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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2023-001655

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

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

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

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Introduction

Pursuant to South Carolina Appellate Rule 242(f), Respondent SPM Management Company, Inc. submits its Return to the Petition for Writ of Certiorari filed by Petitioner/Appellant James E. Carroll, Jr. on October 23, 2023. SPM respectfully requests the Court deny the petition as the Court of Appeals' affirming opinions are well-supported by the record and sound legal precedent. In addition, Carroll has failed to show any special and important circumstances that warrant the Court's exercise of discretionary review.

Counterstatement of the Questions Presented

I. **Did the Court of Appeals correctly affirm the circuit court's grant of partial summary judgment in favor of IOP (and successor SPM) on the ground that Carroll failed to identify a duty that IOP (and successor SPM) owed him outside of the Termite Contract?**

II. **Did the Court of Appeals correctly decide that Carroll failed to preserve his argument regarding the limitation of damages provision in the Termite Contract for appellate review?**

Counterstatement of the Case

This appeal arises out of the circuit court's order granting partial summary judgment in favor of SPM Management Company, Inc. ("SPM") and Isle of Palms Pest Control, Inc. ("IOP") (collectively, "IOP (and successor SPM)" or "Respondents"). (R. pp. 2-3). This lawsuit arises from an alleged termite infestation and resulting damage to James E. Carroll, Jr.'s ("Carroll" or "Appellant") residence located at 11 Tabby Lane on Isle of Palms (the "Property"). (R. pp. 14-27). In February of 2003, Carroll entered into a termite treatment and repair bond agreement (the "Termite Contract") with IOP, a company owned and operated by Vincent Sottile. (R. pp. 55-57). While the termite contract was not signed, Carroll admitted the Termite Contract is a valid contract that governs the relationship between the parties. (R. pp. 59-65). The Termite Contract includes the

following valid and enforceable limitation of damages provision, which limits Carroll's remedy to repair any new damages resulting from termites to $250,000:

> COVERAGE LIABILITY: If new damage occurs to the structure during the contract terms, the operator will, upon notification and inspection, arrange for necessary repairs and pay the cost for the materials and the labor. New damage is that damage done by Eastern Subterranean and Formosan Termites after the contract date/installation date of the Exterra program. Liability for repairs shall not exceed $250,000.

(R. p. 56).

According to the Termite Contract, IOP (and successor SPM) were to treat the Property for subterranean termites, reinspect annually for infestations, and apply any necessary additional treatments, provided Carroll paid the annual reinspection fee of $250. (R. pp. 55-57). Carroll paid the yearly annual reinspection fee and the Property was inspected annually. (R. p. 65). Carroll conceded that all inspections and treatment services performed by IOP (and successor SPM), which form the basis of his claims, were performed under the Termite Contract. (R. pp. 59-65). In June of 2011, SPM was formed and took over IOP's termite services at the Property under the Termite Contract. Thereafter, SPM sold its assets to Terminix Services, Inc. ("Terminix"),[1] and Terminix assumed the termite services at the Property. According to Carroll, Terminix inspected the Property in January of 2014 and discovered live termites and termite damage. (R. p. 60).

Carroll commenced this lawsuit against IOP, SPM, and Terminix in November of 2015 and filed a second amended complaint on July 27, 2016, asserting claims for breach of contract and negligence based on alleged termite infestation and resulting damage to the Property. (R. pp. 14-27). Carroll alleged IOP and SPM were negligent in failing to (1) properly inspect, treat, or apply treatment to the Property; (2) discover active termites in the Property; (3) train its employees

[1] Terminix settled with the Plaintiff prior to this appeal and is no longer in this lawsuit.

regarding pest control management; (4) comply with South Carolina law and regulations pertaining to inspection for and treatment of termites; and (5) use the degree of care and caution that a reasonable, similarly situated termite pest management company would use. (R. pp. 14-21). Carroll sought damages including cost of repair to return the Property to its prior condition or, alternatively, for the replacement of the structure and for the diminished fair market value of the Property resulting from having to disclose termite damage to future potential homebuyers. (R. pp. 14-22).

On February 5, 2019—fourteen days before trial was scheduled to start—SPM filed a Motion for Partial Summary Judgment requesting the circuit court grant summary judgment in its favor on two issues. (R. p. 29-66). First, SPM argued, and the circuit court agreed, that Carroll's negligence claim should be dismissed as a matter of law because all of the allegedly negligent conduct Carroll complained of arises out of and relates to SPM's performance or nonperformance of the Termite Contract. (R. pp. 35-50, R. pp. 2-3). Second, SPM argued, and the circuit court agreed, that Carroll's remedy to repair any new damages resulting from termites shall not exceed $250,000 pursuant to the limitation of damages provision in the Termite Contract. (R. p. 40, R. pp. 2-3). On February 18, 2019, the day before trial was scheduled to begin, Carroll emailed a 192-page Response in Opposition to SPM's Motion for Partial Summary Judgment to the Court and all counsel. (R. pp. 69-118). On February 20, 2019, the Court held a hearing on SPM's Motion for Partial Summary Judgment, at which time IOP joined in SPM's motion on the same grounds. (R. p. 68, R. pp. 1042-1055). At the conclusion of the hearing, the Honorable Roger M. Young granted SPM's (and IOP's) Motion for Partial Summary Judgment on both issues presented, thereby dismissing Carroll's negligence claim as a matter of law and limiting the amount Carroll could recover under his breach of contract claim to $250,000. (R. pp. 1043-44, 1049, 1053). Two days after the hearing, Carroll filed his Response in Opposition. (R. pp. 69-118). Judge Young issued a written order granting

partial summary judgment in favor of the Respondents, which was filed on February 25, 2019. (R. p. 2-3).

Carroll filed a Motion for Reconsideration on March 1, 2019. (R. pp. 119-1024). On March 29, 2019, SPM filed a Response in Opposition to Carroll's Motion for Reconsideration. (R. pp. 1025-1038). Judge Young denied Carroll's Motion for Reconsideration by written order dated April 18, 2019, 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 filed a Petition for Rehearing on September 5, 2023. The Court of Appeals denied the Petition for Rehearing by order entered September 21, 2023. Carroll filed a Petition for Writ of Certiorari on October 23, 2023. SPM hereby timely files its Return to Carroll's Petition for Writ of Certiorari.[2]

Argument

I. Carroll's Petition should be denied because the Court of Appeals correctly affirmed the circuit court's grant of partial summary judgment in favor of IOP (and successor SPM) because Carroll failed to identify a duty IOP (and successor SPM) owed him outside of the Termite Contract.

For Issues I and II of his Petition, Carroll argues the circuit court and the Court of Appeals erred by misapplying the economic loss rule and failing to acknowledge a duty IOP (and successor SPM) owed him outside of the Termite Contract. Contrary to Carroll's assertions, the opinions of the circuit court and the Court of Appeals are well-supported by the record and sound legal precedent.

In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, this Court stated that "[i]n most instances, a negligence action will not lie when the parties are in privity of contract" unless there is "a special relationship between the alleged tortfeasor and the injured party

[2] An Order extending SPM's deadline for serving and filing its Return to Carroll's Petition for Writ of Certiorari until December 18, 2023 was filed on November 16, 2023.

not arising in contract." 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). To determine whether the economic loss rule applies, "[the Court's] inquiry . . . is whether the duties [plaintiff] allege[d] . . . ar[o]se from the parties' contract or independently therefrom." *Koontz v. Thomas*, 33 S.C. 702, 712, 511 S.E.2d 407, 412 (Ct. App. 1999). In *Kennedy v. Columbia Lumber & Mfg. Co.*, this Court adopted a narrow exception to the economic loss rule in the context of residential home building and held the rule did not bar recovery in tort when a builder violates an applicable building code or deviates from industry standards. 299 S.C. 335, 345–47, 384 S.E.2d 730, 736–36 (S.C. 1989).

Following an analysis of case law discussing the economic loss rule, the Court of Appeals turned to the two cases cited in the trial court's order, both of which directly support the circuit court's grant of partial summary judgment in favor of IOP (and successor SPM): *Duc v. Orkin Exterminating Co., Inc.*, 729 F. Supp. 1533 (D.S.C. 1990) and *Dixon v. Texas*, 222 S.C. 385, 72 S.E.2d 897 (1952). Both of these cases, while neither specifically reference the economic loss rule, articulate the same, well settled principle: to pursue a tort and breach of contract claim concerning the same conduct, a plaintiff must allege a duty owed to him by the defendant separate and distinct from any duty owed under a contract. *Duc*, 729 F. Supp. at 1535, *Dixon*, 222 S.C. at 386, 72 S.E.2d at 899. In *Dixon*, this Court concluded a plaintiff could bring an action only for breach of contract where, as here, "[t]he breach of duty complained of ar[ose] solely from contract and constitute[d] nonfeasance rather than misfeasance." 222 S.C. at 390, 72 S.E.2d at 899. The Court stated ". . . when there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract . . ." *Id.* at 389, 72 S.E.2d at 899. It is only when the breach of duty alleged arises out of liability independent of the personal obligation undertaken by the contract, it is a tort. *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974).

Carroll incorrectly asserts the circuit court and the Court of Appeals erred in relying on *Duc* because that case did not involve allegations that the termite company owed a duty to the homeowner independent of the contract. The plaintiff in *Duc* sued Orkin for breach of contract, but also asserted a cause of action in negligence. 729 F. Supp. at 1533. In that case, the homeowner contended that Orkin had a contractual duty to inspect his house annually and to report to him any evidence of water damage discovered during the inspection. *Id.* The homeowner claimed that Orkin did not make annual inspections as required by the contract or, if it did, it failed to notice or report to the homeowner any evidence of water damage. *Id.* Orkin filed a motion for summary judgment, and the district court expressly recognized the distinction between contract and tort causes of action and ruled that the duties and liabilities between the plaintiff and Orkin "were created and defined by the contract and the guarantee." *Id.* at 1535. The district court further explained that, "[a]s a general rule, there must be some active negligence or misfeasance to support the tort" that is "distinct from the breach of contract." *Id.* Because plaintiff failed to allege a breach of duty owed by Orkin that was independent of the contract, his claim for negligence was dismissed as a matter of law. *Id.* at 1533.

Carroll argues the circuit court and the Court of Appeals erred in applying the well settled principles articulated in *Dixon* and *Duc* because Carroll alleged IOP (and successor SPM) violated regulations and industry standards, thereby creating duties independent of the Termite Contract. He contends, for example, that SPM engaged in an independent act of negligence by beading termiticide around the perimeter of the house without telling Carroll. However, the simple fact that there may have been an alteration in treatment protocol over the dozen years or so this contract was in place does not change the fact that the obligations regarding that treatment arise solely from the Termite Contract. Carroll cannot legitimately divorce IOP (and successor SPM's) treatment of the Property using bait stations from the treatment of the Property using termiticide – they both emanate from

central purpose of contract, which was to treat the Property for termites, the method of which Carroll expressly conceded he did not care to know about. Moreover, it is well settled under South Carolina law that, while industry standards are often probative in defining the standard of care, they do not determine if the prerequisite duty of care is owed. *Colleton Prep. Academy, Inc. v. Hoover Universal, Inc.*, 666 S.E.2d 247 (S.C. Ct. App. 2008).

Relying on well settled principles, the Court of Appeals correctly held the circuit court did not err in granting partial summary judgment in favor of IOP (and successor SPM) because all of the acts and omissions complained of clearly arise directly from IOP (and successor SPM's) alleged performance and non-performance of its contractual obligations in treating the Property for termites. IOP (and successor SPM's) duty under the contract was to treat, reinspect, and control termite activity. Carroll alleged that as a result of their failure to properly inspect and treat for termites, termite activity occurred and caused damage to the Property, which he seeks to repair. Carroll's counsel expressly acknowledged during the summary judgment hearing that IOP (and successor SPM's) actions "all related to . . . keeping termites out of the Property." (R. pp. 1048, lines 22–23, 1049, lines 1–5). Had it not been for the contract, IOP (and successor SPM) would have had no duty to inspect or treat the Property for termites at all, and consequently, no responsibility to prevent new damage arising from an infestation. In allegedly failing to perform these duties, Carroll has alleged a breach of the terms of the Termite Contract, the remedy for which is permissibly limited by the contract language itself. Accordingly, neither the circuit court nor the Court of Appeals erred in dismissing Carroll's negligence claim as a matter of law.

Moreover, the circuit court and the Court of Appeals correctly rejected Carroll's argument that the narrow exception to the economic loss rule articulated in *Kennedy* applies. This Court has repeatedly held that the exception to the economic loss rule articulated in *Kennedy* is a narrow one,

expressly limited to the home buyer/builder context, specifically premised on a policy of protecting the new home buyer. *See Sapp v. Ford Motor Co.*, 697 S.E.2d 47, 49 (S.C. 2009) (explaining the court in *Kennedy* created a "narrow exception to the economic loss rule to apply solely in the residential home [building] context"); *Colleton Prep. Academy, Inc. v. Hoover Universal, Inc.*, C/A No. 2:04-cv-00531-DCN, 2007 WL 9710995 (D.S.C. 2007) (certifying a question to the South Carolina Supreme Court and noting "*Kennedy* does not support the proposition that 'breach of industry standards' is a universal exception to the economic loss rule . . . [it] is expressly limited to the home buyer/builder context, and is specifically premised on a policy of protecting the new home buyer.")). Carroll has not raised any legitimate grounds for extending the narrow exception in *Kennedy* because the policy considerations underlying that decision are simply not present here.

Even if this Court were to extend the narrow exception in *Kennedy* to find an independent duty from alleged violations of the South Carolina Department of Pesticide Regulations ("SCDPR") and industry standards, which SPM specifically denies, there is no nexus or causal connection between alleged violations of the SCDPR and Carroll's claimed damages. As an initial matter, the language from SCDPR 27-1085(B)(2) that states "Treatment and inspection must be performed in accordance with these regulations and with the terms of the written agreement or contract for so long as the contract is valid" does not create a duty independent of the contract to support a cause of action for negligence. To the contrary, this language contemplates that the regulations will be incorporated into the contract and any material breach of regulations will be evaluated under the terms of the contract as a potential breach of contract, not a negligence cause of action. Carroll urges this Court to reverse the Court of Appeals and remand the case back to the circuit court so that he can present expert testimony to a jury that IOP (and successor SPM) failed to produce records several years after the SCDPR requires it to keep records to somehow prove they acted negligently

in performing its services at the Property. However, IOP (and successor SPM) were never issued a citation for violations of the SCDPR in relation to the Property, and the evidence Carroll seeks to introduce is from prior unrelated cases that are factually dissimilar and do not involve the same type of alleged misconduct. Accordingly, the Court of Appeals and circuit court properly held the narrow exception articulated in *Kennedy* is inapplicable here.

Simply put, the economic loss rule seeks to uphold the sanctity of the contractual process, reflecting a concern with protecting the core principles that underlie contract law—the rights of the parties to receive the benefit of their bargain, as well as the ability of parties to negotiate terms and allocate risk of foreseeable problems at the outset. *See Palmetto Linen Service, Inc. v. UNX, Inc.*, 205 F.3d 126, 130 (4th Cir. 2000). Carroll, an educated businessman who made his fortune entering into sophisticated commercial contracts for the purchase, sale, and management of real estate, entered into an arms-length transaction with IOP (and successor SPM) to perform annual inspections and treatment of the Property. IOP (and successor SPM) agreed to inspect and treat the Property for termites and repair any new damages resulting from termites not to exceed $250,000. The Termite Contract contemplated precisely what Carroll complains of today—new damage purportedly arising out of a termite infestation—and the parties specifically allocated the risk of this problem occurring by contractually agreeing to limit SPM's liability for repairs not to exceed $250,000. Therefore, to the extent Carroll wishes to sue IOP (and successor SPM) for failing to improve their contractually required performance, he must sue in contract, not tort. For these reasons, the Court of Appeals Opinion is consistent with South Carolina precedent, and Carroll's Petition for Writ of Certiorari should be denied.

II. Carroll's Petition should be denied because the Court of Appeals correctly held that Carroll failed to preserve his argument regarding the limitation of damages provision in the Termite Contract for appellate review.

The Court of Appeals correctly held Carroll waived appellate review of his argument that he is entitled to $250,000 for each year that IOP (and successor SPM) breached the contract because he failed to cite to any supporting authority for his position and his arguments were merely conclusory statements. *See Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 594 (Ct. App. 2005). Citing no legal authority *again*, Carroll has now changed course and urges this Court to find the trial court did not rule on this issue at all and any such ruling should be left remaining with the breach of contract cause of action. Carroll's attempt to raise a new argument for the first time in his Petition for Writ of Certiorari is likewise not preserved for appellate review and should not be considered by this Court. *See Ramirez v. State*, 413 S.C. 351, 776 S.E.2d 101 (S.C. Ct. App. 2015), reversed on other grounds, *Ramirez v. State*, 419 S.C. 14, 795 S.E.2d 841 (2017) (explaining that an argument raised for the first time in a Petition for Writ of Certiorari is not preserved for appellate review)). For these reasons, Carroll's Petition for Writ of Certiorari should be denied.

Conclusion

For the reasons set forth above, Carroll has failed to present any argument that implicates the considerations listed in Rule 242(b), SCACR. The Opinion of the Court of Appeals is fully consistent with binding precedent and does not present any question of exceptional importance. Therefore, the Petition must be denied or, in the alternative, dismissed.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted,

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