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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Bentley D. Price  
Circuit Court Judge

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Appellate Case No. 2023-000117

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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.; Terminix Service, Inc.,

Defendants,

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

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FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. The circuit court correctly found that no evidence exists to support Appellant's negligence claim against Respondent.
- II. The circuit court correctly found that Respondent did not owe Appellant a duty of care.
- III. The circuit court correctly found that Appellant's damages were caused by the intervening negligence of prior owners of the Residence.
- IV. The circuit court correctly granted summary judgment as to Appellant's breach of implied warranty of workmanship claim based on the lack of evidence and controlling South Carolina law.

## **STATEMENT OF THE CASE**

This appeal arises from the circuit court's order granting summary judgment in favor of Respondent Hilton Head Exterminators, Inc. ("Respondent" or "HHE") as to Appellant's negligence/gross negligence and breach of implied warranty of workmanship claims. Appellant filed her original Complaint on March 26, 2020, asserting construction defect claims against various contractors for moisture intrusion and other damage discovered following her purchase of a residence in Hilton Head, South Carolina. She filed an Amended Complaint on October 19, 2020, naming additional defendants, including Respondent. In her Amended Complaint, Appellant asserted claims for negligence/gross negligence and breach of implied warranty of workmanship against Respondent (R. pp. 63-64), claiming Respondent failed to properly treat the residence for termites with the appropriate amount of pesticide, note certain conditions at the residence, and comply with South Carolina pest control regulations (R. p. 55). Appellant filed a Second Amended Complaint on May 20, 2021, adding yet another defendant but no additional claims against Respondent. Respondent timely filed Answers and affirmative defenses to both amended Complaints. (R. pp. 73-82; R. pp. 112-121).

### **Respondent's Motion for Summary Judgment**

Following a lengthy period of discovery, Respondent filed a Notice of Motion and Motion for Summary Judgment on June 21, 2022. Respondent then filed a Memorandum in Support of Its Motion for Summary Judgment with exhibits on August 11, 2022. The exhibits included documents obtained in discovery, excerpts from Appellant's deposition, and affidavits from Brian DeChirico, Manager, HHE; Kevin DeLorenzo, Structural Program Manager, Department of Pesticide Regulation ("DPR"), Clemson University; and entomology expert Dr. Maxcy P. Nolan, III, Owner and President, NIPCAM. (R. pp. 155-230).

Appellant filed a Memorandum in Opposition with exhibits on August 12, 2022. In support of her Memorandum, she relied on a June 24, 2020 Report of Structural Pest Inspection prepared by DPR Pesticide Investigator Kristin Lenox-Rustin, and a DPR informational letter issued to HHE on January 15, 2021. (R. pp. 246-254). Appellant did not submit any deposition testimony or affidavits in support of her Memorandum. Investigator Lenox-Rustin's June 24, 2020 report is based on an inspection she performed at Appellant's residence on January 22, 2020. (R. pp. 246-252). In the report, Investigator Lenox-Rustin states that "that DPR Regulation § 27-1085(G)(2)(b)—addressing EIFS[ stucco]-to-ground contact—was neither met nor wa[i]ved during [HHE's] March 23, 2003 pretreatment." (R. p. 248). The pretreatment referenced in her report occurred approximately 16 years and 10 months prior to Investigator Lenox-Rustin's inspection, and approximately seven years and nine months after HHE cancelled its termite warranty, when a prior owner decided not to renew it. (R. p. 166). DPR did not require HHE to correct this issue and simply issued an informational letter dated January 15, 2021. (R. pp. 253-254). In the same report, DPR cited Terminix, the pest control company providing services at the time of the inspection, for not addressing EIFS-to-ground contact, along with a termiticide use violation. DPR issued a warning letter to Terminix. (R. pp. 248-249; R. pp. 194-195).

The Honorable Bentley D. Price, Circuit Court Judge, conducted a hearing for Respondent's Motion for Summary Judgment on August 15, 2022. Judge Price subsequently issued an Order granting Respondent's Motion for Summary Judgment on August 31, 2022. (R. pp. 9-19). In his Order, Judge Price first concluded that no evidence exists regarding the conditions at the residence during HHE's warranty, whether conditions were waived by previous owners, or any alleged deficiencies in HHE's pretreatment and inspections. (R. pp. 12-14). It was undisputed that the March 23, 2003 termite pretreatment discussed in Investigator Lenox-Rustin's June 24<sup>th</sup>

report was documented by one invoice obtained from a building file, showing that HHE performed the pretreatment of the soil before any structure was built. No EIFS-to-ground contact could have existed at that time. (R. p. 15). Furthermore, Kevin DeLorenzo, DPR Structural Program Manager and Investigator Lenox-Rustin's supervisor, provided undisputed testimony that an investigator can only observe what is present on the day of the inspection, and in this case, the inspection took place approximately seven years and nine months after HHE ceased providing services at the residence. (R. p. 13). DPR has no records that it ever inspected the residence previously. (R. p. 15). Mr. DeLorenzo testified that HHE properly destroyed records on the residence in 2017, in accordance with DPR regulations for records maintenance and destruction; therefore, it is impossible for DPR to determine whether the EIFS-to-ground condition existed almost eight years earlier, or whether one of the previous homeowners signed a waiver, waiving treatment of the EIFS-to-ground condition. (R. p. 13).

The court acknowledged that "DPR issues informational letters to pest control companies with previous involvement at a property for the sole purpose of increasing termite technician awareness of such issues when performing future inspections and treatments at other properties. As such, the informational letter issued to HHE is not tracked against HHE's enforcement history." (R. pp. 13-14). Mr. DeLorenzo stated that he would also have agreed not to issue any letter at all to HHE due to the lack of records. (R. p. 14). The court also held that the lack of HHE records in the case, as well as the passage of a significant amount of time since HHE's involvement at the residence, precludes a determination that HHE's termite chemical pretreatments were in any way deficient.<sup>1</sup> (R. p. 13).

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<sup>1</sup> Page 1 of the Initial Brief of Appellant states that "[s]he does not claim that HHE was negligent in its application of chemical pesticide treatment"; therefore, pursuant to South Carolina Appellate Court Rule 208(b)(1)(C), Appellant is bound by this statement and has abandoned that claim in Paragraph 37 of her Second Amended Complaint.

Based on the lack of HHE records described above, along with the affidavit testimony of Mr. DeLorenzo and independent entomology expert Dr. Maxey Nolan, III, the second conclusion reached by Judge Price is that it is impossible to determine whether HHE owed a duty or breached any standard of care to Appellant or any prior owners. (R. pp. 14-16). Dr. Nolan provided uncontradicted expert testimony 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.” (R. p. 15). As a result, Judge Price dismissed Appellant’s negligence/gross negligence claim. (R. p.15). The court further held that Appellant’s damages were caused by the intervening negligence of prior owners. (R. p. 16). Prior to Appellant’s purchase, the residence sat uninspected and untreated for termites for a period of approximately six years and eight months in an area with significant Formosan termite pressure. (R. p. 16). This undisputed fact was supported by the sworn testimony of defense experts, Mr. DeLorenzo and Dr. Nolan. (R. p. 16). Finally, Judge Price held that Appellant’s claim for breach of implied warranty of workmanship applies only to builders of new homes, not pest control operators, under South Carolina law. (R. pp. 17-18).

**Appellant’s Motion to Alter or Amend Order Granting Summary Judgment**

Appellant filed a Motion to Alter or Amend Order Granting Summary Judgment to Hilton Head Exterminators, Inc. on September 7, 2022. Respondent filed its Response in Opposition on September 14, 2022. Judge Price considered both submissions. He refused to overturn the summary judgment ruling in favor of HHE; however, he considered two revisions suggested by Appellant for an Amended Order Granting Defendant Hilton Head Exterminators, Inc.’s Motion for Summary Judgment. Appellant requested that the “Factual Findings” subsection title be changed to “Preamble.” Appellant also asked that instead of ruling on the merits of her breach of implied warranty of workmanship claim, the court should hold that Appellant “failed to submit

any evidence that would support her contention that HHE breached any implied warranty, if one exists.” (R. p. 28). Judge Price incorporated both revisions in the Amended Order Granting Defendant Hilton Head Exterminators, Inc.’s Motion for Summary Judgment filed on December 28, 2022. Appellant then filed her Notice of Appeal on January 25, 2023.

### STATEMENT OF FACTS

This case involves moisture and termite damage discovered by Appellant following her “as is” purchase of the residence located at 11 Harrogate Drive, Hilton Head, South Carolina (the “Residence”). Palatial Homes, Inc. constructed the Residence, and Respondent Hilton Head Exterminators, Inc. (“Respondent” or “HHE”) applied the termite pre-treatment to the soil in March 2003, prior to construction. On March 3, 2005, the Town of Hilton Head issued a building permit, and the Certificate of Occupancy for the Residence was issued on January 30, 2006.

HHE provided a termite warranty for prior owners of the Residence from June 1, 2005, to April 27, 2012. The warranty was cancelled on April 27, 2012, when the prior owners elected not to renew the termite warranty. HHE did not provide any further termite services at the Residence after April 27, 2012. (R. p. 166). *The Residence then apparently went uninspected and untreated for termites for approximately six years and eight months before Appellant purchased it.*

On or about December 6, 2018, Appellant entered into a Contract of Sale (the “Contract”) to purchase the Residence from seller Michael Grondahl for the purchase price of \$1,240,000.00. (R. p. 169). The Contract expressly states that the Residence was being sold “as-is,” “where-is,” with “no repairs” and “no concessions.” (R. p. 170). Appellant did not obtain a home inspection. Instead, she relied on a previous home inspection report produced by the seller’s real estate agent. (R. p. 206, line 22–p. 207, line 14). Appellant testified that she did not even see the previous home inspection report, and she doesn’t know if her real estate agent reviewed it. (R. p. 207, lines 19-

23). Appellant stated that the seller's real estate agent represented to Appellant's real estate agent that there were no significant issues with the Residence, even though it "had been vacant at different times," and Appellant's real estate agent did not believe another inspection was necessary. (R. p. 209, line 24-p. 210, line 9).

Furthermore, the section of the seller's Residential Property Condition Disclosure Statement regarding wood-destroying insects, which includes termites, was *completely blank* and did not address whether the Residence had any past or present termite infestations, damage, or termite treatment or coverage. (R. p. 178; p. 210, lines 16-24; p. 229, lines 4-15). (emphasis added). Appellant testified this did not raise any red flags for her because she was not aware of the amount of damage termites can do to a house, and she was not surprised the termite section of the disclosure was also blank because the seller "listed no representation on all of the other boxes." (R. p. 229, line 16-p. 230, line 3). She did not know if the prior owner had a termite warranty for the Residence. (R. p. 226, lines 7-12). Appellant obtained an Official South Carolina Wood Infestation Report, or CL-100, prior to closing, and the visual CL-100 inspection did not identify any visible termite activity or damage. (R. p. 182-184; p. 222, line 24-p. 223, line 7).

Appellant closed on the purchase of the Residence on December 18, 2018. She testified that she moved into the Residence in early January 2019, and shortly thereafter, she claims she observed a substance that she later learned was "termite excrement" at the top of one of the columns on the first-floor porch on the rear of the residence. (R. p. 224, line 6-p. 225, line 2; p. 226, line 18-p. 227, line 19). She testified that months later, in late spring or early summer 2019, a painter discovered termites in the breakfast nook on the rear of the residence while painting sheetrock. While he was painting, some of the sheetrock crumbled and exposed the termites. (R. p. 213, lines 3-14). During the same timeframe, a repair contractor hired by Appellant discovered

numerous construction defects at the Residence, including structural stability issues with the second floor balcony on the rear of the Residence and flashing and waterproofing issues. (R. p. 214, line 12-p. 216, line 18; p. 217, line 25-p. 218, line 15; p. 219, line 16-p. 220, line 15; p. 221, lines 7-17).

On January 15, 2020, more than a year after she purchased the Residence, Appellant contacted the Department of Pesticide Regulation (“DPR”), Clemson University, to perform an investigation regarding the CL-100 inspection performed at the Residence by another party and the discovery of termite damage. *Approximately 16 years and 10 months after the March 23, 2003 pretreatment, and seven years and nine months after HHE cancelled its termite warranty at the Residence*, DPR performed an inspection on January 22, 2020, and DPR Pesticide Investigator Kristin Lenox-Rustin subsequently issued a report dated June 18, 2020, which was amended on June 24, 2020. The June 24<sup>th</sup> report indicates that during demolition and repairs, certain hidden conditions were revealed, including a form board in the block and rear patio slab. (R. p. 185). After discussing conditions at the Residence, the DPR report addressed former and current pest control companies that provided services at the Residence. With respect to HHE, which had not provided any termite services since April 2012, DPR concluded that HHE’s March 23, 2003 pre-treatment did not address Exterior Insulation and Finish System, or EIFS, stucco in contact with the ground. (R. p. 187). DPR did not require HHE to correct this issue and simply issued an informational letter to HHE on January 15, 2021. (R. pp. 192-193). DPR instead issued a warning letter to Terminix, the current pest control company at the Residence, for not addressing EIFS-to-ground contact, as well as a termiticide use violation. (R. p. 188; pp. 194-195).

## STANDARD OF REVIEW

“When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). South Carolina Rule of Civil Procedure 56(c) states that summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” [*Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860] (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

*Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

However, “[o]nce the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 [(Ct. App. 2003)].” *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Nor can the nonmoving party rely on speculation or the building of one inference on another to create a genuine issue of material fact. *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 182 (Ct. App. 2019) (citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)). “The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. [*Rife v. Hitachi Cont. Mach. Co., Ltd*, 363 S.C. 209, 214, 609 S.E.2d 565, 568. (Ct. App. 2005)].” *Id.*, 377 S.C. at 198, 659 S.E.2d at 203. “[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are

contested in a deficient manner.” *Guinan v. Tenet Health Sys. of Hilton Head, Inc.*, 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006)).

## ARGUMENT

### **I. The circuit court correctly found that no evidence exists to support Appellant's negligence claim against Respondent.**

Appellant asserts the June 24, 2020 DPR Report of Structural Pest Inspection prepared by Investigator Lenox-Rustin, and the January 15, 2021 informational letter issued by the office of Ryan Okey, Pesticide Program Chief, DPR, provide “more than a mere scintilla of evidence” that Respondent failed to address EIFS-to-ground contact during Respondent's termite pretreatment of the Residence. (Appellant's Br. 7-8). Appellant's assertion is fundamentally flawed for a number of reasons.

First, the June 24, 2020 DPR Report of Structural Pest Inspection states that the EIFS-to-ground contact observed at the Residence was “neither met nor waved during [HHE's] **March 23, 2003 pretreatment.**” (R. p. 248) (emphasis added). It is undisputed that the only record documenting HHE's termite pretreatment at the Residence is an HHE invoice found in the Town of Hilton Head Building Department file produced by Appellant in discovery. The invoice is dated March 23, 2003, which pre-dates the March 3, 2005 Town of Hilton Head building permit for the Residence by almost two years. Thus, the March 23, 2003 termite pretreatment consisted of a soil treatment before the Residence was constructed. Without a structure, EIFS-to-ground contact could not exist. The January 15, 2021 informational letter issued by Mr. Okey's office to HHE references the “2003-2005 subterranean termite pretreatment of the structure.” (R. p. 253). Once again, however, the only document reflecting a pretreatment is the March 23, 2003 invoice described above.

Second, Investigator Lenox-Rustin conducted her inspection at the Residence *approximately 16 years and 10 months after the pretreatment, and seven years and nine months after HHE last provided any termite services at the Residence.* (R. p. 246) (emphasis added). According to the affidavit of Mr. DeLorenzo, DPR Structural Program Manager and Investigator Lenox-Rustin's supervisor, "there have been no other DPR inspections at [the Residence] during the time period HHE had a termite warranty for the property." (R. p. 198). It is undisputed that Investigator Lenox-Rustin never inspected the Residence during HHE's termite warranty period, which lasted from June 1, 2005 to April 27, 2012. Therefore, she has no knowledge of the condition of the property or surrounding landscaping that existed during that time, or if there were any changes to the condition of the Residence or the property made after April 27, 2012. Mr. DeLorenzo testified that "DPR investigators are only able to observe what is visible at the time of inspection, which, in this case, was on January 22, 2020." (R. p. 198).

Third, it is undisputed that no other records exist regarding the termite services and warranty provided by HHE at the Residence, and that HHE's records were properly disposed of pursuant to DPR regulations. The affidavit of DPR Structural Manager Kevin DeLorenzo states that "DPR Regulation § 27-1085M(1)(g) was the applicable records maintenance regulation at the time HHE had a termite warranty on 11 Harrogate Drive. This regulation required [pest control operators] to maintain records for a period of two (2) years after the date of treatment." (R. p. 198). The affidavit of Brian DeChirico, Manager, HHE, states that HHE maintained the records for a period of five years, three years longer than the DPR regulatory requirement, prior to their destruction in 2017. (R. p. 166). Mr. DeLorenzo testified that "[f]ollowing the cancellation of HHE's warranty in April 2012, HHE's disposal of records for 11 Harrogate Drive in 2017 was proper." (R. p. 198). Independent entomology expert, Dr. Maxcy Nolan, III, also opined that

“HHE’s destruction of records in 2017 was proper and complied with DPR regulations concerning maintenance of records by pest control applicators.” (R. p. 202). Appellant has failed to produce any evidence or testimony to dispute the proper maintenance and destruction of HHE’s records.

Appellant argues that 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.” (Appellant’s Br. 8). Appellant therefore concedes that HHE was authorized to destroy documents following the retention period prescribed by DPR. At the same time, Appellant proposes the legally unsupported and impractical requirement for businesses with thousands of client accounts to retain records in perpetuity, in case they are sued at some unknown point in the future. Appellant then accuses HHE of a “failure to follow best practices as to records retention.” (Appellant’s Br. 8). The phrase “best practices” is vague, at best, and Appellant fails to support this argument with any legal authority. As a result, this issue has been abandoned and should not be considered on appeal. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”); *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 453, 772 S.E.2d 544, 554 (Ct. App. 2015) (citing *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (“When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue.”).<sup>2</sup>

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<sup>2</sup> It should also be noted that Appellant improperly attempted to raise this issue for the first time in her Motion to Alter or Amend. (R. pp. 255-260). “An issue may not be raised for the first time in a motion to reconsider.” *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citing *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999)).

Without HHE's records, it is impossible to determine the conditions existing at the Residence from June 2005 to April 2012. Investigator Lenox-Rustin can only speculate as to whether any conditions were met or waived. The findings in her June 24<sup>th</sup> report are allegations or assumptions without any evidentiary support. "Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment." *Marsh Waterproofing v. Steeple S. Pleasantburg*, 2019 S.C. C.P. LEXIS 5687, at \*3 (Greenville County Circuit Ct. Aug. 8, 2019) (citing *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984)). Even if EIFS-to-ground contact existed during HHE's warranty, which HHE disputes, prior owners may have elected to waive that condition and signed valid, written waivers excluding that condition from treatment. Those waivers would have been included in HHE's records. Both Mr. DeLorenzo and Dr. Nolan testified that it is impossible to determine conditions at the Residence and whether a waiver was signed by prior owners due to the lack of available records. (R. p. 198; pp. 202-203).

Fourth, aside from relying on the speculation in Investigator Lenox-Rustin's report and the informational letter issued by Mr. Okey's office, Appellant never deposed or sought an affidavit from Investigator Lenox-Rustin to obtain sworn testimony and further ascertain the limitations of her findings or any explanation of what purpose an "informational letter" serves. Nor has Appellant deposed or sought an affidavit from Mr. Okey, who is now the Assistant Director of DPR, to learn that his former office sends out letters as an administrative function, and that Mr. Okey has no substantive knowledge of the DPR inspection in this case. In fact, Appellant did not take a single deposition in this case which was filed more than two years before Respondent filed its Motion for Summary Judgment. Appellant made no effort to identify and depose prior homeowners to ascertain the condition of the Residence before Appellant's purchase, or whether they signed waivers regarding any conditions. Appellant did not retain any experts in the fields of

entomology or pest control regulation to provide affidavits and opinions in opposition to Respondent's Motion for Summary Judgment or Respondent's experts.

In contrast, HHE produced an affidavit from Mr. DeLorenzo, the individual overseeing the DPR Structural Program, explaining the limitations of DPR's findings in this matter as to HHE. (R. pp. 196-200). His affidavit explains that DPR issues informational letters to pest control companies with previous involvement at a property for the sole purpose of increasing termite technician awareness of such issues when performing future inspections and treatments at other properties. (R. pp.197-198). Mr. DeLorenzo further states that the informational letter to HHE is not tracked against HHE's enforcement history, and due to the lack of available records, Mr. DeLorenzo would have also agreed not to issue any letter to HHE. (R. p. 198). HHE also retained the services of an independent termite expert, Dr. Nolan. Dr. Nolan has extensive education and experience in the areas of termite treatments, inspection and regulation, and he has served as an expert in numerous termite damage cases in South Carolina. (R. pp. 201-202). After a review of relevant case documents and a site inspection at the residence, Dr. Nolan concurs with Mr. DeLorenzo's testimony. (R. pp. 202-204). Dr. Nolan testified that the informational letter issued to HHE "does not require HHE to address any issues found at 11 Harrogate Drive." (R. p. 203).

Lastly, Appellant ignores the facts that Investigator Lenox-Rustin's report does not require HHE to correct the EIFS-to-ground condition found at the Residence on January 22, 2020, almost eight years after the cancellation of HHE's warranty, or take any enforcement action against HHE. (R. p. 248). Instead, DPR cited Terminix, the pest control company with the termite warranty on the Residence in January 2020, for failure to address EIFS-to-ground contact, along with a termiticide use violation. (R. pp. 248-249). DPR also issued Terminix a Commercial Applicator Warning Letter for these violations. (R. pp. 194-195).

Based on Investigator Lenox-Rustin's inspection almost 20 years after the March 23, 2003 pretreatment, and almost eight years after HHE's termite warranty ended at the Residence, the undisputed lack of records, and the expert testimony of Mr. DeLorenzo and Dr. Nolan, there are simply no reasonable inferences that can be drawn in Appellant's favor regarding her negligence claim<sup>3</sup>, even in the light most favorable to Appellant. Both Mr. DeLorenzo, DPR's Structural Program Manager, and Dr. Nolan, an independent entomology expert with extensive experience in South Carolina termite cases, have provided uncontradicted testimony stating that it is impossible to determine conditions at the Residence from the March 23, 2003 pretreatment through the end of HHE's warranty on April 27, 2012, and whether any conditions were waived by prior owners. (R. p. 198; pp. 202-203). It is equally impossible for a jury to make that determination. Any such determination would be purely speculative as to what conditions existed and what information was contained in the properly destroyed HHE records. Appellant cannot rely on speculation to create a genuine issue of material fact (*Gibson*, 426 S.C. at 353, 827 S.E.2d at 182 (internal citation omitted)), and the circuit court's ruling on this issue should be affirmed because Appellant has attempted to dispute facts in a deficient manner (*Guinan*, 383 S.C. at 53, 677 S.E.2d at 35 (internal citation omitted)).

**II. The circuit court correctly found that Respondent did not owe Appellant a duty of care.**

Appellant argues that the June 24, 2020 DPR Report of Structural Pest Inspection and the January 15, 2021 informational letter to HHE create a genuine issue of material fact as to whether HHE was negligent in its inspections at the Residence. (Appellant's Br. 9-10). More specifically,

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<sup>3</sup> For the same reasons, there are no reasonable inferences that can be drawn in Appellant's favor as to her breach of implied warranty of workmanship claim.

Appellant incorrectly argues that by focusing on the lack of privity between Appellant and HHE, the circuit court erred in finding that HHE did not owe Appellant a duty. (Appellant's Br. 10-11).

"The existence of a duty owed is a question of law for the courts." *Washington v. Lexington County Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999) (citing *Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986)). It is accurate that HHE never had any contact or relationship with Appellant regarding termite services at the Residence. Terminix, not HHE, has the current termite warranty on the Residence, and Terminix received a warning letter for EIFS-to-ground contact and a termiticide use violation. (R. pp. 194-195). However, there is no genuine issue of material fact as to Appellant's negligence claim because, as discussed at length above in Subsection I, no evidence exists regarding HHE's pretreatment and subsequent termite warranty inspections, except for the March 23, 2003 pretreatment invoice for work performed by HHE *before the Residence was built*. (R. p. 166) (emphasis added).

The affidavits of both DPR Structural Program Manager, Mr. DeLorenzo, and Dr. Nolan reflect that it is impossible to determine whether the EIFS-to-ground condition existed during HHE's warranty period at the Residence, or whether such a condition was waived by a prior owner, because no records exist. (R. p. 198; pp. 202-203). And DPR is only able to observe what is visible at the time of its inspection. (R. p. 198). In this case, the DPR inspection occurred approximately 16 years and 10 months after the March 23, 2003 pretreatment, and approximately seven years and nine months after HHE's termite warranty was cancelled due to non-renewal. (R. p. 246). There is no way to determine whether HHE breached any duty or standard of care to a prior owner of the Residence, and there is no way to determine what duty, if any, HHE owed to Appellant, when she purchased the Residence approximately six years and eight months after HHE

cancelled its warranty. A party opposing summary judgment “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” *Gibson*, 426 S.C. at 353, 827 S.E.2d at 182 (quoting *Beale*, 769 F.2d at 214).

Furthermore, based on the facts of this case, Mr. DeLorenzo states that “[f]rom a regulatory standpoint, HHE does not owe [Appellant] 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.” (R. p. 199). Dr. Nolan agrees, and his affidavit provides the following opinions:

In my professional opinion, HHE does not owe the [Appellant] in this case a duty or standard of care because HHE’s termite warranty was cancelled six (6) years and (8) months before she purchased 11 Harrogate Drive. There is absolutely no evidence that HHE violated any duties or standards of care because no records exist to make such a determination. The pest control applicator with the current warranty on the residence is responsible for any treatment and/or inspection issues. In addition, it is my opinion that HHE has not violated any laws, regulations, or industry standards applicable to pest control applicators.

(R. p. 203). In response to HHE’s Motion for Summary Judgment, Appellant did not counter the expert opinions of Mr. DeLorenzo and Dr. Nolan with opinions from other experts, or offer any affidavits supporting her assertion that HHE owed Appellant a duty of care. Appellant instead relies upon the allegation HHE failed to address EIFS-to-ground contact, without providing any evidence such a condition existed or was not waived years earlier, when HHE provided a termite warranty for a previous owner.

**III. The circuit court correctly found that Appellant’s damages were caused by the intervening negligence of prior owners of the Residence.**

Appellant argues that the alleged failure of HHE to note EIFS-to-ground contact creates a genuine issue of material fact as to whether HHE contributed to the termite infestation and damages discovered at the Residence more than six years and eight months after HHE last provided any services. (Appellant’s Br. 11-12). However, as discussed in detail in Subsections I and II

above, the lower court correctly concluded that there is no evidence as to whether EIFS-to-ground contact existed or was waived by prior owner following the proper disposal of HHE records in 2017. The inspection by DPR Investigator Lenox-Rustin took place approximately seven years and nine months after HHE last provided any services, and no evidence has been produced by any entity, including DPR, establishing that a termite infestation began or occurred during the period in which HHE provided a termite warranty for the Residence. In fact, Appellant now concedes that there are no issues with the chemical termite treatments previously provided by HHE at the Residence (Appellant's Br. 1), so there is no reason to believe that a termite infestation occurred during HHE's involvement at the Residence. Appellant provided no testimony from anyone at DPR, or any experts, who opine that a termite infestation occurred years earlier, when HHE provided termite services.

“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.” *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962). “For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated.” *Dawkins v. Sell*, 434 S.C. 572, 581, 865 S.E.2d 1, 6 (Ct. App. 2021) (*Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 205, 781 S.E.2d 534, 536 (2015) (quoting *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997))).

There is no evidence showing that HHE was in any way negligent during its termite pretreatment or warranty coverage of the Residence from March 2003 to April 2012, and it is undisputed that the Residence was not treated for termites for six years and eight months prior to

Appellant's "as is" purchase, with almost no inspections performed on her part. (R. p. 170; p. 178; p. 206, line 22-p. 207, line 14; p. 207, lines 19-23; 209, line 24—p. 210, line 9; p. 210, lines 16-24; p. 229, lines 4-15; p. 229, line 16-p. 230, line 3; p. 226, lines 7-12). The dereliction of prior owners to treat the Residence for termites, alone, clearly supersedes the mere allegations of negligence directed at HHE and resulted in Appellant's damages. HHE could not have reasonably foreseen or anticipated that individuals who owned the Residence prior to Appellant's purchase would fail to have the property inspected or treated for termites, thus causing damage to the Residence.

DPR Structural Program Manager, Mr. DeLorenzo, testified that if the Residence was left untreated and uninspected for termites for six years and eight months, it "significantly increased the likelihood that the structure could be infested by subterranean termites." (R. p. 199). Dr. Nolan's testimony goes even farther: "It is my professional opinion to a reasonable degree of scientific certainty that the termite infestation and damage discovered at 11 Harrogate Drive likely began at some point during the period of six (6) years and eight (8) months prior to [Appellant's] purchase of the residence when the residence was not inspected or treated for termites." (R. p. 204). Both Mr. DeLorenzo and Dr. Nolan provided testimony regarding the significant amount of Formosan termite pressure in the Hilton Head area and stressed the necessity of termite treatments, regular inspections, and even booster treatments to protect residential structures. (R. p. 199; pp. 203-204). Appellant did not counter the opinions of these experts, nor did she produce any expert opinions, affidavits, or other evidence in support of her argument on this issue. As a result of the lack of evidence regarding HHE's alleged negligence, and the uncontradicted expert opinions on behalf of HHE, the circuit court correctly found that "liability rests with the prior owners and [Appellant's] due diligence in the course of purchasing the Residence." (R. p. 27).

**IV. The circuit court correctly granted summary judgment as to Appellant's breach of implied warranty of workmanship claim based on the lack of evidence and controlling South Carolina law.**

Appellant argues that the circuit court erred in granting summary judgment as to her breach of implied warranty of workmanship claim by holding that she failed to provide any evidence that HHE breached that cause of action. (Appellant's Br. 13). Aside from Appellant's misplaced reliance on the June 24, 2020 DPR Report of Structural Pest Inspection and the January 15, 2021 informational letter, she has failed to produce any evidence that HHE owed or breached any kind of implied warranty to Appellant. Based on the significant passage of time since HHE provided any termite services at the Residence and the lack of evidence discussed above in Subsections I through III, it is impossible to determine whether HHE owed or breached any kind of warranty to Appellant.

More importantly, Appellant's claim for breach of implied warranty of workmanship applies to builders of new construction, not pest control operators, under established South Carolina law. "A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 61, 71 (2008) (citing *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989)). "[T]o establish a claim for breach of the implied warranty of workmanlike services, the plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 368-69, 725 S.E.2d 112, 123 (Ct. App. 2012) (citing *Smith*, 377 S.C. at 422, 661 S.E.2d at 71. The implied warranty of workmanship "only applies to builders in the business of building new dwellings for sale." *Smith*, 377 S.C. at 422, 661 S.E.2d at 71 (emphasis added); *Champy v. Beazer Homes Corp.*, No. 3:15CV04098MBS, 2016

WL 1110241, at \*3 (D.S.C. Mar. 21, 2016) (“[L]iability for the implied warranty of workmanship is limited to the ‘builder who contracts to construct a dwelling.’” (quoting *Kennedy*, 299 S.C. at 344, 384 S.E.2d at 736.)) The rationale behind this cause of action is “that the purchaser is forced to rely on the skill of the professional builder.” *Smith*, 277 S.C. at 423, 661 S.E.2d at 72.

HHE is a pest control company, not a builder of new homes. HHE did not have any involvement whatsoever in the construction of the Residence purchased by Appellant. Thus, Appellant’s claim for breach of the implied warranty of workmanship is inapplicable to HHE. Moreover, the only existing evidence shows that HHE applied the initial termite pre-treatment to the soil *prior to construction of the Residence*. (R. p. 166) (emphasis added). Unlike large structures constructed by a builder, termite treatments have a much more limited lifespan. The affidavits of Mr. DeLorenzo and Dr. Nolan directly support this point. (R. p. 199; pp. 203-204). The termite warranty issued by HHE was cancelled in 2012 because the owner of the Residence at that time elected not to renew the warranty. There is no evidence indicating that any termite inspections or treatments occurred at the Residence for approximately six years and eight months prior to Plaintiff’s purchase in December 2018. In addition, the affidavits of termite experts Mr. DeLorenzo and Dr. Nolan reflect that it is impossible to determine whether HHE’s prior work at the Residence was performed in accordance with industry standards due to the passage of a significant period of time and the proper destruction of service records years ago. (R. p. 198; pp. 202-203). As such, Appellant’s breach of implied warranty of workmanship was properly dismissed by the circuit court.

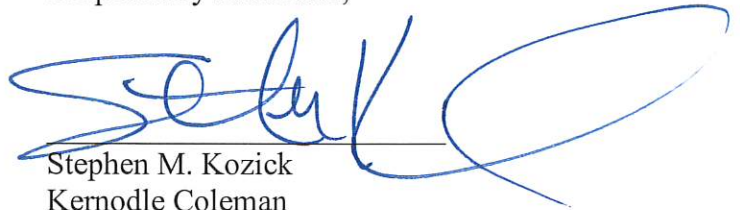
## CONCLUSION

For the reasons set forth above, the circuit court properly granted HHE’s Motion for Summary Judgment, dismissing Appellant’s negligence/gross negligence and breach of implied

warranty of workmanship claims as a matter of law. HHE respectfully requests that this Court affirm the circuit court's order on the grounds set forth herein, as well as any other grounds found in the record pursuant to Rule 220(c), SCACR.

November 7, 2023

Respectfully submitted,



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**Nov 16 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent Isle Of Palms Pest Control, Inc. complies with Rule 21 1 (b), SCACR.

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By:



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November 16, 2023

Charleston, South Carolina