IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2013-000578

Claude McAlhaney, ... Appellant,

v.

Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc. and Erick Cogburn, Of whom, Erick Cogburn is .....Respondent.

RESPONDENT'S INITIAL BRIEF

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OBJECTION TO APPELLANT'S DESIGNATION OF MATTER

Respondent files along with its initial brief, and serves on counsel of record herewith, Notice of Motion and Motion to Strike content of Appellant's initial designation of matter, pursuant to Rule 210(c), SCACR, as the designated matter was not submitted to the lower court, is not on file with the Clerk of Court for Bamberg County and is therefore extraneous and should not properly be considered by the Court.

STATEMENT OF ISSUES ON APPEAL

I. DOES THE DISCOVERY RULE APPLY TO THE CASE AT BAR?

II. DOES THE DISCOVERY RULE APPLY IN CASES WHERE THE PLAINTIFF FAILS TO COMPREHEND THE DEPTH OF THE CIRCUMSTANCES GIVING RISE TO A CAUSE OF ACTION?

III. DOES THE DISCOVERY RULE "CLOCK" BEGIN TO RUN WITH THE INITIAL DISCOVERY OF A SINGLE CAUSE OF ACTION, OR RENEW WITH EACH ADDITIONAL CAUSE OF ACTION?

STATEMENT OF THE CASE

Respondent purchased an investment property on Faust Street in Bamberg, SC, in May 2007. *See Defendant's Exhibit 10, Deposition of Claude McAlhaney.* The property consisted of a split-level home, with the third and lowest floor located below ground level. *See Deposition of Claude McAlhaney, Page 114, line 11—line 15.* Respondent hired co-defendant-below Kenneth A. Carter to perform the CL-100 Termite Inspection, which was completed in March 2007. *See Defendant's Exhibit 10, Deposition of Claude McAlhaney.* As a result of the inspection and professional recommendations of Mr. Carter, Respondent hired Mr. Carter to perform a treatment for termites, and Respondent purchased a transferrable Termite Bond guaranteeing the termite treatment for one-year. *See Deposition of Claude McAlhaney, Page 154, line 10—Page 155, line 1.* Respondent further hired a professional contractor to make repairs to the home, in anticipation of a re-selling the split-level property. *See Deposition of Claude McAlhaney, Page 125, line 10—line 15.*

On or around October 15, 2007, Appellant moved into the Faust Street home, in anticipation of purchasing the home from Respondent. The real estate conveyance proceeded without incident, and was closed November 5, 2007, at which time Appellant took title and complete possession of the Faust Street home. *See Deposition of Claude McAlhaney, Page 38, line 17—Page 40, line 3.* Defendant Carter completed the CL-100 examination for this sale as well, dated October 19, 2007. *See Defendant's Exhibit 12, Deposition of Claude McAlhaney.*

On August 16, 2009, Appellant alleges he was painting an internal wall in the home, when his paint roller went through the sheetrock, releasing mold spores into the air. *See Deposition of Claude McAlhaney, Page 68, line 18—Page 69, line 10.*

On April 11, 2011, Appellant filed his action for damages stemming from moisture and mold within the Faust Street home. *See Summons and Complaint of Claude McAlhaney.* Therein, Appellant claims Respondent had constructive or actual knowledge of the propensity for moisture seepage in the home, as well as the accompanying symptoms of moisture seepage, including both mold and termite damage within the home, and failed to disclose to Appellant the latent defect. *Id.*

In his brief, Appellant argues that there is conflicting evidence regarding the initial date of discovery. This is incorrect. Appellant's deposition testimony clearly and consistently outlines a trajectory of awareness of the mold and moisture problems within the home, beginning with the initial discoveries in October and November 2007. *See Deposition of Claude McAlhaney, Page 142, line 10-18; Page 92, line 8—Page 94, line 3.* From there, Appellant's awareness of the scope of the problem grew, and his potential damages, including his later cause of action for personal injury, mounted. However, there is no conflicting evidence in this case to dispute or even challenge Appellant's own testimony. Plaintiff testified he saw active termites in the driveway and garage area of the Faust Street home immediately following the closing in which he purchased the property (November 5, 2007) and similarly testified he observed black mold under the floor when he removed the flooring to address warping, previously installed by Respondent's contractors, in 2007. *Id.* Plaintiff further testified in each instance he took remedial

measures to treat the termites and the mold to prevent any further damage to the home. *Id.*

Despite these multiple concerns, including the observation of active termites, noticeable amounts of black mold in the corners of the floor, warping of the floor warranting replacement, seeking a professional opinion regarding mold, and the open and obvious issues of maintaining a home with a third flood below ground-level, Appellant failed to bring a claim for damages within the three-year statute of limitations. *See Summons and Complaint of Claude McAlhaney.*

Respondent's motion for summary judgment was filed on March 30, 2012 and heard by the trial court on July 26, 2012. *See Motion of Erick Cogburn, Summary Judgment.* After considering the motion, arguments of counsel, and the memoranda of law presented by the Defendants, along with the Deposition testimony of Appellant, the trial court issued its Order granting Respondents' motions for Summary Judgment and dismissal with prejudice based on S.C. Code Ann. §§15-3-530(1), (3), and (5) which provide for a three-year statute of limitations for all causes of action alleged by Appellant, including personal injury, property damage, and negligent misrepresentation. *See September 11, 2012 Order of Judge Clifton Newman.*

In granting Respondent's motion for summary judgment, the trial court found Appellant knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November 2007, and, by failing to file his summons and complaint within the applicable statute of limitations, Appellant's causes of action are totally barred from recovery. *See*

September 11, 2012 Order of Judge Clifton Newman. From this Order, Appellant appeals.

I. STANDARD OF REVIEW

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. Rule 56(c), SCRCP, *Burris v. Anderson County Bd. Of Educ.,* 369 S.C. 443, 633 S.E.2d 482 (2006); *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433 (2003). "If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," the circuit court may grant a motion for summary judgment. *Ibid.*

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman,* 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.,* 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

When determining if any genuine 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 non-moving party. *Wilson v. Style Crest Products, Inc.,* 367 S.C. 653, 627 S.E.2d 733 (2006). Once the moving party demonstrates that

summary judgment is appropriate, the non-moving party must "do more than simply show that there is some metaphysical doubt as to material facts [and] must come forward with specific facts showing that there is a *genuine issue for trial.*" *George v. Empire Fire & Marine Ins. Co.,* 344 S.C. 582, 545 S.E.2d 500 (2001); *Baughman v. Am. Tel & Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1990)(emphasis original).

ARGUMENT

The lower court properly granted summary judgment in this case, applying the applicable statute of limitations and the discovery rule, as outlined within South Carolina case law.

In this case, Appellant testified under oath that he observed active termites the day of the closing on the Faust Street property, November 5, 2007. According to his deposition testimony, he decided to treat the termites himself: "I seen termites under that car garage, in the utility room, out there on the cement. I didn't know what it was. But it was termites, because it had little wings, like a big ant about that big. So I went to Lowes, and I got some Terminex stuff, and I sprayed it and it killed them." *Deposition of Claude McAlhaney, Page 142, line 10-18.*

Plaintiff further testified, later, in 2007, to remedy warping in the newly installed flooring, he began pulling the floor up in the below-ground downstairs living room, and identified a spot of what he concluded was black mold. *See Deposition of Claude McAlhaney, Page 39, line 13—line 25; Page 93, line 1—line 7.* He consulted with a professional about treating the mold, and received advice, which he followed: "But the guy that—I actually got a friend, he does mold. I don't know if

you know Mr. Herman Harvey. His son-in-law, he sells mold products and he kind of gave me information about mold products and stuff, and what kind—he gave me a chemical that would actually kill the mold. " In response to a follow-up clarifying questions, this exchange transpired: Q: "And he gave you this in 2007? " A: "Yeah. Yeah." *See Deposition of Claude McAlhaney, Page 93, line 13—Page 94, line 3.*

Appellant's own testimony, that he witnessed live termites when he first moved in the home and found mold from a defective moisture barrier when he performed work on the property in October and November of 2007, is reinforced by Appellant's further statements indicating he knew Defendant Carter did not do his job properly, i.e. issuing the transferable termite bond in March 2007 and the clean CL-100 in October 2007: Q: "So you knew in October of 2007 that Mr. Carter hadn't done his job properly? A: Yeah. " *See Deposition of Claude McAlhaney, Page 108, line 18—line 20.*

The trial court, considering the totality of these factors, determined the applicable statutes of limitation began to run when Appellant discovered any or all of these conditions; at the very latest in November 2007. Appellant did not file this lawsuit until April, 2011, well outside the applicable three-year limit.

Appellant accuses the lower court of overvaluing these portions of Appellant's own testimony. In fact, the trial court properly accepted Appellant's testimony as truthful, i.e. in the light most favorable to Appellant, and considered the applicable statutes of limitation in that context. This is the proper consideration, pursuant to Rule 56, SCRCP. Appellant seems to argue that since his own deposition testimony is harmful to his case, the trial court erred in giving his recollections any

weight. In this case, accepting Appellant's testimony as truthful required the trial court to grant summary judgment to Respondent.

While Appellant's testimony demonstrates that he did not grasp the full depth of the mold and termite problems with the home, and Appellant's damages may have continued to mount as the moisture problems spread, Appellant's causes of action against Respondent arose, if any, at the objectively determined at time of discovery.

I. THE DISCOVERY RULE IS APPLICABLE TO THE CASE AT BAR

The applicable statute of limitations for Appellant's causes of action is three years. *See S.C. Code Ann §§15-3-530(1), (3) and (5).*

In general, the discovery rule provides that the statute of limitations begins to run after a person knows or "by the exercise of reasonable diligence should have known that he had a cause of action." *See S.C. Code Ann §15-3-535; Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993). The "discovery rule" applies to causes of action for both negligence and personal injury. *See S.C. Code Ann §15-3-535.*

The "exercise of reasonable diligence" means a Plaintiff must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. *Dean v. Ruscon Corp.,* 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996); *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981). The date on which discovery should have been made is therefore an objective, not subjective, question. *Keutner v. David,* 320 S.C. 283, 465 S.E.2d 88 (1995). "In other

words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his had been invaded, or that *some claim* against another party might exist." *Bayle v. South Carolina Department of Transportation,* 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct.. App. 2001)(emphasis added); *Graham v. Welch, Roberts, and Amburn, LLP, et al.,* 404 S.C. 235, 743 S.E.2d 860 (2013).

The facts, as reported by Appellant, objectively placed Appellant on notice of an issue with termites, moisture, and water seepage. Appellant, who was in exclusive possession of the home, has provided the only evidence of when these events all took place. Appellant's testimony confirms these discoveries took place in October or November of 2007. The totality of this information, considered objectively, would have placed a reasonable person on notice of *some claim* against *some party.*

The trial court correctly determined that the discovery rule applies in this case.

II. WHEN APPLICABLE, THE DISCOVERY RULE ACTS AS A TOTAL BAR TO RECOVERY EVEN IN CASES WHERE PLAINTIFF FAILS TO COMPREHAND THE DEPTH OF THE CIRCUMSTANCES GIVING RISE TO A CAUSE OF ACTION

In his brief, Appellant contends he did not have knowledge of the full extent of the mold problem until 2009, when his paint roller punctured the dry wall in the downstairs living room, an event which caused the dispersal of mold spores, exasperating the mold problem within the home and causing some alleged personal injury to Appellant. *See Summons and Complaint of Claude McAlhaney.* In fact,

Appellant was on notice of the problem, but failed to grasp the severity of the circumstances, and the potential for continued and increasing exposure.

The fact that Appellant did not comprehend the full extent of the damage or the potential for further damage is immaterial. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.,* 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), cert granted, 287 S.C. 234, 337 S.E. 2d 697 (1985), cert dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986). The discovery rule compels a plaintiff to exercise "reasonable diligence" in uncovering the scope and severity of circumstances giving rise to any cause of action against any party. *See True v. Monteith,* 327 S.C. 116, 489 S.E.2d 615, (S.C. 1997). Pursuant to this mandate, the 'clock' does not begin to run from the date of the development of a full-blown theory of recovery, the date of inspection by some investigator or consultation with an attorney or other counsel. *See Peterson v. Richland County,* 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999); *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981). Rather, Appellant's own testimony is conclusive. By November 2007, Appellant had both observed and treated both mold and termites.

While Plaintiff may not have grasped the depth of the problem by November 2007, his testimony regarding the visible termites and the visible mold are direct evidence of his dissatisfaction with the quality of the home, specifically with regard to its propensity for moisture seepage and termite infestation. These facts are sufficient and indeed compelling evidence, which should have served to alert Appellant to the existence of some compensable cause of action against some party.

Appellant's assertion that he did not seek counsel until August 2009 is irrelevant and misleading. Appellant's testimony demonstrates that he continued to uncover the severity of the mold, moisture and termite problems throughout his time living in the Faust Street home. While he perhaps did not feel he was entitled to compensation until much later in time, his initial discoveries are sufficient for starting the clock under the discovery rule.

The trial court properly dismissed Appellant's testimony regarding the advancement of moisture conditions over the years as irrelevant. The initial discovery triggers the statute of limitations, and Appellant's own testimony demonstrates conclusively that the statute was triggered in late 2007.

III. THE DISCOVERY RULE "CLOCK" BEGINS TO RUN WITH THE INITIAL DISCOVERY OF A SINGLE CAUSE OF ACTION AND DOES NOT RENEW WITH THE DISCOVERY OF SUBSEQUENT CAUSES OF ACTION ARISING FROM THE SAME CIRCUMSTANCES

Appellant argues he is entitled to two different statutes of limitation "clocks" in this matter, one for property damage and negligence, and another for personal injury. This argument is premised on the idea that the cause of action for personal injury did not and cannot accrue until the date of the personal injury alleged, in this case the 2009 painting event, which resulted in the alleged inhalation of mold spores.

The plain language of the discovery rule and the consistent application of this rule in South Carolina law repudiate this argument.

"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." *Tollison v. B & J Machinery Co., Inc.,* 812 F. Supp. 618, 620 (D.S.C. 1993), cited affirmatively in *Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169 (1994). This holding, cited by Appellant, invalidates his entire argument. Its plain reading states on the date of an initial injury, in this case, the discovery of mold and termites, a plaintiff is alerted to *some cause of action* against *some defendant,* a plaintiff's statute of limitations begins to run. It is irrelevant to any discovery rule inquiry whether or not those same circumstances advance, unmitigated, and result in a different cause of action. Rather, "all claims based on that injury," relate back to that initial discovery and the initial triggering of the statute of limitation "clock." *Ibid.*

The "wrongful conduct" alleged in this action against Respondent and Defendant Carter occurred, if any, prior to the closing date of the real estate conveyance, November 7, 2007.

The discovery rule clock compels "the exercise of reasonable diligence" on the part of Appellant from the singular moment the Appellant acquired knowledge of the "facts and circumstances" sufficient to put an "injured person on notice of the existence of a cause of action against a party." *See Epstein v. Brown,* 363 S.C. 371, 376, 610 S.E.2d 816, 818 (2005); *Kelly v. Logan, Jolley, & Smith, LLP,* 383 S.C. 626, 633, 682 S.E.2d 1, 4(2009). "The fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean v. Ruscan Corp.,* 321 S.C. 360, 363, 468 S.E.2d 645, 647(1995).

By November, 2007, Appellant had knowledge, based on his own testimony, that Respondent and Defendant Carter had failed to inform him of the home's

propensity for water seepage, termite infestation, and black mold. Appellant knew exactly who had sold him the home, who had inspected the home, and who had issued the CL-100 and Transferable Termite Bond.[1] The circumstances of the 2009 personal injury, including any causal link between the alleged wrongdoing of respondents herein and said injury, were well-known to Appellant by November, 2007. The only unknown element was the full extent of the mold, moisture and termite damage, i.e. damages. The discovery rule does not permit Appellant to sit idly and await the moment the circumstances become unbearable. Rather, the discovery rule "clock" continues ticking on all causes of action related to the alleged harm from the date of the initial discovery (November 2007), as the discovery of termites and mold "would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Young v. S.C. Dep't of Corrs.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); *see also Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004).

The Supreme Court has further considered and rejected Appellants argument in the case *Dean v. Ruscan Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1995). In *Dean,* Plaintiff uncovered cracking in the interior walls within her building related to nearby pile driving. Plaintiff addressed the cracking at that time, but subsequent pile driving further damaged her building. The "harm" identified in that case was the structural damage to the building. The Court found that the subsequent damage,

[1] In fact, the transferable termite bond was still valid, providing coverage to Appellant for a number of months after his initial discovery of termites on November 7, 2007. *See Defendant's Exhibit 10, Deposition of Claude McAlhaney.*

which resulted in bulging bricks in addition to the cracking, was not a new "harm," but was in the same nature as the original harm, "not separate and distinguishable." *Dean,* 321 S.C. at 364-365, 468 S.E.2d at 648 (1995). There, the inquiry is not whether or not a different cause of action arose, but whether the subsequent injury is the result of a "new" harm or the original harm.

In this case, the alleged negligence of Respondent took place, if at all, by November 2007. The injury to Appellant, including both property damage and personal injury, if any, stems directly from the homes propensity for water seepage, termites, and black mold. Any liability on the part of Respondent or Defendant Carter is solely related to the alleged non-disclosure of the alleged latent defects in moisture within the home.. Appellant was on notice of these factors, and in fact treated them both in late 2007. The 2009 episode of mold spores is simply a manifestation of the original harm, not separate and distinguishable.

The statutes of limitation on all causes of action began to run in November 2007, and Appellant is not entitled to an extension of time for additional personal injury which was simply an extension and manifestation of the original harm he first observed immediately after purchasing the home, beginning on the day of closing on the home.

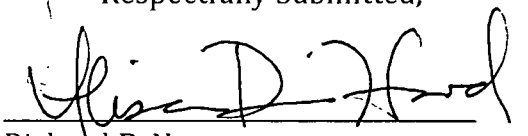
CONCLUSION

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitation embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human

affairs." *Kelly v. Logan, Jolley, & Smith, LLP,* 383 S.C. 626, 632, 682 S.E.2d 1, 4(2009)(internal citations omitted).

As set forth above, the Order of the lower court enforcing the applicable statutes of limitation from which Appellant appeals did not result from judicial error, and should be affirmed.

Respectfully Submitted,



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