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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 6011 (S.C. Ct. App. filed August 9, 2023)
Appellate Case No. 2019-000797

James E. Carroll, Jr. ..... Appellant/Petitioner,

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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Introduction

Petitioner James E. Carroll, Jr. (Carroll) respectfully petitions the Court for a writ of certiorari to review the Court of Appeals' opinion issued August 9, 2023, affirming the circuit court's ruling in favor of Isle of Palms Pest Control, Inc. (IOP Pest Control) and SPM Management Company, Inc. (SPM) (collectively, Respondents). *See Carroll v. Isle of Palms Pest Control et al.* Op. No. 6011 (S.C. Ct. App. filed August 9, 2023) (Opinion). Certiorari should be granted in full for the reasons set forth below.

Certificate by Counsel

The Court of Appeals finally ruled on Appellant's Petition for Rehearing on September 21, 2023.

Questions Presented for Review

I. **Whether the Court of Appeals Erred By Affirming the Circuit Court's Rulings Applying the Economic Loss Rule?**

II. **Whether the Court of Appeals Erred by Affirming the Circuit Court's Grant of Partial Summary Judgment on Plaintiff's Negligence Claims.**

III. **Whether the Court of Appeals Erred In Limiting The Plaintiff's Contract Claim.**

Statement of the Case

A. Procedural History

Carroll commenced this action in November 2015 and filed a Second Amended Complaint on July 27, 2016. Carroll alleged causes of action for Negligence and Breach of Contract/Warranty against IOP, SPM, and Terminix Services, Inc.("Terminix"), which is no longer in the lawsuit and not a part of the appeal. Carroll asserted claims for breach of contract and negligence and sought compensatory damages. Trial was set for a date certain trial on February 19, 2019 before the

Honorable Roger Young. As Carroll was preparing for a February 19, 2019 trial date, SPM moved for partial summary judgment as to Carroll's negligence claims. No hearing was scheduled before trial was to begin. On February 18, 2019, the day before trial was scheduled to begin, Carroll emailed a Memorandum in Opposition to SPM's Motion for Partial Summary Judgment including Exhibits A through T and a copy of S.C. Department of Pesticide Regulations to Judge Young's law clerk and all counsel. Carroll also emailed the Court a pre-trial brief, a motion *in limine* and proposed *voir dire*.

The Court held a hearing on SGM's motion two days later, on February 20, 2019, during which, for the first time, IOP Pest stated it joined in SPM's motion on the same grounds. (R. pp. 68, 1044). During the hearing, Judge Young stated that he considered the record including the exhibits in opposition and requested Respondents' counsel prepare a written order. (R. p. 1052).

The circuit court issued a written order granting Respondents' motion for partial summary judgment file-stamped on February 25, 2019 ("Order Granting Partial Summary Judgment"). (R. p. 2). Carroll then filed a Motion for Reconsideration or to Alter or Amend Judgment ("Motion for Reconsideration") on March 1, 2019. On March 29, 2019, SPM filed a Response in Opposition to Plaintiff's Motion to Alter or Amend ("Response"), and IOP joined in SPM's Response on April 1, 2019. On April 18, 2019, Judge Young signed an Order Denying Plaintiff's Motion for Reconsideration ("Order Denying Reconsideration"), which was filed on April 23, 2019. Carroll filed a Notice of Appeal on May 10, 2019.

The Court of Appeals affirmed the circuit court's order by written opinion filed on August 9, 2023. Carroll timely petitioned the Court of Appeals for rehearing on September 5, 2023[1]. The Court of Appeals denied the petition for rehearing by order entered September 21, 2023.

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[1] An Order extending the deadline for serving and filing the petition until September 5, 2023 was filed on August 25, 2023.

B. Facts

For more than 10 years, Carroll hired the same local pest control company to prevent a termite infestation at his Isle of Palms home. Beginning in 2003, Carroll hired IOP Pest Control, owned by Vincent Sottile, Jr., to treat and inspect his home for termites. Carroll paid the annual fee to maintain this service every year from 2004 to 2013. IOP Pest Control and subsequently SPM— a successor company Mr. Sottile also owned— treated and inspected the property from 2003 until 2013 when Terminix purchased SPM Pest Management in May 2013. (R. pp. 86, 95). In January 2014, a Terminix inspector discovered substantial live termites and termite damage at the Property. (R. pp. 60 - 63).

IOP Pest Control's initial service agreement was for installation and maintenance of a "Exterra Termite Interception and Baiting System" (R. pp. 55-56) for the placement of bait stations and monitoring of the bait stations. This was the agreement Vincent Sottile signed and gave to Carroll in 2003. (R. p. 65). Sottile testified he was not convinced about the baiting system — in fact he stopped using a baiting system in 2008 (R. pp. 92, 95) — and applied Termidor termiticide in 2003 and 2008, a chemical termite barrier using an entirely different technology than the baiting system, although IOP has no record of the termiticide treatment and Carroll was not notified of Sottile's switch from bait stations to termiticide. (R. p. 96). Sottile testified he personally conducted yearly inspections from 2008 to 2013 and that there should have been a new contract for 11 Tabby Lane, specifying treatment with termiticide.[2]

[2] Mr. Sottile testified that in 2003, at the outset of the bait station agreement, that without telling Carroll, he decided to undertake termiticide use; that he "beaded" termiticide around the perimeter of the home, and; that in 2008, again, without telling Carroll, that he again "beaded" termiticide around the Property.

IOP Pest Control and SPM failed to comply with South Carolina Department of Pesticide regulations by failing to document and maintain records on the use of termiticide and failed to meet industry standards.

In opposition to summary judgment, Plaintiff submitted portions of the deposition testimony of experts he was prepared to call at the trial. For example, Sottile's deposition testimony that he "beaded termiticide" using Termidor is evidence that IOP Pest violated the Termidor label instructions and did not meet then existing regulations and industry standards for the use of the termiticide. (Cecil Hernandez Deposition, R. p. 96).

All parties and the circuit court were aware of the following testimony: Maxcy Nolan, PhD, dated November 29, 2016; Cecil Hernandez, entomology expert and regulator with SCDPR, dated November 29, 2016; and James Wright, dated November 4, 2016. All of these experts were mentioned in the Memo in Opposition, and in the case of Cecil Hernandez and Maxcy Nolan, excerpts of depositions were attached as exhibits. Further, these experts were referred to in oral argument on the Motion. (R. p. 1045). The deposition of expert James Wright, including opinions related to IOP Pest Control's violation of regulatory standards, was part of the court's record as an exhibit to Defendant's Motion in Limine to Exclude Expert Testimony filed February 19, 2019. While there was sufficient evidence set forth in the Memo in Opposition and the SCDPR Regulations, which were emailed to the circuit court on February 18, 2019, and in the Court's possession, as well as the circuit court's records, full transcripts were provided as exhibits to the Motion for Reconsideration.[3]

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

[3] These depositions were taken by counsel for SPM and IOP, and the transcripts have been in possession of all parties since they were taken.

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). The only documents related to the property were annual reinspection invoices and reports for the years 2004, 2005, 2007, 2008, 2009, 2010, 2011, and 2013, which did not show the use of Termidor, and no additional documents surfaced from IOP or SPM during the litigation. (R. pp. 0151-0166).

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. (R. 0677-0678 lines 108:16-109:17). Dr. Nolan opined that IOP Pest Control and SPM failed to conduct proper quarterly inspections for termites, and as a result, failed to timely identify any damage or infestations. Dr. Nolan also testified that if Mr. Sottile treated the property with chemical termiticide as he testified, then IOP Pest Control and SPM violated the regulations by not documenting the treatment as required by SCDPR 27-1083 and in changing to a liquid treatment from the bait stations, the treatments failed to properly retreat the property. 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.

ARGUMENT

I. The Court of Appeals and the Trial Court Misconstrued and Misapplied the Economic Loss Rule By Applying It to a Claim for the Negligence Provision of Services Resulting in Damage to Other Property.

The Court of Appeals affirmed the Order Granting Partial Summary Judgment on the grounds that the economic loss rule barred Carroll's negligence claim.[4] But Carrol did not purchase

[4] The Order Granting Summary Judgment states that Plaintiff's Negligence Claim must be dismissed as a matter of law because it is barred by the economic loss rule.

a defective product (or any product) and has not asserted a products liability claim; instead, he engaged a pest control professional service. Further, the damage sustained by Carroll is not damage to a product, it is substantial damage to "other property" — Carroll's home. This Court's precedent — by its plain language — makes it clear that the economic loss rule applies to defective product claims and not negligence in the provision of services resulting in damage to property. *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.") (emphasis added)(internal citations omitted); *Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 393, 396 S.E.2d 369, 371 (1990) ("As we noted in *Kennedy*, the economic loss rule is the general rule that there is no tort liability to product defect if the damage suffered by a plaintiff is only to the product itself.") *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.").

To reiterate as plainly as possible: In this case, no product was sold — not even the bait station — which remained the property of the company. Carroll's claims do not arise from alleged defects in a product; they arise from IOP/SPM's failure to perform pest control services.[5] The

[5] The Court of Appeals opinion states that the issue of whether the economic loss rule applies to service contracts was not preserved. Carroll raised the issue that the economic loss rule is inapplicable initially (R. 75) and in the Motion to Reconsider. (R.119-143).

economic loss rule — as evidenced by this Court's description of the doctrine — is not applicable to claims for the negligent provisions of services.[6]

The Court of Appeals also misapplied the economic loss rule on these facts because even if the economic loss rule applied to this type of service contract, it does not apply when there is damage to "other property" beyond the product itself. Carroll sustained more than economic losses or damage to a product — he sustained damage to other property--his home. South Carolina explicitly recognizes that tort liability exists, and the Economic Loss Rule does not apply, where there is personal injury or damage to *other* property, as there undisputedly is in this case. *See e.g. Sapp v. Ford*, 386 S.C. at 147, 687 S.E.2d at 49 ("In other words, tort liability only lies where there is damage done to other property or personal injury.") *The economic loss rule does not apply where the defective product causes personal injury or property damage* (other than to the product itself).

In *Sapp v. Ford*, the Plaintiffs' Ford F-150 truck caught fire but only caused damage to the truck itself — it did not damage any person or other property. *Sapp v. Ford*, 386 S.C. at 147, 687 S.E.2d at 49. This Court affirmed the trial court's grant of summary judgment and discussed the economic loss doctrine. As the Court explained, an exception to the economic loss rule in *Kennedy* was created for the residential building context in part because it considered the home a product or manufactured good. *See Sapp*, 386 S.C. at 148, 687 S.E.2d at 49 (explaining the residential home exception was created because a "home is typically an individual's single largest investment and is a completely different type of manufactured good than any other type of product that a consumer

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[6] Other states have explicitly stated. *See e.g. Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, 308 Wis. 2d 103, 125, 746 N.W.2d 762, 773 ("In our *Insurance Co. of North America v. Cease Electric* decision, we enunciated a bright line rule that the ELD is inapplicable to claims for the negligent provision of services.") *Traveler's Prop. Cas. Co. v. Rapid Power Corp.,* No. 5:12-CV-00038-TBR, 2013 U.S. Dist. LEXIS 178758 (W.D. Ky. Dec. 19, 2013) (stating that precedent in Kentucky establishes that the economic loss rule does not apply to service contracts).

will buy" and "the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power"). Justice Beatty concurred but wrote separately stating:

> The inconsistent treatment of the doctrine, by use of varying analytical frameworks, does not provide the bench and bar guidance in the proper application of the doctrine. The Court should simply pronounce a list of areas to which public policy prohibits the application of the economic loss doctrine and forego any legal analysis.

Sapp v. Ford Motor Co., 386 S.C. 143, 153, 687 S.E.2d 47, 52 (2009).

The Court of Appeals misconstrued and misapplied the Economic Loss Rule by 1) applying the rule to a case involving a contract for services and not the sale of a product or goods and 2) applying it to a case involving damages to "other property" beyond the product itself. A certiorari petition on this issue should be granted to address the application of the doctrine under South Carolina law.

II. The Court of Appeals Failed to Recognize Duties Owed to Carroll

Regardless of whether the economic loss rule applies, South Carolina has long held that people who provide services pursuant to a contract — lawyers, accountants, engineers, design professionals— may also be liable in tort[7]. And there is no difference here because the service provided was pest control. *See e.g. Palmetto Linen Serv. v. U.N.X.,* Inc., 205 F.3d 126, 129 (4th Cir. 2000) ("For example, South Carolina courts have permitted negligence actions to proceed against engineers and lawyers based on their professional duties to plaintiffs."); *Sea Side Villas II Horizontal Prop. Regime v. Single Source Roofing Corp.*, 64 F. App'x 367, 373 (4th Cir. 2003) ("For example, South Carolina courts have permitted negligence claims to proceed against accountants and attorneys based on their professional duties to plaintiffs."); *Georganne Apparel v.*

[7] Although the standard applied is not consistent. *See e.g. Koontz v. Thomas*, 333 S.C. 702, 712, 511 S.E.2d 407, 412 (Ct. App. 1999).

Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1991) (accountant malpractice dismissed for failure to prosecute); *Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888 (1981) (attorney liable for economic loss to corporate shareholder when attorney breached duty to corporation).

In *Palmetto Linen Service*, the Fourth Circuit found no "special relationship" or tort duty as between an installer of a computerized pump system in a linen service's washers, and the linen service buyer.[8] 205 F.3d at 128-29. In doing so, the significantly the Court found that,

> no special relationship exists between Palmetto and either defendant. Palmetto points to no professional duty on the part of defendants. Nor does Palmetto claim that defendants violated any code provision or contravened any industry standard. Rather, as the district court observed, the relationship between U.N.X. and Palmetto is merely one of vendor-vendee. And a mere buyer may resort only to contractual remedies.

In this case, IOP Pest Control made extra-contractual representations to Carroll because it continued to accept renewal payments although it changed the method of termite prevention entirely without notice. Sottile, as representative of IOP/SPM, testified that it undertook application of other treatments that were not in or contemplated by the Agreement (e.g., Termidor, beading) and stopped using the treatments that were contemplated by the Agreement. IOP had a "special relationship" with Carroll through its professional responsibility to implement the SCDPR requirements. Moreover, there is sufficient evidence that IOP/SPM did not meet industry standards in the performance of their services. The breach of an industry standard may establish that a special duty outside of the contract exists, and thus prevent application of any "rule" related to economic losses.

The lower Court, in their Order Granting Partial Summary Judgment was also incorrect to rely on the factually narrower, and legally inapposite federal district court case of *Duc v. Orkin*, 729

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[8] In *Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 128 (4th Cir. 2000), the court did apply the economic loss rule and limited the party to contractual remedies because the contract involved the delivery of both goods and services, but the "predominant thrust" was "a transaction of sale, with labor incidentally involved.

F. Supp. 1533 (1990). While Duc does involve a termite company, the Court of Appeals erred in relying on it for two reasons. First, *Duc* does not involve or mention the Economic Loss Rule. Instead, it was a case decided simply on whether any duties "separate and distinct" from the contract were at issue. In addition, the Court of Appeals misconstrued *Duc*, which actually supports Carroll's claim. Unlike Mr. Duc, Carroll both alleged and *offered proof of* numerous duties "separate and distinct" from the bait station contract.

The question of whether a "special relationship" or duty in tort exists is a heavily fact dependent inquiry, not appropriate for summary judgment. In many cases, the service provider will be in privity of contract with the plaintiff. These providers, however, owe a duty to the client and sometimes to third parties which arises in addition to the contract for services. Such is the case here.

III. The Plaintiff's Contract Claim Should Not be Limited

The Court of Appeals erred in holding that Carroll abandoned any issue regarding a contractual remedy. As an initial matter, the circuit court's Order Granting Partial Summary Judgment did not limit the contractual remedy to $250,000 and made no mention of a monetary ceiling for damages under the contract (R. p. 0002). The Order Denying Plaintiff's Motion for Reconsideration contains one sentence stating: "IOP (and successor SPM) agreed to inspect and treat the Subject Residence for termites and repair any damages resulting from termites up to $250,000." (R. p. 0013). It contains no analysis of the issue, and as such any ruling should be left remaining with the breach of contract cause of action or in the alternative, the Court should find that Petitioner correctly argued that annual renewal of the contract entitled him to $250,000 for each year that the Respondents were in breach.

CONCLUSION

For the foregoing reasons, Carroll requests certiorari be granted.

Respectfully submitted,

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October 23, 2023

VIA U.S. MAIL
The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

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

Dear Ms. Howard:

Enclosed please find this firm's check in the amount of $250.00 representing the required filing fee for APPELLANT'S PETITION FOR A WRIT OF CERTIORARI filed in the above-referenced matter.

Should you have any questions or need additional information, please let me know.

Thank you, and with kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw
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cc: Via Email –
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