**IN THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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

**The Honorable Jocelyn Newman, Circuit Court Judge**

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**Appellate Case No. 2024-000995**

**Circuit Court Case No. 2022-CP-40-02713**

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Elizabeth and Melvin Ray..... **Appellants,**

v.

Sunsetter Properties, LLC, Nancy Warner Agent for Coldwell Banker Residential Brokerage, and Home Inspection One, LLC .....**Respondents.**

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# FINAL BRIEF OF RESPONDENT HOME INSPECTION ONE, LLC

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## STATEMENT OF THE CASE

This appeal arises out of two orders issued by the circuit court granting summary judgment in favor of Respondents, Home Inspection One, LLC ("HIO") and Sunsetter Properties, LLC ("Sunsetter"). The Orders granting HIO's and Sunsetter's motions were both signed by the Honorable Jocelyn Newman on May 11, 2024, and filed May 13, 2024. While HIO and Sunsetter raised distinct arguments in support of their respective motions, and while the circuit court provided different reasoning in its Orders granting summary judgment, the issues on appeal have been conflated by Appellants. The explanation below has been provided to clarify the issues on appeal which relate to HIO's motion and those which do not.

### *A. The Home Inspection Agreement and Home Inspection Report*

Appellants and HIO entered an agreement (the "Home Inspection Agreement" or "contract") wherein HIO agreed to perform a residential home inspection of the residence located at 901 Valhalla Drive in Columbia, South Carolina ("Subject Residence") and to issue a home

inspection report for an inspection fee in the amount of $310.00, which HIO did in April 2019.[1] Order Granting HIO Mot. Summ. J., p. 2 **(R. p. 154)**; HIO Mem. in Supp. of Mot. Summ. J., Exs. A–C **(R. pp. 197–229)**.

The Home Inspection Agreement defines the scope of inspection, the duties owed by HIO with respect to conducting the inspection, and the rights and obligations of the parties to the contract. HIO Mem. in Supp. of Mot. Summ. J., Ex. A **(R. pp. 197–98)**. For example, Paragraph 2 of the Home Inspection Agreement, provides:

> 2. Inspector agrees to perform a visual inspection of the readily accessible areas of the home located at the Property Address identified above to disclose the general condition of the building, improvements, mechanical systems and appliances as they exist on the date and time of the inspection. The purpose and scope of this inspection is to provide Client a better understanding of the above-referenced property's condition. This inspection is a limited visual inspection as a generalist. Inspector does not inspect for nor is inspector expected to report upon cosmetic conditions or defects. **Conditions that are hidden, concealed, camouflaged, or that cannot be seen by visual inspection are not covered**. Client assumes all risk for potential problems or conditions including those areas not accessible by the inspector. Client agrees that any alleged condition not reported by the Inspector on the Home Inspection Report is deemed to be not readily visible. Insulation is not removed for the inspection. Equipment is not dismantled for inspection. By signing below, Client assumes all risk for potential problems or conditions including those areas not accessible by Inspector. **Client assumes all risk for problems noted in the Inspection Report that may reveal further damage during repair or further investigation by a qualified professional contractor**. Client should recheck plumbing, electrical, and appliances on the day of closing. Inspector can only observe and report on the condition of the Property on the day of inspection and is not responsible for any change(s) that may occur to the Property thereafter.

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[1] Appellants were deemed to have admitted HIO's Requests for Admission as part of an Order granting HIO's Motion to Compel and Motion to Deem Admitted Requests to Admit entered by the Honorable Clifton B. Newman on July 24, 2023, and thus Appellants have conceded that the Home Inspection Agreement and home inspection report attached to HIO's Memorandum in Support of its Motion for Summary Judgment as Exhibits A and C, respectively, represent the contract that is applicable to the home inspection HIO conducted at the subject residence and that the home inspection report HIO produced as a result of its inspection. Order Granting Motion to Compel and Granting Motion to Deem Admitted Requests to Admit **(R. pp. 332–37)**; HIO's Motion to Compel Plaintiffs Discovery Responses and Motion to Deem Admitted Requests to Admit **(R. pp. 288–331)**.

> The parties specifically agree the inspector cannot be and is not expected to find or discover all defects in the above-referenced property.

HIO Mem. in Supp. of Mot. Summ. J., Ex. A, ¶ 2 **(R. p. 197)** (emphasis added).

> Similarly, Paragraph 4 of the Home Inspection Agreement further provides:
>
> 4. Client agrees that the Home Inspection Report is not an engineering study or technically exhaustive report. For a technically exhaustive report, a specialist should be separately consulted and/or retained by Client. **Inspector does not perform engineering, architectural, plumbing, electrical, structural, lead, fire, mold or mildew, or any toxic analysis, or any job function requiring occupational license. Inspector does not perform repairs: therefore, Inspector does not provide any guarantee or warranty of repairs performed by others prior to, simultaneous with, or subsequent to the inspection.** Inspector does not determine the adequacy of repairs performed by others. **Client agrees and understands that this is not a code compliance inspection for city, county, state or federal building codes, construction standards or regulations of any kind.**

HIO Mem. in Supp. of Mot. Summ. J., Ex. A, ¶ 4 **(R. p. 197)** (emphasis added).

As is clear from the Home Inspection Agreement, the Appellants and HIO specifically agreed that the inspector was not required to determine the adequacy of repairs performed by others, that the inspector did not perform repairs, and that the scope of the inspection did not include evaluating the subject property to determine whether it was in compliance for any city, county, state, or federal building code. HIO Mem. in Supp. of Mot. Summ. J., Ex. A, ¶ 4 **(R. p. 197)**. Consequently, the Home Inspection Agreement did not require the inspector to conduct a permit search to evaluate whether prior repairs were properly permitted or inspected by the county or to determine whether such repairs were up to code. Moreover, pursuant to the Home Inspection Agreement, Appellants and HIO specifically agreed that the duties of the inspector did not include performing engineering, architectural, plumbing, electrical, structural, lead, fire**,** mold or mildew, or any toxic analysis, or any job function requiring occupational license**,** and that inspecting for mold or mildew was expressly excluded from the scope of the inspection**.** HIO Mem. in Supp. of Mot. Summ. J., Ex. A, ¶¶ 4, 5 **(R. p. 197)**.

In April 2019, HIO issued a home inspection report identifying numerous potential issues and areas of concern as required pursuant to the Home Inspection Agreement. HIO Mem. in Supp. of Mot. Summ. J., Ex. C **(R. pp. 213–29)**. The report noted, with pictures as evidence, that the dishwasher had not been properly installed, the master shower valve stems were leaking, the water heater valve was leaking, evidence of potential leaks in the attic, and incomplete installation of the HVAC system in the sunroom. HIO Mem. in Supp. of Mot. Summ. J., Ex. C, pp. 2–6 **(R. pp. 214–18)**. Notably, in the report, HIO also recommended that a licensed plumber be hired to further evaluate and repair the plumbing issues/leaks; that a qualified HVAC contractor be retained to evaluate and repair the HVAC issues; and that a qualified contractor evaluate and make repairs to the insulation issues in the attic, which included addressing the evidence of previous leaks in the attic. HIO Mem. in Supp. of Mot. Summ. J., Ex. C, pp. 2–6 **(R. pp. 214–18)**.

Despite being warned of the potential issues identified in the home inspection report, Appellants purchased the Subject Residence. Compl., ¶¶ 7–9 **(R. p. 141)**.

***B. Litigation Related to Home Inspection One***

Appellants filed this lawsuit on May 23, 2022, asserting a cause of action for simple negligence against HIO.[2] Compl., ¶¶ 22–26 **(R. p. 143)**. In support of their ordinary negligence cause of action against HIO, that HIO "had a duty to inspect the home for deficiencies in a manner that was not negligent." Compl. ¶ 23 **(R. p. 143)**. Appellants claim HIO breached this duty by not disclosing water leaks, mold and mildew issues, plumbing deficiencies, and that reconstruction was done to the home without the County inspecting it to determine if the improvements were up

[2] Appellants also assert a cause of action for negligent misrepresentation against Sunsetter, and a breach of fiduciary duty claim against Nancy Warner Agent for Coldwell Banker Residential Brokerage ("Warner"). Warner has not appeared in this lawsuit and is, upon information and belief, not a part of this appeal.

to code, despite such items being identified as potentially problematic in the home inspection report and/or contractually excluded from the scope of the inspection as set forth herein above. Compl. ¶¶ 9, 13, 24 **(R. pp. 141–42)**. HIO filed its Answer to the Complaint on November 10, 2022, and an Amended Answer on November 18, 2022. HIO Answer **(R. pp. 159–63)**; HIO Amended Answer **(R. pp. 183–84)**.

On July 26, 2023, HIO filed a Motion for Summary Judgment seeking to have Appellants' plain negligence claim dismissed on the grounds that HIO's duties to Appellants arise solely from the Home Inspection Agreement and, therefore, Appellants' tort claim is barred by the economic loss doctrine as a matter of law; and, alternatively, requesting declaratory relief. HIO's Mot. Summ. J. **(R. pp. 185–86)**.[3] A hearing on HIO's motions was scheduled for April 16, 2024, and Appellants did not file a Memorandum in Opposition to HIO's Motion for Summary Judgment. Transcript, p. 1 **(R. p. 244, lines 1–19)**.[4]

After hearing oral arguments from Appellants and HIO, Judge Newman suggested that amending the complaint at this stage of litigation would not be appropriate and indicated she would be granting HIO's motion based on the economic loss rule and because "the only duty alleged by [Appellants] arises out of the [Home Inspection Agreement]." Transcript, pp. 20–21 **(R. p. 263, lines 10–p. 264, line 8)**. On May 13, 2024, Judge Newman filed her written Order granting HIO's Motion for Summary Judgment holding that Appellants' negligence claim was barred by the economic loss rule as a matter of law. Order granting HIO's Mot. Summ. J. **(R. pp. 153–58)**.

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[3] On August 9, 2023, Sunsetter filed a Motion to Dismiss and Motion for Summary Judgment seeking dismissal of Appellants' claim due to improper service or, alternatively, seeking summary judgment due to the lack of evidence supporting Appellants' claim. Sunsetter Motion to Dismiss **(R. pp. 49–58)**.

[4] Hearings on HIO's and Sunsetter's motions were scheduled on the same day, but the court heard and ruled on each motion separately, with HIO's motion being heard and ruled on first.

Notably, Judge Newman's Order did not address any of the arguments raised by Appellants' during the hearing. Order granting HIO's Mot. Summ. J. **(R. pp. 153–58)**. Appellants did not file a motion pursuant to Rule 59(e), SCRCP.

## STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. See e.g., Knight v. Austin, 396 S.C. 518, 722 S.E.2d 802 (2012). Summary judgment is appropriate if the circuit court finds "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329, 353 S.E.2d 312, 316 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). Thus, the non-moving party cannot survive summary judgment by simply claiming there is "mere scintilla of evidence" that supports its position, and to satisfy the "genuine issue of material fact" standard, "it is not sufficient for [the nonmoving party] to create an inference that is not reasonable or an issue of fact that is not genuine." Kitchen Planners, LLC v. Friedman, 440

S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Kitchen Planners, 440 S.C. 456, 892 S.E.2d 297 (2023); see Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (providing that Rule 56, SCRCP requires the lower court grant summary judgment where a plaintiff relies solely upon the pleadings and makes no factual showing in opposition to a motion for summary judgment, if, under the facts presented by the moving party, he was entitled to judgment as a matter of law.).

## ARGUMENT

### I. THE LOWER COURT PROPERLY GRANTED HOME INSPECTION ONE LLC'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS HAD A FULL AND FAIR OPPORTUNITY TO CONDUCT DISCOVERY AND FAILED TO DO SO AND BECAUSE APPELLANTS FAILED WITH RULE 56(f), SCRCP:

At the time of the hearing on HIO's Motion for Summary Judgment, Appellants' case had been pending in circuit court for approximately six hundred and ninety-four (694) days (almost twenty-two months), and over two hundred and sixty-two (262) days (over eight months) had passed since HIO's motion and supporting memorandum were filed and served. Complaint **(R. pp. 140–44)**; HIO's Mot. Summ. J. **(R. pp. 185–86)**; HIO's Mem. in Supp. of Mot. Summ. J. **(R. pp. 187–243)**; Transcript **(R. p. 244, lines 1–20; p. 255, line 19–p. 257, line 12)**. Despite the age of this case and despite having ample time to do so, Appellants engaged in no discovery prior to the hearing. However, Appellants now contend they need additional time for discovery and argue the court's granting of summary judgment was premature and in contravention of Rule 56(f), SCRCP. Transcript, p. 11-12 **(R. p. 254, line 5–p. 255, line 2)**; Appellants' Final Br., pp. 3–4.

## A. APPELLANTS HAD A FULL AND FAIR OPPORTUNITY TO CONDUCT DISCOVERY AND THE GRANT OF SUMMARY JUDGMENT WAS NOT PREMATURE.

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) (citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding that a summary judgment motion heard four months after the action was filed and granted nine months after the action was filed was not premature because plaintiffs had a full and fair opportunity for discovery and finding the nonmoving party must demonstrate it is not merely engaged in a 'fishing expedition' by showing the likelihood that further discovery will uncover additional relevant evidence); see Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where appellants "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment.").

Appellants rely on Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) for the proposition that "summary judgment is inappropriate when relevant facts could still be discovered." Appellants' Final Br., p. 4. In Baughman, our Supreme Court reversed a grant of summary judgment to the defendant as premature. Id. at 114, 410 S.E.2d at 545. However, the Supreme Court found the plaintiffs had demonstrated a likelihood that further discovery would uncover additional, relevant evidence, and found the plaintiffs had not been dilatory in seeking discovery. Id. at 112-3, 410 S.E.2d at 544.

Here, Appellants had a full and fair opportunity to conduct discovery. Appellants filed their lawsuit on May 23, 2022, and the case had been pending for almost twenty-two (22) months prior to the hearing. Additionally, HIO's motion and supporting memorandum were filed and served over eight (8) months prior to the hearing. Appellants had ample time to conduct discovery, but they failed to do so or provide any reasonable explanation why they have not engaged in discovery. Thus, contrary to Appellants' contention, and unlike the plaintiffs in Baughman, Appellants were dilatory in seeking discovery. Moreover, Appellants provided no valid reason why the time elapsed was insufficient for them to have developed facts opposing HIO's Motion for Summary Judgment.

Notably, the only "additional discovery" Appellants claim they were denied from conducting prior to the hearing was the deposition of Naeem Shabazz ("Shabazz"), who Appellants identified as a "housing inspector."[5] Appellants' Final Br., p. 3. Appellants claim Shabazz would have testified regarding "unpermitted additions and code violations," and that such testimony would have revealed "facts directly relevant to their negligence claim." Appellants' Final Br., p. 3. However, as Appellants acknowledged during the hearing, any duty owed by HIO arose from the Home Inspection Agreement and Appellants cannot maintain a negligence claim against HIO. Thus, Appellants also failed to show why Shabazz's testimony or any other discovery would uncover additional relevant evidence and create a genuine issue of material fact with respect to Appellants' claim against HIO.

[5] Based on HIO's review of the South Carolina Department of Labor Licensing and Regulation's ("SC LLR") licensee lookup tool, there is no licensed home inspector, residential builder, residential specialty contractor, general contractor, architect, engineer, surveyor, or building code inspector registered with or licensed by the SC LLR named Naeem Shabazz.

Based on the foregoing, it is clear that Appellants had a full and fair opportunity to complete discovery and the lower court's grant of summary judgment in favor of HIO was not premature.

### B. APPELLANTS FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 56(f), SCRCP:

Appellants cite Rule 56(f), SCRCP, to support their argument that the grant of summary judgment was premature. Notably, however, Appellants failed to file an affidavit explaining why they needed more time for discovery and exactly how that discovery would have created an issue of fact as required by Rule 56(f), SCRCP. See Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition . . . the court . . . may order a continuance to permit . . . discovery to be had . . . ."); see also Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.").

## II. THE LOWER COURT DID NOT ERR IN GRANTING HOME INSPECTION ONE, LLC SUMMARY JUDGMENT WHERE APPELLANTS' AFFIDAVIT WAS NOT APPLIED TO OPPOSE HOME INSPECTION ONE, LLC'S MOTION AND THEREFORE NOT PRESERVED FOR APPELLATE REVIEW; HOWEVER, EVEN IF IT WERE PRESERVED SUCH ARGUMENT WOULD FAIL AS A MATTER OF LAW:

Despite Appellants use of the word "Respondents" in Appellants' Argument II, this section of Appellants appeal relates to the lower court not considering an affidavit filed by Appellants in opposition to Sunsetter's Motion for Summary Judgment during the hearing on Sunsetter's Motion. Transcript, pp. 21-42 **(R. p. 264, line 7–p. 285, line 19)**.

Appellants did not attempt to introduce the affidavit, did not argue that it was being presented in opposition to HIO's motion, and did not have the lower court rule on whether the affidavit should be excluded from consideration with respect to HIO's Motion for Summary

Judgment. Transcript, pp. 1-21 **(R. p. 244, line 1–p. 264, line 6)**. Consequently, to the extent Appellants' Argument II on appeal is directed towards HIO's Motion for Summary Judgment it was not preserved for appellate review. I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 723-24 (2000) ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

However, even if Appellants' Argument II is deemed preserved for review with respect to HIO's motion, such argument would fail as the lower court properly excluded the affidavit from consideration as untimely. Under Rule 56(c), SCRCP, the adverse party to a motion for summary judgment "may serve opposing affidavits not later than two days before the hearing." Likewise, Rule 6(d), SCRCP, provides that "additional or opposing affidavits may be served not later than two days before the hearing." Rule 6(d), SCRCP. In calculating the time required under the South Carolina Rules of Civil Procedure, "when the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." Rule 6(a), SCRCP.

Here, the hearing was scheduled for April 16, 2024. Thus, the latest Appellants could have served an opposing affidavit was Friday, April 12, 2024. However, Appellants did not serve the affidavit until they served and filed it on April 14, 2024. Consequently, the affidavit was untimely and properly excluded by the lower court.

## III. THE LOWER COURT DID NOT ERR IN GRANTING HOME INSPECTION ONE, LLC SUMMARY JUDGMENT WHEN IMPROPER SERVICE WAS NOT RAISED AS PART OF HOME INSPECTION ONE, LLC'S MOTION:

Appellants' Argument III relates to the lower court granting dismissal of Appellants' claims against Sunsetter due to Appellants' failure to properly serve Sunsetter. Transcript, pp. 21–42 **(R. p. 264, line 7–p. 285, line 19)**; Order Granting Sunsetter's Mot. Summ. J. **(R. pp. 167–77)**.

HIO's Motion for Summary Judgment was not granted based on improper service nor was improper service raised by HIO as part of its motion. HIO Mot. Summ. J. **(R. pp. 185–86)**; Order Granting HIO's Mot. Summ. J. **(R. pp. 153–58)**.

Additionally, none of the arguments raised in this section of Appellants' brief were raised by Appellants during the hearing on HIO's motion or ruled on by the court with respect to HIO. Order Granting HIO's Mot. Summ. J. **(R. pp. 153–58)**; Transcript, pp. 1–21 **(R. p. 244, line 1–p. 264, line 6)**. Therefore, to the extent Appellants' Argument III is directed towards HIO's Motion for Summary Judgment, it was not preserved for appellate review. See I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 723-24 (2000) ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

## IV. APPELLANTS FAILED TO PRESERVE THE ISSUE OF WHETHER THE COURT ERRED IN NOT PROVIDING APPELLANTS LEAVE TO AMEND FOR APPELLATE REVIEW AND, ALTERNATIVELY THE COURT DID NOT ABUSE ITS DISCRETION BY NOT ALLOWING APPELLANTS TO AMEND THEIR COMPLAINT:

Appellants contend the lower court's grant of summary judgment was improper because Appellants were not provided leave to amend. Appellants' Final Br., p. 9.

### A. APPELLANTS PURPORTED REQUEST TO AMEND WAS NOT RAISED TO OR RULED ON BY THE LOWER COURT AND THEREFORE, APPELLANTS FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Thus, South Carolina's preservation requirements are "mandatory." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24-25, 602 S.E.2d 772, 780 (2004); see also I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 723-24 (2000) (explaining "as expressed in Rule 220(c),SCACR, … an appellate

court may affirm the lower court's judgment or any reason appearing in the record on appeal …[but] and appellate court … may not reverse for any reason appearing in the record.").

Here, Appellants seem to contend they made a request to amend based on the following statement their counsel made during the hearing on HIO's motion: "I agree that it could – it is a possible contract claim and to the extent that there are deficiencies there I would ask the court to allow [Appellants] to, I guess, amend their Complaint to address that issue." Transcript, p. 18 **(R. p. 261, lines 20–24)**. Notably, Appellants provided this statement in response to the lower court asking if Appellants agreed with HIO's contention that Appellants' claim is barred because HIO's duties all arose from the Home Inspector Agreement. Transcript, p. 18 **(R. p. 261, lines 17–19)**.

As is clear from the limited, conditional nature of the statement above and the context in which it was given, Appellants were simply stating they would request leave to amend if the court found their pleading was defective. The lower court did not expressly indicate it found Appellants pleading defective nor did it include a ruling on this purported "request to amend" as part of its written Order granting HIO's motion. Moreover, Appellants did not contest HIO's contention that the only duty alleged by Appellants arose out of the Home Inspection Agreement, nor did Appellants request leave to amend after the lower court stated it was granting HIO's motion. Order granting HIO's Mot. Summ. J. **(R. pp. 153–158**). Appellants also did not file a motion pursuant to Rule 59(e), SCRCP asking the lower court alter or amend its order to include a ruling on their purported request to amend prior to filing this appeal. Therefore, Appellants failed to preserve this issue for appellate review I'On, LLC v. Town of Mount Pleasant, 338 S.C. at 422, 526 S.E.2d at 724 ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

**B. ALTERNATIVELY, IF THIS ISSUE IS DEEMED TO BE PRESERVED FOR APPELLATE REVIEW, THE LOWER COURT DID NOT ERR IN DENYING APPELLANTS LEAVE TO CORRECT DEFICIENCIES IN THEIR COMPLAINT:**

A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion. City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). A trial court's finding on a motion to dismiss will not be overturned absent an abuse of discretion. Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App.1 997). An abuse of discretion occurs when the trial court denies a motion to amend if there is no valid reason for supporting the denial of leave to amend. Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1998). Valid reasons for denying a motion to amend could be "bad faith, undue delay, or prejudice." Id.; See Health Promotion Specialists, LLC v. South Carolina Board of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808 (2013) (Concluding the circuit court did not abuse its discretion in denying a party's motion to amend because the "delay in moving to amend was inexplicable.")

At the hearing, HIO objected to Appellants being allowed to amend on the grounds that HIO's motion and supporting memorandum were filed more than eight (8) months prior to the hearing; that Appellants had not moved to amend to assert a viable claim despite filing the case almost two (2) years prior to the hearing and despite knowing HIO's position for more than eight (8) months; and that Appellants' delay in requesting leave to amend was inexplicable and amounted to undue delay. Transcript, pp. 18–20 **(R. p. 261, line 25–p. 263, line 9)**.

During hearing, the lower court stated that there are a number of reasons why allowing Appellants to amend at this stage of litigation would not be appropriate. Transcript, pp. 20–21 **(R. p. 263, line 10–p. 264, line 8)**. In support of this statement, the lower court pointed out the amount of time that had passed between when the Complaint was filed and the hearing, and suggested

there was no justifiable reason for Appellants to wait until the summary judgment stage to first raise the prospect of needing leave to amend. Transcript, pp. 20–21 **(R. p. 263, line 10–p. 264, line 8)**. Notably, the court also stated that the lower courts "would never dispose of cases if plaintiffs could fix things on summary judgment by amending the pleadings to – to figure out a viable claim." (Transcript, pp. 20–21) **(R. p. 263, line 10–p. 264, line 8)**.

The lower court did not include a ruling on Appellants' purported request to amend in its written order. However, taken together, HIO's arguments and the lower court's reasoning show that, to the extent Appellants requested leave to amend during the hearing and to the extent the court ruled on said request, the lower court had a valid reason for denying Appellants' request to amend (i.e., undue delay) and, thus, it did not abuse its discretion in denying said request.

## V. THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF HOME INSPECTION ONE, LLC BECAUSE APPELLANTS' CLAIMS ARE BARRED BY THE ECONOMIC LOSS RULE:

Appellants contend the lower court erred in granting HIO summary judgment because the economic loss doctrine does not apply to Appellants' claims against HIO.

### A. APPELLANTS CANNOT RELY ON ARGUMENTS OR EVIDENCE THAT WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW OR THAT APPELLANTS PREVIOUSLY CONCEDED AT THE HEARING IN THE LOWER COURT.

In their brief, Appellants contend (a) that the economic loss rule should not apply to preclude Appellants from proceeding against HIO on its negligence claim because their Complaint alleges that HIO breached duties in tort which arise independently of the Home Inspection Agreement; (b) that South Carolina recognizes an exception to the economic loss rule for claims for negligent misrepresentation that is applicable and prevents application of the economic loss rule from barring their negligence claim against HIO; (c) that the limited real estate purchase exception to the economic loss rule, which applies only to home builders, should be expanded to

apply to home inspectors; (d) that the economic loss rule should not be applied because misrepresentations and omissions by the inspector resulted in physical and structural property damage, which they claim falls outside of the economic loss rule's bar on tort claims; and (e) that the case Carrol v. Isle of Palms Pest Control, Inc., which Appellants have not provided a citation for, precludes application of the economic loss rule to bar Appellants' tort claim against HIO. Appellants' Final Br., pp. 7–8.

Importantly, Appellants did not raise any of these arguments orally during the hearing and the arguments set forth above were raised by Appellants for the first time in their brief. These arguments are, therefore, not preserved for review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Elam v. S. Carolina Dep't of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review").

Moreover, when presented with the opportunity to raise arguments opposing HIO's motion during the hearing, Appellants simply agreed that the only duties they allege HIO owed arise from the Home Inspection Agreement and conceded that their tort claim against HIO was potentially based in contract. Transcript, p. 18 **(R. p. 261, lines 17–25)**. Accordingly, Appellants are prevented from arguing to the contrary on appeal. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal") (citing Ex parte McMillan, 319 S.C. 331, 461 S.E.2d 43(1995).

### B. ALTERNATIVELY, THE LOWER COURT DID NOT ERR IN GRANTING HOME INSPECTION ONE LLC'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE ECONOMIC LOSS DOCTRINE BARS APPELLANTS' NEGLIGENCE CLAIMS.

South Carolina courts have long recognized the economic loss rule stating there is no tort liability for purely economic losses suffered from a plaintiff's purchase of a defective product. See Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009); Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989); Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995); Beachwalk Villas Condo. Ass'n, Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991). The South Carolina Supreme Court has also examined the economic loss doctrine in context of residential construction in Kennedy, where it established a narrow residential real estate construction exception. 299 S.C. 335, 384 S.E.2d 730 (1989). The Court in Kennedy found that this exception exists and exposes residential home builders to tort liability when the buyer suffers economic loss from the purchase of a defective property. Id. Notably, the South Carolina Supreme Court has expressly excluded home inspectors from this exception and declared the economic loss doctrine applies. See Gladden v. Boykin, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013).

In addition to the Court's clear direction in Gladden, Appellants' negligence action relies on a duty which was created solely by way of the Agreement and is thus barred by the economic loss doctrine. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995) (A breach of a duty arising under the provisions of contract between parties must be redressed under contract, and a tort action will not stand.). HIO owed Appellants no duty other than that directly contracted for, and accordingly the lower court was correct in finding that Appellants' negligence action against HIO fails as a matter of law and, therefore, the lower court did not err in granting HIO's Motion for Summary Judgment.

## CONCLUSION

For the foregoing reasons, HIO respectfully submits that the Court should affirm the ruling of the trial court granting HIO's Motion for Summary Judgment.

Respectfully Submitted,

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The 17th day of March 2026
Charleston, South Carolina

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SC Court of Appeals

**IN THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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

**The Honorable Jocelyn Newman, Circuit Court Judge**

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**Appellate Case No. 2024-000995**

**Circuit Court Case No. 2022-CP-40-02713**

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Elizabeth and Melvin Ray..... **Appellants,**

v.

Sunsetter Properties, LLC, Nancy Warner Agent for Coldwell Banker Residential Brokerage, and Home Inspection One, LLC .....**Respondents.**

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## CERTIFICATE OF COUNSEL

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I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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The 17th day of March 2026
Charleston, South Carolina