Negligent Inspection—*Grogan v. Uggla*: Duties Owed to Third Parties in Property Inspection Mishaps

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I. INTRODUCTION

Moving into a new home can cause angst and apprehension for a future homeowner, but it has also presented a "fundamental disagreement" in American jurisprudence.[1] Home inspectors are central to the early stages of home ownership, and they are likewise key figures in negligent inspection cases. In determining whether a home inspector owes a duty to third parties in negligent inspection cases, courts have adopted two diverging tort causes of action. In the case of negligent

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1. Grogan v. Uggla, 535 S.W.3d 864, 868 (Tenn. 2017).

inspections, a plaintiff could raise a claim for negligent misrepresentation of the inspection,[2] or, alternatively, a plaintiff could pursue the broader approach of ordinary negligence in inspecting the property.[3]

Over time, this area of tort law has become splintered and inconsistent, and courts should choose a consistent approach. Courts have a unique opportunity to provide clarity in this confused area of law by opting to analyze these claims under an ordinary negligence approach. In doing so, courts should specifically analyze these claims under a "failure-to-warn" analysis in situations of foreseeable risk where the plaintiff alleges not that he himself should be warned by the inspector, but rather that the homeowner should be warned so that he may take the necessary steps to prevent the harm completely. Under such an analysis, the court should conclude that the inspector did in fact owe a duty to a third party where the inspector's conduct creates a foreseeable risk of harm to that third party.

This Case Comment will illustrate why negligent home inspections should be analyzed under a failure-to-warn analysis by using a recent Tennessee Supreme Court case as an example. Part II of this Comment provides the factual background and holding of the Tennessee Supreme Court's recent decision in *Grogan v. Uggla* and argues that the court's approach was flawed. Part III looks to relevant Tennessee case law to provide the historical background of negligent inspection claims and an explanation for when a duty is owed to a third party in an inspection. Part IV closely examines the Tennessee Supreme Court's reasoning and conclusions in *Grogan*. Part V contends that the Tennessee Supreme Court arrived at the wrong conclusion in classifying the claim and offers an alternative approach that the court could have pursued. Finally, Part VI provides several concluding remarks.

II. THE CASE

In 2017, the Tennessee Supreme Court reviewed the appeal of Charles Grogan (the "Plaintiff"), who brought suit against homeowner

2. *See* United States v. Neustadt, 366 U.S. 696, 703 (1961) (explaining when a claim is based on misrepresentation as opposed to "one 'arising out of' negligence").

3. *See Grogan*, 535 S.W.3d at 869 (citing Appley Bros. v. United States, 7 F.3d 720, 728 (8th Cir. 1993)) (articulating that a plaintiff may bring both an ordinary negligence claim and a negligent misrepresentation claim).

Daniel Uggla, home inspector Jerry Black, and home inspection franchisee Pillars to Post, Inc. (collectively, the "Defendants").[4] In *Grogan*, the Plaintiff was injured after falling from a second story deck after the railing collapsed.[5] During an inspection before the collapse, the home inspector noted problems with the floor of the second story deck but did not report the use of improper nails and other defects with the railing.[6] The Tennessee Supreme Court agreed with the Court of Appeals and affirmed the decision of the trial court to grant the Defendants' motion for summary judgment, *holding*: (1) under a negligent misrepresentation analysis,[7] the home inspector did not make an affirmative misstatement to the Plaintiff such that he assumed a duty, and (2) under an ordinary negligence analysis,[8] the inspector did not render services to a third party such that he owed or assumed a duty of care to the Plaintiff. *Grogan v. Uggla*, 535 S.W.3d 864, 870, 876 (Tenn. 2017). Thus, the court determined that, because the home inspector never affirmatively stated that the deck railing was safe, summary judgment for the negligent misrepresentation claim was appropriate.[9] Additionally, in granting summary judgment for the ordinary negligence claim, the court reasoned that the home inspector did not undertake a building codes inspection,[10] and that there was no evidence that the inspector voluntarily assumed a duty outside of what he already owed the homeowner.[11]

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4. *Id.* at 866.

5. *Id.*

6. *Id.*

7. For this analysis, the court relied on a Fifth Circuit case stating that an "affirmative misstatement" is required for a viable negligent misrepresentation claim. *Id.* at 870 (citing McLachlan v. N.Y. Life Ins. Co., 488 F.3d 624, 630 (5th Cir. 2007)).

8. For this analysis, the court interpreted section 324A of the *Restatement (Second) of Torts* to mean that the home inspector did not owe a duty to the Plaintiff because the inspector was only rendering services to his client. *Id.* at 874–76 (citing RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965)).

9. *Id.* at 870. While the court declined to adopt section 311 of the *Restatement (Second) of Torts*, which defines the tort of negligent misrepresentation involving physical harm, the court nevertheless determined that the Defendants here were able to successfully negate the elements of the Plaintiff's claim. *Id.*

10. The Plaintiff alleged that the inspector's failure to identify the defective nails was a violation of the local building code, which is what the court's reasoning here refers to. *Id.* at 875–76.

11. *Id.*

The majority in *Grogan* erred in two major respects in its determination. First, the opinion misconstrues the claim as one of misrepresentation when it instead should have been classified as a failure-to-warn claim. Second, the court failed to reach a proper conclusion on the ordinary negligence claim. The court should have concluded that the home inspector assumed a duty of care by performing an inspection that he knew or should have known would lead to a foreseeable risk of harm to the Plaintiff if done negligently. Further, the home inspector had a duty to warn the homeowner of the risk of harm so that the homeowner could take adequate precautions to prevent that harm being inflicted upon the Plaintiff. Additionally, because foreseeability alone is insufficient to create a duty, the home inspector's engaging in conduct that creates risk to another person also establishes a duty owed to the Plaintiff. Few tort cases involve negligent home inspections,[12] and the court missed a significant opportunity to clarify the issue of liability and to establish a precedent in this nebulous area of tort law.

III. THE EVOLVING LEGAL APPROACHES TO NEGLIGENT INSPECTION

Plaintiffs pursuing a cause of action after a negligent home inspection have two potential avenues of recourse. Specifically, a claim for negligent inspection may fall under one of two distinct classifications. A plaintiff may bring suit for negligent misrepresentation of the inspection,[13] or, in the alternative, a plaintiff may opt to present a broader claim for ordinary negligence.[14] Consequently, in determining whether a duty is owed to a third party in the case of negligent inspections, courts are not limited in their analysis of such a claim. Therefore, where a plaintiff asserts that a home inspector should have reasonably foreseen that his negligent inspection of the property would result in a risk of harm to a third party, a court should analyze the claim as a "failure-to-warn" claim under an ordinary negligence analysis.

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12. In its opinion, the Tennessee Supreme Court noted that it had yet to hear a case on the subject and pointed out that there are very few cases in other jurisdictions involving potential liability to a third party for a negligent home inspection. *Id.* at 872.

13. *See supra* note 2 and accompanying text.

14. *See* Block v. Neal, 460 U.S. 289, 296–97 (1983); *see also infra* notes 17–18.

In *United States v. Neustadt*, the United States Supreme Court recognized that a claim for negligent misrepresentation is available when a defendant fails "to use due care in . . . communicating information upon which [a plaintiff] might reasonably be expected to rely."[15] The *Neustadt* Court found that the plaintiffs had stated a claim for negligent misrepresentation where they reasonably relied on misrepresentations in a property appraisal, but the Federal Torts Claim Act precluded recovery on the claim.[16] Following the *Neustadt* decision, the Court in *Block v. Neal* then opened the door for courts to alternatively classify negligent inspection claims as ordinary negligence actions.[17] Significantly, the *Block* Court distinguished a claim for negligent misrepresentation from one of ordinary negligence by determining that where "misstatements are not essential to [the] plaintiff's negligence claim," courts may classify the claim as one arising out of ordinary negligence.[18] This ruling laid the groundwork for courts to classify negligent inspection claims as failure-to-warn claims.

In 2001, the Tennessee Supreme Court took up the subject of a failure-to-warn claim when it reviewed *Estate of Amos v. Vanderbilt University*, a case in which Vanderbilt University Hospital failed to inform one of its patients that she had been exposed to the HIV virus.[19] In response, the patient and her husband filed a negligence suit against Vanderbilt.[20] Upon review, the court faced the issue of whether the hospital owed a duty to the patient's husband—a non-patient third party—to warn the patient of the risk so that she might take adequate precautions to prevent transmitting the disease to her husband and child.[21] The court ultimately determined that a hospital owes a duty to a non-patient third party if the physician's failure to warn the patient

15. United States v. Neustadt, 366 U.S. 696, 706 (1961).

16. *Id.* at 698–702 (citing 28 U.S.C. § 2680(h)(1960)).

17. *See Block*, 460 U.S. at 296–97.

18. *Id.* at 297. The Eighth Circuit "has interpreted *Block v. Neal* to mean that a plaintiff might allege both a negligent inspection and negligent misrepresentation." Grogan v. Uggla, 535 S.W.3d 864, 869 (Tenn. 2017) (citing Appley Bros. v. United States, 7 F.3d 720, 728 (8th Cir. 1993)).

19. Estate of Amos v. Vanderbilt Univ., 62 S.W.3d 133, 135–36 (Tenn. 2001). The patient's child later died as a result of the exposure. *Id.* at 135.

20. *Id.* at 135.

21. *Id.* at 138.

"causes reasonably foreseeable injuries to the third party."[22] The *Amos* court analyzed whether Vanderbilt owed a duty to non-patient third parties by contemplating foreseeability, stating that "[t]he foreseeable victim is one who is said to be within the zone of danger."[23] Moreover, the court articulated that the duty was not one to warn the patient's husband but to warn *the patient herself* so that she could take adequate precautions to prevent her husband and child from entering the "zone of danger" and being exposed to the virus.[24] Ultimately, the court concluded that Vanderbilt's breach of duty caused the reasonably foreseeable injuries suffered by the patient's husband.[25]

In 2008, the Tennessee Supreme Court again considered the subject of negligent inspection and held that foreseeability alone is insufficient to establish a duty owed to third parties. In *Satterfield v. Breeding Insulation Co.*, a woman filed a negligence suit against her father's employer, alleging that she was diagnosed with mesothelioma after being exposed to asbestos fibers on her father's clothes.[26] The court concluded that her father's employer had a duty to prevent foreseeable injury from the unreasonable risk of harm that the employer created by not informing its employees of the risks associated with asbestos.[27] In reaching its decision, the court stated that foreseeability

22. *Id.* at 138 (citing Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1993)); *see also* Turner v. Jordan, 957 S.W.2d 815, 820 (Tenn. 1997) (ruling that a psychiatrist owed a duty to a psychiatric nurse to protect her from mentally-ill patients); Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521, 528 (Tenn. 1980) (concluding that a physician who gave a physical exam to a truck driver owed a duty of care to subsequent injured drivers).

23. *Amos*, 62 S.W.3d at 138 (citing *Turner*, 957 S.W.2d at 819).

24. *Id.*

25. *Id.* Although this case is not comparable "apples-to-apples" with *Grogan*, the critical point that the court makes here is that Vanderbilt owed a duty to the patient's husband because the hospital's negligence caused a reasonably foreseeable injury as a result of its failure to warn the patient herself. This ruling affirms that a "failure-to-warn" analysis may be appropriate in determining liability for injuries to a third party, as opposed to a negligent misrepresentation analysis. *See* Grogan v. Uggla, 535 S.W.3d 864, 883 (Tenn. 2017) (Kirby, J., concurring) (arguing for a failure-to-warn analysis in place of the majority's negligent misrepresentation approach).

26. Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 353–54 (Tenn. 2008).

27. *Id.* at 374–75.

alone is insufficient to create a duty and provided two other considerations useful in determining whether a duty exists.[28] First, the court utilized the general rule of Tennessee tort law that a person owes a duty not to engage in conduct that creates an unreasonable and foreseeable risk of harm to others.[29] Second, the court also presented several policy factors to be used as a balancing test to determine whether "the particular risk should give rise to a duty of reasonable care."[30] Weighing those factors,[31] the court found that: (1) the risk to the plaintiff was real and substantial; (2) the magnitude of potential harm to the plaintiff was great; (3) the company had not adequately explained the usefulness of its services; (4) the company could have greatly reduced the risk of asbestos exposure; and (5) the measures the company could have taken to protect workers and their families from asbestos exposure were feasible and efficacious without imposing prohibitive costs or burdens.[32] While Tennessee courts have accepted the general rule only to impose

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28. *Id.* at 357, 365–66 (citing McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 904 (Tenn. 1996)).

29. *Id.* at 357 (citing Burroughs v. Magee, 118 S.W.3d 323, 328 (Tenn. 2003)); Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1993) (citing Doe v. Linder, 845 S.W.2d 173, 178 (Tenn. 1992)) ("All persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 reporters' note cmt. c (AM. LAW INST. 2012) ("Even when the actor and victim are complete strangers and have no relationship, the basis for the ordinary duty of reasonable care . . . is conduct that creates a [foreseeable] risk to another. Thus, a relationship ordinarily is not what defines the line between duty and no-duty; conduct creating risk to another is.").

30. *Satterfield*, 266 S.W.3d at 365 (citing West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 551 (Tenn. 2005); *Burroughs*, 118 S.W.3d at 329).

31. The court lists those policy factors in detail, and they include:

> (1) [T]he foreseeable probability of harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct.

Id. at 365 (citing *Burroughs*, 118 S.W.3d at 329; McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995)).

32. *Id.* at 367–71.

an affirmative duty to act to protect another person where a special relationship exists,[33] several courts have employed *Satterfield*'s approach to hold a defendant liable to a third party plaintiff, in the absence of a special relationship, where the defendant's conduct creates a risk of harm.[34]

IV. THE TENNESSEE SUPREME COURT'S DECISION

With the *Amos* and *Satterfield* decisions as a backdrop, the Tennessee Supreme Court again considered a negligent inspection claim when it decided *Grogan v. Uggla* in 2017. In *Grogan*, the trial court granted the Defendants' motion for summary judgment and accepted their argument that the Plaintiff's claim was for negligent misrepresentation; subsequently, the Plaintiff appealed.[35] The Court of Appeals affirmed the lower decision but, unlike the trial court, framed the cause of action as one of ordinary negligence.[36] The Plaintiff appealed on the grounds that the home inspector knew or should have known that the deck railing "constituted an unreasonable risk of harm since it could not withstand reasonable force to prevent someone from falling."[37]

The home inspector was hired to inspect the house prior to its purchase.[38] During his inspection, the home inspector noted problems with the second story deck flooring, but he did not report any defects with the railing.[39] After moving into the house, the homeowner hosted a social gathering, at which the Plaintiff fell from the second story deck

33. *See, e.g.*, Downs *ex rel.* Downs v. Bush, 263 S.W.3d 812, 814 (Tenn. 2008) (finding no affirmative duty where "none of the defendants stood in any special relationship with the plaintiff's decedent"); *Bradshaw*, 854 S.W.2d at 872–73 (finding that a physician-patient relationship created a duty on the part of the physician to warn third party family members); *see also* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342–43 (Cal. 1976) ("[W]hen the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship . . . to the potential victim.").

34. *See supra* text accompanying notes 19, 25–28.

35. Grogan v. Uggla, 535 S.W.3d 864, 867 (Tenn. 2017).

36. *Id.* at 868.

37. *Id.* at 869.

38. *Id.* at 866.

39. *Id.*

after the railing collapsed.[40] A later examination of the railing showed that it had been constructed with interior finishing nails rather than the appropriate galvanized nails.[41] The Plaintiff subsequently filed a negligence suit against the homeowner, the home inspector, and the home inspection franchisee, alleging that (1) the Defendants knew or should have known that the railing was constructed with improper nails in violation of applicable building codes, and (2) the Defendants failed to report that the deck railing was negligently constructed.[42] In its majority opinion authored by Justice Page, the court affirmed the granting of summary judgment for the Defendants and determined that the Plaintiff raised *both* a negligent misrepresentation claim and an ordinary negligence claim, neither of which the Plaintiff sufficiently proved.[43] Specifically, the court held that (1) the Plaintiff failed to prove that the home inspector negligently stated false information, and (2) the home inspector did not owe or assume a duty to the social guest under an ordinary negligence analysis.[44]

The court first addressed whether the Plaintiff, based on his allegation that the inspector did not report defects in the railing, presented a feasible claim for negligent misrepresentation.[45] Emphasizing the lack of an "affirmative misstatement,"[46] the court determined that, because the home inspector never affirmatively informed the homeowner that there was no defect with the railing, the Plaintiff had not sufficiently presented a misrepresentation claim.[47] In reaching its decision that the inspector had not falsely represented the findings of his inspection, the court relied on an assortment of case law.[48]

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40. *Id.*

41. *Id.*

42. *Id.* at 866–67.

43. *Id.* at 869, 876.

44. *Id.* at 876.

45. *See id.* at 869. Specifically, the court analyzed the misrepresentation claim under section 311 of the *Restatement (Second) of Torts*. *Id.* at 870 (citing RESTATEMENT (SECOND) OF TORTS § 311 (AM. LAW INST. 1965)) ("One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results to the other, or to . . . third persons . . . .").

46. *See supra* note 9 and accompanying text.

47. *Grogan*, 535 S.W.3d at 870.

48. *See, e.g.*, McLachlan v. N.Y. Life Ins. Co., 488 F.3d 624, 630 (5th Cir. 2007) (establishing the general rule that "an affirmative misstatement, not just a non-

The court then turned to the issue of whether the home inspector owed a duty to the Plaintiff under an ordinary negligence analysis.[49] Relying on the language of section 324A of the *Restatement (Second) of Torts*,[50] the court ruled that the inspector did not, in rendering services to "another," owe or assume a duty to the Plaintiff.[51] Specifically, the court relied on the home inspector's testimony that the agreement was to inspect the property for the homeowner; thus, the court reasoned that, because the inspection was performed for the benefit of the homeowner, the inspector could not additionally owe a duty to the Plaintiff.[52] The court ultimately determined, based on "the agreement and the relevant statutes," the home inspector only owed a duty to the homeowner.[53]

V. ANALYSIS AND CRITICISM

In *Grogan*, the Tennessee Supreme Court attempted to clarify the confusion presented by diverging claims in negligent inspection cases; however, the majority's decision was problematic because it failed to select a consistent approach. The court should have chosen an ordinary negligence approach, and in keeping with relevant Tennessee

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disclosure" is required for a misrepresentation claim); Hall v. Ford Enters., Ltd., 445 A.2d 610, 612 (D.C. Cir. 1982) (stating that a decal on the front of an apartment building was insufficient to establish that the plaintiff had affirmatively stated false information).

49. *See Grogan*, 535 S.W.3d at 871.

50. *Id.* at 874 (citing RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965)) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . he has undertaken to perform a duty owed by the other to the third person . . . . " (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965))).

51. *Id.*

52. *Id.* at 876 ("[H]ome inspection[s] 'performed according to this rule shall provide the client with an understanding of the property conditions at the time of the home inspection.'" (quoting TENN. COMP. R. & REGS. 0780–05–12–.10(3)(a) (2006))).

53. *Id.* at 875–76 (citing Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 556 N.E.2d 1093, 1096 (1990)) (explaining the relevance of the scope of the defendant's undertaking in determining whether a duty arises).

precedent,[54] the court should have classified and analyzed the Plaintiff's claim as a failure-to-warn claim.[55] Such an analysis would have demonstrated that the home inspector owed a duty to the Plaintiff under two significant theories of Tennessee tort law. First, the home inspector failed to warn the homeowner of the reasonably foreseeable risk of harm so that the homeowner could take the necessary steps to prevent potential harm to the Plaintiff. Second, absent the foreseeability analysis, the home inspector still owed a duty because he engaged in conduct that created a risk of harm to another person.

A. Failure-to-Warn Analysis

Because negligent inspection cases present two opposite avenues of analysis, the preliminary question presented in *Grogan* is whether a negligent misrepresentation analysis or an ordinary negligent inspection analysis is more appropriate given the facts of this case. The Tennessee Supreme Court mistakenly opted to pursue a negligent misrepresentation analysis.[56] Under that analysis, the court reasoned that, because the home inspector did not make an "affirmative misstatement," the Plaintiff did not sufficiently establish a claim for negligent misrepresentation.[57] However, as evidenced by the standard outlined in Justice Kirby's *Grogan* concurrence, a "failure-to-warn" analysis garners the correct result—the home inspector *did* owe a duty to the Plaintiff.[58]

The Tennessee Supreme Court has previously ruled that a failure-to-warn claim is available where the plaintiff alleges not that he himself should be warned of the foreseeable risk, but rather that another party should be warned so that party may take the necessary steps to prevent the injury altogether.[59] Likewise, the court in *Grogan* should have followed that rule, principally because the facts in *Grogan* align with the rules and reasoning of past Tennessee case law—the Plaintiff

54. *See supra* notes 19–25 and accompanying text.

55. *See Grogan*, 535 S.W.3d at 881–83 (Kirby, J., concurring) (rejecting the majority opinion's conclusion that the Plaintiff's claim was one of negligent misrepresentation).

56. *See id.* at 870 (majority opinion).

57. *Id.* at 870.

58. *Id.* at 879–83 (Kirby, J., concurring).

59. *See supra* text accompanying notes 19, 21–24.

made clear in his complaint that he believed the home inspector should have warned the homeowner, not the Plaintiff himself, of the dangers of the defective railing.[60] Additionally, had the court analyzed the claim under a failure-to-warn analysis, it should have determined that, because it was reasonably foreseeable that a social guest leaning on a defective railing would be injured, the inspector breached his duty to warn the homeowner of that foreseeable risk.[61] Further, a closer examination of the *Neustadt* holding reveals that the facts in *Grogan* clearly favor a failure-to-warn analysis as opposed to a negligent misrepresentation analysis.[62] The home inspector never made any affirmative misrepresentation to the Plaintiff or the homeowner regarding the defective railing; rather, the home inspector simply *failed to warn* the homeowner.[63] Had the home inspector adequately issued a warning to the homeowner about the potential risk of harm that the defective railing presented, the homeowner could have taken the necessary steps to prevent such harm that the Plaintiff ultimately suffered. Thus, a failure-to-warn claim was undoubtedly the most sensible approach based on the facts presented in this case.

B. Ordinary Negligence Analysis

In addition to misinterpreting the facts in *Grogan* as giving rise to a negligent misrepresentation claim, the Tennessee Supreme Court also incorrectly addressed the ordinary negligent inspection analysis. In its analysis, the majority utilized section 324A of the *Restatement (Second) of Torts*, which states that any person "who undertakes, gratuitously or for consideration, to render services to another which he

60. *See Grogan*, 535 S.W.3d at 881–83 (Kirby, J., concurring) ("Mr. Grogan does not allege that the [D]efendant home inspectors should have warned *him* of the dangerous condition of the deck railing, but instead asserts that they should have warned their client, to enable the client to 'take adequate precautions to prevent' the injuries Mr. Grogan suffered . . . .").

61. *See supra* notes 19, 21–24 and accompanying text.

62. *See Grogan*, 535 S.W.3d at 881 (Kirby, J., concurring) ("[In relation to the facts presented in *Grogan*], *Neustadt* is inapposite; it involved an affirmative misrepresentation in an FHA appraisal as to the value of a home, disclosed directly to the plaintiff purchasers. The case in no way supports the majority's decision to accept the [D]efendant home inspectors' mis-description of Mr. Grogan's claim as one of negligent misrepresentation.").

63. *See id.*

should recognize as necessary for the protection of a third party . . . is subject to liability to [that] third party."[64] The court reasoned that because the inspection agreement was between the home inspector and the homeowner, the home inspector was only working for the benefit of the *homeowner* and not the Plaintiff.[65] Consequently, the court concluded that the home inspector did not owe a duty to the Plaintiff under the language of section 324A.[66]

Regarding its decision for the ordinary negligence claim, the court mistakenly relied on Section 324A in reaching its conclusion, when instead it should have utilized section 37 of the Restatement (Third) which establishes liability where there is conduct that creates a risk of harm to another person, as outlined in *Satterfield*.[67] Whereas the *Grogan* majority's application of section 324A confuses when a duty is properly owed, the *Satterfield* approach provides a clear and concise path for analyzing when an inspector is liable to a third party. Applying recent Tennessee precedent, the court should have ruled that the home inspector had a duty to prevent the foreseeable risk of harm to the Plaintiff because the home inspector engaged in conduct that created that risk, despite the fact that they did not know each other or have any relationship whatsoever.[68]

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64. *Id.* at 874 (majority opinion) (quoting RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965)). See Kathryn M. Glegg, Note, *Negligent Inspection: Texas Expressly Adopts the Restatement (Second) of Torts Section 324A in* Seay v. Travelers Indemnity Co., 41 SW. L.J. 1041, 1050–52 (1988), for an in-depth discussion regarding the application of section 324A and a general discussion of duties owed to third parties as a result of an undertaking. "[W]hen a law designed to promote safety requires inspections, the one who performs the inspection undertakes to render services to the owner of the item that the inspector investigates." *Id.* at 1051 (emphasis omitted) (citing Seay v. Travelers Indemnity Co., 774, 779 (Tex. App. 1987)).

65. *Grogan*, 535 S.W.3d at 876.

66. *Id.*

67. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 reporters' note cmt. c (AM. LAW INST. 2012) ("Even when the actor and victim are complete strangers and have no relationship, the basis for the ordinary duty of reasonable care . . . is conduct that creates a [foreseeable] risk to another. Thus, a relationship ordinarily is not what defines the line between duty and no-duty; conduct creating risk to another is."); *see also* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 357 (Tenn. 2008).

68. *See Satterfield*, 266 S.W.3d at 357; *see also* Burroughs v. Magee, 118 S.W.3d 323, 328 (Tenn. 2003) ("All persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others.").

After reaching that conclusion, the court should have then turned to the policy factors expressed in *Satterfield* to determine if the home inspector's negligence warranted imposing a duty to the Plaintiff.[69] In her dissent, Justice Lee analyzed and weighed some of those factors and made several useful determinations. First, it was certainly foreseeable that the Plaintiff's injury could result from the failure of a home inspector to warn the homeowner of a faulty second story railing.[70] Second, the foreseeability and gravity of someone falling from the deck outweighs the burden placed on the home inspector to protect against that harm.[71] Finally, Justice Lee states that public policy requires imposing a duty on the home inspector because "'[i]nspections of residential property are of great importance to the public,' as most Tennesseans rely on home inspectors' specialized skills when purchasing a home."[72] Consequently, the court should have ruled using Tennessee precedents that, based on weighing those factors as a balancing test, there was sufficient evidence to conclude that the home inspector owed a duty to the Plaintiff. Thus, the Tennessee Supreme Court should have reversed the lower courts' decisions to grant summary judgment and then remanded the case accordingly.

VI. CONCLUSION

The Tennessee Supreme Court's holding will ultimately present more questions than answers regarding which approach a court should pursue in analyzing negligent inspection claims. As the court correctly notes, the Tennessee Supreme Court "has not previously considered a case involving an allegedly negligent home inspection . . . [and there are] few involving potential liability to a third party for a negligently-performed home inspection."[73] Further, the court missed a substantial

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69. *See supra* notes 30–31.

70. *Grogan*, 535 S.W.3d at 883 (Lee, J., dissenting) ("[I]t was foreseeable that a negligent inspection of the home, and particularly the second-story deck railing, could result in a significant injury to a guest.").

71. *Id.*

72. *Id.* at 885 (quoting Russell v. Bray, 116 S.W.3d 1, 6 (Tenn. Ct. App. 2003)). *Satterfield*'s third factor, "the importance or social value of the activity engaged in by the defendant," is consistent with Justice Lee's public policy argument here. *See* 266 S.W.3d at 365.

73. *See supra* note 12.

opportunity in *Grogan* to extend third party liability to inspectors who fail to adequately warn their clients of potential harms. Particularly given the notion that there is virtually no case law on negligent home inspections, as well as the fact that there are two diverging claims that may be brought, this ruling does nothing to progress the much-needed debate in this complicated and confusing area of American jurisprudence.

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