THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2019-000797

James E. Carroll, Jr.,.....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.

FINAL BRIEF OF RESPONDENT SPM PEST MANAGEMENT COMPANY, INC.

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STATEMENT OF THE CASE

This appeal arises out of the circuit court's order granting partial summary judgment in favor of Respondents SPM Pest Management Company, Inc. ("SPM") and Isle of Palms Pest Control, Inc. ("IOP") on Appellant's negligence claim. Appellant filed the instant lawsuit on November 3, 2015 alleging causes of action for negligence and breach of contract against IOP, SPM, and Terminix Services, Inc.[1] ("Terminix") for alleged termite infestation and resulting damages to his residence located at 11 Tabby Lane on the Isle of Palms (the "Subject Residence"). The causes of action arise out of termite treatment services performed by SPM and IOP on the subject residence pursuant to a contract for inspection and treatment. (Termite Contract). On or about July 27, 2016, Appellant filed his Second Amended Complaint, which is the current operative pleading.

On February 4, 2019, more than ten days before the commencement of a date certain trial in this case, SPM timely filed and served its Motion for Partial Summary Judgment (referred herein as SPM's "MPSJ") requesting an Order granting Summary Judgment on Plaintiff's Negligence claim, since the termite treatment (which is the basis of Appellant's claim) was performed pursuant

[1] Terminix settled with the Plaintiff prior to this appeal and is no longer in this lawsuit.

to a contract. (R. pp. 0029-0040). At the close of business on Monday, February 18, 2019, *the evening before trial*, Appellant's counsel emailed a 192-page Response in Opposition ("Response") to chambers copying all counsel. However, the Response was not filed with the Clerk's office and was not made a part of the record. On February 20, 2019, the circuit court heard oral arguments on Respondents' MPSJ. SPM argued, and the circuit court agreed, that where, as here, there are no duties owed except those arising out of and relating to the contract, a plaintiff's remedy is in contract, not tort. (R. pp. 0030-0040, 1052, lines 18–24). Accordingly, SPM argued, and the circuit court agreed, that Appellant's negligence claim should be dismissed as a matter of law because all of the alleged negligent conduct which formed the basis for Appellant's claim arises out of and relates to SPM's performance or nonperformance of the Termite Contract. (R. pp. 0035, 1053, lines 11–17). Finally, SPM argued, and the circuit court agreed, that Appellant's contractual remedies are limited to $250,000 for repairs to new damage caused by termites as set forth in the Termite Contract. (R. p. 0040).

At the time of their hearing, Appellant's Response still had not been filed with the Clerk's office and was not a part of the record. Following the hearing on the Motion, on February 21, 2019, the circuit judge signed a written Order granting Respondents' MPSJ. On February 22, 2019, after the court had granted SPM's MPSJ, Appellant filed his Response in Opposition to SPM's MPSJ with the clerk of court's office. The Order granting Respondents' MPSJ was filed on February 25, 2019.

On March 1, 2019, Appellant filed a Motion for Reconsideration of the circuit order's granting SPM's MPSJ. In its Motion, Appellant identified specific regulations which it contended gave rise to extra contractual duties. These regulations were not identified in either Appellant's Response to Motion for Summary Judgment nor in his oral argument. In its Motion for

Reconsideration, Appellant also argued, for the first time, that the economic loss rule only applies to products defect claims, and argues, for the first time, that that application of the economic loss rule violates public policy. SPM filed a Response in Opposition to the Motion for Reconsideration on March 29, 2019. IOP joined in SPM's Response in Opposition on April 1, 2019.

In a written order dated April 18, 2019, the circuit court denied Appellant's Motion for Reconsideration holding Appellant's motion "improperly contained arguments and previously available evidence not raised in its summary judgment briefing and otherwise ignored the standard for such motion." (R. p. 0004).. The circuit court held numerous arguments were waived because Appellant raised them for the first time on reconsideration. Likewise, the circuit court held the following previously available evidence was improperly introduced for the first time on in the Motion for 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." (R. p. 0011).
- "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." (R. p. 0011).
- "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." (R. p. 0011).
- "The *entire* 30(b)(6) Deposition of SPM and IOP, whereas his original brief only identified excerpts from pages 22-33 and 53-57." (R. p. 0011).

Finally, the circuit court held that even if it had taken Appellant's new arguments and evidence into consideration, the circuit court would still find Appellant's substantive arguments insufficient. (R. p. 0012). Operative portions of the Order denying Reconsideration are as follows:

- "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.*, 687 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)." (R. p. 0012).
- "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." (R. pp. 0012-0013).
- "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)." (R. p. 0013).

- "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." (R. p. 0013).

Appellant filed a Notice of Appeal on May 10, 2019.

STATEMENT OF FACTS

Appellant purchased the Subject Residence on November 1, 2002. Thereafter, on February 19, 2003, Appellant entered into a Termite Inspection Contract (the "Termite Contract") with Respondent IOP. (R. pp. 0054-0057). 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. (R. pp. 0055-0056). Appellant paid the yearly annual reinspection fee and the Subject Residence was inspected annually. The Termite Contract includes the following limitation of damages provision:

> COVERAGE LIABILITY: If new damage occurs to the structure during the contract terms, the operator will, upon notification and inspection, arrange for necessary repairs and pay the cost for the materials and the labor. New damage is that damage done by Eastern Subterranean and Formosan Termites after the contract date/installation date of the Exterra program. Liability for repairs shall not exceed $250,000.

(R. p. 0056). While the termite contract is not signed, it is undisputed by the Appellant that the Termite Contract is a valid contract that governs the relationship between the parties. (R. pp. 0059-0065). In addition, Appellant conceded in his deposition that all inspections and treatment services performed by IOP and SPM, which form the basis of Appellant's claims, were performed under the Treatment Contract. (R. pp. 0059-0065). Thus, the Termite Contract sets forth the rights and

obligations of the parties regarding any damages resulting from a termite infestation at the Subject Residence.

Pursuant to the provisions in the Termite Contract, IOP provided termite services at the Subject Residence from 2003 until 2011. On or about June 6, 2011, SPM incorporated and took over the termite services at the Subject Residence and continued to provide inspection and treatment services under the Termite Contract. 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. More than six months later, in January of 2014, Terminix discovered termites at the Subject Residence.

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

STANDARD OF REVIEW

An appellate court's review of a grant of summary judgment is subject to the same standard that governs the trial court under Rule 56(c), SCRCP. *Pye v. Estate of Fox*, 633 S.E.2d 505, 509 (S.C. 2006). A trial court may properly grant a motion for summary judgment when "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 a judgment as a matter of law." Rule 56(c), SCRCP. The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. *Rife v. Hitachi Constr. Machinery Co., Ltd.*, 609 S.E.2d 565, 568 (S.C. Ct. App. 2005). "Further, summary judgment depends upon the existence of plain, undisputed facts on which reasonable minds cannot differ." *Allen v. Long Mfg. NC, Inc.*, 505 S.E.2d 354, 356 (S.C. Ct. App. 1998) (citations omitted).

Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558-59, 671 S.E.2d 79, 85 (Ct. App. 2008). Rather the nonmoving party must present at least a scintilla of probative evidence showing a genuine issue for trial that does not rest on mere speculation. *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009).

The circuit court's decision as to whether to consider Appellant's unfiled response in Opposition to Respondent's MPSJ is within the sound discretion of the trial judge and should not be disturbed on appeal absent an abuse of that discretion. *See, e.g., Lloyd's Inc. by Richardson Construction Co. of Columbia v. Good*, 412 S.E.2d 441, 443 (S.C. Ct. App. 1991). This Court has defined the term "abuse of discretion" in a number of cases. In the case of *Darden v. Witham*, 263 S.C. 183, 209 S.E.2d 42 (1974), overruled on other grounds by *Glasscock v. Glasscock*, 304 S.C.

158, 403 S.E.2d 313 (1991) this Court, in discussing the term abuse of discretion, set forth the appropriate standard upon which the action of the lower court is to be judged in determining whether an abuse of discretion has occurred and stated:

> Before this Court is authorized to hold that the judgment of the lower court resulted from an abuse of discretion, there must [be] a showing by appellant that the conclusions reached were without reasonable factual support, resulted in prejudice to the right of the appellant, and therefore, in the circumstances, amounted to an error of law.

263 S.C. at 195, 209 S.E.2d at 47 (citing *S.C. State Highway Dept. v. Sharpe*, 242 S.C. 397, 131 S.E.2d 257 (1963)). Importantly, where a discretionary power is vested in the lower court, it is not the function of the appellate court to substitute its judgment for that of the lower court simply because the appellate court might have reached a different conclusion had it been in the lower court's place. *Fore v. United Insurance Co. of America*, 242 S.C. 451, 454-455, 131 S.E.2d 508, 510 (1963).

ARGUMENT

I. The circuit court did not abuse its discretion by declining to amend its Order to include consideration of Appellant's unfiled Response in Opposition to Respondents' MPSJ.

On reconsideration, SPM argued, and the circuit court agreed that, Appellant failed to comply with the filing requirements of Rule 56, SCRCP, because he did not file his Response with the clerk of court until after the circuit court ruled in favor of the Respondents and he failed to pass his Response to the judge at the hearing. In exercising its discretion, the circuit court declined to amend its Order granting Respondents' MPSJ to include consideration of Appellant's unfiled 192-page Response emailed to chambers at the close of business on the night before trial. (R. pp. 0004-0013). Appellant now argues that since the circuit court noted its consideration of the exhibits attached to his Response at the hearing on SPM's MPSJ, it should be included in the record on appeal.

A trial court may issue a written order inconsistent with statements made by the judge at a hearing in which an oral order is issued. "[I]t is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." *Badeaux v. Davis*, 522 S.E.2d 835, 839 (S.C. Ct. App. 1999); *see also Owens v. Magill*, 419 S.E.2d 786 (S.C. 1992) (ruling judge was not bound by prior oral ruling and could issue written order which conflicted with prior oral ruling); *Parag v. Baby Boy Lovin*, 508 S.E.2d 590, 592 (S.C. Ct. App. 1998) ("To the extent the written order may conflict with the prior oral ruling, the written order controls."). As such, Appellant's assertion that the circuit court noted its consideration at the hearing is irrelevant.

The proper inquiry is whether the circuit court abused its discretion when it declined to amend its Order to include consideration of the unfiled Response. Relying on this Court's precedent set forth in *Lloyd's Inc. by Richardson Construction Co. of Columbia v. Good*, the circuit court properly declined to amend its Order specifically finding that doing so would be prejudicial to the Respondents because they had little, *if any*, time to address the discovery and documents in oral argument. 412 S.E.2d 441, 443 (S.C. Ct. App. 1991) (holding a trial court has the discretion and inherent power to receive documents and make them a part of the file *only if their receipt does not prejudice opposing counsel*). To allow Appellant to rely on a 200-page unfiled opposition to Respondent's MPSJ, a copy of which was not provided to Respondent until the evening before the hearing, would have been highly prejudicial to Respondent. Consideration of this last minute 200-page opposition without offering Respondent ample time to reply would be tantamount to trial by ambush as it would have deprived Respondent of the opportunity to appropriately reply to the argument and records submitted in opposition to their MPSJ. The law in this state provides the trial court the discretion to determine what pleadings and matters should be considered under the

particular facts and circumstances of each case. Accordingly, SPM respectfully requests this Court decline to consider all evidence not properly placed in the record in compliance with Rule 56(c), SCRCP.

II. Appellant cannot rely upon arguments or evidence that were not properly preserved for appellate review.

South Carolina's preservation requirements are "mandatory." *Elam v. S.C. Dep't of Transp.*, 602 S.E.2d 772, 780 (S:C. 2004); *see also I'On, LLC v. Town of Mount Pleasant*, 526 S.E.2d 716, 723–24 (explaining "as expressed in Rule 220(c), SCACR, . . . an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal . . . [but] an appellate court . . . may not reverse for any reason appearing in the record.") Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Creech v. S.C. Wildlife & Marine Resources Dep't*, 491 S.E.2d 571, 576 (S.C. 1997). Arguments must be "sufficiently specific to inform the trial court of the point being urged." *Wilder Corp. v. Wilke*, 497 S.E.2d 731, 733 (S.C. 1998). Raising an argument for the first time via a motion asking the lower court to reconsider its decision is insufficient to preserve an argument for appellate review. *See e.g.*, *Lester v. Sanchez*, C/A No. 2015-000027, 2017 WL 4817527, at *2 (S.C. Ct. App. 2017) (holding an argument was not preserved "because the argument raised in the motion to reconsider was not sufficient to put the argument before the court); *Johnson v. Sonoco Prods. Co.*, 672 S.E.2d 567, 570 (S.C. 2009) ("We find this issue is not preserved. The issue first appears in Sonoco's motion seeking reconsideration of the circuit court's December 20, 2006 order. An issue may not be raised for the first time in a motion to reconsider."); *Hickman v. Hickman*, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (refusing to consider an issue raised for the first time on a motion to reconsider); *Stevens and Wilkinson of S.C., Inc. v. City of Columbia*, 762 S.E.2d 693, 695 (S.C. 2014) (same).

In opposition to SPM's MPSJ, Appellant asserted that SPM's MPSJ should be denied because SPM had violated certain pest control regulations. However, Appellant's Memorandum in Opposition to SPM's MPSJ did not cite a single specific regulation that SPM allegedly violated, did not provide a clear argument as to how pest control regulations create an independent duty beyond that arising out of the Termite Contract, and did not establish any nexus between alleged violations and the damages allegedly suffered by Appellant.

Appellants' current arguments to this Court, which he did not raise to the circuit court until his motion for reconsideration (thus, improperly asking the circuit court to "reconsider" its decision on the basis of argument that he had not asked it to consider in the first place) are not preserved for appellate review and cannot be allowed to undermine the circuit court's grant of summary judgment in favor of the Respondents. *Elam*, 602 S.E.2d at 780. Appellant's Motion for Reconsideration was essentially a full-blown, renewed response to SPM's MPSJ, where he improperly attempted to rely on the evidence included in his previously unfiled Response, as well as a twenty-one page brief with eight hundred and thirty-four pages of deposition transcripts and exhibits, the vast majority of which were not included in his original Response and had not been previously filed with the court in opposition to SPM's MPSJ. (R. pp. 1025-1034).

Appellant now seeks to improperly rely on the same new arguments and previously available evidence in pursuing this appeal asserting that the arguments are not, in fact, new and that the evidence was "in the record if by mention of its existence only."

As an initial matter, the following evidence (which was presented to the trial court for the first time in Appellant's Motion for Reconsideration) was neither new nor recently discovered and there was nothing that prevented Appellant from introducing the evidence it now requests this Court to consider at the summary judgment stage:

- 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.

His failure to do so was a "strategic decision [] for which the [Appellant] bears responsibility." *Regan v. City of Chas., S.C.*, 40 F. Supp. 3d 698 (D.S.C. Aug. 18, 2014) (citations omitted). Likewise, the following arguments were not raised at all or, at a minimum, not specifically articulated in Appellant's Response to SPM's MPSJ:

- In Appellant's Response to SPM's MPSJ, he argued the MPSJ should be denied because SPM "violated regulations governing pest management," "[SPM] failed to meet industry regulations and standards," and SPM had "a separate duty to conform to industry standard." (R. pp. 0075-0077). 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. 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.* Appellant's original argument was entirely devoid of an assertion that SPM owed specific duties created by the SCDPR and appeared to focus solely on purported breaches of industry standards, without first articulating a duty of care owed.

- In Appellant's Response to SPM's MPSJ, he mentions violations of SCDPR regulations without referencing any specific regulation. Based on the arguments of Appellant's counsel at the hearing on SPM's MPSJ, Appellant presumably is referencing—SCDPR § 27-1083(C)(3)(b), which requires 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. (R. p. 0074). On reconsideration and on appeal, Appellant is citing to *entirely* different regulations—SCDPR § 27-1085(A) and SCDPR § 27-1085(B)(2)—to advance a new argument that SPM has duties created by those regulations. (R. pp. 0132-0133).

- In Appellant's Response to SPM's MPSJ, 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." (R. pp. 0075-0077). His original argument failed to acknowledge that *this is not a construction case* and *SPM is not a builder of residential construction*. Appellant 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*. (R. pp. 0130-0132).

- In Appellant's Motion for Reconsideration and on appeal, he argues, for the first time, that SPM owed him 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. (R. pp. 0133-0134).

With Appellant's Motion for Reconsideration and Initial Brief of Appellant, Appellant is attempting to raise new arguments and highlight previously available facts that were not part of the record. Accordingly, SPM respectfully requests this Court decline to consider previously available evidence that was improperly raised for the first time on reconsideration, as well as arguments that were not specifically argued, or raised at all, in response to SPM's MPSJ.

III. The circuit court properly granted SPM's Motion for Partial Summary Judgment because SPM does not owe Appellant any duties except those arising out of the Termite Contract. Therefore, the economic loss rule bars Appellant's damages.

The circuit court properly granted SPM's Motion for Partial Summary Judgment because Appellant failed to allege any duties except those arising out of the Termite Contract, and the economic loss rule bars Appellant's damages. Even if this Court takes Appellant's refurbished

arguments and newly presented evidence into consideration, Appellant's substantive arguments fail under well-settled South Carolina precedent.

According to the Appellant, every service provider who, in exchange for valuable consideration, enters into a valid and enforceable contract with another party to provide a service should be held responsible in tort for damages specifically contemplated by the contract (and in spite of the fact the parties had agreed to an allocation of risk in the contract). As the circuit court noted in its Order, "The Termite Contract specifically contemplated possible foreseeable problems and allocated the risk of that problem occurring." (R. p. 0013). Appellant's argument, if adopted, would create an exception that subsumes, and effectively eliminates, the economic loss rule. These facts present the classic scenario that led to South Carolina's adoption of the economic loss rule based on important public policy considerations. Accordingly, as a starting point, a review of the economic loss rule's underlying policy considerations is appropriate.

The economic loss rule recognizes and maintains the differing policy objectives that underlie tort and contract law and seeks to reinforce these divergent objectives. *See, e.g., Myrtle Beach Pipeline Corp. v. Emerson Electric Co.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993). The law of tort encourages safe conduct and tort risks are assigned as a matter of law, whereas the law of contract encourages business transactions and permits parties to allocate risk. *Id.* The economic loss rule seeks to uphold the sanctity of the contractual process, reflecting a concern with protecting the core principles that underlie contract law—the rights of the parties to receive the benefit of their bargain, as well as the ability of parties to negotiate terms and allocate risk of foreseeable problems at the outset. *See Palmetto Linen Service, Inc. v. UNX, Inc.*, 205 F.3d 126, 130 (4th Cir. 2000). In other words, the rule is centered on the basic premise that parties who have both the capacity and inclination to allocate risk and liability through a contract should not, *ex post*, be

subjected to the unsteady waters of tort liability. The rule is eminently sensible: no gain can be had from injecting tort liability into contractual relationships between sophisticated parties.

a. SPM did not owe Plaintiff any duties except those arising out of the Termite Contract.

It is well-settled under South Carolina law that to pursue a tort claim and a breach of contract claim concerning the same conduct, a plaintiff must allege a duty owed to him by the defendant separate and distinct from any duty owed under a contract. *Kennedy v. Columbia Lumber & Mfg. Co.*, 384 S.E.2d 730 (S.C. 1989); *Duc v. Orkin Exterminating Co., Inc.*, 729 F. Supp. 1533 (D.S.C. 1990); *Dixson v. Texas*, 72 S.E.2d 897 (S.C. 1952) ("where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract"); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 239 S.E.2d 726 (1977) (same); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan & Goulding, Inc.*, 463 S.E.2d 85, 88 (S.C.1995) (same). Where there is no duty except as the contract creates, the plaintiff's remedy is for breach of contract. *Investors Premium Corp. v. Burroughs Corp.,* 389 F. Supp. 39 (D.S.C. 1974). It is only when the breach of duty alleged arises out of a liability independent of the personal obligation undertaken by the contract, it is a tort. *Id.* Any doubt as to whether an action is in contract or tort must be resolved in favor of contract. *See V.P. Randolph & Co. v. Waler*, 59 S.E. 856 (S.C 1907).

This distinction was expressly recognized in the context of performance under a termite treatment contract in *Duc v. Orkin Exterminating Co., Inc.*, where plaintiff brought suit against Orkin to recover the costs for repairing the water-damaged floor in his home. 729 F. Supp. 1533 (D.S.C. 1990). The plaintiff in *Duc* sued Orkin for breach of contract, but also asserted a cause of action in negligence. *Id.* In that case, the homeowner contended that Orkin had a contractual duty to inspect his house annually and to report to him any evidence of water damage discovered during the inspection. *Id.* The homeowner claimed that Orkin did not make annual inspections as required

by the contract or, if it did, it failed to notice or report to the homeowner any evidence of water damage. *Id.* Orkin filed a motion for summary judgment, and the district court expressly recognized the distinction between contract and tort causes of action and ruled that the duties and liabilities between the plaintiff and Orkin "were created and defined by the contract and the guarantee." *Id.* at 1535. The district court further explained that, "[a]s a general rule, there must be some active negligence or misfeasance to support the tort" that is "distinct from the breach of contract." *Id.* Because plaintiff failed to allege a breach of duty owed by Orkin that was independent of the contract, his claim for negligence was dismissed as a matter of law. *Id.* at 1533.

In an attempt to now avoid this result, Appellant argues SPM engaged in an independent act of negligence by beading termiticide around the perimeter of the house without telling Appellant. The fact that there may have been an alteration in treatment protocol over the dozen years or so this contract was in place does not change the fact that the obligations regarding that treatment arise solely from the Termite Contract. Furthermore, Counsel for the Appellant expressly concedes the conduct complained of all relates to termite treatment at the Subject Residence:

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

(R. pp. 1048, lines 22–25, 1049, lines 1–5).

Appellant cannot legitimately divorce SPM's treatment of the Subject Residence using bait stations from the treatment of the Subject Residence using termiticide – they both emanate from central purpose of contract, which was to treat the Subject Residence for termites, the method of which Appellant expressly conceded he did not care to know about. Further, the language that

Appellant cited from SCDPR 27-1085(B)(2) that states "Treatment and inspection must be performed in accordance with these regulations and with the terms of the written agreement or contract for so long as the contract is valid" does not create a cause of action for negligence. To the contrary, this language contemplates that the regulations will be incorporated into the contract and any material breach of regulations would be evaluated under the terms of the contract as a potential breach of contract, not a negligence cause of action. Furthermore, in Appellant's Second Amended Complaint, he alleges as part of the Breach of Contract cause of action that SPM "failed to abide by promises set forth in the bond [Termite Contract] [and] violated treatment and inspection standards. (R. p. 0023 ¶ 21). Therefore, in his own pleadings, Appellant acknowledges that claims related to violation of standards or regulations is a part of a breach of contract cause of action. Accordingly, akin to the court's holding in *Duc*, Appellant failed to allege, and SPM does not owe, Appellant any legal duties separate and distinct of those set forth in the Termite Contract.

Appellant's misinterpretation of the circuit court's ruling is clear by a review of Appellant's "infinite examples" for why this ruling is wrong. By way of example, Appellant apparently believes the circuit court's ruling would preclude a plaintiff from recovering in tort if an employee of SPM had negligently run over a child as he was coming or going to set a bait station at the Subject Residence. Appellant's argument misses the mark by focusing on hypothetical conduct that, if it had occurred, would clearly fall outside the parameters of the Termite Contract. Simply put, no matter how many times he invokes the word "negligence" with respect to SPM's conduct, the fact remains that all of the acts and omissions complained of arise directly from SPM's alleged performance and non-performance of its contractual obligations in treating the Subject Residence for termites. In other words, the allegations and evidence Appellant seeks to present were made *during the course of SPM's performance* and *in furtherance of the Termite Contract*. Had it not

been for the contract, SPM would have had no duty to inspect or treat the Subject Residence for termites at all, and consequently, no responsibility to prevent new damage arising from an infestation. In allegedly failing to perform these duties, Appellant has alleged a breach of the terms of the contract, the remedy for which is permissibly limited by the contract language itself. Therefore, to the extent Appellant wishes to sue SPM for failing to improve their contractually required performance, Appellant must sue in contract, not tort.

b. The circuit court properly held that economic loss rule bars Appellant's claims.

Pursuant to South Carolina case law, the economic loss rule precludes Appellant's negligence claim. *See Kennedy v. Columbia Lumber & Manufacturing Co.*, 384 S.E.2d 730 (S.C. 1989); *Sapp v. Ford Motor Co.*, 687 S.E.2d 47 (S.C. 2009). In *Kennedy*, the Court carved out a narrow exception to the economic loss rule for residential construction, but it specifically noted that "[t]he economic loss rule will still apply where duties are created solely by contract. In that situation, no cause of action in negligence will lie." 384 S.E.2d at 737. The fundamental premise underlying the Supreme Court's imposition of liability based on negligence against builders and developers for defective new residential construction is based on the Court's policy of protecting new buyers against builders that place defective construction into the "stream of commerce" due to the unequal bargaining power between the new home buyer and seller, the new home buyer's reliance on the skills of the builder, and the inability of the new home buyer to inspect a new house for latent defects prior to purchase. *Kennedy*, 384 S.E.2d 730, 735–36 (S.C. 1989).

Since the Supreme Court's decision in *Kennedy*, the Court has made clear that it "had no intention of the exception extending beyond the context of the residential real estate construction." *See Sapp v. Ford Motor 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."); *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 412 F. Supp. 2d 560, 563 (D.S.C. 2006), vacated and replaced by unpublished Order and Opinion, *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, C/A No. 2:04-cv-00531-DCN, 2007 WL 9710995 (D.S.C. 2007) (certifying question to South Carolina Supreme Court and noting "*Kennedy* does not support the proposition that 'breach of industry standards' is a universal exception to the economic loss rule . . . [it] is expressly limited to the home buyer/builder context, and is specifically premised on a policy of protecting the new home buyer."); *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183 (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.").

In accordance with these holdings, the *Duc* court held that the homeowner could not recover on his negligence cause of action because Orkin owed the homeowner no legal duties independent of the contract, and in so reasoning stated:

> **South Carolina courts have recognized the distinction between contract and tort causes of action and have held that in order for a plaintiff to state a claim in tort, he must allege a duty owed him by the defendant separate and distinct from any duty owed under a contract:**
>
> > Ordinarily, ***where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract***, but when the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by the contract, it is a tort . . . As a general rule, there must be some active negligence or misfeasance to support the tort. There must be some breach of duty distinct from breach of contract.

729 F. Supp. 1533 (D.S.C. 1990). (citations omitted) (emphasis added)). Likewise, courts from other jurisdictions have held the economic loss rule bars tort claims against pest control companies

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

In the instant case, Appellant's damages are purely economic. The only detriment suffered by Appellant is the new damage purportedly caused by a termite infestation to the Subject Residence. Appellant, an educated businessman with a career of entering into sophisticated commercial contracts for the purchase, sale, and management of real estate, entered into an arms-length transaction with IOP (and successor SPM) to perform annual inspections and treatment of the Subject Residence. IOP (and successor SPM) agreed to inspect and treat the Subject Residence for termites and repair any new damages resulting from termites not to exceed $250,000. The Termite Contract contemplated precisely what Appellant complains of today—damage purportedly arising out of a termite infestation—and the parties specifically allocated the risk of this problem by contractually agreeing to limit SPM's liability for repairs not to exceed $250,000. Moreover, Appellant has not raised any legitimate grounds for extending the narrow exception articulated in *Kennedy* because the policy considerations underlying that decision (e.g., the inherent unequal bargaining power between a builder and a buyer of a home) are simply not present here.

Furthermore, as noted above, Appellant's current arguments relating to SCDPR regulations and expert testimony are new arguments that were not part of the record on appeal and should not be considered. In Appellant's Response to SPM's MPSJ, while citing no specific regulations by name, he mentions in passing violations of two SCDPR regulations—presumably, SCDPR § 27-1083(C)(3)(b), which requires 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. (R. p. 0074). On reconsideration and on appeal, Appellant cites to entirely

different regulations—SCDPR § 27-1085(A) and SCDPR § 27-1085(B)(2)—to advance a new argument that SPM has duties created by those regulations. (R. pp. 0132-0133). In addition, the expert depositions are not part of the record on appeal and should not be considered.

Even if this Court were to extend the narrow exception in *Kennedy* to find independent duties of care arising out of the SCDPR, which SPM specifically denies, there is no nexus or causal connection between alleged violations of the SCDPR and Appellant's claimed damages. Appellant urges this Court reverse the circuit court's order granting SPM's MPSJ so that it can 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 Residence. However, SPM was never issued a citation for violations of the SCDPR in relation to the Subject Residence. The evidence Appellant seeks to introduce is from prior unrelated cases that are factually dissimilar and do not involve the same type of alleged misconduct. Accordingly, the circuit court properly held the narrow exception articulated in *Kennedy* is inapplicable in this case, and SPM respectfully requests this Court affirm the circuit court's order on these grounds.

IV. The circuit court correctly determined Appellant's remedy in this case is limited to whatever remedies are available under the Termite Contract.

a. The Termite Contract explicitly and unambiguously limits SPM's liability for repairs arising out of new termite damage to $250,000.

The circuit court's holding limiting Appellant's contractual remedies to $250,000 is fully supported by South Carolina law and the factual record. South Carolina courts uphold limitation of liability provisions in contracts noting that they are commercially reasonable in many instances because they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would not be able to afford it. *Gladden v. Boykin*, 739 S.E.2d

882, 884 (S.C. 2013). Where, as here, a contract's language is clear and capable of legal construction, the function of the Court is to interpret its lawful meaning and the intent of the parties as found in the agreement. *Gilbert v. Miller*, 586 S.E.2d 861, 864 (S.C. Ct. App. 2003).

The Termite Contract in this case explicitly and unambiguously limits SPM's liability for repairs arising out of new termite damage to $250,000:

> COVERAGE LIABILITY: If new damage occurs to the structure during the contract terms, the operator will, upon notification and inspection, arrange for necessary repairs and pay the cost for the materials and the labor. New damage is that damage done by Eastern Subterranean and Formosan Termites after the contract date/installation date of the Exterra program. Liability for repairs shall not exceed $250,000.

(R. pp. 0040, 0056). Thus, this Court must enforce the Termite Contract. *U.S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199 (S.C. Ct. App. 2009) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

Appellant argues that the contractual remedy available under the contracts amounts to $250,000 per year for every year it was renewed. Nothing in the record, however, supports an argument that the terms of the Termite Contract are ambiguous or that the parties contemplated the limitation of liability exceeding $250,000 for all services performed under the Termite Contract.

b. Appellant's argument that application of the economic loss rule violates the public policy of this state is not supported by the record and was not properly preserved for appeal.

Appellant argues that limiting his claim to a breach of contract action nullifies a regulatory mandate requiring pest control applicators to have insurance and therefore is against public policy. Appellant's public policy arguments are new arguments that were not a part of the record on appeal

and should not be considered. As noted above, these arguments were made, for the first time, in Appellant's Motion for Reconsideration.

Furthermore, Appellant's public policy argument is based on statements allegedly made by SPM's counsel in chambers which are not a part of the record. Appellant also requests that this Court take judicial notice of the fact that there is no product in the entire universe of insurance that would provide coverage to pest control applicators. In a business as vast as the insurance industry, no such assumption can be made. Regardless, because this issue was not raised until Appellant filed its Motion for Reconsideration, SPM was deprived of the opportunity to establish a record demonstrating how limiting recovery to contractual remedies under these facts would not violate public policy.

CONCLUSION

For the reasons set forth in detail herein, the circuit court properly granted SPM's Motion for Partial Summary Judgment dismissing Appellant's Negligence claim as a matter of law and limiting his potential recovery those remedies available under the Termite Contract. SPM respectfully requests this Court affirm the circuit court's order on the grounds set forth herein, as well as any other grounds found in the record pursuant to Rule 220(c), SCACR.

December 6, 2019

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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

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 certified that this Final Brief complies with Rule 211(b), SCACR.

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December 6, 2019