THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2020-001403
Lower Court 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,"

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

INITIAL BRIEF OF RESPONDENT

Alan R. Belcher, Jr., Esquire, Bar No. 71686
Connor E. Johnson, Esquire, Bar No. 103111
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
Telephone: (843) 720-3460
alan.belcher@hallboothsmith.com
cjohnson@hallboothsmith.com

Attorneys for Respondent Solid Ground Home Inspections, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

STATEMENT OF THE CASE

Appellants Endre and Evan Tomaschek ("Appellants") commenced this lawsuit on January 9, 2019 to recover for alleged damages suffered as a result of their purchase of a home with alleged undisclosed defective conditions. (Compl.). Appellants Complaint and First Amended Complaint alleged only claims of negligence against Solid Ground Home Inspections, LLC ("Solid Ground" or "Respondent"). (Compl.; Am. Compl.). Solid Ground filed a motion to dismiss the Appellants' claim of negligence on April 29, 2019. (Solid Ground's Mot. to Dismiss). While the Circuit Court did find the arguments in the motion to dismiss meritorious, it ultimately denied the motion by Order filed on February 20, 2020. (Order of February 20, 2020).

On February 19, 2020, Respondent Solid Ground Home Inspections, LLC ("Solid Ground" or "Respondent") moved for summary judgment on Appellants' negligence claims and for declaratory relief as to Appellant Andre Tomaschek's anticipated breach of contract claim, limiting recovery to the price of the home inspection contract. (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. (July 22, 2020 Form 4 Order).

Subsequently, in the Second Amended Complaint filed on July 24, 2020, Appellant Andre Tomaschek brought a claim of breach of contract against Solid Ground in addition to its claim of negligence. (Am. Compl.; 2nd Am. Compl.).[1] Appellants' alleged damages are purely economic. (2nd Am. Compl. ¶ 100).

[1] Appellants did claim professional negligence against the engineering defendant in the underlying lawsuit and attached an affidavit of Robert Sisnroy in regard to that claim. (Am. Compl., Aff. of Robert Sisnroy). However, Appellants did not specifically allege a claim of professional negligence against Solid Ground in either the First Amended Complaint or Second Amended Complaint, and they did not provide any expert affidavit pertaining to the home inspection or home inspector in the Complaint, First Amended Complaint, or Second Amended Complaint. (*See generally* Compl., Am. Compl., 2nd Am. Compl.).

On August 4, 2020, Respondent moved for reconsideration on its motion for summary judgment as to Appellants' negligence claim and for declaratory relief as to the breach of contract claim of Appellant Endre Tomaschek. (Mot. for Recons.).

On September 23, 2020, the Honorable Circuit Court Judge Bentley D. Price heard the Respondent's motion for reconsideration. (Tr. of Sept. 23, 2020 Hr'g). On September 30, 2020, the Honorable Circuit Court Judge Bentley D. Price entered a Form 4 Order granting Respondent's motion for reconsideration, which effectively granted Respondent's motion for summary judgment and granted judgment as a matter of law in favor of Respondent as to Appellants' claim of negligence and granted declaratory relief to Respondent to limit the recovery of Appellant Endre Tomaschek's breach of contract claim to the price of the home inspection contract, $405.00. (Sept. 30, 2020 Form 4 Order; Solid Ground Memo. In Supp. Of Mot. Summ. J.).

On October 20, 2020, Appellants filed their Notice of Appeal in this lawsuit. The issues on appeal arise from the Circuit Court's grant of Solid Ground's motion for reconsideration and, as a result, the grant of Solid Ground's motion for summary judgment and declaratory relief.

STATEMENT OF FACTS

This case arises from the Appellants' purchase of a home in Charleston, South Carolina ("subject home" or "home"). The home was originally constructed in 1960 with a slab on grade foundation. (Ex. C, Solid Ground Report). Through the filing of the lawsuit and discovery, it was learned that the subject home consists of two sections. The first section has a slab on grade foundation and is the primary or first foundation of the home, and the second section is the "addition" section of the home and sits on a foundation made of shallow concrete blocks and wooden joists. (Am. Compl. ¶ 8; Ex. A, GWS Ltr. Nov. 20, 2017). The entire home is clad with a mix of stucco and vinyl siding with no crawl space present. (Ex. C, Solid Ground Report).

The subject home was first owned by Bank of America, N.A. after foreclosure on November 21, 2016. (Am. Compl. ¶ 10). Bank of America, N.A. subsequently listed the home for sale with the disclosure of wood infestation problems, that the home was not being sold with a clean Form CL-100 or "Wood Infestation Report", and that the addition section of the home had been damaged by water and differential settlement. (Am. Compl. ¶¶ 11-15).

The home was then purchased by Edith C. Miller and Don L. Sumter ("Miller and Sumter" or "sellers") on May 2, 2017. The sellers then contracted with Robert Oliver for the replacement and installation of the plywood subflooring, hardwood flooring, portions of the drywall, paint, and the application of caulks and sealants in the addition section of the home. (Am. Compl. ¶¶ 16-26).

Next, Miller and Sumter entered into a contract for the sale of the subject home with the Appellants on November 18, 2017 with a closing date of December 28, 2017. (Am. Compl. ¶¶ 31-32). This purchase contract also included the Appellants' own requirement that Miller and Sumter hire a structural engineer to evaluate the property for any issue with the foundation or structure. (Am. Compl. ¶ 87; Ex. F, Dep. Christopher Gibbs p. 33-35). Miller and Sumter then hired Gaynelle Whittle-Shipp, P.E. of GWS, Inc. ("GWS") to perform an investigation of the structure and foundation of the home, which occurred on November 20, 2017. (Ex. A, GWS Ltr. Nov. 20, 2017). GWS found no reason to believe there were major structural concerns in the home, but the letter did specifically note that there was an addition to the structure added onto the original floor plan, that the addition appeared to be supported by concrete block and wood joists foundation, and that differential settlement was present. (Ex. A, GWS Ltr. Nov. 20, 2017). Additionally, during the sale of the home, Miller and Sumter provided the Appellants with a Residential Property Condition Disclosure Statement that stated Miller and Sumter had no knowledge of any problems concerning

the roof, foundation, floors, exterior walls, interior walls, roof leaks, wood rot, or structural components of the home. (Am. Compl. ¶¶ 35-47; Ex. F, Dep. Christopher Gibbs p. 18).

Appellants contacted Solid Ground to perform a home inspection on the property and explained that they were under a tight deadline to get the home inspected. (Aff. Endre Tomaschek, July 9, 2020 ¶¶ 10-15). Solid Ground let Appellants know that it would not schedule any inspection until the home inspection contract was signed and returned by the Appellants, and, on November 20, 2017, Solid Ground entered into a contract with the Appellants to inspect the home for an inspection fee in the amount of $405.00. (Ex. B, Solid Ground Agreement; Aff. Endre Tomaschek, July 9, 2020). This contract explicitly states the inspection of the property is for any visually observable major deficiencies of the home, that the inspection is not a "code" inspection, the inspection excludes any concealed or latent defects, and the contract represents the entire agreement between Solid Ground and the Appellants. (Ex. B, Solid Ground Agreement). Further, Paragraph 13 of the agreement states that the maximum liability for Solid Ground arising from failure to perform any of the obligations of the agreement is limited to an amount not to exceed the fee paid for the inspection. (Ex. B, Solid Ground Agreement; Ex. E, Dep. Erika Houmard Rule 30(b)(6) Solid Ground p. 25). Specifically, the contract states as follows:

> 1. Solid Ground Home Inspections, LLC agrees to perform a primarily visual, non-invasive and not technically exhaustive inspection of the property and to provide CLIENT with a written inspection report identifying visually observable deficiencies of the inspected systems and components that exist at the time of inspection. . . . However, by its nature, the home inspection will not be technically exhaustive – this means that it may not reflect all possible repair needs since some may be concealed or not accessible by the home inspector. Plus, we will not move furniture or take apart equipment. . . . Additionally, this is not a 'code' inspection and we are not building code officials.
>
> . . .

6. Solid Ground Home Inspections is not required to move personal property, debris, furniture, equipment, carpeting, or like materials which may impede access or limit visibility. Concealed or latent defects are excluded from the inspection. Equipment and systems will not be dismantled. The inspection is not intended to be technically exhaustive, nor is it a compliance inspection for any governmental codes or regulations.

. . .

8. NEITHER THE INSPECTION NOR THE INSPECTION REPORT IS A WARRANTY, EXPRESSED OR IMPLIED, REGARDING THE ADEQUACY, PERFORMANCE, OR CONDITION OF ANY INSPECTED STRUCTURE, SYSTEM OR ITEM.

. . .

13. 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 agree 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.

Ex. B, Solid Ground Agreement, ¶¶ 1, 6, 8, 13.[2]

Solid Ground performed the home inspection on November 22, 2017 and created a home inspection report that identified structural, stucco, potential water intrusion, and roof issues in the home. (Ex. C, Solid Ground Report; Ex. F, Dep. Christopher Gibbs p. 86; Ex. G, Corresp. Christopher Gibbs Dec. 1, 2017). The report also explicitly stated that multiple areas of the home were inaccessible or obstructed that included the flooring, wood members below the first floor, and the plumbing. (Ex. C, Solid Ground Report). The inspector of Solid Ground, Ronald McNally,

[2] Appellants' Initial Brief alleges it is uncontested that the language in the limitation of liability provision of the contract between Solid Ground and Appellants does not cover negligence claims. Respondents vehemently deny this allegation by Appellants.

did recommend that a stucco inspector come to the home to opine as to any issue that may be present in the stucco and potential associated water intrusion that was observed on the wood flooring in the home. (Ex. H, Dep. Ronald F. McNally 30(b)(6) Solid Ground p. 30-31; Ex. F, Dep. Christopher Gibbs p. 18-19). Solid Ground also recommended that a roofing contractor come out to the home. (Ex. F, Dep. Christopher Gibbs p. 18, 86).

It was Miller and Sumter, the original homeowners, who secured both the stucco inspector and the structural engineer to inspect the home. (Ex. F, Dep. Christopher Gibbs p. 33-35, 86-87). In fact, the structural engineer, Gaynelle Whittle-Shipp, actually performed an inspection of the home days before Solid Ground performed its home inspection. (Ex. A, GWS Ltr. Nov. 20, 2017; Ex. F, Dep. Christopher Gibbs p. 33-35, 86-87).

On November 27, 2017, Stucco Inspector, LLC performed an inspection of the stucco at the subject home and found inadequacies with the stucco sealants and cracking of the stucco. (Ex. I, Stucco Inspectors, LLC Report, p. 5).

Despite being informed of these issues by both Gaynelle Whittle-Shipp, Solid Ground, and the Stucco Inspector, the Appellants insisted that no work be done on these issues until an agreement was reached between the Appellants and sellers, and, as a result, the due diligence period was extended by seven (7) days. (Ex. L, Corresp. Christopher Gibbs and Adam Barks).

Further, the sellers provided Appellants with a Form CL-100 stating that the subject home was free of termite infestation or damage due to termite infestation, and that Form CL-100 was prepared by Buzzoff Termite & Pest Control, LLC and Delano M. Francis after their inspection of the property at the request of Appellants' real estate agent, Christopher Gibbs. (Am. Compl. ¶¶ 54-60; Ex. F, Dep. Christopher Gibbs p. 36-37). This report was completed on December 13, 2017. (Ex. J, SC Wood Infestation Report; Ex. F, Dep. Christopher Gibbs p. 41).

As a result of Solid Ground's findings, a repair addendum was created prior to the sale of the home that gave the Appellants thirteen thousand and no/100 dollars ($13,000.00) in concessions from the sale price. (Ex. F, Dep. Christopher Gibbs p. 21, 101).

Ultimately, the subject home was purchased by the Appellants on the closing date of December 28, 2017. (Ex. K, Sale Contract).

The Appellants subsequently filed this lawsuit due to alleged issues with the home, and brought claims of negligence and breach of contract against Solid Ground. (*See generally* Compl.).

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the circuit court under Rule 56, SCRCP. *See Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56, SCRCP provides a circuit court may grant a motion for summary judgment 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. *See Bovain*, 383 S.C. at 105, 678 S.E.2d at 424 (citing Rule 56 (c), SCRCP). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE A STATUTORY CLAIM OF PROFESSIONAL NEGLIGENCE DOES NOT APPLY TO A HOME INSPECTOR, AND, AS A RESULT, THE ECONOMIC LOSS RULE DOES BAR APPELLANTS' CLAIM OF NEGLIGENCE AGAINST SOLID GROUND.

In South Carolina, a claim for professional negligence is governed by statute that specifically lists the professionals that may be liable in a professional negligence action and home inspectors are not included. *See* S.C. Code Ann. § 15-36-100 *et seq*. The Supreme Court of South Carolina has concluded that the General Assembly sought to promote tort reform by creating a more efficient process in resolving *all* professional negligence cases by enacting section 15-36-100. *See Ranucci v. Crain*, 409 S.C. 493, 509, 763 S.E.2d 189, 197 (2014) (emphasis added).

A. SOUTH CAROLINA STATUTE SPECIFICALLY PRESCRIBES THE PROFESSIONS THAT ARE SUBJECT TO PROFESSIONAL NEGLIGENCE CLAIMS, AND HOME INSPECTORS ARE NOT INCLUDED.

For all professional negligence claims arising after 2005, South Carolina law specifically prescribes the twenty-two (22) professions that are subject to a professional negligence cause of action. *See Ranucci*, 409 S.C. at 509, 763 S.E.2d at 197; S.C. Code Ann. § 15-36-100 (G). Home inspectors are not a profession listed under the statute, and, as a result, they are not subject to claims of professional negligence in South Carolina. Solid Ground does not deny that a home inspector in South Carolina is licensed in the state to inspect homes and report its opinions as to the condition of the homes. However, the professional negligence statute specifically does not apply to home inspectors.

Appellants argue that South Carolina courts have allowed a professional negligence claim to survive against professions outside of those specifically prescribed by statute. The examples given by Appellant are termite inspectors, insurance agents, and real estate agents. However,

Appellant's citation of this Court's opinions in *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (S.C. Ct. App. 2015), *Carolina Production Maintenance, Inc. v. U.S. Fidelity and Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (S.C. Ct. App. 1992), and *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 334 S.E.2d 834 (S.C. Ct. App. 1985) does not exactly comport with Appellants' position because none of the cited cases relate to professional negligence claims or the claim's alleged effect on the economic loss rule.

In *McAlhany*, the plaintiff homeowner brought claims against the prior owner of a property for negligent misrepresentation and against a termite inspector for *negligence*, alleging that the company did not perform a wood infestation inspection in accordance with the South Carolina Pest Control Act and the result of the defendant's alleged misconduct ultimately led to personal injury. *See McAlhany*, 415 S.C. at 58, 781 S.E.2d at 107 (emphasis added).

In *Carolina Production Maintenance, Inc.*, one of the defendants was an insurance agent that was sued for *negligence* in obtaining an insurance policy where coverage was held to not exist. *See Carolina Production Maintenance, Inc.*, 310 S.C. at 34, 425 S.E.2d at 40 (emphasis added). The Court explained that insurers and their agents generally do not have a duty to advise an insured, and a special duty by an insurance agent only exists if the insurance agent does give advice. *See id.* at 38, 425 S.E.2d at 43. Nevertheless, the case did not involve a professional negligence claim against an insurance agent. *See generally id*.

In *Lengel*, the plaintiffs brought claims of *negligence* and conversion against their real estate agent's company. *See Lengel*, 286 S.C. at 516, 334 S.E.2d at 835.

Here, Solid Ground is a home inspector. A home inspector is not specifically listed in statute governing professional negligence causes of action, and case law has not specifically addressed whether home inspectors are subject to claims of professional negligence. As a result,

the trial court did not err in granting Solid Ground's motion for summary judgment as to Appellants' claim of professional negligence.

B. THE SOUTH CAROLINA GENERAL ASSEMBLY'S STATUTORY SCHEME REGARDING HOME INSPECTOR LICENSING AND LIABILITY FOR UNDISCLOSED DEFECTS FURTHER SHOWS THAT THE GENERAL ASSEMBLY DID NOT INTEND TO SUBJECT HOME INSPECTORS TO CLAIMS OF PROFESSIONAL NEGLIGENCE.

South Carolina statute governs the licensing and any civil penalty against a home inspector through the South Carolina Residential Builders Commission. *See* S.C. Code Ann. § 40-59-500 *et seq.* The statute provides that no person may hold himself out as a home inspector unless that person is licensed by the South Carolina Residential Builders Commission. *See* S.C. Code Ann. § 40-59-500. The statute also governs the home inspection reports and specifically allows a home inspector to limit the scope of the inspection before performing the same. *See* S.C. Code Ann. § 40-59-560 (C). Further, while it is true that the statute allows for denial, suspension, or revocation of licenses and civil penalties of home inspectors for a multitude of reasons, which include and are not limited to malpractice, misrepresentation, or failure to exercise due diligence, the statute also specifically lists civil penalty for violations of any provision specifically listed. *See* S.C. Code Ann. § 40-59-580 *et seq.* For a first violation, a civil penalty in the amount not to exceed one hundred dollars may be issued by the commission. *See* S.C. Code Ann. § 40-59-580 (B)(1). For a second violation, a civil penalty in the amount to exceed two hundred dollars may be issued. *See* S.C. Code Ann. § 40-59-580 (B)(2). For a third and any subsequent violation, a penalty in an amount not to exceed one thousand dollars may be issued. *See* S.C. Code Ann. § 40-59-580 (B)(3).

The South Carolina Supreme Court examined the statutory scheme drafted by the General Assembly regarding home inspections and liability for undisclosed defects in the sale of residential property. *See Gladden v. Boykin.*, 402 S.C. 140, 143, 739 S.E.2d 882, 883 (2013). It is true that

the statutory scheme affords protection from unqualified home inspectors by licensure requirements, but the General Assembly did not require home inspectors to carry errors and omissions liability insurance. *See id.*, 402 S.C. at 143, 739 S.E.2d at 883 (citing S.C. Code Ann. § 40-59-500 *et seq.*). As further evidence to show that home buyers were not without remedy, the Court looked to the Residential Property Condition Disclosure Act, which protects buyers and requires they are informed by the seller of defects of which the seller has knowledge. *See id.*, 402 S.C. at 144, 739 S.E.2d at 884 (citing S.C. Code Ann. § 27-50-10 *et seq.*). The Court concluded that was the most logical place for imposition of liability is upon the seller of the defective property when it comes to a home's defects. *See id*. Specifically, the Residential Property Condition Disclosure Act provides:

> An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs. The court may award reasonable attorney fees incurred by the prevailing party.
>
> S.C. Code Ann. § 27-50-65.

Here, Appellants argue that South Carolina law establishes that home inspectors provide a professional service that subsequently allows them to be subject to professional negligence. This argument is inconsistent with the above cited statutes. It is clear that the South Carolina General Assembly drafted a statutory scheme allowing for the licensing and civil penalty of home inspectors under specific scenarios. Those civil penalties are specifically listed, do not include or reference a claim for professional liability, are related to administrative proceedings paid to the South Carolina Real Estate Commission, and the actual amounts of those civil penalties clearly show the General Assembly did not plan to subject home inspectors to severe penalty. Furthermore, there is no evidence in the record that Solid Ground has been subjected to any

discipline by the South Carolina Residential Builders Commission as it relates to this home inspection. Most importantly, home buyers are not without remedy when they purchase a home with undisclosed defects due to the Residential Property Condition Disclosure Act, and the Appellants have filed suit against the sellers.

C. EVEN IF THIS COURT FINDS THAT A PROFESSIONAL NEGLIGENCE CLAIM CAN BE BROUGHT AGAINST A HOME INSPECTOR, APPELLANTS' COMPLAINT FAILS TO PROPERLY ALLEGE A CLAIM OF PROFESSIONAL NEGLIGENCE BECAUSE NO EXPERT AFFIDAVIT WAS CONTEMPORANEOUSLY ATTACHED OR EVER PROVIDED AS IT RELATES TO THE CLAIMS AGAINST SOLID GROUND.[3]

Under South Carolina law, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina that is specifically listed in the statute, the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. *See* S.C. Code Ann. § 15-36-100 (B). This statute does provide exception to the contemporaneous filing requirement of the expert affidavit in professional negligence actions, but no exception clearly applies here. *See* S.C. Code Ann. § 15-36-100 (C).

Where professional negligence is alleged, expert testimony will usually be necessary to establish both the standard of care and the defendant's departure therefrom, unless the subject matter is within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant. *See Hoeffner v. The Citadel*, 311 S.C. 361, 429 S.E.2d 190 (1993) (citing *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633 (1986)); S.C. Code Ann. § 15-36-100 (C)(2).

[3] The purpose of this subsection is purely to address Appellants' arguments to the contrary in its brief. There is no basis in law or in fact for Appellants' argument on this issue.

Here, Appellants never filed an expert affidavit to accompany their claim of professional negligence against Solid Ground, and the affidavit of Robert Sisnroy attached to the Amended Summons and Complaint only addresses allegations against the engineer, Gaynelle Whittle-Shipp. Appellants never attached any expert affidavit to their Second Summons and Complaint, though the original affidavit of Robert Sisnroy was referenced in the Second Summons and Complaint, as to the claims against Gaynelle Whittle-Shipp. As a result, even if this Court finds that Appellants have a viable professional negligence cause of action against Solid Ground, Appellants failed to properly allege a claim of professional negligence against Solid Ground and their argument as to their claim of professional negligence is effectively moot. If Appellants suggest that an affidavit was not needed because the subject matter surrounding a home inspection is within the ambit of common knowledge, this position would go directly against their argument in the Appellants' Initial Brief. Thus, the trial court did not err in granting Solid Ground's motion for summary judgment as to Appellants' claim of negligence.

II. THE CIRCUIT COURT DID NOT ERR IN GRANTING SOLID GROUND'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS' TORT CLAIMS ARE BARRED BY THE ECONOMIC LOSS RULE.

The basic theory behind the economic loss rule is that when two parties have a contract and the opportunity to negotiate how they want to be protected by the contract, the policy considerations and incentives for proper conduct of tort law are irrelevant. *See East River Steamship Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858, 872-74 (U.S. 1986). "When it is questionable whether an action is plead on contract or in tort, doubt is generally resolved in favor of regarding the action to be on contract." *Seebaldt v. First Federal Sav. & Laon Ass'n*, 269 S.C. 691, 693, 239 S.E.2d 726, 727 (1977) (citing *V.P. Randolph & Company v. Walker*, 78 S.C. 157, 59 S.E. 856 (1907)). The economic loss rule exists to assist in determining whether contract or tort

theories are applicable to a given case. *See Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989).

In *Kennedy*, the Supreme Court of South Carolina sought to clarify the economic loss rule's framework by focusing on activity, not consequence. *See Kennedy*, 299 S.C. at 345, 384 S.E.2d at 737 (stating that if a builder performs construction in such a way that he only violates a contractual duty, then his liability is only contractual). The Supreme Court of South Carolina later expounded on the economic loss rule of *Kennedy* in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) and stated:

> "In our view, the *Kennedy* application of the 'economic loss' rule maintains the dividing line between tort and contract while recognizing the realities of modern tort law. Purely 'economic loss' may be recoverable under a variety of tort theories. The question, thus, is not whether the damages are physical or economic. Rather the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed. ***A breach of duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie.*** A breach of duty arising independently of any contract duties between the parties, however, may support a tort action.
>
> In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action"

Tommy L. Griffin Plumbing & Heating Co., 320 S.C. at 54-55, 463 S.E.2d at 88 (emphasis added).

Here, the Circuit Court properly granted Solid Ground's Motion for Summary Judgment. The economic loss rule bars Appellants' tort claims against Solid Ground because those claims arise only out of the contract between Solid Ground and the Appellants'. No claims arise from a special duty owed by Solid Ground, and no facts have been presented to show that Solid Ground ever breached any special duty owed, if one did exist.

A. EVEN IF APPELLANTS HAVE A VIABLE CLAIM OF PROFESSIONAL NEGLIGENCE, THAT CAUSE OF ACTION IS ONLY A VEILED BREACH OF CONTRACT CLAIM AND THE ECONOMIC LOSS RULE WILL STILL APPLY.

The South Carolina Court of Appeals used the analysis in *Griffin* to hold that no viable professional negligence cause of action existed between a client and an architect where the alleged breaches of duty were only contractual in nature and did not arise from a special relationship between the parties. *See Koontz v. Thomas*, 333 S.C. 702, 711-12, 511 S.E.2d 407, 412 (S.C. Ct. App. 1999). The Court held that the appellant client's tort allegations of professional negligence *were merely veiled breach of contract claims and cannot be maintained as a separate cause of action*. *See Koontz*, 333 S.C. at 712, 511 S.E.2d at 412 (emphasis added).

In *Koontz*, the appellant sued an architectural firm for professional negligence, negligent misrepresentation, and breach of contract in connection with an architectural contract, and this Court affirmed the circuit court's grant of summary judgment as to all three causes of action. *See id.*, 333 S.C. at 706, 511 S.E.2d at 409. The architectural firm's contract with appellant related to the design of a new residence and made no warranties or representations that actual construction bids or negotiated prices may or may not vary from any construction cost the architect prepared. *See id.*, 511 S.E.2d at 409. Ultimately, the designs resulted in contractor bids for construction that were greater than the architect's cost estimate. *See id.*. Appellant then terminated the contract with the architectural firm and demanded the return of all architectural fees paid; the appellant hired a subsequent architect to design a home that was slightly more expensive than the original architect's estimate. *See id*. Appellant then filed suit against the original architectural firm. *See id.*, 333 S.C. at 707, 511 S.E.2d at 410.

This Court held that the economic loss rule barred appellant's professional negligence cause of action against the architectural firm because the alleged breaches of duty were only

contractual in nature and did not arise from any special relationship between the parties. *See id.*, 333 S.C. at 711-12, 511 S.E.2d at 412. Thus, Appellant's assertion that South Carolina courts have never applied the economic loss rule to circumstances involving contracts for services is incorrect.

Here, Appellants argue that the economic loss rule does not apply to their claim of professional negligence against Solid Ground. While Solid Ground disputes whether Appellants have a viable claim of professional negligence or have correctly followed procedure in bringing that claim, that claim ultimately is only a veiled breach of contract claim. Solid Ground and Appellants entered into an Agreement for Home Inspection Services that specifically listed the scope of the inspection, including any exclusion from that scope. (Ex. B, Solid Ground Agreement). Solid Ground then performed its home inspection and provided Appellants with a report that listed many issues in the home that included structural issues, potential water intrusion issues, stucco issues, and issues with the roof. (Ex. C, Solid Ground Report; Ex. F, Dep. Christopher Gibbs p. 86; Ex. G, Corresp. Christopher Gibbs Dec. 1, 2017).

In addition, Solid Ground recommended that the Appellants hire a general contractor and stucco contractor to inspect the home, and it was completely unknown to Solid Ground that the structural engineer, Gaynelle Whittle-Shipp, had performed her inspection approximately two days before the home inspection. (Ex. A, GWS Ltr. Nov. 20, 2017; Ex. C, Solid Ground Report). Solid Ground made its recommendations without knowing the conclusion of the structural engineer, which specifically stated that (1) there was an addition to the home, (2) the addition rested on foundation of concrete block and wood joists, and (3) noted differential settlement at the home. (Ex. A, GWS Ltr. Nov. 20, 2017). These are conditions Appellants allege Solid Ground should have observed and to which the Appellants should have been alerted. Like the architectural firm in *Koontz*, Solid Ground did not owe Appellants any special duty that arose separately from the

contract itself. There is no evidence, outside of Appellants' baseless assertions, that Solid Ground breached any duty, legal, special, or otherwise, owed to the Appellants. As a result, Appellants alleged claim of professional negligence is only a veiled breach of contract claim and is barred by the economic loss rule. Thus, the Circuit Court properly granted Solid Ground's motion for summary judgment.

B. THE ECONOMIC LOSS RULE BARS APPELLANTS' CLAIMS IN TORT AGAINST SOLID GROUND.

The South Carolina Supreme Court has declined to expand the narrow exception to the economic loss rule to contracts between a home buyer and a home inspector. *See Gladden*, 402 S.C. at 144, 739 S.E.2d at 884 (citing *Kennedy*, 299 S.C. at 343-44, 384 S.E.2d at 736). The *Gladden* case is directly on point on this issue. It explains why the economic loss rule may not apply to bar tort claims against a home builder. *See id.* However, *Gladden* specifically restates that the economic loss rule bars tort claims against home inspectors. *See id.*

In *Gladden*, the plaintiff entered into a contract with a home inspector that limited the liability of the home inspector to the home inspection fee paid by the plaintiff. *See id.*, 402 S.C. at 141, 739 S.E.2d at 883. After the home inspection was completed, the plaintiff informed the home inspector of conditions of the home that were not included in the home inspection report, and the home inspector then returned the inspection fee to the plaintiff. *See id.* Subsequently, the plaintiff filed suit against the seller of the home, the real estate agents, the real estate companies involved in the transaction, and the home inspector. *See id.* Specifically, plaintiff sued the home inspector for breach of contract for failing to conduct the inspection in a thorough and workmanlike manner. *See id.* By observing the narrow exception to the economic loss rule of *Kennedy*, the Court held the limited liability provision of the home inspector's contract with the plaintiff was not against public policy because:

> "[i]t is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects, and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering. . . The general assembly has imposed liability on the party with greatest access to information about the home's defects, where it most logically resides."

See id., 402 S.C. at 144, 739 S.E.2d at 884.

In addition, the Court examined the statutory scheme drafted by the General Assembly regarding home inspections and liability for undisclosed defects in the sale of residential property. *See id.*, 402 S.C. at 143, 739 S.E.2d at 883. It is true that the statutory scheme affords protection from unqualified home inspectors by licensure requirements, but the General Assembly did not require home inspectors to carry errors and omissions liability insurance. *See id.*, 402 S.C. at 143, 739 S.E.2d at 883 (citing S.C. Code Ann. § 40-59-500 *et seq.*). As further evidence to show that public policy was not breached and that home buyers were not without remedy, the Court looked to the Residential Property Condition Disclosure Act, which protects buyers and requires they are informed by the seller of defects of which the seller has knowledge. *See id.*, 402 S.C. at 144, 739 S.E.2d at 884 (citing S.C. Code Ann. § 27-50-10). As a result, the Court held that the economic loss rule limits claims between home purchasers and home inspectors to claims arising in contract to the extent a contract exists between the parties. *See id.*, 402 S.C. at 146, 739 S.E.2d at 884-85.

Here, the facts are very similar to those of *Gladden*. Appellants and Solid Ground entered into an agreement for the home inspection that specifically listed the scope of the inspection, including any exclusion from that scope. (Exhibit B, Solid Ground Agreement). Solid Ground then performed its home inspection and provided Appellants with a report that listed many issues in the home that included structural issues, stucco issues, potential water intrusion issues, and issues with the roof. (Ex. C, Solid Ground Report; Exhibit F, Dep. Christopher Gibbs p. 86; Ex. G, Corresp. Christopher Gibbs Dec. 1, 2017). In fact, Solid Ground recommended that the Appellants hire a

stucco contractor to inspect the home, and it was completely unknown to Solid Ground that the structural engineer, Gaynelle Whittle-Shipp, had performed her inspection approximately two days before the home inspection. (Ex. A, GWS Ltr. Nov. 20, 2017). Also unknown to Solid Ground was the conclusion of the structural engineer, which specifically noted differential settlement and differing foundations at the home, which are conditions that Appellants allege Solid Ground should have observed. Even closer to the facts of *Gladden*, the agreement between Appellants and Solid Ground specifically limited the liability of Solid Ground for any claim that arises out of the home inspection to the cost of the contract itself.

As a result, the only claims that Appellants may have against Solid Ground arise out of contract, and the trial court did not err in granting Solid Ground's motion for summary judgment as to Appellants' claim of negligence.

III. THE CIRCUIT COURT DID NOT ERR IN GRANTING DECLARATORY RELIEF ON THE CONTRACTUAL LIMITATION OF LIABILITY PROVISION.

In South Carolina, unconscionability is defined as 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. *See Gladden*, 402 S.C. at 144, 739 S.E.2d at 884 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007)).

Limitation of liability and exculpation clauses are routinely entered into and are commercially reasonable in that they permit the provider to offer the service at a lower price, in turn making it available to people who otherwise would be unable to afford it. *See id*. The Supreme Court of South Carolina has already held that they cannot say a limitation of liability clause in a home inspection contract is so oppressive that no reasonable person would make it and no fair and honest person would accept it. *See id*. Ultimately, the Court held that contractual limitation of a

home inspector's liability is not so oppressive that no reasonable person would make it and no fair and honest person would accept it.[4] *See id.*, at 146, 739 S.E.2d at 885.

In noting the its disagreement with the dissent, the Court explained that it:

> "should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract."

See id.

In looking to the facts surrounding the home inspection contract in *Gladden*, the Court noted that the home inspector was self-employed and had no significantly greater bargaining power or more sophistication than the home buyer, who was a once practicing real estate agent. *See id*. Further, the Court noted that they were unaware of any home inspection contracts without exculpatory clauses available in the market. *See id*.

The Court also looked to whether the clause was inconspicuous and explained the proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term. *See id*. In *Gladden*, the contract was one page with a limitation of liability clause in all capital letters, bold, and its heading was in the same print as the contract's other terms. *See id.*

Further, South Carolina statute specifically allows home inspectors to limit the scope of a residential home inspection. *See* S.C. Code Ann. § 40-59-500 (4) ("The parties to a home inspection may limit or expand the scope of the inspection by agreement."). What's more, a home

[4] Specifically, the Supreme Court only considered the specific provisions of the home inspection contract and the surrounding events in *Gladden* in order to note its disagreement with the dissent's analysis. *See Gladden*, 402 S.C. at 144, 739 S.E.2d at 884. In this regard, Appellants' argument relies heavily on this dicta.

inspector shall disclose the scope and limitations, if any, of each inspection before performing a home inspection. *See* S.C. Code Ann. § 40-59-560 (C).

The Appellants rely on *Smith v. D.R. Horton*, *Inc*. in their argument that the subject limitation of liability provision was oppressive. *See Smith v. D.R. Horton, Inc.,* 403 S.C. 10, 742 S.E.2d 37 (2013). However, yet again, Appellants are attempting to apply standards of a home builder onto a home inspector, which the Court in *Gladden* specifically addressed and refused. *See Gladden*, 402 S.C. at 144, 739 S.E.2d at 884.

In *Smith*, the contractual provision in question was a Mandatory Binding Arbitration provision within a Warranty and Dispute Resolution section of an agreement between a home buyer and home builder, which also included a limitation of liability section. *See generally Smith*, 403 S.C. 10, 742 S.E.2d 37. Ultimately, the Court of Appeals affirmed the lower court's decision that the entire Warranty and Dispute Resolution section of the agreement, including the Mandatory Binding Arbitration provision, was oppressive and unconscionable due to the attempt to disclaim statutorily protected implied warranty claims and the lack of mutuality of remedy, specifically, the exemption of the home builder from monetary damages. *See id*, 403 S.C. at 15, 742 S.E.2d at 40.

Here, Appellants admit that Endre Tomaschek communicated to Solid Ground that he and his wife were under a tight deadline to have the home inspected, and Solid Ground refused to perform the inspection until the home inspection contract had been signed by Endre Tomaschek. (Aff. Endre Tomaschek, July 9, 2020). That home inspection contract explicitly stated the inspection of the property was for any visually observable major deficiency of the home, that the inspection was not a "code" inspection, the inspection excluded any concealed or latent defects, and the contract represented the entire agreement between Solid Ground and Endre Tomaschek. (Ex. B, Solid Ground Agreement). Further, the contract specifically stated that the maximum

liability for Solid Ground arising from failure to perform any of the obligations in the contract was limited to an amount not to exceed the fee paid for the inspection. (Ex. B, Solid Ground Agreement). Like the contract between the home inspector and home buyer in *Gladden*, the limitation of liability provision in the contract between Solid Ground and Endre Tomaschek was not unconscionable. In addition, the limitation of liability provision was not inconspicuous; the contract was only two pages in length and the actual language related to the effect of the limitation of liability was completely capitalized. Lastly, there is no evidence that Endre Tomaschek lacked meaningful choice in choosing a home inspector. He contacted Solid Ground to perform the home inspection and let it know that he was under a time constraint to have the home inspection performed. (Aff. Endre Tomaschek, July 9, 2020). Solid Ground informed Endre Tomaschek that it would not perform the home inspection unless the Agreement for Home Inspection Services was signed by him. (Aff. Endre Tomaschek, July 9, 2020). At this point, Endre Tomaschek could have reached out to another home inspector, but instead he signed the contract and moved forward with Solid Ground performing the home inspection.

As a result, the provision limiting any liability arising out of the contract between Solid Ground and Endre Tomaschek to the price of the contract is not unconscionable, the Circuit Court did not err in granting Solid Ground's motion for summary judgment and grant of declaratory relief, and this Court should affirm the ruling of the Circuit Court.

CONCLUSION

The Circuit Court properly granted Solid Ground's motion for summary judgment and declaratory relief. First, Appellants do not have a viable claim of professional negligence against Solid Ground because professional negligence does not apply to home inspectors. Second, even if Appellants can bring a professional negligence claim against a home inspector, they failed to do

so in this case because they did not follow the appropriate procedure governing professional negligence claims in South Carolina. Third, Appellants' tort claims, whether professional negligence, negligence, or otherwise, do not arise outside of the contract between Endre Tomaschek and Solid Ground, and, as a result, the economic loss rule applies to bar those claims. Fourth, the limitation of liability provision in the home inspection contract entered into between Endre Tomaschek and Solid Ground is not unconscionable. As a result, this Court should affirm the ruling of the Circuit Court.

Respectfully submitted,

Alan R. Belcher, Jr., Esquire, Bar No. 71686
Connor E. Johnson, Esquire, Bar No. 103111
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
Telephone: (843) 720-3460
alan.belcher@hallboothsmith.com
cjohnson@hallboothsmith.com
Attorneys for Respondent-Petitioner Solid Ground Home Inspections, LLC

This 17th day of August, 2021.

COUNSEL OF RECORD:

Frederick Elliotte Quinn, IV, Esquire
103 Grandview Drive, Suite A
Summerville, SC 29483
843-871-6522

Ryan Christopher Andrews, Esquire
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
843-936-667

RECEIVED
Aug 17 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2020-001403
Lower Court 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,"

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent upon the Appellants by U.S. Mail and/or electronic on _August 17_, 2021, addressed to attorneys of record, Frederick Elliotte Quinn, IV, Esquire, 103 Grandview Drive, Suite A, Summerville, SC 29483 and Ryan Christopher Andrews, Esquire, 222 W. Coleman Blvd., Mt. Pleasant, SC 29464.

HALL BOOTH SMITH, P.C.

By: */s/ Bonnie Ellenberger*
Bonnie Ellenberger
Legal Assistant

COUNSEL OF RECORD:

Frederick Elliotte Quinn, IV, Esquire
The Steinberg Law Firm, LLP
103 Grandview Drive, Suite A
Summerville, SC 29483
843-871-6522
equinn@steinberglawfirm.com

Ryan C. Andrews, Esquire
Cobb Dill & Hammett, LLC
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
843-936-6674
randrews@cdhlawfirm.com

Attorneys for Appellants