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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2019-000797

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. Respondents.

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals correctly affirmed the circuit court's grant of partial summary judgment in favor of Respondents because Petitioner's negligence claim is barred by the economic loss rule?

II. Whether the Court of Appeals correctly affirmed the circuit court's grant of partial summary judgment in favor of Respondents because Petitioner failed to identify any duties Respondents owed to him outside of the Termite Contract?

III. Whether the Court of Appeals correctly held the circuit court acted within its discretion in declining to consider Petitioner's unfiled Response in Opposition to Respondents' Motion for Partial Summary Judgment and in declining to consider arguments and evidence presented for the first time in Petitioner's Motion for Reconsideration?

IV. Whether the Court of Appeals correctly held Petitioner abandoned the issue of whether he is entitled to $250,000 for each year that the Respondents were in breach of the Termite Contract?

COUNTERSTATEMENT OF THE CASE

This appeal arises out of the circuit court's order granting partial summary judgment in favor of Respondents SPM Pest Management Company, Inc. ("SPM") and Isle of Palms Pest Control, Inc. ("IOP") (collectively referred to herein as "Respondents") on Petitioner's negligence claim. (R. pp. 0002-0003). Petitioner filed the instant lawsuit on November 3, 2015 alleging negligence and breach of contract causes of action against IOP, SPM, and Terminix Services, Inc. ("Terminix")[1] for alleged termite infestation and resulting damages to his residence located at 11 Tabby Lane on the Isle of Palms (the "Subject Residence"). (R. pp. 0014-0027). On or about July 27, 2016, Petitioner filed his Second Amended Complaint, which is the current operative pleading. (R. pp. 0014-0027).

On February 4, 2019, more than ten days before the commencement of a date certain trial

[1] Terminix settled and is not participating in this appeal.

in this case, SPM timely filed and served its motion for partial summary Judgment (referred herein as SPM's "MPSJ") requesting an order granting summary judgment on Petitioner's negligence claim, since the termite treatment (which is the basis of Petitioner's claim) was performed pursuant to a contract (the "Termite Contract"). SPM's MPSJ also requested the circuit court grant summary judgment in its favor limiting Petitioner's contractual remedies to $250,000 total for repairs to new damage caused by termites pursuant to the limitation of damages provision in the Termite Contract. (R. pp. 0029-0065). At the close of business on Monday, February 18, 2019, the evening before trial, Petitioner's counsel emailed a 192-page response in opposition ("Response") to SPM's MPSJ to chambers copying all counsel. (R. pp. 1018, Ex. 12, Email to Judge Young's Law Clerk). However, the Response was not made part of the record because it was provided to the judge during the hearing, and it was not filed with the Clerk's office until two days after the circuit court heard oral arguments and granted the motion for partial summary judgment in favor of Respondents. (R. pp. 0069-0118).

On February 20, 2019, the circuit court heard oral arguments on SPM's MPSJ. SPM argued, and the circuit court agreed that where, as here, Respondents owed no duties to Petitioner except those arising out of the contract, Petitioner's remedy is in contract, not tort. (R. pp. 0003-0004, 0029-0065, 1052, lines 18-24). Accordingly, SPM argued, and the circuit court agreed that Petitioner's negligence claim should be dismissed as a matter of law because it is barred by the economic loss rule. (R. pp. 0003-0004, 0029-0065, 1053, lines 11-17). Finally, SPM argued, and the circuit court agreed that Petitioner's contractual remedies are limited to $250,000 total for repairs to new damage caused by termites pursuant to the limitation of damages provision in the Termite Contract. (R. pp. 0003-0004, 0029-0065). The circuit court issued a written order granting partial summary judgment in favor of Respondents on these two issues, thereby dismissing

Petitioner's negligence claim and limiting Petitioner's contractual remedies to $250,000 total. (R. pp. 0003-0004).

On March 1, 2019, Petitioner filed a motion for reconsideration raising numerous new arguments and submitting previously available evidence (R. p. 119). In a written order dated April 18, 2019, the circuit court denied Petitioner's motion for reconsideration. (R. pp. 0004-0013). In its order, the circuit court declined Petitioner's request to consider his memorandum opposing summary judgment and attached exhibits because it was neither filed prior to the hearing nor provided to the Court at the hearing. (R. pp. 0008-0009). The circuit court reasoned that, pursuant to Rule 56(c), SCRCP, it had discretion to make the documents part of the file only if it did not prejudice Respondents. (R. pp. 0008-0009). The circuit court concluded Respondents would be prejudiced if it amended its Order to include consideration of the unfiled memorandum and exhibits emailed to counsel at the close of business on the evening before the hearing because Respondents would have had little, if any, time to fully address the arguments and evidence being offered in opposition. (R. p. 0009).

In addition, the circuit court declined to consider the following arguments because Petitioner raised the arguments for the first time in his motion to reconsider: (1) Respondents owed duties created by the South Carolina Department of Pesticide ("SCDPR") and industry standards; (2) Respondents owed duties created by SCDPR regulation 27-1085(a) and (b)(2), neither of which were referenced in his memorandum in opposition; (3) the termite industry is a regulated industry and falls within the exception to the economic loss rule set forth in *Kennedy v. Columbia Lumber & Mfg. Co.*, 384 S.E.2d 730 (1980); and (4) Respondents owed duties arising from regulatory and industry standards for application of termiticide separate and apart from the contractual duties under the Termite Contract. (R. pp. 0009-0011). Likewise, the circuit court declined to consider

previously available evidence that was improperly submitted for the first time on reconsideration. (R. p. 0011-0013). However, the circuit court held that, even if it were to consider the evidence, it would still find Petitioner's arguments were meritless because South Carolina law does not recognize a tort duty under these circumstances. (R. p. 0011-0013).

Petitioner appealed, and the Court of Appeals affirmed. (R. pp. 1127-1140). First, the Court of Appeals correctly held the circuit court did not err in granting partial summary judgment in favor of Respondents on Petitioner's negligence claim because Petitioner's negligence claim is barred by the economic loss rule. (R. pp. 1134-1138). Second, the Court of Appeals correctly held the circuit court did not err in granting partial summary judgment in favor of Respondents on Petitioner's negligence claim because Petitioner failed to identify any duties Respondents owed to him outside of the Termite Contract. (R. pp. 1134-1138). Third, the Court of Appeals correctly held the circuit court acted within its discretion in declining to consider Petitioner's memorandum opposing Respondents' motion for partial summary judgment and attached exhibits and in declining to consider previously available evidence and arguments Petitioner presented for the first-time on reconsideration. (R. pp. 1138-1140). Despite its holding that the circuit court acted within its discretion, the Court of Appeals reviewed and considered all of the exhibits and memorandum submitted by Petitioner and still held the circuit court did not err in granting partial summary judgment in favor of Respondents because none of the arguments and evidence established any duties owed by Respondents to Petitioner that was separate and apart from the contract. (R. p. 1140). Finally, the Court of Appeals correctly held the circuit court did not err in limiting Petitioner's contractual remedy to $250,000 total. (R. p. 1138). On September 5, 2023, Petitioner filed a Petitioner for Rehearing, which the Court of Appeals denied on September 21, 2023. (R. pp. 1141-1154).

COUNTERSTATEMENT OF THE FACTS

Petitioner purchased the Subject Residence on November 1, 2002. Thereafter, on February 19, 2003, Petitioner entered into the Termite Contract with Respondent IOP. (R. pp. 0055-0057, 215-216). Pursuant to the terms of the Termite Contract, IOP was to treat the house for subterranean termites, reinspect annually for infestations, and apply additional treatments so long as the Petitioner paid the annual fee each year. (R. pp. 0055-0056). Petitioner paid the yearly annual reinspection fee, and the Subject Residence was inspected annually. (R. pp. 86, 95, 1068-0176). The Termite Contract included the following limitation of damages provision:

> 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. 0056). While the termite contract is not signed by Petitioner, it is undisputed by the Petitioner that the Termite Contract is a valid contract that governs the relationship between the parties. (R. pp. 0059-0065). In addition, Petitioner conceded during his deposition that all inspections and treatment services performed by IOP and SPM, which form the basis of Petitioner's claims, were performed under the Treatment Contract. (R. pp. 0059-0065). Thus, the Termite Contract sets forth the rights and obligations of the parties regarding any damages resulting from a termite infestation at the Subject Residence.

Pursuant to the provisions in the Termite Contract, IOP provided termite services at the Subject Residence from 2003 until 2011. (R. pp. 86, 95, 1068-0176). On or about June 6, 2011, SPM incorporated and took over the termite services at the Subject Residence and continued to provide inspection and treatment services under the Termite Contract. (R. pp. 86, 95, 1068-0176).

SPM sold its assets to Terminix on or about May 14, 2013, at which time Terminix took over the termite services at the Subject Residence. (R. pp. 86, 95, 1068-0176). More than six months later, in January of 2014, Terminix discovered termites at the Subject Residence. (R. pp. 103, 603-604).

Petitioner filed this lawsuit against IOP, SPM, and Terminix alleging negligence and breach of contract causes of action arising out of the same set of facts. With regard to his negligence claim, Petitioner alleges Respondents were negligent in the following particulars, all of which arise out of or relate to the performance or nonperformance of the Termite Contract: (a) In failing to properly apply the "Exterra" treatment to the Plaintiff's home; (b) In failing to properly treat the Plaintiff's home through other liquid treatments or alternative treatments available in the marketplace to stop termites from entering the property; (c) In failing to properly inspect the Plaintiff's property on annual inspections; (d) In failing to discover active termites in the Plaintiff's property; (e) In failing to train it's employees and management in regards to pest control management; (f) In failing to comply with the laws and regulations promulgated by the State of South Carolina, pertaining to inspection for and treatment of termites; and (g) In failing to use the degree of care and caution that a reasonable, similarly situated company in the field of termite pest management would use. (R. pp. 0014-0027). Thereafter, Petitioner alleges Respondents breached the Termite Contract by failing to properly inspect the Subject Residence and apply appropriate treatments according to accepted treatment standards. (R. pp. 0014-0027).

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, SCRCP: 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." *Wogan v. Kunze*, 666 S.E.2d 901, 903 (S.C. 2008). Once

the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the non-moving party's case, the non-moving party must show a "reasonable inference" to be drawn from the evidence. *Kitchen Planners, LLC v. Friedman*, 892 S.E.2d 297, 300 (S.C. 2023) (citations omitted)). "It is not sufficient for [the non-moving party] to create an inference that is not reasonable or an issue of fact that is not genuine." *Id.* The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 548 S.E.2d 868, 874 (S.C. 2001).

ARGUMENT

I. The Court of Appeals correctly affirmed the circuit court's grant of partial summary judgment in favor of Respondents because the economic loss rule bars Petitioner's negligence claim.

a. The Court of Appeals correctly held Petitioner failed to preserve the issue of whether the economic loss rule applies to service contracts for appellate review.

Petitioner argues the economic loss rule does not apply because the Termite Contract is a contract for services. However, Petitioner ignores the Court of Appeals' holding that Petitioner failed to preserve this issue for appellate review. In his Motion for Reconsideration, Petitioner argued, for the first time, that "whether [the economic loss rule] applies at all to a service, such as that provided by IOP/SPM, is not settled law." (R. p. 0137). The Court of Appeals correctly held Petitioner failed to preserve this issue for appellate review because he improperly raised it, for the first time, in his motion for reconsideration. (R. 1138, n.9). *See, e.g., Herron v. Century BMW*, 693 S.E.2d 394, 397 (S.C. 2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *Kiawah Prop. Owners Grp. v. PSC*, 597 S.E.2d 145, 147 (S.C. 2004) (issue first raised in a motion for reconsideration is not preserved for appellate review); *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177 (2009) (an issue cannot be raised for the first

time in a motion for reconsideration); *Cove Dev., LLC v. Harborside Cmty. Bank*, 691 S.E.2d 158, 160 at n.5 (S.C. 2010) (noting an issue cannot be "raised for the first time in a motion for reconsideration")). As such, SPM respectfully requests this Court affirm the Court of Appeals' holding that this issue was not preserved for appellate review.

However, even if this Court finds this issue was properly preserved, Petitioner's argument fails on its merits. As the basis for his argument, Petitioner relies on dicta from a 20-year-old case which explains that, in the year 2004, "[t]he question of whether the [economic loss rule] even applied to service contracts remain[ed] largely unanswered." *Eaton Corp. v. Trane Carolina Plains* 350 F. Supp. 2d 699, 703 (D.S.C. 2004). Indeed, the *Eaton* court correctly elected not to decide the issue at that time but, rather, left the issue to the South Carolina state courts to evaluate. *Id.* However, in the 20 years since the *Eaton* decision, the question of whether the economic loss rule applies to service contracts has been resoundingly and repeatedly answered in the affirmative by courts in South Carolina. *See, e.g., Tri-Lift NC, Inc. v. Drive Auto Indust. Of Am., Inc.*, C/A No. 6:20-cv-02712-HMH, 2021 WL 131017, at *2–5 (D.S.C. Jan. 13, 2021) (applying economic loss rule to automotive repair services contract and dismissing tort claims pursuant to Rule 12(b)(6); *Bahringer v. ADT Sec. Servs., Inc.*, 942 F. Supp. 2d 585, 589–90 (D.S.C. Apr. 29, 2013) (applying economic loss rule to alarm services contract and dismissing negligence claim); *Trevillyan v. APX Alarm Sec. Sys., Inc.*, No. CA 2:10-1387-MBS, 2011 U.S. Dist. LEXIS 694, at *24 (D.S.C. Jan. 3, 2011) (applying economic loss rule to alarm services contract and dismissing negligence claim)). Moreover, South Carolina courts have routinely applied the economic loss rule to bar tort claims when the duties between the parties originate only from contract. *See, e.g., Palmetto Linen Service v. U.N.X., Inc.*, 205 F.3d 126, 129–30 (4th Cir. 2000) (applying South Carolina law and affirming dismissal of negligence claims because the relationship between the parties was "merely one of

vendor-vendee"); *Tri-Lift NC, Inc.*, 2021 U.S. Dist. LEXIS 6954, at *3–4 (granting plaintiff's motion to dismiss defendant's negligence counterclaim under economic loss rule, and finding that contract between the commercial entities allowed them to properly allocate their risk and that no exceptions to the application of the economic loss rule existed); *Bahringer*, 942 F. Supp. 2d at 590 (dismissing tort claims under economic loss rule, and holding that "thinly veiled breach of contract claims . . . cannot stand as a separate negligence claim"); *Besley v. FCA US, LLC*, C/A No. 1:15-CV-01511-JMC, 2016 U.S. Dist. LEXIS 2200, at` *5 (D.S.C. Jan. 8, 2016) (dismissing tort claims as barred by the economic loss rule because no duty existed between the parties outside of those created by their contract); *Transcendence Treatment Ctr., LLC v. Ascension Recovery Servs., LLC*, C/A No. 2:23-cv-6061-BHH, 2024 U.S. Dist. LEXIS 168297, at *7–15 (D.S.C. Sept. 18, 2024) (dismissing tort claims as barred by the economic loss rule because no duty existed between the parties outside of those created by contract)).

Based on the above-cited decisions, it is clear that South Carolina courts readily apply the economic loss rule to pure service contracts. According to the Petitioner, every service provider who, in exchange for valuable consideration, enters into a valid and enforceable contract with another party to provide a service should be held responsible in tort for damages specifically contemplated by the contract (and despite the fact the parties had agreed to an allocation of risk in the contract). Petitioner's argument, if adopted, would effectively subsume the economic loss rule and eliminate the rights and ability of parties to enter into contracts, negotiate terms, and allocate risk of foreseeable problems at the outset. Indeed, dismissal of Petitioner's negligence claim is the only way to protect South Carolina's stated policy interests in allowing parties to allocate their risks via contractual agreements and, conversely, avoiding a situation where a party receives "a better deal than what was bargained for by the parties" under their contractual agreement. *Myrtle*

Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1049, 1056 (D.S.C. Dec. 7, 1993); *see also Purvis v. Consolidated Energy Prods. Co.*, 674 F.2d 217, 220–23 (4th Cir. 1982); *Tri-Lift NC, Inc.*, 2021 U.S. Dist. LEXIS 6954, at *3–4.

Had it not been for the contract, SPM would have had no duty to inspect or treat the Subject Residence for termites at all, and consequently, no responsibility to prevent new damage arising from an infestation. In allegedly failing to perform these duties, Petitioner has alleged a breach of the terms of the contract, the remedy for which is permissibly limited by the contract language itself. Therefore, to the extent Petitioner wishes to sue SPM for failing to improve their contractually required performance, Petitioner must sue in contract, not tort. As such, if this Court find the issue of whether the economic loss rule applies to service contracts is properly preserved for appellate review, Respondent SPM respectfully requests that this Court reject Petitioner's attempt to improperly evade application of the rule based on the mere fact that the Termite Contract is a service contract.

b. The Court of Appeals correctly held the exception to the economic loss rule set forth in *Kennedy v. Columbia Lumber & Manufacturing Co.* does not apply.

Petitioner urges this Court to find that the economic loss rule does not apply because Petitioner suffered damage to other property and the exception to the rule set forth in *Kennedy* applies. However, pursuant to South Carolina case law, the economic loss rule precludes Petitioner's negligence claim. *See Kennedy v. Columbia Lumber & Manufacturing Co.*, 384 S.E.2d 730 (S.C. 1989). In *Kennedy*, this Court carved out a narrow exception to the economic loss rule for residential construction, but it specifically noted that "[t]he economic loss rule will still apply where duties are created solely by contract. In that situation, no cause of action in negligence will lie." 384 S.E.2d at 737. The fundamental premise underlying the Supreme Court's imposition of

liability based on negligence against builders and developers for defective new residential construction is based on the Court's policy of protecting new buyers against builders that place defective construction into the "stream of commerce" due to the unequal bargaining power between the new home buyer and seller, the new home buyer's reliance on the skills of the builder, and the inability of the new home buyer to inspect a new house for latent defects prior to purchase. *Id.* at 735–36.

Since the Supreme Court's decision in *Kennedy*, the Court has made clear that it "had no intention of the exception extending beyond the context of residential real estate construction." *See Sapp v. Ford Motor Co.*, 687 S.E.2d 47, 51 (S.C. 2009) ("We emphasize the exception announced in *Kennedy* as a very narrow one, applicable only in the residential real estate construction context."); *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 412 F. Supp. 2d 560, 563 (D.S.C. 2006), *vacated and replaced by unpublished Order and Opinion, Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, C/A No. 2:04-cv-00531-DCN, 2007 WL 9710995 (D.S.C. 2007) (certifying question to 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."); *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183, 188 (S.C. Ct. App. 1995) (citing *Kennedy* and describing the holding in parenthesis: "economic loss rule partially rejected by South Carolina Supreme Court in residential home building context. The court expressly noted, however, that where duties are created solely by contract, the economic loss rule still applies and no cause of action in negligence will lie.")). Moreover, courts from other jurisdictions have held the economic loss rule bars tort claims against pest control companies arising from the company's alleged failure

to adequately perform its obligations under the parties' termite bond. *See, e.g., Cook v. Orkin Exterminating Co., Inc.*, 258 P.3d 149 (Az. Ct. App. 2011).

In the instant case, Petitioner's damages are purely economic. The only detriment suffered by Petitioner is the new damage purportedly caused by a termite infestation to the Subject Residence. Petitioner, an educated businessman with a career of 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 Subject Residence. IOP (and successor SPM) agreed to inspect and treat the Subject Residence for termites and repair any new damages resulting from termites not to exceed $250,000. The Termite Contract contemplated precisely what Petitioner complains of today—damage purportedly arising out of a termite infestation—and the parties specifically allocated the risk of this problem by contractually agreeing to limit SPM's liability for repairs not to exceed $250,000. Moreover, Petitioner has not raised any legitimate grounds for extending the narrow exception articulated in *Kennedy* because the policy considerations underlying that decision (e.g., the inherent unequal bargaining power between a builder and a buyer of a home) are simply not present here. As such, the Court of Appeals correctly affirmed the circuit court's grant of partial summary judgment in favor of Respondents because Petitioner's negligence claim is barred by the economic loss rule.

II. The Court of Appeals correctly affirmed the circuit court's grant of partial summary judgment in favor of Respondents because Petitioner failed to identify any duties Respondents owed to him outside of the Termite Contract.

It is well-settled under South Carolina law that to pursue a tort claim and a 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. *Kennedy*, 384 S.E.2d at 737

(holding the economic loss doctrine bars a negligence claim "where duties are created solely by contract"); *Duc v. Orkin Exterminating Co., Inc.*, 729 F. Supp. 1533, 1535 (D.S.C. 1990) (granting summary judgment as to plaintiff's negligence claim holding the plaintiff could not recover on this cause of action because the defendant owed him "no legal duties independent of the contract"); *Dixson v. Texas*, 72 S.E.2d 897, 899 (S.C. 1952) ("where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract"); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 239 S.E.2d 726, 727 (S.C. 1977) (affirming the circuit court's dismissal as to plaintiff's negligence claim holding "bare allegations of negligence cannot convert a breach of contract action into an action in tort"); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan & Goulding, Inc.*, 463 S.E.2d 85, 88 (S.C. 1995) ("[a] breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie.")). Where there is no duty except as the contract creates, the plaintiff's remedy is for breach of contract. *Dixson,* 72 S.E.2d at 899; *Duc*, 729 F. Supp. at 1535; *Tommy L. Griffin Plumbing*, 463 S.E.2d at 88. Where, as here, a plaintiff's tort "allegations mirror its breach of contract allegations," the tort claims are barred by the economic loss rule. *Laidlaw Environmental Services, (TOC), Inc. v. Honeywell Inc.*, 966 F. Supp. 1401, 1414 (D.S.C. 1996) (dismissing negligence claim under economic loss rule)).

While neither *Dixon* nor *Duc* specifically reference the economic loss rule, the courts in both cases found the plaintiff was not entitled to bring tort claims where, as here, his allegations arose out of the performance of nonperformance of a contract. In *Dixon*, this Court concluded the plaintiff could bring an action only for breach of contract because "[t]he breach of duty complained of arose solely from contract and constitute[d] nonfeasance rather than misfeasance." 72 S.E.2d at 899. This Court stated, "Ordinarily, whe[n] there is no duty except such as the contract creates, the

plaintiff's remedy is for breach of contract, but when the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort." *Id.* In *Duc*, a South Carolina district court granted summary judgment as to plaintiff's allegations of negligence, holding the plaintiff could not recover on his negligence cause of action because the defendant owed him "no legal duties independent of the contract." 729 F. Supp. at 1535. The court stated, "South Carolina courts have recognized the distinction between contract and tort causes of action and have held that in order for a plaintiff to state a claim in tort, he must allege a duty owed to him by the defendant separate and distinct from any duty owed under a contract." *Id.* In granting summary judgment, the court reasoned that the contract created and defined the duties and liabilities of the parties and that the plaintiff "alleged no breach of duty by [the defendant] that [wa]s independent of the contract." *Id.*

Petitioner urges this Court to find a duty of care exists outside of the Termite Contract by arguing Respondents owed him duties under industry or professional standards. However, Petitioner's argument is unsupported by South Carolina law. This Court has expressly held that while industry standards are probative in defining the standard or duty of care, they do not determine if the prerequisite duty of care is owed. *See, e.g., Colleton Preparatory Acad., Inc.*, 666 S.E.2d at 252, *overruled on other grounds by Sapp*, 687 S.E.2d at 47. In other words, violations of an industry standard are only helpful in determining that a duty owed has been breached. *Colleton*, 666 S.E.2d at 252. The *Colleton* decision clearly establishes that an alleged breach of industry standards does not serve as *per se* evidence that an extracontractual duty is owed. *Id.* Moreover, recent decisions follow the rule stated in *Colleton. See, e.g., Transcendence Treatment Ctrs., Inc.*, 2024 U.S. Dist. LEXIS 168297, at *7–15 (rejecting plaintiff's alleged industry standard exception to the economic loss rule); *Tri-Lift NC, Inc.*, 2021 WL 131017, at *3 (reviewing South Carolina

case law and finding that "no court has found that the violation of an industry standard can give rise to a special duty . . . the breach of an industry standard is not an exception to the economic loss rule"); *Bennett v. Ford Motor Co.*, 236 F. Supp. 2d 558, 562–63 (D.S.C. Nov. 7 2002) (refusing to recognize an exception to the economic loss rule for a breach of industry standards); *Besley*, 2016 WL 109887, at *5 (holding that "authority simply does not exist under South Carolina law to allow an alleged violation of either statutory law or a regulatory standard to serve as an exception to the economic loss rule); *Sandviks v. PhD Fitness LLC*, C/A No. 1:17-cv-00744-JMC, 2018 U.S. Dist. LEXIS 45071, at *4–5 (D.S.C. Mar. 20, 2018) (noting that plaintiff's alleged industry standard exception has been rejected and dismissing plaintiff's negligence claim pursuant to the economic loss doctrine)).

In an attempt to now avoid this result, Petitioner argues SPM engaged in an independent act of negligence by beading termiticide around the perimeter of the house without telling him. The 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. Counsel for the Petitioner expressly conceded the conduct complained of all relates to termite treatment at the Subject Residence:

> . . . and while one might think that it all rises out of the contract itself, the contract itself specifically said he wasn't going to put termiticide in the ground. So he went off on his own and engaged in a whole different – **yeah, it was all related to termites**, but not – there's really – to keeping termites out of the property, but that the agreement didn't call for that. It called for bait stations, and furthermore, the bait station records were not kept . . .

(R. pp. 1048, lines 22-25, 1049, lines 1-5). Even assuming Respondents' failure to adequately perform pest control services violated regulations and industry standards, which is denied, all of these acts relate to the duties Respondents owed Petitioner under the Termite Contract. Petitioner

cannot legitimately divorce SPM's treatment of the Subject Residence using bait stations from the treatment of the Subject Residence using termiticide because they both emanate from central purpose of contract, which was to treat the Subject Residence for termites, the method of which Petitioner expressly conceded he did not care to know about. Further, the language that Petitioner cites to from SCDPR 27-1085(B)(2), which states: "[t]reatment 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 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 would be evaluated under the terms of the contract as a potential breach of contract, not a negligence cause of action. Furthermore, in Petitioner's Second Amended Complaint, he alleges as part of the Breach of Contract cause of action that SPM "failed to abide by promises set forth in the bond [Termite Contract] [and] violated treatment and inspection standards." (R. pp. 0014 – 0027). Therefore, in his own pleadings, Petitioner acknowledges that claims related to violation of standards or regulations is a part of a breach of contract cause of action.

Petitioner next urges this Court to find a "special relationship" exists between the parties giving rise to a professional duty independent of the Termite Contract. The *Colleton* court emphasized that while in very limited professional contexts breaches of industry standards previously served as evidence of a legal duty, this Court "will not extend the concept of a legal duty of care in tort liability beyond reasonable limits." *Id.* at 251–52 (citing *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 644 S.E.2d 43, 49 (S.C. 2007) (rejecting the notion of a special or legal duty in the secured transactions context)). South Carolina courts have strictly applied the special relationship exception, noting that courts "should not create such an expansion

of existing law"[2] and clarifying that the exception only applies in limited professional contexts, namely for engineers, builders, and lawyers. *Tri-Lift NC, Inc.*, 2021 WL 131017, at *3. Examples of such special relationships include those between design professionals and general contractors who work under their supervision,[3] between lawyers and their clients,[4] and between corporate consultants and a state agency that is the subject of a report prepared by those consultants.[5]

In the examples above, this Court has found a special relationship where the parties' relationship was one marked by professional duty, as in *Lloyd* or *Booz-Allen & Hamilton*, or by supervisor-supervisee relation, as in *Tommy L. Griffin Plumbing*. Petitioner's relationship with Respondents does not fit into either of these categories. Moreover, the special relationship exception to the economic loss rule has been strictly applied in limited professional contexts, and South Carolina courts have never extended it to include pest control companies. Petitioner entered into a contract which comprehensively governs the terms of his relationship with Respondents, and he has a mechanism (a breach of contract claim) to redress his alleged injuries. Petitioner's allegations of negligence are nothing more than thinly veiled breach of contract claims which cannot stand as a separate negligence claim. *See Seebadlt*, 239 S.E.2d at 727 ("Bare allegations of negligence cannot convert a breach of contract action into an action in tort); *Koontz v. Thomas*, 511 S.E.2d 407, 412 (S.C. Ct. App. 1999) ("[Plaintiff's] tort allegations are merely veiled breach

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[2] *Besley*, 2016 WL 109887 at *5 (citation omitted)).

[3] *See Tommy L. Griffin Plumbing & Heating Co.*, 463 S.E.2d at 88 (contractors could maintain negligence action against engineer who supervised them).

[4] *Lloyd v. Walters*, 277 S.E.2d 888, 889 (S.C. 1981) (corporation could maintain negligence action against lawyer who had a professional duty to protect its interests).

[5] *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 346 S.E.2d 324, 326 (S.C. 1986) (state agency could maintain negligence action against corporate consultant when the consultant "undertakes to objectively analyze and compare the attributes of commercial competitors for the purpose of giving one a market advantage over the other").

of contract claims and . . . cannot be maintained as a separatee cause of action)). As such, the Court of Appeals correctly affirmed the circuit court's grant of Partial Summary Judgment in favor of the Respondents because Petitioner failed to identify any duties Respondents owed him separate and apart from the Termite Contract.

III. The Court of Appeals correctly held the circuit court acted within its discretion in declining to amend its Order to include consideration of Petitioner's unfiled Response in Opposition to Respondents' Motion for Partial Summary Judgment and in declining to consider arguments and evidence presented for the first time in Petitioner's Motion for Reconsideration

On reconsideration, SPM argued, and the circuit court agreed, that Petitioner failed to comply with the filing requirements of Rule 56, SCRCP, because he did not file his Response with the clerk of court until after the circuit court ruled in favor of the Respondents and he failed to provide his Response to the judge at the hearing. Rule 56, SCRCP, provides that a motion for summary judgment "shall be served at least [ten] days before the time fixed for the hearing" and "[t]he adverse party may serve opposing affidavits not later than two days before the hearing." Relying on the precedent set forth in *Lloyd's Inc. by Richardson Construction Co. of Columbia v. Good,*[6] the Court of Appeals correctly held the circuit court acted within its discretion when it declined to amend its Order to include consideration of the unfiled Response because doing so would be prejudicial to the Respondents because they had little, *if any*, time to address the discovery and documents in oral argument. (R. pp. 0004-0013). Consideration of this last minute 200-page opposition without offering Respondents ample time to reply would be tantamount to trial by ambush as it would have deprived Respondents of the opportunity to appropriately reply

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[6] 412 S.E.2d 441, 443 (S.C. Ct. App. 1991) (holding a trial court has the discretion and inherent power to receive documents and make them a part of the file *only if their receipt does not prejudice opposing counsel*)).

to the argument and evidence submitted in opposition to their MPSJ. As such, the Court of Appeals correctly held the circuit court acted within its discretion in declining to amend its Order to include consideration of Petitioner's unfiled Response.

Similarly, Petitioner raised numerous new arguments and attached several previously available exhibits to his motion for reconsideration, including complete transcripts of three of his experts and a copy of his memorandum in opposition to the motion for partial summary judgment, including all exhibits. The Court of Appeals correctly held the circuit court acted within its discretion in declining to consider the new arguments and previously available evidence because it was improperly submitted for the first time on reconsideration. (R. p. 0011-0013). *See, e.g., Elam v. S.C. Dep't of Transp.*, 602 S.E.2d 772, 779–80 (S.C. 2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court"); *Regan v. City of Charleston,* 40 F. Supp. 3d 698, 702 (D.S.C. 2014) (holding a motion for reconsideration is not an occasion "to introduce evidence that could have been addressed or previously presented)).

Moreover, despite its holding that the circuit court acted within its discretion, the Court of Appeals reviewed and considered all of the exhibits and memorandum submitted by Petitioner and still held the circuit court did not err in granting partial summary judgment in favor of Respondents because none of the arguments and evidence established any duties owed by Respondents to Petitioner that was separate and apart from the contract. (R. p. 1140). As such, SPM respectfully requests this Court affirmed the Court of Appeals holding that the circuit court acted within its discretion.

IV. The Court of Appeals correctly held Petitioner abandoned the issue of whether he is entitled to $250,000 for each year that the Respondents were in breach of the Termite Contract.

The Court of Appeals correctly held Petitioner abandoned his argument that he is entitled

to $250,000 for each year that the Respondents were in breach of the Termite Contract because Petitioner failed to cite to any legal authority to support this argument on appeal. It is well settled under South Carolina law that an appellant abandons an issue on appeal if he fails to properly support his argument with citations to legal authority. *See, e.g., Mulherin-Howell v. Cobb*, 608 S.E.2d 587, 594 (S.C. Ct. App. 2005) (noting the appellant abandoned issues on appeal and this court need not consider them when the appellant failed to cite any supporting authority for its position and its arguments were merely conclusory statements); *First Sav. Bank v. McLean*, 444 S.E.2d 513, 514 (S.C. 1994) (stating appellant was deemed to have abandoned issues on appeal because he failed to provide any argument or supporting authority); *R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 540 S.E.2d 113, 120 (S.C. Ct. App. 2000) (declaring an issue is deemed abandoned if argument in appellate brief is only conclusory)).

However, even if this Court finds this issue was not abandoned, Petitioner's argument fails on its merits. Petitioner argues a jury could find he is entitled to $250,000 for each year the Termite Contract was renewed. However, South Carolina courts uphold limitation of liability provisions in contracts noting that they are commercially reasonable in many instances because they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would not be able to afford it. *Gladden v. Boykin*, 739 S.E.2d 882, 884 (S.C. 2013). Where, as here, a contract's language is clear and capable of legal construction, the function of the Court is to interpret its lawful meaning, and the intent of the parties as found in the agreement. *Gilbert v. Miller*, 586 S.E.2d 861, 864 (S.C. Ct. App. 2003).

The Termite Contract explicitly and unambiguously limits SPM's liability for repairs arising out of new termite damage 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. pp. 0040, 0056). In SPM's MPSJ, SPM argued, and the circuit court agreed, that the Termite Contract governed the relationship between the parties, and Termite Contract unambiguously limits Petitioner's contractual remedy to repair any new damages resulting from termites "up to $250,000." (R. pp. 0002-0003, R. p. 0031). As such, the circuit court's holding limiting Petitioner's contractual remedy to "up to $250,000" is fully supported by South Carolina law and the factual record and should not be disturbed on appeal.

CONCLUSION

For the foregoing reasons, as well as any other reasons supporting the conclusions set forth in the decisions of the circuit court and the Court of Appeals or otherwise appearing in the record (all of which are incorporated herein by reference), Respondent SPM respectfully requests that this Court affirm or otherwise leave the Court of Appeals' affirmance of the circuit court's grant of Partial Summary Judgment in favor of Respondents intact.

SIGNATURE PAGE TO FOLLOW

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December 4, 2024

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Circuit Court Judge
Civil Action No.: 2015-CP-10-05944

Opinion No. 6011 (S.C. Ct. App. Filed August 9, 2023)
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.

PROOF OF SERVICE

I certify that I have served a copy of the Brief of Respondent in Opposition of Writ for Certiorari on counsel for the Petitioner and Co-Respondents by electronic mail to the following addresses:

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