

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

RECEIVED
NOV 20 2019
SC Court of Appeals

James E. Carroll, Jr., Appellant,

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.

RECORD ON APPEAL
Volume 3 of 3

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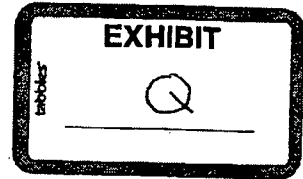
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ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)886-5858

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No: 7609
ACCOUNT #6024

Reference: 11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference: 11 TABBY LN.

Date	Description	Amount
02/23/2004	ANNUAL REINSPECTION & RENEWAL	\$ 250.00

3/1/04

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 005

0994

ANNUAL REINSPECTION REPORT

2/23/04 6024

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE:
HOME PHONE: 886-9600
SUBDIVISION:

OFFICE PHONE: (843) 886-5858
OFFICE FAX: (843) 886-0940
TOLL FREE #: (800) 642-9594

ADDRESS OF PROPERTY UNDER BOND: 111 TABBY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FEB 2004 Thru FEB 2005

PAGER #: (843)-937-9555

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES

NONE

INACTIVE INFESTATION

NONE

WOOD TO GROUND CONTACT

SPRINKLED LUMBER

EXCESSIVE MOISTURE CONDITIONS

NONE

FUNGI DAMAGE

NONE

CRAWLSPACE

OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCIVE TO A NEW TERMITE INFESTATION

NONE

IF YES, WHERE?

COMMENTS

YOU LIVE IN FORMOSA/ MECCA - TREVARDI

(Signature)
Inspector

TSI 006

0995

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)886-5858

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No: 9260
ACCOUNT #6024

Reference:11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference:11 TABBY LN.

Date	Description	Amount
05/19/2005	ANNUAL REINSPECTION & RENEWAL-FEB	\$ 250.00

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 007

0996

ANNUAL REINSPECTION REPORT

5/19/05 6024

ISLE OF PALMS PEST CONTROL, INC
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 886-9600
SUBDIVISION:

OFFICE PHONE: (843) 846-5858
OFF. ... : (843) 886-0940
TOLL FREE # : (800) 643-3394

ADDRESS OF PROPERTY UNDER BOND: 11 TARRY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FEB 2005 THRU FEB 2006

FAX # : (843) 937-9555

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES

None

INACTIVE INFESTATION

None

WOOD TO GROUND CONTACT

OK

EXCESSIVE MOISTURE CONDITIONS

None

FUNGI DAMAGE

None

CRAWLSPACE

OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCTIVE TO A NEW TERMITE INFESTATION

None

IF YES, WHERE?

COMMENTS

Wayne Sells

TSI 008

0997

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)886-5858

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No:11285
ACCOUNT #6024

Reference:11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference:11 TABBY LN.

Date	Description	Amount
02/07/2007	ANNUAL REINSPECTION & RENEWAL	\$ 250.00

PAID

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 009

0998

ANNUAL REINSPECTION REPORT

2/7/07 ACCOUNT #: 6024

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 886-9600
SUBDIVISION:

OFFICE PHONE: (843) 886-5858
OFFICE FAX: (843) 216-1749

ADDRESS OF PROPERTY : 11 TABBY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FEB 2007 Thru FEB 2008

NOTES

DESCRIPTION OF PROPERTY:

RESORT HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES

None

INACTIVE INFESTATION

None

WOOD TO GROUND CONTACT

OK

EXCESSIVE MOISTURE CONDITIONS

None

FUNGI DAMAGE

None

CRACKSPACE

OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCTIVE TO A NEW TERMITE INFESTATION

None

IF YES, WHERE?

COMMENTS

Inspector

James L. ...

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)886-5858

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451

Invoice No: 12334
ACCOUNT #6024

Reference: 11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference: 11 TABBY LN.

Date	Description	Amount
01/29/2008	ANNUAL REINSPECTION & RENEWAL	\$ 250.00

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 011

1000

ANNUAL REINSPECTION REPORT

1/31/08 ACCOUNT #: 6024

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 886-9600
SUBDIVISION:

OFFICE PHONE: (843) 886-5858
OFFICE FAX: (843) 216-1749

ADDRESS OF PROPERTY: 11 TABBY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FEB 2008 Thru FEB 2009

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES

None

INACTIVE INFESTATION

None

WOOD TO GROUND CONTACT

OK

EXCESSIVE MOISTURE CONDITIONS

None

FUNGI DAMAGE

None

CRANLSPACE

OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCIVE TO A NEW TERMITE INFESTATION

None

IF YES, WHERE?

COMMENTS

Inspector: [Signature]

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)886-5858

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No:13484
ACCOUNT #6024

Reference:11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference:11 TABBY LN.

Date	Description	Amount
02/04/2009	ANNUAL RENEWAL & INSPECTION	\$ 250.00

Total Amount: \$ 250.00

{PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 013

ANNUAL REINSPECTION REPORT

2/4/09 ACCOUNT #:6024

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 886-9600

OFFICE PHONE: (843) 886-5858
OFFICE FAX: (843) 216-1749

SUBDIVISION:
ADDRESS OF PROPERTY : 11 TABBY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FEB 2009 Thru FEB 2010

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES None
INACTIVE INFESTATION None
WOOD TO GROUND CONTACT OK
EXCESSIVE MOISTURE CONDITIONS None
FUNGI DAMAGE None
CRAWLSPACE OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCIVE TO A NEW TERMITE INFESTATION None
IF YES, WHERE?

COMMENTS

Vincent Seltzer
Inspector

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)216-1749 FAX (843)216-1759

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No:14571
ACCOUNT #6024 .

Reference:11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference:11 TABBY LN.

Date	Description	Amount
02/03/2010	ANNUAL REINSPECTION & RENEWAL	\$ 250.00

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 015

1004

ANNUAL REINSPECTION REPORT

21310 ACCOUNT #: 6024

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 866-9600
SUBDIVISION:

OFFICE PHONE: (843) 216-1749
OFFICE FAX: (843) 216-1759

ADDRESS OF PROPERTY: 11 TABBY LN.
ANNUAL INSPECTION FEE: \$ 290.00
PERIOD COVERED: FEB 2010 Thru FEB 2011

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES

NONE

INACTIVE INFESTATION

NONE

WOOD TO GROUND CONTACT

NO

EXCESSIVE MOISTURE CONDITIONS

NONE

FUNGI DAMAGE

NONE

CRACKSPACE

OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCIVE TO A NEW TERMITE INFESTATION

NONE

IF YES, WHERE?

COMMENTS

[Handwritten Signature]

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)216-1749 FAX (843)216-1759

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No:15565
ACCOUNT #6024

Reference:11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference:11 TABBY LN.

Date	Description	Amount
02/01/2011	ANNUAL REINSPECTION & RENEWAL	\$ 250.00

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 017

1006

ANNUAL REINSPECTION REPORT

21111 ACCOUNT #: 6024

ISLE OF PALMS PEST CONTROL, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 886-9600
SUBDIVISION:

OFFICE PHONE: (843) 216-1745
OFFICE FAX: (843) 216-1759

ADDRESS OF PROPERTY: 11 TARRY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FROM 2011 THRU FEB 2012

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES None

INACTIVE INFESTATION None

WOOD TO GROUND CONTACT OK - TREATED LUMBER + FELINGS

EXCESSIVE MOISTURE CONDITIONS None

FUNGI DAMAGE None

CRAWLSPACE OK

IF YES, EXPLAIN:

ABNORMAL CONDITIONS CONDUCTIVE TO A NEW TERMITE INFESTATION None

IF YES, WHERE?

COMMENTS

ALL IN ALL OK - PALM BRANCHES NOT TO
BE KEPT OFF THE HOUSE - EDGS CRAWL IN -

[Signature]
Inspector

SPM PEST MANAGEMENT COMPANY, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

(843)216-1749 FAX (843)216-1759

TC1

JIMMY CARROLL
103 PALM BLVD.
ISLE OF PALMS, SC 29451-

Invoice No:17280
ACCOUNT #6024

Reference:11 TABBY LN.

Payment Amount: _____

Please remit top portion for proper credit.

Reference:11 TABBY LN.

Date	Description	Amount
02/06/2013	ANNUAL REINSPECTION & RENEWAL	\$ 250.00

Total Amount: \$ 250.00

(PLEASE PAY BY THIS INVOICE - NO STATEMENT WILL BE RENDERED.
THANK YOU FOR YOUR BUSINESS.

TSI 019

1008

ANNUAL REINSPECTION REPORT

216 1B ACCOUNT #: 6024

SPM PEST MANAGEMENT COMPANY, INC.
P.O. BOX 448
ISLE OF PALMS, SC 29451

CUSTOMER: JIMMY CARROLL
MAILING ADDRESS: 103 PALM BLVD.
CITY-STATE-ZIP: ISLE OF PALMS, SC 29451-
WORK PHONE: 452-1200
HOME PHONE: 886-9600
SUBDIVISION:

OFFICE PHONE: (843) 216-1749
OFFICE FAX: (843) 315 1759
soff@ilepm@comcast.net

ADDRESS OF PROPERTY: 11 TABBY LN.
ANNUAL INSPECTION FEE: \$ 250.00
PERIOD COVERED: FEB 2013 THRU FEB 2014

NOTES

DESCRIPTION OF PROPERTY:

RESIDENTIAL HOME

CONDITIONS OF PROPERTY DURING INSPECTION:

ACTIVE TERMITES

None

INACTIVE INFESTATION

None

WOOD TO GROUND CONTACT

STAIRS, INTERIOR WALLS IN GARAGE

EXCESSIVE MOISTURE CONDITIONS

None

FUNGI DAMAGE

None

CRAWLSPACE

OK

IF YES, EXPLAIN:

~~EXISTING~~ CONDITIONS CONDUCTIVE TO A NEW TERMITE INFESTATION

YES

IF YES, WHERE?

ONLY THAT THE ROOMS WITH THE WALLS IN THE GARAGE ARE CLOSED UP & I CAN'T SEE

COMMENTS

IN THE WALLS IF YOU WERE TO HAVE A GROUND BORNE TERMITIC INFESTATION

Daunt Sells
Inspector



25 five years was -- it was almost just bringing
0010

1 termites to the house and not necessarily taking care
2 of the job.

3 Q So you would put, basically, a wood
4 structure in there which would attract the termites;
5 and then once by monitoring, you found termite
6 activity, that's when you put the white strip in with
7 the chemical, correct?

8 A Yes, sir.

9 Q And then what was your schedule for --

10 A Every three months.

11 Q Every three months?

12 A If it had termites, it was a monthly. You'd
13 come back and check it monthly.

14 Q And what were -- how did you keep records of
15 this?

16 A It was all on the computer. We used Route
17 Master.

18 Q And did you keep records at all times from
19 the very beginning of your using the EXTERRA?

20 A Definitely in the beginning, definitely. I
21 had to X off the stations that had the termites in
22 them.

23 Q Yes.

24 A And I had to scan bar codes on each of the
25 stations. And then I would have to give a little

0011

1 description on what was going on with this station or
2 that station, but that would be on an EXTERRA file,
3 which we got rid of all the EXTERRA. So I don't know
4 if that would be -- I don't know if we kept those
5 files or not.

6 Q And did you monitor the bait stations on
7 Jimmy Carroll's property?

8 A Yes, sir.

9 Q Do you have independent recollection of your
10 monitoring the bait stations of his house?

11 A Yes, sir.

12 Q How did you do that?

13 A How did I do that?

14 Q Yeah.

15 A I can just remember -- how did I -- sorry.
16 Can you rephrase that question?

17 Q In other words, what was your protocol? Was
18 it the one that you just described of every three
19 months going to his house and looking at the bait
20 stations that were in the ground?

21 A Yes. Three months if they were inactive. A
22 month if they were active.

23 Q Did you ever find any live termite activity
24 at Jimmy's house?

25 A In the stations.

0012

1 Q. On the ground floor towards the front of the
2 house?

3 A. Mm-hmm.

4 Q. Is that a yes?

5 A. Yes.

6 Q. All right. Are you referring to the area
7 where there was an enclosed room built on the
8 ground floor?

9 A. The exterior wall there, yes. The wall
10 underneath the stairwell that goes down from the
11 porch.

12 Q. Now, back to the dating of the infestation,
13 so to make sure I understand, you believe that
14 since -- that was in January 2015 I'll represent to
15 you that that Terminix --

16 A. Correct.

17 Q. -- technician --

18 A. That's what I thought.

19 Q. So I believe that because of that you can
20 give the opinion that there were termites in that
21 house since at least when?

22 A. Three years previous to that, so that would
23 be January of '12, at least that long back. Is
24 that right? Three years. That's three years,
25 right? And that's not doing any calculations or

1 any of that stuff. We just know that's how long it
2 takes for -- you know, it takes that long for
3 Formosan termites to swarm, so go back three years,
4 and that's where we'd be.

5 Q. And is it, I mean --

6 A. You can read it. It's literature.

7 Q. All right. Is it exactly three years, is it
8 occasionally three years, is it sometimes two,
9 sometimes four? What is the literature you're
10 getting this from?

11 A. Any pest -- any book you want to read. The
12 range is -- depends on the latitude. In our
13 latitude, once you get this far, it's about three
14 years. It's any way from 18 months way south,
15 Miami, that kind of stuff; up to about four years
16 on the very northern edge of where Formosan
17 termites are found. And you've got to remember,
18 we're on the very northern edge of where Formosan
19 termites are found, maybe about as far north as you
20 can go with Formosan termites, if you start looking
21 at where they're found. Isle of Palms is pretty
22 darn close. We don't have any now just up a little
23 bit, that's about it, so it's --

24 Q. What are the books you're referring to?

25 A. The Mallis pest control book, the Scientific



11 A Yes, sir. We do it right there.
12 Q Is it the same number or same code or just
13 another one?
14 A It was a different number.
15 Q And who did the entry into the computer?
16 A My father.
17 Q Was it ever put on paperwork outside of the
18 computer?
19 A Yes, sir.
20 Q When was that done?
21 A When I was there at the house.
22 Q Your office was that -- that was at the
23 house of the customer?
24 A That was at the house of the -- yes, sir.
25 Q Of the customer?

0050

1 A Yes, sir. And that was pretty -- that was
2 very important stuff. Like you just couldn't check a
3 termite station and, you know -- that's what you had
4 to do. I mean, there was no way around it. I would
5 have been fired if, you know...
6 Q Were the records ever printed out on regular
7 paper and kept in the company files?
8 A Not to my recollection. I guess we were
9 sold that, thought that computers could hold files.
10 Q Earlier, when you were answering questions
11 from Mr. -- earlier, when you were first answering
12 questions, you said you would report to your father
13 at the end of every day and discuss your paperwork
14 with him?
15 A Yes, sir.
16 Q What paperwork would you bring back every
17 day?
18 A My route, from Route Master.
19 Q Was it individual papers for each house or
20 was it a daily log?
21 A Daily log. A daily -- like if I was doing
22 just termite stations for that day, I would probably
23 have ten houses, ten addresses on a piece of paper.
24 Q It would all be on piece of paper on one big
25 report?

0051

1 A Yes, but you would also have the other piece
2 of paper with one through however many stations that
3 were on there.
4 Q And you said you would put the paperwork in
5 the file. What file would you put that in?
6 A Computer.
7 Q Into the computer?
8 A Yes, sir, because it was all -- it was all
9 based on logging into the computer and putting your
10 information into the computer; therefore, Clemson
11 University could actually come and, you know, not
12 actually have to be at your office to review the

13 files.
14 Q Would you discard the paperwork you brought
15 back at the end of the day after the material was put
16 into the computer?

17 A Would I throw it away? My recollection, I
18 never did.

19 Q Where was it kept? If you didn't throw it
20 away, where was it kept?

21 A It was kept right above the computer.

22 Q In the office?

23 A In the office. You know what? There was a
24 file. We did. We did. And that's a good question.
25 And, you, know, I remember a huge stack of papers

0052

1 right above the computer, and it was all my work.

2 Yeah. I don't understand why that wasn't in a -- I
3 mean, we had -- we had ten different filing cabinets.
4 I couldn't say it was thrown away.

5 Q It was a big file? It wasn't individual
6 files for all the different individual customers of
7 the company? Is that what you're saying?

8 A It was -- everything was individual,
9 alphabetically, A to Z, every customer.

10 Q So every day, you would come back and you
11 put stuff in an individual file for each individual
12 customer that you'd done?

13 A I'd bring my paperwork back and then our
14 secretary would take that, those files, and put them
15 into the addresses for that customer, the file for
16 that customer.

17 Q So at some point, the company's files for
18 Mr. Carroll, for example, would have records of all
19 of your quarterly or monthly installation inspections
20 of the bait stations, correct?

21 A Yes, sir.

22 Q I see you're smiling. Why are you smiling
23 when I say that?

24 A Well, nobody's perfect. My father wasn't,
25 you know -- I mean, yes. We did everything we could,

0053

1 yes.

2 Q After you decided that the FXTERRA bait
3 stations were not working sufficiently and you
4 switched, the company decided to switch to liquid
5 treatment, what happened to all those old records of
6 the bait station monitoring?

7 A I don't know. It was all on the computer.
8 So, you know, we just relied on that.

9 Q Who all worked in the company: You and your
10 father and who else?

11 A Cal Cochran, he didn't work in it, but he --
12 he didn't work in it. It was originally his company
13 from the very beginning, so his name might have still
14 been --

EXHIBIT 11

FILED ^{not}

2015-CP-10-5944

JAMES E. PARSONS 2019 FEB 20 PM 12:44

CASE NO 2015-CP-10-5944

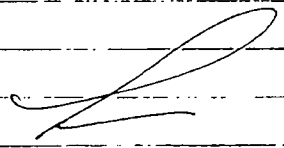
JULIE J. ARMSTRONG
CLERK OF COURT

Isle of Palm Pools ~~Contract, Inc~~
SPM MANAGEMENT COMPANY

Motion for
Partial
Summary
Judgment

MOTION FOR PARTIAL SUMMARY JUDGMENT

Isle of Palm Pools Contract, Inc, moves for
Summary Judgment: on all claims
in the complaint except breach
of contract.



Terry Kenworthy
PO Box 13897
Charleston SC 29412

February 20, 2019



EXHIBIT 12

Plaintiff's Memo in Opposition to Defendant SPM Motion for Partial SJ

Jody McKnight <jody.mcknightlawfirm@gmail.com>

Mon, Feb 18, 2019 at 4:10 PM

To: "Young, Roger Law Clerk (Lyndsay Luthringer)" <ryounglc@sccourts.org>

Cc: Trent Kernodle <tkernodle@kernodlelaw.com>, Steve Kozick <skozick@kernodlelaw.com>, Mike Ethridge <methridge@ethridgelawgroup.com>, Mary Willis <mwillis@ethridgelawgroup.com>, Kacey Huff

<KHuff@ethridgelawgroup.com>, Alison Sessoms <asessoms@kernodlelaw.com>, Ben Thomas <thomasbf@g.cofc.edu>, "M. Leanne Duryea" <leanne.mcknightlawfirm@gmail.com>, CHARLES HARKNESS <harknesscharw@gmail.com>

Lyndsay:

Attached is the above Memorandum with attached exhibits in the Carroll vs. IOP and SPM matter. I have also attached a copy of the SCDPR Regulations, 2005, mentioned therein, for your convenience. A Certificate of Service is also attached. Thank you.

Jody V. McKnight



www.jmcknightlaw.com

McKnight Law Firm

1156 Bowman Rd, Ste. 200

Mount Pleasant, SC 29464

Phone: 843-577-6040

Fax: 843-577-6041

E-Mail: jody.mcknightlawfirm@gmail.com

3 attachments



Carroll MEMO IN OPP TO S_20190218152309.pdf

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carroll.cert service to _20190218154032.pdf

50K



SCDPR 2005 REGULATIONS_20190218160007.pdf

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1010

EXHIBIT 13

No: 2015-CP-10-5944 Carroll v. Isle of Palms Pest Control, Inc., et al.

Roger Law Clerk (Lyndsay Luthringer) <ryounglc@sccourts.org>

Wed, Feb 13, 2019 at 11:35 AM

Lindsay Allio <mla@lwcooper.com>

Lindsay W. Cooper" <lwc@lwcooper.com>, Christina Humphries <christina@lwcooper.com>, Jody McKnight Law Firm <jody.mcknightlawfirm@gmail.com>, Mike Ethridge <methridge@ethridgelawgroup.com>, Kernodle Law <kernodlelaw.com> <skozick@kernodlelaw.com>, "kwalker@ethridgelawgroup.com" <kwalker@ethridgelawgroup.com>, "blanton.oneal@hoodlaw.com" <blanton.oneal@hoodlaw.com>

Isel,

I hope this email finds you well. In light of your trial next Tuesday, please go ahead and submit the following documents you have them by Friday afternoon:

- Pre-trial brief
- Voir Dire
- Pre-trial Motions
- Witness List
- Exhibit Lists
- Proposed Jury Charges

Qualification will begin Tuesday morning in the jury assembly room. Typically, after jury qualification/selection/pre-trial motions, Judge Young begins trial around 2pm.

Thank you. We look forward to working with you.

Lindsay Luthringer

Clerk to The Honorable Roger M. Young, Sr.

3 Broad Street

Georgetown, South Carolina 29401

Phone: (843) 958-2015

Email: RYounglc@sccourts.org

cc: Young, Roger Law Clerk (Lyndsay Luthringer)

Monday, February 11, 2019 10:10 AM

Lindsay Allio' <mla@lwcooper.com>



EXHIBIT 14

- a. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury"

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".



EXHIBIT 15

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

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- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
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 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".



STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
 JAMES E. CARROLL, JR.,)
 Plaintiff,)
 vs.)
 ISLE OF PALMS PEST CONTROL, INC.,)
 SPM MANAGEMENT COMPANY, INC.)
 AND TERMINIX SERVICE, INC.,)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 THE NINTH JUDICIAL CIRCUIT
 CASE NO.: 2015-CP-10-5944

**DEFENDANT SPM PEST
 MANAGEMENT COMPANY, INC.'S
 RESPONSE IN OPPOSITION TO
 PLAINTIFF'S MOTION TO ALTER OR
 AMEND**

FILED
 2019 MAR 29 PM 1:53
 JULIE J. ARMSTRONG
 CLERK OF COURTS
 BY [Signature]

Defendant SPM Pest Management Company, Inc. ("SPM"), by and through its undersigned attorneys, hereby submits this Response in Opposition to Plaintiff's Rule 59(e) Motion to Alter or Amend this Court's February 21, 2019 Order granting Partial Summary Judgment in favor of Defendants on Plaintiff's Negligence claim. This Court correctly 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. Where there is no duty except as the contract creates, Plaintiff's remedy is for breach of contract. Plaintiff has raised no legitimate grounds to amend the Court's Order and, therefore, SPM respectfully requests that Plaintiff's Motion be denied.

STANDARD OF REVIEW

The purpose of Rule 59(e), *SCRCP*, is to request the judge to reconsider matters properly encompassed in a decision on the merits. *Elam v. S.C. Dep't of Transp.*, 602 S.E.2d 772 (S.C. 2004). 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.” *Hanover Ins. Co. v. Corpro Cos.*, 221 F.R.D. 458, 460 (E.D. Va. 2004). Moreover, “[r]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly,” and “[a] litigant may not use Rule 59(e) to relitigate issues already decided by the court.” *In re Cable & Wireless, PLC*, 332 F. Supp. 2d 896, 899–900 (E.D. Va. 2004) (citations omitted).

ARGUMENT

For the reason set forth in detail below, Defendant SPM respectfully requests this Court deny Plaintiff’s Motion to Alter or Amend (Plaintiff’s “MTA”).

- I. THIS COURT PROPERLY DECLINED TO CONSIDER PLAINTIFF’S RESPONSE IN OPPOSITION TO SPM’S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE IT WAS NOT FILED WITH THE CLERK OF COURT BEFORE THE HEARING OR HANDED TO THE JUDGE DURING 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). Rule 56(e), *SCRCP*, by its terms, places the burden on the nonmoving party to come forward with rebuttal affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” to designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). “Where a plaintiff relies solely upon

the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required, under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law.” *Id.*

Plaintiff incorrectly cites *Lloyd's Inc. by Richardson Construction Co. of Columbia v. Good*¹ to support his contention that this Court should amend its Order to include review of his unfiled Response and supporting exhibits. In *Lloyd's*, the Court of Appeals was tasked with determining whether the trial court erred in considering unfiled discovery responses in ruling on a summary judgment motion. *Id.* The court held that the “on file” requirement is satisfied when (1) the document is filed with the clerk of court prior to the hearing; or (2) the document is delivered to and received by the trial judge at the time of the hearing. *Id.* The court further noted that the trial judge has “discretion and the inherent power to receive the documents and make them part of the file” *only if their receipt did not prejudice opposing counsel.* *Id.* The court determined opposing counsel was not prejudiced because he was the individual who prepared the documents and he knew from the memoranda filed in support of the motions that those documents formed the basis of the motions. *Id.* at 454 (citations omitted).

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 (referred herein as Defendant’s “MPSJ”). At 4:10 PM on Monday, February 18, 2019, *on the eve of trial*, Plaintiff’s counsel emailed a 192-page Response in Opposition (referred herein as Plaintiff’s “Response”) to chambers copying all counsel. *See* Plaintiff’s Email, a copy of which is attached hereto as Exhibit A. Plaintiff did not file his Response with the Court until February 22, 2019, *two days after* the Court entered its Order granting Defendant’s MPSJ. Plaintiff’s counsel clearly failed to comply

¹ 412 S.E.2d 441, 443 (S.C. Ct. App. 1991).

with the filing requirements set forth in Rule 56, *SCRCP*, because his Response was neither filed before the hearing nor handed up to the court during the hearing. The purpose of the Rules is to reduce the possibility of surprise and to ensure a fair contest. *See e.g., United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). Unlike opposing counsel in *Lloyd's*, SPM will clearly be prejudiced if the Court amends its Order to include consideration of Plaintiff's unfiled 192-page Response emailed to chambers on the eve of trial considering SPM 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, SPM respectfully requests this Court deny Plaintiff's Motion to amend this Court's order to include review of his Response.

II. PLAINTIFF'S MOTION TO ALTER OR AMEND CONTAINS NEW LEGAL ARGUMENTS THAT ARE NOT PROCEDURALLY APPROPRIATE AND SHOULD NOT BE CONSIDERED BY THIS COURT.

Critically here, reconsideration is 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. It is not an occasion "to present a better or more compelling argument that the party could have presented in the original briefs,"² or "to introduce evidence that could have been addressed or previously presented." *Regan v. City of Charleston*, 40 F. Supp. 3d 698, 702 (D.S.C. 2014). In sum, "a party who fails to present his strongest case in the first instance generally had 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, SPM respectfully requests this Court find Plaintiff's MTA improper. First and foremost, Plaintiff's submission is effectively a full-blown, renewed response

² *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 402 F. Supp. 2d 617, 619 (M.D.N.C. 2005).

in opposition to Defendant's MPSJ. Plaintiff improperly attempts to rely on the arguments and evidence included in his unfiled Response, as well as a twenty-one-page brief with eight hundred and thirty-four pages of previously available deposition transcripts and exhibits, the vast majority of which were not included in Plaintiff's original Response. *See Carter v. Porter*, C/A No. 5:08-cv-246-REW, 2012 WL 298479, at *1 (E.D. Ky. Feb. 1, 2012) (Motions for reconsideration "do not allow the losing party to attempt to supplement the record with previously available evidence."). Plaintiff's MTA is nearly twice as long as his Response, and his "Argument" section—the place one would expect him to have originally articulated his arguments in opposition to Defendant's MPSJ in detail—has nearly tripled. The length and density of Plaintiff's MTA alone suggests that he seeks a mulligan on his summary judgment briefing—and a cursory review confirms it. The following are some, of numerous, instances where Plaintiff attempts to craft new arguments and introduce newly-presented (but previously available) evidence that Plaintiff did not highlight on summary judgment:

- 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 his MTA, Plaintiff now, for the first time, attempts to argue that Defendants owed duties created by the SCDPR. *See* Plaintiff's MTA at 9–13. This argument was not raised previously to this Court and therefore, Plaintiff waived it.
- 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 MTA at 11–12. This argument was not previously raised to this Court and therefore, Plaintiff waived it.

- In Plaintiff’s Response, he 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. SPM does not dispute that under the narrow framework articulated in *Kennedy*, a builder of new residential construction may be liable in tort for building code violations. However, Plaintiff’s original argument failed to acknowledge that *this is not a construction case* and *Defendants are not builders of new residential construction*. Moreover, the South Carolina Supreme Court has repeatedly held that its decision in *Kennedy* is limited to new residential construction only. *See, e.g., Sapp v. Ford Motor Co.*, 687 S.E.2d 47 (S.C. 2009). Now, in Plaintiff’s MTA, he 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 MTA at 9–11. This argument was not previously raised to this Court and therefore, Plaintiff waived it.
- 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 MTA at 12. This argument was not previously raised to this Court and therefore, Plaintiff waived it.
- Plaintiff now improperly seeks to introduce 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. *See* Plaintiff’s MTA at 17. Motions for reconsideration do not allow the losing party to attempt to supplement the record with previously available evidence. Therefore, this evidence should not be considered.
- Plaintiff now improperly seeks to introduce 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. *See* Plaintiff’s MTA at 15–16. Motions for reconsideration do not allow the losing party to attempt to supplement the record with previously available evidence. Therefore, this evidence should not be considered.
- Plaintiff now improperly seeks to introduce 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. *See* Plaintiff’s MTA at 14–16. Motions for reconsideration do not allow the losing party to attempt to supplement the record with previously available evidence. Therefore, this evidence should not be considered.

- Plaintiff now improperly seeks to introduce the *entire* 30(b)(6) Deposition of SPM and IOP, whereas his original brief only identified excerpts from pages 22–33 and 53–57. Motions for reconsideration do not allow the losing party to attempt to supplement the record with previously available evidence. Therefore, this evidence should not be considered.

The foregoing non-exhaustive list definitively shows that the instant motion is merely an attempt to introduce previously-available evidence, present refurbished or improved arguments, and otherwise re-litigate summary judgment. This is clearly forbidden under Rule 59(e). Accordingly, SPM respectfully requests this Court disregard all of Plaintiff's refurbished arguments and newly presented but previously available evidence.

III. EVEN IF THIS COURT TAKES PLAINTIFF'S REFURBISHED ARGUMENTS AND NEWLY PRESENTED BUT PREVIOUSLY-AVAILABLE EVIDENCE INTO CONSIDERATION, PLAINTIFF'S MOTION TO ALTER OR AMEND SHOULD BE DENIED BECAUSE HIS 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).

This Court correctly determined that the narrow exception to the economic loss rule articulated in *Kennedy* is inapplicable because this case does not relate to or arise out of new residential construction. In *Kennedy*, the Supreme Court held the economic loss rule does not preclude a homebuyer from recovering in tort against the developer or builder where the builder violates an applicable building code. 384 S.E.2d at 731. The Supreme Court has repeatedly held that its holding in *Kennedy* is limited to protecting consumers in the residential building context only. *See, e.g., Sapp v. Ford Motors, Co.*, 687 S.E.2d 47 (S.C. 2009) (“We emphasize the exception announced in *Kennedy* as a very narrow one, applicable only in the residential real estate construction context”); *see also Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183 (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.”).

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. This scenario falls squarely within the parameters of the economic loss rule. As such, Plaintiff’s newly presented (but previously available) evidence of SPM’s alleged violations of the SCDPR is irrelevant because South Carolina law does not recognize a tort duty under these circumstances. Furthermore, Plaintiff seeks to present to a jury expert testimony that

SPM failed to produce records several years after the SCDPR requires it to keep records to somehow prove SPM acted negligently in performing its services at the Subject Property. As an initial matter, SPM was *never* issued a citation for violations of the SCDPR in relation to the Subject Property. Plaintiff also seeks to introduce evidence from prior unrelated cases that are factually dissimilar and do not involve the same type of alleged misconduct by Plaintiff. Even construing this evidence in a light most favorable to the Plaintiff, there is no nexus or causal connection between the alleged violations of the SCDPR and Plaintiff's claimed damages. Thus, even if this Court were to take all of Plaintiff's newly presented evidence into consideration, SPM's MPSJ should still be granted.

Finally, this Court correctly declined to hold Defendants' MPSJ in abeyance to allow Plaintiff to amend his pleadings to conform to the evidence presented at trial pursuant to Rule 15(b), *SCRPC*. As an initial matter, SPM's MPSJ specifically argued that, based on the facts of this case and the evidence of record, South Carolina law does not recognize any duties other than those arising out of and relating to the Termite Contract, thereby entitling it to Partial Summary Judgment on Plaintiff's Negligence claim. This Court agreed. As such, holding Defendants' MPSJ in abeyance to permit Plaintiff to present evidence of purported regulatory violations (i.e., in an attempt to prove breach of a duty) would not only be a waste of judicial resources, but it would be entirely futile considering this Court correctly determined the law does not recognize a particular duty under these circumstances.

CONCLUSION

Based on the foregoing, Defendant SPM respectfully requests this Court deny Plaintiff's Motion to Alter or Amend this Court's February 21, 2019 Order.

Signature Page to Follow

Respectfully submitted,

ETHRIDGE LAW GROUP, LLC

By: Mary Willis

R. MICHAEL ETHRIDGE

State Bar No.: 016892

MARY S. WILLIS

State Bar No.: 102411

PO Box 20969

Charleston, SC 29413

843-614-0007

Attorneys for SPM Pest Management Company, Inc.

This 2nd day of March, 2019.

Ethridge Law Group, LLC
P.O. Box 20969
Charleston, South Carolina 29413
843-614-0007

Kimberly Senseney
~~Kacey M. Huff~~ Kimberly Senseney
Paralegal to R. Michael Ethridge and
Mary S. Willis

Mary Willis

From: Jody McKnight <jody.mcknightlawfirm@gmail.com>
Sent: Monday, February 18, 2019 4:10 PM
To: Young, Roger Law Clerk (Lyndsay Luthringer)
Cc: Trent Kernodle; Steve Kozick; Mike Ethridge; Mary Willis; Kacey Huff; Alison Sessoms; Ben Thomas; M. Leanne Duryea; CHARLES HARKNESS
Subject: Plaintiff's Memo in Opposition to Defendant SPM Motion for Partial SJ
Attachments: Carroll MEMO IN OPP TO S_20190218152309.pdf; carroll.cert service to 20190218154032.pdf; SCDPR 2005 REGULATIONS_20190218160007.pdf

Lyndsay:

Attached is the above Memorandum with attached exhibits in the Carroll vs. IOP and SPM matter. I have also attached a copy of the SCDPR Regulations, 2005, mentioned therein, for your convenience. A Certificate of Service is also attached. Thank you.

Jody V. McKnight



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March 27, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

RE: James E. Carroll, Jr. vs. Isle of Palms Pest Control, Inc., et al.
C/A No.: 2015-CP-10-5944
ELG File No.: 4-00042

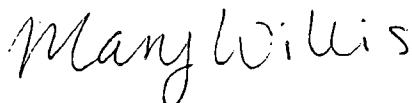
Dear Ms. Armstrong:

Enclosed please find the original and one copy of **Defendant SPM Pest Management Company, Inc.'s Response in Opposition to Plaintiff's Motion to Alter or Amend** in the above-referenced matter. Please file the original and return a clocked in copy to our office in the self addressed stamped envelope.

By copy of this letter, I am serving same to all counsel of record.

With kind regards, I remain,

Sincerely,



Mary S. Willis

MSW/kts
Enclosure


Cc: All Counsel of Record (*via regular U.S. Mail and via e-mail*)

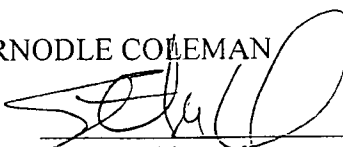
STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 JAMES E. CARROLL, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 ISLE OF PALMS PEST CONTROL, INC.,)
 SPM PEST MANAGEMENT COMPANY,)
 INC. AND TERMINIX SERVICE, INC.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 THE NINTH JUDICIAL CIRCUIT
 CASE NO.: 2015-CP-10-5944

**DEFENDANT ISLE OF PALMS
 PEST CONTROL, INC.'S
 NOTICE OF JOINDER IN CO-
 DEFENDANT SPM PEST
 MANAGEMENT COMPANY, INC.'S
 RESPONSE IN OPPOSITION TO
 PLAINTIFF'S MOTION TO ALTER OR
 AMEND**

Defendant Isle of Palms Pest Control, Inc. ("IOP"), by and through its attorneys, hereby joins in, adopts and incorporates Co-Defendant SPM Pest Management Company, Inc.'s ("SPM") Response in Opposition to Plaintiff's Motion to Alter or Amend. IOP incorporates by reference all arguments and objections set forth therein, asserting that the Court's ruling granting partial summary judgment and dismissing Plaintiff's tort claims should not be reconsidered by the Court. This joinder is appropriate, and IOP seeks the same relief and outcome sought by SPM.

FILED
 2019 APR -1 PH12:13
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY: 

KERNODLE COLEMAN
 By: 
 Trent M. Kernodle
 Stephen M. Kozick
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March 29, 2019
 Charleston, South Carolina

ATTORNEYS FOR DEFENDANT
 ISLE OF PALMS PEST CONTROL, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a copy of *Defendant Isle of Palms Pest Control, Inc.'s Notice of Joinder in Co-Defendant SPM Pest Management Company, Inc.'s Response in Opposition to Plaintiff's Motion to Alter or Amend* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:


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March 29, 2019


Alison D. Sessoms

FILED
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**KERNODLE
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ATTORNEYS AT LAW

Stephen M. Kozick, Esquire
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March 29, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

RE: *James E. Carroll, Jr. v. Isle of Palms Pest Control, Inc., SPM Pest Management Company Inc., and Terminix Services Inc.*
Charleston County / Case No.: 2015-CP-10-5944
K+C File No.: 3221- 155

Dear Julie:

Enclosed are the original and one copy of Defendant Isle of Palms Pest Control, Inc.'s Notice of Joinder in Co-Defendant SPM Pest Management Company, Inc.'s Response in Opposition to Plaintiff's Motion to Alter or Amend. Please file the original, and return a date-stamped copy of the Notice to me in the envelope provided for your convenience.

All counsel have been served with a copy of the Notice. Should you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

KERNODLE COLEMAN

Stephen M. Kozick

SMK
Enclosures

cc: VIA E-MAIL ONLY
Jody Van McKnight, Esquire
Robert Michael Ethridge, Esquire and Mary Willis, Esquire

kernodlelaw.com

1041



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2015-CP-10-05944

JAMES E. CARROLL, JR.,)
)
 Plaintiff,)
)
 -vs-)
)
 ISLE OF PALMS PEST)
 CONTROL, INC., SPM PEST)
 MANAGEMENT, INC., and)
 TERMINIX SERVICES, INC.,)
)
 Defendants.)

TRANSCRIPT OF RECORD
February 20, 2019
Charleston, South Carolina

B E F O R E:

The Honorable Roger M. Young, Judge.

A P P E A R A N C E S:

Jody Vann McKnight, Esquire
Attorney for the Plaintiff

Trent M. Kernodle, Esquire
Attorney for Defendant Isle
of Palms Pest Control, Inc.

Robert Michael Ethridge, Esquire
Mary Skahan Willis, Esquire
Attorneys for Defendant SPM
Pest Management, Inc.

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (February 20, 2019.)

2 MR. MCKNIGHT: Your Honor, I guess the first
3 motion we need to hear is the motion for summary
4 judgment.

5 THE COURT: All right.

6 MR. ETHRIDGE: Mike Ethridge, counsel for SPM
7 Pest Management.

8 We filed a motion for partial summary
9 judgment, which we're asking the Court to grant summary
10 judgment as to all the noncontract-related claims. We
11 had conversations off the record at length about the
12 issues in the case. They've been fully briefed, and
13 unless the Court would like for us to have more extensive
14 argument on it, we can, but our position is fairly
15 straightforward.

16 If the duties arise simply out of a contract,
17 then the damages an claim is limited to the scope of the
18 contract. There is a case, the Duc case, which is a
19 federal court case instructive on this point that's cited
20 in our brief. Judge Henderson ruled in a termite
21 infestation case, just like ours, that the claim the
22 plaintiff had there was limited to claims that were
23 available under contract.

24 In that case, just like ours, the plaintiff
25 was attempting to claim for water-related damage. The

1 Court said there that is a tort claim. It's not
2 available under contract. So what we have asked is that
3 the Court, under the general authority that's set out in
4 South Carolina law that's articulated in that case, we
5 would request summary judgment on all claims unrelated to
6 the contract and specifically would request that the
7 Court limit the claim in this case as to what is
8 available under the contract, which is new damage that
9 occurs during the term of the contract that is caused by
10 eastern subterranean and Formosan termites and that the
11 limitation on those damages not exceed \$250,000.

12 We believe that is clear and unambiguous
13 language, and it was brokered for the Court to grant
14 summary judgment on that issue. Thank you.

15 MR. KERNODLE: And, Your Honor, Isle of
16 Palms -- for the record, Trent Kernodle for Isle of
17 Palms -- on the record joins in that motion for the same
18 grounds.

19 THE COURT: All right. Mr. McKnight?

20 MR. McKNIGHT: Well, I'm not sure that -- he
21 didn't file a motion, so I'm not sure he can join in it
22 at last second, but, Your Honor, I've read the Duc case.
23 I do not agree that Duc is applicable. I do not
24 agree that -- I think it's inapposite to the facts of
25 this case. Duc dealt with the homeowner suing Orkin Pest

1 Control for -- the complaint was that Orkin did not
2 recognize water damage in the property and was negligent
3 in failing to recognize water damage. We believe that
4 our case is much different.

5 In our case, Vince Sottile entered into a
6 February 2003 exterior bait station agreement with Jimmy
7 Carroll. Without telling Mr. Carroll, Mr. Sottile
8 undertook a duty, a separate duty, that had nothing to do
9 with the contract of putting termiticide around the home.
10 He says he beaded it, which experts have said -- I think
11 Cecil Hernandez in our case acknowledged that assuming
12 that's all he did that that is not within the standards,
13 and Maxy Nolan and James Wright may have -- I believe
14 they've commented on that in their deposition as well.

15 The regulations require, specifically
16 27-1085, one of the subsections requires that when you
17 apply a termiticide, in order to comply with the
18 regulations, it must be applied according to the label in
19 the context in which it's being done. The context in
20 which he did it was a situation where there were no
21 termites whatsoever. This was not an effective means.
22 He didn't tell Mr. Carroll about it, very unlike this Duc
23 case.

24 Duc didn't involve any kind of activities on
25 the property that were undisclosed. He didn't tell Mr.

1 Carroll that he put termiticide in his property which, in
2 addition, is another violation that section 27-1083
3 requires that on the recordkeeping -- and maybe it's
4 another section, if I'm wrong. Going by my memory, one
5 of the regulations of the South Carolina Department of
6 Pesticide Regulation says that you're supposed to -- if
7 you put termiticide in somebody's property, you are
8 supposed to fill out a form promulgated by the agency,
9 and you're supposed to -- it's a termiticide disclosure
10 form. He didn't do that.

11 He admits that he didn't tell, he didn't
12 record -- and this is assuming he even did this, but he
13 did undertake this separate duty of -- and then in 2008
14 he agreed that he failed to -- he just quit on the bait
15 station, and he said, once again, after a five-year
16 period -- because the label on Termidor goes for five
17 years. He said, once again, he beaded the termiticide.
18 He didn't do the trenching, the drilling and all that
19 according to the labels.

20 His son said that termites entered the
21 bait -- the termites were in the stations within six
22 months. That's in testimony in this case, and every year
23 thereafter they failed to correct the situation, and we
24 have -- in 2011, he dissolved Isle of Palms Pest
25 Management. It turned into Sottile Pest Management up

1 until the time of sale in May of 2013 when they sold to
2 Terminix, and during that Sottile Pest Management period,
3 he once again failed to notify or to correct the
4 situation.

5 There is evidence that Mr. Carroll did write
6 a check in January of 2012. There's no record of his
7 showing up at the house for the annual inspection in
8 2012, but we're assuming that he did, but he just didn't
9 maintain a good record, once again in violation of
10 regulation.

11 In our memorandum in opposition to this
12 motion for partial summary judgment, we have cited some
13 cases, and one of those cases is the Kennedy case,
14 Kennedy versus Columbia Lumber. If you violate -- let's
15 see. One second. That the case law -- we've cited
16 Colleton Preparatory Academy, and it says where defective
17 product harms other property or causes physical injury,
18 the losses are more than merely economic. The economic
19 loss rule is inapplicable, and remedy lies in tort or
20 contract.

21 Essentially, they are going under the
22 economic loss rule, trying to bind us and keep us within
23 the contract. There was damage to more than just
24 property itself. There's damage -- in that case, the
25 facts were a little bit different, but that damage was

1 done to Mr. Carroll's property, if I'm explaining that
2 clear enough, and not to -- I believe those cases had to
3 deal with -- one of those cases had to deal with a
4 product liability -- or product case or something where
5 the damage was to the product.

6 Then you got Columbia Builders -- Kennedy
7 versus Columbia Lumber. It says where the builders acted
8 grossly negligent, punitive damages may be sought and
9 that a violation of the building code violates a legal
10 duty for which a builder can be held liable in tort for
11 proximately causing losses.

12 In that case, they had a contract. There was
13 a duty, a separate duty. We have evidence in this case
14 of gross negligence, and a violation of the statute, of
15 course, is evidence of gross negligence, and we have
16 those violations and we have him -- admitted them that
17 we've cited by Vince Sottile in his August 8, 2016 30(b)6
18 deposition where he says that he didn't comply with
19 paperwork.

20 He's also admitted that he made these
21 admissions and these allegations about undertaking a
22 duty, and while one might think that it all arises out of
23 the contract itself, the contract itself specifically
24 said he wasn't going to put termiticide in the ground.
25 So he went off on his own and engaged in a whole

1 different -- yeah, it was all related to termites, but
2 not -- there's really -- to keeping termites out of the
3 property, but that the agreement didn't call for that.
4 It called for bait stations, and, furthermore, the bait
5 station records were not kept, and that is also a
6 violation of regulations, and --

7 Now, as to Isle of Palms Pest Management in
8 joining in this motion in any way, we would allege that,
9 as we've outlined in our brief, that every year they
10 renewed it -- it was \$250,000 if you were to bind it to
11 contract, but we feel under the circumstances and the
12 precedent in the state that to hold otherwise would
13 essentially violate public policy, it would -- to protect
14 homeowners.

15 It would -- you've got these insurance
16 companies that insure these people for negligence, insure
17 the company in case they're negligent, and then you have,
18 once they get sued, the carriers -- the lawyers turning
19 around saying, oh, well, there is no negligence. So,
20 essentially, it leaves homeowners with no money ever, if
21 what they're saying on the coverage side is really true,
22 that -- so you have -- alleging that you're locked into
23 this contractual matter, but yet they don't cover for
24 breach of contract, and so we've submitted that. We've
25 talked about it.

1 I'll just ask Your Honor to rule in our favor
2 and not grant the partial motion for summary judgment.

3 THE COURT: Do you wish to reply?

4 MR. ETHRIDGE: Briefly, Your Honor.

5 I would just make a couple points: First of
6 all, all the improper conduct Mr. McKnight talks about is
7 improper conduct that arises from the duties imposed by
8 the contract. He talks about undisclosed activities that
9 were done on the property. Those were activities related
10 to termite treatment, which is the subject of the
11 contract.

12 He cites Kennedy in support of his position
13 that our motion should be denied, and I would just point
14 out, as the Court is aware, the Kennedy decision was
15 issued in 1988, which was two years before Judge
16 Henderson issued his opinion in that Duc case. Clearly,
17 that law would have been applicable then, but that was
18 not the law that precluded the finding in that case, that
19 when you have, as you do here, a contract for termite
20 services, the claims are limited to the obligations
21 flowing from the contract.

22 One other point he made is that there is an
23 independent duty because there are alleged violations of
24 statutes. Your Honor, the violations of the statutes
25 that are alleged are violations related to improper

1 recordkeeping, and he's talking about the failure of --
2 alleged failure of SPM to have a record of an inspection
3 that Mr. Carroll wrote a check for, so there is no nexus
4 between that and the issues in this case, Your Honor, and
5 I don't think that is going to give rise to any
6 independent cause of action or any independent duty.

7 Finally, I would just say with regard to
8 Mr. McKnight's statement that to grant partial summary
9 judgment in this case leaves homeowners with no money
10 ever is not accurate and would again point out our motion
11 here is only a motion for partial summary judgment.
12 There are still the contractual remedies that are
13 available under the contract.

14 Thank you, sir.

15 MR. MCKNIGHT: Just one more thing, Your
16 Honor. First of all, we're not alleging as to SPM or IOP
17 that it's only improper recordkeeping. There is
18 certainly improper recordkeeping, but SPM -- Isle of
19 Palms Pest Management merged in, I believe it was, around
20 June of 2011 with -- its assets into Sottile Pest
21 Management and then sold in May to Terminix.

22 During all of the -- there was active
23 negligence back, as I said, in 2003, active negligence in
24 failing to monitor the bait stations, active negligence
25 in failing to treat in 2003 and 2008 when he did

1 allegedly come in, as he said, and do these termiticide
2 beading that nobody in the industry ever hears of. It
3 violates the statute, and then every year he failed to
4 correct that is negligence through omission, and so it
5 all goes forward all the way up to SPM.

6 We're not just saying he didn't fail to keep
7 records. We're saying that he did much more.

8 THE COURT: Based on the record that I have
9 before me, which is the exhibits, what's in the file, and
10 the exhibits that were filed in support of and in
11 opposition to these motions, based on that record, I
12 don't find anything that was a negligent act that did not
13 arise out of the contract that existed between the
14 parties, and the law in this state, and it's well-settled
15 law, is that where there's a contract, you cannot sue for
16 tort for the same actions that arise out of, basically, a
17 breach of contract.

18 Your remedy is a breach of contract. You
19 have to have an independent factual basis for any duties
20 that arise to support a negligence action, and all of the
21 acts that I have before me and I have heard all arise out
22 of the performance or lack thereof by the defendants in
23 performance or nonperformance of the contract that
24 existed between them.

25 So the case of Dixon vs. Texas, 222 S.C. 385,

1 that's a 1952 case, that sets out the general rule. The
2 case of Duc vs. Orkin Exterminating Company, a 1990 case
3 out of the federal district court in South Carolina, 729
4 F. Supp. 1533 is a case that factually seems to be four
5 squared in that there was a termite contract between the
6 parties and there was causes of action for the breach of
7 that contract as well as negligence, and the Court held
8 that the exterminator did not have any duty that flowed
9 to the homeowner that was separate and apart from the
10 contract that supported a negligence cause of action.

11 All of the acts, again, that I have before me
12 that are in the record appear to flow, again, out of the
13 performance or nonperformance of the contract, so the
14 plaintiff is limited to their contractual remedies and
15 not without a remedy at all, they're just not allowed to
16 sue for negligence where there is a contract. Economic
17 loss rule also would support that proposition.

18 So I'm going to grant the motion for partial
19 summary judgment, ask that Mr. Ethridge and Mr. Kernodle
20 get together and prepare an order for that. I understand
21 that plaintiff wishes to appeal this order immediately,
22 which would postpone this trial that we have going on,
23 does not wish to go forward at this time only on the
24 contract cause of action, and the Court would grant his
25 motion for an intermediate appeal.

I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 20th of February 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 27, 2019

Amanda K. Haffenden

Circuit Court Reporter

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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

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SC Court of Appeals

James E. Carroll, Jr., Appellant,

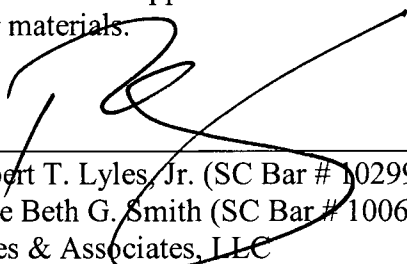
v.

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not other materials.


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