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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.

REPLY BRIEF OF PETITIONER

LYLES & ASSOCIATES, LLC
Robert T. Lyles, Jr. (SC Bar No. 10299)
1037 Chuck Dawley Blvd, Suite G-100
Mount Pleasant, SC 29464
(843) 577-7730
rtl@lylesfirm.com

MCKNIGHT LAW FIRM
Jody V. McKnight (SC Bar No. 66354)
1156 Bowman Road, Suite 200
Mount Pleasant, SC 29464
(843) 577-6040
jody@jmcknightlaw.com

WALTERS LAW
Lee Anne Walters (SC Bar No. 74984)
Post Office Box 1214
Beaufort, South Carolina 29901-1214
(843) 379-0973
leeanne@walterslawsc.com

Counsel for Petitioners

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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. Carroll submits the following in reply to the briefs submitted by Isle of Palms Pest Control ("IOP Pest Control"), owned by Vincent Sottile, Jr., and SPM Management Company, Inc. ("SPM") — a successor company Mr. Sottile also owned. (R. pp. 86, 95, 0168-0176).

ARGUMENTS

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. 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.

Petitioner does not exclusively rely on *Eaton* or as Respondent SPM refers to it — "dicta from a 20-year-old case" — to assert that the economic loss rule does not apply to service contracts. Instead, Petitioner relies on this Court's own plain-language *definition* of the economic loss rule. The South Carolina Supreme Court, in *Sapp v. Ford Motor Co*., 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009), defines the economic rule as follows:

> 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).

While Petitioner acknowledges that there is no South Carolina case that specifically states that the economic loss rule *does not* apply to services (as there is in Florida and Wisconsin, for example), there is likewise not a South Carolina case that specifically holds that the economic loss rule *does* apply to services. What the seminal case on the economic loss rule does do is define the rule in terms of a product defect. See above, *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).

To reiterate as plainly as possible: In this case, no **product** was sold — not even the bait station — which remained the property of the company. Carroll's claims do not arise from alleged defects in a **product**; they arise from IOP/SPM's failure to perform pest control services.[1]

In addressing this issue, Respondent SPM asserts that since the 2004 decision in *Eaton*, the question of whether the economic loss rule applies to service contracts has been "resoundingly and repeatedly answered" by several federal district court opinions. (Respondent SPM's brief pp. 8-9). A close review of the cited cases argues against such a conclusion, especially as they relate to the facts presented here.

Tri-Lift NC, Inc. v. Drive Auto. Indus. of Am.[2] involved two commercial entities: Tri-Lift, a business selling, leasing and servicing forklifts, and Drive Automotive Industries of America, a

[2] The case is cited twice, first by reference to the Westlaw cite and a second time by reference to a Lexis cite.

producer of automotive body structures, who had an agreement for Tri-Lift to maintain and service the forklifts located at Drive's facility. *Tri-Lift NC, Inc. v. Drive Auto. Indus. of Am.,* No. 6:20-cv-02712-HMH, 2021 WL 131017, 2021 U.S. Dist. LEXIS 6954 (D.S.C. Jan. 13, 2021). The decision is, at least in part, based on a case affirmed by the 4th Circuit, *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co*., 843 F. Supp. 1027, 1049 (D.S.C. 1993), aff'd, 46 F.3d 1125 (4th Cir. 1995).

In *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co*., 843 F. Supp. 1027, 1049 (D.S.C. 1993), the court clearly discusses the doctrine in the context of the sale of products in commercial transactions versus the sale of products to individual consumers. Providing one definition of economic loss, the District Court cites the Illinois Supreme Court:

> "Economic loss" has been defined as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property, as well as the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill. 2d 69, 435 N.E.2d 443, 61 Ill. Dec. 746 (Ill. 1982).

Myrtle Beach Pipeline, a corporation, supplied and stored fuel for the Air Force at the Myrtle Beach Air Force Base. It purchased an air eliminator from the defendant company, which ruptured and caused fuel to spill on to the Base premises. The issue was whether the defendant product manufacturer's liability was limited to contractual remedies. *Id*. The opinion discusses the "economic loss doctrine" in that context. "This "economic loss" doctrine therefore bars tort claims and limits a plaintiff's recovery to those contractual remedies provided by the Uniform Commercial Code where the suit arises out of a commercial transaction and the loss incurred is only to the product itself." *Id.*

The district court bases its conclusion on the commercial nature of the transaction (it involved the sale of a product in a commercial setting between merchants versus a sale to individual consumers purchasers), and the nature of the loss:

> Initially, the court observes that a recurrent theme throughout these cases, and indeed, the economic loss doctrine generally, is that if sophisticated parties to a commercial transaction have negotiated a contract, as here, and the product injures only itself and not other property belonging to the plaintiff, also as here, contract law, specifically the Uniform Commercial Code, and not tort law, provides the exclusive rights and remedies of the parties.
> …
>
> Under *Seely and Kaiser Steel Corp*., no tort claim lies: (1) this is a commercial transaction; (2) the parties have relatively equal bargaining power; (3) the air eliminator was specially designed at Myrtle Beach's instructions; and (4) the parties had a contract that allocated their risk of loss.

None of those factors are present in the case before this Court. This was not a commercial transaction.

Respondents also cite two cases involving alarm company contracts. In *Trevillyan v. APX Alarm Sec. Sys.*, No. 2:10-1387-MBS, 2011 U.S. Dist. LEXIS 694, (D.S.C. Jan. 3, 2011), the district court references the economic loss rule in dismissing the plaintiff's claims (in a case involving no personal injury) where plaintiffs sought to terminate their alarm system and monitoring service contract because they alleged the monitoring was not adequate although no personal injury or damage to other property had occurred. Although it is accurate that a subsequent South Carolina district court decision dismisses the negligence claim of Bahringer — significantly handicapped and confined to a wheelchair — against an alarm services company, after the smoke detector failed to alert him or ADT to a fire, the opinion makes no reference to the economic loss rule. *Bahringer v. ADT Sec. Servs.*, 942 F. Supp. 2d 585, 590 (D.S.C. 2013).

In *Besley v. FCA US LLC* — involving the sale of a truck, a product — the district court invoked reference to the economic loss rule and dismissed the plaintiff's putative class action negligence claim against a car manufacturer f/k/a Chrysler Group asserting he suffered economic injury because his pickup truck did not have the rear axle ratio it promised and consequently lacked

the towing capacity he desired. *Besley v. FCA US LLC*, Civil Action No. 1:15-cv-01511-JMC, 2016 U.S. Dist. LEXIS 2200, at *13 (D.S.C. Jan. 8, 2016). In *Besley*, there is no personal injury or damage to property.

In their response briefs, Respondents invoke a slippery slope fallacy to argue that the Petitioner's position would subsume the economic loss rule and that Respondent's position is the only way to protect South Carolina's policy interests. This argument has no merit. First, Petitioner's position is not that services should be an exception but that, as set forth in Petitioner's brief, the economic loss doctrine was intended as a products liability doctrine to protect manufacturers who had no contractual relationship to someone with an economic loss (for example Sapp, who has no contract with Ford). Second, a well-analyzed exception for services would not impact the economic loss rule as defined by *Sapp*. Third, there are multiple cases holding service providers or professionals owe duties in addition to those contained in a contractual agreement. Although for example, lawyers, engineers, and architects, may have contracts with clients that set forth the rights and obligations of the parties with respect to the services they provide, such contracts do not foreclose a negligence claim for a failure to perform in compliance with the industry standard, although the losses are economic. If there is a difference between certain types of providers of services and others, that difference should be defined.[3]

[3] For example, is the difference whether the industry is licensed, regulated, "professional" and how are those terms defined? The Supreme Court of Idaho, in allowing the economic loss doctrine to apply to services, 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).

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

The Court of Appeals also misapplied the economic loss rule on these facts because even if the economic loss rule applied to this type of service contract, it does not apply when there is damage to "other property" beyond the product itself. Carroll sustained more than 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. Again, as noted above, the rule is defined explicitly in *Sapp v. Ford*, 386 S.C. at 147, 687 S.E.2d at 49[4] ("In other words, **tort liability only lies where there is damage done to other property or personal injury**."). In other words, *the economic loss rule does not apply where the defective product causes personal injury or property damage* (other than to the product itself). In *Sapp v. Ford*, the Plaintiffs' Ford F-150 truck caught fire but only caused damage to the truck itself — it did not damage any person or other property. *Sapp v. Ford*, 386 S.C. at 147, 687 S.E.2d at 49. In this case, the damage is to other property, and therefore if the economic loss rule applies to service contracts, it does not apply on these facts.

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.

[4] *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).

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

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. And there is, or should be, no difference here because the professional service provided was pest control. The Court of Appeals and trial court were incorrect to rely on the thirty-five-year-old federal district court case of *Duc v. Orkin*, 729 F. Supp. 1533 (1990), for the reason stated in Petitioner's Brief.

In their response briefs, Respondents argue that they owe no duty to Carroll. This cannot be the case. As further explained in Petitioner's brief, there are several South Carolina cases where the court has found that a contract between the tortfeasor and one party *created* a tort duty to *another third party*. It defies logic that a person would have no duty to the service user or client because they had a contract yet owe a duty to another third party as a result of the contract. In this case, IOP Pest Control and SPM did owe duties to Carroll; Respondents' duties to Carroll duty arose from the parties' contract and independently of it.

Respondents attempt to minimize the Petitioner's arguments by stating that this Court has found a special relationship where the parties' relationship "was one marked by professional duty" and applied in "limited professional contexts." First, the Respondents are professional pest control providers who are held out to the public as having professional expertise in a specialized area. Second, this type of vague statement without any analysis provides no guidance for the bench and bar. The sprinkling of cases cited hold no analysis of why a "special relationship" might exist to allow a tort claim in one context (for example, a corporate consultant) and not another.

If the question of whether a "special relationship" exists is the appropriate one, it is a heavily fact dependent inquiry, not appropriate for summary judgment. In many cases, the service provider or professional will be in privity of contract with the plaintiff. These providers, however, owe a

duty to the client and sometimes to third parties which arises in addition to the contract for services. The Supreme Court of Idaho has 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).

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

Respondents do not dispute that no hearing was scheduled on SPM's motion. SPM filed its motion for partial summary judgment two weeks before a date certain trial. In the normal course, when motions are filed, a hearing is subsequently set by the clerk. In this case, the clerk had not scheduled a hearing before the date set for trial arose. Therefore, the rule regarding affidavits to be submitted two days before the hearing has no application. 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).

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 that 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. Judge Young acknowledged at the hearing that he considered the Plaintiff's memorandum and exhibits (R. p. 1052). 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. There can be no prejudice here as Respondents

were well-aware of the Plaintiff's evidence and the testimony of his experts, which they deposed and who were prepared to come to trial. The Respondents emphasize they filed this motion shortly before trial, but they fail to mention that they filed portions of the deposition testimony of Plaintiff's experts in pretrial motions *in limine* and motions to exclude certain portions of the experts' testimony. Respondents do not dispute this fact in their briefing. Their arguments regarding prejudice are without merit.

IV. The Plaintiff's contract claim should not be limited

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

CONCLUSION

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,

s/ Robert T. Lyles, Jr.
Robert T. Lyles, Jr. (SC Bar No. 10299)
Lyles & Associates, LLC
1037 Chuck Dawley Blvd., Suite G-100
Mt. Pleasant, SC 29464
(843) 577-7730
rtl@lylesfirm.com

Lee Anne Walters (SC Bar No. 74984)
WALTERS LAW
Post Office Box 1214
Beaufort, South Carolina 29901-1214
(843) 379-0973
leeanne@walterslawsc.com

MCKNIGHT LAW FIRM
Jody V. McKnight (SC Bar No. 66354)
1156 Bowman Road, Suite 200
Mount Pleasant, SC 29464
(843) 577-6040
jody@jmcknightlaw.com

Counsel for Petitioner

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