

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

RECEIVED

MAR 24 2014

SC Court of Appeals

Claude McAlhany, Appellant,

-v-

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

**APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO STRIKE**

The Appellant, Claude McAlhany ("McAlhany"), submits this return in opposition to Respondent, Erick Cogburn's ("Cogburn") Motion to Strike. Specifically, Cogburn moves to strike portions of Respondent, Kenneth A. Carter's ("Carter") deposition testimony and accompanying exhibits along with portions of Erick Cogburn's deposition testimony and exhibit number four. For the reasons set forth below Cogburn's motion should be denied.

I. KENNETH A. CARTER'S DEPOSITION

Appellant McAlhany and Respondent Carter's Designations of Matter to be Included in the Record on Appeal included deposition testimony and exhibits from Carter's deposition. At the hearing held on July 26, 2012, the undersigned counsel

submitted materials to the trial court for its consideration. Because the materials presented to the trial court consisted of copies of depositions and accompanying exhibits, the undersigned counsel did not retain a copy of the specific materials submitted to the trial court as the deposition transcripts are still in the file. However, the transcript of the hearing, attached as Exhibit A, clearly reflects that a copy of Carter's deposition was submitted to the trial court:

So, we believe that under the discovery exception to the statute of limitations he did not discover the extent of the violations - - *and I have provided the Court with a copy of Mr. Carter's deposition* and attached to Mr. McAlhany's deposition was the report from Clemson University about the violations from the CL-100 that Mr. Carter did back in October of 2007.

(Tr. p. 11, ll. 15-21) (emphasis added).

As it is the undersigned's usual practice, the copy would have included a copy of the deposition transcript and accompanying exhibits.

Despite this clear reference in the transcript that Carter's deposition testimony was presented to the trial court, Cogburn moves pursuant to Rule 210(c), SCACR, to strike pages 4-5, 8-19, 23, 27-30, 33-34, 39-42, and 45-48 of Kenneth Carter's deposition testimony, along with accompanying exhibits 2, 3, 4, and 6. Based on the reference to Carter's deposition being presented to the trial court, Cogburn's motion on this ground should be denied as the matter designated was "presented to the lower court." Rule 210(c), SCACR.

II. ERICK COGBURN'S DEPOSITION

Appellant McAlhany's Designation of Matter to be Included in the Record on Appeal also included Cogburn's deposition. Cogburn's motion for summary judgment states it was "supported by the deposition testimony of Claude McAlhany, *Erick*

Cogburn, and Kenneth Carter, as well as the pleadings and exhibits on file with the Clerk of Court for Bamberg County, the laws and statutes of South Carolina, and by forthcoming memorandum of law.” (Exhibit B) (emphasis added). The undersigned counsel had a telephone conversation with counsel for Cogburn, Alison Hood, and it appears that there are several filings that are no longer in the court’s file at the Bamberg County Courthouse. As a result, there is no way to know what was provided to the trial court aside from the transcript and pleading references. Despite contending Cogburn’s deposition supported his motion for summary judgment, he now moves to strike certain portions of his own deposition testimony and exhibit four. Most, if not all, of Cogburn’s testimony included in the Record on Appeal provides the factual timeline for the events that give rise to this action. Much of this testimony was presented to the trial court at the hearing on July 26, 2012.

McAlhany contends that Cogburn’s motion to strike as to his testimony should also be denied. Cogburn asserted his own testimony supported his motion for summary judgment but now claims it should not be included in the Record on Appeal. Because Cogburn’s own motion states his deposition testimony is used to support the motion for summary judgment, which is now on appeal, the matter was presented to the trial court and is relevant to this appeal. Rules 209(b) and 210(c), SCACR.

III. CONCLUSION

As a result of the incomplete lower court file, the parties cannot obtain a complete copy of what was presented to the trial court on July 26, 2012. The disputed designations were presented to the trial court and are proper for this Court’s consideration. The Record on Appeal has already been bound and filed, along with

Appellant's Final Brief, based on the items designated by the parties. For these reasons, Cogburn's motion to strike should be denied.

Respectfully Submitted,



William F. Barnes, III
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& DETRICK, P.A.
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ATTORNEYS FOR APPELLANT

March 20, 2014
Hampton, South Carolina

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In the Court of Appeals

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Claude McAlhaney, Appellant,

-v-

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

CERTIFICATE 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 *Appellant's Return to Respondent's Motion to Strike* 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

[SIGNITURE TO FOLLOW ON NEXT PAGE]

March 20th, 2014
Hampton, South Carolina


Megan C. Davis

State of South Carolina)
County of Bamberg)

Court of Common Pleas
2011-CP-05-65

Claude McAlhany)
Plaintiff)
vs.)
Kenneth A. Carter, Sr., et)
al.)
Defendants)

Transcript of Record

July 26, 2012
Bamberg, South Carolina

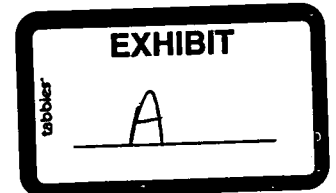
B E F O R E:

The Honorable Clifton Newman, Judge.

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

William F. Barnes, III, Esq.
Attorney for the Plaintiff

Danielle F. Payne, Esq.
Richard B. Ness, Esq.
Attorneys for the Defendants



Lisa H. Davenport, RPR
Official Court Reporter

1 says, Yeah. Is that correct? That's correct.

2 And then there is another page in here, Your Honor.
3 I'll forego that for now, but, basically, if this action
4 arises at the time the mold is discovered for his personal
5 injuries which is August of 2009, he cannot have a cause
6 of action to arise for personal injury when there is no
7 damage for the personal injury, and, so, therefore, you
8 cannot trigger the cause of action to run until he has
9 actually sustained damage, and, so, we believe that the
10 cause of action date of when he discovered this condition
11 was in August of 2009, and, also, if you want to take the
12 June of 2008 as when he first discovered the mold for the
13 damage to the home, three years from there is June of 2011
14 and this action was filed in April of 2011.

15 So, we believe that under the discovery exception to
16 the statute of limitations he did not discover the extent
17 of the violations -- and I have provided the Court with a
18 copy of Mr. Carter's deposition and attached to
19 Mr. McAlhany's deposition was the report from Clemson
20 University about the violations from the CL-100 that
21 Mr. Carter did back in October of 2007. Mr. McAlhany had
22 no knowledge of those violations of, you know, that it
23 was not done in compliance with the laws of South Carolina
24 at the time of -- that that was done back in October of
25 2007.

Clerk of Court for Bamberg County, the laws and statutes of South Carolina, and by
forthcoming memorandum of law.

Respectfully submitted,



Richard B. Ness
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Fax: (803) 245-5184

Attorney for ERICK COGBURN

Bamberg, South Carolina

March 30, 2012

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The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
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*Re: Claude McAlhany v. Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc. and Erick Cogburn,
Civil Action No.: 2011-CP-05-65
Appellate Case No.: 2013-000578*

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellant's Return to Respondent's Motion to Strike with regards to the above-referenced matter. Please return a filed copy of same in the envelope provided.

By copy of this letter, Appellant's Return to Respondent's Motion to Strike is being served on all counsel of record.

With kind regards, I am

Sincerely,



William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: Danielle F. Payne, Esquire
Richard B. Ness, Esquire

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MAR 24 2014

SC Court of Appeals

FIRST CLASS MAIL

LAW OFFICES

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PROFESSIONAL ASSOCIATION

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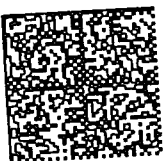
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SC Court of Appeals

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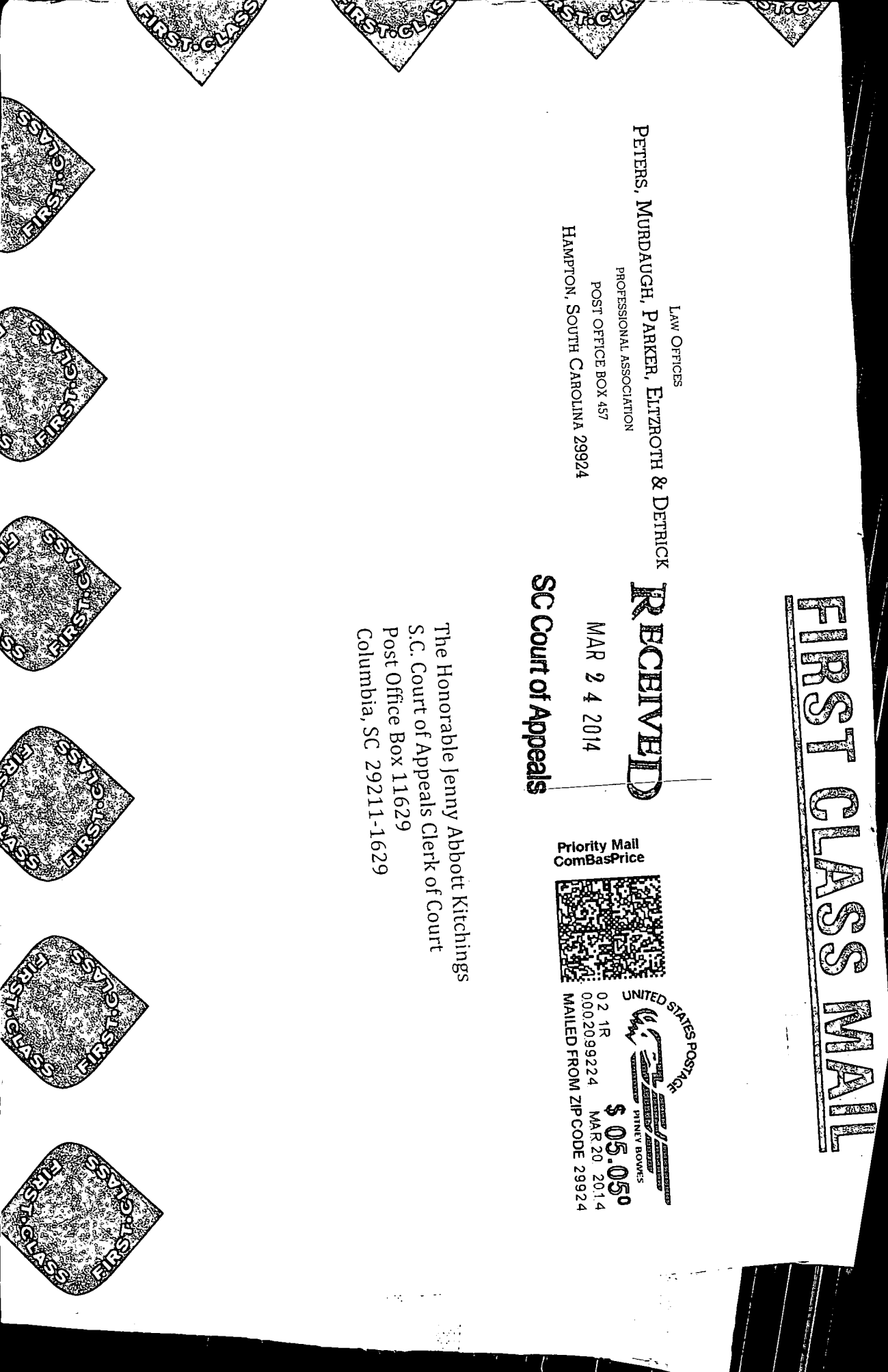


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