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## COMMENT

### **DETERMINING HOME INSPECTOR'S LIABILITY FOR THIRD PARTY GUESTS**

*GROGAN V. UGGLA*, 535 S.W.3D 864 (TENN.  
2017).

*Sophia Kostas\**

Traditionally, home inspectors conduct inspections which provide information to prospective buyers on defective facilities. These visual inspections extend to outdoor facilities such as decks, balconies, and railings and are separate from building code inspections.<sup>1</sup> The scope of the home inspection and report are of principal importance in *Grogan v. Uggla*. Here, the central issue is whether a home inspector shall be liable for a third-party's physical harm after failing to discern a hazard.<sup>2</sup> The Tennessee Supreme Court affirmed a grant of summary judgment in favor of the home inspector,

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\* J.D. Candidate, May 2019, The University of Tennessee College of Law; B.S. Psychology, B.A. Political Science, University of Florida.

<sup>1</sup> See *Grogan v. Uggla*, 535 S.W.3d 864, 874 (Tenn. 2017) (quoting TENN. COMP. R. & REGS. 0780-05-12-.10(13)(a)(4)).

<sup>2</sup> *Id.* at 866.

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therefore concluding that the home inspector, sans prima facie finding of negligence or negligent misrepresentation, shall not be liable for a third-party's physical harm.<sup>3</sup>

The plaintiff, Mr. Charles Grogan, suffered injuries in a fall resulting from a faulty second story deck on Mr. Daniel Ugglá's property.<sup>4</sup> Mr. Ugglá had recently purchased this home after a home inspection by defendant, Jerry Black.<sup>5</sup> The plaintiff filed suit against Mr. Ugglá for negligence in completing the home inspection and relying on misrepresentations.<sup>6</sup> In an amended complaint, Mr. Grogan claimed that the defendant "knew or in the exercise of reasonable care as a professional inspector should have known" that the deck was created using finishing nails which violated building codes and increased the risk of harm.<sup>7</sup>

In response, the defendant testified that he had not observed any damage to the railing and thus had not reported it.<sup>8</sup> Mr. Black emphasized that he was a home inspector and was not qualified to perform a building code inspection, which would have unearthed the more extensive repair needed for the deck railing.<sup>9</sup> Thus, the defendant answered the complaint denying all liability and successfully moved for summary judgment.<sup>10</sup> On appeal, the plaintiff argued that § 311 or § 324A of the *Second Restatement of Torts (Negligent Misrepresentation Involving Risk of Physical Harm and Liability to Third Person for Negligent Performance of*

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<sup>3</sup> *Id.* at 876.

<sup>4</sup> *Id.* at 866.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 866–67.

<sup>7</sup> *Id.* at 866.

<sup>8</sup> *Id.* at 867

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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*Undertaking*, respectively) applied to his case and created a genuine issue of material fact thus negating summary judgment.<sup>11</sup> The Court of Appeals rejected these arguments, providing that § 324A “was not applicable due to the limitations on the scope of a home inspector’s duty as defined by the Tennessee Home Inspector License Act.”<sup>12</sup> The court, similarly, refused to apply § 311 because it had not been adopted in the state and instead analyzed the defendant’s duty of care against the common law factors, finding that the defendant did not owe a duty of care.<sup>13</sup>

The Tennessee Supreme Court granted the appeal to consider *de novo* whether a home inspector is subject to liability for the physical harm suffered by a social guest of the home inspector’s client.<sup>14</sup> The court affirmed the court of appeals and trial court’s decision to grant the home inspector summary judgment finding that he affirmatively negated the elements necessary to the negligent misrepresentation and negligent inspection claims.<sup>15</sup>

Historically, the United States Supreme Court has ruled that a finding of negligence in an inspection was part of a negligent misrepresentation claim and were therefore not separate causes of action.<sup>16</sup> This notion was later rejected when the Court acknowledged that a plaintiff could bring a cause of action where the negligent

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<sup>11</sup> *Id.* at 867–68 (citing RESTATEMENT (Second) of Torts § 311 (Am. Law Inst. 1965); Restatement (Second) of Torts § 324A (Am. Law Inst. 1965)).

<sup>12</sup> *Id.* at 868 (citing Tennessee Home Inspector License Act, 2005 Tenn. Pub. Acts, c. 65),

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 876.

<sup>16</sup> *Id.* at 869 (citing *United States v. Neustadt*, 366 U.S. 696, 706–07 (1961)).

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conduct was separate from the misinformation.<sup>17</sup> Here, the trial court framed the cause of action as negligent misrepresentation and found that the plaintiff did not benefit from nor rely on the defendant's information, and thus granted summary judgment for the lack of negligent misrepresentation.<sup>18</sup> The court of appeals, on the other hand, found the cause of action was ordinary negligence so analyzed through the factors of common law.<sup>19</sup> The Tennessee Supreme Court found that ordinary negligence and negligent misrepresentation were both fairly raised claiming that the home inspector negligently performed his inspection and failed to report the negligent construction, and thus, both proved that summary judgment was appropriate.<sup>20</sup>

Negligent misrepresentation occurs when a person "negligently gives false information" and is thus liable for the harm that results from this action to another person or a third party that is expected to be in harm due to this action.<sup>21</sup> This false information must be "an affirmative misstatement, not just a nondisclosure."<sup>22</sup> Here, Mr. Black's behavior was not an affirmation of a safe railing but rather a lack of information explaining the dangers.<sup>23</sup> Establishing a prima facie case of ordinary negligence requires a duty, breach, proximate cause and damages.<sup>24</sup> Similarly, the court applied § 324A which

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<sup>17</sup> *Id.* (citing *Block v. Neal*, 460 U.S. 289, 296–97 (1983)).

<sup>18</sup> *Id.* at 868.

<sup>19</sup> *Id.* at 869

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 870 (citing Restatement (Second) of Torts § 311 (Am. Law Inst. 1965)).

<sup>22</sup> *Grogan*, 535 S.W.3d at 870 (citing *McLachlan v. New York Life Ins. Co.*, 488 F.3d 624, 630 (5th Cir. 2007)).

<sup>23</sup> *Grogan*, 535 S.W.3d at 870.

<sup>24</sup> *Id.* 871 (citing *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009)).

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arises when an individual “renders services to another which he should recognized as necessary for the protection of a third person or his things,” and is subject to liability when

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.<sup>25</sup>

The home inspector did not undertake a building code inspection, which is what would have found the nails in the railing, because his employment was limited in scope to a visual inspection of major flaws for the prospective buyers to acknowledge.<sup>26</sup> Similarly, the third party could not have relied on this information as he was not privy to it, so the court correctly found that § 324A applies but the plaintiff may not recover in this instance.<sup>27</sup>

This court has not previously ruled on a case of negligent home inspection and used other jurisdictions to help establish that the home inspector does not have a duty to a third party.<sup>28</sup> This ruling has shifted the burden on homeowners to have a safety code inspection and building code inspection separate to a general home inspection. Justice Lee, in dissent, engages in the calculus of negligence taken by Judge Learned Hand

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<sup>25</sup> *Id.* at 874 (citing Restatement (Second) of Torts § 324A (Am. Law Inst. 1965)).

<sup>26</sup> *Id.* at 875.

<sup>27</sup> *Id.* at 874.

<sup>28</sup> *See id.* at 872.

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where the foreseeability and gravity of the harm is balanced against the burden placed on home inspector.<sup>29</sup> Justice Lee believes that public policy favors the burden on the home inspector, however the majority believes that the home inspector does not carry a burden as he does not owe a duty to third parties.<sup>30</sup> Although the court declines to engage in public policy evaluation, the disparity between the two views creates a gap of where the court must look to see if imposing this duty on the home inspector aligns with society's views. Under this case, the defendant rendered services for the client (homeowner) alone, did not affirmatively state the railing was safe and negated the tenets of ordinary negligence; therefore, he does not owe a duty to any third party.<sup>31</sup> The trial court, court of appeals and Supreme Court of Tennessee were correct in finding and affirming the defendant's motion for summary judgement.

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<sup>29</sup> *Id.* at 883 (Lee, J., dissenting); *see also* United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Hand stated that the nexus of considerations regarding liability for when a barge breaks its moorings should be: "(1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.").

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 872 (majority opinion).