

RECEIVED

Jun 19 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No.: 2023-000117

Kathleen M. Rankin,

Appellant,

v.

Palatial Homes, Inc. a/k/a Palatial Homes, LLC n/k/a Palatial Homes Design, LLC; Cesar Castro d/b/a Heritage Plastering, Inc. n/k/a Heritage Plastering & Stucco LLC; CMC Steel Works, Inc.; AMI Ironworks LLC a/k/a American Master Ironworks, LLC; Enaldo Urriola d/b/a Advanced Roofing Services n/k/a Ankon Construction Services, LLC; Kelca Counters, Inc.; John Does 1-20; Cambridge Building, Inc.; Two Brothers Plastering, Inc.; William T. Ruarks d/b/a Ruacon Quality Construction; Jimmy J. Metcalf, Jr. d/b/a Quality Roof Services; Ionut D. Istrate d/b/a Island Plasters LLC; 11 Harrogate Drive Realty Trust; Michael Grondahl; Hilton Head Exterminators, Inc.; and Imperial Pest Controllers, Inc.; Defendants,

of which Hilton Head Exterminators, Inc., is the Respondent.

INITIAL BRIEF OF APPELLANT

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
(843) 814-8181

Charles W. Thomson
Glynn L. Capell
Capell Thomson, LLC
102 Wappoo Creek Dr., Unit 8
Charleston, South Carolina 29412
(843) 501-0423

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES ON APPEAL.....	iv
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW.....	5
ARGUMENT.....	7
I. THE LOWER COURT ERRED IN FINDING THAT “NO EVIDENCE EXISTS” TO SUPPORT APPELLANT’S NEGLIGENCE CLAIM AGAINST RESPONDENT HILTON HEAD EXTERMINATORS, INC.....	7
II. THE LOWER COURT ERRED IN FINDING THAT RESPONDENT HILTON HEAD EXTERMINATORS, INC. DID NOT OWE APPELLANT A DUTY OF CARE.....	9
III. THE LOWER COURT ERRED IN FINDING—AS A MATTER OF LAW—THAT APPELLANT’S DAMAGES WERE CAUSED BY THE INTERVENING NEGLIGENCE OF PRIOR OWNERS.....	11
IV. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT’S IMPLIED WARRANTY CLAIM.....	13
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	16

TABLE OF AUTHORITIES

Cases

Allwin v. Russ Cooper Assocs., Inc., 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019).....6

Bass v. Gopal, Inc., 395 S.C. 129, 716 S.E.2d 910 (2011).....6, 7

Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986).....11

Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).....6

Dawkins v. Sell, 434 S.C. 572, 865 S.E.2d 1 (Ct. App. 2021).....12

Dorrell v. South Carolina Dept. of Transp., 361 S.C. 312, 605 S.E.2d 12 (2004).....11

Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537,
172 S.E.2d 120 (1970).....11

Fleming v. Rose, S.C. 488, 567 S.E.2d 857 (2002).....6, 9

Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013).....12

Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct App. 1983).....13

MacFarlane v. Manly, 264 S.E.2d 838, 274 S.C. 392 (1980).....6

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).....6

Stephens v. CSX Transp., Inc., 415 S.C. 182, 781 S.E.2d 534 (2015).....12

Terlinde v. J.F. Neely, Sr., 275 S.C. 395, 271 S.E.2d 768 (1980).....11

Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011).....5, 6

USAA Property and Cas. Ins. Co. v. Clegg, 661 S.E.2d 791, 377 S.C. 643 (2008).....6, 10

Rules

Rule 56(c), SCRCP.....5

Other Authorities

17A C.J.S. Contracts § 329.....13

STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN FINDING THAT “NO EVIDENCE EXISTS” TO SUPPORT APPELLANT’S NEGLIGENCE CLAIM?
- II. DID THE LOWER COURT ERR IN FINDING THAT RESPONDENT HILTON HEAD EXTERMINATORS, INC. DID NOT OWE APPELLANT A DUTY OF CARE?
- III. DID THE LOWER COURT ERR IN FINDING—AS A MATTER OF LAW—THAT APPELLANT’S DAMAGES WERE CAUSED BY THE INTERVENING NEGLIGENCE OF PRIOR OWNERS?
- IV. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT’S IMPLIED WARRANTY CLAIM?

STATEMENT OF THE CASE

This appeal stems from a negligence action brought by Appellant Kathleen M. Rankin against Respondent Hilton Head Exterminators, Inc. (“HHE”) for its failure to identify and/or address conditions present at her home, which posed a high-risk pathway for termite activity, and later caused and/or contributed to termite infestation of the property. (Second Am. Compl. R. __).¹ In addition to her negligence claim, Ms. Rankin asserts that HHE breached its implied warranty of workmanship as to the inspections it carried out on the property. (R. __). She does not claim that HHE was negligent in its application of chemical pesticide treatment.

A central issue in this appeal is whether the lower court erred in granting HHE’s Motion for Summary Judgment where the parties presented conflicting evidence—from different employees at Department of Pesticide Regulation—as to whether HHE failed to address a high-risk pathway for termite activity during its inspections of the property in violation of the South Carolina Pesticide Control Act.

Motion for Summary Judgment

At the hearing on HHE’s Motion for Summary Judgment, Ms. Rankin presented a report authored on June 24, 2020 by Ms. Kristen Lenox-Rustin, a field investigator for Clemson University’s Department of Pesticide Regulation (“DPR”), based on Ms. Lenox-Rustin’s first-hand inspection of the residence in January of 2020. (Report of Structural Pest Inspection, R. __; Memo in Opp. to Motion for Sum. Judgment, R. __; Hearing Tr., R. __). Ms. Lenox-Rustin found that HHE had failed to address conditions where Exterior Insulation Finishing System (EIFS) stucco was in contact with the ground and that allowing said condition was a violation of the

¹ HHE provided pre-treatment for the 2003-2005 original construction of the home, followed by regular inspections and treatments up until at least April 2012. Ms. Rankin closed on the purchase of the Residence on December 18, 2018.

South Carolina Pest Control Act. (Report, p. 3, R. __).

In addition to the report, Ms. Rankin presented an informational letter from Mr. Ryan Okey, the Pesticide Program Chief at DPR, to William Robertson of HHE, dated January 15, 2021. (Letter, R. __). Mr. Okey's letter expressly referenced Investigator Lenox-Rustin's report and stated, "[T]he following standards for Prevention of Control of Wood Destroying Organisms [Section 27-1085(G)(2)(B)] were not properly completed as required by the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act." (R. __). The letter further stated, "Hilton Head Exterminators failed to address EIFS ground contact. It is a violation of the South Carolina Pesticide Control Act to fail to properly perform the Standards for Prevention or Control of Wood Destroying Organisms. It is hoped that this letter will encourage more caution with future subterranean termite treatments." (R. __).

Despite Ms. Lenox-Rustin's first-hand observation that EIFS stucco was in contact with the ground, and her finding that HHE failed to address this issue in violation of the South Carolina Pesticide Act, and the subsequent letter issued by Mr. Okey affirming the same, Respondent HHE argued, "There is no genuine issue of material fact as to Plaintiff's negligence/gross negligence because no evidence exists regarding HHE's termite pretreatment and subsequent warranty inspections," and, "No evidence exists showing that HHE violated any state laws, regulations, standards of care, or industry standards as they relate to pest control operation." (Resp. Memo in Support of Summ. Judgment, p. 7, R. __).

In support of its Motion for Summary Judgment, HHE submitted an affidavit from Mr. Kevin DeLorenzo, Structural Program Manager for DPR, which acknowledged Ms. Lenox-Rustin's findings and Mr. Okey's letter, but then stated he could have also arrived at a different conclusion, stating, "As DPR Structural Program Manager, I would have *also* agreed not to issue

an informational letter in this case due to the lack of available records.” [Emphasis added] (Affidavit, pp. 2-3, R. __). Mr. DeLorenzo’s affidavit states that HHE destroyed records relating to services it provided at the home, but that such destruction was not a violation of DPR regulations for records maintenance. (Affidavit, p. 3, para. 6, R. __). Mr. DeLorenzo, who is not a qualified legal expert, then opined, “From a regulatory standpoint, HHE does not owe Plaintiff Kathleen Rankin a duty or standard of care because HHE cancelled its warranty on the property six (6) years and eight (8) months prior to her purchase of the property.” (Affidavit, p. 4, para 18, R. __).

Mr. DeLorenzo’s affidavit does not refute the fact that Ms. Lenox-Rustin observed EIFS stucco in contact with the ground—itsself evidence that HHE had not properly addressed this high-risk pathway for termite activity during its inspections. Additionally, his affidavit does not withdraw nor does it amend Ms. Lenox-Rustin’s report or Mr. Okey’s letter. Rather, Mr. DeLorenzo appears to draw a different conclusion than Ms. Lenox-Rustin and Mr. Okey based on his understanding of the facts.²

After submission of briefs by both parties and a hearing on HHE’s Motion for Summary Judgment, the lower court eventually issued an Order granting HHE’s Motion, finding that (1) No evidence exists regarding the conditions at the residence, whether conditions were waived, or any alleged deficiencies in HHE’s pretreatment and inspection at the residence, (2) Plaintiff’s claim fails as HHE did not owe Plaintiff a duty of care, and—that as a matter of law—Plaintiff’s damages were caused by the intervening negligence of prior owners, and that (3) Summary Judgment on Plaintiff’s Implied Warranty claim was appropriate because Plaintiff had failed to submit evidence in support of the claim. (Amended Order, R. __; Memo in Support, R. __; Memo

² Unlike Ms. Lenox-Rustin, Mr. DeLorenzo did not perform the field inspection of the property nor personally observe that EIFS stucco was in contact with the ground.

in Opposition, R. __); Hearing Tr., R. __).

Relevant Procedural History

On March 26, 2020, Ms. Rankin initiated the present lawsuit in Beaufort County, South Carolina, against the general contractor and several subcontractors who constructed and/or provided services to a home she purchased in the Wexford Plantation neighborhood of Hilton Head Island. (Summons and Compl., R. __). On October 19, 2020, Ms. Rankin filed an Amended Summons and Complaint, wherein she named Hilton Head Exterminators, Inc. as a Defendant, asserting claims against it for negligence and breach of implied warranty of workmanship. (Am. Summons and Compl., R. __). On December 8, 2020, Hilton Head Exterminators, Inc. filed its Answer to the Amended Complaint, generally denying the allegations and raising various affirmative defenses. (Answer, R. __).

On April 22, 2021, Ms. Rankin filed a Motion for Leave to file a Second Amended Complaint for purposes of adding an additional defendant to the lawsuit. (Motion, R. __). HHE and the other named defendants consented to the amendment by way of Consent Order, entered on May 17, 2021. (Consent Order, R. __).

On May 20, 2021, Ms. Rankin filed her Second Amended Complaint. (Second Am. Complaint, R. __). HHE filed its Answer to Plaintiff's Second Amended Complaint on May 19, 2021, again generally denying the negligence and breach of implied warranty claims against it and raising various affirmative defenses. (Answer to Second Am. Compl., R. __). On June 12, 2022, HHE filed a Motion for Summary Judgment, simply stating, "There is no genuine issue as to any material fact for the negligence and breach of implied warranty of workmanship causes of action asserted by Plaintiff against Defendant." (Motion for Summary Judgment, R. __). HHE did not attach any affidavits in support of its motion at the time of its filing as required by Rule

6(d), SCRCP.

On August 11, 2022, four days before the scheduled motions hearing, HHE filed its Memorandum in Support of its Motion for Summary Judgment, attaching certain affidavits in support of its Motion. (Memo in Support, R.__). On August 12, 2022, Ms. Rankin filed her Memo in Opposition to Motion for Summary Judgment. (Memo in Opp., R.__).

On August 15, 2022, a hearing on HHE's Motion for Summary Judgment was held before the Honorable Bentley D. Price in Beaufort County, South Carolina. (Transcript, R.__). On August 31, 2022, the Court entered an Order Granting Hilton Head Exterminators, Inc.'s Motion for Summary Judgment. (Order, R.__).

On September 7, 2022, Ms. Rankin filed a Motion to Alter or Amend Order Granting Summary Judgment (Motion, R.__). On September 14, 2022, HHE filed its Response in Opposition to Plaintiff's Motion to Alter or Amend. (Response in Opp. R.__). On December 28, 2022, the Court entered an Amended Order Granting Hilton Head Exterminators, Inc.' Motion for Summary Judgment. (Amended Order, R.__.)

On January 25, 2023, Ms. Rankin timely filed her Notice of Appeal. This Appeal follows.³

STANDARD OF REVIEW

“When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c).” *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). “In a negligence case, where the burden of proof is a preponderance of

³ As set forth in the Complaint, Appellant brought construction defect claims against the contractors who constructed her house and brought failure to disclose claims against those who sold the house to her. All of the parties have settled with Appellant. The only parties remaining at the time of the Motion for Summary Judgment were two pest control contactors, HHE and Imperial Pest Controllers, Inc. Imperial Pest Controllers, Inc. provided subsequent pest control and CL100 services. Imperial did not join HHE in its Motion for Summary Judgment.

the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment.” *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011). “The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Fleming v. Rose*, S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). “[S]ummary judgment is a ‘drastic remedy’ which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” *Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326 (Ct. App. 2003), citing *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003) (other citations omitted).

“Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Turner v. Milliman*, 392 S.C. at 122, 708 S.E.2d at 769. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *USAA Property and Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 796, 377 S.C. 643 (2008). “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” *Id.* See also, *MacFarlane v. Manly*, 264 S.E.2d 838, 840, 274 S.C. 392, 395 (1980), stating, “Summary Judgment should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable. This is true even when there is no dispute as to the evidentiary facts if there is a dispute as to the conclusion to be drawn therefrom.”

“At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 11, 825 S.E.2d 707, 712 (Ct. App. 2019) (citations omitted).

ARGUMENT

I. The Court erred in finding that “no evidence exists” to support Appellant’s negligence claim against Respondent Hilton Head Exterminators, Inc.

The lower court granted HHE’s Motion for summary judgment on the stated ground that “no evidence exists regarding conditions at the residence, whether conditions were waived, or any alleged deficiencies in HHE’s pretreatment and inspection at the residence.” (Order, p. 4, R.___). This finding is both factually incorrect and unsupported by the record.

First, as set forth above, Appellant presented a Report of Structural Pest Inspection from Department of Pesticide Regulation Investigator Kristen Lenox-Rustin, documenting Ms. Lenox-Rustin’s first-hand observations that EIFS stucco was in contact with the ground, thereby presenting a high-risk pathway for termite activity. (Report, R.___). HHE readily admits that it provided a termite warranty on the home from June 1, 2005 to April 27, 2012, stating “HHE provided a termite warranty for prior owners of the Residence from June 1, 2005, to April 27, 2012.” (Memo in Supp. of Summ. Judgment, p. 1, R.___). “In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment.” *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011). Here, the documented first-hand observation by a DPR investigator that EIFS stucco was in contact with the ground is more than a mere scintilla of evidence that HHE failed to address this issue during its engagement at the property from June 1, 2005 to April 27, 2012. As the report expressly states, “Hilton Head Exterminators failed to address EIFS ground contact.” (R.___). At minimum, the documented observations contained in the report undermine the lower court’s conclusion that “no evidence exists regarding conditions at the residence.” (Order, p. 4, R.___).

Second, as noted above, Ms. Rankin also presented an informational letter from Mr. Ryan Okey, the Pesticide Program Chief at DPR, to William Robertson of HHE, dated January 15, 2021. (Letter, R.__). Mr. Okey's letter expressly referenced Ms. Lenox-Rustin's report and stated, "[T]he following standards for Prevention of Control of Wood Destroying Organisms [Section 27-1085(G)(2)(B)] were not properly completed as required by the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act." (R.__). The letter further stated, "Hilton Head Exterminators failed to address EIFS ground contact. It is a violation of the South Carolina Pesticide Control Act to fail to properly preform the Standards for Prevention or Control of Wood Destroying Organisms. It is hoped that this letter will encourage more caution with future subterranean termite treatments." (R.__).

Mr. Okey's letter, like Ms. Lenox-Rustin's report, offers more than a mere scintilla of evidence that HHE was negligent in failing to address the EIFS stucco ground contact condition during its many years of engagement at the property. The lower court's conclusion that "no evidence exists" regarding any alleged deficiencies in HHE's inspections at the residence is directly undercut by the Ms. Lenox-Rustin's report and Mr. Okey's letter, both of which identify the violative conditions at the property and note HHE's failure to address them.

Third, HHE's inability to produce documentation demonstrating whether any prior owners waived the EIFS-ground-contact condition at the residence has no bearing on summary judgment, particularly where HHE destroyed all of its records relating to services it rendered at the property. The fact that HHE may have been statutorily authorized to destroy its records, does not preclude it from saving documentation, which could later absolve it from liability. While HHE's failure to follow best practices as to records retention may have a bearing on its ability to defend itself, it has zero bearing on a motion for summary judgment, where "[t]he evidence and

all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Fleming v. Rose*, S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). HHE should not be rewarded where it is the architect of its own dilemma.

II. The lower court erred in finding that HHE did not owe Appellant a duty of care.

The lower court granted HHE’s Motion for Summary Judgment, finding—as a matter of law—that the HHE did not owe Appellant a duty of care. (Order, p. 6, R.__). As a basis for this decision, the court reasoned, “there is no genuine issue of material fact as to Plaintiff’s negligence/gross negligence claim because no evidence exists regarding HHE’s termite pretreatment and subsequent warranty inspections.” (Order, p. 7, R.__). Again, the lower court’s analysis disregards three things: First, HHE readily admits that it provided a termite warranty for prior owners of the Residence from June 1, 2005 to April 27, 2012. (Memo in Support, p. 1, R.__). Second, Appellant presented a Report of Structural Pest Inspection from DPR Investigator Kirsten Lenox-Rustin documenting her first-hand observations that EIFS stucco was in contact with the ground; evidence that HHE had failed to address this issue at any time during its six year and eleven-month involvement with the property. This official DPR report—which has neither been withdrawn nor amended since—expressly states, “Hilton Head Exterminators failed to address EIFS ground contact.” (R.__). Third, Ms. Rankin presented a letter from the Pesticide Program Chief at DPR, expressly affirming Investigator Lenox-Rustin’s findings and advising HHE that “standards for Prevention of Control of Wood Destroying Organisms were not properly completed as required by the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act.” (R.__). This letter, which has also neither been amended nor withdrawn, expressly states, “Hilton Head Exterminators failed to address EIFS ground contact.” (R.__).

“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *USAA Property and Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 796, 377 S.C. 643 (2008). Respondent’s contention that “no evidence exists showing that HHE violated any state laws, regulations, standards of care, or industry standards as they relate to pest control” is directly contradicted by the aforementioned report and letter. (Order, p. 7, R.__). At minimum, the evidence presented by Appellant creates a genuine issue of material fact as to whether HHE was negligent in carrying out its inspections of the property.

Moreover, even if this Court were to assume *arguendo* that no genuine issue of material exists, summary judgment would *still* not be appropriate because a dispute exists as to the conclusions or inferences to be drawn from the evidence in this case. “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” *USAA Property and Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 796, 377 S.C. 643 (2008). Here, it appears DPR Investigator Lenox-Rustin and DPR Pesticide Program Chief, Mr. Okey, have both drawn different conclusion from the investigation of the subject property than DPR Structural Manager David DeLorenzo. It was error for the lower court to grant summary judgment where different employees of the same regulatory agency appear to diverge in their conclusions.

The lower court also erred in finding that HHE does not owe Appellant a duty of care because “HHE never had any contact or relationship with Plaintiff regarding termite services at the Residence.” (Order, p. 7, R.__). It is notable that the lower court fails to cite any caselaw to support this conclusion. However, the lower court’s finding, which appears to focus on a lack of privity between HHE and Ms. Rankin, runs in direct contravention to the well-settled holding in

Dorrell v. South Carolina Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12 (2004), which specifically states:

A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. *Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986) (citing *Terlinde v. J.F. Neely, Sr.*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980)). The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care. *Id.* (citing *Edward's of Byrnes Downs v. Charleston Sheet Metal Co.*, 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970)). This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs. See *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770 (stating that the “key inquiry” in determining whether to impose liability is “foreseeability, not privity”).

Here, HHE failed to address the EIFS stucco ground contact condition at any time during its six year and eleven-month involvement with the property. As a result, the termites had a pathway into the wall cavities of the home. It is foreseeable that this failure, which is a direct violation of the South Carolina Pesticide Act, would have a damaging effect on the home and affect subsequent purchasers of the property. It was error for the lower court to grant summary judgment where HHE breached its common law duty to avoid damage or injury to foreseeable plaintiffs.

III. The lower court erred in finding—as a matter of law—that Appellant’s damages were caused by the intervening negligence of prior owners.

The lower court found that Appellant’s damages were caused by prior owners of the residence because “apparently no termite inspection or treatment services were provided” for several years following HHE’s engagement with the property. (Order, p. 8, R.__). Per the lower court, this alleged break in services is an intervening and superseding cause of Plaintiff’s damage, excusing HHE from any liability, including its documented failure to properly address

the EIFS-ground condition at any point during its nearly seven-year involvement with the property. (Order, p.8, R.__).

“The defense of intervening third-party negligence ordinarily presents a question of fact for the jury and only rarely becomes a question of law for the court to determine.” *Dawkins v. Sell*, 434 S.C. 572, 582, 865 S.E.2d 1, 6 (Ct. App. 2021). “To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury.” *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013). “In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury.” *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 781 S.E.2d 534 (2015).

In the present case, HHE’s failure to note the EIFS ground-contact condition left a pathway through which termites could travel to the property. As the DPR Report specifically states, “Formosan subterranean termite, like other subterranean termites, must maintain contact with the ground in order to obtain moisture.” (Report, p. 2, R.__). “Hilton Head Exterminators failed to address EFIS ground contact.” (Report, p. 3, R.__). It is clear that HHE’s failure to address this issue directly contributed to the damages present at the home. Minimally, a material question of fact exists as to the degree to which HHE’s documented failures contributed to the termite infestation and damages. It was error for the Court to find—as a matter of law—that a mere break in services, is an intervening and superseding cause of Appellant’s damages.

IV. The lower court erred in granting summary judgment as to Appellant's Implied Warranty claim.

The lower court granted summary on Appellant's Implied Warranty claim on the stated ground that "Plaintiff failed to submit any evidence that HHE breached this alleged cause of action." (Order, p. 9, R. __). This finding is, again, directly contradicted by the record. As set forth in Appellant's Memorandum in Opposition to Summary Judgment, "As a general rule it may be said that where a person holds himself out as especially qualified to perform work of a particular character there is an implied warranty that the work shall be done in a reasonably good and workmanlike manner and that the completed product or structure shall be reasonably fit for its intended purposes." 17A C.J.S. Contracts § 329. (Memo in Opposition, p. 7, R. __). "It is settled law that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes to do shall be of proper workmanship and reasonably fitted for its intended purpose." *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct App. 1983).

In the present case, it is undisputed that HHE is a licensed pest control operator, which represents to the public that it is capable of performing professional pest control services. Appellant asserts that HHE breached its implied warranty of workmanship when it failed to address the EIFS stucco ground-contact condition at any point during its six year and eleven-month involvement with the property. As set forth above, this failure is documented in the DPR report issued by Investigator Lenox-Rustin and the letter issued by Pesticide Program Chief Ryan Okey. It was error for the lower court to grant summary judgment as to Appellant's breach of implied warranty claim where there was evidence to support the claim.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court grant her appeal, reverse the lower court's order granting summary judgment, and remand this case for a trial on the merits. It was error for the lower court to grant summary judgment where Appellant submitted evidence that Respondent Hilton Head Exterminators, Inc. had failed to address a high-risk pathway for termite activity in violation of the South Carolina Pesticide Control Act. Both the Report of Structural Pest Inspection issued by DPR Investigator Lenox-Rustin and the letter issued by DPR Pesticide Program Chief Ryan Okey are more than a scintilla of evidence supporting Appellant's claims. At minimum, the evidence presented by Appellant creates a genuine issue of material fact as to whether HHE was negligent in carrying out inspections of the property.

Even if there was not a dispute as to the evidentiary facts, there is still a dispute as to what inferences can be drawn from the facts making summary judgment inappropriate in this case. Further, HHE owed a duty to properly carry out its professional services. It was foreseeable that its failure to address the EIFS stucco ground contact condition would have a damaging effect on the home and affect subsequent purchasers of the property. Finally, it is settled law that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes to do shall be of proper workmanship and reasonably fitted for its intended purpose. There is more than a mere scintilla of evidence that HHE breached this duty when it failed to address the EIFS stucco ground contact condition at any point during its six year and eleven-month involvement with the property.

[Signature on following page]

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 814-8181
jesse@jessesanchezlaw.com

and

CAPELL THOMSON, LLC

Glynn L. Capell (SC Bar No. 16552)
Charles W. Thomson (SC Bar No. 101471)
102 Wappoo Creek Dr., Unit 8
Charleston, SC 29412
(843) 501-0423

Attorneys for Appellant Kathleen M. Rankin

Mount Pleasant, South Carolina
June 19, 2023

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No.: 2023-000117

Kathleen M. Rankin,

Appellant,

v.

Palatial Homes, Inc. a/k/a Palatial Homes, LLC n/k/a Palatial Homes Design, LLC; Cesar Castro d/b/a Heritage Plastering, Inc. n/k/a Heritage Plastering & Stucco LLC; CMC Steel Works, Inc.; AMI Ironworks LLC a/k/a American Master Ironworks, LLC; Enaldo Urriola d/b/a Advanced Roofing Services n/k/a Ankon Construction Services, LLC; Kelca Counters, Inc.; John Does 1-20; Cambridge Building, Inc.; Two Brothers Plastering, Inc.; William T. Ruarks d/b/a Ruacon Quality Construction; Jimmy J. Metcalf, Jr. d/b/a Quality Roof Services; Ionut D. Istrate d/b/a Island Plasters LLC; 11 Harrogate Drive Realty Trust; Michael Grondahl; Hilton Head Exterminators, Inc.; and Imperial Pest Controllers, Inc.; Defendants,

of which Hilton Head Exterminators, Inc., is the Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Appellant complies with Rule 211(b), SCACR.

[Signature on following page]

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

751 Johnnie Dodds Boulevard, Suite 200

Mount Pleasant, SC 29464

Telephone (843) 814-8181

Facsimile (843) 284-3953

Attorney for the Appellant Kathleen M. Rankin

Mount Pleasant, South Carolina

June 19, 2023