IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 27149

ROGER JOHNSON AND DOROTHY JOHNSON,

Plaintiffs/Appellants,

vs.

HAYMAN RESIDENTIAL ENGINEERING SERVICES, INC., and HAYMAN RESIDENTIAL ENGINEERING SERVICES, LLC,

Defendants/Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Robert A. Mandel,
Circuit Court Judge

Amended Notice of Appeal filed July 30, 2014

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Plaintiffs/Appellants Roger and Dorothy Johnson will be referred to as "the Johnsons" or "Plaintiffs," and Defendants/Appellees Hayman Residential Engineering Services, Inc. and Hayman Residential Engineering Services, LLC will be referred to as "Hayman," "Hayman Engineering," or "Defendants." Citations to the certified record shall be designated as "R" followed by the page number(s) assigned by the Pennington County Clerk of Courts. Citations to the transcript of the summary judgment hearing will be "HT" followed by the appropriate page number(s). The Seventh Judicial Circuit in Pennington County will be referred to as the "trial court." Citations to the trial court's Memorandum Decision filed June 12, 2014, shall be designated as "MD" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The Johnsons appeal from a Memorandum Decision and Order Granting Hayman's Motion for Summary Judgment dated March 18, 2014 (R 462) along with the Judgment filed June 12, 2014. (R 468). Hayman gave Notice of Entry of Judgment on June 24, 2014. (R 476).

The Johnsons filed a timely Notice of Appeal on July 14, 2014. (R 487). An Amended Notice of Appeal was filed June 30, 2014.

STATEMENT OF THE ISSUES

1. **WHETHER THE TRIAL COURT ERRED IN FINDING THAT AN ENGINEER COMPLETING A STRUCTURAL ENGINEERING REPORT OF A RESIDENTIAL PROPERTY FOR FANNIE MAE FOR FANNIE MAE'S SALE OF THE PROPERTY TO THE PUBLIC OWES NO DUTY TO A SUBSEQUENT PURCHASER.**

   The trial court found that Hayman Engineering did not owe a duty to a subsequent purchaser of the residence it completed a structural engineering report on because

it would not be foreseeable to Hayman Engineering that a subsequent purchaser could be harmed by its negligent work. (MD 4)

- *Thompson v. Summers*, 1997 S.D. 103, ¶ 10, 567 N.W.2d 387, 392
- *Mid-W. Elec., Inc. v. DeWild Grant Reckert & Associates Co*., 500 N.W.2d 250, 254 (S.D. 1993)
- *Limpert v. Bail*, 447 N.W.2d 48 (S.D. 1989)
- *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979)

2. WHETHER THE TRIAL COURT ERRED IN FINDING THAT RELIANCE IS A NECESSARY ELEMENT OF A NEGLIGENCE CLAIM BROUGHT BY A SUBSEQUENT PURCHASER AGAINST AN ENGINEER THAT PROVIDED A STRUCTURAL ENGINEERING REPORT TO FANNIE MAE FOR A SALE OF FANNIE MAE'S PROPERTY TO THE PUBLIC.

The trial court found in part that because Masons did not rely on any actions of Hayman Engineering, Hayman Engineering is not liable for any damages claimed by Johnson. (MD 5)

- *Thompson v. Summers*, 1997 SD 103, ¶ 10, 567 N.W.2d 387, 392
- *Mid-W. Elec., Inc. v. DeWild Grant Reckert & Associates Co*., 500 N.W.2d 250, 254 (S.D. 1993)
- *Limpert v. Bail*, 447 N.W.2d 48, 51 (S.D. 1989)
- *Brown v. Fowler*, 279 N.W.2d 907, 909 (S.D. 1979)

STATEMENT OF THE CASE

The Johnsons filed a Complaint on June 14, 2013 in the Seventh Judicial Circuit Court. (R 3). The Honorable Robert A. Mandel was the presiding judge at the Circuit Court.

Hayman Engineering was hired by Fannie Mae to prepare a structural engineering report regarding property located at 4112 Augusta Drive, Rapid City, South Dakota (the "Property"). (R 187 at ¶ 4 and R 298 at ¶ 1). The Hayman Engineering report provided opinions related to the movement of the home on the property supported by invalid assumptions and inaccurate information. The Hayman Engineering report suggested fixes to Fannie Mae to alleviate identified issues, including settlement issues, all of which

would make the Property saleable. Because the Hayman Engineering report relied on invalid assumptions, the fixes suggested and made by Fannie Mae did not alleviate the issues prior to sale of the Property to the public.

he Johnsons were subsequent purchasers of the Property and the house began to show signs of significant movement, causing damage throughout the home and garage. (R 304 at ¶ 14; R 301 at ¶¶ 3, 4 and 11; and R 298 at ¶ 13). The Johnsons brought a claim against Hayman Engineering for negligence related to its substandard and inadequate residential structural engineering report and suggested repairs.

Defendants filed a Motion for Summary Judgment and a hearing was held on February 20, 2014. (MD 1). Defendants argued that Hayman owed no duty to the Johnsons because the Johnsons did not rely on the Hayman Engineering report. (MD 5 and R 175). The trial court granted the Hayman's Motion for Summary Judgment and entered judgment in favor of Hayman. (MD 5).

STATEMENT OF THE FACTS

Roger and Dorothy Johnson purchased a home located at 4112 Augusta Drive in Rapid City, South Dakota (the "Property") in May 2012, from Ronald and Dawn Mason (the "Masons"). (R 298 at ¶ 1 and R 301 at ¶ 1). Prior to the Masons owning the Property, Fannie Mae acquired the Property through foreclosure. (R 187 at ¶ 2). On or about May 30, 2009, prior to the sale of the Property to the Masons, Fannie Mae, through its broker/agent, Cathy Brickey, hired Paul Hayman with Hayman Engineering to conduct a structural inspection of the Property and prepare a report of his findings. (R 187 at ¶ 4 and R 384 at ¶4) (hereinafter "Hayman Report"). Brickey ordered the report to determine whether the house was livable, and she wanted to identify any issues with the Property

before selling because she didn't want any purchasers to have problems. (R 377 at ¶ 4). Brickey had used Hayman Engineering before and Hayman Engineering knew Brickey was the agent for Fannie Mae, the entity selling the Property to the public. *Id.*

The Hayman Report noted the existence of "visible cracks in the foundation wall and along the backside of the home." (R 97 at ¶ 6). It also noted the "visible bowing in the common wall between the garage and home and visible cracks in the entry foyer." *Id.* There are pictures attached to the Hayman Report which depict the cracks throughout the walls and ceilings of the home and in the walls of the foundation. *Id.* The Hayman Report concluded that the cause of these cracks was "expansive soil under the foundation" and that the "key to minimizing further movement in the footing is to keep water from collecting there." (R 97 at ¶ 6).

The Hayman Report provided specific instructions on how to alleviate further movement and stop water from collecting. (R 97 at ¶ 6). First, the Hayman Report directed that the downspouts and grading slope away from the foundation of the home at least six feet and ensure that the soil has not pulled away from the foundation. (R 97 at ¶ 6). The Hayman Report also directed that a vapor barrier be installed and recommended a French drain system may need to be installed to direct water into a sump pump so it can be removed from the area. (R 97 at ¶ 6).

Based on the Hayman Report, Fannie Mae's agent, Brickey, determined that the Property was not "hopeless" and if the repairs were made the house would be livable from then on. (R 377 at ¶ 4) Those repairs included fixing cracked sheetrock, painting, measures taken to cure structural and movement issues such as installation of a French drain as suggested by the Hayman Report. *Id.* Brickey understood those repairs would

alleviate the expansive soil problem noted in the Hayman Report and make the Property saleable and livable. *Id*. Despite the "as is" clause in Fannie Mae's agreement to sell the Property, Brickey testified that she would not have sold the Property without a structural inspection report and she placed a "hold-don't show" on the Property until the Hayman Report was delivered and the repairs completed. *Id*. Consistent with the Hayman Engineering Report, a French drain was installed to alleviate movement and other repairs were made. (R 304 at ¶ 13).

After the repairs were made, Brickey listed the Property for sale to the public. Notwithstanding the "as is" clause regarding the sale by Fannie Mae, Brickey advised Susan Raposa, Ronald and Dawn Mason's agent, of the repairs made to the Property pursuant to the Hayman Report and discussed each point in the Engineering Report with Ms. Raposa. (R 304 at ¶ 13; R 377 at ¶ 5). Cathy Brickey represented to Susan Raposa that repairs were made based on the Hayman Report and would alleviate the expansive soil problem. *Id*. Fannie Mae sold the Property to Ronald and Dawn Mason in October 2009. (187 at ¶ 5). The Masons resided at the Property until its sale to the Johnsons. (R 301 at ¶ 2).

The Masons sold the Property to the Johnsons by Warranty Deed on May 24, 2012. (R 187 at ¶ 10). The Disclosure Statement provided by the Masons to the Johnsons noted cracks in the driveway of the Property. (R 187 at ¶ 7). No other cracks or issues were noted on the Disclosure Statement. *Id*. Prior to purchasing the Property, Roger Johnson noticed the French drain that was installed by Fannie Mae at the direction of the Hayman Report. (R 301 at ¶ 3). Mr. Johnson believed the French drain functioned, was installed at the direction of a professional, was working to drain water away from the

residence and was installed to alleviate a prior issue with the Property. *Id*. The Johnsons presumed that the Masons did what was necessary to make the Property marketable and livable. (R 301 at ¶ 4 and 298 at ¶ 3).

In August of 2012, the Johnsons met with Mike Albertson of Albertson Engineering as problems became noticeable at the Property. (R 301 at ¶ 7 and R 298 at ¶ 6). Albertson told the Johnsons that the amount of settling of the Property could create problems for utilities, including electrical, gas, water, and sewer. (R 301 at ¶ 8 and R 298 at ¶ 7). Albertson Engineering's review of the May 30, 2009, Hayman Report indicated that the report contained invalid assumptions about the cause of the movement of the Property and were based on a general level of understanding of expansive soils. (R 304 at ¶ 14). The Albertson Engineering Report further concluded that the Hayman Report did not contain the level of due diligence that a professional engineer should use to reach the conclusions it did and a geotechnical investigation should have been recommended before suggesting repairs. *Id*. The house was deemed uninhabitable and unsafe by Albertson Engineering and the Johnsons have not been able to live in the home. (R 298) The findings of Albertson remain undisputed by Hayman Engineering.

At the suggestion of Albertson Engineering, Terracon Consultants, Inc. completed a residential distress evaluation. (R 301 at ¶ 10 and R 298 at ¶ 11). The Terracon Consultants Report found that the soils below the foundation of the Property were settling and additional settling remained a concern. (R 301 at ¶ 10; R 298 at ¶ 11 and R 304 at ¶ 15). The Terracon Consultants Report recommended support of the structure of the Property via deep foundations with the use of micro piles or helical piers. (R 304 at ¶ 15). It is estimated the cost of leveling the Property is approximately $112,642.56. (R 304 at ¶

16). The cost to make all of the suggested and necessary repairs, coupled with the cost of leveling, will exceed the value of the Property.

The Johnsons filed a negligence claim against Hayman Engineering alleging that an engineering company completing a structural engineering report on a residential property for Fannie Mae so that the Property can be livable and sold to the public does owe a duty to a subsequent purchaser. The Johnsons claim that under that scenario, Hayman Engineering owes a duty to a subsequent purchaser because it is foreseeable that a subsequent purchaser could be injured or harmed by a negligently prepared engineering report. Defendant Hayman Engineering moved for summary judgment claiming that it owed no duty to the Johnsons. The trial court entered judgment in favor of Hayman, finding that Hayman owed no duty to a subsequent purchaser and also that Plaintiffs had not relied on the negligently prepared engineering report. The following issues are raised on appeal.

ISSUES

1. **Whether The Trial Court Erred In Finding That An Engineer Completing A Structural Engineering Report Of A Residential Property For Fannie Mae For Fannie Mae's Sale Of The Property To The Public Owes No Duty To A Subsequent Purchaser.**

2. **Whether The Trial Court Erred In Finding That Reliance Is A Necessary Element Of A Negligence Claim Against An Engineer That Provided A Structural Engineering Report To Fannie Mae For A Sale Of Fannie Mae's Property To The Public.**

STANDARD OF REVIEW

Summary judgment is appropriate if there are no disputes as to any material facts and the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56. The determination of whether a duty is owed is a question of law subject to a de novo

standard of review. *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.,* 2000 S.D. 116, 616 N.W.2d 397.

ARGUMENT

1. Hayman Residential Engineering Services Owed A Duty To The Johnsons Because It Was Reasonably Foreseeable That Prospective Purchasers Could Be Injured If Hayman Engineering Failed To Adequately Discharge Its Duty.

The trial court erred in granting summary judgment for Hayman because Hayman owed a duty to the Johnsons, a foreseeable third party. When Hayman Engineering prepared the report for Fannie Mae on May 30, 2009, it had a duty not only to Fannie Mae but also to other persons foreseeable to be injured by Hayman's failure to discharge that duty, such as subsequent purchasers like the Johnsons.

A duty can be created by statute or common law. *See Kuehl v. Homer (J.W.) Lumber Co*., 2004 SD 48, ¶10, 678 N.W.2d at 392 (citations omitted). This Court has explained that a common law duty is based upon the foreseeability of injury to another. *Thompson v. Summers*, 1997 SD 103, ¶ 10, 567 N.W.2d 387, 392. The Court in *Thompson* noted that "[i]t is the *foreseeability* of injury to another, *not a relationship* with another, which is a prerequisite to establishing a duty necessary to sustain a cause of action." *Id*. (emphasis added). Thus, "[t]o establish a duty on the part of the defendant, it must be foreseeable that a party would be injured by the defendant's failure to discharge that duty." *Id; see also Luke v. Deal*, 2005 SD 6, ¶ 19, 692 N.W.2d 165, 170 ("Whether a common-law duty exists depends upon the foreseeability of the injury"); *Mid-W. Elec., Inc. v. DeWild Grant Reckert & Associates Co*., 500 N.W.2d 250, 254 (S.D. 1993) ("We instruct trial courts to use the legal concept of foreseeability to determine whether a duty exists").

Additionally, when a blameless person is injured due to a person's failure to discharge a duty, the cause of action is not based on a contractual obligation but on the person's failure to exercise care in the performance of the obligation:

> Where one undertakes by contract to perform a certain service and is chargeable with the duty of performing the work in a reasonably proper and efficient manner, and injury occurs to a blameless person, the injured person has a right of action directly against the offending contractor which is not based on any contractual obligation but rather on the failure of such contractor to exercise due care in the performance of his assumed obligation.

Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334, 341 (N.D. 1983), cited with approval in *Limpert v. Bail*, 447 N.W.2d 48, 51 (S.D. 1989). This is sound policy and supported by South Dakota statute. This imposition of liability is consistent with SDCL § 20-9-1, which provides in part: "Every person is responsible for injury to the person, property, or rights of another caused by his . . . want of ordinary care or skill[.]" Further, "[t]o establish a duty on the part of the defendant, it must be foreseeable that a party would be injured by the defendant's failure to discharge that duty." *Thompson*, 1997 SD 103, ¶ 10, 567 N.W.2d at 392. It therefore remains clear that the benchmark of whether a duty arises is the foreseeability of injury.

A case involving a similar issue is *Limpert v. Bail*, where the Court analyzed whether a duty was owed to a prospective purchaser when a veterinarian breached his duty to properly test cattle. 447 N.W.2d at 50-52. The Court noted that where one has a duty to perform work in a reasonable and proper manner and an injury occurs to a blameless person, the injured person has a right of action directly against the offending contractor [or veterinarian]. *Id*. Just as it was foreseeable to a veterinarian that a subsequent purchaser of cattle could be injured if the veterinarian failed to adequately discharge his duty, it was foreseeable to Hayman that their failure to discharge their duty

to a seller of real property could injure a subsequent purchaser of property. That is particularly true when, like here, the engineer provided services to Fannie Mae in anticipation of a sale of the property to the public.

The case of *Brown v. Fowler*, 279 N.W.2d 907, 909 (S.D. 1979) is also instructive. In that case, this Court was asked to determine whether negligence liability for improper construction of a residence extends to purchasers other than those who initially purchased from the builder-vendor. *Id.* The Court rephrased the issues as "whether [builder-vendors] owed a duty of proper construction of the residence to plaintiffs, or to a class of which plaintiffs are members." *Id.* Although the Court acknowledged that the house was not specifically constructed for the plaintiffs, who were subsequent purchasers, the Court did not preclude their recovery.

In *Brown*, the Court stated that whether a duty should be imposed on the builder-vendor was a policy determination that must take into account foreseeability of harm, degree of certainty that plaintiffs suffered injury, the closeness of the connection between defendants' conduct to the injury suffered and the policy of preventing future harm. *Id.* The Court applied those factors to the builder-vendor in *Brown* and stated:

> [W]e conclude that defendants were under a duty, running to the Browns, to construct the house non-negligently. Plaintiffs were members of the class of purchasers for whom the house was constructed, even if they were not the first purchasers. It is certainly foreseeable that such a house will be sold to subsequent purchasers, and that any structural defects are as certain to harm the subsequent purchaser as the first. Foreseeability is enhanced by the fact that the defects came to light within three years after construction and within one year after defendants' unsuccessful attempt to stop the settling. It is apparent from the record that plaintiffs suffered injury and that defendants' conduct is directly related to this injury. The

> policy of preventing future harm is promoted by imposing liability on contractors who negligently construct houses.

Id. at 909. Applying this same policy analysis to the case at bar reveals that Hayman Engineering owed a duty to the Johnsons, a subsequent purchaser. This precise question raised by Johnsons appears to be an issue of first impression in South Dakota.

Here, Fannie Mae's agent ordered the Hayman Report to determine whether the house was livable, and she wanted to figure out any issues with the Property before selling because she didn't want any purchasers to have problems. (R 377 at ¶ 4). Hayman Engineering knew Brickey was the agent for Fannie Mae, and knew she was obtaining the report in anticipation of fixing/alleviating any issues with the Property and selling the Property to the public. *Id*. Based on the Hayman Report, Fannie Mae's agent determined that the house was not "hopeless" and if the repairs were made the house would be livable from then on. (R 377 at ¶ 4) Brickey understood those repairs would alleviate the expansive soil problem noted in the Hayman Report and make the Property saleable and livable. *Id*. Brickey testified that she would not have sold the Property without a structural inspection report and she placed a "hold-don't show" on the Property until the Hayman Report was delivered and the repairs were complete. *Id*. After receiving the Hayman Report and making the repairs, despite the "as is" clause as to Fannie Mae's sale, Fannie Mae through Brickey represented to prospective purchasers that the issues were resolved.

There is no dispute that Hayman owed Fannie Mae a duty to exercise skill and care in completing the residential engineering services. Although the contractual relationship was between Hayman and Fannie Mae, a breach by Hayman of the duty owed to Fannie Mae still renders Hayman liable to the Johnsons.

It is foreseeable to Hayman Engineering that its actions might result in injury to the Johnsons or any subsequent purchaser of the Property. Hayman Engineering had a duty to exercise ordinary care and skill in its undertaking for Fannie Mae for the protection of persons who foreseeably may be injured by its failure to do so. Any residential engineer, including Hayman, could foresee that its errors and omissions in discharging its duty in determining the engineering defects and making recommendations regarding the Property owned by Fannie Mae in anticipation of a sale to the public would result in injury to a prospective purchaser like the Johnsons. It is certainly foreseeable that after the structural analysis and repairs are made as suggested in the Hayman Report, the Property would be sold to subsequent purchasers, and that any structural defects not properly repaired or reported are as certain to harm any subsequent purchaser as they are to the first purchaser. Moreover, as in *Brown*, foreseeability is enhanced by the fact that the defects came to light within a few years after the defendants were hired and unsuccessfully provided structural engineering advice to alleviate the expansive soil/settlement issues with the Property.

Hayman committed many different errors and omissions, including: failing to properly diagnose problems with the Property by incorrectly stating that the soil was heaving, when in fact it was settling; failing to recommend employing the services of a geotechnical engineer as would be the custom for an engineer with limited knowledge of structures and soils; negligently identifying dry soil conditions as the cause of the Property's issues and recommending diverting water from collecting near the foundation of the home; negligently recommending the installation of a French drain; and generally

failing to exercise due diligence that a professional engineering company should utilize. (R 97 at ¶ 6).

Hayman could reasonably foresee that its negligent, substandard work in completing a structural inspection for a seller of property to the public (Fannie Mae) would directly injure purchasers of the residence. Arguably, under these facts, subsequent purchasers were the *only* foreseeable party to be injured by Hayman Engineering's negligence. As noted in *Brown*, the policy of preventing future harm is promoted by imposing liability on contractors who negligently construct houses. Similarly, to deny the Johnsons their day in court is, in effect, condoning Hayman Engineering's right to do his or her job negligently with impunity as far as innocent parties who suffer loss. Moreover, the Johnsons could be deemed the third party beneficiary of any contract. The fact that Hayman might not have foreseen the precise purchaser that would sustain injury carries no weight as a rule of law and does not preclude a duty or foreclose liability.

As such, Hayman had a duty to exercise due care in the structural inspection it completed for Fannie Mae and in making the recommendations on how to repair identified issues. Failure to use ordinary care would injure a prospective purchaser of the property. As such, the injury was foreseeable which gives rise to the existence of a legal duty.

2. The Trial Court Erred In Finding That Reliance Is A Necessary Element Of A Negligence Claim Against An Engineer That Provided A Structural Engineering Report To Fannie Mae For A Sale Of Fannie Mae's Property To The Public.

a. Reliance Is Not Required In This Case.

Reliance by the Johnsons is not required in order to maintain their negligence action against Hayman. Hayman cites *Mulhlenkort v. Union County Land Trust*, 530 N.W.2d 658, 662-663 (S.D. 1995) and *Lien v. McGladrey & Pullen*, 509 N.W.2d 421, 424 (S.D. 1993) for the proposition that *all* professional negligence actions require reliance. The South Dakota Supreme Court has not made such a sweeping statement and such cases do not control the case at bar – a negligence action brought by an owner of property against an engineer.

In *Mulhlenkort*, the Court specifically noted that other "jurisdictions which extended abstractor's negligent liability to a third party not in privity of contract involved reliance on the part of the third party." *Id*. The Court stated, "[w]e agree that to hold an abstractor liable in tort to a third party there must be some reliance on the part of the third party." *Id*. This narrow holding does not require reliance in the subject action. *Lien v. McGladrey* can similarly be distinguished as it dealt solely with the issue of liability for a tax accounting firm.

Neither of the cases cited by Hayman require direct reliance by a subsequent *purchaser* on a structural engineering report completed by an engineer for Fannie Mae regarding a sale of Fannie Mae's property to *the public*. Here, to establish a duty on the part of the defendant, it must be foreseeable that a party would be injured by the defendant's failure to discharge that duty. *Mid-Western Elect*., 500 N.W.2d at 254. As shown above, it would be foreseeable that the Johnsons, as well as other subsequent purchasers, would be harmed if Hayman failed to adequately discharge its duty to Fannie Mae prior to the sale of the Property to the public. Further, to the extent that Hayman

relies on Section 552 of the Restatement of Torts and *Fisher v. Kahler*, 2002 SD 30, 641 N.W.2d 122, the Johnsons assert that those authorities deal with a claim for negligent misrepresentation rather than negligence.

To deny the Johnsons their day in court is, in effect, condoning Hayman Engineering's right to do his or her job negligently with impunity as far as innocent parties who suffer loss.

b. The Johnsons Both Directly And Indirectly Relied On The Hayman Report.

Assuming, *arguendo*, that reliance is required, it must be noted that "whether [a party] reasonably relied upon that advice is a question of fact, to be determined by the trier of fact, the jury." *Lien*, 509 N.W.2d at 424. The Johnsons assert they both directly and indirectly relied on the information provided by Hayman regarding the Property. This creates a disputed question of material fact for the fact finder and summary judgment was not appropriate.

The Johnsons did in fact rely on the Hayman Report in several ways. First, Mr. Johnson saw the French drain when looking at the Property with the realtor. (R 301 at ¶ 3). He presumed that this had been done to alleviate some issue with the Property. *Id.* Upon information and belief, this, or similar information, was provided to the Masons prior to their purchase of the Property in October 2009. (R 304 at ¶ 13). The Johnsons relied on the information set forth in the Hayman Report as they relied on the effectiveness of the French drain in deciding to purchase the residence. (R 301 at ¶¶ 3, 4 and 11 and R 298 at ¶¶ 3 and 12). In reality, the French drain was not effective and it was settling, making the Property unsafe and uninhabitable. (R 301 at ¶ 12; R 298 at ¶ 13; and

R 304 at ¶¶ 14 and 15). The French drain appears to have actually made problems with the Property worse. *Id*.

As this sequence of events clearly indicates, when Hayman completed a negligent structural inspection and report, all subsequent purchasers were ill-informed as to the condition of the residence and relied on such advice or repairs made on the Property to their detriment. This further led to inaccurate disclosure statements being presented to subsequent purchasers, including the Johnsons.

Additionally, Hayman's Report further affected the accuracy of the disclosure statement that was completed by the Masons when selling the property to the Johnsons. The disclosure statement was thereafter relied on by the Johnsons when deciding to purchase the Property. (R 301 at ¶ 11 and R 298 at ¶ 12). Upon information and belief, the Masons were aware of certain fixes and repairs that were completed by Fannie Mae and aware of the soil and other issues set forth in the Hayman Report. (R 304 at ¶ 13). As such, the Masons relied on the Hayman Report, or the repairs made consistent with that report, which impacted the disclosure statement completed by the Masons and relied on by the Johnsons.

It is undisputed the Johnsons knew of and relied on the French drain to alleviate some issue with the Property, which was a direct consequence of the Hayman Report. It is undisputed that the French drain, along with the other conclusions in the Hayman Report, proved to be unreliable, inaccurate, and substandard for a structural engineer. (R 304 at ¶ 14).

Thus, even if reliance were required, the Johnsons have put forth evidence - that must be viewed in the light most favorable to them – that they directly and indirectly

relied on the negligently completed Hayman Report which was incorporated into the Mason's disclosure statement which, in turn, induced the Johnsons into purchasing the Property. Because reliance is to be determined by the trier of fact, the jury, summary judgment was inappropriate.

CONCLUSION

When Hayman Residential Engineering prepared the report for Fannie Mae on May 30, 2009, knowing Fannie Mae hoped to sell the Property to the public, Hayman had a duty not only to Fannie Mae but also to other persons it was foreseeable would be injured by Hayman's failure to discharge that duty - such as subsequent purchasers like the Johnsons. Hayman could reasonably foresee that its negligent, substandard work in completing a structural inspection for a seller of property to the public would directly injure purchasers of the Property; therefore, a clear duty was owed to the Johnsons.

Further, the Johnsons need not show reliance. If, however, reliance is required, the facts show that the Johnsons both directly and indirectly relied on the Hayman Report. Additionally, the degree the Johnsons changed their position in reliance upon the erroneous information furnished by Hayman is evident from their reliance on the Mason's disclosure statement and their reliance on the effectiveness of the French drain. Information flowing directly from the Hayman Report caused the Johnsons to continue their negotiations for the purchase of the Property, and as such, the Johnsons relied on the report. Hayman Report. Hayman Engineering's liability for setting the chain of events in motion and causing injury to the Johnsons is apparent.

For the foregoing reasons, this Court should reverse and remand the decision of the trial court.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument in this case.

Respectfully submitted on September 26, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellants' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Appellants' Brief, including footnotes, contains 4,751 words. I have relied upon the word count of our word processing system as used to prepare this Appellants' Brief. The original Appellants' Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I certify that on September 26, 2014, I emailed a true and correct copy of the foregoing Appellants' Brief to the following at his last-known email address:

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I further certify that on September 26, 2014, I emailed the foregoing Appellants' Brief and sent the original and two copies of it by United States mail, first-class postage prepaid, to:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 27149

ROGER and DOROTHY JOHNSON

Plaintiffs/Appellants,

vs.

HAYMAN RESIDENTIAL ENGINEERING SERVICES, INC. AND HAYMAN RESIDENTIAL ENGINEERING SERVICES, LLC

Defendants/Appellees.

APPELLEES' BRIEF

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

HONORABLE ROBERT A. MANDEL
Circuit Court Judge

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PRELIMINARY STATEMENT

Plaintiffs/Appellants Roger and Dorothy Johnson will be collectively referred to as "the Johnsons." The named Defendants/Appellees will be referred to as "Hayman Engineering." Reference to the record as reflected in the clerk's index will be referred to as "R." Documents in the Appendix will be referred to by the letters "APP" followed by the appropriate letter designation.

JURISDICTIONAL STATEMENT

The Johnsons appealed from the Memorandum Decision granting summary judgment in Hayman Engineering's favor and the Judgment entered against the Johnsons filed June 12, 2014. APP: A, B; R: 462, 468. The Notice of Entry of Judgment was served on June 24, 2014. R: 448. The Johnsons' Notice of Appeal was filed on July 14, 2014, and an Amended Notice of Appeal was filed July 30, 2014. R: 487.

STATEMENT OF THE ISSUES

A. Whether the trial court correctly found that Hayman Engineering owed no duty to the Johnsons.

The trial court held that there was no foreseeability that a subsequent buyer would be damaged and, therefore, Hayman Engineering had no duty to the Johnsons.

Legal Authority:

- *Mid-Western Elec., Inc. v. DeWild Grant Reckert & Associates Co.*, 500 N.W.2d 250 (S.D. 1993)
- *Mark Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227 (S.D. 1994)

B. Whether the trial court correctly found that the Johnsons did not rely on any representations made by Hayman Engineering.

The trial court held that the Johnsons did not rely on the letter report drafted by Hayman Engineering in any way when purchasing the property.

Legal Authority:

- *Fisher v. Kahler*, 2002 S.D. 30, 641 N.W.2d 122
- Restatement (Second) of Torts § 552
- *Cooper v. Cordova Sand & Gravel Co., Inc.*, 485 S.W.2d 261 (Tenn. Ct. App. 1971)

STATEMENT OF THE CASE

The Johnsons filed a complaint on June 14, 2013, suing for damages related to property they had purchased at 4112 Augusta Drive, Rapid City, South Dakota on May 24, 2012. R: 3. The Johnsons purchased the home from Ronald and Dawn Mason, who had purchased the home from Fannie Mae in a foreclosure sale. *Id.*

Fannie Mae had hired Hayman Engineering to perform a visual structural inspection of the house. APP: D; R: 187. Fannie Mae sold the property to the Masons "As Is" with no warranties. APP: C; R: 404. The Masons, who have not been sued by the Johnsons, sold the property to the Johnsons after providing them with a Property Condition Disclosure Statement. APP: D; R: 187, 190.

After finding structural problems with the home, the Johnson sued Hayman Engineering alleging Hayman Engineering "negligently failed to disclose a number of structural defects" with the property and "fail[ed] to correctly diagnose problems with the residence." R: 3. Hayman Engineering filed a Motion for Summary Judgment on the grounds that Hayman Engineering had no duty to the Johnsons and that the Johnsons did not rely on any representations made by Hayman Engineering when purchasing the property. R. 173.

The trial court found that "[b]ased upon the undisputed facts, it was not foreseeable to Hayman Residential Engineering Services, when it prepared a letter report following a structural inspection for Fannie Mae, who was selling the property 'As Is' with no warranties, that it could be liable for damages alleged by a subsequent purchaser." APP: A; R: 462. The trial court also found that the Johnsons did not rely on Hayman Engineering's report when they purchased the property. *Id.* Based upon these findings, the court granted Hayman Engineering's Motion for Summary Judgment. *Id.*

STATEMENT OF THE FACTS

A. Preliminary Background

The property at issue in this case, 4112 Augusta Drive, Rapid City, South Dakota, was acquired by Fannie Mae in or before 2008 via foreclosure. APP: D, ¶¶ 1-2; R: 187. Fannie Mae sold the property to Ronald and Dawn Mason in October 2009. APP: D, ¶ 5; R: 187. Upon information and belief, the Masons lived in the home until they sold it to the Johnsons in 2012. On April 14, 2012, Plaintiffs Roger and Dorothy Johnson entered into a purchase agreement to purchase the property from Ronald and Dawn Mason; the Johnsons received title to the property on May 24, 2012. APP: D, ¶¶ 6, 10; R: 187.

B. Fannie Mae hires Hayman Engineering

When Fannie Mae was the record owner of the home, it hired Hayman Engineering to perform a visual inspection of the property to check the cracks in the home. On or about May 30, 2009, Paul Hayman,[1] an employee of Hayman Engineering, prepared a letter report after the visual inspection was conducted. APP: D, ¶ 4; R: 187. The report noted the uplifting of the foundation, visible cracks in the foundation wall, and other problems with the foundation. It also noted the visible bowing in the common wall between the garage and home and the visible cracks in the foyer. R: 190, Exhibit 2.

The 2009 letter concluded that the cause of the uplifting was "most likely" expansive soil under the foundation and "[t]he key to minimizing further movement in the footing is to keep water from collecting there." *Id.* Hayman provided two ways to prevent water from collecting: 1) ensure that downspouts and grading slope away from the foundation by at least six feet, ensure soil has not pulled away from the foundation

[1] Paul Hayman passed away on May 12, 2012.

wall, and install a vapor barrier covered with gravel to prevent water entry along the foundation wall; or 2) install an active French drain system along the exterior wall that will direct water into a sump with a pump to remove the water from the area. *Id.*

Although it is not known precisely what Fannie Mae did with the information it obtain from Hayman Engineering,[2] it is undisputed that Fannie Mae was the entity that retained Hayman Engineering to conduct the visual inspection. The scope of the job Fannie Mae hired Hayman Engineering to complete was to conduct a visual structural inspection to check the cracks in the home. Hayman Engineering did not have anything to do with the house after the report was provided. It did not select the contractors or design the repair work. It was not asked to come back and look at the work that was done at the property. R: 404, Brickey Dep. 57:1-58:15.

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[2] Many of the problems identified in the Hayman Engineering report were not fixed, including:

- Nothing was done to fix the uplifting of the back center foundation. R: 404, Brickey Dep. 82:10-21.
- Nothing was done to fix the visible cracks in the foundation wall. R: 404, Brickey Dep. 82:22-84:3.
- Nothing was done to fix the bowing in the common wall between the house and the garage. R: 404, Brickey Dep. 84:4-85:8.
- Nothing was done to fix the low spot in front of the garage. R: 404, Brickey Dep. 85:14-86:14.

Many of the recommendations in the Hayman Engineering report were not followed, including:

- Grading was only changed on one side of the house. R: 404, Brickey Dep. 88:12-19.
- No sump pump was installed. R: 404, Brickey Dep. 91:17-25, 92:14-19.
- No exterior drain system was installed along the entire exterior foundation of the home – only along one side. R: 404, Brickey Dep. 92:20-24.
- What was ultimately installed was not the French drain system that was called for in the report. R: 404, Brickey Dep. 93:8-11.

C. Fannie Mae sells the property "As Is" to the Masons

It was not foreseeable by Hayman Engineering that its visual inspection for Fannie Mae would be relied on by future buyers. As was made clear by Fannie Mae's realtor, Cathy Brickey, "Fannie Mae did not authorize the report for the purpose of providing [it] to prospective buyers. The paperwork makes it very clear that the sale was 'as-is, where-is.'" R: 404, Brickey Dep. Exhibit 4. The Masons were purchasing a foreclosure property "as is."

The Masons purchased the property pursuant to an agreement where they agreed they were purchasing the property "as is" with no warranties, either express or implied, with respect to the physical condition of the property "including the structural integrity . . . stability of the soil . . . sufficiency of drainage . . . or any other matter affecting the stability, integrity, or condition of the property or improvements" as well as no warranties with respect to the habitability or merchantability of the property. APP: C; R: 404, Brickey Dep. Exhibit 7. Fannie Mae was making no warranties on the condition of the property – it certainly was not making any warranties based upon any representation made in the Hayman Engineering letter.

When the Masons purchased the home, there were visible cracks and other problems with the home. R: 404, Brickey Dep. 38:8-13. There were steel support beams in the crawl space. R: 404, Brickey Dep. 43:2-19.

There is no evidence that the Masons ever knew about the Hayman Engineering report prior to purchasing the home "as is" from Fannie Mae. Brickey believes she may have told the Masons' realtor, Susan Raposa, about the report during the walkthrough just prior to closing. R: 404, Brickey Dep. 66:17-68:2.

However, since that time, Raposa told Brickey that she couldn't recall being told about the problems with the house or the Hayman Engineering report. R: 404, Brickey Dep. 65:12-66:4.

The Masons paid cash for the property, wanted to move in quickly, and then flipped the house. They did not use the same realtor (Susan Raposa) to sell the house to the Johnsons. R: 404, Brickey Dep. 53:18-54:16.

D. The Johnsons purchase of the property

The Johnsons never saw the letter drafted by the Hayman Engineering prior to purchasing the property. They didn't even know the letter existed until October 4, 2012, – several months after they purchased the property. APP: D, ¶ 12; R: 187. The Johnsons have never had any contact with Fannie Mae. APP: D, ¶ 13; R: 187.

Although the Johnsons did not rely on any representations made by Hayman Engineering when purchasing their home, they did have other information on which they relied. Prior to purchasing the property, the Johnsons were provided with a copy of a Seller's Property Condition Disclosure Statement dated February 15, 2012, that was filled out by the Masons. APP: D, ¶ 7; R: 187. On this disclosure statement, the Masons noted there were "cracks in driveway." R: 190, Exhibit 6. The Masons did not list the cracks in the garage or the cracks along the house's interior walls and ceiling. The Masons did not list the "number of large cracks throughout the house [that] had been repaired" or areas where "water leaked into the garage area of the home." *See* R: 3, Complaint ¶ 31. The Johnsons have not filed a lawsuit against the Masons despite the fact that all of the

property's defects alleged in the Complaint in this matter were not disclosed in the Seller's Property Condition Disclosure Statement.[3]

After being provided with the disclosure statement, the Johnsons submitted an offer to purchase the property. R: 190, Exhibit 5. The Johnsons made the offer contingent upon obtaining an inspection of the physical condition of the property. *Id.* If the inspection revealed conditions unsatisfactory to the Johnsons, they had multiple options, including deeming the purchase agreement null and void in its entirety. *Id.*

The Johnsons hired Drew Inspection Service to inspect the home. On April 24, 2012, Drew Inspection Service issued its home inspection report to its client, Plaintiff Roger Johnson. APP: D, ¶ 8; R: 187. The inspection revealed significant settling and cracking in the driveway in front of the garage, a negative slope of the driveway causing pooling and run-off towards the house, several major cracks in the garage ceiling, cracks in the garage's sheetrock, and cracks along the joints of the house's interior wall and ceiling. R: 190, Exhibit 7. The inspection also showed photos of steel support columns that had been placed in the crawl space below the home.[4] *Id.*

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[3] On October 26, 2012, the Johnsons' attorney wrote to the Masons alleging available causes of action of fraud, deceit and misrepresentation, breach of contract, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, breach of implied covenant of good faith and fair dealing and rescission for the misrepresentations in the disclosure statement. R: 190, Exhibit 11. However, the Johnsons have filed no causes of action against the Masons.

[4] In their Complaint, the Johnsons allege that after they purchased the home, they had Nathan Parkin with Rapid Foundation Repair inspect the home. They alleged that "[during the course of his inspection, Parkin noted . . . that the crawl space contained added steel support columns in an effort to reduce or possibly re-level the main floor area of the residence." R: 3, Complaint ¶ 42. However, the Johnsons knew about these support columns prior to purchasing the home – they were clearly shown in the photographs in their home inspector's report. *See* R: 190, Exhibit 7.

Following the property inspection, the Johnsons negotiated a price reduction from the original offer of $225,000 to $220,900 and the contingency regarding the property inspection was removed by written agreement dated April 30, 2012. R: 190, Exhibit 5. Despite the contents of the home inspection report, the Johnsons made the decision to purchase the home. The Johnsons have not filed suit against the home inspector, Drew Inspection Service, despite the fact that this home inspection was conducted just prior to their purchase of the property.

In addition, the realtors representing the buyers and sellers hired Dave Bressler, an engineer with American Technical Service, Inc., to come and look at the cracks in the garage and the sloping of the driveway. APP: D, ¶ 9; R: 187. The engineer opined that, by extending the drainage area on the west and with re-routing water away from the garage and driveway area, it would solve any further movement of the garage and driveway. R: 190, Exhibit 4, ¶ 12. The Johnsons were present when this opinion was given. APP: D, ¶ 9; R: 187. The Johnsons have not filed a lawsuit against Dave Bressler or American Technical Service, Inc. despite the fact that this inspection of the garage and driveway was conducted just prior to their purchase of the property.

There is no question of fact that prior to purchasing the home the Johnsons were aware the home was subject to settlement and movement of an undetermined cause. There is also no question of fact that the Johnsons had this knowledge independent of anything Hayman Engineering told Fannie Mae in 2009. The Johnsons did not know that Hayman Engineering had done a visual inspection of the property until after they had purchased the property in reliance on (1) the disclosures made by the Masons; (2) the

home inspection by Drew Inspection Service; (3) the advice from engineer Dave Bressler; and (4) the Johnsons' own visual inspection.[5]

This is a case of a plaintiff failing to sue the correct party and, instead, attempting to find deeper pockets from which to recover. It is clear that the Johnsons know that their claims are against the Masons or others involved in their home purchase. The Johnsons' attorney wrote the Masons a lengthy letter detailing their claims against them in October 2012. R: 190, Exhibit 11. But instead of pursuing claims against the Masons, who failed to disclose major problems in the home, or their own retained experts, Drew Inspection Services and engineer Dave Bressler, the Johnsons have chosen to go after a company that performed one visual structural inspection for a limited purpose in 2009. The Johnsons didn't even know the visual inspection had been performed until months after they purchased the property in reliance upon the representations of the Masons, the home inspector, and Dave Bressler.

The Johnsons do not dispute any material fact in this case:

- They admit Fannie Mae sold the foreclosure property to Ronald and Dawn Mason in 2009.
- They admit they received a property disclosure statement from the Masons before the Johnsons purchased the property.
- They admit they had the property inspected before they purchased it.
- They admit they spoke to an engineer about the crack issues before they purchased the property.
- They admit they had never seen nor had any knowledge of the letter written by Paul Hayman prior to purchasing the home.

See APP: E; R: 293.

[5] Prior to purchasing the home, Roger Johnson saw that a French drain had been installed. R: 301.

ARGUMENT AND AUTHORITY

The Johnsons' claims against Hayman Engineering fail because Hayman Engineering had no duty to the Johnsons, and the Johnsons did not rely on any representations made by Hayman Engineering when purchasing the property.

A. Summary Judgment Standard

This Court reviews a grant of summary judgment by deciding "whether genuine issues of material fact exist and whether the law was correctly applied." *Fedderson v. Columbia Ins. Group d/b/a Columbia Nat'l Ins. Co.*, 2012 S.D. 90, ¶ 5, 824 N.W.2d 793, 795 (citations omitted). Conclusions of law are reviewed de novo. *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 13, 827 N.W.2d 859, 864.

B. Hayman Engineering owed no duty to the Johnsons

The Johnsons have made allegations of professional negligence claiming Hayman Engineering "negligently failed to disclose a number of structural defects." R: 3. There is no dispute of fact in this case that no privity of contract existed between the Johnsons and Hayman Engineering. Instead, the Johnsons claim it was foreseeable they – subsequent purchasers that bought the home after it passed from Fannie Mae, to the Masons, to them – could be damaged by Hayman Engineering's report from a visual inspection that occurred in 2009.

Absent privity of contract, a cause of action for economic damages resulting from professional negligence may only be brought if the professional had a duty to the party alleging the economic damages. *Mid-Western Elec., Inc. v. DeWild Grant Reckert & Associates Co.*, 500 N.W.2d 250, 254 (S.D. 1993). Whether a duty exists depends on the foreseeability of the injury. *Id.* The policy concerns expressed by the Court to allow claims absent privity were to protect innocent third parties *who relied on the actions of*

others. *See Fisher Sand & Gravel v. State*, 1997 S.D. 8, ¶ 13, 558 N.W.2d 864, 867. As demonstrated further below, there is no dispute of fact that the Johnsons did not rely on any of the work performed by Hayman Engineering.

It was not foreseeable by Hayman Engineering that any work it performed for Fannie Mae would be relied on by future buyers. It was also not foreseeable that any inspection would cause harm to anyone not in privity with Hayman Engineering. As was made clear by realtor Cathy Brickey, "Fannie Mae did not authorize the report for the purpose of providing [it] to prospective buyers. The paperwork makes it very clear that the sale was 'as-is, where-is.'" R: 404, Brickey Dep. Exhibit 4. The Masons were purchasing a foreclosure "as is." It was their obligation to do their due diligence prior to purchasing the home, just as it was their duty to make the proper disclosures when turning around and selling the home. The Johnsons admit they relied on the Masons; they presumed that the Masons did what was necessary to make the house marketable and livable. R: 298, 301.

It was not foreseeable to Hayman Engineering that the letter drafted after a visual structural inspection of the home in 2009 would be relied upon by the Johnsons in 2012. When Hayman Engineering stated that the cause of the cracks in the home was "most likely" expansive soil under the foundation, there was no way for them to foresee that years later, after the property had passed from Fannie Mae to the Masons and finally to the Johnsons, that the Johnsons would be damaged as a result of the qualified representations in the 2009 letter.

Roger Johnson saw that a French drain had been installed. R: 301. The Johnsons cite this as an example of how they "relied" on the Hayman Engineering letter. However,

what this shows is that the Johnsons had actual knowledge that there were problems with the residence. Rather than making the necessary inquiries into the problems with the home like a prudent buyer should, the Johnsons just "presumed" the Masons had done what was necessary to make the house marketable. R: 298, 301. This shows that the Johnsons purchased the home because of their reliance on actions taken by someone that is not a party to this lawsuit. Nothing Hayman Engineering did induced the Johnsons to purchase the home.

This Court has answered questions regarding foreseeability in professional negligence cases as a matter of law. In *Mark Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227 (S.D. 1994), an insurer brought a third-party complaint for indemnity against an independent broker and appraiser maintaining they were negligent in failing to notify the insurer of the number and severity of hail storms that were at issue in a claim by an insured. The trial court dismissed the claims and the insurer appealed. The South Dakota Supreme Court noted that the broker and appraiser had no duty to monitor and assess risks, since that was the duty of the insurance agency's claims supervisor. *Id.* at 230. Because the broker and appraiser had no legal duty to report the circumstances of the loss or report on factors regarding risk, it was not foreseeable that they could be liable to the insurer, and the summary judgment holding was upheld. *Id.*

The Johnsons take issue with Hayman Engineering's reliance on *Mark Inc.*;[6] however, it directly addresses questions regarding foreseeability as a matter of law where

[6] The Johnsons instead would like the Court to rely on *Limpert v. Bail*, 447 N.W.2d 48 (S.D. 1989); however, that case is readily distinguishable. In *Limpert*, an oral agreement was entered into for the sale of cattle. One part of the terms of that agreement was that the cattle would be inspected for various things by a veterinarian. The vet was hired by the seller for the purpose of making certain certifications to be used by the buyer in

the facts show a complex series of events, such as the long line of events in this case. Here, we have a company that did a visual inspection on a house that was to be sold "as-is, where-is" followed by a long line of intervening events that eventually led to the Johnsons purchase of the home.

Hayman Engineering could not foresee the long line of events that lead to Johnsons' alleged damages – (1) Fannie Mae asking for a visual inspection of the cracks in the home by Hayman Engineering in 2009; (2) Hayman Engineering reporting that the cracks were "most likely" caused by expansive soil under the foundation; (3) Fannie Mae making certain repairs to the home – not the repairs suggested by Hayman Engineering; (4) Fannie Mae selling the home to the Masons "as-is, where-is" and specifically with no warranties on the structural integrity of the home; (5) the Masons living in the home for over two years and performing additional repairs – the additional settling/cracking in the home during this time is unknown; (6) the Masons selling the home without making the proper disclosures of visible defects in the home or the repairs they had to make; (7) the Johnsons hiring and relying on a home inspector to inspect the home; (8) the Johnsons relying on an engineer's opinion regarding cracks in the garage and sloping in the driveway; (9) the Johnsons making their own visual inspection of the home and seeing the French drain but asking no questions about the problems with the home. Hayman Engineering could not foresee that all of these events could take place and yet that they

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connection with the purchase. Here, that is not the case. Hayman Engineering was hired to perform a visual inspection for Fannie Mae. "Fannie Mae did not authorize the report for the purpose of providing [it] to prospective buyers." R: 404, Brickey Dep. Exhibit 4. The foreclosure home was sold "as-is, where-is" to the Masons. *Id.* The Masons then turned around and sold the property to the Johnsons without making the proper disclosures.

would still be liable for their qualified statement that the cause of the cracks was "most likely" expansive soil under the foundation.

For the first time in their appeal brief, the Johnsons raise a public policy argument citing *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979).[7] However, the policy argument set forth in *Brown* has no application to this case. In *Brown*, the Court determined that there were public policy considerations to prevent future harm that are promoted by imposing liability on *contractors who negligently construct houses. Id.* at 909. The Court noted that contractors construct homes for sale to the general public and have a duty to subsequent purchasers for defects that are the result of negligent construction. The Court specifically held that privity of contract is not required "where the action is based on the builder-vendor's negligence." *Id.* at 910.

This is not a case based on builder-vendor negligence, and *Brown* has no application. Here, Hayman Engineering was hired to visually inspect the cracks in a home. It was not hired to perform geotechnical engineering studies. It was not hired to study the soil. It was not hired to give any kind of public opinion on the home. It was not hired to make any repairs. Hayman Engineering gave a qualified opinion that the cause of the cracks was "most likely" from expansive soil. Hayman Engineering could not foresee that this qualified opinion based on a visual inspection would, in any way, cause harm to subsequent purchasers who purchased the home after it was sold "as is" in a foreclosure sale.

[7] This public policy argument was not raised before the trial court and has been waived by the Johnsons. The South Dakota Supreme Court has "consistently stated that [it] will not address issues raised for the first time on appeal not raised before the lower court." *Kreisers Inc. v. First Dakota Title Ltd. Partnership*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425.

Absent privity of contract, a cause of action for economic damages resulting from professional negligence may only be brought if the professional had a duty to the party alleging the economic damages because the injury was foreseeable to the professional. *Mid-Western Elec., Inc.*, 500 N.W.2d at 254. It was not foreseeable to Hayman Engineering that the letter drafted after a visual structural inspection of the home in 2009 would be relied upon by the Johnsons in 2012. It certainly was not foreseeable that the report and recommendations would not even be followed and that someone would still try to hold Hayman Engineering liable.

C. The Johnsons did not rely on any representations made by Hayman Engineering

Hayman Engineering owed no duty to the Johnsons. In addition, there is no dispute of fact that Johnsons did not rely on Hayman Engineering's letter in any way when deciding to purchase the property. This Court has specifically included the need to establish reliance on alleged professional negligence in certain instances in order to extend liability beyond privity of contract. *See Muhlenkort v. Union County Land Trust,* 530 N.W.2d 658, 662-663 (S.D. 1995) (finding there must be some reliance on the part of the third party to find an abstractor liable in tort to the third party); *Lein v. McGladrey & Pullen*, 509 N.W.2d 421, 424 (S.D. 1993) (finding that reliance on tax advice is necessary to extend liability to non-client).

The Johnsons claim that reliance is not required for them to recover. Reliance is key to the Johnsons' claims. The Johnsons cannot disguise their negligent misrepresentation claim by labeling it "negligence" in an attempt to thwart the reliance requirement. They have alleged that Hayman Engineering negligently represented various facts about the property and "negligently identified dry soil conditions as the cause of the home's issues and recommended diverting water from collecting near the

foundation of the home." *See* R: 3, Complaint ¶¶ 48-52. It is clear that the claims the Johnsons are making are for negligent misrepresentation.

Under South Dakota law, negligent misrepresentation occurs when there is (1) a misrepresentation, (2) without reasonable grounds for believing the statement to be true, (3) with the intent to induce a particular action by another party, and the other party (4) changes position with actual and justifiable reliance on the statement, and (5) suffers damage as a result. *Fisher v. Kahler*, 2002 S.D. 30, ¶ 10, 641 N.W.2d 122, 126. To further illustrate this legal principle in the context of professional negligence, this Court has cited Restatement (Second) of Torts § 552 for instruction:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss *caused to them by their justifiable reliance upon the information*, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement (Second) of Torts § 552 (emphasis added). Under this standard, it is clear that there must be reliance upon the representation made by the professional and that liability is limited to those persons "for whose benefit and guidance he intends to supply

the information or knows that the recipient intends to supply it." *Id.* It is undisputed that the Johnsons were not supplied with the inspection reports and that they did not rely on the letter drafted by Hayman Engineering. They did not even see the letter until after they had purchased the home.

The Johnsons claim they relied on the Hayman Engineering letter "directly and indirectly;" however, that is clearly untrue. The Johnsons admit they never even saw or knew of the existence of the letter until October 4, 2012. APP:E, ¶ 12; R: 293. They did, however, directly rely on the statements made by the Masons and presumed that the Masons did what was necessary to make the house marketable and livable. R: 298, 301.

To attempt to support their argument regarding reliance, the Johnsons have suggested that the Masons relied on the Hayman Engineering letter, and that the Masons reliance should somehow trickle down to the Johnsons. However, there is no evidence that the Masons ever even knew about, let alone relied on, the Hayman Engineering letter. Cathy Brickey says that she told the Masons' realtor that work had to be done because "there was some settling of the home."[8] R: 404, Brickey Dep. Exhibit 4. Brickey believes she may have told the Masons' realtor this during the walkthrough just prior to closing. R: 404, Brickey Dep. 66:17-68:2. However, since that time, Raposa told Brickey that she couldn't recall being told about the problems with the house or the Hayman Engineering report. R: 404, Brickey Dep. 65:12-66:4. Furthermore, Brickey has no idea whether the Masons were given any information by their realtor. The

[8] The Johnsons alleged that Paul Hayman's conclusions that the ground was heaving, not settling, are the cause of all of their damages. Yet, it appears that the Masons' realtor was told that the home was settling. Although irrelevant to the issues before the Court, this fact further demonstrates that it was the Masons who failed to give the proper disclosures regarding the problems they knew the property had.

Johnsons have never taken the depositions of the Masons or attempted to put forth any evidence from the Masons showing any kind of knowledge or reliance.

What is clear from the evidence is that the Masons were aware of the settling problems at the property: "the Masons immediately began to make additional repairs, ie. leveling the doors/frames and/or other work." R: 404, Brickey Dep. Exhibit 4. However, despite the knowledge of the settling problems and the presence of obvious additional settling and cracking throughout the time they lived there, the Masons failed to make the proper disclosures on the disclosure form.

The Johnsons claim they indirectly relied on the Hayman Engineering letter because Roger Johnson saw the French drain. But this put the Johnsons on notice that there had been problems with the property. Assuming that there would be no problems with the home after observing a French drain had been installed is not indirect reliance on a letter they didn't know existed. It certainly isn't justifiable reliance that would create some duty on behalf of Hayman Engineering.

The Johnsons had constructive notice that the Masons purchased the property that had been acquired by Fannie Mae through foreclosure. SDCL § 43-28-15. The Johnsons also had constructive notice that the Masons had purchased the home from Fannie Mae "as is" with no warranties with respect to the physical condition of the property. SDCL § 43-28-15 and SDCL § 17-1-4; *see also Tan Corp. v. Johnson*, 555 N.W.2d 613, 617 (S.D. 1996) (constructive notice requires the purchaser to make inquiry upon circumstances sufficient to raise the possibility that an issue with the property exists).

There is no evidence to indicate that the Johnsons relied upon the statements made by Hayman Engineering in the 2009 letter to Fannie Mae. However, the Johnsons

did rely on several other things: (1) the disclosures made by the Masons; (2) the home inspection by Drew Inspection Service; (3) the advice from engineer Dave Bressler; and (4) the Johnsons' own visual inspection. The Johnsons cannot recover damages from Hayman Engineering, because the Johnsons never relied on any statements made by Hayman Engineering.

In *Cooper v. Cordova Sand & Gravel Co., Inc.*, the Court of Appeals of Tennessee addressed a case where a subsequent purchaser filed suit against various individuals, including an engineer, for damages to a home due to settling on a lot. 485 S.W.2d 261 (Tenn. Ct. App. 1971). The engineer had certified to the county planning board that he had inspected the footings of the home two years before the plaintiffs purchased the home. The homeowners' claim against the engineer was dismissed. *Id.* at 271. "[T]here was no proof that the [homeowners] relied upon the certification made by [the engineer] to the [planning board]. There is nothing to indicate that [the engineer] ever intended or expected or anticipated that his certification as to the footings would be used as an inducement by the sellor [sic] . . . or by any subsequent owner of the property to induce purchasers to purchase the home." *Id.* The court held that this case did not come within Section 552 of the Restatement of the Law of Torts and the dismissal was upheld. *Id.*

As in the *Cooper* case, here there is no evidence to indicate that the Johnsons relied upon the statements made by Hayman Engineering in the 2009 letter to Fannie Mae. However, as demonstrated throughout this brief, the Johnsons did rely on several other things: (1) the disclosures made by the Masons; (2) the home inspection by Drew Inspection Service; (3) the advice from engineer Dave Bressler; and (4) the Johnsons'

own visual inspection. The Johnsons never relied on any statements made by Hayman Engineering and, therefore, they cannot recover damages from Hayman Engineering.

CONCLUSION

Hayman Engineering had no duty to subsequent purchasers when it authored a qualified opinion at the direction of Fannie Mae for property that was to be sold "as is" with no warranties. The Johnsons relied on many things when making the decisions to purchase the property, but the Hayman Engineering letter was not one of those things – they didn't even know the letter existed until months after they purchased the property.

The Johnsons' claims against Hayman Engineering fail because Hayman Engineering had no duty to the Johnsons, and the Johnsons did not rely on any representations made by Hayman Engineering when purchasing the property. Hayman Engineering requests this Court affirm the Memorandum Decision granting summary judgment in Hayman Engineering's favor and the Judgment entered against the Johnsons.

Respectfully submitted this 12th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

I, Jessica L. Larson, attorney for the Appellee, hereby certify that pursuant to SDCL § 15-26A-66 the foregoing brief complies with the above mentioned statute in that it is in Times New Roman font and that the word processor used to prepare this brief indicated that said brief contains 5,837 words and 29,143 characters (no spaces) in the body of this brief.

Dated this 12th day of November, 2014.

/s/ Jessica L. Larson
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CERTIFICATE OF SERVICE

I certify that on November 12, 2014, I emailed a true and correct copy of the foregoing Appellees' Brief to the following:

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 27149

ROGER JOHNSON AND DOROTHY JOHNSON,

Plaintiffs/Appellants,

vs.

HAYMAN RESIDENTIAL ENGINEERING SERVICES, INC., and HAYMAN RESIDENTIAL ENGINEERING SERVICES, LLC,

Defendants/Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Robert A. Mandel,
Circuit Court Judge

Amended Notice of Appeal filed July 30, 2014

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FACTS IN REPLY

Fannie Mae acquired the Property through foreclosure. (R 187 at ¶ 2). Prior to the sale of the Property to the general public, Fannie Mae, through its agent, Cathy Brickey, hired Hayman Engineering to conduct a "structural inspection" of the Property and prepare a report of its findings. (R 187 at ¶ 4 and R 384 at ¶4) (hereinafter "Hayman Report"). Fannie Mae ordered the structural report to determine if the house was livable and saleable, and to identify any issues with the Property before selling. (R 377 at ¶ 4). Hayman Engineering knew Brickey was the agent for Fannie Mae, the entity selling the Property to the public. *Id*.

Based on the Hayman Report, Fannie Mae's agent determined that the Property was not "hopeless" and if the repairs were made the house would be livable. (R 377 at ¶ 4). The Hayman Report advised that "[t]he *key to minimizing further movement* in the footing is to keep water from collecting there." Hayman Report (emphasis added). It further stated that "the expansion *is* driven by water intrusion." *Id*. (emphasis added). Consistent with the Hayman Report, Fannie Mae had installed a French drain to alleviate the claimed expansive soil issue and movement. (R 377 at ¶ 4); (R 304 at ¶ 13). Brickey understood that the suggested repairs would alleviate the expansive soil problem noted in the Hayman Report and make the Property saleable and livable. *Id*. Despite the "as is" clause in Fannie Mae's agreement to sell, Brickey testified that she would not have sold the Property without a structural inspection report and she placed a "hold-don't show" on the Property until the Hayman Report was delivered and the repairs completed. *Id*.

After the repairs were made, Fannie Mae, through Brickey, listed the Property for sale to the general public. Notwithstanding the "as is" clause regarding the sale by

Fannie Mae, Brickey advised Susan Raposa, Ronald and Dawn Mason's agent, of the repairs made to the Property pursuant to the Hayman Report and discussed each point in the Report with Raposa. (R 304 at ¶ 13; R 377 at ¶ 5). Cathy Brickey represented to Susan Raposa that repairs were made based on the Hayman Report to alleviate the expansive soil problem. *Id*.

Fannie Mae sold the Property to Ronald and Dawn Mason in October 2009. (187 at ¶ 5). The Masons resided at the Property until its sale to the Johnsons. (R 301 at ¶ 2). At the time Johnsons purchased the Property, Roger Johnson noticed the French drain and understood the French drain was installed at the direction of a professional to drain water away from the residence and alleviate a prior issue with the Property. (R 301 at ¶ 3).

In August of 2012, the Johnsons met with Mike Albertson of Albertson Engineering regarding problems at the Property. (R 301 at ¶ 7 and R 298 at ¶ 6). Ultimately, Albertson Engineering concluded that the Hayman Report contained invalid assumptions about the cause of the movement and that the Hayman Report's conclusions and opinions were based on a general level of understanding of expansive soils. (R 304 at ¶ 14). The Albertson Engineering Report further concluded that the Hayman Report did not contain the level of due diligence that a professional engineer should use to reach the conclusions it did. *Id*. The house was deemed uninhabitable and unsafe by Albertson Engineering and the Johnsons have not been able to live in the home. (R 298) Albertson Engineering's findings and expert opinion as to the substandard, negligent work of Hayman remain undisputed by Hayman Engineering.

At the suggestion of Albertson Engineering, Terracon Consultants, Inc. completed a residential distress evaluation. (R 301 at ¶ 10 and R 298 at ¶ 11). The Terracon Consultants Report found that the soils below the foundation of the Property were settling and additional settling remained a concern. (R 301 at ¶ 10; R 298 at ¶ 11 and R 304 at ¶ 15). It is estimated the cost of leveling the Property is approximately $112,642.56, and the cost to make all of the suggested and necessary repairs will exceed the value of the Property. (R 304 at ¶ 16)

The Johnsons filed a negligence claim against Hayman Engineering alleging that an engineering company completing a structural engineering report on a residential property so that the Property can be livable and sold to the general public does owe a duty to a subsequent purchaser. Under the facts of this case, Hayman Engineering owes a duty to the Johnsons because it is foreseeable that as a subsequent purchaser they could be injured or harmed by a negligently prepared engineering report. The trial court disagreed and found Hayman Engineering owed no duty to the Johnsons. Johnsons appealed that decision. [1]

ARGUMENT

1. Duty depends on foreseeability of injury

Whether a duty exists depends on the foreseeability of injury. *See Luke v. Deal,* 2005 S.D. 6, ¶ 19, 692 N.W.2d 165, 170; *Thompson v. Summers,* 1997 S.D. 103, ¶ 10, 567 N.W.2d 387, 392; *Mid-W. Elec., Inc. v. DeWild Grant Reckert & Associates Co.,* 500 N.W.2d 250, 254 (S.D. 1993). "It is the *foreseeability* of injury to another, *not a relationship* with another, which is a prerequisite to establishing a duty necessary to

[1] The determination of whether a duty is owed is a question of law subject to a de novo standard of review. *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.,* 2000 S.D. 116, 616 N.W.2d 397.

sustain a cause of action." *Thompson,* 1997 S.D. 103, ¶ 10, 567 N.W.2d at 392 (emphasis added). Thus, "[t]o establish a duty on the part of the defendant, it must be foreseeable that a party would be injured by the defendant's failure to discharge that duty." *Id.*

The benchmark of whether a duty arises is the foreseeability of injury.

2. It was foreseeable to Hayman Engineering that its failure to exercise care in its structural inspection for the house to be sold to the public could harm persons not in privity with Hayman Engineering

Hayman Engineering relies heavily on a purported "long line of events" leading to Johnsons' injury to suggest that the injury was not foreseeable. But this is not a complex case.

a. There is no "long line of events" leading to Johnsons' injury

The foreseeability of injury in this case is simple and straightforward much like in the case of *Brown v. Fowler*, 279 N.W.2d 907, 909 (S.D. 1979). In *Brown*, the court determined that a duty should be imposed on the builder-vendor as to a subsequent purchaser stating: *Id*.

> [W]e conclude that defendants were under a duty, running to the [subsequent purchaser], to construct the house non-negligently. Plaintiffs were members of the class of purchasers for whom the house was constructed, even if they were not the first purchasers. It is certainly foreseeable that such a house will be sold to subsequent purchasers, and that any structural defects are as certain to harm the subsequent purchaser as the first. Foreseeability is enhanced by the fact that the defects came to light within three years after construction and within one year after defendants' unsuccessful attempt to stop the settling. It is apparent from the record that plaintiffs suffered injury and that defendants' conduct is directly related to this injury. The policy of preventing future harm is promoted by imposing liability on contractors who negligently construct houses.

Id. at 909.

As was argued to the trial court below,[2] this same analysis should apply to Hayman Engineering completing a structural inspection that, if done negligently, is as certain to harm the subsequent purchaser as the first. Any residential engineer, including Hayman, could foresee that errors and omissions in discharging its duty in determining the structural defects and recommending repairs, *in anticipation of a sale by Fannie Mae to the general public*, would result in injury to no one other than a prospective purchaser like the Johnsons.

Hayman could reasonably foresee that its negligent, substandard work in completing a structural inspection for a seller of property to the general public (Fannie Mae) would directly injure purchasers of the residence. In fact, subsequent purchasers were the *only* foreseeable party to be injured by Hayman Engineering's negligence. As noted in *Brown*, the policy of preventing future harm is promoted by imposing liability on contractors who negligently construct houses. The same policy applies to structural engineers who are consulted for the express purpose of determining whether a defective condition would render the property unlivable. To deny the Johnsons their day in court is, in effect, condoning Hayman Engineering's right to do its job negligently with impunity as far as innocent parties who suffer loss.

Hayman Engineering asserts it could not foresee the "long line of events" that led to Johnsons' damages. In delineating this "long line of events" Hayman Engineering

[2] Hayman Engineering claims this argument was not raised below. That is not accurate. In Plaintiffs' Post-Hearing Summary Brief In Opposition to Defendants' Motion for Summary Judgment, Johnsons argued that this case is similar to when a contractor building a home may be liable to a subsequent owner because the subsequent owner would be a foreseeable party that would be injured. (R. 450, p. 7). Moreover, at the summary judgment hearing counsel for Johnsons indicated this case was "more akin to . . . a typical contractor case." (HT 20). It was further argued at the Summary Judgment hearing that "this is not much different than any contractor doing a house and being held responsible to the subsequent purchaser." (HT 22). Johnsons did not waive this argument; rather, this argument was squarely before the court.

asserts that it could not foresee that: (1) it would be hired by Fannie Mae to complete a structural inspection; (2) it would provide an opinion as to expansive soil; and (3) it would make recommendations on how to alleviate the problem.[3] Appellees' Brief at 13. Determining foreseeability of injury means analyzing whether it was foreseeable that the Johnsons would be injured by Hayman Engineering's failure to discharge its duty of performing the structural inspection up to the standard of care. It does not mean analyzing whether it was foreseeable that Hayman Engineering would be hired to perform the services– it was, and it had a duty of performing work in a non-negligent manner. Hayman Engineering makes a circular argument: foreseeability does not mean analyzing whether an engineer would be hired to perform the work it actually performed.

Here, Hayman, a structural engineer, would have this court believe that it could not foresee a subsequent purchaser encountering structural problems if it completes its structural inspection and analysis in a negligent, substandard way. The reality is, like in *Brown*, that "[i]t is certainly foreseeable that such a house will be sold to subsequent purchasers, and that any structural defects are as certain to harm the subsequent purchaser as the first." *Brown*, 279 N.W.2d at 909. And foreseeability is enhanced by the fact that the structural defects came to light only years after Hayman Engineering's unsuccessful, neglectful structural inspection and recommendations to Fannie Mae on how to stop the settling.

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[3] Hayman Engineering claims that it could not foresee that Fannie Mae would make certain repairs to the home, but not the repairs suggested by Hayman Engineering. Appellants' Brief at 13. First, Fannie Mae did install the French drain to alleviate the collection of water – a "key to minimizing further movement." Hayman Report. Moreover, whether Fannie Mae made Hayman's suggested repairs is a red-herring as it is undisputed that Hayman's Report contained invalid assumptions about the cause of the movement and its recommended fixes would not alleviate the actual settlement problem. (R 304 at ¶ 14). The Albertson Engineering Report concluded that the Hayman Report did not contain the level of due diligence that a professional engineer should use to reach the conclusions it did. *Id*.

This is not a complex series of events as Hayman Engineering alleges, citing *Mark Inc. v. Maguire Ins. Agency, Inc.,* 518 N.W.2d 227 (S.D. 1994). Rather, this case is as straightforward as *Brown*. Hayman's argument that a host of unforeseen events prevented foreseeability of harm to the Johnsons would be akin to the Defendant in *Brown* arguing that because it could not see a litany of irrelevant details regarding intervening owners that it cannot be liable to a subsequent purchaser. The court in *Brown* made it indelibly clear that "[i]t is certainly foreseeable that such a house will be sold to subsequent purchasers, and that any structural defects are as certain to harm the subsequent purchaser as the first." *Brown*, 279 N.W.2d at 909. The only relevant events are that there was a negligently conducted structural inspection by a structural engineering regarding structural defects and the implementation of certain recommended repairs did not (and would not have) alleviate(d) the problem. The structural defects harmed a subsequent purchaser.

b. The Hayman Report allowed the Property to be sold to the public.

Hayman also relies heavily on the "as-is" clause in the Mason/Fannie Mae Purchase Agreement. Hayman's reliance on this clause is misplaced.

First, there is no evidence in the record that Hayman Engineering knew Fannie Mae was selling the property "as-is". Hayman cannot argue that the "as-is" clause limited the foreseeability of injury when there is no evidence Hayman was aware of the "as-is" clause.

Moreover, it is undisputed that Fannie Mae, through its agent Cathy Brickey, ordered a structural inspection report from Hayman to determine if the house was livable and saleable, and to identify any issues with the Property before selling. (R 377 at ¶ 4).

After receiving the report, Brickey, on behalf of Fannie Mae, made representations to Masons' agent about the property beyond the "as-is" language contained within the Purchase Agreement. Only after repairs were made based on the Hayman Report was the property listed for sale to the public. *Id*.

Despite the "as is" clause in Fannie Mae's agreement, Brickey testified that she would not have sold the Property without a structural inspection report and she placed a "hold-don't show" on the Property until the Hayman Report was delivered and the repairs completed. *Id*. Accordingly, this property was sold "as-is" but supplemented by the representations of Fannie Mae as to the repairs.

Simply put, the Hayman Report was *the* reason this Property was permitted to be sold to the general public. Under the facts of this case, and as noted in *Brown* as to contractors, the policy of preventing future harm is promoted by imposing liability on engineers who negligently complete structural inspections. To deny the Johnsons their day in court is, in effect, condoning Hayman Engineering's right to do its job negligently with impunity as far as innocent parties who suffer loss.

3. Potential claims against other persons is a distraction from the issue

In an attempt to distract from the issues, Hayman Engineering emphasizes that the Johnsons had other information upon which to rely when purchasing the Property. Any other person that has been or could be sued by Johnsons does not negate the injury caused by Hayman's negligent, substandard work in completing the structural inspection. Hayman Engineering would be entitled to join and cross-claim any other person and seek indemnity or contribution. SDCL 15-6-13(g)-(h); SDCL 15-6-14(a).

4. Reliance is not required in this case because Hayman conducted a structural inspection on residential property to be sold to the general public

Hayman cites no controlling or persuasive cases holding that reliance is required by a plaintiff suing a structural engineer for negligence in conducting a structural inspection on a residential property to be sold to the general public by Fannie Mae. Although this is an issue of first impression, the analysis directly aligns with the case of *Brown v. Fowler*. The court in *Brown*, in finding a duty owed by a builder/vendor to a subsequent purchaser, stated that "[w]hile this house was not constructed specifically for plaintiffs, it was constructed for sale to the general public[.]" *Brown*, 279 N.W.2d at 909. The court held that "[u]nder these circumstances, we do not believe that plaintiffs should be precluded from recovery merely because the house was not constructed specifically for them." *Id*.

The same concerns exist in this case. Although the structural inspection was not completed for the Johnsons, it was completed to sell the Property to the general public. As in *Brown*, the policy of preventing future harm is promoted by imposing liability on structural engineers who negligently inspect and make recommendations regarding the structure of homes to be sold to the general public.

The cases cited by Hayman Engineering for the proposition that Johnsons needed to directly rely on and know of the Hayman Report are not controlling and are distinguishable. In both *Lien v. McGladrey & Pullen*, 509 N.W.2d 421, 424 (S.D. 1993) and *Mulhlenkort v. Union County Land Trust*, 530 N.W.2d 658, 662-663 (S.D. 1995) cited by Hayman Engineering, the policy considerations at the heart of this dispute are not present. In those cases, the accounting firm and the abstracting firm were not

completing a structural inspection report for a residential property to be sold the general public.

Hayman Engineering argues that this is an action for negligent misrepresentation. The law does not permit Defendants to choose the Plaintiffs' legal theories and the Johnsons have chosen to pursue a professional negligence claim based on the negligent manner in which the Hayman Report was generated and conducted. The fact that misrepresentations were also made as a result does not negate the negligence claim. It is well-settled that the facts giving rise to the negligence claim can give rise to multiple claims, as recognized by Hayman Engineering. Moreover, "[t]he 'theory of the pleadings' doctrine, under which a plaintiff must succeed on those theories that are pleaded or not at all, has been effectively abolished under the federal rules." *Thompson*, 1997 S.D. 103, ¶ 12, 567 N.W.2d at 392) (citation omitted).

CONCLUSION

This Property was sold to the general public on the basis that Hayman Engineering adequately and non-negligently completed its structural inspection. Subsequent purchasers were the *only* foreseeable party to be injured by Hayman Engineering's negligence. The policy of preventing future harm is promoted by imposing liability on structural engineers who negligently conduct structural inspections. To deny the Johnsons their day in court is condoning Hayman Engineering's right to do its job negligently with impunity as far as innocent parties who suffer loss.

Respectfully submitted on November 25, 2014.

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Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellants' Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Appellants' Reply Brief, including footnotes, contains 2,805 words. I have relied upon the word count of our word processing system as used to prepare this Appellants' Reply Brief. The original Appellants' Reply Brief and all copies are in compliance with this rule.

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I further certify that on November 25, 2014, I emailed the foregoing Appellants' Reply Brief and sent the original and two copies of it by United States mail, first-class postage prepaid, to:

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