IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No.: 2011-CP-05-65

Claude McAlhaney, ... Appellant,

-v-

Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control,
Carter & Son Pest Control, Inc. and Erick Cogburg, ...Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This appeal arises from the trial court granting summary judgment in favor of all Respondents on the basis that the statute of limitations expired prior to the filing of the summons and complaint on April 11, 2011. (Order Granting S.J.). The events giving rise to this action relate to Appellant, Claude McAlhany's ("McAlhany") purchase of a house from Respondent, Erick Cogburn ("Cogburn"). In March 2007 Cogburn purchased the home located at 3633 Faust Street ("Home") in Bamberg and subsequently renovated and sold it to McAlhany in November 2007. (Compl. ¶¶ 6-7). Prior to the real estate closing, Respondents, Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. (collectively "Carter") issued a South Carolina Wood Infestation Report, also known as a CL-100, on October 19, 2007 based on its inspection of the Home. (Compl. ¶ 9).

On or about August 16, 2009, McAlhany was painting one of the Home's interior walls, when the paint roller he was using penetrated the sheetrock, releasing mold spores in the air which he inhaled. (Compl. ¶ 11). McAlhany's inhalation of the mold spores required medical treatment for the injuries he sustained. (Compl. ¶¶ 15; 23). As a result of discovering the mold throughout the Home, McAlhany also learned that the Wood Infestation Report issued by Carter on October 19, 2007 was not performed in accordance with the South Carolina Pesticide Control Act. (Compl. ¶ 12).

McAlhany filed this action on April 11, 2011, in the Bamberg County Court of Common Pleas against Cogburn and Carter. (Compl.). The Complaint alleges a negligence action against Carter for damage to the Home and for personal injuries McAlhany sustained. (Compl. ¶¶ 13-16). Specifically, Carter was negligent in numerous

ways, including failing to conduct a moisture reading test during the CL-100 inspection. (Compl. ¶ 14).

McAlhany also alleged a negligent misrepresentation cause of action against Cogburn. (Compl. ¶¶ 17-23). McAlhany alleged that Cogburn "falsely represented the condition of the Home, including its propensity for water seepage, when discussing the Home's condition with [McAlhany]". (Compl. ¶ 18). As a result of Cogburn failing to disclose the Home's condition, McAlhany "incurred expenses for alternate housing, lost use of the Home, incurred medical expenses, and other actual and pecuniary damages for which Defendant Cogburn is liable." (Compl. ¶ 23).

Carter and Cogburn moved for summary judgment contending the applicable statutes of limitation barred McAlhany's claims for damage to the Home and personal injury. (Carter Mot. for S.J.; Cogburn Mot. for S.J.). The trial court held a hearing on these motions for summary judgment on July 26, 2012, at the Bamberg County Courthouse. (Tr. p. 1). After hearing oral argument from counsel and reviewing the parties' submissions, the trial court granted Respondents' motions in an order filed September 13, 2012. (Order Granting S.J.). The trial court held that Carter and Cogburn were entitled to summary judgment based on the statutes of limitation. (Order Granting S.J.).

Upon receipt of the trial court's order, McAlhany filed a Rule 59(e), SCRCP, motion on September 24, 2012, contending there was conflicting evidence as to the date when McAlhany first learned of the problems with the Home. (Motion to Reconsider). By granting summary judgment on the earliest possible date in light of conflicting testimony, the trial court made a factual determination that contravenes the well-

established summary judgment standard of viewing the evidence in a light most favorable to the non-moving party. (Mot. to Reconsider). McAlhany also argued that the statute of limitation in a personal injury action cannot accrue and begin to run until an injury is sustained. (Mot. to Reconsider). The trial court's holding that both the property damage claim and personal injury claim accrued on the same date, when McAlhany did not sustain personal injuries until August 2009, is reversible error. (Mot. to Reconsider). In a summary order filed, February 15, 2013, the trial court denied McAlhany's motion to reconsider. (Order Denying Reconsider). Upon receiving the trial court's order, McAlhany filed the Notice of Appeal on March 18, 2013. (Not. of App.). As an action for personal injury cannot begin to accrue until personal injuries are sustained, the order granting summary judgment on the statute of limitations should be reversed.

FACTS

I. COGBURN'S PURCHASE OF THE HOME LOCATED AT 3633 FAUST STREET

In March 2007, Erick Cogburn purchased the Home located at 3633 Faust Street in Bamberg, SC, from William Ginn. (Cogburn Depo. p. 10, ll. 22-25). Cogburn is a customer service representative at a Bamberg insurance agency that has bought and re-sold several homes around the Bamberg community. (Carter Depo. p. 23, ll. 10-11; Cogburn Depo. p. 6, ll. 15-17). The insurance agency that employs Cogburn had maintained the insurance on the Home dating back to 1998. (Cogburn Depo. p. 11, ll. 2-8). In early 2007, Cogburn learned the Home would likely be for sale as the owner did not wish to continue renting it. (Cogburn Depo. p. 9, l. 19 – p. 10, l. 1).

Cogburn paid Ginn $78,000.00 for the Home. (Cogburn Depo. p. 15, ll. 5-7). Prior to purchasing the Home, Cogburn had a termite inspection and South Carolina

Wood Infestation Report done by Carter and Son Pest Control in Bamberg. (Cogburn Depo. p. 16, ll. 2-7; McAlhany Depo. Ex. 10).

II. CARTER'S WOOD INFESTATION REPORTS ON THE HOME IN MARCH 2007 AND OCTOBER 2007

Kenny Carter owns and operates Carter and Son Pest Control which does business in and around Bamberg. (Carter Depo. p. 8, ll. 17-18). A portion of Carter's business relates to conducting home termite inspections and issuing Wood Infestation Reports. (Carter Depo. p. 13, ll. 1-6). A Wood Infestation Report, more commonly known as a CL-100, is used to determine if the home has an infestation of termites, any rotten wood caused by termites, or any visible damage caused by termites. (Carter Depo. p. 10, ll. 20-22). Typically, if the purchaser is borrowing money to purchase the home, the bank requires a CL-100. (Carter Depo. p. 13, ll. 5-13). Carter charges $100.00 for a CL-100 inspection. (Carter Depo. p. 27, ll. 1-2).

As part of conducting a CL-100 inspection, Carter looks for moisture and termites. (Carter Depo. p. 14, ll. 17-19). Moisture levels should not be above twenty-eight percent. (Carter Depo. p. 15, ll. 4-5). Carter uses a moisture reading probe to conduct the moisture readings. (Carter Depo. p. 14, l. 24 – p. 15, l. 9). To get a moisture reading, the probe does not have to penetrate the wood, instead it merely touches the surface of the wood. (Carter Depo. p. 16, ll. 4-16). Upon touching the surface of the wood, the probe gives an immediate reading. (Carter Depo. p. 4). Carter conducts moisture readings during an inspection if there is visible evidence of water damage. (Carter Depo. p. 43, ll. 2-4).

In March 2007 Cogburn asked Carter to conduct an inspection on the Home because it was Cogburn's intent to resell it. (Carter Depo. p. 18, ll. 4-8). As a result of

the inspection in March 2007, Carter advised Cogburn that the home needed to be treated for termites. (Carter Depo. p. 18, l. 12). Carter was aware of water issues with the Home when he first inspected it in March 2007. (Carter Depo. p. 39, ll. 15-17). On the March 2007 CL-100 report, Carter noted that "[d]ue to the presence of water damage to the window sills, this firm has recommended termite treatment." (McAlhany Depo. Ex. 10, p. 2). The report further noted that "[t]here is visible water damage to the front & rear window sills." (McAlhany Depo. Ex. 10, p. 2). Cogburn testified that Carter did not tell him about any water damage found during the inspection. (Cogburn Depo. p. 67, l. 22 – p. 68, l. 1; pp. 80-81). Carter, on the other hand, is sure the water issues with the Home were discussed with Cogburn. (Carter Depo. p. 40, ll. 7-13). While conducting the inspection, Carter observed wood that was wet and rotten and asked Cogburn to replace it. (Carter Depo. p. 48, ll. 21-22). On the March 2007 CL-100 report, Carter noted that the visible water damage to the front and rear window sills was "being repaired by a licensed contractor." (McAlhany Depo. Ex. 10, p. 2).

After Cogburn's purchase of the Home was completed, he began making repairs. (Cogburn Depo. p. 19, ll. 16-19). The repairs included, among other things, a new roof, new crown molding, new baseboard molding, new cabinet facings, tile on the kitchen backsplash, ceramic tile on the kitchen countertops, and new flooring. (Cogburn Depo. p. 19, l. 20 – p. 20, l. 12). Cogburn spent approximately $35,000.00 on the repairs. (Cogburn Depo. p. 20, ll. 15-18).

III. MCALHANY'S PURCHASE OF THE HOME FROM COGBURN

Sometime following the Fourth of July in 2007, Claude McAlhany contacted Cogburn regarding his interest in purchasing the Home. (Cogburn Depo. p. 25, ll. 14-17).

McAlhany looked at the house and continued calling Cogburn every couple of weeks. (Cogburn Depo. p. 26, ll. 17-20). Cogburn's initial asking price was $149,000.00. (Cogburn Depo. p. 28, ll. 1-2). After several offers and counter-offers, Cogburn and McAlhany agreed on a $120,000.00 purchase price. (Cogburn Depo. p. 31, ll. 18-22; McAlhany Depo. p. 20, ll. 19-21; McAlhany Depo. Ex. 2). McAlhany moved into the Home approximately two weeks prior to the November 5, 2007 closing. (Cogburn Depo. p. 39, ll. 6-9; McAlhany Depo. p. 38, ll. 19-21).

McAlhany was questioned extensively during his deposition regarding the circumstances surrounding the purchase of the Home, the events in August 2009 where he inhaled mold spores, and when he first learned of problems with the Home. (McAlhany Depo.).[1] Subsequent to moving into the Home, McAlhany painted the living room, painted some upstairs rooms, and replaced a floor. (McAlhany Depo. p. 39, ll. 16-25). The room was painted "in late '08 sometime." (McAlhany Depo. p. 41, ll. 4-5). McAlhany replaced the floor about seven months after moving into the Home, in June 2008. (McAlhany Depo. p. 110, l. 14 – p. 111, l. 6; p. 144, ll. 3-4; p. 151, l. 16 – p. 152, l. 14). While replacing the floor, McAlhany did not observe any water damage or water seepage. (McAlhany Depo. p. 112, ll. 18-21). McAlhany first observed mold in the house after tearing out the first floor. (McAlhany Depo. p. 93, ll. 6-7). He cleaned it up with bleach and then installed the proper moisture barrier down underneath the floor. (McAlhany Depo. p. 93, ll. 16-17). Cogburn informed McAlhany about seven months after the June 2008 floor replacement that the property had a tendency to flood.

[1] Admittedly, portions of McAlhany's testimony are conflicting, which for the purposes of summary judgment must be viewed in a light most favorable to McAlhany as the non-moving party. Rule 56, SCRCP.

(McAlhany Depo. p. 110, ll. 7-13). Cogburn testified that the only time McAlhany mentioned replacing a floor due to water damage was several weeks prior to August 2009. (Cogburn Depo. p. 41, l. 4 – p. 42, l. 10). The first time McAlhany discovered mold was in late 2008. (McAlhany Depo. p. 45, l. 24 – p. 46, l. 3). However, it could have been sometime in 2009. (McAlhany Depo. p. 48, l. 23 – p. 49, l. 4).

On August 16, 2009, as he was painting a wall, the paint roller went through the sheet rock, releasing mold spores which McAlhany inhaled. As a result of inhaling the mold spores, McAlhany had damage to his sinuses, his eyes itched and burned, and had nosebleeds. (McAlhany Depo. p. 68, l. 18 – p. 69, l. 10). These injuries required medical treatment. A mold analysis report was conducted on August 24, 2009, and revealed that several organisms in the inside sitting room were classified as "ratio abnormality" – the report's highest level. (McAlhany Depo. Ex. 6). Shortly after sustaining the injuries from the mold inhalation, in August 2009, McAlhany retained an attorney. (McAlhany Depo. p. 57, l. 1 – p. 58, l. 2).

Carter learned of the problems with the Home in August 2009 after receiving a letter dated August 14, 2009 from Bo Griffin with the Home Federal Savings and Loan in Bamberg regarding a bond that was given on the Home. (Carter Depo. p. 28, ll. 1-12; Carter Depo. Ex. 3). Carter wrote Griffin a letter dated August 26, 2009 regarding the damage to McAlhany's home and whether a bond was issued. (Carter Depo. Ex. 4). In the letter, Carter stated that the Home "was treated for Mr. Cogburn in March of 2007 after active termites were found. At that time, there was also visible damage that Mr. Cogburn had repaired (scabbed on repairs)." (Carter Depo. Ex. 4). When conducting

"scabbed on repairs", the whole house is not demolished but instead all rotten wood is taken out and new wood is installed. (Carter Depo. p. 29, l. 25 – p. 30, l. 5).

STANDARD OF REVIEW

The standard governing summary judgment is well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

ARGUMENT

McAlhany's action alleges two different injuries that are governed by two different statutes of limitation – one for damage to the Home governed by S.C. Code Ann. § 15-3-530(3) and the other for personal injuries which is governed by S.C. Code Ann. § 15-3-530(5). In the September 13, 2012, order the trial court held the Respondents are entitled to summary judgment because the complaint, filed on April 11, 2011, was not commenced within three years from date McAlhany should have

discovered a cause of action existed. (Order Granting S.J.). In reaching this conclusion, the trial court impermissibly weighs conflicting testimony, contravening the summary judgment standard, as to the time McAlhany first learned of problems with the Home. Additionally, the trial court essentially holds that the statute of limitation on an action for personal injury can begin to run prior to any injury actually occurring. For these reasons, the trial court's order granting summary judgment should be reversed.

I. THE TRIAL COURT DOES NOT VIEW MCALHANY'S TESTIMONY IN A LIGHT MOST FAVORABLE TO HIM AS THE NON-MOVING PARTY

The trial court order holds that the Respondents are entitled to summary judgment because the summons and complaint were not filed within three years: "[T]he Court finds that Plaintiff knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November of 2007, and, by failing to file his summons and complaint within the applicable statute of limitations, Plaintiff is now barred from recovery." (Order Granting S.J. p. 5). This case illustrates the importance of the summary judgment standard of review because, to reach this conclusion, the trial court impermissibly weighs McAlhany's conflicting testimony to decide the action was not filed within three years from October or November 2007. It is well established, but worth repeating, that at the summary judgment stage the evidence and all inferences must be viewed in a light most favorable to the non-moving party – in this case McAlhany. Koester, 313 S.C. at 493, 443 S.E.2d at 394. More importantly, all that is needed to defeat a motion for summary judgment is a mere scintilla of evidence. Hancock, 381 S.C. at 330, 673 S.E.2d at 803. For the purposes of this appeal from an order granting summary judgment, the testimony quoted below about when McAlhany

first learned of any problems with the home must be viewed in a light most favorable to him.

> And anyways, he signed the papers and we, you know, let us went ahead and move in the house, and I got with Bo Griffin. I got the loan. I paid Erick. And, ***I stayed there probably about - - about almost two years, I rec[k]on, and that's when I discovered the mold and stuff.***

(McAlhany Depo. p. 19, 10-15) (emphasis added).

Q. So the first time you discovered mold was in late '08?
A. ***Yeah.***
Q. Is that correct?
A. That's correct.

(McAlhany Depo. p. 45, l. 24 – p. 46, l. 3) (emphasis added).

Q. Okay. So when you were saying earlier that you thought it was late '08, it actually could have been - -
A. ***In probably '09.***
Q. - - in '09. And I'm just trying to get a timeline down.
A. Yeah.
Q. I'm not trying to trick you at all, okay?
A. Yeah.

(McAlhany Depo. p. 48, l. 23 – p. 49, l. 4) (emphasis added).

There is conflicting testimony as to when McAlhany discovered problems existed with the Home.

Q. So you knew in October of 2007 that Mr. Carter hadn't done his job properly?
A. Yeah.

(McAlhany Depo. p. 108, ll. 18-20).

Q. So you found mold when you first moved in the house?
A. When I very first moved in there after I tore out the first floor.

(McAlhany Depo. p. 93, ll. 5-7).

As the testimony in this matter is conflicting, the evidence most favorable to McAlhany at the summary judgment level controls. However, the trial court relied on the

earliest of these conflicting dates to grant summary judgment in favor of Respondents. It is axiomatic that the evidence and all inferences be viewed in a light most favorable to the non-moving party, but the evidence most unfavorable to McAlhany is what the trial court relied on to grant summary judgment.

Section 15-3-530(3) provides that actions for damage to real property must be brought within three years. S.C. Code Ann. § 15-3-530(3). The trial court relied on Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996) to support the conclusion that McAlhany's action was not filed within the three-year statute of limitations. (Order Granting S.J.). In that case, Susan Dean purchased a building in Charleston in September 1984. Id. at 362, 468 S.E.2d at 646. During October and November 1984, Ruscon Corporation performed pile driving activities at a nearby construction site. Id. In early November 1984, Dean observed a fine crack approximately three feet in length in the front right corner of the building. Id. As a result of seeing the crack, Dean hired a contractor and structural engineer to inspect the building. Id. In the summer of 1985, Ruscon resumed pile driving activities and in August 1985 Dean noticed that the original crack had expanded. Id. In April 1991, Dean filed an action against Ruscon Corporation. Id. at 362, 468 S.E.2d at 647. Both Dean and her expert testified that the damage to the building resulted from the 1984 pile driving activities. Id. at 363. The circuit court directed a verdict in favor of Ruscon, concluding that as a matter of law, Dean's lawsuit accrued in November 1984, and by not filing until April 1991 was barred by the six-year statute of limitation. Id.

In affirming the trial court's directed verdict, the Supreme Court noted that the evidence "establishes that Dean acted promptly by retaining consultants in November

1984 to inspect the damage." Id. at 365, 468 S.E.2d at 648. More importantly, "Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984." Id. In this case, unlike in Dean, there are two claims – one for property damage and one for personal injury – and conflicting testimony that warrants reversal. McAlhany testified he was in the Home for two years before discovering mold (McAlhany Depo. p. 19, 10-15); he first discovered mold in late 2008 (McAlhany Depo. p. 45, l. 24 – p. 46, l. 3); or probably 2009 (McAlhany Depo. p. 48, l. 23 – p. 49, l. 4). For the purposes of summary judgment, the evidence must be construed in McAlhany's favor. The later of the dates to which he testified should be the triggering date for summary judgment purposes. For these reasons, the trial court's order granting summary judgment on McAlhany's claim for property damage should be reversed.

II. MCALHANY'S ACTION FOR PERSONAL INJURY DAMAGES DID NOT ACCRUE UNTIL AN INJURY AND DAMAGES WERE SUSTAINED ON AUGUST 16, 2009

McAlhany's personal injury claim was brought within the three-year statute of limitation regardless of whether the claim for property damage was brought within the three-year statute of limitation. Section 15-3-530(5) provides the applicable statute of limitations for personal injury damages. Specifically, § 15-3-530(5) provides a three-year statute o limitation for "action[s] for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15-3-545." S.C. Code Ann. § 15-3-530(5). Section 15-3-535 provides that "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535. The important "focus is upon the

date of discovery of the injury, not the date of discovery of the wrongdoer. . . ." Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (emphasis added). The Supreme Court in Wiggins noted that:

> The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Id. The inquiry of when an injury is sustained is an objective determination. Id.

Viewing the evidence in a light most favorable to McAlhany as the non-moving party, the trial court's order granting summary judgment on McAlhany's claim for personal injury damages should be reversed. McAlhany inhaled mold spores while painting one of the Home's walls on August 16, 2009. There is no testimony that McAlhany inhaled mold spores resulting in physical injuries at any time before August 2009. As a result of inhaling mold spores, McAlhany received medical treatment for his injuries. By granting summary judgment on the basis of the statute of limitations, the trial court holds that the applicable three-year statute of limitation begins to run prior to the date the actual injury was sustained. This rationale contravenes Wiggins by not focusing on the date of the injury, but instead focusing on McAlhany's knowledge prior to any injury.

The trial court's finding implies that McAlhany should have prevented his own injury. Such a ruling is improper because prior to August 2009 he had no personal injury on which to bring an action. An action for personal injury does not accrue until an injury is sustained, which then starts the three-year limitation imposed by § 15-3-530(5). Wiggins, 314 S.C. at 128, 442 S.E.2d at 170. McAlhany's knowledge prior to sustaining

an injury may be considered in a comparative negligence analysis but cannot be a basis to grant summary judgment on the statute of limitations. By filing this action on April 11, 2011 – within three-years of August 2009 – McAlhany timely sought relief and the trial court's order granting summary judgment on the personal injury claim should be reversed.

III. MCALHANY PRESENTS A MERE SCINTILLA OF EVIDENCE TO SUPPORT A PERSONAL INJURY CLAIM AGAINST CARTER

In the order granting summary judgment, the trial court wrote "[t]here is no evidence to support a personal injury claim against" Carter. (Order Granting S.J. p. 8). In this case, only a mere scintilla of evidence is needed to defeat summary judgment. Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The evidence before the Court warrants reversal of this finding.

McAlhany contends that Carter's negligence is in failing to conduct a moisture reading on the home in October 2007 when he knew in March 2007 that the home had water damage and the propensity to flood. (McAlhany Depo. p. 142, ll. 5-8). Carter was aware of water issues with the Home when he first inspected it in March 2007. (Carter Depo. p. 39, ll. 15-17). On the March 2007 CL-100 report, Carter noted that "[d]ue to the presence of water damage to the window sills, this firm has recommended termite treatment." (McAlhany Depo. Ex. 10, p. 2). The report further noted that "[t]here is visible water damage to the front & rear window sills." (McAlhany Depo. Ex. 10, p. 2). Carter merely had to use his moisture probe to get a reading while inspecting the Home in October 2007. (Carter Depo. p. 14, l. 24 – p. 15, l. 9). Getting a reading is immediate and does not require any wood to be penetrated. (Carter Depo. p. 16, ll. 4-16). The wood just has to be touched at various locations to get a reading.

Despite being aware of the water issues with the Home in March 2007, Carter contends that a moisture reading is not required. However, Carter conducts moisture readings during an inspection if there is visible evidence of water damage. (Carter Depo. p. 43, ll. 2-4). In October 2007, during his second CL-100 inspection of the Home in seven months, Carter was aware of the water issues related to the Home but failed to conduct a moisture test using the probe. As a result, the Home developed mold, which resulted in McAlhany being injured in August 2009. This presents a mere scintilla of evidence to support a personal injury action against Carter.

CONCLUSION

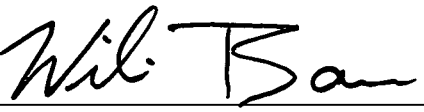
This action presents conflicting testimony as to when McAlhany knew a problem existed with the Home. At the summary judgment stage, the court must view the evidence and all inferences in a light most favorable to McAlhany as the non-moving party. The trial court improperly held the earliest of the dates triggered the statute of limitations despite the summary judgment standard. Additionally, McAlhany's action for personal injury cannot accrue until he sustains an injury. As a result, the claim for personal injuries was properly filed within the three-year statute of limitation. There is also evidence to support a claim for personal injury against Carter when he knew in March 2007 the Home had water issues, but failed to take any moisture readings in October 2007. For these reasons, the trial court's decision granting summary judgment should be reversed.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

November 7, 2013
Hampton, South Carolina

BY: 

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PROOF OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **INITIAL BRIEF OF APPELLANT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to:

Danielle F. Payne, Esquire
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-And-

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ATTORNEYS FOR RESPONDENTS

[SIGNITURE TO FOLLOW ON NEXT PAGE]

Megan C. Davis

Megan C. Davis

November 7th, 2013
Hampton, South Carolina

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Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control,
Carter & Son Pest Control, Inc. and Erick Cogburg,.....Respondent.

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant designates the following items for inclusion in the Record on Appeal, in additional to the material designated by the Respondent.

1) Order Granting Defendant's Motion for Summary Judgment dated September 11, 2012;

2) Order Denying Plaintiff's Motion to Reconsider dated February 13, 2013;

3) Defendants Kenneth A Carter, Sr. d/b/a Carter & Son Pest Control and Carter & Son Pest Control, Inc.'s Motion for Summary Judgment dated January 26, 2012;

4) Defendant Erick Cogburn's Motion for Summary Judgment dated March 30, 2012;

5) Plaintiff's Motion to Reconsider pursuant to Rule 59(e) dated September 20, 2013;

6) Summons and Complaint action filed April 11, 2011;

7) Defendant Erick Cogburn's Answer to Complaint dated June 17, 2011;

8) Defendants Kenneth A Carter, Sr. d/b/a Carter & Son Pest Control and Carter & Son Pest Control, Inc.'s Answer to Complaint dated August 12, 2011;

9) Motions Hearing Transcript from July 26, 2012 – pp. 1-21;

10) Claude McAlhany, Jr's Deposition Testimony dated January 25, 2011 - pp. 7; 19-20; 32-33; 37-54; 56-72; 74-95; 108-110; 112-116; 138-146; 149-152; 155; and 158-159;

11) Claude McAlhany, Jr.'s Deposition Exhibits 2, 6, 7, 8, 9A-9R, and 10;

12) Kenneth A. Carter, Sr.'s Deposition Testimony dated January 25, 2012 – pp. 4-5; 8-19; 23; 27-30; 33-34; 39-42; and 45-48;

13) Kenneth A. Carter, Sr.'s Deposition Exhibits 2, 3, 4, and 6;

14) Erick Cogburn's Deposition Testimony dated February 29, 2012 – pp. 3; 9-11; 15-17; 19-28; 31; 39-42; 53-54; 65-73; and 77-81;

15) Erick Cogburn's Deposition Exhibit 4;

16) Letter of July 9, 2013 from Barnes to Court Reporter Davenport requesting complete transcript;

17) Letter of March 15, 2013 from Barnes to Clerk of Court Hiers filing copy of Notice of Appeal;

18) Letter of March 15, 2013 from Barnes to SC Court of Appeals filing Notice of Appeal;

19) Letter of September 18, 2013 from Barnes to Clerk, SC Court of Appeals – advising transcript received;

20) Notice of Appeal filed March 18, 2013.

I certify that this designation contains no matter which is irrelevant to this appeal.

[SIGNITURE TO FOLLOW ON NEXT PAGE]

Respectfully submitted,

PETERS, MURDUAGH, PARKER, ELTZROTH
& DETRICK, P.A.

by: _____

November 7, 2013
Hampton, South Carolina

William F. Barnes, III
R. Alexander Murdaugh
101 Mulberry Street East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that I, **Megan C. Davis**, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to:

Danielle F. Payne, Esquire
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202

-And-

Richard B. Ness, Esquire
Ness & Jett, LLC
Post Office Box 909
Bamberg, SC 29003

ATTORNEYS FOR RESPONDENTS

Re: ***Claude McAlhany v. Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc. and Erick Cogburn***
Case No. 2011-CP-05-65

Megan C. Davis
Megan C. Davis

November 7th, 2013
Hampton, South Carolina