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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No.
2019-000797

James E. Carroll, Jr., Appellant,
v.

Isle of Palms Pest Control, Inc., SPM Management Company, Inc.
and Terminex Service, Inc., Defendants

Of which Isle of Palms Pest Control, Inc. and SPM
Management Company, Inc. are Respondents.

**APPELLANT'S PETITION FOR REHEARING
AS TO AUGUST 9, 2023 ORDER**

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, James E. Carroll, Jr. (“Carroll”) hereby files this Petition for Rehearing as to this Court’s Order issued on August 9, 2023 (the “Order”). In this Petition, defined terms from Carroll’s prior brief, including those for Isle of Plams Pest Management, Inc. (“IOP”) and SPM Pest Management Company, Inc. (“SPM”) are also used. Carroll incorporates the facts and arguments from his prior briefs as well as the references to the Record on Appeal.

I. The Court should grant the Petition for Rehearing to address its misapplication and expansion of the economic loss rule.

In the Order, the Court has, without proper legal basis, misapplied and greatly expanded the economic loss rule to completely bar; 1) tort claims involving service contracts, where no product was sold; 2) tort claims in which damages are not to any product provided but are instead damages to other property; and 3) tort claims supported by breaches of clear, independent, non-contractual duties. For the reasons set forth below, the Court should reconsider its opinion and reverse the Circuit Court’s granting of Summary Judgment.

A. The economic loss rule does not apply to a service contract.

The Court erred in the Order by holding that Carroll’s negligence claim was barred by the economic loss rule. Under well-settled South Carolina precedent, the economic loss rule applies to *defective product claims*. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) (“The economic loss rule is a creation of the modern law of products liability. Under the rule, there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where there is damage done to other property or personal injury.”) (internal citations omitted); *Sea Side Villas II Horizontal Prop. Regime v. Single Source Roofing Corp.*, 64 F. App’x 367, 373 (4th Cir. 2003) (“South Carolina’s economic loss rule

provides that, where a buyer's expectations in a sale are frustrated because the product does not work properly, the buyer's remedies are limited to those prescribed by the law of contract.”); *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 703 (D.S.C. 2004) (“In particular, the question of whether the doctrine even applies to service contracts remains largely unanswered.”); *Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 128 (4th Cir. 2000).

“Most fundamentally, the economic loss rule distinguishes between transactions involving the sale of goods, where contract law protects economic expectations, and transactions involving the sale of defective products to individual consumers, whose injuries are traditionally remedied by the law of torts.” *Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 128 (4th Cir. 2000).¹

In this case, no product was sold, not even the bait station, which under the agreement remained the property of the company supplying them to the defendant.

In *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993), a district court case cited by Defendants, the court clearly discusses the doctrine in the context of the sale of products in commercial transactions versus the sale of products to individual consumers. Providing one definition of economic loss, the District Court cites the Illinois Supreme Court:

"Economic loss" has been defined as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property, as well as the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.

Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443, 61 Ill. Dec. 746 (Ill. 1982).

¹ In *Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 128 (4th Cir. 2000), the court limited the party to contractual remedies because the contract involved the delivery of both goods and services which were classified as a sale of goods governed by the UCC where the “predominant thrust” is “a transaction of sale, with labor incidentally involved.

Myrtle Beach, a corporation, supplied and stored fuel for the Air Force at the Myrtle Beach Air Force Base. It purchased an air eliminator from the defendant company, which ruptured and caused fuel to spill on to the Base premises. The issue was whether the defendant product manufacturer liability was limited to contractual remedies. *Id.* The opinion discusses the “economic loss doctrine” in that context. “This “economic loss” doctrine therefore bars tort claims and limits a plaintiff’s recovery to those contractual remedies provided by the Uniform Commercial Code where the suit arises out of a commercial transaction and the loss incurred is only to the product itself.” *Id.*

The district court bases its conclusion on the commercial nature of the transaction (it involved sale of a product in a commercial setting between merchants versus a sale to individual consumer purchasers), and the nature of the loss:

Initially, the court observes that a recurrent theme throughout these cases, and indeed, the economic loss doctrine generally, is that if sophisticated parties to a commercial transaction have negotiated a contract, as here, and the product injures only itself and not other property belonging to the plaintiff, also as here, contract law, specifically the Uniform Commercial Code, and not tort law, provides the exclusive rights and remedies of the parties.

...

Under *Seely and Kaiser Steel Corp.*, no tort claim lies: (1) this is a commercial transaction; (2) the parties have relatively equal bargaining power; (3) the air eliminator was specially designed at Myrtle Beach’s instructions; and (4) the parties had a contract that allocated their risk of loss.

None of those factors are present in this case.

The transaction between Carroll and SPM and IOP were transactions involving the placement and monitoring of bait stations, both functions clearly being the provision of services.

There is no previous South Carolina case applying the economic loss rule to a claim arising from

the performance of a service and the Court's Order has impermissibly redefined the economic loss rule in South Carolina.

B. Even if the economic loss rule applies to a service contract, the claim is not for damage to any product delivered by the Defendants, and instead involves damages to Carroll's home.

By definition, the economic loss rule applies where the damage sought to be recovered are "only to the product itself". *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). Carroll's case is not and has never been about damage to any product *provided* (since no product was ever sold) by IOP and SPM. Rather, as established by the record and acknowledged in the Order, the damages for which Carroll seeks recovery are damages caused to his home. *James E. Carroll, Jr. v. Isle of Plams Pest Control, Inc., SPM Manamgent Company, Inc. and Terminex Services, Inc.*, Appellate Case No. 2019-000797, Opinion No. 6011, August 9, 2023. With its Order, the Court has impermissibly expanded the scope and effect of the economic loss rule by applying it to *any* damage suffered by a Plaintiff.

II. The Court should grant the Petition for Rehearing because Respondents owed a duty to the Plaintiff that existed beyond the contract.

IOP and SPM owed duties to the Plaintiff that arose completely independently of any contract between them and Carroll. South Carolina courts have allowed negligence claims to proceed against those providing services pursuant to contracts, including accountants, engineers and attorneys, based on alleged breaches of their professional duties to plaintiffs. The Order cites to *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995). In *Griffin*, a contractor filed a negligence claim against an engineer, and the trial court improperly dismissed the negligence claim on the grounds the loss was purely economic. The Supreme Court overturned holding that the engineer owed a duty to the contractor

not to negligently design or supervise. If there were a contract between the contractor and engineer, the same duties would apply and it would be an absurd result to hold there are greater duties owed to one with whom you have no contract, than to one with whom you do have a contract. Yet that is what the Order holds.

In prior briefing, and in the Court of Appeals own opinion, the record reflects that, in addition to contractual obligations relating to bait stations, SPM and IOP owed and violated numerous duties created by regulations and industry standards, not by contract. Regulations promulgated by the SCDPR (*27-1085 Standards for the Prevention or Control of Wood-destroying organisms*) require that “[e]very person performing either preventative measures against or control measures for termites and other wood destroying organisms (both insects and fungi) on the property of another must follow at a minimum the methods and procedures specified in the following codified paragraphs of this regulation.” SCDPR 27-1085(A).

SCDPR 27-1085(B)(2) makes a breach of the contract a dual regulatory violation, wherein it states as follows: “Treatment and inspection must be performed in accordance with these regulations and with the terms of the written agreement or contract for as long as the contract is valid.” (emphasis added). Thus, by definition, a breach of the contract is a breach of the regulations.

The Regulations require that a termite prevention company/applicator maintain records for two (2) years, or for the duration of the contract, whichever is longer. SCDPR 27-1083(C)(3)(b). Furthermore, the Regulations require that all chemicals used on a property must be used according to the label instructions, 27-1085(D), and documented with a special Termiticide Disclosure Form specified by the SCDPR, 27-1085(D)(6).

Finally, when SPM and IOP undertook the non-contractual duty of using termiticide (*which was expressly not created by the contract*) IOP and SPM had regulatory duties under SCDPR 27-1085, along with all other applicable industry standards.

The testimony offered by Carroll's experts established that all of those non-contractual duties had been breached by IOP and SPM. Maxcy Nolan, Ph.D. ("Dr. Nolan"), testified about the many ways in which SPM/IOP/Mr. Sottile owed and violated duties created by SCDPR regulations while undertaking both contractual and extra-contractual activities regarding termite prevention at the Property. We discuss some of the numerous examples in his testimony here. Dr. Nolan testified that SPM did not inspect the bait stations; sent an annual bill only; and failed to keep bait station monitoring records; he also testified that he worked on another case where Mr. Sottile committed the same violations. Rec. on App. 0677-0678. SCDPR 27-1083 requires that records on treatment or bait station monitoring be kept for two years, or as long as the contract is in place. Dr. Nolan testified that pest control operators must monitor bait stations quarterly, keep records, show hits (evidence of termites), and return to the Property to monitor them. Upon reading the depositions for SPM and IOP, he opined that they did not correctly monitor the Property. Rec. on App. 0678-0679.

The technician for IOP failed to properly drill the slabs; failed to properly trench and treat around the perimeter of the building; and failed to perform inspections. Rec. on App. 0681-0683. The label directions for the Termidor chemical that Mr. Sottile used required drilling and trenching; and IOP did not do that. Rec. on App., 0689-0690.

James Wright, an expert in structural entomology and regulatory entomology, also opined on the several ways in which SPM and IOP had regulatory duties that they violated. In particular, he testified regarding the following: regulatory violations of SPM and IOP; IOP and SPM

violations of the standard of care for termiticide use, bait station use, and bait station monitoring at the Property, including quarterly record-keeping; patterns of conduct of SPM and IOP as to acts and omissions; and termiticide use and regulatory compliance with termiticide use including record-keeping. Rec. on App., 0252.

Cecil Hernandez, who works for the South Carolina Department of Pesticide Regulation, investigated whether Terminix was in violation. While he did not find any violations by Terminix, he opined that if Mr. Sottile was truthful in what he said he did in terms of termiticide treatment, that Mr. Sottile's actions would not have been to standard. Rec. on App., 0170.

These transcripts show a plethora of testimony as to the regulation violations of SPM and IOP, and they show that, by definition, all activities related to the prevention of termites by pest control applicators involves both the duty to comply with regulations and industry standards as well as a duty to comply with private contracts.

In this case, notwithstanding those duties owed to Carroll by SPM and IOP, which are in addition to and independent of any bait station contractual obligations, the Court in its Order, holds that Carroll has no right to assert a tort claim for a clear breach of those duties *because of* the bait station contract. Again, that is an absurd result of the Order and one that was likely not intended by the Court.

III. The Court should consider Carroll's memorandum and exhibits.

While the Court acknowledged that it reviewed all of Carroll's submissions in reaching its opinion, this Petition would not be complete without a request that the Court revisit its conclusion that the Trial Court was within its discretion with respect to Carroll's submissions.

No Court has discretion to change the facts of a case, whether it be the substantive facts or the procedural history of a case. In this instance, the Trial Court expressly acknowledged that it received and reviewed Carroll's submissions. Rec. on App., 1052. The Court then issued an order saying that opposition materials had not been filed. Rec. on App., 0008.

The Trial Court, like this Court, considered and found Carroll's materials unpersuasive or lacked merit. However, it was an abuse of discretion for the Trial Court to change the procedural history of the case by saying materials it saw and considered were not filed and were therefore disregarded.

CONCLUSION

For the foregoing reasons, the Court of Appeals should grant this Petition for Rehearing.

s/ Robert T. Lyles, Jr.

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PROOF OF SERVICE

I certify that I have served a copy of Appellant’s Petition for Rehearing on counsel for the Respondents by electronic mail to the following addresses:

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September 5, 2023

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Re: *James E. Carroll, Jr. vs. Isle of Palms Pest Control, Inc.*
Appellate Case No. 2019-000797

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies each of Appellant's Petition for Rehearing and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of \$50.00 to cover the required filing fee.

Thank you, and with kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw

Enclosures

cc: Trent M. Kernodle, Esquire
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