STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Opinion No. 2025-UP-375 (S.C. Ct. App. filed November 12, 2025)

Appellate Case No. 2026-000055

Kathleen M. Rankin,

Petitioner,

v.

Hilton Head Exterminators, Inc.,

Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
(843) 814-8181

Charles W. Thomson
Glynn L. Capell
Capell Thomson, LLC
102 Wappoo Creek Dr., Unit 8
Charleston, South Carolina 29412
(843) 501-0423

Attorneys for Petitioner
Kathleen M. Rankin

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INTRODUCTION

Pursuant to South Carolina Appellate Court Rule 242(g), Petitioner Kathleen M. Rankin respectfully submits this Reply to the Return to Petition for Writ of Certiorari filed by Respondent Hilton Head Exterminators, Inc. ("HHE" or "Respondent").

The central question before this Court is straightforward: whether official regulatory documents, based on first-hand observation and expressly finding that Respondent violated the South Carolina Pesticide Control Act, create a genuine issue of material fact sufficient to survive summary judgment. Respondent's Return does not meaningfully address this question. Instead, it recycles the same arguments that prevailed below without confronting the substance of the DPR findings.

Those findings are not ambiguous. The DPR Report itself establishes the causal connection between Respondent's failure and the resulting harm: Formosan subterranean termites must maintain contact with the ground to obtain moisture (App. p. 247); EIFS ground contact at the Residence provided precisely that pathway (App. pp. 246–248); and HHE's failure to address that condition during its nearly seven-year engagement left the pathway in place. The DPR Letter from Pesticide Program Chief Ryan Okey confirms that "Hilton Head Exterminators failed to address EIFS ground contact" in violation of the South Carolina Pesticide Control Act. (App. pp. 253–254). For purposes of summary judgment, no speculation is required at any step.

As set forth below, Respondent's Return: (1) conflates the March 23, 2003 pretreatment with HHE's nearly seven-year warranty period, during which HHE conducted regular inspections and treatments; (2) asks this Court to accept Respondent's own speculative assertion that EIFS ground contact is a "transient" condition while simultaneously characterizing Petitioner's reliance on official DPR findings as speculative; (3) fails to distinguish the official DPR documents from

the ambiguous check at issue in *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023); and (4) characterizes its own expert affidavits as "uncontradicted" when those affidavits do not dispute, withdraw, or amend the official DPR findings and, even if credited fully, do not eliminate the factual dispute the DPR documents create.

ARGUMENTS IN REPLY

I. The DPR Findings Encompass HHE's Entire Seven-Year Engagement at the Property, Not Merely the March 23, 2003 Pretreatment.

Respondent devotes substantial attention to the fact that HHE's March 23, 2003 pretreatment occurred before the Residence was constructed, arguing that EIFS-to-ground contact could not have existed at that time. (Return, pp. 10, 15–16, 17). This is a straw man. Petitioner has never claimed that EIFS-to-ground contact existed before the Residence was built. Petitioner's claim is that HHE failed to address EIFS ground contact during its nearly seven-year engagement at the property, from June 1, 2005 to April 27, 2012, during which HHE conducted regular inspections and treatments under a termite warranty. (App. p. 155).

The official DPR Letter from Pesticide Program Chief Ryan Okey expressly states that HHE "failed to address EIFS ground contact," finding this to be "a violation of the South Carolina Pesticide Control Act to fail to properly perform the Standards for Prevention or Control of Wood Destroying Organisms." (App. pp. 253–254). This finding is not limited to a single pretreatment application; it encompasses HHE's entire engagement at the property, during which the EIFS ground contact condition existed and HHE was obligated to address it.

Respondent's own Memorandum in Support of its Motion for Summary Judgment acknowledged that HHE provided termite services at the Residence from June 1, 2005 to April 27, 2012. (App. p. 155). During that entire period, HHE had a duty under the South Carolina Pesticide Control Act to address conditions at the Residence, including EIFS ground contact. The DPR

documents establish that HHE failed to do so. At the summary judgment stage, the inference must be drawn in Petitioner's favor.

II. Respondent's "Transient Condition" Theory Is Itself Speculative and Unsupported by the Record.

Respondent contends that "EIFS-to-ground contact is not a structural condition; it is a condition of EIFS synthetic stucco exterior cladding in contact with the ground, which can be changed at any time" and "can also be affected by the surrounding soil grade." (Return, p. 11). This assertion is remarkable for two reasons.

First, there is no evidence in the record supporting Respondent's claim that the EIFS ground contact condition at the Residence changed at any point. No witness testified that the EIFS ground contact was remediated and then recurred. No evidence was presented that renovations, environmental conditions, or any other factor altered the EIFS-to-ground condition during or after HHE's engagement. Respondent's suggestion that the condition may have spontaneously appeared after HHE's involvement ended is precisely the type of speculation that cannot defeat evidence at the summary judgment stage.

Second, Respondent asks this Court to reject Petitioner's evidence (official DPR findings based on first-hand observation) as speculative, while simultaneously asking the Court to accept Respondent's own unsupported theory that the EIFS ground contact condition may have changed over time. At summary judgment, inferences are drawn in favor of the nonmoving party, not the movant. *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022). The reasonable inference from the DPR documents is that the EIFS ground contact observed in January 2020, a condition the DPR Report identifies as presenting a high-risk pathway for termite activity (App. pp. 246–248), existed during HHE's nearly seven-year engagement. Indeed, as the Petition noted, it would be speculative to assume that this condition somehow

spontaneously appeared after HHE's involvement with the property. That is the inference the courts below were required to draw but failed to draw.

III. Unlike the Ambiguous Check in *Kitchen Planners*, the DPR Documents Expressly Identify Respondent's Specific Failure, Its Regulatory Significance, and Its Connection to the Harm.

Under *Kitchen Planners*, the proper standard for summary judgment under Rule 56(c), SCRCP, is the "genuine issue of material fact" standard. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). To survive summary judgment, the nonmoving party must present evidence that provides "a meaningful factual basis" for the factfinder's determination and supports a "reasonable inference" in the nonmoving party's favor. *Id.* at 464. Summary judgment is proper only where the factfinder "would be required to speculate." *Id.* "[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Id.* at 463–64 (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Where "the evidence is susceptible to more than one reasonable inference, [it] should be submitted to the jury." *Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006); *see also Kitchen Planners*, 440 S.C. at 461 (citing *Vaughan* approvingly). In making this determination, "the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022) (quoting *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002)).

Petitioner's evidence satisfies each element of this standard. The official DPR Report and Letter provide a "meaningful factual basis" for the factfinder's determination: they identify a specific entity (HHE), a specific failure ("failed to address EIFS ground contact"), and a specific legal violation ("a violation of the South Carolina Pesticide Control Act"). (App. pp. 248, 253–

254). The DPR Report is based on the first-hand observations of DPR Investigator Lenox-Rustin, and the DPR Letter was issued by Pesticide Program Chief Ryan Okey. Neither document has been withdrawn or amended.

Moreover, the DPR Report itself establishes the causal mechanism linking Respondent's failure to the resulting harm. The Report explains that "Formosan subterranean termite, like other subterranean termites, must maintain contact with the ground in order to obtain moisture." (App. p. 247). The DPR documents thus establish each link in the causal chain: (1) Formosan subterranean termites require ground contact to obtain moisture (App. p. 247); (2) EIFS ground contact at the Residence provided that necessary pathway (App. pp. 246–248); (3) HHE failed to address the EIFS ground contact condition during its nearly seven-year engagement (App. pp. 248, 253–254); and (4) termite infestation and damage resulted. No speculation is required at any step. The DPR Report itself supplies the factual basis, the first-hand observation, and the regulatory conclusion.

HHE's documented failure to address this condition during its nearly seven-year engagement left in place the very pathway the Report identifies as necessary for termite infestation. (App. pp. 246–248). The DPR documents thus provide the factual basis for a factfinder to conclude that HHE's failure to address the EIFS ground contact condition caused or contributed to the termite infestation and resulting damages, a determination for the factfinder, not for resolution at summary judgment. Unlike the ambiguous check in *Kitchen Planners*, the DPR documents expressly state what Respondent failed to do, why it matters, and how it connects to the harm. Viewed in the light most favorable to Petitioner, this evidence creates a genuine issue of material fact as to both Petitioner's negligence and implied warranty of workmanship claims that precludes summary judgment.

Respondent nevertheless argues that the DPR documents are "similar to the check issued to pay for cabinet parts in *Kitchen Planners*" because neither provides "a meaningful factual basis on which a factfinder could determine" the conditions that existed when HHE provided services. (Return, p. 18). This analogy fails. In *Kitchen Planners*, the nonmoving party's evidence was a check written on a certain date to pay for parts ordered on an unknown date. 440 S.C. at 464. The check did not "provide a meaningful factual basis" because the factfinder would have to speculate about when the parts were ordered. *Id.* The evidence was ambiguous on its face, a payment instrument that, standing alone, could not establish the timing of the underlying transaction. Here, by contrast, nothing is ambiguous. The DPR documents are not indirect evidence from which a factfinder must draw an attenuated chain of inferences. They are direct regulatory findings that expressly state what Respondent failed to do, based on first-hand observation. That is the opposite of speculation, and it is precisely what *Kitchen Planners* requires.

Respondent's reliance on *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 677 S.E.2d 612 (Ct. App. 2009), and *Gibson v. Epting*, 426 S.C. 346, 827 S.E.2d 178 (Ct. App. 2019), is similarly misplaced. In *Jackson*, the key evidence (the chair that collapsed) had been destroyed by a third party, and the plaintiff's expert admitted under oath that his opinions about causation were "guesses and speculation" based on internet references rather than first-hand observation or testing. 383 S.C. at 18. In *Gibson*, the court cited the principle that a party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another," 426 S.C. at 353, in a legal malpractice case where the plaintiff failed to produce evidence supporting her claims. Here, Petitioner's evidence is the opposite of speculation. DPR Investigator Lenox-Rustin personally inspected the property, personally observed EIFS stucco in contact with the ground, and documented her findings in an official report that expressly states Respondent "failed to

address EIFS ground contact."[1] (App. p. 248). Those findings were then affirmed by the Pesticide Program Chief. This is direct, first-hand evidence of regulatory noncompliance, not the guesswork, internet research, or bare allegations found insufficient in *Jackson* and *Gibson*.

Respondent's position, taken to its logical conclusion, would mean that official regulatory findings can never create a genuine issue of material fact if the regulated entity's records have been destroyed, even where the destruction of those records was within the regulated entity's own control. This is not the standard articulated in *Kitchen Planners*, and it would effectively immunize regulated entities from accountability by rewarding the passage of time and the destruction of records.

IV. Petitioner Has Not Abandoned Any Claim Regarding EIFS Ground Contact.

In Footnote 1 of its Return, Respondent seizes on the Petition's statement that Petitioner "does not claim that HHE was negligent in its application of chemical pesticide treatment" and argues this constitutes abandonment under Rule 208(b)(1)(C), SCACR. (Return, p. 8 n.1). This is a distortion of Petitioner's position.

Petitioner's statement distinguished between two entirely separate categories of conduct: (1) the application of chemical pesticide (i.e., the volume and manner of termiticide applied), and (2) the failure to address EIFS ground contact during inspections and treatments. Petitioner has consistently maintained that HHE's negligence lies in its failure to address the EIFS ground contact condition, a failure expressly documented by DPR. The Petition's acknowledgment that the chemical application itself is not at issue is not an abandonment of the EIFS ground contact claim; it is a clarification that sharpens, rather than narrows, Petitioner's theory of liability.

[1] The DPR Report's reference to a condition "hidden from view" during HHE's contract concerns the form board, not the EIFS stucco that Investigator Lenox-Rustin personally observed in contact with the ground. (App. p. 248)

V. The Official DPR Documents Directly Contradict the DeLorenzo and Nolan Affidavits, Creating a Factual Dispute Reserved for the Jury.

Respondent repeatedly characterizes the testimony of Mr. DeLorenzo and Dr. Nolan as "uncontradicted." (Return, pp. 14, 16). This characterization ignores the official DPR documents that are also in the record. The official DPR Report and DPR Letter expressly state that HHE "failed to address EIFS ground contact" and that this failure constituted "a violation of the South Carolina Pesticide Control Act." (App. pp. 248, 253–254). These official regulatory findings directly contradict Respondent's claim that no evidence supports Petitioner's negligence claim. Dr. Nolan further opined that the termite infestation and damage "likely began" during the years of nontreatment after HHE's warranty ended. (App. p. 204). But the DPR Report itself establishes the causal mechanism: subterranean termites "must maintain contact with the ground in order to obtain moisture," and the EIFS ground contact condition provided precisely that necessary pathway. (App. p. 247). HHE's failure to address this condition left in place the very pathway the Report identifies as necessary for infestation. Whether HHE's failure caused or contributed to the infestation is a question for the factfinder, not a question to be resolved at summary judgment.

Mr. DeLorenzo's testimony does not dispute the factual findings in the DPR Investigative Report or the Pesticide Program Chief's Letter. Mr. DeLorenzo did not conduct the inspection, did not issue the Report, and did not write the Letter. His affidavit states that he "would have also agreed not to issue an informational letter in this case due to the lack of available records" (App. p. 198), a statement about the discretionary nature of the letter, not the substance of the findings. Significantly, nothing in Mr. DeLorenzo's affidavit withdraws or amends the official DPR Report, which was based on Investigator Lenox-Rustin's first-hand observation that EIFS stucco was in contact with the ground. Mr. DeLorenzo does not dispute that observation, nor does his affidavit challenge the DPR Report's finding that HHE "failed to address EIFS ground contact."

Further, Mr. DeLorenzo's affidavit was prepared after litigation commenced. By contrast, the DPR Report and Letter were generated in the ordinary course of DPR's regulatory function, based on Investigator Lenox-Rustin's first-hand inspection of the property. Even if different officials of the same regulatory agency reached different conclusions from the same investigation, this would be a credibility determination, not a basis for summary judgment.

At summary judgment, it is for the factfinder, not the court, to weigh these competing pieces of evidence and determine which is more credible. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 11, 825 S.E.2d 707, 712 (Ct. App. 2019). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Moreover, "even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* Here, Investigator Lenox-Rustin and Program Chief Okey reached conclusions from the same investigation that differ from Mr. DeLorenzo's, precisely the type of factual and inferential dispute that precludes summary judgment. But even crediting the DeLorenzo and Nolan affidavits fully, they do not eliminate the factual dispute created by the official DPR documents. They are the dispute.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant her Petition for Writ of Certiorari, reverse the decision of the Court of Appeals, and remand this case for trial on the merits.

Official DPR documents, a report based on first-hand observation and a letter from the Pesticide Program Chief, expressly found that HHE "failed to address EIFS ground contact" in violation of the South Carolina Pesticide Control Act. These findings have never been withdrawn or amended. The DPR Report itself establishes each link in the causal chain from Respondent's failure to the resulting harm: Formosan subterranean termites require ground contact to obtain moisture; EIFS ground contact at the Residence provided that necessary pathway; HHE failed to address this condition during its nearly seven-year engagement; and termite infestation and damage resulted. No speculation is required at any step. Unlike in *Kitchen Planners*, where the evidence required the factfinder to speculate, Petitioner's evidence here consists of official regulatory documents that expressly state what Respondent failed to do, why it matters, and how it connects to the harm. Even crediting Respondent's expert affidavits fully, they do not eliminate this factual dispute. They are the dispute.

If official regulatory findings based on first-hand observation cannot survive summary judgment, the "genuine issue of material fact" standard this Court articulated in *Kitchen Planners* will be rendered meaningless in cases involving regulated entities. This Court should grant certiorari to ensure that standard is properly applied.

[Signatures on following page]

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez_____
Jesse Sanchez (SC Bar No. 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 814-8181
jesse@jessesanchezlaw.com

and

CAPELL THOMSON, LLC

Glynn L. Capell (SC Bar No. 16552)
Charles W. Thomson (SC Bar No. 101471)
102 Wappoo Creek Dr., Unit 8
Charleston, SC 29412
(843) 501-0423
GCapell@capellthomson.com
CThomson@capellthomson.com

Attorneys for Petitioner Kathleen M. Rankin

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Mount Pleasant, South Carolina