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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Appellate Case No. 2013-000578
Opinion No. 5360
Heard March 3, 2015—Filed November 12, 2015

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.

# PETITION FOR REHEARING

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Attorneys for Respondent
Erick Cogburn

Respondent Erick Cogburn moves, pursuant to Rule 221, SCACR, for a rehearing in the above-captioned matter, on the grounds the Court overlooked or misapprehended the facts of this case and misapplied the discovery rule and the law of inquiry notice to the facts of this matter. The Court failed to distinguish the applicability of the appropriate statute of limitations to the sole cause of action (negligent misrepresentation) as to Respondent Erick Cogburn (Cobgurn) independent of any facts in dispute related to co-defendant and termite inspector, Kenneth Carter (Carter). Additionally, the Court failed to acknowledge Appellant's waiver of any exception as to Respondent Cogburn.

**Misapprehension of the Law of Inquiry Notice**

The Court concluded that while Appellant would have been on notice of *termites* in October 2007, and therefore time-barred from any claims of damages related to termites, Appellant, as a reasonable person, would not have been on notice of a potential negligence claim for *mold damages* in October 2007, either related to personal injury or property damages. In doing so, the Court distinguishes termite damages from mold damages, finding one time-barred and the other viable. Yet the Court then conflates the elements of these distinct causes of action into a single consideration, failing to consider the practical implications of permitting a single nexus of activity in 2007 to spiral into the future indefinitely developing new causes of action as damages continue to accrue. In short, the Court's opinion permits Appellant to wait until all possible causes of action have accrued to bring any claim at all. This is antithetical to our discovery rule.

As to Cogburn, this issue is particularly important. Respondent Cogburn is sued for negligent misrepresentation only. The summary judgment Order correctly stated that dismissal of this claim is appropriate given the discovery of the termites and moisture in October 2007, or shortly thereafter, as the discovery itself, in this case of the "latent" defect, must be fixed in time before the question of liability on the part of Cogburn can be properly evaluated. The conflicting testimony of Appellant fixed the moment in time as early as October 2007 or as late as June 2008. Assuming that inconsistent testimony is permitted to create a question of fact sufficient to reach a jury on the question of property damage and personal injury, Cogburn is still entitled to summary judgment.

Inquiry notice, the moment of "discovery," means Appellant is not given opportunity to sit idly by, aware of some claim, against some party, and wait for additional causes of action to accrue. *See Epstein v. Brown,* 363 S.C. 371, 610 S.E.2d 816 (2005). As to Respondent Cogburn, the representations upon which the sole claim against Cogburn were made, if any, before the closing date on the home. This date was November 5, 2007. Everything Cogburn did, was done no later than November 5, 2007. The applicable statute of limitations for a claim of negligent misrepresentation is three years. *See S.C. Code §15-3-530(5).* According to the Order of this Court, all elements of all possible causes of action had accrued by August 16, 2009, the date Appellant allegedly suffered a physical injury.

The Court distinguishes *Dean v. Ruscon Corp.* (321 S.C. 360, 468 S.E.2d 645 (1996)), claiming that Appellant "could not have comprehended the full extent of his damages" because he "had no personal injury damages prior to August 2009." This is a misapprehension of law. In South Carolina, the CL-100 contains two distinct inspection

criteria. The inspector is identifying and reporting termite activity. Moisture is also reported, when observed, as moisture is related to the likelihood of termite infestation. Moisture is a symptom that indicates both termites and mold may be likely in the home, and it is only observed as it relates to the termite inspection itself, and in a limited fashion, as described on the face of the CL-100. See R. 227.

Central to Appellant's case against Cogburn is the date of inquiry notice or discovery of the mold. The complaint references only latent defects, which are by definition not open or obvious. Carter testified Cogburn hired a professional contractor to make repairs to the home, including repairs to window-sills identified by Carter as having moisture damage. Cogburn afforded Appellant the opportunity to spend weeks inside the home prior to closing. See R. 143—135. Any mold was obviously latent, undiscoverable through any means of reasonable inspection by any party involved in the transaction, including Appellant. Mold is notoriously fast spreading, and given the amount of time allowed to pass between the first discovery of *some* cause of action against *some* party, there is no possible mechanism for determining when or how the mold originated. The only date we can identify as the date for inquiry notice is the first date of *some* claim against Kenny Carter for the defective CL-100. If you see termites while under a termite bond, the reasonable person calls the company to have the issue checked out. Appellant chose not to, and waited for his circumstances to deteriorate. While the mold may have been latent, the termites were not. The Court should amend its Order, at a minimum, to affirm the lower court's dismissal of all claims for property damage, even if personal injury damages persist, as the termites absolutely confirm

Appellant knew or should have known the CL-100 was defective and the home was at risk.

The Court's construction seems to imply a statute of limitations does not begin to run until the last element of any possible cause of action accrues, regardless of what point in time the injured party knew or should have known they have been originally harmed. Appellant had the option of building his case when he first learned the house had termites, on or around November 5, 2007. Appellant chose not to. Appellant could have built his case in October 2007 or June 2008, both dates being offered as the proper date for the replacement of the basement floor in the underground portion of the home. Appellant chose not to. Had Appellant investigated the initial discovery of termites, if Appellants claims are in fact true, he would have discovered moisture and mold at that time. The causes of action would have developed and each party would have full information regarding the events around the 2007 closing. Had Appellant investigated and failed to file moisture and mold, he would have had no claim at all, save the claim against Carter defective treatment of termites. However, the Court permits Appellant to wait, to allow any moisture issues to multiply and worsen, then permits Appellant additional time to suffer numerous prongs of multiple causes of action against a limited universe of known defendants all stemming from the same, singular real estate transaction which took place in 2007. This is not anticipated by our law, and creates uncertainty into perpetuity. While at some point these causes of action may seem too remote, the present Order in this case creates a sort of limbo for similarly situated defendants. South Carolina law has dealt with this quandary, and the discovery rule is the answer. Statutes of limitations must protect Defendants from protracted fear of

litigation. *See Stokes-Craven Holding Corp., v. Robinson*, 2015WL5247124. The Court failed to properly apply this principle herein, and for this reason, a rehearing is necessary.

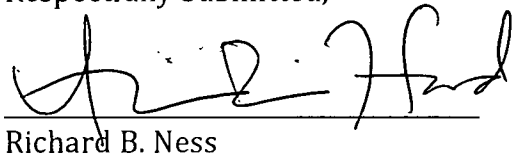
On some date no later than November 2007, Appellant had notice of *some* claim against Carter for failure to properly treat the home for termites. This inquiry notice starts the metaphorical clock and shifts the burden to Appellant herein to investigate his potential claims. The court herein rewards Appellant for idleness and preserves delinquent and untenable causes of action based on a misapprehension of the facts in this case and improper application of the principles of the discovery rule.

**Abandonment of Exception as to Negligent Misrepresentation**

Appellant failed to brief, or argue specifically, as to the applicable statute of limitations for the claim of negligent misrepresentation, and failed to specifically appeal the grant of summary judgment to Defendant Cogburn. While this issue was before the Court by consent of the parties, Appellant's failure to brief or argue the matter should result in an abandonment of the issue. *See Nienow v. Nienow,* 268 S.C. 161, 232 S.E.2d 504 (1977) (failure to argue issue in brief deemed abandonment of exception); *Bentrim v. Bentrim,* 282 S.C. 333, 318 S.E.2d 131 (Ct.App.1984) (failure to raise issue in an exception constitutes waiver).

Respondent Cogburn respectfully petitions the Court for a rehearing on this matter.

Respectfully Submitted,



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12/4, 2015

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**CERTIFICATE OF SERVICE**

This is to certify that I, Alison Dennis Hood, Attorney for Respondent Erick Cogburn, along with Richard B. Ness of Ness & Jett, 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 Petition for Rehearing** in the matter captioned *Claude McAlhaney v. Kenneth A. Carter, Sr., d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn, Appellate Case Number: 2013-000578*:

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December 4, 2015

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
P.O. Box 11629
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[redacted]

Re: *Claude McAlhaney v. Kenneth Carter, Sr., Kenneth A. Carter, Sr., d/b/a Carter and Sons Pest Control, Carter & Sons Pest Control, Inc., and Erick Cogburn*
*Appellate Case No: 2013-000578*

Dear Ms. Kitchings,

Please find enclosed the original and six copies of *Respondent Erick Cogburn's Petition for Rehearing and a Certificate of Service* in the above-referenced matter. Please file the originals and return clocked copies of each in the enclosed envelope.

By copy of this letter, a copy of this motion is being served on all counsel of record.

Sincerely,

Richard B. Ness
Alison Dennis Hood

ADH
Enclosure

Cc: James C. (Trey) Cox, III
William F. Barnes