

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

DEC 31 2019

SC Court of Appeals

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.

APPELLANT'S FINAL BRIEF

Robert T. Lyles, Jr. (SC Bar # 10299)
Rose Beth G. Smith (SC Bar # 100623)
Lyles & Associates, LLC
301 Rutherford Street, Suite D
Greenville, SC 29609
843.577.7730
rtl@lylesfirm.com / rbgs@lylesfirm.com

-and

Jody V. McKnight (SC Bar #66354)
McKnight Law Firm
1156 Bowman Road, Suite 200
Mt. Pleasant, SC 29464
843.577.6040
jody.mcknightlawfirm@gmail.com
Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in granting partial summary judgment as to Carroll's negligence claim where the court held that *Duc v. Orkin* and the economic loss rule are applicable to the claim?
- II. Did the circuit court err in granting partial summary judgment as to Carroll's negligence claim where the claim arises out of duties created by SCDPR regulations and industry standards, which are separate and distinct from any duties owed under the contract?
- III. Did the circuit court err in limiting the contractual remedy to \$250,000 where the terms of the contract show that the remedies amount to \$250,000.00 per year, for every year the contract was renewed?
- IV. Did the circuit court err in granting partial summary judgment as to Carroll's negligence claim where limiting Carroll's claims to a breach of contract cause of action nullifies the regulatory mandate that pest control applicators have insurance for the protection of homeowners where breach of contract is excluded from insurance coverage?
- V. Should the Court reject the findings and conclusions of the circuit court's Order Denying Reconsideration because they are false and pretextual?

STATEMENT OF THE CASE

This appeal arises from the circuit court's order granting partial summary judgment in favor of Isle of Palms Pest Control, Inc. ("IOP") and SPM Pest Management Co., Inc. ("SPM") as to Jimmy Carroll's ("Carroll") negligence claim. The Honorable Roger M. Young signed the *Order Granting Defendants' Motion for Partial Summary Judgment Pursuant to Rule 56, SCRCF* ("Order Granting Partial Summary Judgment") on February 21, 2019, and it was filed on February 25, 2019.

Carroll filed this lawsuit on November 3, 2015, amended the complaint on November 20, 2015, and filed a Second Amended Complaint on July 27, 2016, alleging causes of action for Negligence and Breach of Contract/Warranty against IOP, SPM, and Terminix Services, Inc. ("Terminix"), which is no longer in the lawsuit and not a part of the appeal.

On February 4, 2019, on the eve of the two week “date certain” trial scheduled to begin on February 19, 2019 before Judge Young, SPM filed a Motion for Partial Summary Judgment (“MPSJ”) “as to [Carroll’s] Negligence claim and limiting his damages award to \$250,000.” R. p. 0031. SPM argued that Carroll’s negligence claim “is barred by the economic loss rule.” R. p. 0035. SPM further argued that “Plaintiff failed to allege, and SPM does not owe, Plaintiff any legal duties separate and distinct of those set forth in the Termite Bond.” R. p. 0039.

On February 18, 2019, Carroll emailed a copy of his Memorandum in Opposition to SPM Pest Management Company Inc.’s Motion for Partial Summary Judgment (“Memo in Opposition”) to Judge Young’s law clerk, Lyndsay Luthringer, for the trial court’s review prior to the motion hearing. R. p. 1018.

The trial court heard SPM’s MPSJ on February 20, 2019, after settlement negotiations between the parties came to an impasse. IOP joined in the MPSJ during the hearing, R. p. 1044, lines 15–18, and filed a handwritten motion thereafter. After hearing oral argument of counsel for SPM and Carroll, the trial court held as follows:

- “Based on the record that I have before me, which is the exhibits, what’s in the file, and the exhibits that were filed in support of and in opposition to these motions, based on the record, I don’t find anything that was a negligent act that did not arise out of the contract that existed between the parties, and the law in this state, and it’s well-settled law, is that where there’s a contract, you cannot sue for tort for the same actions that arise out of, basically, a breach of contract.” R. p. 1052, lines 8–17.
- “Your remedy is a breach of contract. You have to have an independent factual basis for any duties that arise to support a negligence action, and all of the acts that I have before me and I have heard all arise out of the performance or lack thereof by the defendants in

performance or nonperformance of the contract that existed between them.” R. p. 1052, lines 18–24.

- “So the case of *Dixon vs. Texas*, 222 S.C. 385, that’s a 1952 case, that sets out the general rule. The case of *Duc vs. Orkin Exterminating Company*, a 1990 case out of the federal district court in South Carolina, 729 F. Supp. 1533 is a case that factually seems to be four squared in that there was a termite contract between the parties and there was causes of action for the breach of that contract as well as negligence, and the Court held that the exterminator did not have any duty that flowed to the homeowner that was separate and apart from the contract that supported a negligence cause of action.” R. p. 1052, line 25–p. 1053, line 10.
- “All of the acts, again, that I have before me that are in the record appear to flow, again, out of the performance or nonperformance of the contract, so the plaintiff is limited to their contractual remedies and not without a remedy at all, they’re just not allowed to sue for negligence where there is a contract. Economic loss rule also would support that proposition.” R. p. 1053, lines 11–17.
- “So I’m going to grant the motion for partial summary judgment, ask that Mr. Ethridge and Mr. Kernodle get together and prepare an order for that. I understand that plaintiff wishes to appeal this order immediately, which would postpone this trial that we have going on, does not wish to go forward at this time only on the contract cause of action, and the Court would grant his motion for an intermediate appeal.” R. p. 1053, lines 18–25.

Judge Young then signed, on February 21, 2019, the formal Order Granting Partial Summary Judgment prepared by counsel for SPM and IOP.

Operative portions of the Order Granting Partial Summary Judgment are as follows:

- “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 him by the defendant separate and distinct from any duty owed under the contract. *Duc v. Orkin Exterminating Co., Inc.*, 729 F. Supp. 1553 (D.S.C. 1990); *Dixson v. Texas*, 72 S.E.2d 897 (S.C. 1952). 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).” R. p. 0002.
- “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, the Court find that Plaintiff’s claims arise out of, relate to, and are therefore limited to the duties set forth in the Termite Contract.” R. p. 0002.
- “Accordingly, the Court finds that the Plaintiff’s Negligence claim must be dismissed as a matter of law because it is barred by the economic loss rule.” R. pp. 0002–0003.
- “Therefore, Defendants’ Motion for Partial Summary Judgment is **GRANTED.**” R. p. 0003.

Notably, the Order Granting Partial Summary Judgment did not mention that the trial court reviewed the Memo in Opposition. Also, it did not specifically limit the contractual remedy to \$250,000, even though that was a ground for the MPSJ. The order made no mention of a monetary ceiling for damages under the contract.

On February 22, 2019, Carroll filed the Memo in Opposition with the clerk of court’s office, even though Carroll emailed it to the Judge’s law clerk prior to the hearing. The Order Granting Partial Summary Judgment was file-stamped on February 25, 2019. Carroll then filed a Motion for Reconsideration or to Alter or Amend Judgment (“Motion for Reconsideration”) on March 1, 2019. On March 29, 2019, SPM filed a Response in Opposition to Plaintiff’s Motion to

Alter or Amend (“Response”), and IOP joined in SPM’s Response on April 1, 2019. On April 18, 2019, Judge Young signed an Order Denying Plaintiff’s Motion for Reconsideration (“Order Denying Reconsideration”), prepared by counsel for SPM and IOP, which was filed on April 23, 2019. Carroll then filed a Notice of Appeal on May 10, 2019.

STATEMENT OF FACTS

Carroll purchased his Isle of Palms home at 11 Tabby Lane (the “Property”) in late 2002. In February 2003, IOP, owned by Vince Sottile (“Mr. Sottile”), entered into an Exterra Bait Station Agreement with Carroll. R. pp. 0145–0147. The Bait Station Agreement contained “waiver” language, explaining to Carroll that the services of the Bait Station Agreement *specifically did not include the application of chemical termiticide* on the Property. R. p. 0149. IOP and Carroll renewed the Bait Station Agreement annually in February of every year from 2004 through 2010 for \$250.00, which involved a yearly inspection of the Property. However, no evidence that Mr. Sottile did anything on the Property in 2006 exists. R. pp. 0151–0166.

In 2011, IOP merged its assets into SPM Pest Management Company, Inc. (“SPM”), which was a new company created by Mr. Sottile, the same owner/principal. IOP was dissolved. The organizational structure as to employee(s) and ownership/management remained the same. R. pp. 0168–0169.

In May 2013, Terminix purchased SPM by way of a Purchase Agreement. R. pp. 0171–0176. That agreement contained indemnification language, shifting liability back to SPM for any termites or termite damages related to acts or omissions by SPM, which were discovered by Terminix after the sale of the business.

Terminix discovered substantial live termites and termite damage at the Property on January 22, 2014. Terminix treated the Property with termiticide several months later, following unsuccessful attempts to have Mr. Sottile take responsibility per the terms of the Purchase Agreement between SPM and Terminix. The Terminix treatments were in compliance with applicable pesticide regulations, according to Cecil Hernandez of the South Carolina Department of Pesticide Regulation (“SCDPR”), which is operated through Clemson University. R. p. 0184, lines 12:25–13:5.

Mr. Sottile has testified that without notifying Carroll, he decided to stop monitoring and protecting the Property with the Exterra Bait Stations and instead, on or about 2008, applied Termidor termiticide in the ground around the home on the Property, which is a chemical termite barrier comprising an entirely different technology for preventing termite intrusion into the Property. Some of that testimony is as follows:

Q: Were you ever doing a combination of termiticide and baiting?

A: “Yes.”

Q: “Do you know—”

A: “But the record doesn’t reflect that. I’ve already looked over all this. The record doesn’t reflect it. And the reason I did it, when I did the baiting system...to me, you know, be comfortable with it, I did it a little different...called Termidor.”

R. p. 0212, lines 23:9–24:4; R. p. 0228, lines 56:16–18.

Mr. Sottile testified that he personally continued to conduct yearly inspections of the Property from January of 2008 to January of 2013, just prior to selling SPM to Terminix. However, no evidence that he visited the property in 2012 exists, although Carroll paid for the renewal amount. Mr. Sottile testified that there was never a lapse in coverage under the Exterra Bait Station Agreement for the Property from 2003 up to his last inspection prior to the sale of

SPM in 2013, and, that at the time of sale, all Exterra Bond Bait Contracts had in fact lapsed. R. p. 0216, lines 31:1–10.

Mr. Sottile also testified that while there *should have been* a new contract for the Property specifying treatment with termiticide in lieu of the Exterra Bait Station Agreement, no such contract was offered to Carroll and no termite bond specific to the use of termiticide treatment in lieu of and after abandonment of the bait station monitoring in 2008 was ever offered. R. p. 0215, lines 30:18–25.

Regulations promulgated by the SCDPR (27-1085 *Standards for the Prevention or Control of Wood-destroying organisms*) require that “[e]very person performing either preventative measures against or control measures for termites and other wood destroying organisms (both insects and fungi) on the property of another must follow at a minimum the methods and procedures specified in the following codified paragraphs of this regulation.” SCDPR 27-1085(A).

SCDPR 27-1085(B)(2) makes a breach of the contract a dual regulatory violation, wherein it states as follows: “Treatment and inspection must be performed in accordance with these regulations and with the terms of the written agreement or contract for as long as the contract is valid.” (emphasis added). Thus, by definition, a breach of the contract is a breach of the regulations.

The Regulations require that a termite prevention company/applicator maintain records for two (2) years, or for the duration of the contract, whichever is longer. SCDPR 27-1083(C)(3)(b). Furthermore, the Regulations require that all chemicals used on a property must be used according to the label instructions, 27-1085(D), and documented with a special Termiticide Disclosure Form specified by the SCDPR, 27-1085(D)(6).

In the present case, not only did Mr. Sottile never tell Carroll about the use of Termidor, but the only documents Terminix received were annual reinspection invoices and reports for the years 2004, 2005, 2007, 2008, 2009, 2010, 2011, and 2013, which did not show the use of Termidor, and no additional documents surfaced from IOP or SPM during the litigation. R. pp. 0151–0166.

As previously noted, Mr. Sottile did not notify Carroll that he used any chemicals on the Property. R. pp. 0213–0214, lines 26:14–27:2. Carroll testified that he was aware that the company had changed names but was never told that the bait stations were discontinued or that Termidor was applied to the Property in 2008, as alleged by Mr. Sottile in his prior testimony. R. pp. 0227–0228, lines 55:12–56:4. Yet, Mr. Sottile continued to accept renewal premiums on behalf of IOP and SPM from 2004 through 2013. R. pp. 0151–0166.

Further, at trial, experts will testify that Mr. Sottile violated regulations in the manner in which the bait stations were monitored, the way in which the Termidor was applied, and the failure of IOP and SPM to create and maintain records. Expert Entomologist Cecil Hernandez has testified that Mr. Sottile’s method of application for the Property would not be a termiticide treatment in compliance with industry standards. R. p. 0194, lines 32:21–33:1. Further, see the plethora of references to regulatory violations by James Wright, Regulatory/entomology expert, and Maxcy Nolan, III, Ph.D., entomology expert (Excerpts set forth in section I.(d) below; and see R. pp. 0252–0569 and R. pp. 0571–0821).

STANDARD OF REVIEW

“In reviewing the grant of a summary judgment motion, [the appellate court] appl[ies] the same standard which governs the trial court under Rule 56(c), S.C.R.C.P.: summary judgment is proper when ‘there is no genuine issue as to any material fact and ... the moving party is entitled

to judgment as a matter of law.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114–15, 410 S.E.2d 537, 545 (1991). “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Id.* at 115, 410 S.E.2d at 545 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by ‘showing’—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* (quoting *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554, 91 L.Ed.2d at 275). “The moving party need not ‘support its motion with affidavits or other similar materials *negating* the opponent’s claim.” *Id.* (quoting *Celotex* at 323, 106 S.Ct. at 2553, 91 L.Ed.2d at 274) (emphasis in original).

“Once moving party carries its initial burden, opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with ‘specific facts showing that there is a *genuine issue for trial*.’” *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)) (emphasis in original). “Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.” *Id.* “In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party.” *Id.*

The court then applies the standard set out in Rule 56(c): [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 115–16, 410 S.E.2d 537 at 545–46 (quoting *Celotex* 477 U.S. at 322–23, 106 S.Ct. at 2552, 91 L.Ed.2d at 273). “Since it is a drastic remedy, summary judgment ‘should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.’” *Id.* at 112, 410 S.E.2d at 543 (quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (“an extreme remedy to be cautiously invoked”)).

ARGUMENT

I. This Court should reverse the circuit court judge’s Order Granting Partial Summary Judgment because that court based its ruling on inapposite case law, including misapplication of the economic loss rule; Carroll’s claims for negligence unequivocally arise out of duties created by SCDPR regulations; SPM and IOP owed those duties separately and distinctly from any duties they owed under the contract; and contractual remedies alone are not capped at \$250,000 total per the contract.

Succinctly, the great issue on appeal is thus: Judge Young has ruled that if a party to a service contract violates duties created by common law, statutes, regulations, or industry standards, an injured parties’ claims in tort are barred by the economic loss rule. That is not the law in South Carolina and would be against public policy if it were. The examples of how that ruling is wrong are infinite: What if the employee setting the bait stations negligently threw a burning cigarette butt into the bushes and burned down Carroll’s house? What if that employee ran over a child or damaged a boat sitting in the yard as he was coming or going to set a bait station? What if the employee stole valuable items while he was setting the bait stations? What if a pest control person left termiticide open and a child consumed it and died? What if a contractor performing work on

a home creates a hazardous condition that results in personal injury? Judge Young's ruling would mean that any of these injuries could be satisfied with contractual remedies only.

During the course of SPM and IOP's performance of the contract, SPM and IOP owed and violated duties created by regulations and industry standards. Under South Carolina law, Carroll has a claim in tort in addition to his claim in contract for SPM and IOP's violations of those duties created by regulations and industry standards. Judge Young holds otherwise, and this Court must reverse his ruling. As a matter of law, Judge Young stopped his analysis with the contract, then misapplied the economic loss rule, and ignored the evidence of breaches of duty beyond the face of the contract.

The circuit court's ruling is simply incorrect that the Second Amended Complaint does not allege violations of duties outside of the contract. The Second Amended Complaint alleges that SPM and IOP were negligent, grossly negligent, willful, and wonton "[i]n failing to comply with the laws and regulations promulgated by the State of South Carolina, pertaining to inspection for and treatment of termites." R. p. 0021, ¶17(f). The circuit court's analysis and use of evidence is improper in its ruling, as further explained.

(a) The circuit court based its ruling on inapposite case law, including misapplication of the economic loss rule.

When private parties contract in a regulated industry, violations of those regulations in the performance of the contract allow for causes of action in tort, including punitive damages. The seminal case of *Kennedy v. Columbia Lumber* states the general rule as follows:

The framework we adopt focuses on activity, not consequence. If a builder performs construction in such a way that he violates a contractual duty only, then his liability is only contractual. If he acts in such a way as to violate a legal duty, however, his liability is both in contract and in tort. Where the builder's actions are grossly negligent, of course, punitive damages may be sought.

Kennedy vs. Columbia Lumber, 299 S.C. 335, 345-46, 384 S.E.2d 730, 737 (1989). *Kennedy* then explains that a violation of a building code or industry standard is a violation of a legal duty, which results in tort liability:

The Court of Appeals itself correctly recognized in *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986) that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses. *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770, imposes a legal duty on builders to undertake construction commensurate with industry standards.

Id. at 346, 384 S.E.2d at 737. *Kennedy* inherently applies to the instant action because SPM and IOP's activities were undertaken in a regulated industry and regulations, as well as industry standards, create legal duties. SPM and IOP violated legal duties; therefore, the liability is both in contract and in tort.

As such, the Order Granting Partial Summary Judgment was incorrect to rely on the factually narrower and legally inapposite case of *Duc v. Orkin*, 729 F.Supp. 1533 (1990). While the *Duc* case does involve the termite industry, it does not involve any alleged regulatory violations. *Duc* was correctly decided in its narrow context. The Plaintiff in *Duc* alleged a failure of the Defendant Orkin to report water damage, and discovering and reporting water damage were not duties contained in the contract. There were no allegations that the activities related to duties within the *Duc/Orkin* contract were violated, and there were no allegations of breaches of duties originating outside of the contract, including with applicable regulations.

As *Kennedy* holds, SPM and IOP's violation of that legal duty created by the SCDPR regulations and industry standards creates liability in tort. The principle of law is thus: when in the process of performing pursuant to a private contract, and regulated activities are involved, a violation of those regulations creates questions of fact for a jury as to whether negligent, grossly

negligent, or reckless behavior occurred, because a violation of a regulation is evidence of the same.

Furthermore, the economic loss rule does not apply to this claim. “The economic loss rule is a creation of the modern law of products liability. Under the rule, there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where there is damage done to other property or personal injury. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) (internal citations omitted). The rule precludes tort liability where a defective product causes injury to the product itself. Whether it applies at all to a service, such as that provided by IOP/SPM, is not settled law. More certainly, it does not apply where a defective product (or negligently performed service) causes personal injury or property damage to people or property different than the product (or service) provided. Here, IOP/SPM’s contract provided the bait stations, whether that is a product or service. Carroll’s claims do not arise from alleged defects in the bait stations. Instead, they explicitly arise from the failure of IOP/SPM to properly perform pest control services at the Property, and the testimony introduced in opposition to summary judgment establishes that those services were not performed in conformance with industry standards or regulations. The damages Carroll seeks to recover are to his home. The economic loss rule simply does not apply to this claim at all.

The economic loss rule in South Carolina does not prohibit all recovery of purely economic damages in tort. Instead, South Carolina “has long recognized tort actions when the damages are purely economic.” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995). We recognize that “[t]he ‘economic loss’ rule will still apply where the duties are created solely by contract.” *Id.* at 54, 463 S.E.2d at 88 (quoting

Kennedy at 347, 384 S.E.2d at 737). The Court explains further:

In our view, the *Kennedy* application of the “economic loss” rule maintains the dividing line between tort and contract while recognizing the realities of modern tort law. Purely “economic loss” may be recoverable under a variety [of] tort theories. The question, thus, is not whether the damages are physical or economic. Rather the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action.

Id. at 54–55, 463 S.E.2d at 88 (internal citations omitted). For example, the economic loss rule does not prevent a negligence action against those who have undertaken a duty that is regulated and who are also in privity of contract with the plaintiff, such as attorneys, architects, accountants, and builders. *See id.*

Therefore, to confine the facts and circumstances of the present case into the narrow facts of the *Duc* decision is improper, and Carroll respectfully asks the Court to reverse the circuit court’s decision and allow Carroll to move forward to a jury trial on all causes of action. The circuit court’s analysis for confining Carroll to a contractual remedy only, where there is evidence of regulatory violations and a specific regulation making a breach of any contract a breach of the regulations, is an error of law.

(b) In performing the obligations of the contract, SPM and IOP owed a duty created by SCDPR regulations.

SCDPR 27-1085(B)(2) makes a breach of the contract a dual regulatory violation, wherein it states: “Treatment and inspection must be performed in accordance with these regulations and with the terms of the written agreement or contract for as long as the contract is valid” (emphasis added). Thus, by definition, a breach of the contract is a breach of the regulations. In the context

of Pest Control Applicators such as IOP and SPM, duties arising from the contract share a *direct, regulatory nexus* with the regulation itself. *A breach of one is the breach of the other.*

SPM and IOP's activities in the performance of the Bait Station Agreement, which is the contract involved in this case, were regulated by SCDPR 27-1085(B)(2), and because evidence of a regulatory violation is evidence of negligence and recklessness for a jury, the duties involved in this matter arise out of both contract and regulation, allowing Carroll to maintain causes of action for negligence and breach of contract, in line with the principles enunciated in *Kennedy* rather than in *Duc*. Therefore, SPM and IOP's duties arise not only from the contract between the parties but also from the regulations governing those contractual obligations, especially given the fact that the regulations specifically say that the pest control applicator has a regulatory duty to comply with contractual terms for the duration of the contract. SCDPR 27-1085(B)(2).

(c) In undertaking the activity of Termiticide Application explicitly outside of the contractual obligations, SPM and IOP owed a duty created by SCDPR regulations and applicable industry standards.

SPM and IOP undertook duties involving Termiticide Application on the Property, duties which were not part of the Bait Station Agreement and have specific standards and regulatory requirements, separate and apart from the standards and regulatory requirements of bait station installation, monitoring, and chemical usage. Therefore, the duties in this case arise not only from the Bait Station Agreement and the regulatory requirements inherent in the performance of those specific contractual duties, but also from regulatory requirements and industry standards for application of termiticide, separate and apart from the contractual and regulatory duties inherent to the Bait Station Agreement.

The Exterra Bait Station Agreement was for the placement of bait stations and bait station monitoring. Mr. Sottile testified that in 2003, at the outset of the bait station agreement, that without telling Carroll, he decided to undertake termiticide use; that he “beaded” termiticide around the perimeter of the home as extra protection, and; that in 2008, again, without telling Carroll, that he again “beaded” termiticide around the Property.

Undertaking a non-contractual duty of using termiticide is a separate duty, not arising from the contract that spells out baiting and specifically states that termiticide would not be used. Furthermore, *once undertaken, with or without a contract, with or without the knowledge of the property owner, IOP and SPM had regulatory duties under SCDPR 27-1085, duties distinct and apart from the original Bait Station Agreement of 2003 between Carroll and SPM/IOP.* He also had a duty to comply with all other applicable industry standards. Alleged violations of SCDPR 27-1085(A) and (D) are explained below via expert testimony.

- (d) Expert testimony elicited during discovery opines that SPM and IOP owed and violated duties created by SCDPR regulations while undertaking both contractual and extra-contractual activities regarding termite prevention at the Property.**

During discovery, the parties elicited opinions from experts, which were made a part of the record at least by acknowledgement of the existence of the testimony prior to the circuit court’s Order Granting Partial Summary Judgment. The expert testimony of structural entomology and regulatory entomology experts James Wright, Maxcy Nolan, and Cecil Hernandez create questions of fact as to whether SPM and IOP violated applicable Pesticide Application and Operator regulations as part of the contractual and extra-contractual activities in relation to the Property. The testimony creates questions of fact as to whether regulatory duties were violated, which is

evidence of negligence, gross negligence, and recklessness, and whether duties in addition to and separate from contractual duties were violated.

All parties and the circuit court were aware of the following testimony: Maxcy Nolan, PhD, dated November 29, 2016; Cecil Hernandez, entomology expert and regulator with SCDPR, dated November 29, 2016; and James Wright, dated November 4, 2016. All of these experts were mentioned in the Memo in Opposition, and in the case of Cecil Hernandez and Maxcy Nolan, excerpts of depositions were attached as exhibits. Further, these experts were referred to in oral argument on the Motion. While there was sufficient evidence set forth in the Memo in Opposition, as well as the SCDPR Regulations having been emailed to the circuit court on February 18, 2019, these transcripts were provided in full as exhibits to the Motion for Reconsideration. These depositions were taken by counsel for SPM and IOP, and the transcripts have been in possession of all parties since they were taken.

Maxcy Nolan, Ph.D. (“Dr. Nolan”), testified about the many ways in which SPM/IOP/Mr. Sottile owed and violated duties created by SCDPR regulations while undertaking both contractual and extra-contractual activities regarding termite prevention at the Property. We discuss some of the numerous examples in his testimony here. Dr. Nolan testified that SPM did not inspect the bait stations; sent an annual bill only; and failed to keep bait station monitoring records; he also testified that he worked on another case where Mr. Sottile committed the same violations. R. pp. 0677–0678, lines 107:23–108:15. SCDPR 27-1083 requires that records on treatment or bait station monitoring be kept for two years, or as long as the contract is in place. Dr. Nolan testified that pest control operators must monitor bait stations quarterly, keep records, show hits (evidence of termites), and return to the Property to monitor them. Upon reading the depositions for SPM

and IOP, he opined that they did not correctly monitor the Property. R. pp. 0678–0679, lines 108:16–109:17.

Dr. Nolan had the opinion that if Mr. Sottile did treat the property with chemical termiticide as Mr. Sottile himself testified that he did, that Mr. Sottile violated the regulations by not documenting the treatment as required by SCDPR 27-1083. Dr. Nolan states that the issue of whether SPM did anything improper at the Property must be broken down into subparts. The first is that Mr. Sottile was supposed to inspect the property quarterly for termites, and if the technician for IOP did a thorough inspection of the property for termites, he would have found damage or infestation along the way. The second part of the problem would have been that Mr. Sottile changed to a liquid treatment from the bait stations, and the treatment he did on any particular day did not totally retreat the property. The technician for IOP failed to properly drill the slabs; failed to properly trench and treat around the perimeter of the building; and failed to perform inspections. R. pp. 0681–0683, lines 111:20–113:10. The label directions for the Termidor chemical that Mr. Sottile used required drilling and trenching; and IOP did not do that. R. pp. 0689–0690, lines 119:9–120:5.

James Wright, an expert in structural entomology and regulatory entomology, also opined on the several ways in which SPM and IOP had regulatory duties that they violated. In particular, he testified regarding the following: regulatory violations of SPM and IOP; IOP and SPM violations of the standard of care for termiticide use, bait station use, and bait station monitoring at the Property, including quarterly record-keeping; patterns of conduct of SPM and IOP as to acts and omissions; and termiticide use and regulatory compliance with termiticide use including record-keeping. R. p. 0263–0264, lines 12:6–13:7; p. 0281–0282, lines 30:24–31:8; p. 0282–0296.

Cecil Hernandez, who works for the South Carolina Department of Pesticide Regulation, investigated whether Terminix was in violation. While he did not find any violations by Terminix, he opined that if Mr. Sottile was truthful in what he said he did in terms of termiticide treatment, that Mr. Sottile's actions would not have been to standard. R. p. 0194, lines 32:20–33:1.

These transcripts show a plethora of testimony as to the regulation violations of SPM and IOP, and they show that, by definition, all activities related to the prevention of termites by pest control applicators involves both the duty to comply with regulations and industry standards as well as a duty to comply with private contracts. Therefore, under the principles of *Kennedy*, the Court should reverse the Order Granting Partial Summary Judgment.

(e) The contractual remedies alone, absent tort remedies, amount to \$250,000.00 per year, for every year the contract was renewed.

Each of the years the contract was renewed by SPM/IOP would be a separate and distinct year, with new contractual remedy amounts, and new occurrences occurring during each, for \$250,000 coverage, per year. As such, evidence exists that termites were on the property as early as 2003. In Thomas Sottile's May 11, 2017 deposition testimony, he admits to saying he intercepted termites in the stations during the first six (6) months but did not tell Carroll. Further, Dr. Nolan has testified that calculations show that the termites were in the Property for several years prior to their discovery. See R. pp. 0571–0821.

Given Mr. Sottile's own admission that he "beaded" termiticide onto the property without forming a continuous barrier, given that no other records were produced other than annual reinspection invoices, and give that no records of bait station monitoring exist, by the admission of Mr. Sottile and his son Thomas, a jury could find that negligence began in 2003 and continued up through 2013 through direct, actionable, negligence on the part of IOP, attributable to SPM as

its successor, and through continued omission negligence, gross negligence, and recklessness in consciously disregarding the standards and regulatory requirements of their pest control, thereby constituting a continuing breach of contract.

A jury could find that damages of \$250,000 per year, from 2003 to 2013 are attributable, jointly and severally, to IOP and SPM. Therefore, limiting contractual damages to presumably one year at \$250,000 would be inconsistent with the evidence, even if one did not consider open-ended damages available in tort.

II. The Court should reverse the Order Granting Partial Summary Judgment because limiting Carroll's claims to a breach of contract cause of action nullifies the regulatory mandate that pest control applicators have insurance for the protection of homeowners because breach of contract is excluded from insurance coverage; the circuit court's Order is therefore against public policy.

The SCDPR regulations require pest control companies to carry liability insurance. SCDPR 27-1078. In an effort to gain settlement leverage, counsel for SPM, Mike Ethridge, and for IOP, Trent Kernodle, as well as counsel for Attain Ins. Co. (SPM's carrier), have noted to the circuit court during chambers discussions that the insurance for IOP and SPM does not cover for recovery under breach of contract, an express policy exclusion. For this reason, Carroll's counsel argued to the circuit court that binding Carroll to a breach of contract cause of action would be inconsistent with regulations and would be against public policy.

To verify the insurance exclusions for breach of contract, Carroll's counsel reviewed both the Attain policy exclusions (SPM's carrier) and the Starnet Policy exclusions (IOP's carrier). As to the Attain policy, "Contractual Liability" is listed as an Exclusion. R. p. 1022, at Section 2(b), page 2 of 16 in the Commercial Liability Form CG 00 01 12 07. As to the Starnet Policy,

“Contractual Liability” is listed as an exclusion. R. p. 1024, at Section 2(b), page 2 of 16 in the Commercial Liability Form CG 00 01 10 01.

Conducting a full analysis of these provisions and case law interpreting them is beyond the scope of this brief, but, apparently, any homeowner recovering only under a breach of contract cause of action will face an uphill battle at best to obtain the very protection contemplated by the mandatory liability insurance mandate of the Pesticide Regulations. Carroll requests that this Court take judicial notice that policy forms for Commercial General Liability Insurance Coverage are generally alike, as evidenced by the identical exclusionary language in both the Starnet (IOP) and Attain (SPM) policies.

Once again, this is another basis for why principles in *Kennedy*, allowing for causes of action in tort when there are regulatory violations occurring in the process of the performance of a private contract, are applicable to this case involving the termite industry. To hold otherwise would be to nullify the protections provided by SCDPR, mandating that homeowners be protected by pest applicator liability insurance. Because the policy forms are all alike, and there would be recovery for breach of contract only, this means that homeowners across the State of South Carolina will fight to a judgment for breach of contract, then have to fight for insurance coverage, due to this common exclusion for contractual liability.

III. The Court should reject the findings and conclusions of the circuit court’s Order Denying Reconsideration because they are false and pretextual.

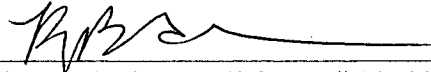
The circuit court was in possession of Carroll’s Memo in Opposition, which it obtained via email, as is customary prior to a hearing, and acknowledged its review of the exhibits to the Memo in Opposition. Carroll’s counsel emailed a copy of the Memo in Opposition to the circuit court and opposing counsel on Monday, February 18, 2019. R. p. 1018. Judge Young’s Law Clerk,

Lyndsay Luthringer, used email for making requests of attorneys and sending pre-trial documents. R. p. 1020. The Order Granting Partial Summary Judgment did not make any reference to the circuit court having reviewed the Memo in Opposition, and the Order Denying Reconsideration presents a flawed analysis of how it would have been improper for the circuit court to consider the Memo in Opposition. However, Carroll's counsel referred to the Memo in Opposition during the hearing, R. p. 1047, and Judge Young acknowledged at the hearing that he considered the exhibits to the Memo in Opposition when making his decision, R. p. 1052, lines 8–11. Judge Young therefore made the Memo in Opposition and its exhibits a part of the record, and those documents must be considered in this Court's review of the record. In *Loyd's Inc. by Richardson Const. Co. of Columbia, S.C., Inc. v. Good*, 412 S.E.2d 441, 306 S.C. 450 (Ct. App. 1991), the Court of Appeals held that “where the court file is in the physical custody of the trial judge[,]” the court has “discretion and the inherent power to receive the documents and make them a part of the file provided their receipt did not prejudice” opposing counsel.

The circuit court next declined to consider what it called “new legal arguments” that Carroll “failed to advance on summary judgment.” R. p. 9. None of the cited arguments are indeed new and can be found in Carroll's Memo in Opposition, oral argument on the motion, or Second Amended Complaint. In the same vein, Carroll's evidence in the Motion for Reconsideration had already been put on the record if by mention of its existence only. Furthermore, the circuit court reiterated its flawed analysis regarding the applicability of *Kennedy* and *Duc*.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the circuit court's order granting partial summary judgment as to Carroll's negligence claim because that claim should be presented to the jury at trial.



Robert T. Lyles, Jr. (SC Bar # 10299)
Rose Beth G. Smith (SC Bar # 100623)
Lyles & Associates, LLC
301 Rutherford Street, Suite D
Greenville, SC 29609
843.577.7730
rtl@lylesfirm.com / rbgs@lylesfirm.com

-and

Jody V. McKnight (SC Bar #66354)
McKnight Law Firm
1156 Bowman Road, Suite 200
Mt. Pleasant, SC 29464
843.577.6040
jody.mcknightlawfirm@gmail.com
Attorneys for Appellant

December 30, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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,

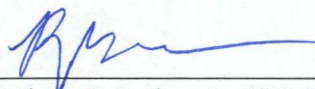
v.

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 hereby certifies that Appellant's Final Brief and Appellant's Final Reply Brief comply with Rule 211(b), South Carolina Rules of Appellate Practice.



Robert T. Lyles, Jr. (SC Bar # 10299)
Rose Beth G. Smith (SC Bar # 100623)
Lyles & Associates, LLC
301 Rutherford Street, Suite D
Greenville, SC 29609
843.577.7730
Attorneys for Appellant

Greenville, South Carolina
December 30, 2019