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 McAlhany, ...Appellant.

-vs-

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

PETITION FOR REHEARING

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Respondents, Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc., petitions this Court to rehear and/or reconsider, reverse or modify its decision in the appeal of this case. Respondents believe this Opinion is in error because the Court of Appeals has misapprehended, overlooked, or failed to correctly rule on the following:

Court of Appeal Opinion Creates Duty on CL-100 Inspector with Regard to Mold

The Court of Appeals' Opinion improperly creates a duty on CL-100 inspectors to find mold and/or mold-causing-conditions, which is well beyond the statutory duties set forth in the enabling Pesticide Control Act, S.C. Code § 46-31-10 *et seq.* (the "Act"), passed by the South Carolina legislature and is outside the regulatory duties imposed by S.C. Code Regs. 27-1070 through 27-1085. Neither the Report on Structural Pest Inspection, issued on October 9, 2009, by Clemson University[1], nor the language of the Act, nor the Rules and Regulations for the Enforcement of said Act, recognizes the imposition of such a duty on CL-100 inspectors. However, the Appeals Court's Opinion cannot be read in any way other than for the proposition that an inspection for wood destroying organisms now includes a duty to find mold and/or mold-causing-conditions even in areas not readily accessible.

Specifically, this court held, that "[a]ccording to McAlhany, [Respondents were] negligent because it knew of water damage to the home at the time of the October 2007 CL-100, yet *it failed to conduct a moisture test. As a result, the home developed mold, which caused McAlhany's injury in* August 2009. We agree." *McAlhany v. Carter*, 2015 S.C. App. LEXIS 237, *24 (S.C. Ct. App. Nov. 12, 2015) (emphasis added). In agreeing with Appellant's argument, the Court of Appeals has recognized a direct causal connection between the presence of moisture

[1] Clemson University was acting in its capacity as "Director" under the regulatory regime at issue. See S.C. Code § 46-13-30.

and the resulting damages to McAlhany and placed a duty on CL-100 inspectors to detect moisture or be held liable for any ensuing mold.

Such an action by this Court would contravene clear legislative intent, which vested in the Director, as defined by the Act, the authority to promulgate regulations related to structural pest control activity. See S.C. Code § 41-13-55. Had the legislature or the Director wished to expand the scope of duties imposed on a person performing a CL-100 inspection, then either could have utilized of the statutory and regulatory apparatuses already in place. Respondent would argue that the Director, who drafted and promulgated the CL-100, specifically intended that such CL-100 report would not include an inspection for mold given the following CL-100 mandatory language: "[t]his property was not inspected for the presence or absence of health related molds or fungi."

Yet, the Court of Appeals appears to have usurped the authority of the Director by its Opinion and imposed a duty on inspectors to certify that neither mold nor mold-causing-conditions are present when a CL-100 inspection is performed. As the Opinion now reads, an inspector may now be held civilly responsible for any failure to do so. Such a duty may prove unworkable given that a CL-100 inspection is never performed on "hidden areas, areas not readily accessible, and the undersigned pest control operator disclaims that he has made any inspections of such hidden areas or of such areas not readily accessible" but these are the vary areas where such mold and mold-causing-conditions might be found and only through a partially destructive inspection to access such hidden areas. (See CL-100 promulgated by the Director as named by the Act).

Appellant McAlhany's Testimony Not Inconsistent

The Court of Appeals erred in finding McAlhany's testimony to be inconsistent during his deposition. In fact, McAlhany testified consistently that he found mold and moisture (causing mold) in different locations at different times. As this Court initially notes, McAlhany clearly stated that he found live termites on "[t]he day and hour [McAlhany] purchased the house." (McAlhany Depo. p. 75 ll. 25.) A focused reading of the Appellant's deposition indicates that McAlhany then sets forth what immediate remedial measures he took to kill the termites discovered that day and the other home-repairs he started at or near this time. McAlhany testified that after moving into the home - between October and November of 2007 - he immediately began renovations of the home. (*Id.*, p. 39, ll. 10-12). McAlhany testified that he pulled up the existing hardwood floors – warped from previous water damage – and installed the new corrective moisture barriers. (*Id.*, p. 39, ll. 13-25). McAlhany testified that he discovered moisture and mold when he first moved in the house and tore up the first floor, which could only have occurred between October or November of 2007, the stipulated dates of purchase and transfer of ownership. (*Id.*, p. 93, ll. 1-7).

Subsequently, McAlhany claims that this new floor that he installed, shortly after taking possession of the house, then also began bowing and warping from water intrusion *eight or nine months after installation.* McAlhany stated, "And anyways, I put that down [the 2nd floor]. It wasn't probably about another eight month -- eight to nine months, then that floor started bowing up." (*Id.*, p. 40, ll. 5-9). And even later in time, McAlhany allegedly discovered mold in a bedroom in '07/'08, or late '08 while he was painting, and the roller penetrated the sheetrock. (*Id.*, p. 41, ll. 2-6, p.46, ll. 5-13). A careful review of McAlhany's testimony reveals that he was aware of the existence of water damage, the presence of moisture, and possibly mold from his earliest days of moving into the house.

This Court found that "McAlhany testified that had he known there were high moisture levels in the home, he would have removed sheetrock from the walls to determine the source of the moisture." *Id. McAlhany* LEXIS 237, *28. If the presence of moisture was the cause-in-fact of Appellant's injuries, then the statute of limitations must being to run from this point in time. And, since McAlhany found repeated instances of moisture in various locations of the house beginning from his first possession of the property, the statute of limitation expired before filing this action.

Appellant Cannot Manufacture a Genuine Issue of Material Fact

The Court of Appeals erred by narrowly construing *McMaster v. Dewitt*, 411 S.C. 138 (S.C. Ct. App. 2014) and the proposition that a party "cannot create a conflict and resist summary judgment." *Id.* 149 (citing *Torres v. E.I. Dupont de Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. P.R. 2000)). The Appeals Court focused incorrectly on the "sham affidavit" at issue in *McMaster* and not the more important tests outlined by the case-law supporting and cited by *McMaster*.

Should McAlhany wish to change his testimony, then – according to the case-law cited by this Court – he must "give a satisfactory explanation of why the testimony is changed." *Colantuoni v. Alfred Calcagni & Sons*, 44 F.3d 1, 5 (1st Cir. R.I. 1994) (citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2726, at 30-31 (2d ed. Supp. 1994)). As the Court of Appeals noted in *McMaster*, "[e]xplanations that may be satisfactory include the need to correct misstatements made during the deposition,... to 'elaborate upon or clarify information already submitted,' and 'to alter testimony based on the discovery of new evidence.'" (internal citations omitted).

Respondents still maintain that a close examination of McAlhany's deposition testimony demonstrates that Appellant found mold and mold-causing-moisture at various places at various times beginning with his initial possession of the house. However, the Court of Appeals disagreed and found his testimony contradictory. Yet, McAlhany has never offered any explanation, elaboration, or new evidence for his deposition contradictions as required by the case-law. Without explanation, McAlhany would appear to lack the knowledge necessary to establish a foundation for any ensuing testimony as required by South Carolina Rule of Evidence 602. Respondents should not be required to defend a case where the complainant cannot put forth competent testimony on a material issue of fact.

Appellant's Knowledge of Moisture And/Or Knowledge that No Moisture Tests Performed Triggers Statute of Limitations to Run.

The Appeals Court erred in finding that only McAlhany's discovery of mold itself triggered the statue of limitations to run because such a finding is inconsistent with the rest of the Court of Appeals' Opinion. This Opinion recognized the obvious causal nexus between the presence of moisture and McAlhany's injuries. In fact, even Appellant's Complaint contends that Respondents' failure to discover and to disclose moisture levels caused-in-fact the mold, which proximately resulting in McAlhany's injures. As such, McAlhany's awareness of moisture, or at least the opportunity to inspect for moisture, would trigger the statute of limitations to being running. Respondents' failure to perform this moisture test was not hidden from McAlhany but made plain by the language of the CL-100 report itself.

All CL-100 reports in South Carolina clearly state, "[t]his report specifically excludes hidden areas, areas not readily accessible, and the undersigned pest control operator disclaims

that he has made any inspections of such hidden areas or of such areas not readily accessible." Moreover, the specific CL-100 issued by Respondents also stated that wood and ground moisture readings were not available due to the building being on cement slab.

Now, whether or not such a statement in a CL-100 sufficiently complies with South Carolina law and governing regulations is immaterial to the more substantive question of whether Appellant was on notice that no moisture readings were done, which McAlhany clearly was. And, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered and "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. (also see *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996)).

McAlhany testified that he received and read the CL-100 report dated October 19, 2007 issued by the Respondents. (Id. p. 32, ll. 13-25). Thereafter, McAlhany concluded in October of 2007 that Respondent had not properly done his job as it related to the CL 100 inspection. (Id. p. 156, ll. 18-20). With this knowledge, McAlhany still chose not to have a certified home inspection[2] performed, which would have determined the condition of the home he was purchasing, or he could have inspected the house himself, which given his prior training and knowledge would have further placed McAlhany on notice.

Such an inspection is the normal, legally proper, and reasonable course of conduct utilized by most home buyers to discover hidden mold or water damage as well as any

[2] See S.C. Code § 40-59-500 *et seq.* for the enabling statutes giving the Director of the Department of Labor, Licensing and Regulation sole authority to license home inspectors and to determine the scope of such inspections including for mold.

construction defects allowing water to penetrate the first floor, not a CL-100 inspection report. If McAlhany believes that Respondents did not perform the inspection correctly – by failing to inspect for moisture – then such belief necessarily triggers statute of limitations. McAlhany certainly would have had a "legal right to sue" though his damages might have been substantially less at that time. *Id. McAlhany* LEXIS 237, *19 (citing *Grillo v Speedrit Products, Inc.* 340 S.C. 498, 502).

McAlhany Agrees CL-100 Report Is Not a Mold or Fungi Report

Respondents have no duty to inspect the home for mold, nor to perform moisture readings if there is not a crawlspace under the first floor or find hidden water damage. This is a legal question relating to the duties imposed on anyone performing a CL-100 inspection and is a question put forth by Respondent's brief and discussed *supra*. However, it may be enough here to simply note that Appellant agrees that a CL-100 inspection does not address or inspect for mold or fungi. (McAlhany Depo., p. 63, ll. 20-22). Based on this stipulated point of law, if Respondent has no duty to Appellant regarding the existence of mold or fungi when issuing a CL-100, then the first element of an action based on negligence (duty) is left unsatisfied and the summary judgment by the trial court was appropriate.

Respondents were not the architect or general contractor for the construction of the subject property. As such, Respondents cannot be responsible for the failure of the prior owner to properly perform repairs or seal the concrete blocks to avoid water intrusion. Respondents believe their duties were confined 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 at that time Appellant knew that such inspection did not meet the obligations imposed by law, then that is when the applicable statute of limitations begins to run.

McAlhany's Alleged Personal Injury Claims Arise as the Direct Consequence of Moisture Not Disclosed on the CL-100

The Court of Appeals erred in not finding that McAlhany's injuries for personal injury and property damage are indivisible, and as such, the statute of limitations for both began in October of 2007. Respondents believe the Court of Appeals erred in not finding that mold-causing-conditions such as moisture, would not place a reasonable person on notice of the likely injuries resulting from such conditions. The fact that McAlhany may not have comprehended the full extent of the damage is immaterial. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364 (S.C. 1996).

McAlhany's complains that Respondents failed to detect moisture in the CL-100 inspection and that this moisture allowed mold thus giving rise of his personal injuries. No one, including McAlhany, argues that the CL-100 is intended to reveal the presence of mold, merely moisture. However, as noted above, the Court of Appeals acknowledged the direct causal connection between the presence of moisture and McAlhany's ensuing mold related damages. "We believe the evidence that [Respondents were] aware of water issues in the home, yet apparently did not check and disclose the moisture levels in the October 2007 CL-100..." and "had [Respondents] disclosed the moisture levels in the home, McAlhany would not have been injured." *Id. McAlhany* LEXIS 237, *27-28.

In South Carolina, the statute of limitations "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." South Carolina Courts "have interpreted the 'exercise of reasonable diligence' to mean 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." *Id. Dean* 363-364.

The plain language of the CL-100 report advised that no moisture tests were conducted, and a reasonable person would be aware of the implications for moisture/mold and that helps problems might arise due to a mold infestation. Given that McAlhany had access to the CL 100, read the CL 100 with language notifying Appellant of the lack of a moisture reading, and concluded that the CL 100 issued by Respondents was defective, McAlhany was clearly on notice some right of the Appellant's has been invaded or that some claim against another party (Respondents) might exist. (paraphrasing *Id. McAlhany* LEXIS 237, *13).

Conclusion

Respondent requests that the Petition for Rehearing be granted, that the Court reverse its initial opinion, and reinstate the judgment in favor of Respondents for the reasons set forth above.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing upon the addressees listed below by depositing a true copy in the United States Mail, First Class postage prepaid, on **December 3, 2015**.

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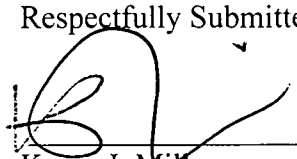
Respectfully Submitted,



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December 3, 2015

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11639
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Re: Claude McAlhany v. Kenneth A. Carter, Sr., Erick Cogburn, et al.
C/A No.: 2011-CP-05-65
Appellate Case No. 2013-000578
Our File #: 005-237

Dear Ms. Kitchings:

Enclosed for filing are the original and nine (9) copies of our Petition for Rehearing along with a Proof of Service.

Also enclosed is a check in the amount of $25.00 as required for the filing fee.

By copy of this letter, the Petition for Rehearing is being served on all counsel of record.

With kindest regards, I remain

Very truly yours,

James C. (Trey) Cox, III

JCC, III/kjm

Enclosure

cc: William F. Barnes, III, Esquire
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