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.

-vs-

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

RESPONDENTS' KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. D/B/A CARTER & SON PEST CONTROL, AND CARTER & SON PEST CONTROL, INC.
FINAL BRIEF

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STATEMENT OF THE CASE

Appellant filed his lawsuit on April 11, 2011 alleging negligence against Respondents Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Cater & Son Pest Control, Inc. (hereinafter "Respondents"). (R. pp. 17-24). Respondents answered denying all allegations and causes of action against them and asserting the statute of limitations as an affirmative defense. (R. pp. 31-37). Respondents filed a motion for summary judgment to Rule 56, SCRCP, based upon the statute of limitations and submitted a memorandum of law in support thereof. (R. pp. 38-39). The trial court heard Respondents motion for summary judgment on July 26, 2012 and after receiving oral argument and considering written memorandums, the trial court granted Respondents' motion. (R. pp. 72-92). The trial court filed an order granting Respondents' motion on September 13, 2012. (R. pp. 5-15). Appellant filed a Rule 59 (e), SCRCP, motion for reconsideration dated September 24, 2012. (R. pp. 42-43). Appellant's Motion to Reconsider was denied on February 15, 2013. (R. p. 16). Appellant filed the Notice of Appeal on March 18, 2013. (R. pp. 316-317).

STATEMENT OF THE FACTS

Respondents conducted a CL-100 inspection on October 19, 2007 for the home at 3633 Faust Street, Bamberg, South Carolina. (R, p. 243, ll. 8-15). This inspection was performed for the sale of the residence from Cogburn to Appellant. (Id, ll. 1-25). Prior to this inspection, Respondents treated the home in March of 2007 for active termites. (R. p. 246, ll. 19-22). The purpose of a CL-100 Wood Infestation Report is to determine if the home has infestation of termites, and any rotten wood caused by termites, or any **visible** damage caused by termites. (R. p. 233, ll. 17-22). A moisture reading is not performed unless there is visible damage in the home. (R. p. 238, ll. 21-25). A moisture reading is not required by the Official Code of the South Carolina Pesticide and Fertilizer Regulations. (R. p. 239).

At the time of issuance of the October 19, 2007 CL-100 report, Respondents found no evidence of active termites or visibly damaged wooden members. (R. pp. 227-228). Respondents noted that that there was evidence of previous infestation and disclosed that prior treatment for subterranean termites was performed on March 21, 2007 by it. (Id.). Furthermore, it is clearly noted that moisture readings were not taken in the home because the property is built on a cement slab. (Id.). Claude McAlhaney signed that he acknowledges that a copy of the report has been reviewed and received on November 5, 2007. (Id.). Respondents do not look for mold in a property as mold has nothing to do with infestation of termites. (R. p. 251, ll. 14-17). Appellant agreed that the CL-100 inspection is not to address or discover mold or fungi in a home. (R. p. 123, 11. 20-23).

Appellant purchased and closed on the home on November 5, 2007. (R. p. 100, ll. 5-7). Appellant was aware that Cogburn had performed repairs and work on the home prior to purchasing it. (R. p. 155, ll. 23-25). Appellant testified that he moved into the home approximately two weeks before he closed on it. (R. p. 99, ll. 17-25). Appellant did not have a home inspection performed on the subject home. (R. p. 102, ll. 8-16). Appellant did not request nor was a property disclosure form filled out by Cogburn and given to him prior to the purchase of the home. (R. p. 104, ll. 20-24). Appellant physically inspected the property prior to purchasing it and did not see anything wrong with it. (R. p. 136, ll. 5-10).

Appellant testified that he saw live termites the first day that they purchased the house which would be November 5, 2007. (R. pp. 134, ll. 23-25, 135, ll. 1-5). Appellant stated that he went to Lowe's and purchased Terminix to kill the termites. (R. p. 135, ll. 8-9). Appellant testified that he received and read the CL-100 report dated October 19, 2007 issued by the Respondents. (R. p. 96, ll. 13-25). Appellant stated that he knew in October of 2007 that Respondents had not done their job properly. (R. p. 156, ll.18-20). Appellant did not renew the termite bond for the property with Respondents after he purchased the home. (R. p. 99, ll. 3-5).

After moving into the home in October/November of 2007, Appellant immediately began doing work on the home. (R. p. 100. ll. 10-12). He pulled up the existing hardwood floors because they had warped from water coming through the insides of the house and installed the correct moisture barrier. (Id., ll. 13-25). Appellant testified that he discovered mold when he first moved in the house and tore up the first floor which would have been in October or November of 2007. (R. p. 152, ll. 1-7).

Additionally, Appellant notes that the floor he installed when he first moved in began bowing up from water intrusion eight or nine months later. (R. p. 101, ll. 5-9). Appellant allegedly discovered mold in a bedroom in '07/'08, or late '08 sometime when he was painting and the roller penetrated the sheetrock. (R. p. 102, ll. 2-6, p. 107, ll. 5-13). Appellant decided to take a knife and cut a 12-foot span of sheetrock out exposing himself to mold. (R. p. 107, ll. 13-16).

After Appellant discovered mold, he hired Executive Restoration, a mold specialist to investigate. (R. p. 105, ll. 18-21). The mold specialist determined that the cement blocks for the bottom floor were not sealed properly and whenever it rains the water seeps down through the sand and dirt and comes right through the block wall and sheetrock into the house. (R. pp. 105, ll. 18-25, 106, ll. 1-6). Appellant testified that Respondents did not build the home or install the cement blocks. (R. p. 118, ll. 12-15).

STANDARD OF REVIEW

The Appellate Court applies the same standard which governs the trial court under Rule 56(c), SCRCP, when reviewing the grant of a summary judgment motion. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (2003). 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; Burriss 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). When determining if 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 non-moving party. Wilson v. Style Crest Products, Inc., 367 S.C.

653, 627 S.E.2d 733 (2006). If the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the court. Ward v. Zelinski, 260 S.C. 229, 195 S.E.2d 385 (1973). Once the moving party demonstrates 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) (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990)) (emphasis in original and further internal quotation marks omitted).

The decision of the circuit court will not be disturbed on appeal absent a clear showing that the circuit court abused its discretion. Em-Co Metal Products, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 280 S.C. 107, 311 S.E.2d 83 (1984). "An abuse of discretion can only arise when either an order based on factual conclusions is without evidentiary support or the judge issuing an order was controlled by an error of law." Id. "The burden always rests upon the appellant to show an abuse of discretion; and in determining whether an abuse of discretion occurred, the case must be considered in the light of its underlying circumstances." Id. In order for a reviewing court to reverse a judgment for an alleged error in the exclusion of evidence (expert testimony) the complaining party must prove both the error of the ruling and the resulting prejudice. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). "A court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." Id.

ARGUMENTS

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

Respondents performed a CL-100 inspection on the home to determine if there was visible water damage or live termites. This inspection was performed on October 19, 2007. Appellant testified that he knew at that time (October 19, 2007) Respondents had not performed their scope of work correctly. Appellant further testified that he saw live termites when he first moved into the property in October of 2007. It is not Respondents duty to inspect the home for mold, perform moisture readings if there is not a crawlspace under the first floor or find hidden water damage. Appellant agreed that a CL-100 inspection does not address or inspect for mold or fungi. (R. p. 123, ll. 20-22). The statute of limitations for Appellants claims against Respondents began when he knew or should have known that Respondents had not performed the CL-100 inspection correctly, October 19, 2007 or November 5, 2007, the date he received the report. Furthermore, Appellant's claims against Respondents for discovering live termites began when Appellant first noticed the live termites, which by his own testimony was in October of 2007. Therefore, Appellant's causes of action against Respondents were time barred when he failed to file suit by October or November of 2010.

Appellants would have the Court focus solely on when the mold was discovered. This is not applicable in this case since Respondents did not scrutinize the home for mold during the CL-100 inspection and was not required to by any state statute, regulation, code or industry standard. Appellant agreed with this. Furthermore, Appellant alleges that a moisture reading should have been performed at the time of the CL-100 inspection. (R.

p. 97, ll. 1-7). The Official South Carolina Wood Infestation Report clearly states that the inspection for fungi and fungi damage is limited to the area below the first main floor of the structure as defined by DPTPN-198. (R. pp. 223-228). Respondents testified that there was not a crawl space or any area underneath the first main floor in the subject residence, therefore, he was unable to perform any moisture readings pursuant to item numbers four (4) or five (5) in the report. (R. pp. 245, ll. 24-25, 246, ll. 1-7). Lastly, the report states "not applicable" in sections four (4) and five (5) addressing moisture content readings and the notes section of the report clearly state that "the building was built on a cement slab and is therefore inaccessible for underneath inspection" and "wood and ground moisture is not available due to the building being on a cement slab." (R. pp. 223-228). Respondents were not required to perform moisture content readings in the subject residence and thus Appellants allegations are without merit.

The statute of limitations in this case is three years from the date of Appellants alleged discovery of termites and water intrusion/mold in October and November of 2007. South Carolina Code Ann. § 15-3-530(3) & (5) states that "within three (3) years (3) an action for trespass upon or damage to real property; and (5) an action 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" must be filed. Furthermore, South Carolina Code Ann. §15-3-535 states that "Except as to actions initiated under Section 15-3-545, 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." (emphasis added).

The statute of limitations begins to run when a cause of action reasonably ought to have been discovered. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Young v. South Carolina Dep't of Correction, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). The date on which discovery of the cause of action should be made is an objective, rather than subjective, question. Id.

Statute of limitations "are not simply technicalities," but instead "have long been respected as fundamental to a well-ordered judicial system." City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 230, 599 S.E.2d 462, 465 (Ct. App. 2004). The Courts of South Carolina have adopted the "discovery rule" in determining when a cause of action accrues. Dillon County School Dist. V. Lewis Sheet Metal Works, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985)(overruled on other grounds). The statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Cline v. JE. Faulker Homes, Inc., 359 S.C. 367, 371-372, 597 S.E.2d 27, 29 (Ct.App. 2004). When the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist, one is charged with discovery under the objective test anticipated by the discovery rule. Id. (citing Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987). Ignorance by a party of a defect is irrelevant if a person exercising reasonable care under similar circumstances would have been aware of the injury. See Christensen v. Mikell, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996).

Appellant chose not to have a home inspection performed to determine the condition of the home he was purchasing. This would have been the proper course to discover hidden mold or water damage and any construction defects causing water to come into the first floor, not a CL-100 inspection report. Respondents were not the architects or general contractors for the construction of the subject property. They are not responsible for the failure of the prior owner to properly perform repairs or seal the concrete blocks to avoid water intrusion. Respondents were solely to inspect the areas that were visible to the naked eye for active termites, previous infestation of termites, damage to wooden members below the first main floor, and to do moisture readings below the first main floor if applicable. Respondents performed their job on October 19, 2007 and if that time Appellant knew that they did not perform the inspection correctly that is when the applicable statute of limitations begins to run, or at the least when he discovered live termites when he moved in and mold and water intrusion in November of 2007.

The statute of limitations is inherently important to all parties in establishing a set period within which lawsuits can be filed against them. In this instance, it would be unduly prejudicial to Respondents to allow Appellant to proceed with these causes of action against them outside of the statutorily mandated time period.

II. APPELLANT'S PERSONAL INJURY CLAIM IS ALSO TIME BARRED BY THE STATUTE OF LIMITATIONS.

Appellant's injuries for personal injury and property damage are indivisible and the statute of limitations for both began in October or November of 2007. Any claims for mold exposure began at the initial discovery of mold which was 2007. Appellant is attempting to muddy the waters with respect to his personal injury claim. Appellant has

not established a personal injury claim because there have been no allegations of causation alleged against Respondents. Respondent performed a CL-100 inspection. They did not perform a home inspection and did not inspect any areas that were not visible to the naked eye. They were not required to perform moisture testing which is the only basis for which Appellant attempts to establish any failure of the Respondents to discover water intrusion and mold in the downstairs bedroom area.

The Supreme Court of South Carolina held in Dean v. Ruscon Corp. that where the subsequent harm was not separate and distinguishable from the original injury the statute of limitations had expired. 321 S.C. 360, 468 S.E.2d 645 (1995). In Dean, the Court considered whether a building owner exercised reasonable diligence in determining when the damage to her building occurred. Id. Dean set forth that a crack occurred in the building from pile driving in 1984. Id. Subsequently in 1985, the crack enlarged and there was bulging of the bricks. Id. The Court cited that the potential damage to Dean's building was not latent, but was apparent in 1984 and that there was no question the damage was discovered in 1984 and it was associated with Defendant's pile driving activities. Id. The Court further stated that the fact that "Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial." Id.

Dean is analogous to the case at bar. The statute of limitations began to run at the same time and is of the same duration, three (3) years, for the Appellant's claims of property damage and personal injury. See South Carolina Code Ann. § 15-3-530(3) & (5). Appellant testified that he discovered termites and mold/water intrusion when he first moved in the house in October and November of 2007. (R. pp. 134, ll. 23-25, 135,

ll. 1-5, 152, ll. 1-7). Appellant was first exposed to mold in November of 2007. It was then that the statute of limitations began to run on his personal injury claims from mold exposure as injuries from mold exposure are indivisible. The exposure and danger of mold was apparent and Appellant himself failed to fully appreciate the extent of harm to his home and to himself. South Carolina Code §15-3-535 states, in pertinent part, 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."

> "The 'exercise of reasonable diligence' means that the injured party 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. The statute of limitations begins to run when a Appellant knows or should know of a potential claim against another party, not when the Appellant develops a full-blown theory of recovery."

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005). Clearly, Appellant should have known by the exercise of reasonable diligence that his discovery of and inhalation of mold in 2007 created a cause of action against Respondents, particularly when he testified that he knew in 2007 that Respondents had not performed their work correctly. Although, Respondents' scope of work on the subject residence in no way addressed or was the proximate cause of mold at Appellant's residence.

In Dean, the Court distinguishes the case of Benton vs. Roger C. Pease Hosp., wherein a Down syndrome patient fell out of his wheel chair and suffered facial lacerations. 313 S.C. 520, 443 S.E2d 537 (1994). A more serious injury arose from neurological damage which may have been caused by the fall or by something else. Id. The Court held that these injuries were two separate, distinct and severable harms and

that the statute of limitations began to run at different times for each injury. Id. Respondents also argue that Benton is distinguishable from the case at bar. Appellant's injuries of property damage and personal injury from mold exposure were readily apparent and discoverable had he exercised reasonable diligence as required in October and November of 2007.

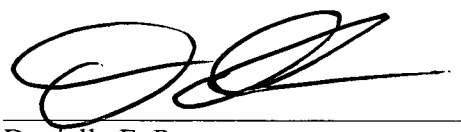
More importantly though, Appellant's negligence claim rests upon allegations that Respondents failed to comply with the South Carolina Pesticide Act when it issued its CL-100 on October 19, 2007. Appellant is trying to confuse the issues and allege that his claims against Respondents include a personal injury claim which it does not. There is no evidence to support a personal injury claim against Respondents and therefore the applicable statute of limitations for personal injury is of no importance. Appellant points to Clemson University's report detailing how Respondents failed to comply with the Pesticide Act in its October 19, 2007 report. (R. pp. 266, 201). The Clemson letter does not indicate that Respondents failure to comply with said Act in issuing its CL-100 report caused or contributed in any manner to mold and a plain reading of the report and common sense indicate that what Respondents failed to do would not cause the mold Appellant now complains of. As previously argued, Appellant knew in October of 2007 by his own testimony that Respondents had not performed their job correctly. He also knew that he had found termites the first day that he moved in, end of October of 2007. That is the applicable date from which to start the running of the statute of limitations. Since Appellant did not file its complaint within the applicable three (3) year statute of limitations his action is now time barred and the order granting summary judgment should be affirmed.

III. RESPONDENTS ADOPT BY REFERENCE THE BRIEF OF RESPONDENT ERICK COGBURN

CONCLUSION

For the above-stated reasons, the trial courts findings should be affirmed by the Appellate Court as the trial court did not abuse of discretion. The evidence supports the trial court's finding that summary judgment was proper after looking at all of the evidence presented in the light most favorable to the Appellant a genuine issue of material fact did not exist to submit the case to the jury. Accordingly, the trial court's decision to grant Respondents' Motion for Summary Judgment should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

Counsel certifies that Respondents Final Brief complies with Rule ~~211 (b)~~, SCARC.

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CERTIFICATE OF SERVICE

This is to certify that I, Victoria N. Clark with the Law Firm of Grier Cox and Cranshaw, LLC, have this date mailed via the U.S. Postal Service with first Class postage prepaid, a true and correct copy of the within Respondent's Final Brief with Certificate of Counsel to:

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