Exhibit B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2015-CP-10-5944
	)	
JAMES E. CARROLL, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER DENYING PLAINTIFF'S**
	)	**MOTION FOR RECONSIDERATION**
ISLE OF PALMS PEST CONTROL, INC., SPM MANAGEMENT COMPANY, INC. AND TERMINIX SERVICE, INC.,	)	
	)	
Defendants.	)	

This matter is before the Court on Plaintiff's Motion for Reconsideration of this Court's Order, or a supplemental Order, amending and modifying the Court's Order dated February 21, 2019, wherein the Court granted Defendant Isle of Palms Pest Control, Inc. ("IOP") and SPM Pest Management, Inc.'s ("SPM") (collectively "Defendants") Motion for Partial Summary Judgment as to Plaintiff's Negligence claim pursuant to Rule 56, *SCRCP*. Plaintiff's Motion for Reconsideration improperly contains arguments and previously available evidence not raised in its summary judgment briefing and otherwise ignores the standard for such motion. Having considered the motion, response, record, and relevant law, the Court finds Plaintiff's Motion for Reconsideration should be **DENIED**.

A. Background and Procedural History

On or about November 13, 2015, Plaintiff James E. Carroll, Jr. ("Plaintiff") filed suit against SPM, IOP, and Terminix Services, Inc. ("Terminix") for Negligence and Breach of Contract arising out of an alleged termite infestation and resulting damages to his residence located at 11 Tabby Lane on Isle of Palms (the "Subject Residence"). Plaintiff purchased the Subject

Residence on November 1, 2002. Thereafter, on February 19, 2003, Plaintiff entered into a Termite Inspection Contract ("Termite Contract") with Defendant IOP. 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 Plaintiff paid the annual fee each year. The Termite Contract provided, among other things, that if new damages occurred to the structure during the contract term, the servicer of the contract would undertake the necessary repairs and pay the costs for the materials and the labor up to $250,000. While the Termite Contract is not signed by the Plaintiff, the evidence in the record confirms that the Termite Contract is a valid contract that governs the relationship between the parties. Pursuant to the terms of the Termite Contract, IOP provided termite services at the Subject Residence from 2003 until 2011. On or about June 6, 2011, SPM incorporated and took over the termite services at the Subject Residence under the Termite Contract. 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.

In his Second Amended Complaint, Plaintiff alleged causes of action for Negligence and Breach of Contract against the Defendants arising out of the same set of facts. Specifically, Plaintiff alleged the following relevant facts in support of his causes of action:

> 7. On February 19, 2003, Defendant IOP (and Successor SPM) entered into a Termite Inspection and Repair Bond Agreement ("Termite Bond") with the Plaintiff on his home located at 11 Tabby Lane, Isle of Palms, South Carolina. Said Bond is attached hereto as Exhibit A.
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> 8. The terms of the Termite Bond required the Plaintiff to pay an initial sum of $1250; and thereafter, pay annual installments to Defendant IOP, at that time referred to as Isle of Palms Pest Control, Inc., for annual inspections and treatment at the Plaintiff's home at 11 Tabby Lane. Defendant SPM was the successor corporation to Defendant IOP; and SPM also accepted the annual installments per the reference bond; and presumably performed annual inspections and treatment per the bond.
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> ***

10. The Plaintiff paid said initial installments and installments annually on a timely basis, and relied on Defendants IOP, SPM and Terminix, using their respective expertise, to fully inspect the 11 Tabby Lane property and structure for the presence of termites and/or termite activity, as well as any conditions conducive to termite activity; and to provide the appropriate preventative treatments to the property, in accordance with the laws and regulations in the State of South Carolina for pest control management.

As to his Negligence claim, Plaintiff's Second Amended Complaint reads, in relevant part:

17. That Defendants IOP and SPM were negligent, grossly negligent, willful and wanton in the following particulars:

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 its employees and management in regard 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.

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.

See Second Am. Compl. at 4. As to his Breach of Contract claim, Plaintiff's Second Amended Complaint alleges, in relevant part:

20. The Defendants IOP and SPM warranted in the attached Termite Bond that it would apply appropriate treatments according to accepted treatment standards and properly inspect the Plaintiff's property.

21. That Defendants IOP and SPM failed to abide by promises set forth in the bond, violated treatment and inspection standards; and is responsible for any and all action and consequential damages suffered by the Plaintiff.

See id. at 6.

On February 4, 2019, more than ten days before the commencement of the date certain trial in this case, SPM timely filed and served its Motion for Partial Summary Judgment (Defendants' "MPSJ") arguing Plaintiff's Negligence claim should be dismissed as a matter of law because it is barred by the economic loss rule and Plaintiff's claims are limited to the duties set forth in the contract. At 4:10 PM on Monday, February 18, 2019, *the night before trial,* Plaintiff's counsel emailed a 192-page Response in Opposition (referred herein as Plaintiff's "Response") to chambers copying all counsel. However, the Response was not filed with the Clerk of Court at that time. The Court heard oral arguments from the parties on Defendants' MPSJ on February 20, 2019. The Court determined, after reviewing the record including Plaintiff's Second Amended Complaint, the Motions and Memorandum of Law filed in support therewith, and the arguments of counsel, that Partial Summary Judgment in favor of the Defendants on Plaintiff's Negligence claim was appropriate because Plaintiff's claims arise out of, relate to, and are therefore limited to those duties set forth in the Termite Contract.

The Court issued its Order dated February 21, 2019 granting Partial Summary Judgment in favor of Defendants on Plaintiff's Negligence claim. On February 22, 2019, two days after the Court entered its Order granting Defendants' MPSJ, Plaintiff filed the above-referenced Response with the Clerk of Court. Thereafter, on March 1, 2019, Plaintiff filed a Motion for Reconsideration, which consisted of a twenty-one-page brief with eight hundred and thirty-four pages of previously available deposition transcripts and exhibits to support his position that Defendant's MPSJ should be denied, the vast majority of which were not included in Plaintiff's original Response and were not a part of the Court record. On March 27, 2019, SPM filed a Response in Opposition to

Plaintiff's Motion for Reconsideration, and Defendant IOP joined in SPM's Response in Opposition on March 29, 2019. This Order follows.

A. Standard of Review

Plaintiff filed his motion pursuant to Rule 59(e), *SCRCP*, which governs motions to reconsider. Although trial courts have discretion in granting or denying motions under Rule 59(e), "amending a judgment after its entry remains 'an extraordinary remedy which should be used sparingly.'" *In re Cable & Wireless, PLC*, 332 F. Supp. 2d 896, 899–900 (E.D. Va. 2004) (citations omitted). South Carolina courts have repeatedly and unequivocally held that "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 329 S.E.2d 481 (S.C. Ct. App. 1990). Simply put, having had his day in court, "Rule 59(e) does not entitle [Plaintiff] to a second bite at the apple" and may not be used to raise arguments or present evidence for the first time. *Hanover Ins. Co. v. Corrpro Cos.*, 221 F.R.D. 458, 460 (E.D. Va. 2004).

B. Discussion

As an initial matter, the Court summarily rejects Plaintiff's request to amend its Order to include consideration of Plaintiff's unfiled Response in Opposition emailed to chambers on the eve of trial because Plaintiff's Response and supporting exhibits were neither filed with the clerk of court prior to the hearing nor handed up to the judge at the time of the hearing. Rule 56(c), *SCRCP*, unambiguously requires summary judgment motions and, inferentially, supporting materials to be on file when they are to be relied upon at a summary judgment motion hearing. Rule 56(c) provides, in relevant part:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the

> hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions *on file*, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c), *SCRCP* (emphasis added). As articulated by the South Carolina Court of Appeals in *Lloyd's Inc. by Richardson Const. Co. of Columbia v. Good*, where the "on file" requirement in Rule 56 is not met, a trial court has discretion and inherent power to receive the documents and make them part of the file *only if their receipt does not prejudice opposing counsel*. 412 S.E.2d 441, 443 (S.C. Ct. App. 1991). The Court finds that Defendants will clearly be prejudiced if the Court amends its Order to include Plaintiff's unfiled 192-page Response emailed to chambers on the eve of trial considering Defendants had little, if any, time to fully address the discovery and documents in oral argument that are now being offered in opposition to SPM's MPSJ. As such, this Court declines to amend its Order on this basis.

Next, the Court declines to consider Plaintiff's new legal arguments that Plaintiff failed to advance on summary judgment. Once a party takes a certain position, it cannot change horses midstream. The adversary nature of the judicial system is designed around the premise that the parties know what is best for them and are responsible for advancing facts and arguments entitling them to relief. As such, motions for reconsideration are not meant to re-litigate issues already decided, provide a party the chance to craft new or improved legal positions, highlight previously-available facts, or otherwise award a proverbial "second bite at the apple" to a dissatisfied litigant. In sum, "a party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider." *United States v. Duke Energy Corp.*, 218 F.R.D. 468, 474 (M.D.N.C. 2003).

With these standards in mind, the Court finds Plaintiff improperly attempts to raise numerous new legal arguments in his Motion for Reconsideration that were not raised at the summary judgment stage, including but not limited to, the following:

- In Plaintiff's Response, he argued Defendant's MPSJ should be denied because Defendants "violated regulations governing pest management," "Defendants failed to meet industry regulations and standards," and Defendants had "a separate duty to conform to industry standard." *See* Plaintiff's Response at 5, 6. It is well settled under South Carolina law that, while industry standards are often probative in defining the standard of care, they do not determine if the prerequisite duty of care is owed. *Colleton Prep. Academy, Inc. v. Hoover Universal, Inc.*, 666 S.E.2d 247 (S.C. Ct. App. 2008), overruled on other grounds, *Sapp v. Ford Motor Co.*, 687 S.E.2d 47 (S.C. 2009). In other words, a violation of industry standard is only helpful in determining that a duty owed has been breached. *Id.* Plaintiff's original argument was entirely devoid of an assertion that Defendants owed duties created by the SCDPR.

- In Plaintiff's Response, he mentions in passing violations of two specific SCDPR regulations—SCDPR § 27-1083(C)(3)(b), which requires that a termite prevention company maintain records for a period of time, and SCDPR § 27-1085(D), which requires chemicals used on a property to be used in accordance with label instructions. *See* Plaintiff's Response at 4. In his MTA, Plaintiff now directs this Court to *entirely* different regulations—SCDPR § 27-1085(A) and SCDPR § 27-1085(B)(2)—to advance a new argument that Defendants have duties created by those regulations. *See* Plaintiff's Motion for Reconsideration at 11–12.

- In Plaintiff's Response, Plaintiff argued that, under *Kennedy*, a violation of a *building code* violates a legal duty for which a *builder* can be held liable for in tort and that application of the economic loss rule under the facts of this case "would change almost *every construction* cause of action in tort to be barred." *See* Plaintiff's Response at 5–6. Plaintiff's original argument failed to acknowledge that *this is not a construction case* and *Defendants are not builders of residential construction.* Plaintiff now attempts to advance a new argument that the framework articulated in *Kennedy* applies because the termite industry is a regulated industry, thereby falling within the narrow exception to the economic loss rule set forth in *Kennedy*. *See* Plaintiff's Motion for Reconsideration at 9–11.

- In Plaintiff's MTA, he argues, for the first time, that Defendants owed Plaintiff duties arising out of the regulatory and standards for application of termiticide, separate and apart from the contractual duties set forth in the Termite Agreement. *See* Plaintiff's Motion for Reconsideration at 12.

Because Plaintiff failed to raise these arguments at summary judgment, the Court declines to reconsider its Order on these grounds.

Next, the Court declines to consider the following previously available evidence presented by Plaintiff for the first time on reconsideration:

- The *entire* deposition of Cecil Hernandez, specifically directing this Court to "[s]ee his full transcript," whereas his original brief only identified excerpts from pages 14–18 and 30–34.

- The *entire* Deposition of James Wright, specifically directing this Court to six new exhibits or excerpts for consideration, whereas his original brief was *entirely devoid* of citations to that transcript.

- The *entire* Depositions of Maxcy P. Nolan, III, specifically directing this Court to eighteen exhibits or excerpts for consideration, whereas his original brief only included citations and excerpts to pages 80–81 and 152–153 of his November 29, 2016 deposition and 1–118 of his May 3, 2017 deposition.

- The *entire* 30(b)(6) Deposition of SPM and IOP, whereas his original brief only identified excerpts from pages 22–33 and 53–57.

It is well settled law that motions for reconsideration do not allow the losing party to attempt to supplement the record with previously available evidence. *See, e.g., Regan v. City of Chas., S.C.*, 40 F. Supp. 3d 698 (D.S.C. Aug. 18, 2014). Plaintiff's argument that, because Defendants' counsel was present at the depositions, the transcripts "do not constitute new arguments being brought up that were not previously raised, just the transcripts, to verify what was previously argued" misinterprets the standard under Rule 59(e), *SCRCP*. The proper inquiry is whether the evidence a party seeks to introduce to the Court on reconsideration is, in fact, new or was previously unavailable such that it would justify the Court's reconsideration of a previous order after it

expended the time and judicial resources to consider the motion once. The evidence Plaintiff now requests this Court consider is neither new nor recently discovered and there was nothing that prevented Plaintiff from introducing the evidence at summary judgment. His failure to do so was a "strategic decision [] for which the Plaintiff bears responsibility." *Regan v. City of Chas.*, S.C., 40 F. Supp. 3d 698 (D.S.C. Aug. 18, 2014) (citations omitted). As such, the Court declines to take into consideration the foregoing newly presented but previously available evidence.

In the alternative, even if this Court were to take Plaintiff's refurbished arguments and newly presented evidence into consideration (which it is not), the Court would still find Plaintiff's substantive arguments are insufficient. Whether the law recognizes a particular duty is a question of law for the Court. *Moore v. Weinberg*, 644 S.E.2d 740 (S.C. Ct. App. 2008). Where, as here, the Court determines that no duty exists, a defendant is entitled to judgment as a matter of law. *Simmons v. Tuomey Reg'l Med. Ctr.*, 533 S.E.2d 312, 316 (S.C. 2000). South Carolina courts have long recognized the distinction between contract and tort causes of action and have held that where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract. *Duc v. Orkin Exterminating Co., Inc.*, 729 F. Supp. 1553 (D.S.C. 1990). In other words, the economic loss rule bars a plaintiff from recovering in tort where he fails to receive the benefit of his bargain, or where his expectancy interests are frustrated. *See Sapp v. Ford Motor Co.*, 697 S.E.2d 47, 49 (S.C. 2009). This is especially true in situations where, as here, a contract between the parties contemplates possible foreseeable problems and allocates the risk of that problem occurring. *See Palmetto Linen Service, Inc. v. UNX, Inc.*, 205 F.3d 126, 130 (4th Cir. 2000).

The Court finds that the evidence in this case establishes that the Termite Contract governs the relationship between the Plaintiff and SPM. Plaintiff, an educated businessman, entered into an arm's length transaction with Defendant 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 damages resulting from termites up to $250,000. The Termite Contract specifically contemplated possible foreseeable problems and allocated the risk of that problem occurring. The Court finds this scenario falls squarely within the parameters of the economic loss rule. The Court further finds that it properly determined the limited exception to the economic loss rule articulated in *Kennedy* does not apply to the instant case because the South Carolina Supreme Court has repeatedly held that its holding in *Kennedy* is limited to residential housing construction only. *See, e.g.*, *Sapp v. Ford Motor Co.*, 687 S.E.2d 47 (S.C. 2009). As such, the Court finds the evidence Plaintiff now seeks to introduce is irrelevant because South Carolina law does not recognize a tort duty under these circumstances. Accordingly, even if the Court were inclined to consider Plaintiff's newly raised arguments and evidence (which it is not), it would reject them as meritless.

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration is **DENIED**.

IT IS SO ORDERED.

The Honorable Roger M. Young
Circuit Court Judge

Date: 4/18/19
Charleston County, South Carolina