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S.C. SUPREME COURT

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
Civil Action No. 2015-CP-10-05944

Appellate Case No. 2023-001655

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

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF 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

For more than ten (10) years, Petitioner James E. Carroll, Jr. (Carroll) hired the same local pest control company to prevent a termite infestation at his Isle of Palms home. Beginning in 2003, Carroll hired Isle of Palms Pest Control ("IOP Pest Control"), owned by Vincent Sottile, Jr., to treat and inspect his home for termites. (R. pp. 215-216). Carroll paid a yearly fee to maintain this service every year from 2004 to 2013. IOP Pest Control and subsequently SPM Management Company, Inc. ("SPM") — a successor company Mr. Sottile also owned — treated and inspected the property from 2003 until 2013 when Terminix purchased SPM Pest Management. (R. pp. 86, 95, 0168-0176). In January 2014, a Terminix inspector discovered a substantial infestation of live termites and extensive termite damage to the property. (R. pp. 103, 603-604).

IOP Pest Control's initial service agreement was for installation and maintenance of an "Exterra Termite Interception and Baiting System" for the placement of bait stations and monitoring of the bait stations. (R. pp. 55-56, 82-85). This was the agreement Vincent Sottile signed and gave to Carroll in 2003, (R. pp. 65, 98), and it specifically excluded the use of a chemical termiticide. (R. p. 58). Sottile 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 Pest Control has no record of the termiticide treatment and Carroll was not notified of Sottile's switch from bait stations to termiticide. (R. pp. 92-96). According to Mr. Sottile, in 2003, at the outset of the bait station agreement, without telling Carroll, he decided to undertake termiticide use and "beaded" termiticide around the perimeter of the home, and in 2008, again, without telling Carroll, he "beaded" termiticide around the property yet failed to disclose it or keep any records of it, admittedly violating regulations. *Id*. Sottile's testimony that he quit monitoring the bait stations in 2008, "beaded termiticide" using Termidor without drilling, trenching or disclosing to the owner is evidence of one way in which IOP Pest Control and SPM undertook a duty and also failed to comply with the then existing regulations and industry standards. (R. pp. 96, 0102-0103,[1] 0194, 252-569, 571-0821).

There was further evidence IOP Pest Control and SPM failed to comply with South Carolina Department of Pesticide ("SCDPR") regulations and failed to meet industry standards. Sottile testified that there should have been a new agreement for 11 Tabby Lane, specifying treatment with termiticide.[2] (R. p. 96). Dr. Maxcy Nolan, an entomologist with a PhD from Clemson and extensive education and experience dating back more than 30 years, who is qualified to give opinions on the requirements of the pest control company and the standards of care in the industry, testified that IOP Pest Control and SPM's treatments and inspections did not comply with industry standards. (R. pp. 583-585, 617). Nolan testified there was extensive termite damage throughout the house. After purchasing SPM and finding no bait stations at the property and no Exterra records in the documents they received, Terminix ultimately treated the property in 2014-15 and stopped the live termites. (R. pp. 618-622). Nolan testified the bait stations referenced in the original 2003 agreement (which were not in any of SPM or IOP Pest Control's records but

[1] Deposition of Cecil Hernandez (R. p. 0077, 0102-0103).

were found by Mr. Carroll) were not there or were in the wrong location (R. pp. 744-746), and if bait stations had been abandoned, as was testified, then the chemical treatment Sottile said he used, was not applied properly[3] and failed to comply with the chemical's label and the state's pesticide regulations (R. pp. 678-679, 689-90, 744-746, 754-756). James Wright, an expert in structural entomology and regulatory entomology, also opined on the several ways in which SPM and IOP Pest Control violated regulatory duties. In particular, Wright testified there were no records showing the baiting station was properly managed. He also testified about the state's implementation of a regulatory framework for the structural pest control industry that is consistent with the expectations of consumers regarding the protection of their property and patterns of conduct of SPM and IOP Pest Control as to the alleged acts and omissions (R. pp. 0263–0264, 0282–0296).

On February 4, 2019, on the eve of a two week "date certain" trial scheduled to begin on February 19, 2019, before the Honorable Roger Young, SPM moved for partial summary judgment as to Carroll's negligence claims, arguing those claims were barred by the economic loss rule (R. p. 0031).[4] As would have been typical for a motion pending less than two weeks, no hearing was scheduled prior to the time that the parties were to appear for jury qualification and trial. On Monday, February 18, 2019 — President's Day and the day before jury qualification — Carroll emailed a Memorandum in Opposition to SPM's Motion for Partial Summary Judgment including Exhibits A through T and a copy of SCDPR's regulations to Judge Young's law clerk and all

[3] The opinion is that sometime after Sottile lost faith in the bait stations, five years after he began with it, the company should have drilled the foundation and applied the termiticide using trenching and treating at that time. R. p. 754.

[4] In Carroll's Second Amended Complaint, filed July 27, 2016, he alleges causes of action for Negligence and Breach of Contract/Warranty against IOP Pest Control, SPM, and Terminix Services, Inc.("Terminix"), which is no longer in the lawsuit and not a part of the appeal.

counsel. (R. pp. 69, 1018). Carroll also emailed the Court a pre-trial brief, a motion *in limine* and proposed *voir dire*. (R. p. 1020).

Plaintiff's Memorandum in Opposition included portions[5] of the deposition testimony of witnesses and experts he was prepared to call at the February 19, 2019 trial. For example, Vincent Sottile's deposition testimony — that he quit using the baiting system in 2008, that he "did it a little different" by "beading" Termidor, in violation of the Termidor label instructions, and never disclosed to the owner or kept records of the termiticide use, in violation of the regulations and industry standards for the use of the termiticide — is included in the exhibits to the memorandum (R. pp. 96 – 0101, pp. 872). Also included were excerpts of the depositions of Cecil Hernandez (including as Exhibit K, R. pp. 0102-0103), who testified that a treatment, like Sottile described, of beading termiticide without drilling piers, drilling slabs or trenching would not have complied with the regulations or industry standards. The Plaintiff's memorandum also included portions of the first deposition of Maxcy P. Nolan, PhD and the entire Vol. 2 of Nolan's deposition including his testimony that the Termidor application Sottile described did not comply with the labeled use, that records of station monitoring and pesticide use were missing, and that the termites were on the property years before their discovery. (R. pp. 870-989 Exh. N and O to Plaintiff's Memorandum in Opposition).[6]

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[6] Portions of the depositions of expert Dr. Maxcy Nolan were included as Exhibits N – O to Plaintiff's Memorandum in Opposition to SPM's Motion for Partial Summary Judgment. Plaintiff's entire memorandum including all exhibits A through T were emailed to Judge Young and subsequently filed. There is an error in the Record on Appeal in that the first version of the Plaintiff's Memorandum in Opposition to SPM Pest Management Company's Motion for Partial Summary Judgment does not include all of the exhibits (A through T) (R.p. 0069). However, the Plaintiff's Memorandum in Opposition to SPM Pest Management Company's Motion for Partial Summary Judgment (with a complete set of exhibits A-T) is included as Exhibit 10 to the Plaintiff's Motion for Reconsideration or to Alter or Amend Judgment and Memorandum in Support (R pp. 823 to 1013). The trial court filings including the Plaintiff's memo and exhibits are publicly available in the electronic record.

In addition to the documents attached to Plaintiff's Memorandum in Opposition, all parties and the circuit court were aware of the following deposition testimony: Maxcy Nolan, PhD, dated November 29, 2016, and May 3, 2017; Cecil Hernandez, entomology expert and regulator with SCDPR, dated November 29, 2016; and James Wright, dated November 4, 2016. All of these experts were referenced in the Memorandum in Opposition,[7] and in the case of Cecil Hernandez and Maxcy Nolan, excerpts of depositions (including Vol. 2 of Nolan's deposition) were attached as exhibits. (R. pp. 0103, 0116 – 0118, 872-1013, see footnote 6). 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.[8] While there was sufficient evidence set forth in the Memorandum in Opposition, its exhibits including the entire Nolan Day 2 transcript, and the SCDPR Regulations, which were emailed to the circuit court on February 18, 2019 and in the court's possession and the circuit court's records, and subsequently filed (R. pp.823 -1014 1018, Ex. 12, Email to Judge Young's law clerk), full transcripts[9] were provided as exhibits to the Motion for Reconsideration. (R. pp. 0119 – 0141, 201 – 250 (Exh. 7 Sottile), 252 – 424 (Exh. 8 James Wright) 572 – 820 (Exh. 9 Maxcy Nolan (11/29/16) Vol. 1).

The court held a hearing on SPM's motion two days later, on February 20, 2019, during which, *for the first time*, IOP Pest Control stated it joined in SPM's motion on the same grounds, subsequently filing a handwritten motion (R. pp. 68, 1044). During the hearing, Judge Young

[8] The trial court filings are publicly available in the electronic record.
[9] This is in addition to the entire Volume 2 Maxcy Nolan deposition, which was included as Exhibit O to Plaintiff's Memorandum in Opposition to SPM's Motion for Partial Summary Judgment (see R. p. 872-989) and footnote 6 above.

stated that he considered the record including the exhibits in opposition and requested Respondents' counsel prepare a written order. (R. pp. 1042). A written order granting Respondents' motion for partial summary judgment was signed the next day and file-stamped on February 25, 2019 ("Order Granting Partial Summary Judgment"). (R. pp. 0002-0003).

On March 1, 2019, Carroll filed a Motion for Reconsideration or to Alter or Amend Judgment ("Motion for Reconsideration"), which Judge Young denied. (R. p. 0004).

Carroll appealed, and the Court of Appeals affirmed. (App. pp. 1127). Applying the economic loss rule and finding no exception applied, the Court of Appeals held that the circuit court did not err in granting partial summary judgment, that no duty existed beyond the contract and that no exception to the economic loss rule applied. Carroll's Petition for Rehearing was denied. (App. pp. 1153).

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, [the South Carolina Supreme Court] appl[ies] the same standard which governs the trial court under Rule 56(c), S.C.R.C.P.: summary judgment is proper when 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114–15, 410 S.E.2d 537, 545 (1991). The party opposing the motion must show a "reasonable inference" to be drawn from the evidence. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 461, 892 S.E.2d 297, 300 (2023).

"On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Summary judgment is not proper when further inquiry into the facts is necessary "to clarify the application of the law." *Id.*

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 negligent 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.[10] But Carroll did not purchase a defective product (or any product) and has not asserted a products liability claim; instead, he engaged a professional pest control service. Further, the damage sustained by Carroll is not damage to a product, it is substantial damage to "other property" — Carroll's home.

A. The economic loss rule is a products liability doctrine.

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."); *Kennedy v. Columbia Lumber & Mfg. Co*., 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989) ("Where a purchaser's expectations in a sale are frustrated **because the product he bought is not working properly**, his remedy is said to

[10] 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.

be in contract alone, for he has suffered only 'economic' losses." [emphasis added]); *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.").

In South Carolina, the economic loss rule — as evidenced by this Court's own plain-language description of the doctrine — is not applicable to claims for the negligent provisions of services. 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 Pest Control/SPM's failure to perform pest control services.[11]

The economic loss rule originated in the products liability arena with the 1965 California Supreme Court case of *Seely v. White Motor Co*.. 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (Cal. 1965). In *Seely*, the plaintiff purchased a truck with defective brakes that resulted in loss of use and subsequent loss of profit to plaintiff's business. The California Supreme Court established the economic loss rule by barring the plaintiff's strict products liability claim to recover purely economic loss caused by a defective product. Twenty-one years later, the U.S. Supreme Court decided the admiralty case *East River Steamship Corp v. Transamerica Delaval* Inc. and adopted an approach similar to *Seely*, holding that "a manufacturer in a commercial relationship has no duty

[11] 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. p. 75) and in the Motion to Reconsider. (R. p. 137).

under either a negligence or strict products-liability theory to prevent a product from injuring itself." *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871, 106 S. Ct. 2295, 2302 (1986). In *East River*, a shipbuilder contracted with a company to design and install turbines that would serve as the propulsion units for oil-transporting supertankers. The turbines malfunctioned and the plaintiffs, who had chartered the supertankers, filed suit against the turbine designer/manufacturer based on a product liability theory, seeking damages for the cost to repair the supertankers and the income lost when the ships were out of service. The Supreme Court recognized product liability, including strict liability, as part of the general maritime law, 476 U.S. 858, 865, 106 S. Ct. 2295, 2299 (1986); however, the court declined to extend the doctrine to defective products where there is no damage to "other property." *Id*. at 867-68. As the Florida Supreme Court noted in surveying the origins of the doctrine, "from the outset, the focus of the economic loss rule was directed to damages resulting from defects in the product itself." *Tiara Condo. Ass'n v. Marsh & McLennan Cos*., 110 So. 3d 399, 404 (Fla. 2013).

In *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 703 (D.S.C. 2004), the District Court for the District of South Carolina (Judge Duffy), in denying Defendant's motion for partial summary judgment, noted that "the question of whether the [economic loss] doctrine even applies to service contracts remains largely unanswered" and cited to other states' holdings that "if the contract is one for services, the economic loss doctrine does not apply, and a negligence claim is permissible." *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 703 (D.S.C. 2004).

The Court of Appeals notes that in *Koontz v. Thomas*, it applied the economic loss rule to plaintiff's professional negligence claim against an architectural firm. (App. pp. 1136, 1138, footnote 9). Koontz and Thomas & Denziger P.A. ("T & D"), an architectural firm, entered into an agreement for T & D to design Koontz' residence. T & D developed a schematic design and after

numerous revisions a plan with an $800,000 construction estimate. When the construction bids ranged from $980,000 to $1.2 million, Koontz went to another architect and instituted a suit for breach of contract, professional negligence and negligent misrepresentation against T & D. The Court of Appeals, without analysis of the doctrine, upheld the trial court's holding that the economic loss doctrine barred the professional negligence claim. *Koontz v. Thomas*, 333 S.C. 702, 712, 511 S.E.2d 407, 412 (Ct. App. 1999). The analysis, *Koontz* held, in deciding whether the remedy is limited to the contract, was whether the duty arose from the parties' contract or independently. In that case, the facts present here are more akin to the Court of Appeal's decision in *Caldwell v. Jim Walter Homes, Inc.*, 293 S.C. 229, 232, 359 S.E.2d 518, 519-20 (Ct. App. 1987) (citing *Dixon v. Texas* Co., 222 S.C. 385, 389, 72 S.E.2d 897, 899 (1952) holding that even though there was a contract between the parties addressing property taxes that Jim Walter Homes, Inc., by course of dealing, undertook and owed the Caldwells a duty such that a cause of action in negligence was maintainable).

Numerous other states have held that the economic loss doctrine does not apply to negligent services claims. The Florida Supreme Court, after expanding the doctrine beyond the products liability context, returned the doctrine to its origins, stating that the expansion of the doctrine outside of products liability had become "unwise and unworkable in practice." *Tiara Condo. Ass'n v. Marsh & McLennan Cos*., 110 So. 3d 399, 407 (Fla. 2013) (holding that the economic loss rule applies only in the products liability context and receding from prior rulings to the extent that they have applied the economic loss rule to cases other than products liability). Other states have likewise rejected the doctrine in cases involving services. *See e.g. Stuart v. Weisflog's Showroom Gallery, Inc*., 308 Wis. 2d 103, 125, 746 N.W.2d 762, 773 (2008) ("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."); *Quest Diagnostics, Inc. v. MCI WorldCom, Inc.*, 254 Mich. App. 372, 380, 656 N.W.2d 858, 863 (2002) ("This Court has declined to apply the economic loss doctrine where the claim emanates from a contract for 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); *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 315 (Minn. 1987) (holding that contracts predominantly for the provision of services rather than goods are excluded from state's application of the economic loss doctrine to "commercial transactions").

B. The economic loss rule does not apply where, as here, there is damage to other property.

The Court of Appeals also misapplied the economic loss rule to 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 plaintiff's 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 will buy" and "the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power").

Although the *Sapp* opinion's discussion focuses on the difference between contract and tort duties, there was no contract between the parties in *Sapp* — Jeffrey Sapp bought a 2000 Ford F-150 with 190,000 miles on it from Atlantic Coast Construction for $5,000. After the truck caught fire and cost $7,000 to repair, but did not injure Sapp or any other property, Sapp sued Ford alleging negligence, strict liability and breach of warranty. *Sapp*, 386 S.C. at 145, 687 S.E.2d at 48. The ultimate holding is related to the damage:

> The only damage caused by the defect in the trucks was damage to the trucks themselves — purely an economic loss to Appellants. Therefore, the economic loss rule precludes Appellant's recovery in tort.

Sapp, 386 S.C. at 150, 687 S.E.2d at 51.

Justice Beatty concurred in the opinion, 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).

In summary, 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.

II. The Court of Appeals failed to recognize duties owed to Carroll

While either rejecting the doctrine or paying no mind to it, South Carolina has long held those who provide services pursuant to a contract — lawyers, accountants, engineers, design professionals, for example— may also be liable in tort[12]. And there is, or should be, no difference here because the professional service provided was pest control.

In this case, the court is essentially saying that because the parties had a contractual relationship, there can be no negligence or tort claim. However, "an affirmative legal duty may be created by statute, ***a contractual relationship***, status, property interest, or some other special circumstance." *See McCullough v. Goodrich & Pennington Mortg. Fund, Inc*., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007). Further, there are several South Carolina cases where the court has found that a contractual relationship between the tortfeasor and one party *created* a tort duty to a third party. *Id* (citing cases); *Tommy L. Griffin Plumbing*, 320 S.C. at 55, 463 S.E.2d at 89 ("We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties."). In fact, this is the context in which the concept of a special relationship giving rise to a duty has arisen. *See McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. at 52, 644 S.E.2d at 48 (citing *Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding*, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995) for the holding that the "special relationship" between a design professional and a contractor gives rise to a professional duty - separate and distinct from any

[12] Although the standard applied is not consistent. *See Sapp v. Ford Motor Co.*, 386 S.C. 143, 152, 687 S.E.2d 47, 52 (2009) (Justice Beatty concurring in result) (referring to the negative treatment of the rule in other areas such as professional services); *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.");

contractual duties - to not negligently design or supervise a construction project). In this instance, the court does not need to recognize a non-contractual basis for a duty in tort or extend a professional duty to a third party (as in Griffin or as the result sought by the Trustee in McCullough), IOP Pest Control and SPM certainly owe a professional duty to Carroll.

In the services arena, this Court has often allowed a tort action to proceed, whether or not there was a contractual relationship between the parties, although the plaintiff has suffered "economic losses." *See Fabian v. Lindsay*, 410 S.C. 475, 492, 765 S.E.2d 132, 141 (2014) (recognizing a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error causes him "economic loss" without reference to the economic loss rule); *Sentry Select Ins. Co. v. Maybank Law Firm*, LLC, 426 S.C. 154, 158, 826 S.E.2d 270, 272 (2019) (recognizing a direct negligence action by an insurer against the lawyer it hired to represent its insured); *Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding*, Inc., 320 S.C. 49, 55, 463 S.E.2d 85 (1995) ("These professionals, however, owe a duty to the client and sometimes to third parties which arises separate and distinct from the Contract for services.") *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."); *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); *Sea Side Villas II Horizontal Prop. Regime v. Single Source Roofing Corp.*, 64 F. App'x 367, 373 (4th Cir. 2003).

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.[13] 205 F.3d at 128-29. In doing so, 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 and SPM did owe professional duties to Carroll and violated industry standards; Respondents' duties to Carroll arose from the parties' contract and independently of it. IOP Pest Control made representations to Carroll because it continued to accept renewal payments although it changed the method of termite prevention entirely without notice. (R. pp. 92-96). Sottile, as representative of IOP Pest Control/SPM, testified that it undertook application of other treatments that were not in or contemplated by the agreement (e.g., Termidor, beading), stopped using the treatments that were contemplated by the agreement, violated regulations by not keeping records of chemical use or using the chemicals in a manner inconsistent with the label. IOP Pest Control and SPM had a professional responsibility and duty to Carroll to comply with the SCDPR regulations. Moreover, there is sufficient evidence that IOP Pest Control/SPM did not comply with these regulations or industry standards in the performance of their services.

According to Dr. Nolan there are two subparts: the first is that IOP Pest Control and subsequently SPM were supposed to inspect the property quarterly for termites and if the

[13] 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.

technician did a thorough inspection of the Property, he would have found damage or infestation along the way. The second subpart is that the company changed to a liquid treatment from the bait stations and the treatment was not a complete or adequate one. The label directions for the Termidor chemical used required drilling and trenching and IOP Pest Control did not do that. (R. pp. 77, 101-03, 681-683, 689-90).[14] James Wright also opined on the several ways in which SPM and IOP Pest Control violated regulatory duties. Wright testified there were no records showing the baiting station was properly managed. He also testified about the state's implementation of a regulatory framework for the structural pest control industry that is consistent with the expectations of consumers regarding the protection of their property (R. pp. 0263–0264, 0282–0296).

The lower court, in its Order Granting Partial Summary Judgment and the Court of Appeals were also incorrect to rely on the factually narrower, and legally inapposite federal district court case of *Duc v. Orkin*, 729 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. 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, as described above, both alleged and *offered proof of* numerous duties "separate and distinct" from the bait station contract, as well as a course of conduct and factual basis for a conclusion that IOP Pest Control and SPM held themselves out as providing/performing professional services requiring specialized knowledge.

If the question of whether a "special relationship" or duty in tort exists is the appropriate one, it 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

[14] Facts outlined in Statement of Case, page 2-3; R. pp. 96, 0102-0103, 0194, 252-569, 571-0821

a duty to the client and sometimes to third parties which arises in addition to the contract for services. The Supreme Court of Idaho has framed the "special relationship" as an exception to the economic loss rule that exists where the relationship between the parties makes it equitable to impose such a duty, and held that the "special relationship" exists in only two situations: "(1) where a professional or quasi-professional performs personal services; [or] (2) where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function." *Aardema v. U.S. Dairy Sys.*, 147 Idaho 785, 792, 215 P.3d 505, 512 (2009); *Wallace v. Heath*, 168 Idaho 40, 49 n.1, 479 P.3d 155, 164 (2021).

In this case, both situations exist. Petitioner asks this Court to reverse the Court of Appeals' decision affirming the circuit court's order on the grounds Respondents owed Carroll a duty under the facts presented.

III. Failure to consider the Plaintiff's filings was an abuse of discretion.

SPM filed its Motion for Partial Summary Judgment shortly before trial. No hearing was scheduled. The trial court was in possession of Carroll's Memorandum in Opposition to SPM's motion (including the exhibits) at the time of the hearing, which took place on February 20, 2019, because it was emailed to the Judge's clerk, as had been requested for filings related to the trial, and Carroll's counsel referred to the memorandum and exhibits and to its experts in the hearing. In fact, February 20, 2019, was the first time that IOP Pest Control made a motion, which was made on the record during the hearing and followed by a handwritten submission. (R. pp. 68, 1044). Judge Young acknowledged at the hearing that he considered the Plaintiff's memorandum and exhibits (R. p. 1052). The Respondents then submitted the requested proposed order that failed to refer to the Plaintiff's submission. (R. p. 00002). Only in the Order denying Plaintiff's Motion to Reconsider does the court make an issue of the Plaintiff's submission. (R. p. 00004). The court has the discretion and inherent power to receive documents and make them a part of the file provided

they did not cause prejudice. *See Loyd's Inc. by Richardson Constr. Co. v. Good*, 306 S.C. 450, 453, 412 S.E.2d 441, 443 (Ct. App. 1991). In this case, the parties received copies of the Plaintiff's memorandum and exhibits including transcript excerpts of expert depositions that they had attended and even filed portions in pre-trial motions. IOP Pest Control did not have a motion on file, only joining in SPM's at the time of the hearing. (R. p. 1044). On February 19, 2019, IOP Pest Control filed a Motion *in Limine* to exclude the expert testimony of James Wright, including an exhibit with his deposition transcript.[15] SPM filed a similar motion in *limine* on February 15, 2019. Any finding that the Respondents would be prejudiced is without support. If the trial court failed to consider the Plaintiff's submissions, it was an abuse of the trial court's discretion.

IV. 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.

[15] The trial court's record is publicly available and the specific link to the motion in *limine* is https://docviewer.charlestoncounty.org/PublicIndex/Index?viewertype=cms&ctagency=10002&casenumber=2015CP1005944&docseq=P19A3.

CONCLUSION

Based on the foregoing analysis, the Petitioner respectfully requests that this Court reverse the decision of the South Carolina Court of Appeals and the trial court's order granting partial summary judgment.

Respectfully submitted,

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