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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.

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ARGUMENT

Respondent asserts numerous arguments—many for the first time—in opposition to Appellants' appeal, but many of those arguments have been adequately addressed previously and others can be dealt with swiftly.[1] A more extensive discussion of five of Respondent's arguments may benefit the Court: (1) that Section 15-36-100 limits the professions that are subject to professional negligence claims, (2) that the home inspector licensing statutes bar professional negligence claims against home inspectors, (3) that the decisions cited by Appellants as recognizing certain professions are subject to professional negligence claims are not cases dealing with professional negligence, (4) that Appellants' claims are based on purely contractual breaches, and (5) that limitation of liability provisions are universally enforceable in home inspection

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[1] Respondent misstates the holding of *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), stating that decision "specifically restates that the economic loss rule bars tort claims against home inspectors." (Resp't Br. 17.) The *Gladden* decision contains no discussion of and no holding on the economic loss rule. The *Gladden* decision deals exclusively with whether a limitation of liability provision in a home inspector's contract was unenforceable because against public policy or unconscionable. The *only* mention of "economic loss" in the *Gladden* decision is in a citations' parenthetical quotation of language from an earlier decision cited to explain the policy rationale for eliminating the economic loss rule in relation to claims against home builders, as part of providing heightened protections for home purchasers. *Gladden*, 402 S.C. at 144, 739 S.E.2d at 884 (citing *Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009)). There is *nothing* in the *Gladden* decision stating "that the economic loss rule bars tort claims against home inspectors."

Additionally, Respondent repeatedly asserts that the limitation of liability provision at issue in this case covers "any claim that arises out of the home inspection" and is as broad as the limitation of liability provision at issue in the *Gladden* case. (Resp't Br. at 19; *see also* Resp't Br. at 5 n.2.) The limitation of liability provision at issue here limits only Respondent's liability "arising from failure to perform any of the obligations stated in this agreement." (Mem. in Oppn. to Mot for Summ. J., Ex. E, Solid Ground Contract ¶ 13.) Therefore, the provision only limits Respondent's liability for breach of contract claims and has no impact on negligence claims against Respondent. Even were the provision ambiguous and susceptible to an interpretation whereby it covers negligence claims, a limitation of liability provision is to be strictly construed against the party relying on the provision. *Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964).

agreements and courts are not to examine the specific limitation provision at issue in determining whether a provision is unconscionable.

I. SECTION 15-36-100 DOES NOT LIMIT THE PROFESSIONS SUBJECT TO A PROFESSIONAL NEGLIGENCE CLAIM.

Respondent notably does not contest whether a home inspector is a professional, does not contest the principle that professional negligence claims are not barred by the economic loss rule, and offers only the conclusory assertion that Respondent's limitation of liability to the cost of the inspection covers Appellants' negligence claim. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[C]onclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Instead, Respondent contends that Section 15-36-100 limits the professions subject to professional negligence claims and the statutory licensing scheme for home inspectors "shows that the General Assembly did not intend to subject home inspectors to claims of professional negligence."[2] (Resp't Br. 10.) Accordingly, if those statutes do not bar professional negligence claims against home inspectors as explained below, then Respondent apparently concedes that home inspectors are professionals subject to professional negligence claims not barred by the economic loss rule and not barred by the limitation of liability provision.

While Respondent contends that Section 15-36-100 limits the professions subject to professional negligence claims to the twenty-two professions listed in subsection G of the statute, Respondent fails to identify any language in the statute providing such a limitation. Respondent's failure to identify any such language is fatal to this argument because statutes are only to be

[2] Respondent also contends that Appellants' professional negligence claim fails because Appellants did not file an expert affidavit for the claims against Respondent. However, an expert affidavit would only be required if Section 15-36-100 applied to Respondent as a home inspector, and Respondent concedes that the statute "specifically does not apply to home inspectors." (Resp't Br. 8.)

interpreted as abrogating the common law where there was a "clear and unambiguous legislative enactment." *Singleton v. State*, 313 S.C. 75, 83, 437 S.E.2d 53, 58 (1993). Nowhere in the statute is there any language defining or limiting the professional negligence claims available in South Carolina.

Not only does the statute not have any language supporting Respondent's position, but the statute also explicitly applies *only* to the professions listed in the statute and not to all professional negligence claims. Section 15-36-100 is not a statute defining professional negligence claims or setting forth the professions subject to such claims. Section 15-36-100 creates heightened pleading requirements for professional negligence claims against certain professionals. The statute only applies "in [1] an action for damages [2] alleging professional negligence [3] against a professional licensed by or registered with the State of South Carolina and [4] listed in subsection (G)." S.C. Code § 15-36-100(B). For those professionals, and only those professionals, "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." *Id.* The statute's use of "and" in the list of four requirements means that all four requirements must be satisfied for the statute to apply. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 172 (1980) (interpreting statute using "and" and concluding that "[b]y describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent"); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589 (6th Cir. 2005) (*First*, dictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' does not mean 'or.' . . . Reflecting these traditional assumptions about the meaning of the term, the Supreme Court has said that 'and' presumptively should be read in its 'ordinary' conjunctive sense unless the 'context' in which is used or 'other provisions of the statute' dictate a contrary

interpretation."); *Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988) ("The word 'and' is therefore to be accepted for its conjunctive connotation rather than as a word interchangeable with 'or' except where strict grammatical construction will frustrate clear legislative intent."); Antonin Scalia & Bryan Garner, *Reading Law* 116–17 (2012) ("*And* joins a conjunctive list . . . . A common interpretive issue involves the conjunction *and*, which (if there are two elements in the construction) entails an express or implied *both* before the first element."). Because the statute only applies to the listed professions, the statute leaves open the existence of other professions to which the statute does not apply and which are subject to professional negligence claims. Additionally, subsection G states the statute "applies to the following professions," thereby implying that there are other professions to which the statute does not apply.

Therefore, not only is the statute silent as to which professions are subject to professional negligence claims, the statute's language indicates there are other professions subject to professional negligence claims and to which the statute does not apply. That silence and indication of other professions subject to professional negligence claims is the opposite of the "clear and unambiguous legislative enactment" necessary to abrogate the common law on when professional negligence claims exist. *Singleton*, 313 S.C. at 83, 437 S.E.2d at 58. Moreover, even were there any ambiguity in the statute's language, statutes in derogation of the common law are to be strictly construed, and the Court would have to construe the ambiguity against the statute limiting common law professional negligence claims against other professions. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012).

To be clear, adopting Respondent's reading of Section 15-36-100 would require finding that the General Assembly, without providing any indication in the language of statute, silently

and by implication only abrogated all South Carolina common law on when professional negligence claims exist and limited professional negligence claims to the twenty-two professions listed in Section 15-36-100(g). Such a result would be contrary to South Carolina law on what is required for statutory abrogation of the common law. Such a result would also be absurd given that a reading that comports with and does not require expanding the statutory language exists—that Section 15-36-100 creates enhanced pleading requirements for professional negligence claims against certain professionals and leaves undisturbed the common law requirements for professional negligence claims against all other professionals. While curious that home inspectors, termite pesticide applicators, insurance agents, and real estate agents were not included in the statutory list of professions warranting a heightened pleading requirement while other seemingly equivalent professions like accountants and land surveyors were included, the decision as to which professions warrant such protections is a policy decision left to the wisdom of the legislature. *See Smith v. Tiffany*, 419 S.C. 548, 558, 799 S.E.2d 479, 485 (2017).

The absence of any language in Section 15-36-100 expressly stating that the statute limits the professions against which common law professional negligence claims are available disposes of this issue. The Court should not be led astray by Respondent latching onto dicta in the decision in *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014). Respondent is correct that in *Ranucci* the Court three times used the language "all professional negligence cases" in relation to Section 15-36-100.[3] However, that language is at best dicta and does not further Respondent's position.

[3] The three statements regarding "all professional negligence cases" in the *Ranucci* opinion are as follows: (1) "Based on this legislative history, we conclude the General Assembly enacted[ ] section 15-36-100 to establish the general construct regarding expert witnesses for all professional negligence cases . . . ."; (2) "Thus, although sections 15-79-125 and 15-36-100 are distinct in their operational procedures, it is evident that the General Assembly promulgated the statutes to work in concert for the common purpose of tort reform involving all professional negligence claims."; and (3) "Therefore, without incorporating all provisions of section 15-36-100 into section 15-79-

The language in the *Ranucci* decision would be more accurate and would still further the Court's reasoning in *Ranucci* if the Court had used the language "*certain* professional negligence cases" rather than "*all* professional negligence cases."

In *Ranucci*, the plaintiff filed suit against a medical doctor alleging he negligently performed a medical procedure. *Ranucci*, 409 S.C. at 496–97, 763 S.E.2d at 190–91. The issue before the Court was whether the trial court properly dismissed the plaintiff's claims where she failed to file an expert affidavit pursuant to Section 15-36-100 when she filed her Notice of Intent to File Suit pursuant to Section 15-79-125. *Id.* at 496, 763 S.E.2d at 190. Resolution of that issue turned on whether Section 15-79-125, the statute requiring a plaintiff to file a notice of intent to file suit prior to proceeding with a medical malpractice claim, incorporated the entirety of Section 15-36-100, including its forty-five-day grace period for filing an expert affidavit. *Id.* The Court's decision did not require any consideration of, and does not contain any discussion of, whether the claim was subject to Section 15-36-100. Not only did the parties agree that Section 15-36-100 applied, but there also could not have been any dispute that the Section 15-36-100 applied to the claim.[4]

Because the claim before the Court was indisputably subject to Section 15-36-100, and the issue of whether Section 15-36-100 limited the professions subject to professional negligence claims was not before the Court, any mentions of the statute in relation to "all professional

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125, a plaintiff with a medical malpractice claim is[] deprived of the forty-five day 'grace period' for filing the affidavit, which is afforded in all other professional negligence cases . . . ."

[4] The defendant was a medical doctor which is a profession licensed by the State, *see* S.C. Code Ann. § 40-47-30, and is a profession listed in subsection G of Section 15-36-100, thereby satisfying two of the requirements for Section 15-36-100 to apply. The plaintiff claimed she suffered a "collapsed lung" due to the defendant doctor's "negligent execution of [a] biopsy," and therefore, she asserted a claim seeking damages for professional negligence as required to satisfy the remaining two requirements for Section 15-36-100 to apply. *Ranucci*, 409 S.C. at 497, 763 S.E.2d at 191.

negligence claims" were not necessary to the decision and are merely dicta. *See Gordon v. Lancaster*, 425 S.C. 386, 394, 823 S.E.2d 173, 177 (2018) (Few, J., concurring) ("[B]ecause the Court's expansive statement was not necessary to the decision of the case, the statement is dictum."); *Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Dicta, or, as it is also known, dictum ' is a statement on a matter not necessarily involved in the case, and is not binding authority."). As dicta, the statements in the *Ranucci* opinion have no bearing on the issue before this Court. As Justice Few succinctly stated, "Dictum is not the law." *Gordon*, 425 S.C. at 395, 823 S.E.2d at 178.

II. THE HOME INSPECTOR LICENSING STATUTES DO NOT BAR PROFESSIONAL NEGLIGENCE CLAIMS AGAINST HOME INSPECTORS.

Respondent's argument that the licensing statutes for home inspectors—Title 40, Chapter 59, Article 3 of the South Carolina Code—evidence an intent not to subject home inspectors to professional negligence claims is also unavailing. First, professional negligence claims are common law negligence claims, and a statute would need to expressly address such claims to bar them. *See Grier*, 397 S.C. at 536, 725 S.E.2d at 696 (stating that "a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" (quoting *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)); *Singleton*, 313 S.C. at 83, 437 S.E.2d at 58 ("The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment."); *State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980) ("It is clear that the common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of common law be eroded."). Respondent has not cited, nor is there any, language in the licensing statutes for home inspectors that addresses common law professional negligence claims, much less provides that home inspectors are not subject to professional negligence claims.

Second, many other professions are subject to licensing statutes providing for sanctions through administrative proceedings, are not subject to licensing statutes providing for professional negligence claims, and yet are clearly subject to common law professional negligence claims as evidenced by Section 15-36-100 and the decisions of South Carolina's appellate courts. *See, e.g.*, S.C. Code Ann. Title 40, Chap. 3 (architect licensing statute that does not mention "negligence" or "negligent"); S.C. Code Ann. Title 40, Chap. 5 (attorney licensing statute that does not mention "negligence" or "negligent"); S.C. Code Ann. § 15-36-100 (providing requirements for asserting a professional negligence claim against architects and attorneys); *Beachwalk Villas Condo. Ass'n v. Martin*, 305 S.C. 144, 146–47, 406 S.E.2d 372, 374 (1991) (professional negligence claim against an architect); *Lloyd v. Walters*, 276 S.C. 223, 226, 277 S.E.2d 888, 889 (1981) (professional negligence claim against an attorney). Therefore, were Respondent's argument from the licensing statute for home inspectors correct, architects and attorneys, and potentially many other professions, also could not be subject to professional negligence claims, a result which is plainly contrary to South Carolina law. Respondent's argument thus must be rejected both because the licensing statutes contain no language supporting an abrogation of common law professional negligence claims and because such an interpretation would be contrary to existing South Carolina law establishing that a professional licensing statute not mentioning professional negligence claims does not bar such claims.

III. PROFESSIONAL NEGLIGENCE IS MERELY A FORM OF NEGLIGENCE WHERE THE STANDARD OF CARE IS SUPPLIED BY THE PROFESSION, AND A DECISION DOES NOT NEED TO USE THE TERM "PROFESSIONAL NEGLIGENCE" TO RECOGNIZE A PROFESSIONAL NEGLIGENCE CLAIM FOR A PARTICULAR PROFESSION.

Respondent contends three of the decisions cited by Appellants as recognizing professional negligence claims do not actually recognize professional negligence claims. Specifically,

Respondent contends *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015), cited by Appellants as recognizing a professional negligence claim against a termite inspector, *Carolina Production Maintenance, Inc. v. U.S. Fidelity & Guaranty Co.*, 310 S.C. 32, 425 S.E.2d 39 (Ct. App. 1992), cited by Appellants as recognizing a professional negligence claim against an insurance agent, and *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985), cited by Appellants as recognizing a professional negligence claim against a real estate agent, do not "relate to professional negligence" and were claims for "negligence." (Resp't Br. 9.)

Respondent puts too fine a point on the concept of professional negligence, treating it as if it were a claim separate from negligence and which must be pled separately from negligence. Professional negligence is merely a form of negligence in which the defendant, due to his status and actions as a professional in a particular field, is subject to a standard of care beyond that applicable to the average person conducting normal activities. A professional is subject to a specific standard of care, not to a separate "professional negligence" claim. Our Court recognized as much in *Doe v. American Red Cross Blood Services*, holding that "in a professional negligence cause of action, *the standard of care* that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession." 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989) (emphasis added). In *Doe*, the Court went on to state that "to maintain her action for negligence, [the plaintiff] must prove that the [defendant] failed to conform to the generally recognized and accepted practices in its profession." *Id.* at 436, 377 S.E.2d at 326 (emphasis added). Thus, the *Doe* decision recognizes that professional negligence is merely a negligence claim with a special standard of care and refers to a professional negligence claim as a "negligence claim," not a "professional negligence claim." Numerous other South Carolina appellate decisions treat professional negligence claims in the same manner, referring to such

claims as "negligence" claims. *See, e.g.*, *Evans v. Rite Aid Corp.*, 324 S.C. 269, 275, 478 S.E.2d 846, 849 (1996) ("Pharmacists clearly fall into the category of a 'profession which furnishes skilled services for compensation;' therefore, they could be liable *in negligence* for failure to conform to the practices of their profession." (emphasis added) (quoting *Doe*, 297 S.C. at 435, 377 S.E.2d at 326)); *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) ("As in any negligence action, the plaintiff in a medical malpractice action must establish proximate cause."); *Folkens v. Hunt*, 290 S.C. 194, 200, 348 S.E.2d 839, 842 (Ct. App. 1986) ("A public accountant who fails to perform in accordance with accepted professional standards may be liable in tort to his client for his *negligence*." (emphasis added)). Similarly, the jury charges for a medical malpractice claim state that medical malpractice is merely a form of negligence. *See* Ralph K. Anderson, Jr., *South Carolina Requests to Charge-Civil* § 27-2 (2002) ("Medical malpractice is a particular form of negligence that consists of not applying to the exercise of the practice of medicine that degree of care and skill which is ordinarily employed by the profession generally . . . . In a case of this nature, negligence is . . . . . Negligence on the part of a physician . . . has been said to consist in . . . ."). As established by the foregoing authorities, a professional negligence claim is a negligence claim where the plaintiff alleges the defendant failed to comport with the professional standard of care applicable to members of the particular profession.

While the *McAlhany v. Carter* decision does not use the term "professional negligence," the decision reverses the trial court's grant of summary judgment on a negligence claim against a termite inspector with the details of the negligence claim at issue showing that it was a claim for professional negligence. In *McAlhany*, the plaintiff sued a termite inspector on the basis that he "was negligent in failing to conduct a reasonable inspection of the home's premises." *McAlhany*, 415 S.C. at 58, 781 S.E.2d at 108. The plaintiff alleged that due to the negligently performed

inspection, he was not aware of ongoing mold damage to the home and that he suffered personal injury when exposed to that mold. *Id.* After reversing the trial court's grant of summary judgment against the plaintiff on statute of limitations grounds, the Court of Appeals turned to whether the trial court erred in granting summary judgment against the plaintiff on his personal injury claim on the basis that he failed to submit any evidence to support that claim. *Id.* at 69, 781 S.E.2d at 114. Whether a termite inspector conducted a reasonable inspection of a home is dependent on a professional standard as to what termite inspectors are to inspect, and thus, such a claim is a professional negligence claim. Because the average person does not have the knowledge or skill to perform a CL-100 inspection of a home, a person could only be negligent in performing such an inspection if there is a professional standard of care applicable to such inspections. Moreover, while not using the term "professional negligence," the Court recognized the claims as such by discussing the termite inspector's deposition testimony as to how he conducts inspections and the State regulations governing such inspections and then deciding there was a genuine issue as to whether the "inspection . . . fell below the standard of care." *Id.* at 71, 781 S.E.2d at 115.

The *Carolina Production Maintenance, Inc. v. U.S. Fidelity & Guaranty Co.*, decision also does not use the term "professional negligence." However, the decision, in line with a long string of cases, provides that where an insurance agent undertakes to advise an insured in procuring insurance, the agent is liable for any failure to "exercise due care in giving advice." *Carolina Production*, 310 S.C. at 38, 425 S.E.2d at 43 (quoting *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988)). The average person does not have knowledge of the types and details of insurance coverage available, and an insurance agent could only give advice on purchasing insurance coverage due to the agent's special knowledge as a member of his profession. As such, for an insurance agent to be liable for failing to exercise due

care in giving advice for procuring insurance coverage requires that there be a professional standard of care applicable to insurance agents, and the statement of law in the *Carolina Production* decision as to when agents can be liable can only be true if there is a professional standard of care and professional negligence claims for insurance agents.

Similarly, *Lengel v. Tom Jenkins Realty, Inc.*, does not use the term "professional negligence," but the Court affirmed a jury award against a real estate agent on a claim for "negligence" on the basis that the agent failed to fulfill the duties applicable specifically to real estate agents, *i.e.*, the professional standard of care for real estate agents. 286 S.C. at 518–19, 334 S.E.2d at 836. In reaching that result, the Court relied in part on the plaintiffs' expert's testimony that the agent erred in not listing certain terms in the listing agreement and the sales contract. *Id.* at 517, 334 S.E.2d at 835. If an expert testified about the actions a real estate agent reasonably takes in professional conduct, that is testimony about a professional standard of care. The actions the expert testified the real estate agent should have done—listed a contingency in the listing agreement, listed a contingency in the sales agreement, and informed the purchasers of the contingency—are things that person would not do and would not know to do unless the person were engaged in the real estate agent profession. Therefore, while the *Lengel* decision does not use the term "professional negligence," the decision affirmed a verdict on a professional negligence claim against a real estate agent.

While the decisions cited by Appellants as recognizing professional negligence claims do not all use the term "professional negligence," the use of that term is not necessary to address a professional negligence claim. Many other decisions of South Carolina's appellate courts recognize professional negligence claims while referring to those claims as "negligence" claims. Moreover, in each of the decisions cited by Appellants that do not use the term "professional

negligence," the details of those claims establish that the Court recognized a professional negligence claim against the profession at issue.

IV. APPELLANTS' CLAIMS ARE NOT PURELY CONTRACTUAL CLAIMS BECAUSE THE CLAIMS CONCERN WHETHER RESPONDENT PERFORMED THE HOME INSPECTION IN ACCORDANCE WITH THE STANDARDS OF THE PROFESSION.

Respondent asserts that Appellants' claims are for purely contractual breaches and do not arise from any special relationship between the parties, and therefore, Appellants do not have a negligence claim. However, Respondent's argument is premised on the conclusory assertion that Appellants' "claims arise only out of contract." (Resp't Br. 14.) The undisputed facts do not support that assertion.

Respondent engages in a profession requiring the use of specialized knowledge and skills to provide a service to members of the public. In doing so, Respondent must meet the minimum standards of care applicable to members of that profession. Respondent acknowledges that the American Society of Home Inspectors' standards (the "ASHI Standards") state a minimum level of inspection that 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 thus owed Appellants the duty to perform its professional services in accordance with that standard of care and is liable for its failure to meet that standard of care. That duty is a tort duty arising from Respondent providing a professional service and is not a solely contract duty.

The *Koontz v. Thomas* decision discussed at length by Respondent does nothing to change that analysis and is inapposite here. In *Koontz*, a property owner entered into a contract with an architect for the design of a new residence. *Koontz v. Thomas*, 333 S.C. 702, 706, 511 S.E.2d 407, 409 (Ct. App. 1999). The owner approved a set of plans and estimated construction costs prepared by the architect. *Id.* Contractors then submitted bids based on those plans, and the bids

significantly exceeded the architect's construction estimate. *Id.* at 706–07, 511 S.E.2d at 409. The owner then terminated the contract and sued the architect, "alleging professional negligence." *Id.* at 707, 511 S.E.2d at 409. The sole basis for the owner's negligence claim was that the architect designed a home that exceeded the maximum construction cost the owner and architect agreed upon. *Id.* Reviewing the trial court's grant of summary judgment to the architect on the professional negligence claim, the Court restated the legal principle relied upon by Appellants in this case, that the economic loss rule bars a claim for purely economic losses unless the defendant was subject to a duty independent of any contractual duties. *Id.* at 711–12, 511 S.E.2d at 412. Due to that principle, the Court had to determine whether the duties allegedly breached "arise from the parties' contract or independently therefrom." *Id.* at 712, 511 S.E.2d at 412. Reviewing the owner's claims and the evidence presented, the Court found the parties' contract expressly stated the parties were not agreeing to any maximum construction price and there was no evidence of any standard in the profession related to maximum construction costs. *Id.* at 709–12, 511 S.E.2d at 411–12. Because there was no professional standard of care applicable to the issue before the Court, the claim was purely a matter of the parties' contractual preferences, and there was no professional negligence claim available.

The result is *Koontz* is unremarkable. Parties can contractually agree to a cost limit on construction, or they can contractually agree to have plans drawn without any associated cost limitation. That is a choice for the parties to make given the circumstances. There could never be any professional standard of care as to whether parties have a limit on construction costs in a contract for architectural services.

Similarly and also unremarkable, Appellants would agree that had the contract with Respondent provided that Respondent was to perform the home inspection by a certain date,

Respondent failed to perform the inspection by that date, and Appellants were harmed by that failure, Appellants would only have a contract claim for that breach. There can be no standard of care as to the date on which an inspection is performed. That is not something that requires specialized knowledge or skill inherent in the profession. That is a choice made by the parties given their circumstances and needs.

The *Koontz* decision and the hypothetical contractual time limitation for a home inspection are both markedly different from the facts in this case. Here, Respondent acknowledges there is a standard—the ASHI Standards—that sets out the minimum level of inspection a home inspector must perform. 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 §§ 2.2A, 2.2B, & 3.1B.) That standard is a quintessential professional standard of care because it requires a home inspector to inspect certain items, exercise professional judgment in evaluating those items, and report items that are defective based on the inspector's professional knowledge. Respondent failed to meet that professional standard of care by, among other failures, failing to conduct any inspection of the defective foundation system present on the rear half of the home and reporting that the entire home was constructed on a slab-on-grade foundation. Appellants' expert opines that the deficiencies in the foundation system on the rear half of the home "were evident and obvious conditions," and thus, had the inspector inspected that foundation system he would have recognized and reported the deficient nature of that system. (Mem. in Oppn. to Mot. for Summ. J., Ex. G, Sisnroy Report 3–4.)

Therefore, Appellants' claims concern whether Respondent met the standard of care it acknowledges applies to its profession, not whether Respondent complied with a contractual choice made by the parties as was the case in *Koontz*. Accordingly, and unlike *Koontz*, the duty at issue here arose independently of the parties' contract, and Appellants have a viable tort claim independent of any contract claim they have against Respondent.

V. SOUTH CAROLINA LAW DOES NOT PROVIDE THAT LIMITATION OF LIABILITY PROVISIONS ARE UNIFORMLY ENFORCEABLE IN HOME INSPECTION CONTRACTS AND RATHER, REQUIRES INDIVIDUALIZED CONSIDERATION OF THE TERMS OF A PROVISION AND THE FACTS SURROUNDING THE PARTIES ENTERING INTO THE CONTRACT.

Respondent contends that the *Gladden* decision held that limitation of liability provisions in home inspector's contracts are uniformly enforceable and that the decision's discussion of the facts related to the parties there entering into the contract was merely dicta included to address the dissent's analysis. (Resp't Br. 19–20 & n.4.) However, the *Gladden* decision does not support Respondent's expansive reading.

Unconscionability requires two elements be met: (1) "the absence of meaningful choice on the part of one party due to one-sided contract provisions," and (2) "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Gladden*, 402 S.C. at 144, 739 S.E.2d at 884 (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007)). Analyzing whether the limitation of liability clause in the *Gladden* contract was unconscionable, the Court concluded that a simple limitation of liability clause alone is not oppressive. *Gladden*, 402 S.C. at 144, 739 S.E.2d at 884 ("We cannot say that 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."). The Court then concluded that because the limitation of liability provision was not oppressive, it did not need to

consider whether the provision was the result of a lack of meaningful choice. *Id.* The Court left open the possibility that a different contract with different limitation of liability terms may be oppressive, stating that limitation of liability provisions are "commercially reasonable *in at least some cases*." *Id.* at 144–45, 739 S.E.2d at 884 (emphasis added).

Here, Respondent's contract attempts to limit Respondent's liability through intertwined terms that are much broader than the provision at issue in *Gladden*. The contract in this case attempts to disclaim any liability for the accuracy of Respondent's report, impose a ten-day notification and statute of limitations requirement on any claim, and limit any remaining liability for failure to perform contractual obligations to the fee paid for the inspection. These provisions are a confusing and complicated attempt to eliminate all liability for Respondent related to the performance of its inspection and report, which goes far beyond the simple provision in *Gladden* that provided only that the inspector's liability was "limited to a sum equal to the amount of the fee paid by the client." *Id.* at 142 n.1, 739 S.E.2d 883 n.1.

No South Carolina decision has held that limitation of liability provisions are uniformly enforceable. As evidenced by the difference between the contract provisions at issue in *Gladden* versus here, there are myriad potential limitation of liability provisions, and consideration of whether a particular limitation of liability provision is unconscionable requires consideration of the particular contractual language at issue.

Respondent also relies on a statute governing home inspectors as providing that limitation of liability provisions are uniformly enforceable, contending that "South Carolina statute specifically allows home inspector to limit the scope of a residential home inspection," and citing Section 40-59-500(4) in support. (Resp't Br. 20.) While correct that Section 40-59-400(4) allows a home inspector and client to agree to limit or expand "the scope of the inspection," Section 40-

59-400(4) does *not* address an inspector limiting *liability*. An inspector and client could limit or expand the "scope" of an inspection in infinite ways without changing the inspector's liability for a deficient inspection, and an inspector and client could agree to limit the inspector's liability in infinite way without changing the "scope" of the inspection. An inspection's "scope" and an inspector's liability for deficiently performing an inspection are not synonymous. Therefore, the fact that an inspector can freely contractually limit the scope of an inspection does not mean that the inspector has the unrestrained right to any imaginable limitation of liability provision.

The *Gladden* decision found a particular limitation of liability provision—the most basic limitation of liability provision that simply limited the recoverable damages to the amount of the contract fee—was not oppressive. However, that basic limitation of liability provision is not what is before the Court here. Here, the contract has complex, intertwined limitation of liability provisions, and the analysis of whether those provisions are unconscionable requires consideration of whether those specific terms are oppressive. As set forth in Appellants' prior briefs, the provisions here go far beyond the provision found acceptable in *Gladden* and attempt to eliminate Respondent's liability so arbitrarily and completely that the provisions are oppressive.

CONCLUSION

Respondent concedes that it is a professional, concedes that professional negligence claims are an exception to the economic loss rule, abandons any argument as to whether the limitation of liability provision covers negligence claims, and only contests whether Section 15-36-100 or the home inspector licensing statute bar professional negligence claims against home inspectors. Yet those statutes do not address professional negligence claims against home inspectors, much less explicitly bar such claims as would be needed to eliminate common law professional claims against home inspectors. Accordingly, Appellants have a professional negligence claim against

Respondent, Appellants' professional negligence claim is not affected by the economic loss rule, and the trial court's grant of summary judgment should be reversed. Alternatively, the trial court's grant of summary judgment should be reversed because Appellants' claim relates to the performance of a service and is therefore not subject to the economic loss rule and because the limitation of liability provision is unconscionable and therefore unenforceable.

Respectfully submitted,

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August 27, 2021
Summerville, South Carolina

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Aug 27 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 August 27, 2021, he caused a copy of the foregoing Initial Reply Brief of Appellants 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:

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August 27, 2021

VIA U.S. MAIL AND E-MAIL

Hon. Jenny Abbott Kitchings
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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 Reply Brief of Appellants in the above-referenced appeal.

Regards,

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FEQ/mbc

Enclosures (as stated)

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