appellants were denied the opportunity to oppose summary judgment effectively, as they lacked essential evidence that would likely reveal material facts.

South Carolina case law supports the principle that summary judgment should not be granted until discovery is complete, particularly when pending discovery addresses material facts. In *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), the court emphasized that summary judgment is inappropriate when relevant facts could still be discovered. Granting summary judgment while essential discovery is pending is an abuse of discretion because it prevents the nonmoving party from fully developing their case. Rule 56(f), SCRCF, explicitly permits the court to defer summary judgment to allow for additional discovery if the opposing party needs more time to gather evidence crucial to its claims.

By disregarding the pending deposition and granting summary judgment prematurely, the trial court contravened the purpose of Rule 56 and denied Appellants the procedural safeguards necessary for a fair determination of their case. The trial court's premature grant of summary judgment was therefore an abuse of discretion and warrants reversal.

## **II. THE TRIAL COURT ERRED IN STRIKING APPELLANTS' AFFIDAVIT AS UNTIMELY FILED DESPITE NO PREJUDICE TO RESPONDENTS.**

The trial court excluded Appellants' affidavit, which was filed two days before the hearing, as untimely under Rule 6(d), SCRCF. In excluding the affidavit, the court interpreted the "two days" requirement narrowly, applying it as "two business days," and thereby excluded the affidavit from consideration. This interpretation, however, conflicts with precedent set in *Black v. Lexington School District No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997), which suggests that "two days" means two calendar days, regardless of weekends or holidays.

In *Black*, the South Carolina Supreme Court upheld the trial court's exclusion of an affidavit served within the two-day period specified by Rule 56, emphasizing that affidavits opposing summary

judgment must comply with the timeline regardless of intermediate weekends or holidays. The court did not allow any interpretation that would treat "two days" as "two business days" in that context. This strict interpretation underscores that "two days" means calendar days under South Carolina law, particularly in the context of Rule 56, thus supporting the inclusion of affidavits filed within that literal two-day window.

Moreover, the *Black* decision demonstrates the need for procedural fairness and a case-by-case consideration of potential prejudice. Here, the Respondents did not demonstrate any prejudice resulting from the filing of the affidavit two calendar days before the hearing. Procedural rules are intended to facilitate justice, not obstruct it by imposing undue technicalities. See *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005) (emphasizing that procedural requirements should not obstruct the fair presentation of claims).

In light of *Black* and its interpretation of the "two days" requirement, the exclusion of Appellants' affidavit was an abuse of discretion, as it unduly restricted Appellants' ability to present critical evidence without any evidence of prejudice to Respondents. Therefore, Appellants respectfully request that this Court reverse the trial court's decision to strike the affidavit and consider the evidence in determining the merits of their claims.

### **III. THE TRIAL COURT ERRED IN DISMISSING CLAIMS AGAINST SUNSETTER PROPERTIES FOR ALLEGED IMPROPER SERVICE, AS RESPONDENTS WAIVED THE DEFENSE BY PARTICIPATING IN LITIGATION.**

The trial court dismissed claims against Sunsetter Properties, LLC, for alleged improper service, despite substantial participation in the case by Respondents. Sunsetter Properties filed responsive pleadings, engaged in discovery, and filed motions—all actions that demonstrate a waiver of any

objections to service under South Carolina law. A party that actively participates in litigation effectively waives procedural defenses, including improper service. See *Stewart v. Richland Mem'l Hosp.*, 313 S.C. 402, 438 S.E.2d 897 (1993).

Allowing Sunsetter Properties to invoke an improper service defense after fully engaging in litigation contradicts the principles of fairness and due process, as it rewards Respondents for using service as a reserve defense while progressing through the case. Appellants reasonably relied on Respondents' active participation as an indication that the service issue had been waived. By dismissing the claims on these grounds, the trial court disregarded the substantial prejudice to Appellants, who were entitled to rely on Respondents' participation as waiving service objections. The dismissal was unwarranted and legally unsound.

**IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS' REQUEST TO AMEND THE COMPLAINT TO ADDRESS ANY DEFICIENCIES IDENTIFIED BY THE COURT.**

At the summary judgment hearing, Appellants requested leave to amend their complaint to address any deficiencies the court found in their initial pleadings. Under Rule 15(a), SCRCP, leave to amend "shall be freely given when justice so requires." The rule is designed to promote adjudication on the merits, rather than on procedural technicalities, and allows parties to cure defects in their pleadings when doing so would not prejudice the opposing party.

Here, the court's denial of Appellants' request to amend was an abuse of discretion, as it effectively precluded Appellants from rectifying any alleged deficiencies in their complaint. Appellants were willing and prepared to address the court's concerns and thereby ensure that their claims would proceed based on a complete and amended record. South Carolina courts have upheld the principle

that amendments should be permitted to avoid unnecessary dismissals, especially when no prejudice to the opposing party is shown. See *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (2005). The court’s denial of leave to amend in this case unfairly limited Appellants’ ability to present their case on the merits and resulted in an unjust outcome.

**V. THE COURT ERRED IN APPLYING THE ECONOMIC LOSS RULE TO DISMISS APPELLANTS' CLAIMS.**

The trial court's reliance on the economic loss rule to grant summary judgment was misplaced. This rule generally restricts recovery for purely economic losses to contractual remedies; however, exceptions exist, particularly where there are allegations of fraudulent or negligent misrepresentation.

1. Separate Duty Owed in Tort: In *Carroll v. Isle of Palms Pest Control, Inc.*, the South Carolina Court of Appeals reaffirmed that for a plaintiff to pursue a tort claim alongside a contract claim, there must be a duty independent of the contract. The court noted that “[w]hen the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort.” This standard is met here, where Appellants allege that Home Inspection One had a duty to accurately report the property's condition—a duty rooted in public safety and industry standards, not merely the contractual relationship. This duty is distinct from any contractual obligation, as it relates to the inspector’s professional role and the public's reliance on accurate inspections.
2. Negligent Misrepresentation Exception: South Carolina recognizes an exception to the economic loss rule for claims of negligent misrepresentation, which are distinct from simple breaches of contract. *Carroll* also acknowledges this principle by noting that economic loss

rules do not bar claims where tort duties exist independently of contract. Appellants' claim that Home Inspection One failed to disclose material defects or misrepresented the condition of the property invokes negligent misrepresentation, as it directly impacted the Appellants' reliance on the inspection report.

3. Expansion of Residential Exception: The court in *Carroll* referenced the "narrow exception" to the economic loss rule established in *Kennedy v. Columbia Lumber & Mfg. Co.*, which applies specifically to residential homebuilding. However, Appellants argue that this rationale should extend to home inspections because of the public reliance on accurate reports for safety and consumer protection. Like the builder's duty to construct safe homes, the inspector's duty to provide truthful and complete information aligns with consumer protection interests.
4. Physical Harm or Property Damage Beyond Economic Loss: Appellants contend that the harm they suffered due to undisclosed property defects extends beyond mere economic loss. The inspector's misrepresentations or omissions resulted in physical and structural property damage, which falls outside the economic loss rule's bar on tort claims. This property damage was not only economic in nature but also impacts the physical integrity and safety of the property, warranting a separate tort action.

The *Carroll* decision supports the position that the economic loss rule should not apply to cases where tort duties and public reliance are central to the defendant's role. Accordingly, Appellants' claims should not be dismissed under the economic loss rule, and this Court should remand the case for further proceedings on this basis.

## CONCLUSION

For the reasons stated, Appellants respectfully request that this Court reverse the trial court's order granting summary judgment to Respondents, remand for completion of discovery, and allow Appellants to amend their complaint. The premature grant of summary judgment, the improper exclusion of evidence, and the erroneous dismissal of claims warrant a full reconsideration of Appellants' case.

Respectfully submitted,

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