RECEIVED
May 20 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001403
Case No. 2019-CP-10-00105

Endre Tomaschek and Evan Tomaschek, Appellants,

v.

Edith C. Miller; Don L. Sumter; Carolina Elite Real Estate, LLC; Christopher Gibbs; Buzz Off TPC, LLC d/b/a Buzzoff Termite & Pest Control, LLC; GWS, Inc.; Gaynelle Whittle-Shipp; Stucco Inspector, LLC; Solid Ground Home Inspections, LLC; Jerry L. Anderson d/b/a "Anderson Roofing"; Delano M. Francis; and Robert Oliver d/b/a "Home Repair by Robert," Defendants.

Of whom Solid Ground Home Inspections, LLC is the Respondent.

INITIAL BRIEF OF APPELLANTS

F. Elliotte Quinn IV
Rachel Igdal
The Steinberg Law Firm, LLP
103 Grandview Drive
Summerville, SC 29483

Ryan C. Andrews
Cobb Dill & Hammett, LLC
222 W. Coleman Boulevard
Mt. Pleasant, SC 29464

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

Table of Authorities ii

Issues Presented 1

Statement of the Case 2

Statement of Facts 2

Standard of Review 6

Argument 7

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' NEGLIGENCE CLAIM BECAUSE A HOME INSPECTOR IS SUBJECT TO A PROFESSIONAL NEGLIGENCE CLAIM AND THE ECONOMIC LOSS RULE DOES NOT BAR PROFESSIONAL NEGLIGENCE CLAIMS. 7

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' NEGLIGENCE CLAIM BECAUSE THE CLAIM IS FOR THE NEGLIGENT PROVISION OF A SERVICE AND THEREFORE NOT BARRED BY THE ECONOMIC LOSS RULE..14

III. THE CIRCUIT COURT ERRED IN GRANTING DECLARATORY RELIEF ON THE CONTRACTUAL LIMITATION OF LIABILITY PROVISION BECAUSE THE PROVISION IS UNCONSCIONABLE. 18

Conclusion 26

TABLE OF AUTHORITIES

CASES

Beachwalk Villas Condo. Ass'n v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991). 13

Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). 7

Broadnax v. Swift Transp. Corp., 694 F. Supp. 2d 947 (W.D. Tenn. 2010). 16

Carolina Prod. Maint., Inc. v. U.S. Fidelity & Guar. Co., 310 S.C. 32, 425 S.E.2d 39 (Ct. App. 1992). 13

Doe v. Am. Red Cross Blood Servs., S.C. Region, 297 S.C. 430, 377 S.E.2d 323 (1989). 9

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). 15

Evans v. Rite Aid Corp., 324 S.C. 269, 478 S.E.2d 846 (1996). 9

Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1991). 13

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013). 12, 18, 19, 20, 21, 22, 23, 24, 25

Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). 7

Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc., 891 So. 2d 532 (Fla. 2004). 16

Ins. Co. of N. Am. v. Cease Electric, Inc., 688 N.W.2d 462 (Wis. 2004). 17

Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989). 8, 14

Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985). 13

Lloyd v. Walters, 276 S.C. 223, 277 S.E.2d 888 (1991). 13

Marx v. Hartford Accident & Indem. Co., 157 N.W.2d 870 (Neb. 1968). 9

Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016). 8, 20

McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015). 13

Pittman v. Grand Strand Ent., Inc., 363 S.C.531, 611 S.E.2d 922 (2005). 6

Pride v. S. Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964). 8, 20

Quest Diagnostics, Inc. v. MCI Worldcom, Inc., 656 N.W.2d 858 (Mich. Ct. App. 2002).......... 16

S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984).8

S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 291 S.C. 460, 354 S.E.2d 378 (1987).. 9

Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009).. 15

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 668 (2007). 18, 24, 25

Smith v. D.R. Horton, Inc., 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013)................................. 22

Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995). 8, 13

STATUTES AND REGULATIONS

S.C. Code Ann. §§ 36-2-314.. 15

S.C. Code Ann. §§ 36-2-315.. 15

S.C. Code Ann. §§ 36-2-316.. 15

S.C. Code Ann. § 40-59-500.. 12

S.C. Code Ann. § 40-59-520.. 12

S.C. Code Ann. § 40-59-540.. 12

S.C. Code Ann. § 40-59-580.. 12

S.C. Code Ann. Regs. 106-4.. 12

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004).. 12

ISSUES PRESENTED

I. Did the trial court err in deciding a home inspector is not subject to a professional negligence claim?

II. Did the trial court err in deciding a claim for negligent provision of a service is barred by the economic loss rule?

III. Did the trial court err in applying an unconscionable limitation of liability provision in a home inspector's contract?

STATEMENT OF THE CASE

Appellants Endre and Evan Tomaschek commenced this action on January 9, 2019, to recover for damages suffered as the result of their purchase of a home with undisclosed defective conditions. (Compl.) On February 19, 2020, Respondent Solid Ground Home Inspections, LLC moved for summary judgment on Appellants' negligence claims and for a declaratory judgment on the breach of contract claim.[1] (Mot. Summ. J.) Following a July 16, 2020 hearing on Respondent's motion for summary judgment, the Honorable Circuit Court Judge Bentley D. Price entered a July 22, 2020 Form 4 Order denying the motion. (Tr. of July 16, 2020 Hearing; July 22, 2020 Order.) On August 4, 2020, Respondent moved for reconsideration. (Mot. for Recons.) Following a September 23, 2020 hearing on the motion for reconsideration, Judge Price entered a September 30, 2020 Form 4 Order granting the motion. (Tr. of Sept. 23, 2020 Hearing; Sept. 30, 2020 Order.) On October 20, 2020, Appellants noticed this appeal.

STATEMENT OF FACTS

This case arises from the purchase of a home in Charleston by Appellants, husband and wife first-time homebuyers. (Mem. in Oppn. to Mot. for Summ. J., Ex. D, Aff. of Endre Tomaschek ¶¶ 3–4.) Appellant Endre Tomaschek ("Endre") engaged Respondent as a licensed home inspector to perform a home inspection prior to Appellants closing on the purchase of the home. (Mem. in Oppn. to Mot. for Summ. J., Ex. A, Dep. of Erika Houmard-Solid Ground 30(b)(6) 15:23–16:21 & Ex. D, Aff. of Endre Tomaschek ¶ 8.) Endre communicated to Respondent that Appellants were under a tight deadline to have the home inspected, and

[1] On November 25, 2019, Appellants moved to amend their pleadings to add a breach of contract claim against Respondent. Anticipating the amendment and added claim, Respondent moved for declaratory relief on the proposed breach of contract claim. Appellants' motion to amend was heard at the same hearing as Respondent's motion for summary judgment and request for declaratory relief, and Judge Price granted Appellants' motion to amend in the July 22, 2020 Order.

Respondent told Endre the inspection would not be scheduled until he signed Respondent's form contract for inspection services. (Mem. in Oppn. to Mot. for Summ. J., Ex. A, Dep. of Erika Houmard-Solid Ground 30(b)(6) 16:18–18:7 & Ex. D, Aff. of Endre Tomaschek ¶¶ 10–15.) While neither conspicuous nor made known to Endre, Respondent's contract purported to limit Respondent's liability through the following terms:

> **NEITHER THE INSPECTION NOR THE REPORT IS A WARRANTY, EXPRESS OR IMPLIED, REGARDING THE ADEQUACY, PERFORMANCE, OR CONDITION OF ANY INSPECT STRUCTURE, SYSTEM OR ITEM.**
>
> . . .
>
> Client understands and agrees that any claim for failure to accurately report the visually discernible conditions of the subject property as limited herein above shall be made in writing and reported to the inspector within ten (10) business days of discovery. Client further agrees that with the exception of emergency conditions, client or client's agents, employees or independent contractors will make no alterations, modifications or repairs to the claimed discrepancy prior to a re-inspection by Solid Ground Home Inspections. Client understands and agrees that any failure to notify Solid Ground a [sic] stated above shall constitute a waiver of any and all claims for said failure to accurately report the condition in question. The parties agrees that the maximum liability for Solid Ground Home Inspections, or its agent, arising from failure to perform any of the obligations stated in this agreement, is limited to an amount NOT TO EXCEED THE FEE PAID FOR THE INSPECTION.

(Mem. in Oppn. to Mot. for Summ. J., Ex. E, Solid Ground Contract ¶¶ 8 & 13.)

Endre signed the contract, and Respondent performed the inspection and produced a report stating its findings. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 13:18–25, Ex. D, Aff. of Endre Tomaschek ¶ 12, Ex. E, Solid Ground Contract, Ex. F, Solid Ground Report.) The report identified some items of concern in the home but did not identify the significant foundation issues and other deficiencies that are the subject of this action. (Mem. in Oppn. to Mot. for Summ. J., Ex. F, Solid Ground Report, Ex. G, Sisnroy Report.)

Appellants purchased the home and shortly after moving into the home, Appellants began to observe cracking and separating flooring and finishes, sloping of the floors, termite damage, and wood rot in the rear portion of the home—an addition built after the original construction of the home but prior to Appellants' purchase of the home. (First Am. Compl. ¶¶ 92–93.) Upon further investigation, Appellants learned the rear portion of the home does not have a foundation; instead, the wood floor framing was placed directly on the soil below in some locations and on a single concrete block in other locations—all in violation of applicable building codes. (Mem. in Oppn. to Mot. for Summ. J., Ex. G, Sisnroy Report.) As a direct result of the lack of a foundation, the addition is sustaining damage from soil settlement, wood rot, and termite damage. (Mem. in Oppn. to Mot. for Summ. J., Ex. G, Sisnroy Report.)

Respondent admitted in its deposition testimony that the American Society of Home Inspectors' standards ("ASHI Standards") set forth a minimum level of inspection a home inspector is to provide. (Mem. in Oppn. to Mot. for Summ. J., Ex. D, Depo. of Stephen Houmard-Solid Ground 30(b)(6) 10:4–18, Ex. H, ASHI Standards.) Respondent's inspection and report did not comply with the ASHI Standards, did not meet the professional standard of care for home inspectors, and were negligently performed as shown by a comparison of the ASHI Standards against what Respondent reported and the actual condition of the home. In particular, the ASHI Standards provide that a home inspector "shall" "inspect readily accessible, visually observable, installed systems and components listed" in the standards, "provide the client with a written report . . . that states those systems and components inspected that, in the professional judgment of the inspector, are . . . significantly deficient," and "inspect structural components including the foundation and framing." (Mem. in Oppn. to Mot. for Summ. J., Ex. H, ASHI Standards §§ 2.2.A, 2.2.B, & 3.1.B.) Failing to comply with those standards, Respondent reported that the entire home

is a slab-on-grade foundation and failed to identify any concern regarding the observably deficient construction of the foundation for the rear portion of the home.

Appellants' expert engineer in this action determined the foundation of the rear addition to the home was improperly constructed and the improper foundation condition should have been obvious to any professional home inspector. Specifically, the engineer found:

- "Deficiencies such as lack of footings, lack of proper foundation, framing in ground contact and framing on damaged structural material were evident and obvious conditions . . . ."
- "Foundation and wall failure were evident from out of level conditions readily observable in the sunroom east end . . . ."
- "Simple probe testing revealed clearly that no footing was installed . . . ."

(Mem. in Oppn. to Mot. for Summ. J., Ex. G, Sisnroy Report 3–4.) Appellants' engineer concluded the addition "will continue to deteriorate and become more structurally unsound and unstable" and therefore, the addition needs to "be demolished and rebuilt." (Mem. in Oppn. to Mot. for Summ. J., Ex. G, Sisnroy Report 5.)

As the result of the extensive problems in the home and the extensive repairs needed to remedy those problems, Appellants filed this action against the former owners, Respondent, and others. Appellants both assert a negligence cause of action against Respondent, and Endre asserts a breach of contract cause of action against Respondent. (Second Am. Compl.)

Respondent moved for summary judgment on Appellants' negligence claim and for a declaratory judgment that its liability is contractually limited on the breach of contract claim. Faced with a limitation of liability provision that—even if enforceable—does not cover negligence claims, Respondent sought to eliminate the negligence claim through the economic loss rule. Respondent argued the economic loss rule limits Appellants' claims to a contract claim and bars Appellants' negligence claim. Respondent also moved for a declaratory judgment that its liability

to Appellants is limited to $405 pursuant to the limitation of liability provision in its contract. Appellants opposed Respondent's motion on the grounds that: (1) Respondent owed a duty of professional care and the economic loss rule does not apply to a tort claim for professional negligence, (2) Respondent contracted for the provision of a service and the economic loss rule does not apply to contracts for services, and (3) the limitation of liability provision is unconscionable and therefore unenforceable.

Judge Price initially denied Respondent's motion in its entirety through a July 22, 2020 Form 4 Order stating only: "Solid Ground Home Inspection Company's Motion for Summary Judgment is Denied." (July 22, 2020 Order.) Respondent moved for reconsideration, and Judge Price heard arguments on the motion for reconsideration. Without providing any explanation as to why he believed his earlier ruling was incorrect, Judge Price entered a September 23, 2020 Form 4 Order stating only: "Defendant Solid Ground Home Inspections, LLC's Motion to Alter or Amend Court's Ruling is GRANTED as to both defendants."[2] (Sept. 23, 2020 Order.) Because Appellants' three grounds for opposing the motion are each an independent basis on which the trial court could have denied the motion, at least in part, Judge Price rejected all three grounds in granting Respondent's motion for reconsideration in its entirety.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [the appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Ent., Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

[2] Appellants are unclear as to what Judge Price intended by the reference to "both defendants."

"On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." *Id.*

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." In cases applying the preponderance of the evidence burden of proof, as is applicable here, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Summary judgment is only appropriate in "the rare case whe[n] a verdict is not reasonably possible under the facts presented." *Bloom v. Ravoira*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' NEGLIGENCE CLAIM BECAUSE A HOME INSPECTOR IS SUBJECT TO A PROFESSIONAL NEGLIGENCE CLAIM AND THE ECONOMIC LOSS RULE DOES NOT BAR PROFESSIONAL NEGLIGENCE CLAIMS.

While the economic loss rule limits tort liability in relation to contracts for a product, the economic loss rule does not bar professional negligence claims. A home inspector in South Carolina is a person licensed by the state to use specialized knowledge of home construction to inspect homes and to report their opinions as to the condition of homes in accordance with a set of industry standards. Accordingly, a home inspector is a professional subject to professional negligence claims, and the economic loss rule does not bar professional negligence claims against

home inspectors. Therefore, the circuit court erred in granting summary judgment on Appellants' professional negligence claim on the basis it is barred by the economic loss rule.[3]

The economic loss rule provides that "there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself." *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989). The economic loss rule does not bar tort claims for economic losses where there is a duty owed by the tortfeasor separate from the tortfeasor's contractual obligation. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) ("When, however, there is a special relationship between the tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action."); *Kennedy*, 299 S.C. at 345–46, 384 S.E.2d at 737 ("If a builder performs construction in such a way that he violates a contractual duty *only*, then his liability is only contractual. If he acts in such a way as to violate a legal duty, however, his liability is both in contract and in tort."). Such a separate duty exists where the tortfeasor is a professional who owes a professional duty of care to the injured party. *Griffin Plumbing*, 320 S.C. at 55, 463

[3] It appears uncontested in the record that the limitation of liability provision in Respondent's form contract does not cover negligence claims. The limitation of liability provision relied upon by Respondent provides: "The parties agree that the maximum liability for [Respondent], or its agent, *arising from failure to perform any of the obligations stated in this agreement*, is limited to an amount NOT TO EXCEED THE FEE PAID FOR THE INSPECTION." (Mem. in Oppn. to Mot. for Summ. J., Ex. E, Solid Ground Contract (emphasis added).) Thus, the plain language of the limitation of liability provision provides that it only applies to a failure to perform a contractual obligation and does not extend to a failure to act in accordance with a standard of care that exists independent of the contract. Furthermore, while the plain language of the provision is clear that it does not cover anything more than failures to perform contractual obligations, even if there were any ambiguity as to whether the provision covered negligence claims, any such ambiguity must be resolved against Respondent. Respondent drafted the provision and is the party relying on it, and therefore, the language of the provision is to be strictly construed against Respondent. *Maybank v. BB&T Corp.*, 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016) ("However, notwithstanding our general acceptance of limitation of liability provisions and exculpatory clauses, the law disfavors such provisions, and courts must strictly construe the language of the provision against the drafter."); *Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 619, 138 S.E.2d 155, 157 ("Since such provisions tend to induce want of care, they are not favored by the law and will be strictly construed against the party relying thereon."); *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984) ("An exculpatory clause, our Supreme Court has held, is to be strictly construed against the party relying thereon."). Therefore, even were there any ambiguity as to the scope of the limitation of liability provision, which there is not, that ambiguity would be construed against Respondent to find that the provision covers only breach of contract claims.

S.E.2d at 89 ("These professionals, however, owe a duty to the client and sometimes to third parties which arises separate and distinct from the contract for services. We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties." (internal citation omitted)).

A professional duty of care exists for any "profession which furnishes skilled services for compensation." *Doe v. Am. Red Cross Blood Servs., S.C. Region*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989); *see also Evans v. Rite Aid Corp.*, 324 S.C. 269, 275, 478 S.E.2d 846, 849 (1996) ("In South Carolina, *American Red Cross* . . . clarified the standard of care in professional negligence causes of action: 'the professional failed to conform to the generally recognized and accepted practices in his profession.' This standard applies to 'physicians, dentists, ophthalmologists, accountants and *any other professional which furnishes skilled services for compensation*." (emphasis added) (quoting *Am. Red Cross*, 297 S.C. at 435, 377 S.E.2d at 326)). "A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominately mental or intellectual, rather than physical or manual." *S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry*, 291 S.C. 460, 463–64, 354 S.E.2d 378, 380 (1987) (quoting *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870 (Neb. 1968)). Accordingly, whenever a person or business furnishes such a skilled service for compensation, that person or business owes the customer a duty to perform the service in accordance with the generally recognized and accepted practices of the profession.

While South Carolina's appellate courts have not yet addressed whether the skilled service provided by home inspectors gives rise to a professional negligence claim, the service home inspectors provide is a professional service as established by: (1) the nature of the service, (2) the South Carolina licensing laws for home inspectors, and (3) a comparison of home inspection services to other services found to be professional services by South Carolina courts. First, as to the nature of the service provided by home inspectors, Respondent admits it provides home inspection services for compensation and that performing home inspections requires a license, training, and knowledge that an average person does not have. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 29:3–10, Ex. J, Solid Ground's Responses to Ps.' Requests to Admit ¶¶ 1–4.) Specifically, Respondent admits that home inspectors must perform their work according to a "standard of practice," with the standard of practice being the ASHI Standards. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 9:13–19.) Respondent admits the ASHI Standards set out a minimum level of inspection a home inspector is to provide, *i.e.*, accepted practices of the profession. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 10:13–18.)

Respondent also admits that to be licensed as a home inspector in South Carolina requires training and an examination. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 23:13–24:6.) Respondent admits the information covered in the training and on the examination include construction methods, the components of a home, potential defects in the components of a home, methods of performing home inspections, and the ASHI Standards. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 24:10–27:6.) Respondent admits that to be a licensed home inspector, a person must have

knowledge of residential foundations, the different types of residential foundations, and the potentially visually observable defects in a residential foundation, among other necessary knowledge. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 27:7–29:2.) Therefore, the knowledge that a home inspector must have to provide home inspection services is specialized knowledge that an average person does not have, and which requires education and training to acquire.

A review of the ASHI Standards confirms that providing home inspection services requires specialized knowledge. The ASHI Standards require an inspector to "provide the client with a written report . . . that states . . . those systems and components inspected that, *in the professional judgment of the inspector*, are not functioning properly, significantly deficient, unsafe, or are near the end of their service lives." (Mem. in Oppn. to Mot. for Summ. J., Ex. H, ASHI Standards (emphasis added).) Most notably, that provision of the ASHI Standards makes clear that performing home inspection services requires the exercise of "professional judgment." The exercise of "professional judgment" and the creation of a report stating a home inspector's conclusions reached through the exercise of professional judgment is exactly the type of furnishing of a skilled service and use of specialized knowledge that constitutes a professional service subject to professional negligence claims in South Carolina. Moreover, that provision of the ASHI Standards exemplifies how providing home inspection services requires specialized knowledge. A home inspector cannot provide a report detailing home components that are significantly deficient without specialized knowledge as to their proper condition.

Therefore, Respondent's admissions as to the nature of the home inspection services it provides and the ASHI Standards detailing the nature of home inspection services are alone enough

to establish that Respondent provides professional services for which a professional standard of care applies and for which a professional negligence claim exists.

Second, South Carolina licensing law for home inspectors also establishes that home inspectors provide a professional service. South Carolina law provides that a home inspector must be licensed by the Residential Builders Commission to lawfully provide home inspection services. S.C. Code Ann. § 40-59-520. To be licensed as a home inspector, an individual must meet certain requirements including attaining a specific level of training and experience and passing a licensing exam. S.C. Code Ann. § 40-59-540; S.C. Code Ann. Regs. 106-4. The South Carolina Supreme Court recognized that those requirements exist so that "purchasers are protected from unqualified home inspectors." *Gladden v. Boykin*, 402 S.C. 140, 143, 739 S.E.2d 882, 883 (2013). The requirement of a professional license and the requirement of training and passage of an examination both indicate that performing home inspections is a skilled occupation requiring specialized knowledge. The South Carolina Supreme Court indicated as much when making a distinction between qualified home inspectors (*i.e.*, those who have the knowledge necessary to pass the examination and obtain a license) and "unqualified home inspectors." *Id.*

South Carolina law also defines the activity of providing home inspections as a skilled service by defining a "home inspector" as "an individual who, for compensation of any sort, engages in the business of home inspection" and defining "home inspection" as "the rendering of a written or oral report . . . regarding the condition of the construction or improvements to a residence." S.C. Code Ann. § 40-59-500. The inspection of a home and rendering of a report on the condition of its construction is an activity that requires a specialized knowledge of residential construction. The inspection of a home and rendering of a report is also primarily a mental, rather than physical, activity.

South Carolina law also establishes that home inspectors perform a professional service by providing for disciplinary action against a home inspector for engaging in "malpractice, gross negligence, or incompetence in the performance of home inspections." S.C. Code Ann. § 40-59-580. The term "malpractice" is a legal term of art meaning "[a]n instance of negligence or incompetence on the part of a professional." Black's Law Dictionary 978 (8th ed. 2004). Therefore, by explicitly stating that a home inspector can engage in "malpractice" in "the performance of home inspections," South Carolina law provides that a home inspector is a professional subject to a professional standard of care and professional negligence claims.

Third, comparing the service provided by home inspectors to other services recognized by decisions of South Carolina's appellate courts as professional services establishes that a home inspector provides a professional service. South Carolina's appellate courts have recognized as professions subject to a professional standard of care: termite inspectors, real estate agents, insurance agents, accountants, architects, engineers, and attorneys. *See Griffin Plumbing*, 320 S.C. at 55, 463 S.E.2d at 88 (engineer); *Beachwalk Villas Condo. Ass'n v. Martin*, 305 S.C. 144, 146–47, 406 S.E.2d 372, 374 (1991) (architect); *Lloyd v. Walters*, 276 S.C. 223, 226, 277 S.E.2d 888, 889 (1981) (attorney); *McAlhany v. Carter*, 415 S.C. 54, 71, 781 S.E.2d 105, 115 (Ct. App. 2015) (termite inspector); *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1991) (accountant); *Carolina Prod. Maint., Inc. v. U.S. Fidelity & Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (Ct. App. 1992) (insurance agent); *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985) (real estate agent).

A home inspector provides services comparable to those services already found to constitute professional services. Most notably, if a termite inspector is subject to a professional standard of care as previously acknowledged by South Carolina courts, then a home inspector must

also be subject to a professional standard of care. While largely inspecting residential structures for different problems—termites and moisture versus deficiencies in building components—their services otherwise are essentially the same, with each inspecting residential structures, applying specialized knowledge in conducting those inspections, and then providing a report stating the conclusions reached through the inspection and the application of the inspector's specialized knowledge. There is no functional difference between a termite inspector's services and a home inspector's services that could result in a termite inspector being subject to a professional standard of care and a home inspector not being subject to a professional standard of care.

Therefore, as established by Respondent's own admissions regarding the services it provides, the licensing requirement to provide home inspection services in South Carolina, the State's regulation of the profession, the specialized knowledge required to provide home inspection services, the existence of an industry standard of practice, and South Carolina caselaw finding equivalent services to be subject to a professional standard of care, the provision of home inspection services is the furnishing of a skilled service for compensation. Home inspectors are thus subject to professional negligence claims. Appellants therefore have a separate professional negligence claim against Respondent, independent of any contract claim, and the economic loss rule has no impact on that professional negligence claim.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' NEGLIGENCE CLAIM BECAUSE THE CLAIM IS FOR THE NEGLIGENT PROVISION OF A SERVICE AND THEREFORE NOT BARRED BY THE ECONOMIC LOSS RULE.

While the economic loss rule is not applicable to Appellants' negligence claim due to the professional nature of the services provided by Respondent, the economic loss rule also does not bar Appellants' negligence claim because the rule only applies to product defect claims and does not apply to claims for improperly provided services. Therefore, because the contract at issue here

was a contract for a service and not a contract for a product, the economic loss rule does not apply.

South Carolina courts recognize the economic loss rule only in relation to product defect claims and have not extended the rule to apply to claims for improperly provided services. For example, in *Kennedy*, the South Carolina Supreme Court stated the economic loss rule provides "that there is no tort liability *for a product defect* if the damage suffered by the plaintiff is *only to the product itself*." 299 S.C. at 341, 384 S.E.2d at 734 (emphasis added). In *Sapp v. Ford Motor Co.*, our Supreme Court used the same language, explaining the economic loss rule as providing that "there is no tort liability *for a product defect* if the damage suffered by the plaintiff is *only to the product itself*." 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) (emphasis added and citation omitted). Similarly, the United States Supreme Court explained the economic loss rule as existing to fulfill "the need to keep products liability and contract law in separate spheres . . . ." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870–71 (1986).

Appellants are unaware of, and Respondent and the trial court did not cite to, any South Carolina decision extending the economic loss rule to the provision of services. With the South Carolina decisions applying the rule all stating it applies only "for a product defect" claim and not mentioning claims for services, the result is that the rule does not apply to claims for improper services.

Moreover, while the language in existing caselaw limits the application of the economic loss rule to claims for defective products, even were there some ambiguity that compelled the Court to examine whether the economic loss rule should extend to claims for improperly provided services, no such extension would be warranted. If a purchaser does not get what he contracted for in a product—*i.e.*, the product does not work properly or does not perform as agreed upon—his claim is for breach of the contract to provide the good. There the Uniform Commercial Code

("UCC") provides a comprehensive system for compensating consumers for economic losses arising from defective products, including implied warranties and limitations on sellers' ability to disclaim those warranties. *See* S.C. Code Ann. §§ 36-2-314–316. However, for services there are no UCC warranty provisions to provide a remedy or to limit a service provider's attempts to avoid responsibility for its negligence. Given that contracts for services are often one-sided, form contracts drafted in favor of the service provider and without provisions for adequate remedies for the consumer, a consumer is often left without any remedy other than a negligence claim to recover for damages caused by a service provider's negligence.

As a result, "[t]he vast majority of states restrict the [economic loss] rule to products cases," holding that the rule only applies where there is a contract for a product and does not apply where there is a contract for a service. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 545 (Fla. 2004) (Cantero, J. concurring); *see also, e.g.*, *Broadnax v. Swift Transp. Corp.*, 694 F. Supp. 2d 947, 954 (W.D. Tenn. 2010) ("Considering all appropriate indicia, the Court concludes that the Tennessee Supreme Court would decline to extend the economic loss doctrine to cases involving the provision of services if squarely faced with this question."); *Quest Diagnostics, Inc. v. MCI Worldcom, Inc.*, 656 N.W.2d 858, 862–63 (Mich. Ct. App. 2002) ("[T]he economic loss doctrine in Michigan has been applied in the context of various transactions for goods or products to bar recovery in tort when damages are recoverable under the [UCC] . . . . This Court has declined to apply the economic loss doctrine where the claim emanates from a contract for services.").

Illustrative is the decision of the Supreme Court of Wisconsin in *Insurance Co. of North America v. Cease Electric, Inc.*, where the court held the economic loss rule does not apply to claims arising from the provision of services, reasoning:

> The major problem with [the defendant's] argument [for application of the economic loss rule to bar the plaintiff's negligence claim] is that it assumes that contract law is better suited than tort law for dealing with purely economic loss in the context of service agreements. It is not. Unlike contracts for products or goods, which enjoy the benefit of well-developed law under the U.C.C., no such benefit exists for contracts for services. This is because the U.C.C. does not apply to service contracts. As a result, the built-in warranty provision that the U.C.C. may provide in a contract for the sale of products or goods would not apply to a contract for services. Given the inapplicability of the U.C.C. to service contracts, we decline to extend the economic loss doctrine in this case.

688 N.W.2d 462, 469 (Wis. 2004) (internal citations omitted). The Wisconsin Supreme Court further reasoned:

> [C]ontract law is not better suited than tort law for dealing with negligently provided services. Tort law provides an incentive to generally guard against negligent conduct in the provision of services. If tort law is avoided, the ability to deter certain activity is impaired because contract remedies and warranties may be easily disclaimed. Tort principles address more than merely a private interest between two commercial companies; they also address society's interest in minimizing harm by deterring negligent conduct.

Id. at 470. The court explained that because service contracts are often oral and informal rather than negotiated agreements allocating the risk of economic loss as contemplated by the economic loss rule, the rationale for application of the economic loss rule does not fit in the instance of service contracts. *Id.* Specifically, the court noted: "The requirement of pre-negotiated agreements seems to presuppose that each party to the service contract can negotiate the terms with an identical level of bargaining power. In many service contract relationships, the information disparities between the parties do not support such a presupposition." *Id.* at 471.

South Carolina law provides that the economic loss rule applies to product defect claims and does not apply to claims for negligently provided services. Accordingly, the economic loss rule does not bar Appellants' negligence claim arising from Respondent's improperly provided services. Moreover, even were South Carolina law not clear that the economic loss rule does not apply to service contracts, the significant differences between contracts for products versus

contracts for services result in the economic loss rule not applying to claims arising from the provision of services.

III. THE CIRCUIT COURT ERRED IN GRANTING DECLARATORY RELIEF ON THE CONTRACTUAL LIMITATION OF LIABILITY PROVISION BECAUSE THE PROVISION IS UNCONSCIONABLE.

In addition to erring in granting Respondent's motion because Appellants have a viable negligence claim, Endre has a breach of contract claim against Respondent, and the trial court erred in declaring that Respondent's contractual liability is limited to $405 pursuant to the contract's limitation of liability provision because the provision is unconscionable and unenforceable. The contract contains oppressive terms which attempt to limit Respondent's liability in multiple ways including an absolute disclaimer, an arbitrary time limitation on claims, and a limitation on damages. In addition to those oppressive terms, Endre was an unsophisticated consumer offered a form contract from a sophisticated service provider in a situation in which the oppressive terms were not brought to his attention and he was unable to negotiate the terms. The combination of the oppressive terms and the lack of a meaningful choice by Endre cause the provision to be unconscionable under South Carolina law.

In South Carolina, a contract provision is unconscionable and unenforceable where there is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Appellants contend that given the factual circumstances and limitation of liability provision at issue here, the provision is unconscionable under South Carolina law. Foregoing consideration of the factual circumstances and terms of the provision, Respondent

argues that limitation of liability provisions in home inspectors' contracts are uniformly enforceable as the result of *Gladden v. Boykin*, 402 S.C. 140, 739 SE.2d 882 (2013).

Respondent contends the *Gladden* decision provides "that a contractual limitation of a home inspector's liability does not violate South Carolina public policy and is not unconscionable," (Mot. for Summ. J. 7.); however, this position is much broader than the actual holding in the *Gladden* decision. The narrow holding in the *Gladden* decision supports Appellants' position and indicates the limitation of liability provision here is unconscionable.

In *Gladden*, a home purchaser pursued a breach of contract claim against a home inspector, alleging the inspector failed to properly perform the inspection and failed to report defective conditions in the home. 402 S.C. at 142, 739 S.E.2d at 883. The contract between the purchaser and the inspector contained a clause limiting the inspector's liability to the inspection fee paid by the purchaser. *Id.* The inspector moved for summary judgment on the grounds the limitation of liability provision was enforceable. *Id.* The trial court granted the inspector's motion for summary judgment, and the home purchaser appealed arguing the limitation of liability provision was unconscionable. *Id.* at 142–43, 739 S.E.2d at 883.

Analyzing whether the provision was unconscionable, the South Carolina Supreme Court restated the established South Carolina law that a contract provision is unconscionable where it is the result of the absence of a meaningful choice and contains oppressive terms. *Id.* at 144, 739 S.E.2d at 884. Turning first to whether the limitation of liability provision was oppressive, the Court found the particular terms at issue were not oppressive but left open the possibility that other limitation of liability provisions—*i.e.*, provisions with terms different from the provision before the Court in the *Gladden* case—may be oppressive. *Id.* at 144–45, 739 S.E.2d at 884. Specifically, the Court indicated that limitation of liability provisions are not universally enforceable by stating

that such provisions are "commercially reasonable in at least some cases," thereby indicating that in many cases such provisions are *not* reasonable. *Id.*

The *Gladden* decision then examined whether the purchaser lacked a meaningful choice when entering into the contract. The Court engaged in a highly fact specific analysis, concluding that due to the particular characteristics of the purchaser and the inspector, the purchaser did not lack a meaningful choice. *Id.* at 145, 739 S.E.2d at 884. Specifically, the Court pointed to the purchaser's training as a real estate agent, the purchaser having "directly engaged in sophisticated negotiations throughout the process of buying the home," the inspector being a "self-employed home inspector operating out of his home," and the conspicuous nature of the limitation of liability provision where the provision had a bolded, capitalized heading in the one-page contract. *Id.* at 145–46, 739 S.E.2d at 885.

Therefore, the *Gladden* decision only enforced a particular limitation of liability provision in a particular set of factual circumstances and did *not* make a broad holding that limitation of liability provisions are uniformly enforceable in home inspection contracts. Rather, as made clear by the *Gladden* decision, the enforceability of such a provision requires a fact intensive review of the terms of the specific limitation of liability provision at issue and the surrounding factual circumstances. The limited nature of the *Gladden* holding and the limited, rather than uniform, enforceability of limitation of liability provisions in South Carolina are further indicated by South Carolina decisions, both before and after the *Gladden* decision, providing that South Carolina law disfavors limitation of liability provisions. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016) ("However, notwithstanding our general acceptance of limitation of liability provisions and exculpatory clauses, the law disfavors such provisions . . . ."); *Pride v. S.*

Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964) ("Since such provisions tend to induce want of care, they are not favored by the law . . . .").

As required by the *Gladden* decision and South Carolina law on unconscionability of contract provisions, the analysis must turn to consideration of whether Respondent's provision is oppressive and the result of the lack of a meaningful choice. Here, Respondent's contract attempts to limit its liability in a manner extending far beyond the provision at issue in *Gladden*. In *Gladden*, the provision at issue provided "in full":

> **LIMIT OF LIABILITY**: [ ]It is understood and agreed that should [the home inspector] and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of it's [sic] obligations, including but not limited to negligence, [ ]breach of contract or otherwise, the the [sic] liability of [the home inspector] and/or it's [sic] 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.

Gladden, 402 S.C. at 142 n.1, 739 S.E.2d at 883 n.1 (2013). By comparison, Respondent's contract first attempts to provide that a home purchaser cannot rely on any representations in the report regarding the condition of the property, stating: "**NEITHER THE INSPECTION NOR THE INSPECTION REPORT IS A WARRANTY, EXPRESS OR IMPLIED, REGARDING THE ADEQUACY, PERFORMANCE, OR CONDITION OF ANY INSPECTED STRUCTURE, SYSTEM OR ITEM.**" (Mem. in Oppn. to Mot. for Summ. J., Ex. E, Solid Ground Contract ¶ 8.) Respondent's contract then attempts to further limit Respondent's liability, stating:

> Client understands and agrees that any claim for failure to accurately report the visually discernible conditions of the subject property as limited herein above shall be made in writing and reported to the inspector within ten (10) business days of discovery. Client further agrees that with the exception of emergency conditions, client or client's agents, employees or independent contractors will make no alterations, modifications or repairs to the claimed discrepancy prior to a re-inspection by Solid Ground Home Inspections. Client understands and agrees that any failure to notify Solid Ground a [sic] stated above shall constitute a waiver of any and all claims for said failure to accurately report the condition in question. The parties agrees that the maximum liability for Solid Ground Home Inspections, or its agent, arising from failure to perform any of the obligations stated in this

> agreement, is limited to an amount NOT TO EXCEED THE FEE PAID FOR THE INSPECTION.

(Mem. in Oppn. to Mot. for Summ. J., Ex. E, Solid Ground Contract ¶ 13.)

Unlike the provision at issue in *Gladden* which only purported to limit the inspector's liability to a set amount, the provision at issue here oppressively attempts to limit Respondent's liability in three different ways. First, the provision attempts to disclaim any liability for the accuracy of Respondent's report by providing that the purchaser cannot rely on the representations made therein. Were that enforceable, the purchaser would be paying the inspector for a worthless service. A home inspector's services are of value to a home purchaser only because the purchaser can rely on the inspector's report as stating the condition of the home. Second, were the purchaser able to rely on the accuracy of the report despite that first term, the provision then attempts to impose an arbitrary and oppressively short ten-day notification and statute of limitations requirement and waive any claim that does not meet that requirement. Third, were the purchaser able to pursue a claim despite those first two terms, the inspector's liability would be limited to the fee paid for the inspection.[4]

The terms included in Respondent's contract extend far beyond the simple limit of liability in the *Gladden* provision. These terms are a multi-layered attempt to obtain a fee for performing an inspection while eliminating all potential liability for errors. The provision at issue here is analogous to the provision at issue in *Smith v. D.R. Horton, Inc.*, which was found oppressive and unconscionable because it both disclaimed all warranties except the builder's limited warranty and contained a limitation of liability provision exculpating the builder from monetary damages. 403

---

[4] While Respondent sought declaratory relief based on the term in the limitation of liability provision limiting Respondent's liability to the fee paid for the inspection, Respondent contends the other terms of the provision are enforceable and also bar Endre's breach of contract claim. (Mem. in Oppn. to Mot. for Summ. J., Ex. A, Dep. of Erika Houmard-Solid Ground 30(b)(6) 24:7–14 & Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 45:8–12.)

S.C. 10, 12–15, 742 S.E.2d 37, 39–41 (Ct. App. 2013). In the same way in which the provision in *Smith* was found oppressive and unconscionable because it attempted to eliminate all liability except through the builder's limited warranty, the limitation of liability provision at issue here is oppressive because it attempts to have a purchaser pay for an inspection, to not entitle the purchaser to rely on the accuracy of the inspection report, and to eliminate liability for errors in the inspection and report.

In addition to containing oppressive terms extending well beyond the simple limitation of liability in *Gladden*, the factual circumstances at issue here are markedly different from the circumstances at issue in *Gladden*. Appellants were first-time home purchasers when purchasing the home. (Mem. in Oppn. to Mot. for Summ. J., Ex. D, Aff. of Endre Tomaschek ¶ 4.) Unlike the purchaser in *Gladden*, Appellants were not real estate agents and had no education or training relevant to real estate. (Mem. in Oppn. to Mot. for Summ. J., Ex. D, Aff. of Endre Tomaschek ¶¶ 5–7.) There also is no evidence that Appellants engaged in sophisticated negotiations in the purchase of their home as was the case for the purchaser in *Gladden*.

Additionally, Respondent was substantially different from the home inspector at issue in *Gladden*. Respondent was not a single, self-employed home inspector operating out of his own home as was the case for the home inspector in *Gladden*. Respondent had multiple employees and subcontractors. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 8:19–9:8.) Respondent operated out of an office with a business manager employed in the office. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 8:2–8.) Respondent had performed over five thousand home inspections over the more than thirteen years it had been in business. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 8:19–9:8.) Respondent had a lawyer

review and revise its form contract. (Mem. in Oppn. to Mot. for Summ. J., Ex. B, Dep. of Stephen Houmard-Solid Ground 30(b)(6) 16:22–18:7.)

Therefore, unlike *Gladden* where the home inspector and real estate agent home purchaser were close to equal in their relative sophistication or the purchaser was actually more sophisticated than the inspector, here Respondent was significantly more sophisticated and had significantly more bargaining power than Endre. Respondent's contract was drafted by a dedicated business manager with advice and revisions from legal counsel, whereas Endre was a first-time home purchaser with no relevant knowledge or experience.

Additionally, the details of how Respondent entered into the contract with Endre indicate the disparity in bargaining power between the parties and how the contract was a contract of adhesion. In *Simpson*, the Court defined an adhesion contract as "a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable," held the fact that a contract is a contract of adhesion is relevant to whether a party lacked meaningful choice, and specified that adhesion contracts are to be viewed with "considerable skepticism." 373 S.C. at 26–27, 644 S.E.2d at 669–70. Here, Respondent admits the contract Endre signed was a standard form contract used for all inspections. (Mem. in Oppn. to Mot. for Summ. J., Ex. A, Dep. of Erika Houmard-Solid Ground 30(b)(6) 16:22–17:13.) Moreover, Respondent's counsel informed the trial court that the terms at issue in Respondent's contract are ASHI standard terms present in all home inspectors' contracts, and therefore, even if Endre had been made aware of the oppressive terms, he could not have avoided them by using a different home inspector. (Tr. of Sept. 23, 2020 Hearing 7:5–12.)

Endre averred and Respondent admitted that Endre was not given any opportunity to negotiate the terms of the contract, and instead, the contract was offered to him on a take-it-or-leave-it basis. (Mem. in Oppn. to Mot. for Summ. J., Ex. A, Dep. of Erika Houmard-Solid Ground

30(b)(6) 18:8–16; Ex. D, Aff. of Endre Tomaschek ¶¶ 13–18.) The circumstances present here also go beyond those situations where agreements were found adhesive and unconscionable in past decisions like *Simpson*, because here Endre told Respondent that he needed the inspection performed quickly, and Respondent told him the inspection would not be scheduled until he signed the contract. (Mem. in Oppn. to Mot. for Summ. J., Ex. D, Aff. of Endre Tomaschek ¶¶ 9–11.)

Finally, unlike the limitation of liability provision at issue in the *Gladden* case, the provision in Respondent's contract was not conspicuous. Respondent's provision has no heading, much less a capitalized, bolded heading as was the case in *Gladden*. Instead, paragraph thirteen in Respondent's contract is indistinguishable from any other paragraph in the agreement. This contrasts with some of the paragraphs in the agreement which have language capitalized and bolded or in one instance in paragraph seven language is bolded, capitalized, and underlined. Respondent therefore knew how to emphasize contractual language when it chose to do so, yet paragraph thirteen in the contract has no bolded language, and none of the language is both capitalized and underlined. Moreover, the language providing that the "maximum liability" for Respondent "is limited to" the inspection fee is not capitalized, not bolded, and not underlined. Also, a significant fact in the *Gladden* decision was that the limitation of liability language was in a one-page contract, whereas here the limitation is buried in a nondescript paragraph on the second page of the contract. Therefore, unlike the provision at issue in *Gladden*, here the limitation language was placed in the contract in a manner that would not be expected to draw attention to it, much less placed in a manner that would highlight to the home purchaser the monumental importance of the provision.

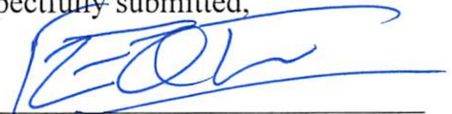
Therefore, because Respondent's provision contains oppressive terms attempting to eliminate Endre's ability to rely on the service purchased, attempting to insert a ten-day notice and

limitation period, and attempting to limit any remaining liability, and because the provision was in a contract of adhesion offered to a comparatively unsophisticated party without any notice of the provision, the limitation of liability provision is unconscionable. The trial court accordingly erred in enforcing the provision and granting Respondent's declaratory relief based on the provision.

CONCLUSION

Appellants have a viable negligence claim against Respondent because Respondent provided a professional service subject to a claim for professional negligence unaffected by the economic loss rule. Appellants also have a viable negligence claim because Respondent provided a service, and the economic loss rule does not apply to claims arising from improperly provided services. The trial court therefore erred in granting summary judgment on Appellants' negligence claim. The trial court also erred in granting declaratory relief enforcing the contractual limitation of liability provision because that provision is unconscionable and unenforceable. Accordingly, and for the reasons set forth herein, the Court should reverse the decision of the trial court.

Respectfully submitted,



F. Elliotte Quinn IV
Rachel Igdal
The Steinberg Law Firm, LLP
103 Grandview Drive
Summerville, SC 29483

Ryan C. Andrews
Cobb Dill & Hammett, LLC
222 W. Coleman Boulevard
Mt. Pleasant, SC 29464

Attorneys for Appellants

May 20, 2021

Summerville, South Carolina

RECEIVED
May 20 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001403
Case No. 2019-CP-10-00105

Endre Tomaschek and Evan Tomaschek, Appellants,

v.

Edith C. Miller; Don L. Sumter; Carolina Elite Real Estate, LLC; Christopher Gibbs; Buzz Off TPC, LLC d/b/a Buzzoff Termite & Pest Control, LLC; GWS, Inc.; Gaynelle Whittle-Shipp; Stucco Inspector, LLC; Solid Ground Home Inspections, LLC; Jerry L. Anderson d/b/a "Anderson Roofing"; Delano M. Francis; and Robert Oliver d/b/a "Home Repair by Robert," Defendants.

Of whom Solid Ground Home Inspections, LLC is the Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies on May 20, 2021, he caused a copy of the foregoing Initial Brief of Appellant to be served on all parties to the appeal by e-mail and by placing copies in the U.S. Mail, first class, postage prepaid, and addressed as follows:

Alan R. Belcher
Connor E. Johnson
Hall Booth Smith, P.C.
111 Coleman Blvd., Ste. 301
Mt. Pleasant, SC 29464
alanbelcher@hallboothsmith.com
connorjohnson@hallboothsmith.com

F. Elliotte Quinn IV
The Steinberg Law Firm, LLP
103 Grandview Drive, Ste. A
Summerville, SC 29484
(843) 871-6522

DAVID T. PEARLMAN
J. KEVIN HOLMES
THOMAS M. WHITE
MALCOLM M. CROSLAND, JR.
STEVEN E. GOLDBERG
MICHAEL J. JORDAN
BENJAMIN W. AKERY

CATHERINE D. MEEHAN
KELLY M. ALFREDS
F. ELLIOTTE QUINN IV
TAYLOR L. GROOMS
ANNIE E. ANDREWS
RACHEL IGDAL
CHARLES S. GOLDBERG (1933-2019)
HUGO M. SPITZ (1927-2018)
IRVING STEINBERG (1902-1980)

103 Grandview Dr. | P.O. Box 2670 | Summerville | SC | 29484 | (843) 871-6522 | (843) 871-8565 fax | steinberglawfirm.com

May 20, 2021

RECEIVED
May 20 2021
SC Court of Appeals

VIA U.S. MAIL AND E-MAIL

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Tomaschek vs. Miller, et al.
Case No. 2019-CP-10-0105
Appellate Case No. 2020-001403

Dear Hon. Clerk Kitchings,

Enclosed please find the Initial Brief of Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal.

Regards,

Elliotte Quinn
equinn@steinberglawfirm.com
843-871-6522

FEQ/mbc

Enclosures (as stated)

cc: (via U.S. mail and email)

Alan R. Belcher, Jr.
Connor Johnson
Hall Booth Smith, P.C.
111 Coleman Boulevard, Suite 301
Mount Pleasant, SC 29464
alan.belcher@hallboothsmith.com
sfischer@hallboothsmith.com
connorjohnson@hallboothsmith.com