

RECEIVED

Sep 22 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 REPLY 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
REPLY ARGUMENT.....	1
CONCLUSION.....	7
CERTIFICATE OF COMPLIANCE.....	8

TABLE OF AUTHORITIES

Cases

Dawkins v. Sell, 434 S.C. 572, 582, 865 S.E.2d 1, 6 (Ct. App. 2021).....3

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

Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994).....6

Rwe Nukem Corporation v. Ensr Corporation, 644 S.E.2d 730, 373 S.C. 190 (2007).....6

USAA Property and Cas. Ins. Co. v. Clegg, 661 S.E.2d 791, 377 S.C. 643 (2008).....4

Wogan v. Kunze, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005).....1

Rules

Rule 6(d), SCRCP.....4

REPLY ARGUMENT

As a preliminary matter, Respondent HHE’s Brief misrepresents the Record in this case, selectively omitting facts which are essential to this Court’s review. First, Respondent refers to the subject home as an “as is” purchase, intimating that Ms. Rankin purchased the home subject to any and all defects, including the EIFS stucco defect—a defect which HHE indisputably failed to correct at any point during its admitted six-year and eleven-month engagement at the property. A review of the Contract of Sale, however, establishes that “as is” in this case refers to “normal wear and tear” and expressly excludes any structural damage or habitability issues. (Contract of Sale, para 8, R. __). The contract specifically provides that “the structure shall be reasonably sound” and that “[t]he property shall be habitable.” (R. at Ibid). Contrary to HHE’s intimations, the “as is” provision contained in the Contract is subject to these express limitations, which are contained in the provision itself: “‘As is’ means the property shall be conveyed in the condition existing on the Effective Date, *subject to the terms of this Contract.*” (R. at Ibid, emphasis added).

Further, even if the Contract of Sale did not contain these express limitations, which it clearly does, HHE has no standing to enforce the terms of a contract to which it was not a party or third-party beneficiary. “Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract.” *Wogan v. Kunze*, 366 S.C. 583, 604, 623 S.E2d 107, 119 (Ct. App. 2005). Here, Respondent’s Brief attempts to hide behind the misinterpretation of an inapplicable contract to which it was neither a party nor intended beneficiary.

Second, Respondent’s Brief attempts to divert attention away from the central issue in this appeal by focusing on Respondent’s *pretreatment* of the property. (Respondent’s Initial

Brief, p. 7). This is a red herring. The 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. HHE readily admits that it provided a termite warranty for prior owners of the Residence from June 1, 2005 to April 27, 2012. (Respondent's Memo in Support, p. 1, R.__). The Report of Structural Pest Inspection from DPR Investigator Kristin Lenox-Rustin sets forth 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."¹ (Report, emphasis added R.__).

The Pesticide Program Chief at DPR expressly affirmed Investigator Lenox Rustin's findings and advised HHE that "standards for Prevention and 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 official letter, which has also neither been amended nor withdrawn, expressly states, "Hilton Head Exterminators failed to address EIFS ground contact." (Letter, emphasis added, R.__). Here, summary judgment is not appropriate because a genuine issue of material fact exists as to whether HHE was negligent in carrying out its inspections of the property, having failed to address the EIFS ground contact

¹ Respondent's Brief attempts to draw attention away from its own failure address the EIFS ground contact issue during its nearly seven-year engagement at the property by noting that Terminix also received a letter from DPR. This is, again, another diversionary tactic. The fact that Terminix received a similar letter does not absolve HHE of its duty to comply with the South Carolina Pest Control Act and properly carry out its inspection of the subject property during the period in which it was engaged.

during its engagement at the property.

Additionally, summary judgment is not appropriate because a reasonable inference can be drawn from both the official DPR Report and official DPR Letter that HHE's failure to properly address the EIFS-ground condition caused and/or *contributed* to the termite infestation at the property. This is more than just a reasonable inference. As the official DPR Report states, "Formosan subterranean termite, like other subterranean termites, must maintain contact with the ground in order to obtain moisture." (Report, p. 2, R.__). Here, "[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). Viewed in this light, a reasonable inference can be drawn from 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 earlier inspections. Indeed, it would be speculative to assume that the EIFS grade issue had somehow spontaneously appeared after HHE's involvement with the property.

Third, HHE's Brief suggests that the prior owners' failure to renew their termite warranty somehow absolves HHE from its obligation to have properly inspected the property during the time it was engaged. Respectfully, this is not a cogent argument, particularly when it concerns the issue of summary judgment. "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). Here, a material question of fact exists as to *the degree* to which HHE's failures caused and/or 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, particularly where a reasonable inference can be drawn from the evidence that HHE's failure to address EIFS ground contact caused and/or contributed to the extent of termite infestation and damage to the home.

Additionally, Respondent's Brief erroneously contends that that the affidavits submitted in support of its Motion in Support of Summary Judgment are "uncontradicted evidence" and that "No evidence exists showing that HHE violated any state laws, regulations, standards of care, or industry standards as they relate to pest control operators." (Respondent's Brief, p. 4, R. __). Respondent's contention is, again, directly contradicted by the record, as both the official DPR Report and official DPR Letter—the only official DPR documents in the record—establish that HHE violated the South Carolina Pesticide Control Act, failing to address EIFS ground contact at the home. (DPR Report, R. __, Letter, R. __). "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, summary judgment is not appropriate because there is clearly a dispute as to what conclusions can be drawn from the DPR Report and Letter.

Respondent's Brief also conveniently ignores the timing of its affidavits and identification of witnesses. Notably, HHE filed the underlying Motion for Summary Judgment on June 12, 2022, summarily stating, "There is no genuine issue as to any material fact for the negligence and breach of implied warrant of workmanship causes of action asserted by Plaintiff against Defendant." (Motion for Summary Judgment, R. __). However, HHE did not attach any affidavits in support of its motion at the time of its filing as required by Rule 6(d), SCRCPP, which specifically states, "When a Motion is to be supported by Affidavit, the Affidavit shall be served with the motion." (Emphasis added). Instead, HHE waited until August 11, 2022, just four days

(two business days) before the scheduled hearing, to file a Memorandum in Support for Summary Judgment, attaching the subject affidavits.² Accordingly, HHE's contention that "Appellant did not counter the opinions of these experts" is specious at best and undermined by its strategic decision to withhold the affidavits from Appellant in the first place. Respondent's contention that that these affidavits are "uncontradicted evidence" is also directly undermined by the fact that Appellant's attorney submitted both the official DPR Report and official DPR Letter from the Pesticide Program Chief Oakey with the Memorandum in Opposition to Summary Judgment, both of which find that HHE violated the South Carolina Pest Control Act and failed to address EIFS ground contact. (Memorandum, R. __).

Additionally, the mere fact that Mr. DeLorenzo would have "*also* agreed to not issue any letter to HHE" does not change the fact that the Department of Pesticide Regulation did in fact issue an official letter and official report finding that HHE had violated the South Carolina Pest Control Act and failed to address EIFS ground contact at the home. (DeLorenzo Affidavit, para 13, emphasis added R. __). The issuance of these official DPR documents, even when taken alone, creates a material issue of genuine fact as to whether HHE was negligent in carrying out its inspection of the property. Certainly, a reasonable inference can be drawn that HHE's failure to address EIFS ground contact caused and/or contributed to the termite infestation and damages.

Finally, 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. In fact, "Waiver is a question of fact for the finder of fact," and, therefore, clearly

² Dr. Nolan's affidavit had been obtained on August 3, 2022, but then withheld until the 11th. (Affidavit, R. __). Additionally, Mr. DeLorenzo's affidavit was obtained on August 9, 2022, but then also withheld for a few days. (Affidavit, R. __).

not a matter that is appropriate at the summary judgment stage of litigation. See *Rwe Nukem Corporation v. Ensr Corporation*, 644 S.E.2d 730, 373 S.C. 190 (2007), citing *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). As stated in Appellant's Brief, 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).

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 create 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, as set

forthin Appellant's Brief, 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 a genuine issue of material fact as to whether 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. This case was not appropriate candidate for summary judgment and deserves a trial on the merits.

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
September 22, 2023

RECEIVED

Sep 22 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.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Reply 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

September 22, 2023

RECEIVED

Sep 22 2023

SC Court of Appeals

THE 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 whom Hilton Head Exterminators, Inc., is the Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served Appellant Kathleen M. Rankin's Initial Reply Brief via electronic mail on Counsel for Respondent Hilton Head Exterminators, Inc., Stephen Kozick, Esquire, at his AIS-designated email address (skozick@kernodlelaw.com) on September 22, 2023.

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South

Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), a copy of the aforementioned email correspondence to counsel is attached.

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez, Esquire (SC Bar No. 101906)

751 Johnnie Dodds Boulevard, Suite 200

Mount Pleasant, SC 29464

jesse@jessesanchezlaw.com

(843) 814-8181

Attorney for Appellant Kathleen M. Rankin

Mount Pleasant, South Carolina
September 22, 2023



From: Jesse Sanchez jesse@jessesanchezlaw.com 
Subject: Rankin v. Hilton Head Exterminators, Inc. 2023-000117
Date: September 22, 2023 at 5:21 PM
To: Steve Kozick skozick@kernodlelaw.com
Cc: Charlie Thomson CThomson@capellthomson.com, Glynn Capell GCapell@capellthomson.com

Good afternoon Steve,

Attached for service please find Appellant's Initial Reply Brief and corresponding Cover Letter, both of which are being filed momentarily with the South Carolina Court of Appeals via OneDrive electronic submission.

Regards,

Jesse

--

PLEASE NOTE WE HAVE A NEW ADDRESS:

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
Office: (843) 804-4753
Direct: (843) 814-8181
Fax: (843) 284-3953
jesse@jessesanchezlaw.com

CONFIDENTIALITY NOTICE

This electronic mail transmission and any accompanying documents constitute information belonging to the sender and may be confidential and legally privileged. This information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, any disclosure, copying, distribution, or action taken in reliance on the contents of the information contained in this transmission is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone at (843) 814-8181 and delete the message. Thank you.

2023-000117 - Rankin - Letter
Rankin...23.pdf to Kitc...23.pdf
170 KB 102 KB

September 22, 2023

VIA ONEDRIVE ELECTRONIC SUBMISSION

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211



RECEIVED

Sep 22 2023

SC Court of Appeals

RE: Kathleen M. Rankin, Appellant v. Hilton Head Exterminators, Inc,
Respondent. Appellate Case No. 2023-000117

Dear Ms. Kitchings:

Enclosed for filing please find the following:

- (1) Appellant Kathleen M. Rankin's Initial Reply Brief, and
- (2) Proof of Service.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

Enclosures (as stated)

Cc: Glynn L. Capell, Esq.
Charles W. Thomson, Esq.
Stephen M. Kozick, Esq.

THE LAW OFFICE OF JESSE SANCHEZ, LLC

751 Johnnie Dodds Blvd., Suite 200, Mount Pleasant, SC 29464 P: 843.814.8181 F: 843.284.3953
jesse@jessesanchezlaw.com jessesanchezlaw.com