THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC SUPREME COURT

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 5360 (S.C. Ct. App. filed November 12, 2015)

Claude McAlhany, ...Respondent.

v.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Bamberg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-05-65

FILED
BAMBERG COUNTY
SEP 13 AM 10:19
JANET [illegible]
CLERK OF COURT
BAMBERG, SC

Claude McAlhany,	Kenneth A. Carter, Sr., Kennth A Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Danielle F. Payne	Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered

☒ **ACTION DISMISSED** (*CHECK REASON*): ☒ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Defendants Kenneth Carter and Carter & Sons' Motion for Summary Judgment is Granted.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2127
Judge Code

9/11/12
Date

For Clerk of Court Office Use Only

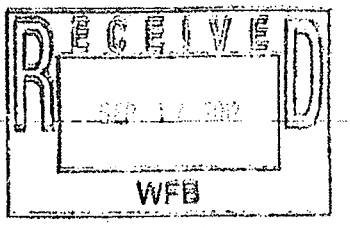
This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:



FILED

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
2012 SEP 13 AM 10:05	
COUNTY OF BAMBERG)	CIVIL ACTION NO.: 2011-CP-05-65
CLERK OF COURT	
Claude McAlhany, BAMBERG, SC)	
)	
Plaintiff,)	ORDER GRANTING
)	KENNETH A. CARTER, SR.,
vs.)	CARTER & SON PEST
)	CONTROL, INC., AND ERICK COGBURN'S
Kenneth A. Carter, Sr.,)	MOTION FOR
Kenneth A. Carter, Sr. d/b/a Carter)	SUMMARY JUDGMENT
& Son Pest Control, Carter & Son)	
Pest Control, Inc. And Erick)	
Cogburn,)	
Defendants)	

STATEMENT OF THE CASE

This is a negligence action wherein Plaintiff alleged that Defendants Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn (hereinafter "Defendants") conducted an improper inspection of the property located at 3633 Faust Street, Bamberg, South Carolina and issued an inaccurate South Carolina Wood Infestation Report, CL-100, on October 19, 2007. Plaintiff filed his Summons and Complaint commencing the action on April 11, 2011. Defendants timely filed an Answer denying the causes of action and asserting the statute of limitations as a defense. Defendants filed a Notice of Motion and Motion for Summary Judgment on January 26, 2012 based upon the defense of statute of limitations. Defendants presented a Memorandum in Support of their Motion for Summary Judgment and a Supplemental Memorandum in Support of their Motion for Summary Judgment. The motion for Summary Judgment was heard by the Court on July 26, 2012. After considering the arguments presented by both parties, and as further discussed below, Defendants', Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control,

Carter & Son Pest Control, Inc., and Erick Cogburn, Motion for Summary Judgment is GRANTED.

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; 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 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) (*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 purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact finder. Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct.App.2008). Rule 56(c), SCRCP, requires the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Id. "A complete failure of proof concerning an essential element of the

non-moving party's case necessarily renders all other facts immaterial." Id.

FACTUAL BACKGROUND

Plaintiff purchased and closed on the home located at 3633 Faust Street. Bamberg, South Carolina on November 5, 2007. Plaintiff and his wife moved into the home approximately two weeks before Plaintiff closed on it. Plaintiff witnessed live termites the day that he closed on the house. Plaintiff received and reviewed the CL-100 report, dated October 19, 2007, issued by the Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. After reviewing the CL-100 report, Plaintiff knew that Defendants. Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc., had not done their job properly.

Plaintiff immediately began doing work on the home. When he pulled up the existing hardwood floors because it had warped, he discovered mold due to the wrong moisture barrier being installed.

On August 16, 2009, Plaintiff again discovered and inhaled mold while painting one of the interior walls of the home. Plaintiff alleged property damage and personal injuries from the exposure to mold.

DISCUSSION

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, §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."

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).

In the instant case, the Court finds that Plaintiff knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November of 2007, and, by failing to file his summons and complaint within the applicable statute of limitations, Plaintiff is now barred from recovery.

Plaintiff testified 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. He furthermore stated that he knew Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc., did not do their job, i.e. issuing the CL-100, properly in October of 2007. The applicable statute of limitations began to run when Plaintiff discovered either of these two conditions. The statute of limitations ran on Plaintiff's causes of action in 2010. Plaintiff did not file this lawsuit until April of 2011, after the expiration of the statute of limitations.

Plaintiff contends that he did not discover the mold, which is the subject of this lawsuit, until 2009. Plaintiff testified thoroughly that he discovered in 2007 that the prior owner had not installed a proper moisture barrier and found mold when he pulled back the existing hardwood floor. Had Plaintiff conducted a reasonable investigation as required by the statute and case law, Plaintiff would have uncovered additional areas within the first floor of the home that also did not have a proper moisture barrier and contained mold. Plaintiff decided not to exercise reasonable diligence in discovering additional problems with his home and the result was the statute of limitations expired.

Additionally, the Court properly considered whether there can be two separate statute of limitations for a single cause of action and, in this case, determined that there could not. Plaintiff's personal injury and property damage are indivisible and caused by the same alleged negligent act of the Defendants. The Supreme Court of South Carolina has held that where the subsequent harm was not separate and distinguishable from the original injury the statute of limitations had expired. Dean v. Ruscon Corp., 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 Plaintiff's claims of property damage and personal injury. See South Carolina Code Ann. § 15-3-530(3) & (5). Plaintiff testified that he discovered termites and mold when he first moved into the house in October and November of 2007. Plaintiff 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. Furthermore, it was the alleged negligent act of Defendants on October 19, 2007 that allegedly caused the conditions complained of by the Plaintiff. The exposure and danger of mold was apparent and Plaintiff 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 plaintiff knows or should know of a potential claim against another party, not when the plaintiff 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). Plaintiff should have known, by exercising reasonable diligence, that his discovery of and inhalation of mold in 2007 created a cause of action against Defendants, particularly evidence by his testimony that he knew in 2007 that Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc., had not correctly performed their work.

Furthermore, in Dean, the Court distinguishes the case of Benton v. Roger C. Pease Hosp., wherein a Down syndrome patient fell out of his wheel chair, suffering facial lacerations, and where a more serious injury arose from neurological damage which may have been caused by the fall or by something else. 313 S.C. 520, 443 S.E2d 537 (1994). 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. Benton is distinguishable from the immediate case. Plaintiff's injuries were readily apparent and discoverable had he exercised reasonable diligence as required.

More importantly, Plaintiff's negligence claim rests upon allegations that Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son

Pest Control, Inc., failed to comply with the South Carolina Pesticide Act when it issued its CL-100 on October 19, 2007. There is no evidence to support a personal injury claim against Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. Plaintiff points to Clemson University's report to support its negligence claim against Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. The report does not indicate that Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc., failure to comply with said Act caused or contributed in any manner to mold. Plaintiff knew in October of 2007 by his own admission that Defendants, Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc., had not performed their job correctly. He also knew that he had found termites the first day that he moved into the house, which is the applicable date for the running of the statute of limitations to begin. Since Plaintiff did not file the complaint within the applicable three (3) year statute of limitations his action is now time barred and summary judgment is proper.

CONCLUSION

It is, therefore, ordered that Defendants', Kenneth A Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn, Motion for Summary Judgment is GRANTED and the above-captioned action is hereby dismissed with prejudice as to all Defendants.

IT IS SO ORDERED.

Clifton Newman
Circuit Court Judge

Kingstree, South Carolina

This 11th day of September, 2012.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG) CIVIL ACTION NO.: 2011-CP-05-65

Claude McAlhany)
)
Plaintiff,)
)
vs.)
)
Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. D/B/A Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn,)
)
Defendants.)

ORDER DENYING MOTION TO RECONSIDERATION

A TRUE COPY
CLERK OF COURT
BAMBERG COUNTY, SC

This matter comes before the Court by way of Plaintiff's Motion for Reconsideration. Plaintiff moves the Court to reconsider the Order dated September 11, 2012 granting summary judgment as to Defendants, Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. D/B/A Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn in the above referenced action.

Having carefully considered the arguments submitted and applicable law, the Court finds that the Motion for Reconsideration should be DENIED.

It is therefore ORDERED that the Plaintiff's Motion for Reconsideration is DENIED.

AND, IT IS SO ORDERED.

Clifton Newman
Presiding Judge

February 13, 2013
Walterboro, SC

FILED
BAMBERG COUNTY
2013 FEB 15 AM 10:15
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS

CLAUDE MCALHANY)
Plaintiff(s))

2011-CP-05-

vs.

CIVIL ACTION COVERSHEET

KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. d/b/a CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC. and ERICK COGBURN,
Defendant(s)

(Please Print)
Submitted By: William F. Barnes, III
Address: Post Office Box 457
101 Mulberry Street, East
Hampton, SC 29924

SC Bar #: 78220
Telephone #: (803) 943-2111
Fax #: (803) 914-2014
Other:
E-mail: wbarnes@pmped.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filed out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20___-CP-____-_____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☒ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
	_____	☐ Other (399) _____	☐ Other (499) _____

Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899) _____	☐ Worker's Comp (960)
			☐ Zoning Board (970)
	☐ Other (799) _____		☐ Public Service Commission (990)
			☐ Employment Security Comm (991)

Special/Complex /Other	
☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of State Depositions (650)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)
_____	☐ Sexual Predator (510)

☐ Other (999)

Submitting Party Signature: Wil. Barn **Date:** 4/7/2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO.: 2011-CP-05-_____
CLAUDE MCALHANY,	)	
	)	
Plaintiff,	)	
	)	**SUMMONS**
v.	)	*(Jury Trial Demanded)*
	)	
KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. d/b/a CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC. and ERICK COGBURN,	)	
Defendants.	)	

FILED
BAMBERG COUNTY
2011 APR 11 AM 10:13
CLERK OF COURT

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at PETERS, MURDAUGH, PARKER, ELTZROTH, & DETRICK, PA, Post Office Box 457, 101 Mulberry St. East, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____

R. Alexander Murdaugh
William F. Barnes, III
Post Office Box 457
101 Mulberry Street East
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

April 7, 2011
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO.: 2011-CP-05-____
	)	
CLAUDE MCALHANY,	)	
	)	
Plaintiff,	)	
	)	**COMPLAINT**
v.	)	*(Jury Trial Demanded)*
	)	
KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. d/b/a CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC. and ERICK COGBURN,,	)	
Defendants.	)	

FILED
2011 SEP 11 AM 10:
CLERK OF COURT
BAMBERG, SC

The Plaintiff alleges:

1. Plaintiff, Claude McAlhany, is a citizen and resident of Bamberg County, South Carolina and at all times mentioned below was the owner of the home located at 3633 Faust Street ("Home") in Bamberg, South Carolina, which is the subject of this action.

2. Defendant, Kenneth A. Carter, Sr., is, upon information and belief, a citizen and resident of Bamberg County, South Carolina.

3. Defendant, Kenneth A. Carter, Sr. d/b/a Carter and Son Pest Control ("Carter and Son Pest Control") is upon information and belief a South Carolina based sole proprietorship owned and operated by Defendant Carter.

4. Defendant Carter and Son Pest Control, Inc. is upon information and belief a domestic corporation organized and existing under the laws of the State of South Carolina, which owns property, maintains an office and agent, and regularly transacts business in Bamberg County, South Carolina.

5. At all times hereinafter mentioned Kenneth A. Carter, Sr. was an agent, servant and employee acting in the course and scope of his employment with Carter & Son Pest Control and his conduct is thereby imputed to the defendant, Carter & Son Pest Control.

WFB

6. Defendant, Erick Cogburn ("Cogburn"), is upon information and belief a citizen and resident of Bamberg County, South Carolina, and sold the home located at 3633 Faust Street in Bamberg, South Carolina to Plaintiff.

7. Defendant Cogburn purchased the Home in March 2007 from Carolyn and William Ginn.

8. After Defendant Cogburn purchased the Home, he renovated it and later agreed to sell it to the Plaintiff.

9. Carter & Son Pest Control conducted an inspection of the Home on or about October 19, 2007 prior to the real estate closing. Carter & Son Pest Control issued a South Carolina Wood Infestation Report, also known as a CL-100, on October 19, 2007 based on its inspection.

10. The title to real estate for the Home and property was executed by all parties on November 5, 2007 and filed with the Bamberg County Court of Common Pleas on November 6, 2007.

11. On or about August 16, 2009, Plaintiff was painting one of the home's interior walls, when the paint roller penetrated the sheetrock. The hole created in the wall released mold spores in the air which Plaintiff inhaled. Upon further investigation behind the Home's interior walls, Plaintiff discovered an abundance of mold on the studs and insulation.

12. As a result of the discovering the mold throughout the Home, Plaintiff also learned that the South Carolina Wood Infestation Report issued by Carter & Son Pest Control on October 19, 2007, prior to closing on the Home, was not done in accordance with the South Carolina Pesticide Control Act.

FIRST CAUSE OF ACTION
(Negligence as to Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control)

13. The above allegations are incorporated as if rewritten.

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14. The damages to the Home and injuries sustained by McAlhany were due to and proximately caused by the negligent, careless, and reckless conduct of the defendants in the following particulars:

a. In failing to conduct a reasonable inspection of the Home's premises;

b. In failing to act as a reasonably prudent company would act under the same or similar circumstances;

c. In failing to use the degree of care and skill which a reasonably prudent company would have exercised under the same or similar circumstances;

d. In failing to satisfy the applicable provisions of the SC Pesticide Control Act;

e. In such other particulars as the evidence may establish.

15. As a direct and proximate result of the aforementioned omissions, the Plaintiff suffered damages to his Home, including severe and permanent injuries to his lungs and respiratory system from which he has suffered and will continue to suffer physical pain, has expended and will in the future expend monies for the repair and renovation of the Home, has suffered lost wages, and caused to lose the enjoyment of life.

16. By reason of and in consequence of the aforesaid negligence, carelessness, recklessness, willfulness, wantonness and grossly negligent conduct of the defendant, the Plaintiff suffered the injuries and losses complained of for which Kenneth A. Carter, Sr., d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. are liable.

SECOND CAUSE OF ACTION
(Negligent Misrepresentation as to Cogburn)

17. The above allegations are incorporated as if rewritten.

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3

18. Defendant Cogburn falsely represented the condition of the Home, including its propensity for water seepage, when discussing the Home's condition with Plaintiff.

19. Defendant Cogburn had a pecuniary interest in failing to disclose the Home's condition since he stood to profit by selling the Home at an inflated price, given this condition.

20. In discussing the Home's condition and attempting to sell the Home to Plaintiff, Defendant Cogburn owed Plaintiff a duty to disclose latent, or hidden defects which Plaintiff was not aware.

21. By failing to accurately disclose the Home's condition to Plaintiff, Defendant Cogburn breached this duty.

22. Plaintiff justifiably relied on Defendant Cogburn's representations as to the Home's condition since the Plaintiff was unaware of any latent defects.

23. As a result of Defendant Cogburn's breach, Plaintiff has incurred expenses for alternate housing, loss use of the Home, incurred medical expenses, and other actual and pecuniary damages for which Defendant Cogburn is liable.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, attorneys' fees, and for such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE TO FOLLOW]

WFB
4

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____

R. Alexander Murdaugh
William F. Barnes, III
Post Office Box 457
101 Mulberry Street East
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

April 7, 2011

Hampton, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BAMBERG)	CIVIL ACTION NO.: 2011-CP-05-65
CLAUDE McALHANY,)	
)	
PLAINTIFF,)	
)	ANSWER
v.)	(Defendant Erick Cogburn)
)	
KENNETH A. CARTER, SR.,)	
KENNETH A. CARTER, SR. d/b/a)	
CARTER & SON PEST CONTROL,)	
CARTER & SON PEST CONTROL,)	
INC., and ERICK COGBURN,)	
)	
DEFENDANTS.)	
)	

Defendant ERICK COGBURN, in response to the Complaint in this action, answers and alleges as follows:

FOR A FIRST DEFENSE
(Responding Specifically to the Allegations of the Complaint)

1. Any allegation of the Complaint not hereinafter expressly admitted, modified, or explained is hereby denied.

2. Defendant lacks sufficient information upon which to form a belief as the allegations of Paragraphs 1-5, and demands strict proof thereof.

3. Defendant admits the allegations of Paragraphs 6 through 8.

4. Defendant lacks sufficient information upon which to form a belief as to all allegations regarding the issuance of a CL-100, and demands strict proof thereof. All other allegations of Paragraph 9 are admitted.

5. Defendant lacks sufficient information upon which to form a belief as to the allegations of Paragraphs 10-12 of the Complaint, and demands strict proof thereof.

6. Paragraphs 13 through 16 do not involve any allegations regarding this Defendant, and therefore no response is required. To the extent that a response is required, these allegations are denied, and strict proof demanded thereof.

7. Defendant denies the allegations of Paragraphs 18-19, and demands strict proof thereof.

8. Defendant expressly denies the allegations of Paragraph 20, and craves reference to the laws of South Carolina, which would impose such a duty on Defendant.

9. Defendant denies the allegations of Paragraph 21, and demands strict proof thereof.

10. Defendant lacks sufficient information upon which to form a belief as to the allegations of Paragraphs 22-23, and therefore denies these allegations and demands strict proof thereof.

FOR A SECOND DEFENSE
(Statute of Limitations)

11. Defendant realleges and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

12. Upon information and belief, Defendant conveyed the property at issue to Plaintiff in November of 2007.

13. Upon information and belief, Plaintiff is time barred from bringing this action under South Carolina law.

14. Defendant is entitled to a dismissal with prejudice, as Plaintiff's action is untimely, and not permitted under applicable South Carolina law.

FOR A THIRD DEFENSE
(Full Disclosure of Known Defects)

15. Defendant reallages and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

16. Upon information and belief, Defendant disclosed all information regarding the property known to Defendant at the time of sale to Plaintiff purchaser.

17. Upon information and belief, Defendant had no knowledge of any latent defects comparable to those alleged within the complaint.

18. As Defendant disclosed all information regarding the property at the time of sale, Defendant is entitled to dismissal with prejudice.

FOR A FOURTH DEFENSE
(No Duty to Disclose Non-Discoverable Latent Defects)

19. Defendant realleges and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

20. Upon information and belief, Defendant had no duty to disclose those undiscoverable latent defects of which Defendant did not have knowledge or constructive knowledge.

21. Upon information and belief, those defects alleged within the Complaint as the basis for compensation were undiscoverable latent defects of which Defendant did not have knowledge or constructive knowledge.

22. Defendant had no duty to Plaintiff to disclose such defects, and cannot be liable for such non-disclosure of unknown, undiscoverable defects. Therefore, Defendant is entitled to a dismissal with prejudice.

FOR A FIFTH DEFENSE
(Comparative Negligence)

23. Defendant realleges and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

24. Upon information and belief, Plaintiff had a duty to inspect the property, which he intended to purchase.

25. Upon information and belief, Defendant afforded Plaintiff every opportunity to inspect the property, even allowing Plaintiff to reside in the property prior to purchase.

26. Upon information and belief, Plaintiff did conduct himself, or solicit the assistance of others to perform, certain inspections on the property prior to purchase.

27. Upon information and belief, Plaintiff's own inspections failed to disclose the undiscoverable latent defects at issue in this action.

28. Upon information and belief, Plaintiff had full knowledge of the condition of the subject property, having had the opportunity and duty to conduct certain inspections upon the real estate.

29. Plaintiff or his agents failed to discover the latent defects which are the grounds for this action, and therefore Plaintiff's own negligence, or that of his agents is a proximate cause of Plaintiff's injury.

30. As Plaintiff's own negligence or the negligence of his agents is at least as great as any negligence on the part of this Defendant, who expressly denies any negligence, Defendant is entitled to an order of dismissal, with prejudice.

FOR A SIXTH DEFENSE
(Sole Negligence)

31. Defendant realleges and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

32. Upon information and belief, any failure to uncover latent defects in the subject property was the result of Plaintiff's own negligence alone.

33. As Plaintiff is solely responsible for any failures to uncover latent defects, this Defendant is entitled to dismissal, with prejudice.

FOR A SEVENTH DEFENSE
(Negligence of Others)

34. Defendant realleges and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

35. Upon information and belief, Plaintiff retained outside parties to conduct investigation and inspection of the subject property prior to the date of sale.

36. Upon information and belief, these parties, including all other Defendants named herein, had a duty to uncover latent defects and disclose those defects, if any, to Plaintiff prior to sale.

37. Upon information and belief, other named Defendants, and/or other unnamed inspectors, breached their duty to properly inspect the property and uncover and disclose latent defects in the real estate, which is the subject of this action.

38. Upon information and belief, that breach is the proximate cause of Plaintiff's injury, if any.

39. As the negligence of others is the proximate cause of Plaintiff's injury, if any, this Defendant is entitled to a dismissal with prejudice.

FOR AN EIGHTH DEFENSE
(Spoliation of Evidence)

40. Defendant realleges and incorporates by reference all preceding paragraphs as if repeated verbatim herein.

41. Upon information and belief, the latent defects alleged by Plaintiff were not present at the date of sale.

42. Upon information and belief, the latent defects alleged by Plaintiff have been remedied through professional or layman's repairs to the property, as Plaintiff has ripped out, altered, modified, or repaired the structure.

43. Upon information and belief, any evidence of the existence of the latent defects alleged within the complaint has been destroyed.

44. Upon information and belief, Plaintiff cannot prove that the latent defects arose before or after the date of the sale, and as the evidence of such defects has been destroyed, no analysis of the defects can be performed by either party.

45. Upon information and belief, Plaintiff has allowed or encouraged the spoliation of the only probative evidence available to determine the approximate date of the manifestation of the latent defect, as alleged.

46. As the evidence necessary to determine this critical portion of Plaintiff's claim no longer exists, Defendant is entitled to a dismissal with prejudice.

WHEREFORE, Defendant, having fully answered Plaintiff's allegations, requests this Court dismiss all of Plaintiff's causes of action, with prejudice, and award Defendant such other and further relief as this Court deems just and equitable.

Respectfully Submitted,

Richard B. Ness
Ness & Jett, LLC
P.O. Box 909
Bamberg, South Carolina 29003
(803) 245-5178
Fax: (803) 245-5384
ATTORNEY FOR ERICK COGBURN

Bamberg, South Carolina
June 17, 2011
Z://Public:COGBURN, ERICK:Answer, Erick Cogburn.doc

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BAMBERG)	CIVIL ACTION NO.: 2011-CP-05-65
)	
Claude Mcalhany,)	
)	
Plaintiff,)	
)	ANSWER
vs.)	
)	
Kenneth A. Carter, Sr.,)	
Kenneth A. Carter, Sr. d/b/a Carter)	
& Son Pest Control, Carter & Son)	
Pest Control, Inc. And Erick)	
Cogburn,)	
Defendants.)	

Defendants, Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., (hereinafter "Defendants"), hereby answer the allegations of the Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified or explained.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph one (1) of the Plaintiff's complaint and demands strict proof thereof.

3. Upon information and belief, Defendants admit the allegations contained in paragraphs two (2) through five (5) of the Plaintiff's complaint.

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs six (6), seven (7) and eight (8) of the Plaintiff's complaint and demands strict proof thereof.

5. Defendants admit the allegations contained in paragraph nine (9) of the Plaintiff's complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs ten (10), eleven (11) and twelve (12) of the Plaintiff's complaint and demands strict proof thereof.

7. In response to paragraph thirteen (13) of Plaintiff's complaint, Defendants repeat each and every answer to the previous paragraphs as if repeated verbatim herein.

8. Defendants deny the allegations contained in paragraphs fourteen (14), including subparagraphs (a) through (e), fifteen (15) and sixteen (16) of Plaintiff's complaint and demands strict proof thereof.

9. Paragraphs seventeen (17) through twenty-three (23) of Plaintiff's complaint do not pertain to Defendants and, therefore, no response is necessary or required, but if any such allegations could be construed against Defendants, then those allegations are expressly denied and demands strict proof thereof.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION
(12(b)(6) Failure to State Facts Sufficient to Constitute a Cause of Action)

10. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

11. Plaintiff's claims fail to state facts sufficient to constitute causes of action against Defendants regarding negligence or any other cause of action. Therefore, all stated causes of action against Defendants by Plaintiff should be dismissed.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION
(Comparative Negligence)

12. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

13. That by reason of Plaintiff's own negligence, carelessness, recklessness and willfulness, Plaintiff's injuries and damages were due to and proximately caused by such, and combining, contributing and concurring with any negligence, carelessness, recklessness and willfulness on the part of Defendants, if any, which is expressly denied, so as to be a proximate cause of said injuries and damages without which the same would not have occurred. This court should compare the negligence of Plaintiff and if it is greater than the negligence of Defendants, if any, then Plaintiff would be totally barred from recovery and, if it is determined that Plaintiff's negligence is equal to or less than the negligence of Defendants, if any, then the amount of recovery available to Plaintiff should be reduced by the percentage of Plaintiff's own negligence, carelessness, recklessness and willfulness.

FOR A FOURTH DEFENSE TO ALL CAUSES OF ACTION
(Economic Loss Rule)

14. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

15. Defendants pleads the economic loss rule as a complete bar to any recovery against Defendants.

FOR A FIFTH DEFENSE TO ALL CAUSES OF ACTION
(Statute of Limitations)

16. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

17. Plaintiff's claims against Defendants may be barred by all applicable statute of limitations.

18. Defendants reserve the right to affirmatively state that the applicable statute of limitations is a complete bar to recovery if discovery warrants this defense.

FOR A SIXTH DEFENSE TO ALL CAUSES OF ACTION
(Third Party Liability)

19. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

20. The damages alleged, if any, were proximately caused by unforeseeable, independent, intervening and/or superseding acts of third-parties beyond Defendants' control, and unrelated to any actions and conduct of Defendants, by reason of which Defendants is not liable to Plaintiff in any sum whatsoever.

FOR AN SEVENTH DEFENSE TO ALL CAUSES OF ACTION
(Spoliation of Evidence)

21. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

22. Defendants reserves the right to plead spoliation of evidence as a complete defense if the facts as developed through discovery warrant such a defense.

FOR AN EIGHTH DEFENSE TO ALL CAUSES OF ACTION
(Mitigation)

23. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

24. Defendants would show that Plaintiff has failed to mitigate its damages, which is required by law and to the extent it failed to mitigate those damages should be excluded as any damages against Defendants.

FOR A NINTH DEFENSE TO ALL CAUSES OF ACTION
(Waiver, Estoppel & Laches)

25. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

26. Plaintiff's claims are barred by the Doctrine of Waiver, Estoppel and Laches.

FOR A TENTH DEFENSE TO ALL CAUSES OF ACTION
(Acts of Nature)

27. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

28. To the extent the Plaintiff has been damaged, said act of nature is pled as a bar to Plaintiff's claim against Defendants.

FOR AN ELEVENTH DEFENSE TO ALL CAUSES OF ACTION
(Real Party In Interest)

29. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

30. Defendants are not a Real Party In Interest, and therefore, all claims against Defendants should be dismissed with prejudice.

FOR A TWELFTH DEFENSE TO ALL CAUSES OF ACTION
(Unclean Hands)

31. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

32. All claims asserted by Plaintiff are barred by the doctrine of unclean hands as may be shown by the evidence.

FOR A THIRTEENTH DEFENSE TO ALL CAUSES OF ACTION

(Punitive Damages)

33. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

34. That Defendants would show that an award of punitive damages would violate the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that:

a. the judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

c. any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

e. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

f. Plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

Plaintiff's claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 8 of the South Carolina Constitution for the reason that

punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR A FOURTEENTH DEFENSE TO ALL CAUSES OF ACTION
(Reservation of Additional Defenses)

35. The paragraphs in the above defense are incorporated by reference as fully and effectually as if set forth herein verbatim.

36. Defendants reserve the right after discovery to amend, delete or include such defenses as may be appropriate, as discovery will reveal.

WHEREFORE, having fully answered the Plaintiff's complaint, Defendants pray for a trial by jury and that this complaint be dismissed, for reasonable attorneys' fees and costs, and for such other relief as this Honorable Court deems necessary.

Respectfully submitted,

Danielle F. Payne
GRIER, COX & CRANSHAW, LLC
Post Office Box 2823
Columbia, South Carolina 29202
(803) 731-0031 Telephone
(803) 731-4059 Facsimile

ATTORNEYS FOR DEFENDANTS KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. D/B/A CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC.

August 12, 2011
West Columbia, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BAMBERG)	CIVIL ACTION NO.: 2011-CP-05-65
)	
Claude Mcalhany,)	
)	
Plaintiff,)	**DEFENDANTS' KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. D/B/A CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC. MOTION FOR SUMMARY JUDGMENT**
)	
vs.)	
)	
Kenneth A. Carter, Sr.,)	
Kenneth A. Carter, Sr. d/b/a Carter)	
& Son Pest Control, Carter & Son)	
Pest Control, Inc. And Erick)	
Cogburn,)	
Defendants.)	

TO: R. ALEXANDER MURDAUGH, ESQUIRE, WILLIAM BARNES, III, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF AND TO PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for Defendants Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc. (hereinafter "Defendants") will move before the presiding judge of the Second Judicial Circuit at such time and place as the Court may direct, for an Order granting Summary Judgment pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure* on the ground that the statute of limitations bars the Plaintiff's claims and that Defendants are, therefore, entitled to Summary Judgment as a matter of law.

Defendants reserve the right to move for summary judgment on other grounds as discovery is on-going.

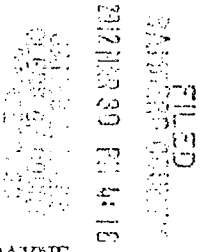
The Defendants' Motion will further be based on the pleadings herein, affidavits, memorandums to be submitted as part of this Motion, rules of court, statutes, the applicable law, and any such other evidence as may be accepted by the Court.

Respectfully Submitted,

Danielle F. Payne
GRIER COX & CRANSHAW, LLC
Post Office Box 2823
Columbia, South Carolina 29202
Tele: (803)731-0030
Fax: (803)731-4059
ATTORNEY FOR DEFENDANTS KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. D/B/A CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC.

January 20 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO.: 2011-CP-05-65
CLAUDE McALHANY,	)	
	)	
PLAINTIFF,	)	
	)	NOTICE OF MOTION AND MOTION
v.	)	FOR SUMMARY JUDGMENT
	)	(ERICK COGBURN)
KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. d/b/a CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC., and ERICK COGBURN,	)	
	)	
DEFENDANTS.	)	



TO: WILLIAM BARNES, ATTORNEY FOR PLAINTIFF and DANIELLE PAYNE, ATTORNEY FOR KENNETH A. CARTER, SR.; KENNETH A. CARTER, SR. d/b/a CARTER & SON PEST CONTROL, and CARTER & SON PEST CONTROL

YOU WILL PLEASE TAKE NOTICE the Defendant Erick Cogburn, hereby moves the Court, pursuant to Rule 56 SCRCP, for an Order of Summary Judgment in this action, on the ground that this action is time barred by the applicable statute of limitation which prohibits this action.

Defendant Erick Cogburn is entitled to an Order of Summary Judgment, and an Order dismissing this case with prejudice. Defendant reserves the right to move for summary judgment on other grounds, as discovery is on-going.

This motion is supported by the deposition testimony of Claude McAlhaney, 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.

Respectfully submitted,

Richard B. Ness
Ness & Jett, LLC
P.O. Box 909
Bamberg, South Carolina 29003
Phone: (803) 245-5178
Fax: (803) 245-5184
Attorney for ERICK COGBURN

Bamberg, South Carolina
March 30, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	CIVIL ACTION NO.: 2011-CP-05-65
CLAUDE MCALHANY,	)	
Plaintiff,	)	
v.	)	*PLAINTIFF'S MOTION TO RECONSIDER PURSUANT TO RULE 59(e)*
KENNETH A. CARTER, SR., KENNETH A. CARTER, SR. D/B/A CARTER & SON PEST CONTROL, CARTER & SON PEST CONTROL, INC. AND ERICK COGBURN,	)	
Defendants.	)	

TO: DANIELLE F. PAYNE, ESQUIRE, ATTORNEY FOR DEFENDANT, KENNETH CARTER SR. AND CARTER & SONS PEST CONTROL, INC. AND RICHARD B. NESS, ESQUIRE, ATTORNEY FOR DEFENDANT, ERICK COGBURN:

PLEASE TAKE NOTICE that the Plaintiff, Claude McAlhany, by and through his undersigned counsel, will move before the Court pursuant to Rule 59(e), SCRCP, to reconsider the Order dated September 11, 2012, granting summary judgment as to Defendants, Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn in the above referenced action. Plaintiff's counsel received notice of the order by email on September 13, 2012[1], and received a copy of the filed order on September 17, 2012.

The basis for this motion is that the evidence before the Court is conflicting as to the date Mr. McAlhany learned of the problems with the home. Given that the evidence is the conflicting, the well-established standard at the summary judgment stage is to weigh the evidence in a light most favorable to the Plaintiff as the non-moving party. Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). By granting summary judgment on the earlier of the two dates, the Court makes a factual determination that views the evidence in a light not most favorable to the Plaintiff.

[1] The Order granting Defendants' Motions for Summary Judgment was not attached to the email.

Respectfully, this holding is incorrect based on the well-established summary judgment standard and should be reconsidered or amended.

The second basis is that under South Carolina law a personal injury action statute of limitation cannot begin to accrue until damage is sustained. In order to file an action for personal injury under a negligence cause of action, all elements must be satisfied – duty, breach, causation, and damages. With one of those elements missing, Plaintiff cannot file an action. The Court's holding that both the property damage claim and personal injury claim accrued on the same date, when Plaintiff did not sustain personal injuries until August 2009, is incorrect and should be reconsidered or amended.

This motion will be supported by a memorandum, affidavits, or other materials prior to the hearing set in this matter.

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

BY: _____

William F. Barnes, III
101 Mulberry Street East
P.O. Box 457
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ATTORNEYS FOR PLAINTIFF

September 20, 2012
Hampton, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BAMBERG)	CIVIL ACTION NO.: 2011-CP-05-65
CLAUDE McALHANY,)	
)	
PLAINTIFF,)	
)	MEMORANDUM OF LAW IN SUPPORT
v.)	OF DEFENDANT ERICK COGBURN'S
)	MOTION FOR SUMMARY JUDGMENT
KENNETH A. CARTER, SR.,)	
KENNETH A. CARTER, SR. d/b/a)	
CARTER & SON PEST CONTROL,)	
CARTER & SON PEST CONTROL,)	
INC., and ERICK COGBURN,)	
)	
DEFENDANTS)	
)	

INTRODUCTION

Defendant Erick Cogburn purchased a property on Faust Street in May 2007. Cogburn hired a licensed professional contractor to make improvements on the home, in anticipation of reselling the home at a profit. Cogburn invested upwards of $35,000.00 in improving the home. (*See Deposition of Eric Cogburn, Page 21, line 15-line 18*). Cogburn hired Defendant Kenneth A. Carter to perform a CL-100 Termite Inspection, which was completed on October 19, 2007. (*See attached, CL-100 Document, identified as Exhibit A*). Pursuant to his inspection, Defendant Carter recommended and completed a preventative termite treatment. On November 6, 2007, Plaintiff purchased the house from Cogburn, and received the transferrable termite bond issued in the Spring. *See Deposition Testimony of Plaintiff, Page 154, line 10 – Page 155, line 1, and Termite Bond, attached as Exhibit B.*

On April 7, 2011, Plaintiff filed this action for damages stemming from moisture and mold within the Faust Street home. Plaintiff claims Defendant Cogburn had

constructive or actual knowledge of the existence of the propensity for moisture seepage in the home, and failed to disclose to Plaintiff the latent defect. *See Complaint, dated April 7, 2012.* On March 30, 2012, Defendant Cogburn filed his motion for Summary Judgment, based on the applicable statute of limitations. Defendant Cogburn bases this motion on the Deposition testimony and South Carolina case law, which divest the Court of jurisdiction to hear causes of action brought outside the three-year window of limitations.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Young v. South Carolina Dep't of Corrections,* 333 S.C. 714, 511 S.E 2d 413 (Ct.App.1999); *see also Bruce v. Durney,* 341 S.C. 563, 534 S.E.2d 720 (Ct.App.2000) (holding a motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law).When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Pye v. Aycock,* 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997).

A Motion for Summary Judgment is the appropriate method for seeking dismissal if the cause of action was brought in violation of §15-3-530, S.C. Code of Laws, as amended (1976). *See The Rev'd Canon Richard P. McDonnell, III, D. Min., Appellant,v. The Consolidated SCHOOL DISTRICT OF AIKEN, a body politic and corporate, Respondent,* 315 S.C. 487, 445 S.E.2d 638 (S.C. 1994). The causes of action set forth in

the Complaint are subject to the three-year statue of limitations contained in S.C. Code Ann. §15-3-530(1), as the action is one for negligence and misrepresentation.

South Carolina follows the "discovery rule" for the triggering of the statute of limitations. Our statute of limitations "requires 'very little to start the clock.'" *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct.App. 1998), citing *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). According to the discovery rule, the statute of limitations begins to run when a cause of action, through the exercise of reasonable diligence, ought to have been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001), *cert. denied*. The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury 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. *See Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999) (emphasis added). The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997).

Instead, the South Carolina Supreme Court has stated: "If, on the date of injury, a plaintiff knows or should know that [s]he had *some claim* against *someone* else, the statute of limitations begins to run for all claims based on that injury." *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (emphasis added). South Carolina law does not require a Plaintiff to identify their potential claims, their

representative, or even the particular Defendants that may share liability. Rather, the clock begins to run when a Plaintiff is on notice of a defect or injury that may give rise to a cause of action.

BACKGROUND INFORMATION

Plaintiff sat for his deposition on January 25, 2012. During his testimony, Plaintiff testified under oath, clearly indicating he was on notice of both the propensity for water seepage in the Faust Street home, the existence of mold within the home, and the defects in the CL-100, transferable termite bond, dated October 19, 2007.

According to Plaintiff, he and his wife moved into the Faust Street property on or around October 15, 2007, at which time they began making improvements to the property including painting and replacing the flooring in the downstairs living room. *See Transcript of Testimony, January 25, 2012, Page 39, line 1- Page 40, line 1.* Plaintiff testified he saw active termites in the driveway and garage area of the Faust Street house immediately following the closing, in which he purchased the house on November 7, 2007. *See Transcript of Testimony, January 25, 2012, Page 75, line 23-Page 76, line 18.* Plaintiff testified he observed black mold under the floor when he removed the flooring installed by Defendant Cogburn's contractors. *See Transcript of Testimony, January 25, 2012, Page 92, line 25-Page 93, line 7.* While Plaintiff did not seek professional help at that time, he did request information about treating mold from a friend in the business. Plaintiff confirmed that this all took place in 2007: Q: And he gave you this in 2007? A: Yeah, yeah. *See Transcript of Testimony, January 25, 2012, Page 93, line 13-Page 94, line 3.*

Plaintiff moved into the Faust Street house two weeks prior to closing. Plaintiff did not demand any formal property inspections and did not hire any home inspector to investigate the property, despite its age. (The home was built in 1965.) Plaintiff had unfettered access to the home for more than two weeks, and did not use this opportunity to inspect the property. *See Transcript of Testimony, January 25, 2012, Page 102, line 12-23.* Plaintiff confirmed that he knew the CL-100 was defective, and that Defendant Carter failed to complete the inspection in the appropriate manner in 2007. Q: So you knew in October of 2007 that Mr. Carter hadn't done his job properly? A: Yeah. *See Transcript of Testimony, Page 108, line 18-20.* Plaintiff described the open and obvious nature of the potential for water seepage, as the tri-level house is partially underground, a fact which is observable with the naked eye. *See Transcript of Testimony, Page 113, line 16-Page 114, line 13.*

Despite these multiple concerns, including active termites, noticeable amounts of black mold in the corners of the floor, warping of the floor, seeking a professional opinion regarding mold, and the open and obvious issues of maintaining a 40+ year old home with a third floor build below ground level, Plaintiff failed to bring a claim for damages within the three-year statute of limitations. Plaintiff filed his action on April 7, 2011. Defendant Cogburn was served on April 26, 2011. Pursuant to Rule 4, SCRCP, the action was not commenced until it was filed and served on Defendant Cogburn. *See Rule 4, SCRCP.*

INQUIRY NOTICE

Plaintiff was, as a matter of law, on inquiry notice of these causes of action on the day he purchased the property, November 6, 2007.

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably *ought* to have been discovered. 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 arose from the alleged wrongful conduct. *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993). The "exercise of reasonable diligence" means that, in this case, 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. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dillon County School 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).

Plaintiff's failure to discover the mold in the wall itself until 2009 is not the relevant inquiry in this case. Rather, the date on which discovery should have been made is an objective, not subjective, question. *See Kreutner 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 has been invaded, or that some claim against another party might exist. *See Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987); *Barr v. City of Rock Hill*, 330 S.C. 640, 644, 500 S.E.2d 157, 159-160 (Ct.App.1998).

In this case, Plaintiff has testified under oath that he observed active termites the day of the closing on the Faust Street property, November 5, 2007. At that moment, Plaintiff was on inquiry notice of a defect in the Faust Street property. As evidenced by the CL-100, termites are usually active in homes with moisture damage or seepage. A person with reasonable diligence would be on notice that the CL-100 termite bond had been breached and additional termite treatment and more thorough inspection was necessary Instead, Plaintiff did not investigate this issue. 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." *See Deposition of Plaintiff, Page 142, line 10 – line 18.*

Later in 2007, Plaintiff began pulling up the floor in the downstairs living room, which is below ground level, and identified a spot of what he concluded was black mold. 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." Q: "And he gave you this in 2007?" A: "Yeah. Yeah." *See Deposition of Plaintiff, Page 93, line 13 – Page 94, line 3.*

These facts, as testified to by Plaintiff, objectively placed Plaintiff on notice of an issue with termites and water seepage. These events all took place in 2007. While Plaintiff may not have grasped the depth of the problem in November 2007, his testimony

regarding the visible termites and the visible mold are direct evidence of his dissatisfaction with the termite and moisture inspection of Defendant Carter, a fact which Plaintiff confirmed in his deposition testimony. Further, while Plaintiff may not have linked Defendant Cogburn to these defects until uncovering the mold, South Carolina law does not wait for a Plaintiff to identify all causes of action and all potential Defendants before starting the three-year clock; only *some claim* against *someone*. *See Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994).

Plaintiff's failure to bring any cause of action for negligence in inspecting the home for termites and moisture damages related to water seepage until April 7, 2011 bars Plaintiff from recovery, and requires the Court to issue its Order of Summary Judgment and dismissal, with prejudice, in this action.

CONCLUSION

For the reasons stated herein, the Court must grant Defendant Cogburn's Motion for Summary Judgment, and dismiss, with prejudice, Plaintiff's claims against Defendnat Cogburn.

Respectfully Submitted,

Richard B. Ness
Ness & Jett, LLC
P.O. Box 909
Bamberg, South Carolina 29003
Phone: (803) 245-5178
Fax: (803) 245-5384
ATTORNEY FOR DEFENDANT COGBURN

_____, 2012
Bamberg, South Carolina
Dropbox:Public:COGBURN, ERICK:memo on SJ

OFFICIAL SOUTH CAROLINA WOOD INFESTATION REPORT

THIS REPORT VALID FOR 45 DAYS ONLY. THIS REPORT MAY NOT BE USED IN A REAL ESTATE CLOSING AFTER 45 DAYS. THIS REPORT IS NO TO BE CONSTRUED AS A GUARANTEE OR WARRANTY AGAINST FUTURE INFESTATION OR DAMAGE. IT IS RECOMMENDED BY TH DEPARTMENT OF PESTICIDE REGULATION, REGULATORY AND PUBLIC SERVICE PROGRAMS, AND THE SOUTH CAROLINA PEST CONTRC ASSOCIATION THAT THE PURCHASER OF THE STRUCTURE, RATHER THAN THE SELLER, OBTAIN THIS WOOD INFESTATION REPORT.

Date October 19, 2007 File No. Cogburn/McAlhaney-07

This is to report that a qualified inspector employed by the below named firm has carefully inspected readily accessible areas, including attics and craw spaces which permit entry, of the property located at the below address for termites, other wood-destroying insects, and fungi. The inspection for fungi and fung damage commonly called water damaged wood, rot or decay is limited to the area below the first main floor of the structure as defined by DPTPN-196. This repor specifically excludes hidden areas and areas not readily accessible, and the undersigned pest control operator disclaims that he has made any inspection of such hidden areas or of such areas not readily accessible.

The inspection described has been made on the basis of visible evidence, and special attention was given to those accessible areas which experience has shown to be particularly susceptible to attack by wood-destroying insects. Probing and/or sounding of those areas and other visible accessible wood members showing evidence of infestation was performed. This report is submitted without warranty, guarantee, or representation as to concealed evidence of infestation or damage or as to future infestation.

If there is evidence of active infestation or past infestation of termites and/or other wood destroying insects or fungi, it must be assumed that there is some damage to the building caused by this infestation; however any visible damage to a wood member in accessible areas has been reported. The below-named firm's inspectors are not engineers or builders, and you may wish to call a qualified engineer or expert in the building trade to provide their opinion as to whether there is structural damage to this property.

LOCATION AND DESCRIPTION OF PROPERTY INSPECTED: 3633 Faust St, Bamberg, SC
wood frame on slab

TYPE OF TRANSACTION: FHA VA CONVENTIONAL X LOAN ASSUMPTION CASH SALE

IF ANY OF THE FOLLOWING ITEMS ARE MARKED YES, DESCRIBE ON REVERSE:

	Check Only Appropriate Items YES	
WERE ANY AREAS OF THE PROPERTY OBSTRUCTED OR INACCESSIBLE?	[X]	[ ]
INFESTATION:		
1. There is visible evidence of active: (A) subterranean termites	[ ]	[X]
(B) other wood-destroying insects	[ ]	[X]
2. There is visible evidence of a previous infestation of:		
(A) subterranean termites	[X]	[ ]
(B) other wood-destroying insects	[ ]	[X]
3. There is visible evidence of prior subterranean termite treatment	[X]	[ ]
4. There is evidence below the first main floor of the presence of:		
(A) active wood-destroying fungi (wood moisture content 28% or above)	[ ]	[X]
(B) wood-destroying fungi is present but not active (less than 28% wood moisture content)	[X]	[ ]
5. There is evidence of the presence of excessive moisture conditions below the first main floor (20% or above wood moisture content, standing water, etc.)	[ ]	[ ] NA [ ]
	[ ]	[ ] NA [ ]
DAMAGE: Termite, other wood-destroying insects and fungi (Note: reporting of fungi damage to wood, commonly called water damage, decay or rot, is limited to the area below the first main floor of the structure as defined by DPRPN-198.) At the time of our inspection, there were visibly damaged wooden members (e.g. insect damage to columns, sills, joists, plates, doorjambs, headers, exterior stairs, porches, or fungi damage below the first main floor) ... If the answer is "YES," specify causes and location(s) on back.	[ ]	[ ] NA [ ]
DAMAGE OBSERVED (IF ANY)		[ ] [X]
A. Will be or has been corrected by this company	Check Appropriate Block Below	
B. Will be or has been corrected by another company, see attached contract	[ ]	
C. Will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by a qualified building expert licensed or registered with the S.C. Department of Labor, Licensing, and Regulations, Residential Builder's Commission and that needed repairs be made	[ ]	
D. In our opinion there is insufficient visible damage to recommend repair. (Explanation on the reverse side why repair was not recommended)	[ ]	
TREATMENT		
1. The property described was treated by us for the prevention or control of Subterranean Termites on 3-21-07 (date of treatment)	[ ]	
A waiver has been issued and is attached to this form	[X]	
The present treatment warranty will expire on and may be renewed initially at $150.00 by the owner.	[NA]	
2. The property described has not been treated by us and is not now under contract with our firm	[X]	

SEE OTHER SIDE OF THIS REPORT FOR ADDITIONAL CONDITIONS GOVERNING THIS REPORT.

CL-100 Approved by the South Carolina Pest Control Association, Inc., and the Division of Regulatory and Public Service Programs of Clemson University
Revised 3/99 Supercedes earlier versions. (OVER)

EXHIBIT A

TERMITE WARRANTY

YEAR 1st

CARTER & SON PEST CONTROL
P.O. BOX 1132
BAMBERG, SC 29003-1132
803-245-4747
SC LIC. #CA00010389
BUS LIC. #B0002021

SOLD
MCA/Haney

ISSUE TO: Erik Coatural PO Box 296, Bamberg SC 29003 DATE: 3-21-07
PROPERTY OWNER ADDRESS

In consideration of Sums received and to be received by us for treating and re-inspecting the structure located at 512 Faust St Bamberg SC for the control of Subterranean Termites. We Guarantee, subject to the provisions of the Warranty, to re-inspect annually the structure treated, and apply any necessary additional treatment to such structure at NO EXTRA COST, if re-infestation is found herein during the period that this Warranty remains in force.

TERMS AND CONDITIONS

The initial payment under this Warranty for termite treatment (exoluding repairs) performed by us is $ 900.00, plus an additional payment of $ _____ for repairs, receipt of all which is hereby acknowledged. The initial period of the Warranty shall be one year, commencing on 3-21-07. The date of the initial treatment, and terminating on 3-21-08. In addition to this initial one year period, you may at your sole option, renew this Warranty annually for a period of (4) additional years, by making annual payments of $ 150.00, payable on or before 3-21 of each subsequent year, which is the anniversary date, with the company reserving the right to adjust this annual renewal. If such payments are made without lapse during said additional (4) year period, the period of this Warranty shall be for (5) years from the date of the initial treatment. If annual payment is NOT made on or before said date of any subsequent year, during said additional (4) year period, this Warranty shall terminate and become null and void as of the anniversary date on which such payment is due. This Warranty covers the premise as of the date of initial treatment, and in the event the structure is modified, altered, or otherwise changed after the date of the initial treatment, this Warranty shall terminate unless a prior written agreement shall have been entered into by the owner for the Company to treat and to re-inspect the structure, provide additional treatment if necessary at additional cost to the owner and/or adjust the annual renewal fee.

Wood frame on slab
Description of Property

H A Carter Sr.
Carter and Son Pest Control Authorized Signature

EXHIBIT B

APP 0053

house, put some new cabinet facings on the cabinets, tiled the backsplash in the kitchen and ceramic tiled the countertops in the kitchen.

Went upstairs and made the bathroom larger, going into the second bedroom, taking up the closet space and making a nice, large bathroom, and we put all new bathroom fixtures in it with new ceramic tile flooring.

We put some new windows in the home, hung some new light fixtures, and put a new -- a new door in the front with -- with lights on each side.

Q. On the front?

A. Yes, sir.

Q. How much did you spend on the repairs, approximately?

A. Let's see here. I'd say at least $35,000.

Q. I was writing down as you were going through some of those. Was the new crown molding throughout the house?

A. I don't think we hung new crown molding upstairs. It was on the downstairs only. We hung it to match the hardwood flooring.

Q. So that was only downstairs; is that

correct?

A. Yes, sir.

Q. What about the baseboards?

A. We put new baseboard down, and we painted them white.

Q. Throughout the house?

A. On the downstairs.

Q. You said you put in new flooring?

A. Well, what we did, we put in the floating floor, we call it. It's laminate hardwood floors, and it was honey oak. That was downstairs.

Q. So did you have to take up the floor that was previously there before putting the new one down, or was --

A. My contractor did.

Q. Who was your contractor?

A. Steedley Construction.

Q. I assume it's Mr. Steedley?

A. Yes, sir.

Q. What's Mr. Steedley's first name?

A. Manual.

Q. Had you used Mr. Steedley before?

A. Yes, sir.

Q. And so Mr. Steedley did all the repairs or just some of them?

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CONDENSED

Did you keep the tanning bed in the Faust Street house?

I did.

Is it still there?

No.

Where is it now?

I took it and put it in the storage shed.

Okay. Did y'all continue using the tanning bed after you discovered the mold?

No, I did not.

Okay. Did you understand that you were purchasing the property while it was still under the one-year termite bond from Mr. Carter?

I did.

Were you alerted to the expiration of that one-year bond?

I was not alerted. Actually, Kenny Carter actually told me, he said, "Bubba, you will get a paper in the mail, a brochure, stating when to renew the policy." I got anything.

Was your understanding that the bond ran for one year from the date of issuance?

Well, I mean, I -- no, I did not understand that, no.

Okay. But you did have an opportunity to see the bond itself?

Yeah.

Okay. Did you observe poor drainage in the yard prior to moving in or sometime shortly after moving in?

No.

You've never -- have you ever observed poor drainage in the yard?

No.

Okay. So it's your testimony then there's no drainage issue?

There was no drainage issue, no.

Can you tell me where about in the kitchen the refrigerator was?

The kitchen was right -- I mean, the refrigerator was right there towards where the wood stove is, right sitting next to the cabinets.

Did that share a back wall with the room that you found the mold in?

It did.

Okay. Just making sure about that. Did y'all ever live in a house on North Street owned by Mr. Hughes? By Mr. Hughes, I don't know his first name? Did you ever live on North Street?

No. But I actually did some work for Mr. Hughes on North Street.

What kind of work?

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home.

Q Okay. So if we look back at the mortgage, which was signed on --

A It would be two weeks before that.

Q Okay. I think this is -- you have that? The day is November 5, 2007?

A Yes. So it would have been two weeks prior to that.

Q So the end of October?

A Yeah.

Q Once you moved into the home, what did you do?

A Well, I started doing some work inside the home; you know, some stuff that me and my wife wanted to actually do, painting and stuff.

Q Okay. And where did you paint? Tell me about all of that.

A I painted the living room. I painted some upstairs rooms. I put down -- the floor warped down in the bottom, down there that had the plank flooring or whatever, the lock in tongue-and-groove flooring, hardwood flooring. Replaced that because it warped all up. Water was coming through the insides of the house. That warped up. They used the wrong moisture barrier. So I put a three -- they had a 2 and 1, I put a 3 and 1 moisture barrier. That was the correct moisture barrier, and I put it down. I put down a second floor

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myself. Anyways the floor that --

What kind of floor? Was it wood floor?

It was one of them lock in floatable floors.

Okay.

And anyways, I put that down. It wasn't probably about another eight month -- eight to nine months, then that floor started bowing up. And I said, "You know what? This is ridiculous." Well, come to find out, it was bowing up from the corners like it was before, even with the new moisture barrier on there; the one that's supposed to be on there. But the insurance company did pay because it had a leak on the refrigerator that warped the floor behind the refrigerator. That's the only way they paid, Nationwide paid; and I think they gave me a check for $5,000. So I had to end up putting the money with that and I put down ceramic tile flooring. The flooring that you seen there now? That don't warp. So I put that down because I got tired of putting down flooring. And whenever I was in the process of finishing that last room up, I said, "Well, you know what? I'm going to go ahead and paint the room before I put down the flooring." And when I started painting the room, that's when I found the mold.

Q And about what time -- when was it that you started

sir." He said, "I was over there one day whenever they was doing the work on the house," and it was weird the way he just started talking about it. He said, "I was over there, you know, looking at them do the work on the house." And he said, "They knew that house had mold in it." He said, "Heck, I seen the mold in the house whenever they was doing the work." And I said, "Now, what was your name?" He said, "Mr. Mixon." I said, "Okay." I said, "Well, I have to let the lawyer know about this." He said, "But I was married to Audie Rae Mixon." I said, "Well, Audie Rae was one of the ones that was doing the work." He said, "I know." He said, "But I'm very aware of that house and what kind of damage was in that house whenever they was doing, you know, the remodeling and stuff."

Q Do you have a way to get in contact with him? Or do --

A I don't, but I know where he lives.

Q Where does he live?

A He actually live out on highway -- I think it's highway -- like going towards Branchville. Is that 21 or 78? And he lives probably about, I want to say about four or five miles.

Q Okay. Did you see any live termites between the time that you moved in and the time that you found the mold?

A The day and hour we purchased the house, and I even

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mentioned this to Bo Griffin about it, that's when the house, well, wasn't long ago, got sprayed. When I pulled up under the car garage, you remember that spot I showed right down there at the car garage? I seen live termites right there then, but I said, "You know, maybe it takes a little bit for that stuff to kick in to kill them." I said -- but I end up going -- this is what I did. I end up going to Lowes and I purchased something they call Terminix. It's supposed to be a chemical that kills termites. And anyways, I sprayed them and it killed them. Now, after that, I did not see no more termites there, but, when I was doing the flooring in the house, I took the mold up from around the windows and you know around the doorframe and all that, because I had to cut the bottom off to get the, you know, the slate tile down or whatever. And anyways, when I did that, then I seen what they call beetle post bugs.

And about when was this?

This was -- it was in '09. It was actually -- it was actually right before Krystal [sic] Lenox come there, because she seen them too.

Okay. So other than when you saw the live termites on the carport --

Uh-huh (affirmative).

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Bottom floor in the living room by the fireplace.

Q By the front of the house or by the rear?

A By the front of the house.

Q Okay. That's 9P.

[Whereupon, Defendants' Exhibit No. 9P is marked for identification.]

Q And this is another picture of the same thing.

A Okay.

Q And this is a picture before I actually tore the wall out of the same thing. Water was coming up underneath this wall right here, under this corner in, you know the back corner.

A Okay. We'll mark that as 9Q.

[Whereupon, Defendants' Exhibit No. 9Q is marked for identification.]

Q That's where I actually tore out the old flooring, and you'll see how it's got mold underneath the flooring and stuff right there? That's what that is.

A Well, was this taken at the same time these other photos were taken?

Q Yeah. But that's when I already tore the wall out though. That's before I tore -- that's when I very first tore the old flooring out, that Erick just put in there. The mold was under --

A When you first moved in?

very first moved in there. The first flooring
was in there, when I took it out from it being
because it had the wrong moisture barrier under
that's what was under it, the black mold.
You found mold when you first moved in the house?
Yes. Every first moved in there after I tore out the
first floor.
Okay. Mark that as 9R.
[Whereupon, Defendants' Exhibit No. 9R is marked
for identification.]
And that's just the same thing, but that's nothing.
Same room.
When you found this black mold, what did you do?
What did I do?
Yeah.
I'm going to be honest with you, I didn't know what it
was at first. I cleaned it up, cleaned it up with
bleach and put down the right moisture barrier. I put
the floor right on top of it.
Do you have any training or expertise in mold?
No. 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

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the mold.

Q. He gave you this in 2007?

A. Yeah.

Q. He come out and take a look at it?

A. Yeah, he looked at the house.

MR. BARNES: Object to the form.

Q. Mr. Herman Harvey come and look at what we're looking at in picture 9R?

A. No, Mr. Herman Harvey didn't come; his son-in-law come down. Mr. Herman Harvey's 95 years old, but he actually came to the house when they was doing the remodeling.

Q. Remodeling when? By who?

A. By Erick Cogburn and them was doing remodeling of the home. Mr. Herman, you know -- we -- me and my wife actually helped take care of him.

Q. Okay.

A. And he actually came there when Erick and them was actually doing the work in the home. Now, his son-in-law is a mold specialist.

Q. Okay.

A. And anyways, he came there, he wanted to give me a price on how much it would cost to fix the home.

Q. In 2007 or in 2009?

A. That was in 2009. It sat like that for that many

years.

Q Right. But in 2007, did you call Mr. Harvey's son-in-law; what's his name?

A Oh, goodness. I can't remember his name for nothing. I can't remember his name.

Q Well, did you consult with him about this?

A I spoke to him about it and he said it wasn't nothing to worry about. He said just take you some bleach and clean it up and put down the new flooring. But see we did not know it was all in the walls and all that neither, so.

Q Okay.

MS. PAYNE: I'm going to pass you off now, and this lady's going to ask you some questions. I may have a few follow up. Do you need to take a break?

THE DEPONENT: I'm fine.

MS. HOOD: Let's do take just a five-minute break.

MS. PAYNE: I'm going to see if Mr. Carter's out there.

[Briefly off the record from 12:22 p.m. until 12:37 p.m.]

MS. HOOD: Before I start, I just wanted to put on record that we just received some discovery from Mr. Barnes and we haven't really had an opportunity to thoroughly go over it. So I would like to, at the conclusion of today's testimony, hold the deposition

doing there? Just curious?

A Just curious.

Q Okay. Was Erick in the habit of allowing people to come see the house while they were working on it?

A I don't know that.

Q You don't know? Okay.

A I don't know.

Q You mentioned that you did not have a formal home inspection done apart from the appraisal done by Mr. Howard Cooler; is that correct?

A Uh-huh (affirmative).

Q Did anyone prevent you from doing a home inspection?

A No, they did not.

Q Did anyone tell you that you weren't allowed to do a home inspection?

A No, they did not.

Q During that two weeks that you were in the home on your own, did you inspect the house with your own eyes and your own skills?

A Well, what I can see, yeah, I did inspect. Yeah, I did.

Q Did you look in the ductwork?

A No, I did not.

Q You mentioned that you've never had any problems with termites or water damage at the Henry Street home; is

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is not now under contract with our firm." And you see that that box is checked there? Do you see that? Number 2, under column "Treatment" there? The property described has not been treated by us and is not now under contract with our firm? At the very bottom of the page right there.

A Oh, no, okay.

Q Yeah.

A Yeah, it's got "Yes".

Q So you did not hire Mr. Carter to do any termite treatment at this time based on this report?

A No, I did not because of Faust Street.

Q And when you said because of Faust Street, what do you mean by that?

A Because he didn't do his job right on Faust Street and if I don't trust somebody to do their job on Faust Street, I don't trust them doing nothing else for me.

Q So you knew in October of 2007 that Mr. Carter hadn't done his job properly?

A Yeah.

Q Under the remarks on the second page of that report, Mr. Carter lists a Number 2A, a Number 3, a Number 4B and then he has another remark there. I'm going to read those to you, and please let me know if you're not following where I am. Under the column headed

Okay. That's your opinion?

Yeah, that's my opinion.

Has any professional ever told you that?

The guy that did the inspection on the house as far as the mold's concerned, David Snells.

Okay. That fellow with Executive Restoration?

Yeah, Restoration.

Yes, okay. Did he write that opinion anywhere or he just orally told you?

He might have wrote it, but I know he orally told me.

Okay.

But he might have wrote it, too.

Did Mr. Snells report any water seepage around the windows?

No.

Okay. So the water seepage is from the ground outside up through the floor, is Mr. Snells -- that's what you understood Mr. Snells opinion to be?

Yeah. What he was saying was the insurance company that went -- David Snells saying what happened is, is the way the house is designed, five foot of it is under the ground, the front part of it.

Uh-huh (affirmative).

It's a tri-level house. The front part's under the ground five foot, and whenever it rains, it don't have

...each drain that takes the water out. When it ...the water just seeps right down through the ...and the only thinking stopping it is a cement ...ock wall.

...h-huh (affirmative).

...you know a block can absorb water and water can ...through a cement block. Okay. And if there's no ...ling, it's going to run right on into the house. ...that's what they tried to patch it up with by ...ing polyurethane.

...you observe that there's a wall inside the house ...ve foot under the ground just with the naked eye?

...Oh, yeah. A tri-level house, yeah, you can.

...So you were aware that part of the house was built --

...Oh, yeah.

...kind of into the hill there in the front?

...eah.

MR. BARNES: Object to the form.

...Yeah.

...you mentioned that you were told not to go back into ...the house without a respirator?

...Uh-huh (affirmative).

...Just for my benefit, what's a respirator?

...A respirator is something you put over your face to ...keep you from breathing different stuff; you know,

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getting into your lungs and stuff.

Q Okay. So you were actually putting something on your back to go back into the house?

A I put something over my face to go inside the house.

Q Okay. So by respirator, do you mean a mask?

A A mask. It's like a mask is all it is.

Q It's not pumping oxygen into you or nothing like that?

A No, no, no, no.

Q Okay. You mentioned that DHEC refused to inspect the house after you uncovered the water damage?

A Yes.

Q Do you know who you spoke with at DHEC?

A I cannot remember her name.

Q She came out to the property but didn't go into the house?

A She came to the property and she asked me was it to do with sewage, and I told her yes, it was due to sewage and water, you know, seeping through the walls and she said, "Well, I don't want to get involved in that." She said, "Because if it's water," she said, "I can't get involved, but if it's sewage, then I can get involved." I said, "Well, it is sewage," but she wouldn't get out of the car. She was too scared to get out of the car to come look.

Q Tell me about the sewage problem.

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new windowsills in, and look out and see a big old rotten windowsill, on the shed part of the utility room had termites coming out of it. I mean, there was many different things.

So you -- it's your contention that there were termites and water damage prior to you purchasing the house?

Not water damage. Just like I told Ms. Payne, when I pulled up in the car garage that day --

Okay.

-- they wasn't long ago sprayed for the termites. I seen termites under that car garage, in the utility room, out there on the cement. I didn't know what it was.

Okay.

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 Terminix stuff, and I sprayed it and it killed them.

Okay.

And I didn't see anymore.

Okay. But you dispute Mr. Cooler's findings?

I do.

Okay. Based on your belief --

My belief.

-- that he should have uncovered the propensity for

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EXHIBITS

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

INDEX OF WITNESSES

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EXHIBITS

NO.	DESCRIPTION	ID	EV

(None Offered)

(Whereupon, on July 26, 2012 the following proceedings were held:)

THE COURT: Eric Cogburn moves for summary judgment pursuant to Rule 56. All right. Yes, ma'am?

MRS. PAYNE: I represent Mr. Carter and Carter and Sons.

THE COURT: All right.

MR. NESS: There are two summary judgment motions pending, Your Honor. There is one filed by Carter and Sons and one filed by Cogburn. Essentially, the same summary judgment motion.

THE COURT: All right. Who wants to be first?

MR. NESS: It doesn't make any difference to me. She can go first.

MRS. PAYNE: Okay. Thank you, Your Honor. Danielle Payne. I represent Kenneth Carter and Carter and Sons in the lawsuit brought by Claude McAlhany. Your Honor, this is a -- Mr. McAlhany purchased the property located at 3633 Faust Street here in Bamberg. My client performed the CL-100 at the time of purchase for the mortgage company in October of 2007. Mr. McAlhany closed on the property in November 5 of 2007. We performed the CL-100 October 19, 2007.

Your Honor, I am giving you these dates. I have moved under the statute of limitations for summary

judgment; so I am creating a timeline for Your Honor.

THE COURT: All right. The closing was in November of 2007.

MRS. PAYNE: November 5, 2007 and I the performed the CL-100 October 19, 2007.

THE COURT: Okay.

MRS. PAYNE: Mr. McAlhany testified in his deposition and I have attached the deposition transcript wherein he stated he actually moved in to the property two weeks prior to closing. At the time that he moved into the property he saw live termites. He took it upon himself to treat those termites with a product he purchased from Lowes. A couple of weeks later he was performing work on the property on the first floor.

It's a unique house where when you walk in it's like a landing area. You go up and that's where the bedrooms are. You go down, it is a tri-level and the bottom level is, basically, underground except for the back. It's a unique property where you can walk out the back but in the front it's underground.

THE COURT: All right.

MRS. PAYNE: He was performing work on the bottom portion kind of like a basement-type area where it's next to the ground and he was pulling back the hardwood floor down there because it had warped and he testified in his

deposition that he found molo. Black mold. This was, again, in 2007, November, right around that time that he closed on the property.

He took it upon himself again to perform this work and he actually consulted with a friend of his that does mold remediation or mold work and the guy said, oh, just fix it on your own and he relied upon it. He failed to perform any further investigation. In 2009 which is what the plaintiff alleges when this action occurred he was painting one of the downstairs bedrooms and the roller went through the wall and he discovered more mold.

Our position is that he should have known under the case law as of October of 2007 with respect to the CL-100 performed by my clients and the fact that he saw live termites, that is when the date of his cause of action began to accrue. The case law is clear taking the evidence in the light most favorable to the plaintiff, the non-moving party, that he has a duty to exercise reasonable diligence and, you know, ignorance by a party of a defect is irrelevant in exercising reasonable care under these circumstances.

The test here is an objective test. It's not a subjective test. The statute of limitations under this cause of action is three years and that date began October of 2007 when he first moved into the property when he

testified that he first saw live termites and then subsequently in November of 2007 when he found mold. Furthermore, Mr. McAlhany testified that he knew in October of 2007 that my clients had performed their work improperly. Well, right there he has admitted that he knew that we had not performed our work properly and that he had a cause of action against us then.

This lawsuit was not filed until April of 2011. The statute of limitations had run and expired in October, November of 2010 and at this point he should be barred from continuing on with this lawsuit and that's our position.

THE COURT: All right. Mr. Ness?

MR. NESS: Thank you, Your Honor. I represent Erick Cogburn and we have essentially the same motion. Mr. Cogburn bought this property to rehab it and to then resell it which he did to Mr. McAlhany and I have -- in addition to what Mrs. Payne has said, I have a copy of the Deed from Mr. Cogburn to Mr. McAlhany which was recorded on November 6, 2007 just to set the dates as far as, you know, the documents go and the matters of law of when it was recorded.

I have submitted a memorandum and some case law and some deposition excerpts as well. I think that the key excerpt that interests my client as well as Mrs. Payne's

client is on Page 92 of Mr. McAlhany's deposition. Down at the very bottom of Page 92 it says, When you first moved in -- he says, When I very first moved in the first flooring that was in there when I took it out from being warped because it had the wrong moisture barrier under it, that's what was under it -- the black mold. So you found mold when you first moved in the house? When I very first moved in the house after I tore out the first floor.

So, Your Honor, that's more or less a straight-up admission right then that he first moved in the house -- now, whether that was October 19 as he said one place in his deposition or whether that's the day of the closing, I don't know which one legally the statute starts on, but in either event whether it is October 19, '07 or November 5 or 6 of '07, the statute starts running at either time.

This action was filed according to the stamp on the summons and complaint on April 11, 2011. So, we've got three-and-a-half-plus years from the time he says he discovered mold and termites as well until the time when he brought this action. He goes on further in these documents or at his deposition that he went to Lowes and bought some type of chemical to kill mold. He did all kinds of things as self-remediation right after he moved in and then still waited three and a half years to file the action and under the law of South Carolina it's not

whether you identify the exact cause of action you have. It is just that you identify that you have some type of cause of action and he knew -- positively knew that he had some type of problem that I think he could try to blame on Mr. Cogburn and or Carter Pest Control right when he moved in and whether he had developed his theory of recovery to file an action is not what the issue is.

The law says as long as you have some type of notice here that you should bring an action and I have cited a number of cases in my memorandum and so has Mrs. Payne in her memorandum. You know, the discovery rule -- and he discovered it as of the time he bought the property and I don't think there is any question whether there is clear -- under our law that he was under a duty to file his action if he thought he had a right of recovery within three years of the date that he first discovered a problem with this house and he waited three and a half years.

So, Your Honor, I won't belabor the point, but I think my memorandum with the various cases that I've cited will clearly show that the law is on the side of the defendants under the three-year statute of limitations issue in this case, and, you know, the discovery rule in terms of citing a case you got the *Dean v Ruscon Corporation* case where it says the statute of limitations begins to run when a cause of action through the exercise

of reasonable diligence ought to have been discovered, and the circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or some claim against another party might exist.

Well, going to Lowes to buy some kind of chemical to kill mold ought to tell you that he knew he has a mold issue and then he waits three and a half years. So, we take the position that the statute of limitations has run on this case before it was filed unequivocably. Thank you, Your Honor.

THE COURT: And the three-year statute is based on an action which -- Why is it a three-year statute?

MR. NESS: Because, I mean, it's just the statute is three years from the day he discovered it. He knew ---

THE COURT: For what type of action? Mrs. Payne has the answer.

MRS. PAYNE: Yeah, well, South Carolina Code Annotated 15-3-530(3) and (5) -- he's got two claims. One is for real property damage and one is for personal damage. Both of those are for three years.

THE COURT: 15-3-5 ---

MRS. PAYNE: Thirty, three and five. Sections three and five.

THE COURT: 530 (3) and (5).

MRS. PAYNE: Yes, sir, and I also cite 15-3-535 which addresses 530, Subsection 5, which talks about the person knew or by the exercise of reasonable diligence should have known that he had a cause of action and both of those are cited.

THE COURT: All right. Mr. Barnes?

MR. BARNES: Thank you, Your Honor. I'll address the Carter's Pest Control first. As Mrs. Payne said, this was an inspection that was done back in October of 2007 and Mr. McAlhany in August of 2009 was painting a wall in his home and the paint roller went through the wall and, basically, he discovered a bunch of mold spores and mold came out and he breathed a lot of the mold spores in and had to seek medical treatment for that.

So, we, in essence, have two claims. We have one for the damage to the home and then, also, for his personal injury he sustained from the mold and with the CL-100 that was done -- I'd like to hand up a portion of -- May I approach, Your Honor?

THE COURT: Sure.

MR. BARNES: I would like to direct the Court to Page 45 of Mr. McAlhany's deposition. I think this is instructive as far as when any action may arise and they -- this is Mrs. Payne asking him here down at Line 24, So the first time you discovered mold was in late 2008? He

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

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

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. Mr. McAlhany had no knowledge of those violations of, you know, that it was not done in compliance with the laws of South Carolina at the time of -- that that was done back in October of 2007.

So, we believe that a cause of action for his personal injury and the damage to the home does not begin to run until August of 2009 when he discovers this mold and the extent of it and the violation from the CL100 and as a result the statute runs next month, and, so, we believe that viewing this evidence in a light most favorable to the plaintiff as the non-moving party which is the standard that summary judgment should be denied.

THE COURT: How about the damage at -- around closing time? Or there was no damage at closing time?

MR. BARNES: There was ---

THE COURT: How about that? How about their argument?

MR. BARNES: Your Honor, I would -- You know, I directed the Court earlier to Page 45. Page 48 of Mr. McAlhany's deposition says, So, when you're saying earlier you thought it was late 2008, it actually could have been and probably '09? And Mrs. Payne says, In '09? And I am just trying to get a timeline down. Yeah. I'm not trying to trick you at all. Okay. Yeah.

And, so, we believe based on the evidence that in the deposition testimony that he first discovered this in 2008 and Page 45 of Mr. McAlhany's deposition is the exact question: So the first time you discovered mold was in late '08? And the response on Page 46, line one, is Yeah.

THE COURT: And the earlier dates they're referring to, those are just irrelevant? No evidence to support it? What is your response to those?

MR. BARNES: That may be evidence, Your Honor, but viewing the evidence in the light most favorable to the plaintiff we have evidence that says -- our position is that the statute begins to run on his personal injury claim in August of '09. He does not have an action for that until the damage occurs.

THE COURT: All right.

MR. BARNES: And, so, that's evidence, but taking the evidence and the inferences that can be drawn from that in the light most favorable to the plaintiff, we believe summary judgment should be denied.

THE COURT: So there can be two separate statute of limitations. There can be one for damage to the realty and a separate one for personal injury?

MR. BARNES: Well, our position on that would be that you have the -- it is when the damage occurs.

THE COURT: All right.

MR. BARNES: The damage that occurred here was in 2009 when he discovered this and that is some evidence that can be considered for summary judgment purposes.

THE COURT: All right. What says the defense?

MR. NESS: Your Honor, one of the cases I've cited in

my memorandum is *Dillon County School District v Lewis Sheet Metal* and that case -- we pulled one sentence out of it. It says, The fact that the injured party may not comprehend the full extent of the damage is immaterial. That's the point I was making earlier or at least I was trying to make earlier is that he knew he had mold the day this thing closed and the deal was sealed when he bought the property.

Whether it's mold in the floor or whether it's mold in the wall when he discovers again later on in 2008 or 2009, as the *Dillon* case says is immaterial. He knew there was mold in that house and that's where that duty on him starts to work. He should have known -- he did know at that point in time actual notice that he had mold in that house. Whether it's under the floorboards or whether it is in the wall, it is still mold, and that's where the cause of action arose and there was a number of cases cited here. I am not going to bore you with the cases I've already cited in the memorandum, but I think the case law as a matter of law is absolutely clear that this started -- this statute of limitations, whether you're talking about personal injury or whether you're talking about property damage, under the statute that we told you earlier -- and I actually cited that statute in my memorandum as well. I didn't understand your question

earlier, but under that statute the statute of limitations started running when he discovered it.

THE COURT: I am trying to get Mr. Barnes to answer my question. He didn't never acknowledge anything about any damage from November of 2007 or 2006 -- that first notice was in 2008 or 2009 based on the questions of Mrs. Barnes [sic] and he says, therefore, in the light most favorable to the plaintiff those are the dates the Court should use in ruling on this summary judgment motion. What do you say about that?

MR. NESS: Well, I understand what point he is making, but we're talking about two different discoveries of mold in the house -- the mold under the floorboard when he moved in and then when he was later doing something in the house to another room he said he was painting and he punched through the wall somehow and discovered mold in the wall.

THE COURT: The mold on the floorboard when he first moved in, that's someplace else in the deposition?

MR. NESS: That's on Page 92. I mentioned that earlier. That's part of the excerpts that I've attached to mine. At the bottom of Page 92 and top of 93.

THE COURT: So you mentioned the part most favorable to you and he mentioned the part that excluded what's most favorable to you.

MR. NESS: Well, Your Honor, it is a question of notice. It's not what is more favorable. He wants to say it is later in time. Sure, he can say it's later in time, but the fact of the matter is of the testimony is that he knew it on Page 92 on the day of the closing.

THE COURT: All right. Mrs. Payne?

MRS. PAYNE: Thank you, Your Honor, and just, you know, I don't want to get into the factual details because that's not what the statute of limitations is all about, but what Mr. Barnes is stating with respect to the Clemson University people coming out around 2009 when -- and that's when they found out that the CL-100 was performed incorrectly, I put that in my memorandum because I knew that they're trying to cloud the issue and they have been the whole time.

Defendant's Exhibit B and on the third page it says, Although evidence of a previous infestation was disclosed, the location of that infestation and the accompanying damage was not disclosed. So, what was wrong with the CL-100 has absolutely nothing to do with the causes of action that Mr. McAlhany and the damages that he suffered.

Furthermore, Your Honor, what Mr. Barnes is asking the Court to grab on to is that Mr. McAlhany should -- had no duty when he found that mold to protect himself and his personal injury -- that the exercising reasonable

diligence to find further mold, he didn't have to do that until he actually was painting and found the mold behind the wall and that's when his personal injury claim arises and I think that is directly against what the statute of limitations is for. The statute of limitations is to protect further injury and that's exactly what Mr. McAlhany did not do. He did not exercise reasonable diligence in finding further damage within that three-year period to bring his lawsuit and then he got personal injuries by the exposure of mold which is the same mold that he found in 2007 -- black mold, which is what he says consistently.

On Page 45 when I am questioning him it is about when he was painting that wall. That's when he says I first found the mold when I was painting the sheetrock and it was -- and it exposed -- Sorry. I lost my train of thought there. So, that was in that context of that Page 45 was talking about -- the cause of action that he is talking about in his complaint. It's not until I get into pictures that he's taken that he starts telling me, Oh, yeah, this picture is from 2007 when I found mold under the floor, and he's like, Oh, yeah, I did find mold then and I fixed it myself and I didn't do any further investigation. So, that's when I am eliciting more information from him.

THE COURT: All right.

MRS. PAYNE: The fact about the CL-100, that is to cloud the issue. The issue here is in November and in October of 2007 that's when he discovered this. That's when both causes of action began to run. He has a duty to exercise reasonable diligence and he did not do that.

THE COURT: All right. Mr. Barnes, anything else?

MR. BARNES: Your Honor, just a couple of points. I don't believe any of the pictures -- I could be mistaken -- were from 2007, but I'd like to direct the Court to Pages 40 and 41 of Mr. McAlhany's deposition. I think it's instructive as to when he first discovered and he is talking here about replacing the floor for the first time and that this is in the painting context and he says it was in '07, '08, and in late '08 sometime. I can't tell you what month because I have no idea.

And, so, that's the context that it arises out of, and Page 110 of his deposition the questioning relates to whether Mr. Cogburn disclosed that the property had a tendency to flood and -- do you know in time he told you about that? That's Line 12. And it says, About seven months after I replaced the first floor. And when did you replace the first floor? It was seven months after I purchased the house.

And, so, we believe as I previously stated that the

earliest -- we believe that the cause of action arises to his personal injury claim in August of '09. You can't have a personal injury claim until you have damage. That completes the cause of action and any argument that, oh, he had a duty, well, that's argument, but from the standpoint of when that cause arises would be then and if you use an earlier date it is seven months after November of 2007 which is some time mid-2008 and this action three years from then would be April of 2011 within the three-year timeframe that this action was filed.

THE COURT: Final words by the moving party, the defendant.

MR. NESS: Your Honor, when -- in terms of mitigation of damages in any case, you know, if you don't mitigate your damages the law holds that against you, but in this case when he moved in and knew there was mold we don't know what happened between the day he moved in and the day he punched a hole in the wall a couple of years later and finds mold a second time. Maybe it is a spreading of the same mold, but the point being he was on notice of the mold when he moved in to the house and that's why the statute of limitations started to run on that day and not two years later when he wants to say, well, something worse is wrong with my house because I haven't bothered to tell anybody or sue anybody or get it treated and the

differences in what the plaintiff says about when he put a floor down, essentially, I guess we're calling into question the credibility of the plaintiff whether he was telling the truth about finding it on the day of -- he moved in or a year later or did he find it both times which is what I think happened. If he found it both times, the earlier one is going to have to control because he found it.

THE COURT: And the evidence again clearly establishes that he knew about it in November of 2007 or October -- November of 2007. Tell me those main points again.

MR. NESS: Page 92 and 93 of the deposition -- bottom of 92 and top of 93 he talks about pulling up a floor and finding black mold underneath the floor. Your Honor, I hand up two different photos that have been produced in this case that Mrs. Payne actually handed them to me just now, but they're coming from the deposition testimony. Those are pictures taken in 2007, I believe, and that shows the mold on the floor.

MRS. PAYNE: That's what is referenced on Page 92 and 93. Those are the exhibits.

THE COURT: All right.

MR. NESS: Your Honor, while I don't want to ask the Court to read the whole deposition, we've each submitted

excerpts, but it may be that the Court -- we've submitted some pages and the plaintiff has submitted some pages and I don't want to get the Court confused. Maybe we just ought to hand up the deposition if the Court wants it.

THE COURT: All right.

MR. NESS: That way you won't have bits and pieces of the deposition of Mr. McAlhany. I'll hand up the sealed original.

THE COURT: All right. All right. Well, I'll read the deposition and consider the arguments and the briefs and everything else and I'll rule on the motion.

(End of Transcript of Record.)

A No, I don't.
Q Okay. I don't think that was provided, those notes, but maybe we can get a copy of those later. And I'll just ask you about them and you can tell me what are them; okay?
A Uh-huh (affirmative).
Q Have you spoken with any witnesses or anything in preparation for your testimony today?
A No, ma'am.
Q Okay. Okay. Now let's get started on the deposition.
A Okay.
Q Can you please state your full name for the record?
A My full name is Claude McAlhany, Jr.
Q Okay. And, have you ever been known by any nicknames or anything like that?
A Bubba.
Q Bubba, okay. Is that what your wife calls you?
A A lot of times, yes, she do call me Bubba.
Q Okay. Any other nicknames?
A That's it.
Q Okay. What's your date of birth?
A 4/15/74.
Q And your current address?
A Is 55 Henry Street, Bamberg, South Carolina 29003.
Q How long have you resided at that address?

A Okay.
Q Tell me about how you came to own the home at 3633 Faust Street.
A Me and my wife was actually riding down the road and we actually looked at two homes. And, she wanted the other home and I pitched a fit for the home on Faust Street. Well, we end up buying -- purchased the home from Erick Cogburn; I talked to Erick about it and he wanted $180,000 for it. We talked him down to $120,000. And anyways, he signed the papers and we, you know, let us went ahead and move in the house, and I got with Bo Griffin. I got the loan. I paid Erick. And, I stayed there probably about -- about almost two years, I recon, and that's when I discovered the mold and stuff.
Q Okay. And I'm going to stop you real quick, and we'll get back to talking about when you discovered the mold. But I'm going to show you what I'm going to mark as Defendants' Exhibit 1, which I'm going to use my copy, which is a color copy, I'm sorry. And, I'm going to show you this is a property map.
A Uh-huh (affirmative).
Q Does that accurately depict where the property is located in Bamberg County, to the best of your knowledge?

A It is.
Q Okay.
A It is.
Q And that is for identification purposes.
(Whereupon, Defendants' Exhibit No. 1 is marked for identification.)
Q Okay. And, you mentioned that you entered into a contract with --
A Erick.
Q -- Erick Cogburn. Did he write a letter to Mr. Griffin?
A He did.
(Whereupon, Defendants' Exhibit No. 2 is marked for identification.)
Q Okay. Let me just show you that, marked as Defendants' Exhibit 2. Do you recognize that?
A I do.
Q And what is that -- the purpose of that letter?
A He's just agree -- we all agreed to purchase the -- that me and my wife would purchase the home on 3633 Faust Street for $120,000.
Q Okay. Did you know Mr. Cogburn prior to purchasing the home?
A I did. I had insurance with Nationwide Insurance.
Q Okay. And does he work with Nationwide?

Q -- Mr. Carter?
A Yeah.
Q Okay. I'm going to show you what we'll mark as five, Defendants' 5. Were you there at the time that the CL100 was done?
[Whereupon, Defendants' Exhibit No. 5 is marked for identification.]
A I wasn't.
Q No. Was anyone -- was Bo Griffin there or?
A Unh-unh (negative).
Q No one was there, okay.
A No.
Q I'll show you what we've marked as Defendants' Exhibit 5. Is that a copy of the Wood Infestation Report, the CL100?
A It is.
Q And did you -- and what was the date of that report?
A That was October 19th, '07.
Q Okay. And, did you look this over when --
A I did look it all over.
Q -- when it was done?
A Yeah.
Q Okay. Was there anything that concerned you about the CL100?
A No.

Q Okay. What is your understanding about a CL100 and whether or not it addresses mold or any fungi or anything like that?
A Well, from my knowledge, from what Krystal [sic] Lenox told me, that they supposed to do a moisture test.
Q A what?
A A moisture test.
Q A moisture test.
A Well, in that wall, whenever I cut that sheetrock out, water comes out the wall, water all over the sheetrock, all over the insulation, and it's just dripping down my hands and everything else when I cut the sheetrock out.
Q Okay.
A So, and he -- she asked Kenny, did he do a moisture test and he said, "No," he did not know how to treat the house.
Q Okay. And when you're talking about Kristy, is that her name? Is that what you're saying?
A Yeah, Krystal [sic] Lenox.
Q That's the lady from Clemson --
A -- University.
Q Okay. And she came out after the fact and took a look at what had been done --
A Yeah.
Q -- by Mr. Carter previously?

Q Okay.
A -- to be honest with you.
Q And that's what I want you to do. We're here to find out what you know and what your opinions are.
A Yeah.
Q When is the first time that you talked to Mr. Carter about the Faust Street home?
A That was back, soon as I found the mold; I got Home Federal, Bo Griffin or whatever and Bo Griffin -- because I actually seen some live termites and some kind of beetle post bugs or something coming down that doorframe where I showed you. And that's when I went to Home Federal and Home Federal, Bo called up Kenny Carter --
Q Okay.
A -- and spoke with him about it. And they offered me to come there and re-spray the house for half off.
Q Okay.
A But it was done too late. I mean, they done ate everything they could eat so why spray it?
Q So it hasn't been sprayed since you found the mold?
A No.
Q Okay. Prior to your purchase were you aware that the home was being treated by Carter & Sons?
A I was.

Q Okay. So Mr. Cogburn had talked to you about that?
A He did.
Q Did you then -- did you call Carter & Sons and transfer the treatment plan or what did you do?
A I didn't because I -- well, I did call Carter & Sons, but they said they -- when it was time for it to be treated they will send me a letter in the mail on 3633 Faust Street, at that home, letting me know when it would be time to be treated. I've never received anything from nobody.
Q Did you call them because you hadn't received anything?
A I did call them, and he said that they might've mistake, might have not mailed it out.
Q Okay. And when did you call?
A That was right when all this stuff was going on. It was back in, must have been '08. I want to say '08.
Q And, what was the date that you took -- that you actually moved into the home?
A We actually moved in the home probably two weeks before this date of -- well, the date that we purchased the home. It was actually two weeks before we purchased it, because Bo told me I could go ahead, because I knew I was getting a loan. He said I could go ahead and move in and Erick Cogburn said that's fine. So we lived there two weeks before we even purchased the

home.
Q Okay. So if we look back at the mortgage, which was signed on --
A It would be two weeks before that.
Q Okay. I think this is -- you have that? The day is November 5, 2007?
A Yes. So it would have been two weeks prior to that.
Q So the end of October?
A Yeah.
Q Once you moved into the home, what did you do?
A Well, I started doing some work inside the home; you know, some stuff that me and my wife wanted to actually do, painting and stuff.
Q Okay. And where did you paint? Tell me about all of that.
A I painted the living room. I painted some upstairs rooms. I put down -- the floor warped down in the bottom, down there that had the plank flooring or whatever, the lock in tongue-and-groove flooring, hardwood flooring. Replaced that because it warped all up. Water was coming through the insides of the house. That warped up. They used the wrong moisture barrier. So I put a three -- they had a 2 and 1, I put a 3 and 1 moisture barrier. That was the correct moisture barrier, and I put it down. I put down a second floor

myself. Anyways the floor that --
Q What kind of floor? Was it wood floor?
A It was one of them lock in floatable floors.
Q Okay.
A And anyways, I put that down. It wasn't probably about another eight month -- eight to nine months, then that floor started bowing up. And I said, "You know what? This is ridiculous." Well, come to find out, it was bowing up from the corners like it was before, even with the new moisture barrier on there; the one that's supposed to be on there. But the insurance company did pay because it had a leak on the refrigerator that warped the floor behind the refrigerator. That's the only way they paid, Nationwide paid; and I think they gave me a check for $5,000. So I had to end up putting the money with that and I put down ceramic tile flooring. The flooring that you seen there now? That don't warp. So I put that down because I got tired of putting down flooring. And whenever I was in the process of finishing that last room up, I said, "Well, you know what? I'm going to go ahead and paint the room before I put down the flooring." And when I started painting the room, that's when I found the mold.
Q And about what time -- when was it that you started

painting that room?
A That room was painted -- it was -- it was probably close to -- that was that very -- at the end. That was about, I want to say it was '07/'08, in late '08 sometime. I can't tell you what month because I have no idea.
Q Okay. Did you make any other claims on your Nationwide policy?
A That was it. Just on that one floor.
Q Okay. When was the home built?
A It was built in -- the home was 40-something years old. It was built, what, 19 -- I want to say 1960-something.
Q Okay. Did you have any discussions with Mr. Cogburn about any renovations or repairs or remodeling that he had done while he owned the home?
A I did.
Q And what did he tell you?
A He told me that he did a bunch of different work with the sewage, up in the ceiling for the upstairs. He also stated to me that the house flooded in the past, you know, through the walls. That he correct all that stuff. But it was not correct because that's what warped the floors.
Q And was this prior to your purchase that he told you all of this?

A No, that was after the purchase. That was after the second floor got ruined he told me that.
Q Did you ever see the home flood?
A When I lived there?
Q Yes.
A Yes.
Q Okay. When was the first time it flooded?
A First time was seven months after we moved in. That's when it ruined the first floor.
Q And that's when you made the claim on Nationwide?
A Well, I tried to make a claim on Nationwide, but they wouldn't accept that claim because they said the wrong moisture barrier was used. So Erick and them used the wrong moisture barrier on the floor.
Q Did Erick tell you that he had replaced the floor?
A He did.
Q Okay. Did he do the renovations himself?
A He had another guy. The guy's passed away now. Mr. Manual Steley.
Q Can you spell his last name?
A It's -- I think it's S-T-E-L-E-Y.
Q Okay.
A Steley.
Q Okay. What else did Mr. Cogburn do as a result of the flooding to the home?

A Well, he took some of the sheetrock off the wall and painted the block walls. It's got a block wall behind there. He painted it with polyurethane thinking that was going to seal the block wall. Well, that don't work. After he did that, then they did what they call -- Kenny told me, he said, "Bubba," he said, "I seen Erick do the scab on repair work in that room." Because he said, "I was there spraying the house at the time whenever it was being done," and he seen him doing scab -- what they call scab on repair work.

Q And if you'll explain that.

A In other words, scab on repair work is like if there's a stud in the wall, and it's rotten off here at the bottom, they'll scab another 2x4 into the side, and then go down with it, and nail it down and nail it to the side of the other one. Instead of just replacing the whole stud, that's what you call scab on repair.

Q Okay. And so you found out all of this after the fact?

A After the fact.

Q Was a property disclosure form ever filled out by Mr. Cogburn and given to you?

A [Deponent nods head.]

Q Did you ask for one?

A No, I didn't.

Q Did you ask him if he had done any repairs or if there

were any problems with the home?
A I did -- I did -- I asked him did he do any repairs and he told me what repairs he'd done.
Q Okay.
A And what he'd done was good repairs, don't get me wrong. But the thing is, he didn't do them the correct way. In other words, you don't paint blocks with polyurethane to try to seal water coming from the outside. And you don't do scab on repair work unless if you wanting to rig something up.
Q What -- did you ever discover what the source of the flooding -- how it was flooding the home?
A They said -- what they're saying was --
Q Let me stop you. Who is saying what?
A Nationwide Insurance --
Q Okay.
A -- saying it's a act of God.
Q Did anybody investigate where the water was coming?
A I got a mold specialist and he was investigate -- he does all that kind of stuff, water damage and everything. And where the water was coming from, is -- dirt is build up right beside the wall to start with, it was a bad design. Dirt was built right up beside -- a cement block wall was not sealed and whenever it rained, the water seeps down through the sand and the

dirt, and it just comes right through the block wall, right on into the sheetrock, and right on into the house. So, on all four -- well, three corners, this corner on the front, this corner on the other front and the back corner, when it pours down rain, you can see water just going right on the floor.

Q So it's seeping in through the cement walls, through the sheetrock, directly into your home?

A Into the home.

Q And it's only coming, I'm assuming, correct me if I'm wrong, it's only coming into that bottom floor?

A Yeah.

Q Do you have any water intrusion above?

A No.

Q Okay.

A No.

Q Okay.

MS. PAYNE: [To the Court Reporter:] Do you need to take a break?

THE COURT REPORTER: [Nods heads.]

MS. PAYNE: Okay.

Q Are you okay to continue on?

A Oh, yeah, I'm fine.

Q So the first time that you discovered mold was in late '08?

A Yeah.
Q Is that correct?
A That's correct.
Q Okay. Tell me about how that came about.
A Well, after I just got finished putting down the third floor, I went into that last room where you see the floor wasn't replaced, and I said, "Well, you know what? I'm going to go ahead and paint this before I put down the floor." So that's why I got to cover the floor to keep from getting the paint on it. So I started painting and painting and painting and painting and I got to the last wall. Well, the roller penetrated through the wall, sheetrock wall. I said, "Oh, no," I said, "Something ain't right." So what I did, I took a sheetrock knife and I cut a 12-foot span of sheetrock out. When I did, I wasn't thinking. I let the sheetrock fall. And when it did, the mold spores come my face, eyes, nose, mouth and everywhere else it could go. And when I did that, all I seen was water from all the sheetrock -- all the sheet -- behind the sheetrock. The sheetrock was soaking wet, the insulation was soaking wet, the studs in the wall, some of them has been replaced, what they call scab on repair work, and some of them were so rotten, you can just reach in there and just grab a handful of wood and

this do this right here [demonstrates] and it was just like dust. Like be grabbing a handful of sand and be doing this [demonstrates].

Q So what did you do after you found all this?

A Well, I contacted a mold specialist, paid him $1,700 from North Carolina to come down and do mold samples.

Q And what was the name of that company?

A It was -- great goodness. What in the world was the name of it?

Q You didn't know this was going to be a quiz. Just to the best of your recollection. I have a report here.

A I know his name's David Snells.

Q Is this -- I'll show you what I'm going to mark as 6, Defendants' Exhibit 6, and I think I have a copy here.

[Whereupon, Defendants' Exhibit No. 6 is marked for identification.]

Q And I'm going to give you the color copy.

A Okay. That's fine.

Q Is that the report?

A Executive Restoration, that is.

Q Okay. And what is the name of the company that you hired?

A Executive Restoration.

Q Okay. Is that also Hayes Microbial Consulting?

A Yeah.

Q Okay. And, what was the date of this report?
A The date of the report was 8/24/09.
Q And is that about -- did you hire the mold people or Executive Restoration the same time as when you found it or was there a period of time between there?
A Well, soon as I found it, to be honest with you, soon as I found the mold, I was stunned. What I did, I took a piece of plastic, I put over the doorway and stapled over the doorway so the spores -- because I know once you open that wall up, the mold spores go everywhere, because we didn't have nowhere to stay at the time. And what I did, I put a piece of plastic over it and nailed it from the inside, stapled it from the inside; sealed it up good so the spores could stay in there. But then I started thinking about it. If you run the HVAC, then the spores is going to spread. So we stayed there, I believe, might be -- I want to say right at about three days after the fact and then we moved back into my other home on Henry Street, 55 Henry Street, and that's when I called David Snells in.
Q So, would it have been right around August 24, 2009?
A It would have been, yeah.
Q Okay. So when you were saying earlier that you thought it was late '08, it actually could have been --
A In probably '09.

Q -- in '09. And I'm just trying to get a timeline down.
A Yeah.
Q I'm not trying to trick you at all, okay?
A Yeah.
Q Okay. So Mr. Snell came down?
A Uh-huh (affirmative).
Q Well, the guy who signed it, if you look on Page 2, is Stephen Hayes.
A Okay.
Q Could that be...
A This Hayes Microbial Consulting --
Q Uh-huh (affirmative).
A -- that is -- that is a place that does the samples of the mold.
Q Okay.
A It's a lab.
Q So they were doing the testing for the samples?
A They were doing the testing for Executive Respiration [sic] --
Q I understand.
A -- which was David Snells.
Q I understand. So you hired Executive Restoration who then, in turn, sent the spores to Hayes?
A That's correct.
Q Okay. And what did Mr. Snells do when he came down?

A He did air samples, he did mold samples, he set some kind of equipment up in there to try to suck some of the mold spores out. And, he told us straight up not to go back in the house "period" without a respirator.
Q How long was he in the home?
A He was in the home for probably, him and another fellow actually came, they was in the home for probably about, I want to say about 30 to 45 minutes looking.
Q Okay. Did he issue a report? Did he have a written report that he gave to you?
A He did, but I couldn't tell you where it's at. Yeah, he did issue me a report.
Q Okay. If you will look back through your documents just to see if you have a copy of that report --
A I will.
Q -- and provide it to your attorney?
A I will.
Q Okay. Did he provide an opinion as to how the mold or when the mold first started growing?
A He wouldn't provide me with that information, but he told me this right here, him and the guy at Nationwide, yeah, Nationwide Insurance, the claim adjuster, they got into it on the phone. And the guy at the insurance company said that they was not responsible for no kind of mold damage. And David Snells said, "Well, I can

tell you right now about when this mold took place a lot better than what you could tell me because I'm a mold expert and you not." So they really got into a knockdown drag out over the phone about the situation. But no, I don't know.

Q He can't provide you with a timeline of when the mold first started growing?

A He might would be able to tell me that --

Q Okay.

A -- if I asked him.

Q Okay.

A I will ask him.

Q Do you recall if it's in his report?

A I can't remember. I'm not going to lie to you.

Q No, that's fine.

A I cannot remember.

Q If you don't know something than that's fine to say that.

A I don't know that.

Q So you made another claim on your Nationwide policy to see if they would cover the mold?

A No.

Q No?

A I did not make another claim with Nationwide.

Q Okay.

A Because it states specifically in my policy, "No mold coverage."
Q Okay. So how -- why did Mr. Snells talk to Nationwide?
A Because of the damage up to the other floors, and he was just stating to them, because that insurance guy said, "Well, evidentially you need to hire another mold guy," because evidentially, he don't know what he's talking about or whatever. But it got into a lot of details that really I didn't understand myself what they was getting into about. But he was trying to tell David Snells how to run his business and David Snells been doing this for a long time.
Q Did anyone from Nationwide ever come out during any time -- any -- since the time that you purchased the home until you found the mold and do an inspection?
A One guy did come out when the floor warped. Whenever the floor, you know, got destroyed, the second floor, two different guys come out. And then when I found the mold, another guy come out. And, he said, "You know this water damage is due to an act of God." He said, "We do not cover that." I said, "That's fine." And then, far as the mold concern, he -- I -- next thing I know, I get a letter about a month later saying that my house, they dropped the insurance on it due to having the mold or whatever.

Q Okay. And, I'm going to mark that --
THE COURT REPORTER: Seven.
Q -- 7.
[Whereupon, Defendants' Exhibit No. 7 is marked for identification.]
Q Is this the letter that you received?
A It is.
Q And what's the date of that letter?
A It is August 28th, '09.
Q Okay. So pretty shortly after the report was done by Hayes --
A Uh-huh (affirmative).
Q -- that they issued the letter. And what did Nationwide say in that letter?
A The home is due to -- uninhabitable due to mold.
Q So they dropped the coverage?
A Dropped my coverage.
Q Okay. What did you do after that?
A Well, I was kind of mad because of Erick Cogburn to start with. Because he knew that the mold and stuff was there. He knew all that stuff was there, because I mean, I was told by a few people, but I'm not going to call no names, that they seen the mold in the house when Erick and them was doing the work. Now Erick worked at Nationwide Insurance and I had my insurance

with them for about eight years. And for them to drop my insurance, and I've been a good paying customer, I thought that was, you know, was not right.

Q Was Erick living there when he owned the home?

A No, he did not live there.

Q Did anyone live there?

A I don't know.

Q How long did he own the home?

A He owned the home from -- when he bought the house, he bought from Mr. Ginn; that was the original owner. And, I recon he owned the home for around seven or eight months, maybe a year. Somewhere up in there.

Q Did he hire any subcontractors to come in and do work or did he do all the work?

A He hired a subcontract.

Q That's his --

A And that was Mr. Manual Steley, but he's passed away now.

Q What company did he work for, Mr. Steley?

A He actually owned his own business.

Q Is it still in business?

A No.

Q Did you ever talk to Mr. Steley?

A I didn't -- I -- yeah, I spoke with Mr. Steley over the phone, but he was sick at the time, but I did talk to

go back in it. I mean, we -- we've been moving -- we've moved probably about 15 times because we was very unhappy where we moved at. It was like a disaster to us. I mean we lost everything we had. All my stuff that was in the house, the majority, all of it, got infected with mold spores and everything else, because I do heating and air and I didn't know the duct system, it's supposed to be silver and it was black, because it had so much mold in it. And I mean nothing was good. I mean it had mold spores over everything. So if I'd have moved it from one room to another, from one room to another house, then it would have got it. So I said, "You know what?" I just hauled the stuff off.

Q So you just threw all of your personal belongings away?

A The majority of everything, yeah.

Q Okay. Are you making a claim for your personal belongings in this lawsuit?

A I don't know. I got to talk to William about that.

Q Okay.

A Mr. Barnes, my attorney.

Q When did you decide to get an attorney? And I don't want to know any --

A Uh-huh (affirmative).

Q -- communications you had with Mr. Barnes. But when did you decide that that's the route you were going to

take?
A Well, the day that I went in Nationwide, and I'm going to make this long story short. The day I went in Nationwide, I talked to Erick about the floors and all that. Erick told me -- I said, "Erick," I said, "I talked to Kenny Carter." I said, "Kenny Carter told me this here." He said, "He seen you doing these patchwork in this house. He's seen the windowsill where you can stick your finger through it. He seen you go through that wall and your guys did the scab on repair work." Well Erick Cogburn started pouring down in sweat. He said, "I'll be back in a minute, Bubba." He left me in his office. He went in there and talked to the guy at Nationwide, I can't think of the name. Rick Pinson. He come back, he said, "Bubba, I tell you what I'm going to do." He said, "This is not my fault." He said, "I will write you a check right now for $500 to hire you an attorney to sue Kenny Carter." I said, "Okay," I said, "Number 1 is I don't want your money; Number 2 is," I told him I did not have a lawyer at the time, which I did not have a lawyer at the time, but I was in the process of getting a lawyer.
Q And when is the timeframe of this conversation?
A That was -- that was right after we found the mold and stuff is when I talked to him.

Q So right around August of 2009?
A August -- nine, yeah.
Q Okay. So you went in and said that. And then -- so what happened? What was the result of that conversation?
A Well, he just told me to get an attorney, and that's just what I did.
Q Then why did he say to sue Kenny Carter?
A He said because Kenny Carter was in fault of it, because he didn't do his job right by drilling the holes right.
Q Okay. But Kenny Carter didn't build the home?
A I know.
Q And, he didn't put in the cement blocks?
A Unh-unh (negative). In other words, what one was doing was pointing fingers at one and the other and it was both of them's fault.
Q When did you first talk to Mr. Carter about the problems you were seeing?
A I actually talked to Mr. Carter -- I was in the home. I had a respirator on. I was in the home, and I was getting my guns out of the home, because I didn't want nobody to break into the house at the time to steal my personal -- my -- especially, my guns and stuff, because some of them was my great granddaddy's guns and

stuff. And anyways, Kenny was next door, him and a guy named Brad Bunch, which I know very well. And anyways, they was actually spraying the house right next door to mine. I told Kenny, I said, "Kenny, would you walk over here to my house?" He said, "Yeah." And he walked over there and he looked in that room. He said, "Great goodness, Bubba." He said, "What in the world is all this?" I said, "That's termite damage, rotten wood." And I said, "Look at the hole right here through the windowsill. You can stick your two fingers through the hole." He said, "Well, you know what's said about this." He said, "I remember whenever all this work was being done." He said, "And I remember, that Erick went through with a guy, and you know, they did the scab on repair work." And he said, "I remember that hole being there and they filled it full of caulking." He said, "I will take some of the fault." Because he said, "I did not know how to treat the house like it was supposed to be," Kenny said. He said -- and I'll tell you who else was there. Krystal [sic] Lenox was there at the time when he said this.

Q Is that the lady with Clemson?

A Clemson.

Q Okay.

A And she said -- he said, "I will take some of the fault

but I am not taking all the fault for this." He said, "A lot of this is, you know just as much as Erick's fault as it my fault." And that's when I contact my attorney, which is William Barnes and I let him know everything.

Q Okay. Had you ever dealt with Mr. Barnes before?

A Never.

Q Okay. How about his law firm?

A Never.

Q Okay. Was there a meeting where the lady from Clemson was there with Mr. Carter?

A Yeah, we met at the house.

Q Okay. So he just wasn't next door, he was actually at a meeting with you and the lady from Clemson?

A He was actually at the next door looking at a job and me -- and me and Krystal [sic] Lenox was over there at the house, but he was going to walk over there anyways.

Q Okay.

A And I told him, you know, that we was ready or whatever and he came walking over there.

Q I understand now. So he was treating the house next door?

A Yeah.

Q Okay. What's the general reputation of Carter & Sons in Bamberg?

A I'm going to tell you the truth.
Q I mean, I asked the question.
A I've heard nothing but a bunch of bad stuff about them. I don't want to put down nobody's business, because I don't believe in that, but I've heard a bunch of bad stuff about them.
Q Okay. Have you talked to people about Carter & Sons?
A No. But someone actually told me on the golf course that they had the same problem with their house was supposed to be sprayed and it was ate slap up with termites.
Q All right. Do you remember the date of that meeting with Kristin Lenox?
A Great goodness.
Q I'm just asking. I have the report if that'll --
A No, I don't.
Q Okay.
A I'll be honest with you, I don't.
Q We'll mark this as Defendants' 8.
[Whereupon, Defendants' Exhibit No. 8 is marked for identification.]
[Sotto voce discussion between Ms. Payne and Mr. Hood.]
Q Does that look like the --
A Yes.
Q -- report that you received?

A It is.
Q And what's the date of that report?
A October 9th, 2009.
Q Okay. And what's the date that they -- that the -- Kristin Lenox came out and inspected the home? Does it say on the report?
A [Mumbles while reviewing report.] The 9th of 2009, September.
Q September 9, 2009?
A Yeah.
Q So all of this pretty much happened very quickly?
A It was very -- yeah.
Q Okay. Did you read this report?
A I did.
Q Okay.
A I did.
Q And if you look on the Page 3.
A Okay. [Reviews document.]
Q Does she address the CL100 that was issued?
A Yeah, Wood -- Wood Infestation Report references the structure issued by Carter & Sons Pest Control, March 20th, 2007 and October 19th 2000, Wood Infestation [mumbles while reviewing report]. Yeah.
Q Okay. So, she was saying that the Wood Infestation Report that was issued for -- when you purchased the

home was not in compliance with the section she states here in the report?
A Uh-huh (affirmative).
Q Why -- did she tell you why it was not in compliance?
A She didn't tell me why unless it states it in here.
Q Does it mention in the third paragraph that evidence of previous infestation --
A Infestation --
Q -- was disclosed on the CL100; that the location of that infestation and the accompanying damage was not disclosed?
A Uh-huh (affirmative).
Q Okay. So that was your understanding of what was in violation?
A Yeah.
Q Okay. Does she also state that her inspection had nothing to do with the absence or presence of mold or fungi?
A She did.
Q Okay. Are you aware if a CL100, if it is to address or to discover mold or fungi in the home?
A No, it don't supposed to.
Q Okay.
A But my understanding though is, if you do a moisture test, then if it's got high moisture in there, if

somebody would've to say, "Yeah, Bubba, it's got 80 per cent moisture in that wall," then I'm going to tell you the first thing I would have did. I used to do construction work for Harry Hiott Construction. First thing I would have did, I would have cut the sheetrock out to start with and I would have seen just where the moisture was coming from, and I would have seen the water in the walls and the sheetrock.

Q When did you do construction work with Harry Heights?

A That was -- Harry Hiott --

Q Hiott.

A -- that's been back, probably, close to 18 years ago.

Q Okay. But in her report she does not indicate that we violated, or that Carter & Sons violated the CL100 by not doing a moisture test, does she?

A No.

Q Okay.

A But she did say -- I heard her verbally say -- she asked Kenny. She said that, "Did you do a moisture test?" And Kenny said, "No." And then she kind of told me, she said, "Well, he would have had to come inside to do the moisture test." That's why I didn't understand. He would have had to come inside to do the moisture test in the wall, but yet he was supposed to come inside and drill underneath the cabinets for the

holes for the termites. And that wasn't --
Q But he wasn't supposed to drill the holes at the time of the CL100? He was supposed to do that during the treatment?
A Uh-huh (affirmative).
Q Correct?
A I recon, yeah.
Q Okay. I mean, it's not your understanding that he's going to -- during the CL100 that he's going to drill holes; is that right?
A No, no, no, no, I know that.
MR. BARNES: Object to the form.
Q Okay.
A No. I gotcha.
Q Okay. Let me just ask you, because he objected my question. What is your understanding about when a CL100 is performed on a home with respect to the drilling of holes?
A It's not.
Q Okay.
A It's not.
Q All right. Did you have any subsequent conversations with Mr. Carter after the meeting on September 9th?
A No, I did not.
Q Okay. Did you have anyone come out after the mold was

discovered and do a complete inspection or investigation of all the problems with the home?

A I tried to get DHEC to come out, but they wouldn't get out of the car. They was scared to death. They wouldn't get out of the car. They said, "Well, if it's a sewage problem, then we can get out of the car." Well, if you notice when you went in there, something kind of smells like sewage, don't it, in that room?

Q I tried not --

A Well, you couldn't --

Q -- to smell.

A -- you couldn't -- you couldn't pull DHEC in the house.

Q Okay.

A I don't know why, but they didn't want to come in.

Q So, you didn't hire anyone or ask anyone to come in and do a complete investigation of all the damages to your home?

A No.

Q Okay. Did you hire someone to come out and give you a cost of repair to put the home in the condition that it should have been in when you purchased it?

A Let me -- let me stop. The guy that did the mold, David Snells, he does, you know, remodeling and stuff and he fixes stuff. He did -- he quote me a price, but I cannot remember, on fixing the home up, getting it

back to the standards where it's supposed to be. But he said that they would've had to dig out the whole front yard, put French drains in and have to actually -- the block wall where it's leaking through or whatever, they would have to put bricks there and they would had to do all kind of stuff and put French drains in. He did state that he could've did it, but I cannot tell you what the figure he gave me on it.

Q Okay. Did he do it in written form or just oral form?

A I think he told me oral.

Q Okay.

A I can't really --

Q If you'll just in your records --

A I'll look and see.

Q -- and see if there is something and provide that to Mr. Barnes, okay? I'm just looking through my notes. Give me one second. When we were -- we did a -- earlier this morning we went and inspected your home; isn't that correct?

A That's correct.

Q At that time it was mentioned that a news lady come out.

A Uh-huh (affirmative).

Q Why did a news person come to your home?

A Well, because we wanted everybody in the world to know

when you purchase a home to make sure that you get the -- I forgot the name of the thing -- the inspection like you're supposed to instead of being stuck like how we were stuck.

Q Okay. And was that -- was that on TV or...

A It was on TV.

Q What news channel is that on?

A I think it was WLTX.

Q Do you remember the -- was it -- is that Judi Gatson or is --

A No, it was -- I can't remember that woman's name for nothing.

Q Do you remember when they came out?

A Unh-unh (negative). I want to say it was back in '09. But you can actually go under WLTX and Bamberg couple loses dream home, or whatever, and I think it's got the picture and us actually talking on there.

Q Okay. It's my understanding that you're making some physical injury claims as well?

A Uh-huh (affirmative).

Q Can you tell me about those damages?

A Well, Number 1 is, I got real bad sinuses from all of it; I mean really bad. My eyes itch and burn like crazy. I -- and I -- now this is nasty, but it's the truth, I got sores all over my body: neck, back and my

sides. Never had nothing like that. And on like -- I have bad nosebleeds, real bad nosebleeds. My nose bleeds at least three or four times a week.

Q Okay. And all of this happened --

A After being exposed.

Q -- after the --

A Not only that, I went to the eye doctor and I got it on my report, I don't know if y'all got a report on it, but he said I got some kind of eye disease or something from being exposed to that mold.

Q Okay.

A I know I got a copy of it.

Q Who is your family doctor?

A Dr. Padgett.

Q Okay. And how long have you been seeing him?

A I've been seeing Dr. Padgett now for probably about 10 years.

Q And then, your ENT doctor is who?

A ENT?

Q Your ear, nose and throat doctor.

A Oh, honest with you --

Q Is it Dr. Sterling?

A Yeah, Dr. Sterling.

Q Okay. And, did you have to get any prescriptions as a result of this exposure to mold?

A No, because I'm going to tell you why. Dr. Sterling -- I'm going to be honest with you, I did not have the money to go to the doctor at the time, to Dr. Sterling, to even be seen and that's the God honest truth. So I did not make it to that appointment.
Q Have you seen anyone else other than Dr. Padgett and you wanted to see --
A I've been to the hospital.
Q Okay.
A The Orangeburg County and the Bamberg County Hospital.
Q And what did you go there for?
A For the nosebleeds and headaches and...
Q Did you go to the emergency room?
A Emergency room, yeah.
Q Okay. Did you also see Dr. Padgett for these same...
A Same thing.
Q Okay. So about how much are you claiming in medical damages; do you know?
A I don't know.
Q Okay. Is it more than $250?
A Yeah, it would be a lot more than that.
Q Do you have health insurance?
A None.
Q Okay. How much have you paid out of pocket to date?
A I would have to actually look back. I don't have that

with me. I would have to actually look back.
Q Okay. If you'll just provide that to your attorney and then he'll provide it to me, okay?
A Okay.
Q Are you claiming any lost wages as a result of this incident?
A Yes.
Q Okay. And tell me about that.
A I just wasn't able to work. I'm just not able to work like use to.
Q Okay.
A I mean, I called my wife the other day and, I told her I was driving down the road and I just all of a sudden got so dizzy. I mean, I couldn't even see straight. I went straight to the eye doctor, and that's whenever they told me I had that, some kind of -- some kind of diseass in my -- I got shot in my right eye when I was young with a BB gun. Okay. And I got -- I had five operations on it, but I got a glass lens in it. And I can see out of it, but my left eye, I've been having a bunch of problems, ever since that sheetrock fell, that mold went straight into my eyes, and I've had nothing but problems with it since.
Q Okay. So, how much are you claiming in the way of lost damages -- lost wages?

A I would have to get with the lawyer on that, and I'd have to actually go through all my paperwork and all that.
Q Okay.
A I can't remember all that stuff.
Q And the reason why I'm asking you these questions, it's just important for me to get that information, so that I can prepare my client if we are to --
A Uh-huh (affirmative).
Q -- try to resolve this matter. So if you can --
A Yeah, I'll get all that.
Q -- gather all that information for me --
A I will.
Q -- I would appreciate it. You've also claimed in your discovery responses -- did you take a look at those before or assist your attorney in answering discovery that I sent to him?
A I think --
Q When I mean discovery, I sent him some questions and --
A Yeah.
Q Okay. So you did help him in answering them?
A I believe the majority of the stuff that you -- that he already had was pretty much the answers to all the questions, I believe now --
Q Okay.

from Erick Cogburn?" And I said, "Yes, sir."
Q Now let me stop you. Mr. whose old house?
A Mr. Ginn.
Q Can you spell that for me?
A I think it's G-I-N-N.
Q Okay. All right. Go ahead.
A And anyways, I said, "Yes, sir, I am the one that purchased the house from him. I purchased it from Erick Cogburn." He said, "Well, you know my ex-wife," I can't think of -- she lives right across the Bamberg River on the left-hand side -- Audie Rae Mixon; that's his ex-wife. She is one of the ones that did the -- she's still living. She is one of the ones that did the work in the house with the guy that passed away, Mr. Steley.
Q And what's her name again?
A Her last name's Mixon. Audie Rae Mixon.
Q Audie Rae Mixon. Does she work with a company or just on her own?
A She was actually working for him at the time.
Q Okay. Do you have a contact number for her or --
A Unh-unh (negative).
Q Okay. All right. And, go ahead, I'm sorry.
A And anyways, he told me, he said, "Well, you know," he said, "I want to tell you something." I said, "Yes,

sir." He said, "I was over there one day whenever they was doing the work on the house," and it was weird the way he just started talking about it. He said, "I was over there, you know, looking at them do the work on the house." And he said, "They knew that house had mold in it." He said, "Heck, I seen the mold in the house whenever they was doing the work." And I said, "Now, what was your name?" He said, "Mr. Mixon." I said, "Okay." I said, "Well, I have to let the lawyer know about this." He said, "But I was married to Audie Rae Mixon." I said, "Well, Audie Rae was one of the ones that was doing the work." He said, "I know." He said, "But I'm very aware of that house and what kind of damage was in that house whenever they was doing, you know, the remodeling and stuff."

Q Do you have a way to get in contact with him? Or do --

A I don't, but I know where he lives.

Q Where does he live?

A He actually live out on highway -- I think it's highway -- like going towards Branchville. Is that 21 or 78? And he lives probably about, I want to say about four or five miles.

Q Okay. Did you see any live termites between the time that you moved in and the time that you found the mold?

A The day and hour we purchased the house, and I even

mentioned this to Bo Griffin about it, that's when the house, well, wasn't long ago, got sprayed. When I pulled up under the car garage, you remember that spot I showed right down there at the car garage? I seen live termites right there then, but I said, "You know, maybe it takes a little bit for that stuff to kick in to kill them." I said -- but I end up going -- this is what I did. I end up going to Lowes and I purchased something they call Terminix. It's supposed to be a chemical that kills termites. And anyways, I sprayed them and it killed them. Now, after that, I did not see no more termites there, but, when I was doing the flooring in the house, I took the mold up from around the windows and you know around the doorframe and all that, because I had to cut the bottom off to get the, you know, the slate tile down or whatever. And anyways, when I did that, then I seen what they call beetle post bugs.

Q And about when was this?

A This was -- it was in '09. It was actually -- it was actually right before Krystal [sic] Lenox come there, because she seen them too.

Q Okay. So other than when you saw the live termites on the carport --

A Uh-huh (affirmative).

Q -- and then when you saw the beetle post bugs, did you see any other live termites or any other bugs in between that time period?
A No, I did not see any other ones.
Q Okay. Did you do a physical inspection of the home prior to purchasing it?
A I did walk around the home and I looked, and I mean, once you rig something up to make it look good, it's no way really of telling the truth until later on down the line.
Q Okay. How did the Clemson people come to inspect the property; did you call them?
A I actually called them.
Q And I have some photographs that you provided. I'll mark them just as one exhibit. But if you will just -- because there's a lot of duplicates -- let me get -- let's go off the record for one second.

[Briefly off the record at 12:02 p.m. until 12:04 p.m.]

[Whereupon, Defendants' Exhibit No. 9 is marked for identification.]

MS. PAYNE: While they're looking at that we can go back on the record and I'll ask you follow up questions and we'll talk about the pictures, okay?

Q Mr. McAlhany, you sued Mr. Carter, individually, and you sued Kenny Carter & Sons?

A Uh-huh (affirmative).
Q I want you to tell me why you sued my clients?
A Why I sued yours?
Q Yes.
A Is because they were in fault of not doing their job right. They did not drill the holes right like they were supposed to, the termite, per Krystal [sic] Lenox. I mean, they in fault "period". They didn't --
Q And how did what they failed to do cause the mold damage or the damage that you're claiming from the --
A Well, far as the mold damage, just like Krystal [sic] said, if they would have did a moisture test, they would have found out it was very high moisture in that wall. It was over 80 to 90 percent moisture in that wall; that was one thing. And she asked Kenny that. She asked Kenny did he have a mold -- a mold, whatever you call the little mold thing to where you stick in the wall, a tester or whatever, and he said, "Yeah." She said, "Well, why didn't you test the wall because you know this wall, it was under the ground." I'm not blaming him for all the moisture damage. I'm not. But I feel like that if he would have used a mold. I mean that probe to see how much moisture would have been in that wall, then we probably could have found out a little bit quicker before it rotten everything out.

Q And, do you know if it's required to do a moisture test to issue a CL100?
A Well, she told me that, I mean, that was part of his job, is what Krystal [sic] Lenox told me.
Q Okay. But the -- but we looked at his report -- her report, and it's not in her report; is that right?
A Well, she verbally told me and him sitting right there in that room that she asked him did he do a moisture test on that wall.
Q Okay.
A And he stated this right here, "It was no way of doing it." She said, "Well, why you said there's no way of doing it when all you had to do is walk inside the house and stick the probe in the wall."
Q Okay. Why are you suing Mr. Carter, personally?
A Why I'm suing him personally?
Q Yes.
A I mean for the damages on my house. I mean, from what he's not doing his job, you know, far as drilling the holes. He's supposed to drill them every 12-inches apart and he drilled them every two foot apart, and mold -- I mean, not mold but termites and beetle post bugs and everything else got into my home.
Q But wasn't he acting as Carter & Sons --
A Uh-huh (affirmative).

Q -- when he was doing those things?
A Yeah.
Q Okay. So he wasn't acting on his own coming out to your house and treating your property as Kenny Carter?
A No, no.
Q He was doing it as Carter & Sons?
A Carter & Sons, yeah.
Q Now let's take a look at what's been marked as Defendant's Exhibit 9, and if you'll just -- there's a lot of duplicate of photographs. If you'll just pull out --
A Okay.
Q -- a few to show me the damage and we'll talk about each one.
A Okay. That's the one that's in that room, you know, that had all the mold. See all the mold right there?
Q So that's the bottom room next to the kitchen?
A That's the bottom room next to the kitchen.
Q And that's where you first found the mold?
A That's where I first found the mold. And when that piece of sheetrock fell, that's when I got direct exposed to the mold.
Q Okay.
MR. NESS: And if you would identify those as 9A, B, C --

MS. PAYNE: Sure.

MR. BARNES: -- or some way we can track them when we go over them later?

MS. PAYNE: Sure.

[Whereupon, Defendants' Exhibit No. 9 is remarked to establish 9A for identification.]

Q And we'll do this as 9A; this is the first one --

A Okay.

Q -- in the group. And then, like I said, try not to do duplicate. We'll just do --

A Okay. Okay.

Q Okay?

A That's the same thing, isn't it? Yeah, that's the -- no, that's different one, isn't it, or is that the same thing? Looks different. It's on the same wall, but it just looks different.

Q Oh, that's fine. You can just tell me.

[Whereupon, Defendants' Exhibit No. 9B is marked for identification.]

A I mean --

Q So this is 9A, and then we'll look at 9B, which is what?

A The same thing with the mold on the walls and how the studs is rotten off. And then, you can't see -- if you look close right here, these pictures here, they were

the very first I tooken whenever the -- when the sheetrock came down. If you look at that insulation, that insulation back is soaking sopping wet. It was water beating down it.

Q What was the weather like when you found the mold?

A When I found the mold? It wasn't raining that day --

Q Okay.

A -- at all.

Q Had it rained within the past three days?

A It might have rained within the past week or so --

Q Okay.

A -- I believe.

Q Who took these photographs?

THE DEPONENT: Is these the ones I took or your guy took?

MR. BARNES: I --

Q Well, you can't ask him.

A I think these are the ones that I took.

Q Okay.

A I'm pretty sure these are the ones that I took. Well, anyway --

Q When did you take them?

MS. PAYNE: Thank you.

A Back in '09 when it very first happened. When I found the mold.

Q Okay. What are you showing me there?
A Okay. This is what you call scab on repair work. You see that stud right there?
Q Yes, sir.
A That's a new treated 2x4, okay?
Q Okay.
A That's the old one there at the top. You see that little two short pieces about a foot long?
Q Yes.
A That's scab on repair. What they did, they nailed that one to the old one on both sides, and then nailed the new one at the bottom on both sides. Instead of replacing the whole stud, they figured they go the short way out and scab on repair work.

[Whereupon, Defendants' Exhibit No. 9C is marked for identification.]

Q Okay. So you're looking at 9C to the piece of wood to the far left. Okay. And then, are you looking in the same room?
A That's the same room.
Q Okay.

[Whereupon, Defendants' Exhibit No. 9D is marked for identification.]

A Okay. This is another picture and that's with the mold, with the mold and stuff, and this is the same

thing with the -- that's mold. But that's the insulation that's soaking wet. And right there, it actually had a plywood behind that, and that's the plywood. See the felt paper, the tarpaper? That black is tarpaper. That's rotted and the plywood's rotted.

Q Okay. And that's in the same room?

A That's the same room.

Q Okay. That's 9D.

[Whereupon, Defendants' Exhibit No. 9E is marked for identification.]

A And this is a good picture of the scab on repair. Old 2x4, two treated -- well, three treated 2x4s. See how the 2x4 goes to the bottom. And then they scabbed in on with another 2x4 on both sides with the new one and the old one. And, that's how they did that. And here, same thing here. See the old 2x4 and then they scabbed a new one onto it?

Q Okay.

A And dropped it down to the floor. Now, if you look closely, you see how shimmy that finish is? That's polyurethane on the block wall. They thought by putting polyurethane on the block wall, that would keep the water from coming inside the house.

Q So these are dated -- there's a date stamp --

A '09.

Q July 15th of '09.
A Yeah.
Q So that's most likely --
A Yeah.
Q -- the day that you found it or at least within a few days.
A Yeah, it was.
Q Okay. This is 9E. Okay.

[Whereupon, Defendants' Exhibit No. 9F is marked for identification.]

A Okay. There's more scab on repair work on the left-hand side of that wall. This is the front side, this is the left-hand side. There's more scab on repair. Now, you see that insulation there, right? That's new insulation. That's the pink insulation. You see that yellow insulation? That's the old one. So what they did, they scabbed on from here. They did the work from here to here and stopped. From here all the way across the front of my house is rotten wood.
Q Okay. That's 9F. Okay.

[Whereupon, Defendants' Exhibit No. 9G is marked for identification.]

A And this guy here is actually my wife -- he's actually my wife's first cousin's husband; that's William.
Q Okay.

A He was actually there when I was doing the work. He was actually helping me do the work. But, that's mold there. All that by itself there is mold. But see, as you could tell, as it gets from right here on this away, none of those was actually replaced. Those are the rotten studs on over that away. See the rotten? On the back of each stud, see the rotten stuff there?
Q Okay.
A Now see the polyurethane end right here.
Q Okay.
A So, in other words, it was -- what they was doing, it was leaking in the corners of the walls. But I reckon when it rained real hard, it was coming through on all -- you know, all the way down it, because when I cut that sheetrock all the way out, that sheetrock all the way out, when it came down, water, I mean the water was just beating down the insulation, running down the insulation on it.
Q And what is William's last name?
A Zeigler.
Q Z-E-I or Z-I?
A Z-E-I-G-L-E.
Q No R?
A Yeah, it is R. It is.

[Whereupon, Defendants' Exhibit No. 9H is marked

for identification.]
Q All right. That was 9G. All right.
A Okay.
MS. HOOD: What was that first name? William --
MS. PAYNE: William Zeigler.
THE DEPONENT: William Zeigler.
Q This is in the same room. As soon as you walk in that room, straight ahead where that door was. I don't know if you see me when I grabbed a handful of the wood off the stud. That's rotten wood there. That's felt paper; that's tar paper. Now, you see the discolor in that? That's water that's actually in that insulation.
Q Okay. And that's 9H. All right, and, try, like I said, let's just do representative photographs for --
A I think this might be the same thing. That's --
Q Okay. Well, set that one aside.
[Whereupon, Defendants' Exhibit No. 9I is marked for identification.]
A But there was one. I'm trying to find it. I'm thinking this might be it here. I can't really tell. I believe that's it there. When the wall was up, it had a receptacle on this wall. Well, whoever did the building inspection, the receptacle was behind the sheetrock. When I cut the sheetrock out, there the receptacle was. It was never through the sheetrock

wall. It was behind the sheetrock wall, full of water.
Q Who would have done the building inspection?
A I don't know who Erick and them got to do the building inspector. I don't know who the inspector was at that time up here. I think they --
Q Why would an inspection had to have been done?
A Well, they did remodeling on the house. I don't know how much -- after so much of cost, they got to get a permit or whatever to get it inspected.
Q Right. But you don't know if they -- the work they were doing needed a permit?
A I don't know.
Q Okay.
A I'll be honest with you, I do not.
Q So you don't know if an inspection was ever done by anyone?
A I don't know.
Q Okay.
A I don't know.
Q Okay, this is 9T.

[Whereupon, Defendants' Exhibit No. 9T is marked for identification.]

A Okay.

MS. PAYNE: [To the Court Reporter:] I probably need a few more.

A That's the piece of wood that was off the back sliding glass door that had the termites on it.
Q Okay.
A Not the termites, the beetle post bugs.
Q Okay.
A Okay?
Q Yeah.
A That's the receptacle that was in the wall.
Q We've marked that as 9J. Okay.

[Whereupon, Defendants' Exhibit No. 9K is marked for identification.]

A That's the receptacle. As you can tell there's the sheetrock that was not torn off the bottom. Here's the sheetrock that come off the top, and there's the receptacle, where the receptacle was sitting at, was never cut through the wall.
Q Okay. And we've marked that as 9K.
A And that's a bunch of rotten wood and wet insulation.
Q Okay. And that's in the same room?
A Same room.
Q I'm going to pull that to the side.

[Whereupon, Defendants' Exhibit No. 9L is marked for identification.]

A And this is pretty much the same thing. But see the polyurethane on the bricks and see how they scabbed on

repair work? If you look at -- see the new insulation. That's new insulation. That's the pink insulation. It started from here, went back that away. From here on down was the yellow insulation. That's the one that had the mold on it and all the studs where you could just take your hand and twist the studs around, and take your hand behind it and just do this right here [demonstrates]. It's like dust. Them was rotten.

Q We'll mark that as 9L. Okay.

[Whereupon, Defendants' Exhibit No. 9M is marked for identification.]

A That's black mold.

Q What room is that?

A Same room.

Q Okay. 9M.

A This is in that same room, too. It's just -- that's really nothing. I mean --

Q You can put that one to the side.

[Whereupon, Defendants' Exhibit No. 9N is marked for identification.]

A That's the sliding glass door where you seen that beetle post --

Q Okay.

A -- the beetle post bugs.

Q Okay. We've marked that as 9N. That's outside or

inside --
A That's inside.
Q -- right next to the --
A Sliding glass door.
Q -- sliding glass door?
A Yes, ma'am.
Q Okay.
A This is where I stuck my finger through the wall.
Q And, what room is that in?
A That's in the kitchen. That's where it was filled with caulking.
Q Okay.
A Where Erick Cogburn filled the hole with caulking per Kenny Carter now.
Q We'll mark that as 90.

[Whereupon, Defendants' Exhibit No. 90 is marked for identification.]

A This is the second flooring. The first flooring I tore out, I was putting down a second flooring. It's hard to see it, but right in this corner, right here, you have to look real close, you see that kind of a dark color stuff there? That's actually water.
Q Okay.
A That came under the corner of that --
Q And that's on the bottom floor?

A Bottom floor in the living room by the fireplace.
Q By the front of the house or by the rear?
A By the front of the house.
Q Okay. That's 9P.
[Whereupon, Defendants' Exhibit No. 9P is marked for identification.]
A And this is another picture of the same thing.
Q Okay.
A And this is a picture before I actually tore the wall out of the same thing. Water was coming up underneath this wall right here, under this corner in, you know the back corner.
Q Okay. We'll mark that as 9Q.
[Whereupon, Defendants' Exhibit No. 9Q is marked for identification.]
A That's where I actually tore out the old flooring, and you'll see how it's got mold underneath the flooring and stuff right there? That's what that is.
Q Well, was this taken at the same time these other photos were taken?
A Yeah. But that's when I already tore the wall out though. That's before I tore -- that's when I very first tore the old flooring out, that Erick just put in there. The mold was under --
Q When you first moved in?

A When I very first moved in there. The first flooring that was in there, when I took it out from it being warped because it had the wrong moisture barrier under it, that's what was under it, the black mold.
Q So you found mold when you first moved in the house?
A When I very first moved in there after I tore out the first floor.
Q Okay. Mark that as 9R.

[Whereupon, Defendants' Exhibit No. 9R is marked for identification.]

A And that's just the same thing, but that's nothing. Same room.
Q When you found this black mold, what did you do?
A What did I do?
Q Yeah.
A I'm going to be honest with you, I didn't know what it was at first. I cleaned it up, cleaned it up with bleach and put down the right moisture barrier. I put the floor right on top of it.
Q Do you have any training or expertise in mold?
A No. 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.
Q And he gave you this in 2007?
A Yeah. Yeah.
Q Did he come out and take a look at it?
A Oh, yeah, he looked at the house.
MR. BARNES: Object to the form.
Q Did Mr. Herman Harvey come and look at what we're looking at in picture 9R?
A No, Mr. Herman Harvey didn't come; his son-in-law come down. Mr. Herman Harvey's 95 years old, but he actually came to the house when they was doing the remodeling.
Q Remodeling when? By who?
A By Erick Cogburn and them was doing remodeling of the home. Mr. Herman, you know -- we -- me and my wife actually helped take care of him.
Q Okay.
A And he actually came there when Erick and them was actually doing the work in the home. Now, his son-in-law is a mold specialist.
Q Okay.
A And anyways, he came there, he wanted to give me a price on how much it would cost to fix the home.
Q In 2007 or in 2009?
A That was in 2009. It sat like that for that many

years.
Q Right. But in 2007, did you call Mr. Harvey's son-in-law; what's his name?
A Oh, goodness. I can't remember his name for nothing. I can't remember his name.
Q Well, did you consult with him about this?
A I spoke to him about it and he said it wasn't nothing to worry about. He said just take you some bleach and clean it up and put down the new flooring. But see we did not know it was all in the walls and all that neither, so.
Q Okay.
MS. PAYNE: I'm going to pass you off now, and this lady's going to ask you some questions. I may have a few follow up. Do you need to take a break?
THE DEPONENT: I'm fine.
MS. HOOD: Let's do take just a five-minute break.
MS. PAYNE: I'm going to see if Mr. Carter's out there.
[Briefly off the record from 12:22 p.m. until 12:37 p.m.]
MS. HOOD: Before I start, I just wanted to put on record that we just received some discovery from Mr. Barnes and we haven't really had an opportunity to thoroughly go over it. So I would like to, at the conclusion of today's testimony, hold the deposition

there.
Q Uh-huh (affirmative).
A But I think we lived there probably about -- probably about three days before we closed on the house.
Q Okay. Did y'all have a key?
A We did.
Q When did y'all get a key?
A Erick gave us a key from day one. He had one hit actually out in the laundry room.
Q Okay. Well, when did y'all get that key or when did Erick give y'all permission to start coming into the home?
A As soon as whatever that two weeks.
Q Was that about two weeks before?
A Two weeks, yeah.
Q Okay. So y'all weren't in the property on your own --
A No, no, no.
Q -- until about two weeks prior to closing?
A Yeah, two weeks prior to closing.
Q Okay. Just wanted to make sure I understand that timeline.
A Yeah.
Q Okay. Did y'all observe Erick doing some of these repairs himself?
A No, I did not.

is not now under contract with our firm." And you see that that box is checked there? Do you see that? Number 2, under column "Treatment" there? The property described has not been treated by us and is not now under contract with our firm? At the very bottom of the page right there.

A Oh, no, okay.

Q Yeah.

A Yeah, it's got "Yes".

Q So you did not hire Mr. Carter to do any termite treatment at this time based on this report?

A No, I did not because of Faust Street.

Q And when you said because of Faust Street, what do you mean by that?

A Because he didn't do his job right on Faust Street and if I don't trust somebody to do their job on Faust Street, I don't trust them doing nothing else for me.

Q So you knew in October of 2007 that Mr. Carter hadn't done his job properly?

A Yeah.

Q Under the remarks on the second page of that report, Mr. Carter lists a Number 2A, a Number 3, a Number 4B and then he has another remark there. I'm going to read those to you, and please let me know if you're not following where I am. Under the column headed

"Remarks" about middle of the page.
A Uh-huh (affirmative).
Q Mr. Carter remarks, "There is visible evidence of previous infestation of subterranean termites and other wood-destroying insects."
A Uh-huh (affirmative).
Q Number 3, "There is visible evidence of prior treatment for termites." 4B, "Wood-destroying fungi is present but not active."
A Uh-huh (affirmative).
Q And then the final comment is, "Wood moisture content is 14 to 16 percent."
A Uh-huh (affirmative).
Q Do you have any idea how Mr. Carter could have determined wood-moisture content without doing that moisture test that you mentioned?
A No, I have no idea.
Q Okay. Do you know what a moisture test entails?
A It tells you how much moisture is actually inside of the wood or inside the wall.
Q What does that test look like though? What do you do? If I were going to do a wood-moisture test, what would I do?
A It's a probe you use.
Q Uh-huh (affirmative).

A It's got a reading on it and you just stick it -- it's got a little sharp end on it. You stick into the wood or into whatever you testing and it'll read how much moisture is in it.
Q So it's a simple test?
A It's a simple test.
Q Okay. Okay. You mentioned that Mr. Cogburn disclosed that the property had a tendency to flood or had flooded at some point in the past. You allege he did not disclose that to you prior to the sale?
A No, ma'am, he did not.
Q Do you when about in time he told you about that?
A About seven months after I replaced the first floor.
Q And when did you replace that first floor?
A It was seven months after I purchased the house.
Q Okay. So you purchased --
A We purchased --
Q -- the house in --
A Something '07.
Q -- November of 2007?
A Yeah, and it was about seven months after that.
Q About seven months?
A Yes.
Q [Counts months.] So around June 2008?
A Yeah around June, yeah.

underneath it and bowed it all up.
Q Did it look like that when you bought it?
A No.
Q Okay. So you replaced it on your own. Who paid to have it replaced?
A I actually had that -- I paid to have that one replaced, the first time.
Q Okay. Did you have a subcontractor do that work?
A I did it myself.
Q And you mentioned before that you've worked with Mr. Harry Hiott before?
A Harry Hiott Construction.
Q Do you have any training in doing construction work?
A I did. I've done construction work all my life.
Q Okay. So do you have any formal training or just experience?
A I have experience.
Q Okay. When you replaced that first floor, did you notice water damage? Did you notice water seepage?
A No because at the time it wasn't raining outside and it wasn't wet.
Q So is it your opinion -- am I correct in understanding that you believe the water was seeping in from the rain outside?
A That's what I'm thinking.

Q Okay. That's your opinion?
A Yeah, that's my opinion.
Q Has any professional ever told you that?
A The guy that did the inspection on the house as far as the mold's concerned, David Snells.
Q Okay. That fellow with Executive Restoration?
A Yeah, Restoration.
Q Yes, okay. Did he write that opinion anywhere or he just orally told you?
A He might have wrote it, but I know he orally told me.
Q Okay.
A But he might have wrote it, too.
Q Did Mr. Snells report any water seepage around the windows?
A No.
Q Okay. So the water seepage is from the ground outside up through the floor, is Mr. Snells -- that's what you understood Mr. Snells opinion to be?
A Yeah. What he was saying was the insurance company that went -- David Snells saying what happened is, is the way the house is designed, five foot of it is under the ground, the front part of it.
Q Uh-huh (affirmative).
A It's a tri-level house. The front part's under the ground five foot, and whenever it rains, it don't have

a French drain that takes the water out. When it rains, the water just seeps right down through the soil, and the only thinking stopping it is a cement block wall.

Q Uh-huh (affirmative).

A Well, you know a block can absorb water and water can go through a cement block. Okay. And if there's no ceiling, it's going to run right on into the house. Well, that's what they tried to patch it up with by using polyurethane.

Q Can you observe that there's a wall inside the house five foot under the ground just with the naked eye?

A Oh, yeah. A tri-level house, yeah, you can.

Q So you were aware that part of the house was built --

A Oh, yeah.

Q -- kind of into the hill there in the front?

A Yeah.

MR. BARNES: Object to the form.

A Yeah.

Q You mentioned that you were told not to go back into the house without a respirator?

A Uh-huh (affirmative).

Q Just for my benefit, what's a respirator?

A A respirator is something you put over your face to keep you from breathing different stuff; you know,

getting into your lungs and stuff.
Q Okay. So you were actually putting something on your back to go back into the house?
A I put something over my face to go inside the house.
Q Okay. So by respirator, do you mean a mask?
A A mask. It's like a mask is all it is.
Q It's not pumping oxygen into you or nothing like that?
A No, no, no, no.
Q Okay. You mentioned that DHEC refused to inspect the house after you uncovered the water damage?
A Yes.
Q Do you know who you spoke with at DHEC?
A I cannot remember her name.
Q She came out to the property but didn't go into the house?
A She came to the property and she asked me was it to do with sewage, and I told her yes, it was due to sewage and water, you know, seeping through the walls and she said, "Well, I don't want to get involved in that." She said, "Because if it's water," she said, "I can't get involved, but if it's sewage, then I can get involved." I said, "Well, it is sewage," but she wouldn't get out of the car. She was too scared to get out of the car to come look.
Q Tell me about the sewage problem.

A The sewage problem -- I mean, you -- I don't know about the sewage problem. All I can tell you if you walk inside the house and smell it, you can smell sewage in that one room.
Q Have you ever had a visible sewage leak in the house that you know of?
A Never. Now, they did have problems with the sewage, Erick and them, upstairs. Mr. Manuel Steley had to cut a big old piece of sheetrock out because the sewage was backing up upstairs.
Q How do you know that?
A Because I -- he told me that after the fact, when all this stuff was going on with the flooring. Some of the work that was done.
Q When did Mr. Steley pass away?
A Oh, goodness. I don't know when he passed away. I ain't going to lie to you.
Q Okay. So, you spoke with him prior to his passing --
A It's been in the past -- it's been the past year and a half or so.
Q Okay.
A I just want to say during that time.
Q You mentioned you were on the news in 2009. Can you tell me with any more specificity about what date? Was it spring or summer or fall 2009?

somewhere around 45 years.
A Yeah.
Q Okay. How do you know that -- what evidence do you have that Mr. Ginn did not do those "scabbing" as you call them, improvements on that downstairs wall?
A Because I talked to his son, and his mother, and they told me straight up there was no work done on that house by Mr. Ginn before he sold that house besides some yard work. The work was done by Erick Cogburn.
Q Are you alleging that Erick did that work himself?
A No. Erick didn't do it his self because he don't know how to do carpenter work. The other guy that he hired did the work.
Q Mr. Steley and Ms. Mixon; is that correct?
A Mr. Steley and Ms. Mixon, yeah.
Q Did you hire Executive Restoration to come in and look at the house?
A I did.
Q What did you pay them?
A I paid -- I can't remember if it's $1,500 even or $1,800. They come from North Carolina.
Q Okay. What sort of equipment did they have when they came in?
A They had all kind of stuff. I mean, they had -- they did mold samples, swabs. They had some kind of machine

A Erick Cogburn told me.
Q Okay.
A They did the painting.
Q In the whole house?
A Not the whole house. On the outside of the house and some of the rooms.
Q Did they paint the room that -- the downstairs room that you have not yet completed the floor it? Was that room painted?
A It was already painted, yes.
Q Okay. When you say already painted, are you saying that Mr. Steley and Ms. Mixon painted that room prior to you moving in?
A Yeah. They painted it prior to me moving in. And then, when I moved in, I decided to paint it a different color.
Q Okay.
A That's when I ran across the mold. Okay. The outside of the house, they painted that.
Q Okay.
A And I know for a fact they put new vinyl windows in it. But my question is, with the vinyl window situation, I don't know if you went up there and seen it, but I know --

MS. PAYNE: Payne.

A -- Ms. Payne did. Under the windowsill was rotten. Well, if you're going to stick a brand new vinyl window in a rotten windowsill, what kind of sense do that make? When the water's running under the windowsill right down through the walls and causing a mold problem.

Q So is your testimony that there was water leaking in through the upstairs windows?

A Yes, it was.

[Sotto voce discussion between Ms. Hood and Mr. Ness.]

Q Okay. When was the first time you observed water leaking through the upstairs window?

A Whenever I found the mold downstairs. And when I actually tore the sheetrock out upstairs, up underneath that window --

Q Uh-huh (affirmative).

A - I was watching -- we stayed in there probably about two days after the fact, but I had a piece of plastic over it. I said, "You know," I said, "something ain't right," because I kept hearing something drip, drip, drip. And I pulled the plastic off, and it was raining. It was pouring down rain outside that day, and I seen the water just dripping down the wall right up underneath the window. Straight down the wall, straight downstairs.

Q The two weeks that you were in the house prior to closing --
A Uh-huh (affirmative).
Q -- did it rain?
A It did.
Q Did you notice any leaking during --
A No.
Q -- those two weeks?
A Because I had no idea it was leaking. Like I said, the only time I knew it was ever leaking is when that first floor was destroyed.
Q Uh-huh (affirmative).
A And then when I pulled that floor up, I seen water, how the floor was bowed in different places and had the wrong moisture barrier. And I even told the guys at Lowes this, I seen water in the corners of those rooms, in that living room, in that corner by the fireplace, and the other back corner in there, in that room where I found the mold at, it was water, a puddle of water about that wide, it's on the pictures, about that wide where the water was just sitting there. You could sit there and watch it rain outside, and if I had the floor tore up, and all of it torn out of it and everything, and the moisture barrier pulled up, you could sit there and watch the water just come in. But the insurance

company says, "It's an act of God."
Q Have you had the opportunity to read over that appraisal that Howard Cooler performed prior to your purchasing the Faust Street property?
A I read over some of it. Yeah, I did.
Q Okay. Do you dispute his findings?
A Do I dispute them?
Q Uh-huh (affirmative).
A I dispute a lot of his findings.
Q Okay.
A Because Number one is -- I'll tell you why I dispute it. Number one is, when he come in my little house on 55 Henry Street, he made me get on my hands and knees and put down molding here, a piece of mold to make sure this was -- he was acting as a home inspector, not an appraiser. You need to do this for -- Bo wants you to do this, he want you to put this piece of molding in here, he wants you to pain this corner right here, he wants you to paint this closet here, this, that and everything else, and I did it all. He had to come back two or three different times before they would approve me to get the loan. I had to have the house straight. Okay. Yeah, on 3633 Faust Street, it didn't take a rocket scientist to know that when you sit that paint over rotten wood and you sit there and look out and put

new windowsills in, and look out and see a big old rotten windowsill, on the shed part of the utility room had termites coming out of it. I mean, there was many different things.

Q So you -- it's your contention that there were termites and water damage prior to you purchasing the house?

A Not water damage. Just like I told Ms. Payne, when I pulled up in the car garage that day --

Q Okay.

A -- they wasn't long ago sprayed for the termites. I seen termites under that car garage, in the utility room, out there on the cement. I didn't know what it was.

Q Okay.

A 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 Terminix stuff, and I sprayed it, and it killed them.

Q Okay.

A And I didn't see anymore.

Q Okay. But you dispute Mr. Cooler's findings?

A I do.

Q Okay. Based on your belief --

A My belief.

Q -- that he should have uncovered the propensity for

water seepage?
A Yeah. But see, like -- once again, that don't fall -- he's not an inspector, but he had asked --
Q Did you testify that on the Henry Street property he was acting as an inspector?
A He's acting as an inspector for Home Federal, but he's not an inspector.
Q In a formal sense, he was providing you a home inspection of the Henry Street property?
A He was telling me I need to do this and I need to do that, so I figure he's acting as an inspector. Wouldn't you think that?
Q That's not up to me to think that.
A So, in other words, this is your house and he tells you, well, Home Federal says you need to replace that board here, you need to paint this room here, you need to do this, you need to do that, to me he's not acting as an appraiser, he's acting as an inspector. But he's really an appraiser, he's not an inspector.
Q Do you know any home inspectors around here?
A Not right off hand, I don't.
Q Okay. Sometime in October of 2007 -- I'm sorry, that was the date of sale. When did you have the first flood that you mentioned in the house after -- after the sale, you had a flood.

A After we moved in -- you talking about on Faust Street?
Q On Faust Street, yeah.
A After we moved in, it was about seven months after we moved in is when I had to replace the first floor.
Q Right. But you -- was that due to a flood or was that due to --
A That was due to just regular water.
Q Okay.
A Rain outside is all that was.
Q But you had knowledge that water was coming in?
A Yeah.
Q Okay.
A Come through the walls, corner of the walls.
Q Okay. And then did you actually have a flood, a water -- some sort of pipe burst --
A No, it wasn't no flood that a rush of ocean just come in my house; no, it was never none of that.
Q Did you have standing water for some reason?
A No.
Q Okay.
A It was just rain and the water seeped through the ground and came in.
Q I might have misheard you, but did you testify earlier you had a waterline that broke in the kitchen?
A Well, a leak in the icemaker line?

Q I'm asking you --
A Yeah.
Q -- did you have something like that?
A Yeah, the icemaker line did leak a little bit and it warped one or two piece of the flooring and I told the guy that was fine at the insurance company. He said, "Well, we'll go ahead and pay to go ahead and put a whole new floor down, because it was a discontinued flooring." And I said to myself then, I said, "This will be my third floor putting down." I said, "I will put down ceramic tile this time."
Q Uh-huh (affirmative).
A And that's what I put down.
Q And that was -- and -- the claim from Nationwide?
A That was Nationwide.
Q Okay. When you had that leak, did you hire a company like ServPro or someone to come drain off the water?
A No, because there wasn't but about that much water. Just enough water to warp the floor up underneath the -- I would have never known it. The water actually come from underneath the refrigerator.
Q Uh-huh (affirmative).
A And I said, "Darn, maybe we dropped a piece of ice or something." And it wasn't. I pulled the refrigerator out from the flooring after I had put it down or

whatever, and it was just barely dripping on the floor and it warped the wood underneath there. And I took -- I said, "You know what? The refrigerator's going to hide it anyways so why worry about it?" He said, "No." He said, "You didn't get paid on the first claim when the floor was ruined." He said, "I'll go ahead and pay you on this claim here because it was due to the refrigerator." So he paid me, and the money that he paid me, I had to put about $4,000 with it to get ceramic tile flooring. And I put down the ceramic tile myself.

Q And how much was that claim for?

A I want to say it was four or five thousand dollars.

Q Okay. And you did that repair work yourself?

A I did.

Q So there was never any standing water due to the refrigerator leak?

A Yeah.

Q Okay.

A Until when it poured down rain, and like I said, it came in on the corners of the house and come in on the flooring.

Q Was there any water in the wall due to the refrigerator leak?

A No.

some friends to come over stating that the house flooded when they had the house, before Erick ever bought the house.

Q What friends?

A You want me to call them out?

Q Yes, sir.

A Michelle Bunch, Ronnie --

Q Who is Michelle Bunch?

A A friend of ours. She works at Billy Rhoad's law firm.

Q Okay. She's from Bamberg?

A Yeah, she's from Bamberg.

Q Okay.

A Ronnie Maxwell at the bank right here, SCBT. And, it was another couple, but I can't remember their name.

Q Okay. And they alleged that they lived in the house?

A They lived in the house and seen the water coming in.

Q Okay.

A And Erick knew this, but yet Erick didn't disclose this information to me until the house ruined the first floor. And I asked him, I said, "Bo, why is water coming in this house?" He said, "Well, oh, me and Mr. Ginn had that fixed." Well, why wasn't that information disclosed to me when I purchased the house? If he had told me that when I purchased the house, I would've said, you know what, take that house and do

something else with it. I don't want it.
Q Did you ever ask Mr. Cogburn what repairs he had done?
A I did ask him.
[Sotto voce discussion between Ms. Hood and Mr. Ness.]
Q You did ask Mr. Cogburn to disclose what repairs he had done?
A I did.
Q Okay.
A But he disclosed some of it. He didn't tell me every -- - he said he didn't do anything in the room where the mold was, is what he's telling me, but Kenny Carter told me, that's a lie, that he did do the work.
Q Okay. All right. Well, I'd like to stick with things that Mr. Cogburn directly --
A Okay, well --
Q -- or that you understood him to say. But you do -- you testified here previously today that you knew that he painted that room?
A Yeah, he did.
Q And you knew that he had re-floored the downstairs?
A I did.
Q Okay. When you -- back up to Ms. Bunch and Mr. Maxwell, when did they tell you that they noticed the flooding?
A Well, Mr. Maxwell, he said that, if he needed to go --

he told me -- this was probably about -- I want to say it's been about eight months ago, and he said that, if he needed to he would testify in court on it --

Q Okay.

A -- if it needed to go to court.

Q And Ms. Bunch, when did she tell you about the propensity for --

A From -- she told me when the very first floor got ruined, that's how I knew it flooded. I confronted Erick Cogburn about it. Erick Cogburn said, "Yeah, we had that problem fixed; Me and Mr. Ginn had that problem fixed." If it wasn't for Michelle Bunch, I would have never known nothing, until finally Erick Cogburn told me he had the problem fixed, him and the other guy that owned the house.

Q Okay. So Ms. Bunch told you that about seven months after you moved into the house?

A After the first floor was ruined.

Q Well, that -- I'm sorry, I -- I thought -- thought your testimony --

A Seven months after the first floor -- seven months, the first floor was ruined, that's when she come in there, she seen me doing the work. As a matter of fact she helped me put down some of the flooring. That's when she disclosed that information to me that she knows,

for a fact, and Timmy Wilson also lived in there, that's her uncle.

Q Okay. So about June of 2009, Ms. Bunch told you about --

A Yeah.

Q -- the water --

A About the water coming in.

Q -- seepage issue?

A Yeah.

Q Okay. I'm sorry, that -- no, that was not 2009, that was 2007.

A 2007.

Q 2007 when you purchased the house, so that's 2008.

A It would have been -- yeah, 2008.

Q Okay. I'm sorry. Got my dates wrong. Okay. Do you recall a specific conversation you had with Ms. Bunch?

A Do I recall?

Q Uh-huh (affirmative).

A She's a good friend of ours, yeah, I do recall.

Q She's a good friend? She hadn't spoken with you about the house you purchased prior to that?

A She didn't know we purchased the house at first. She was a friend of my wife's whenever she was younger.

Q Uh-huh (affirmative).

A And then, she came around, because we had a swimming

Q Did you keep the tanning bed in the Faust Street house?
A I did.
Q Is it still there?
A No.
Q Where is it now?
A I took it and put it in the storage shed.
Q Okay. Did y'all continue using the tanning bed after you discovered the mold?
A No, I did not.
Q Okay. Did you understand that you were purchasing the property while it was still under the one-year termite bond from Mr. Carter?
A I did.
Q Were you alerted to the expiration of that one-year period?
A I was not alerted. Actually, Kenny Carter actually told me, he said, "Bubba, you will get a paper in the mail, a brochure, stating when to renew the policy." I never got anything.
Q Was it your understanding that the bond ran for one year from the date of issuance?
A I did not. I mean, I -- no, I did not understand that, no.
Q Okay. But you did have an opportunity to see the termite bond itself?

A Some remodeling his house right behind the courthouse.
Q Did y'all ever have any legal dispute over that work?
A Well, he owned me about $15,000 and he never paid me, and I felt sorry for him, because he was almost 90 years old and I wasn't going to take him to court.
Q Okay.
A Because I'm just that type of person.
Q And what's your relationship with Mr. Timmy Wilson?
A Timmy Wilson.
Q Uh-huh (affirmative).
A There is really no relationship. That is Michelle Bunch -- I think it's Michelle Bunch's uncle.
Q Did you ever live in a house owned by Mr. Timmy Wilson?
A No. Mr. Timmy Wilson lived in a house that we actually owned on 3633 Faust Street where it flooded. He lived in that house before.
Q Mr. Timmy Wilson lived in your Faust Street house?
A He lived in there before we purchased it the house.
Q Before you purchased -- oh, right. I'm sorry.
A Before Erick Cogburn ever got it.
Q Okay. Okay.
A He rented it from Mr. Ginn.
Q Rented it from Mr. Ginn?
A Yeah.
Q Okay. Was Mr. Ginn -- was it a rental property for Mr.

you have purchased the home?

A I sure wouldn't of. Hell no.

MR. NESS: I don't have anything else.

MS. PAYNE: Thank you, Mr. McAlhany.

MR. BARNES: That's it.

THE DEPONENT: Thank y'all.

[Whereupon, Defendants' Exhibit No. 10 is marked for identification.]

[Whereupon, Defendants' Exhibit No. 12 is marked for identification.]

WHEREUPON, THERE BEING NO FURTHER QUESTIONS AT THIS TIME, THE DEPOSITION IS RECESSED AT 1:39 P.M. THE DEPONENT RESERVES THE READING AND SIGNING OF THE DEPOSITION.

(*This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker.)

Danielle F. Payne, Esquire
Grier, Cox & Cranshaw, L.L.C.
Post Office Box 2823
Columbia, South Carolina 29202-2823

RE: McAlhany vs. Carter, et al

Dear Ms. Payne:

Enclosed you will find both the original and copy of the deposition of Claude McAlhany, Jr. taken January 25, 2012 in the above referenced action.

As you may recall, the deponent requested to read and sign his deposition. Therefore, by copy of this letter, I am forwarding a copy of the transcript to the deponent, along with the original signature page, errata sheet and instructions for reading and signing.

Upon completion of the signature page and errata sheet, the original of these pages will be sealed under separate cover and forwarded to you with a copy to all counsel. If the said pages are not completed within the thirty day period or when required in court, the original deposition shall be considered complete with this letter in lieu of the signature page.

It was a pleasure working with you. If we can be of assistance to you in the future, please give us a call.

Very truly yours,

Suesan L. Richardson,
Professional Court Reporter

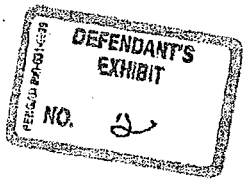
Enclosures
cc: Claude McAlhany, Jr.
Alison Dennis Hood, Esquire
William F. Barnes, III, Esquire
Original Deposition
Copies of Deposition

Attn: Mr. B. Dufton

I have agreed to sell my house located at 3837 Faust Street Ranberg, S.C. 29003 to Mr. and Mrs. Claude McAlhaney for the sale price of $120,000.00.

Thank you,

Enid Coghlan



093478

Hayes Microbial Consulting

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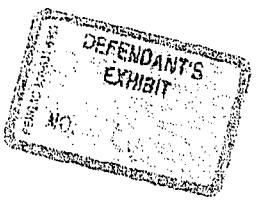
Ph. 804.562.3435 Fax. 804-562-3435

Mold Analysis Report prepared for

Executive Restoration

5437 Cedarmint Drive
Charlotte, NC 28227
Ph. 704-545-0098



Job Number:
Job Name:
Date Sampled:
Date Analyzed: 8/24/2009

AIHA EMPAT Laboratory ID# 188863

American Society for Clinical Pathology
Certified Clinical Microbiologist

Member

American Indoor Air Quality Council
Certified Indoor Environmentalist

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Spore Trap Analysis
HMC Report #
093476

Customer
Executive Restoration
5437 Cedarmint Drive
Charlotte, NC 28227
Ph. 704-545-0998

Job Number:

Job Name:

Collected by: David
Email: inspectordavidsnell@yahoo.com
Date Collected:
Date Received: 8/24/2009
Date Reported: 8/24/2009

HMC ID Number	093476 - 1		093476 - 2		093476 - 4			
Sample ID #	1		2		4			
Sample Name	Inside Sitting Room		Baseline		Master Bedroom			
Sample Volume	25 Liters		25 Liters		25 Liters		Liters	
Limit of Detection	40 spores/M3		40 spores/M3		40 spores/M3		spores/M3	
Background	3		1+		2+			
Fragments	680 /M3		120 /M3		200 /M3		/M3	
Organism	Count / M³	% of Total	Count / M³	% of Total	Count / M³	% of Total	Count / M³	% of Total
Alternaria								
Ascospores	360	5.8	2320	42.3	520	24.6		
Aspergillus/Penicillium	2720	43.6	640	11.7	840	39.6		
Basidiospores	80	1.3	840	15.3	80	3.8		
Bipolaris/Drechslera								
Chaetomium	200	3.2			120	5.7		
Cladosporium	1720	27.6	1280	23.4	280	13.2		
Curvularia	120	1.9	200	3.6	200	9.4		
Epicoccum								
Fusarium								
Memnoniella								
Myxomycetes			160	2.9	40	1.9		
Pithomyces			40	0.7				
Stachybotrys	1040	16.7			40	1.9		
Stemphylium								
Torula								
Trichothecium								
Ulocladium								
Unidentifiable spore								
Total	6240		5480		2120			

Water Damage Indicators | Common Allergens | Slightly Higher than Outside Air | Significantly Higher than Outside Air | Ratio Abnormality

Signature: Stephen N. Hayes Date: 8/24/2009

0184

APP 0184

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Direct ID Analysis
HMC Report #
093476

Customer
Executive Restoration
5437 Cedarmint Drive
Charlotte, NC 28227
Ph. 704-545-0096

Job Number:

Job Name:

Collected by: David
Email: inspectordavidsnell@yahoo.com
Date Collected:
Date Received: 8/24/2009
Date Reported: 8/24/2009

HMC ID Number:	093476 - 3	Sample Type:	Swab
Sample ID #:	3	Sample Name:	Sitting Room
Organism	Spore Estimate	Mycelial Estimate	Notes
Cladosporium	Heavy	Many	

HMC ID Number:	093476 - 5	Sample Type:	Swab
Sample ID #:	5	Sample Name:	Upstairs Window Wall
Organism	Spore Estimate	Mycelial Estimate	Notes
Chaetomium	Heavy	Many	

HMC ID Number:		Sample Type:	
Sample ID #:		Sample Name:	
Organism	Spore Estimate	Mycelial Estimate	Notes

Signature: Stephen A. Hayes Date: 8/24/2009

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Spore Trap Information

Limit of Detection	The Limit of Detection is the lowest number of spores that can be detected based on the total volume of the sample collected and the percentage of the slide that is counted. At Hayes Microbial, 100% of the slide is read so the LOD is based solely on the total volume. Raw spore counts that exceed 500 spores will be estimated.
Background	The Backgound is the amount of debris that is present in the sample. This debris consists of skin cells, dirt, dust, pollen, drywall dust and other organic and nonorganic matter. As the background density increases, the likelyhood of spores, especially small spores such as those of Aspergillus / Penicillium may be obscured. The background is rated on a scale of 1 to 4 and each level is determined as follows. ND : No background detected. (Pump or cassette malfunction) Recollect sample. 1 : Extremely light background. No spores will be uncountable. 1+ : Very light background. Less than 1% of small spores may be uncountable. 2 : Light background. Less than 3% of small spores may be uncountable. 2+ : Moderate background. Less than 5% of small spores may be uncountable. 3 : Moderate/Heavy background. 5% to 25% of small spores and less than 5% of large spores may be uncountable. 3+ : Heavy background. More than 25% of small spores and more than 5% of large spores may be uncountable. 4 : Sample unreadable. Recollect sample.
Fragments	Fragments are small pieces of fungal mycelium or spores. They are not identifiable as to type and when present in very large numbers, may indicate the presence of mold amplification.
Indoor / Outdoor Comparisons	There are no national standards for the numbers of fungal spores that may be present in the indoor environment. As a general rule and guideline that is widely accepted in the indoor air quality field, the numbers and types of spores that are present in the indoor environment should not exceed those that are present outdoors at any given time. There will always be some mold spores present in "normal" indoor environments. The purpose of sampling and counting spores is to help determine whether an abnormal condition exists within the indoor environment and if it does, to help pinpoint the area of contamination. Spore counts should not be used as the sole determining factor of mold contamination. There are many factors that can cause anomalies in the comparison of indoor and outdoor samples due to the dynamic nature of both of those environments.
Water Damage Indicators	These molds are commonly seen in conditions of prolonged water intrusion and usually indicate a problem.
Common Allergens	Although all molds are potential allegens, these are the most common allergens that may be found indoors.
Slightly Higher than Outside Air	The spore count is slightly higher than the outside count and may or may not indicate a source of contamination.
Significantly Higher than Outside Air	The spore count is significantly higher than the outdoor count and probably indicates a source of contamination.
Ratio Abnormality	The types of spores found indoors should be similar to the ones that were identified in the outdoor sample. Significant increases (more than 25 or 30%) in the ratio of a particular spore type may indicate the presence of abnormal levels of mold, even if the total number of spores of that type is lower in the indoor environment than it was outdoors.
Note	Fungi that are present in indoor samples at levels lower than 200 per cubic meter are considered insignificant. Insignificant spore counts are not color coded on the report.

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Additional Information for Direct Identification Analysis

Spore Estimate	
ND	None Detected
Rare	<10 Spores
Light	10-100 Spores
Moderate	100-1000 Spores
Heavy	>1000 Spores

Mycelial Estimate		
ND	None Detected	No active growth at site.
Trace	Very small amount of mycelium	Probably no active growth at site.
Few	Some mycelium	Possible active growth at site.
Many	Large amounts of mycelium	Probable active growth at site.

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Ascospores	Habitat:	A large group consisting of more than 3000 species of fungi. Common plant pathogens and outdoor numbers become very high following rain. Most of the genera are indistinguishable by spore trap analysis and are combined on the report.
	Health Effects:	Health affects are poorly studied, but many are likely to be allergenic.
Aspergillus/Penicillium	Habitat:	The most common fungi isolated from the environment. Very common in soil and on decaying plant material. Are able to grow well indoors on a wide variety of substrates.
	Health Effects:	This group contains common allergens and many can cause hypersensitivity pneumonitis. They may cause extrinsic asthma, and many are opportunistic pathogens. Many species produce mycotoxins which may be associated with disease in humans and other animals. Toxin production is dependent on the species and on the food source for the fungus. Some of these toxins have been found to be carcinogenic.
Basidiospores	Habitat:	A common group of Fungi that includes the mushrooms and bracket fungi. They are saprophytes and plant pathogens. In wet conditions they can cause structural damage to buildings.
	Health Effects:	Common allergens and are also associated with hypersensitivity pneumonitis.
Chaetomium	Habitat:	Ascomycete fungus, commonly isolated from soil and decaying plant materials. It is cellulolytic and grows well indoors on damp sheetrock and other paper substrates. It is often found growing with Stachybotrys.
	Health Effects:	It is reported to be allergenic and may produce toxins.
Cladosporium	Habitat:	One of the most common genera worldwide. Found in soil and plant debris and on the leaf surfaces of living plants. The outdoor numbers are lower in the winter and often relatively high in the summer, especially in high humidity. The outdoor numbers often spike in the late afternoon and evening. Indoors, it can be found growing on textiles, wood, sheetrock, moist window sills and in HVAC supply ducts.
	Health Effects:	A very common allergen, producing more than 10 allergenic antigens and a common cause of hypersensitivity pneumonitis.
Curvularia	Habitat:	They exist in soil and plant debris, and are plant pathogens.
	Health Effects:	They are allergenic and a common cause of allergic fungal sinusitis. An occasional cause of human infection, including keratitis, sinusitis, onychomycosis, mycetoma, pneumonia, endocarditis and disseminated infection, primarily in immunocompromised individuals.
Myxomycetes	Habitat:	Found on decaying plant material and as a plant pathogen.
	Health Effects:	Some allergenic properties reported, but generally pose no health concerns to humans.
Pithomyces	Habitat:	Common fungus isolated from soil, decaying plant material. Rarely found indoors.
	Health Effects:	Allergenic properties are poorly studied. No cases of infection in humans.

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Stachybotrys	Habitat:	Commonly found in soil and on decaying plant material. It is cellulolytic, and can be found indoors on wet materials containing cellulose, such as wallboard, ceiling tile, and other paper-based materials. It is found outdoors on decaying plant material although it is rarely detected on outdoor air samples.
	Health Effects:	Allergenic properties are poorly studied and no cases of infection have been reported in humans. They do however produce potent tricothecene mycotoxins. The toxins produced by this fungus can suppress the immune system affecting the lymphoid tissue and the bone marrow. The mycotoxin is also reported to be a liver and kidney carcinogen.

HMC Job#: 093476

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Ph. 804.562.3435 Fax. 804-562-3435

Mold Analysis Report prepared for

Executive Restoration

5437 Cedarmint Drive

Charlotte, NC 28227

Ph. 704-545-0098

Job Number:

Job Name: Bubba & Ani Mcalhany

Date Sampled:

Date Analyzed: 8/24/2009

AIHA EMPAT Laboratory ID# 188863

American Society for Clinical Pathology

Certified Clinical Microbiologist

Member

Certified Indoor Environmentalist

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Spore Trap Analysis

HMC Report #
093476

Customer
Executive Restoration
5437 Cedarmint Drive
Charlotte, NC 28227
Ph. 704-545-0098

Job Number:
Job Name: Bubba & Ami Mcalhany

Collected by: David
Email: Inspectordavidanell@yahoo.com
Date Collected:
Date Received: 8/24/2009
Date Reported: 8/24/2009

HMC ID Number	093476 - 1		093476 - 2		093476 - 4		-	
Sample ID #	1		2		4			
Sample Name	Inside Sitting Room		Baseline		Master Bedroom			
Sample Volume	25 Liters		25 Liters		25 Liters		Liters	
Limit of Detection	40 spores/M3		40 spores/M3		40 spores/M3		spores/M3	
Background	3		1*		2*			
Fragments	680 /M3		120 /M3		200 /M3		/M3	
Organism	Count / M^3	% of Total	Count / M^3	% of Total	Count / M^3	% of Total	Count / M^3	% of Total
Alternaria								
Ascospores	360	5.8	2320	42.3	520	24.5		
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Epicoccum								
Fusarium								
Memnoniella								
Myxomycetes			160	2.9	40	1.9		
Pithomyces			40	0.7				
Stachybotrys	1040	16.7			40	1.9		
Stemphylium								
Torula								
Trichothecium								
Ulocladium								
Unidentifiable spore								
Total	6240		5480		2120			

Water Damage Indicators | Common Allergens | Slightly Higher than Outside Air | Significantly Higher than Outside Air | Ratio Abnormality

Signature: Stephen M Hayes Date: 8/24/2009

0191

APP 0191

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Indoor Air Quality Microbiology Consulting
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Direct ID Analysis
HMC Report #
093476

Customer	Job Number:	Collected by: David
Executive Restoration 5437 Cedarmint Drive Charlotte, NC 28227 Ph. 704-545-0098	Job Name: Bubba & Aml Mcalhany	Email: inspectordavidsnell@yahoo.com Date Collected: Date Received: 8/24/2009 Date Reported: 8/24/2009

HMC ID Number:	093476 - 3	Sample Type:	Swab
Sample ID #:	3	Sample Name:	Sitting Room
Organism	Spore Estimate	Mycelial Estimate	Notes
Cladosporium	Heavy	Many	

HMC ID Number:	093476 - 5	Sample Type:	Swab
Sample ID #:	5	Sample Name:	Upstairs Window Wall
Organism	Spore Estimate	Mycelial Estimate	Notes
Chaetomium	Heavy	Many	

HMC ID Number:		Sample Type:	
Sample ID #:		Sample Name:	
Organism	Spore Estimate	Mycelial Estimate	Notes

Signature: Stephen N Hayes Date: 8/24/2009

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Indoor Air Quality Microbiology Consulting
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Midlothian, VA 23112
Ph. 804.562.3435 Fax. 804-562-3435

Spore Trap Information

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Note	Fungi that are present in indoor samples at levels lower than 200 per cubic meter are considered insignificant. Insignificant spore counts are not color coded on the report.

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Additional Information for Direct Identification Analysis

Spore Estimate	
ND	None Detected
Rare	<10 Spores
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Moderate	100-1000 Spores
Heavy	>1000 Spores

Mycelial Estimate		
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Trace	Very small amount of mycelium	Probably no active growth at site.
Few	Some mycelium	Possible active growth at site.
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Ascospores	Habitat:	A large group consisting of more than 3000 species of fungi. Common plant pathogens and outdoor numbers become very high following rain. Most of the genera are indistinguishable by spore trap analysis and are combined on the report.
	Health Effects:	Health affects are poorly studied, but many are likely to be allergenic.
Asperglilus/Penicillium	Habitat:	The most common fungi isolated from the environment. Very common in soil and on decaying plant material. Are able to grow well indoors on a wide variety of substrates.
	Health Effects:	This group contains common allergens and many can cause hypersensitivity pneumonitis. They may cause extrinsic asthma, and many are opportunistic pathogens. Many species produce mycotoxins which may be associated with disease in humans and other animals. Toxin production is dependent on the species and on the food source for the fungus. Some of these toxins have been found to be carcinogenic.
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	Health Effects:	It is reported to be allergenic and may produce toxins.
Cladosporium	Habitat:	One of the most common genera worldwide. Found in soil and plant debris and on the leaf surfaces of living plants. The outdoor numbers are lower in the winter and often relatively high in the summer, especially in high humidity. The outdoor numbers often spike in the late afternoon and evening. Indoors, it can be found growing on textiles, wood, sheetrock, moist window sills and in HVAC supply ducts.
	Health Effects:	A very common allergen, producing more than 10 allergenic antigens and a common cause of hypersensitivity pneumonitis.
Curvularia	Habitat:	They exist in soil and plant debris, and are plant pathogens.
	Health Effects:	They are allergenic and a common cause of allergic fungal sinusitis. An occasional cause of human infection, including keratitis, sinusitis, onychomycosis, mycetoma, pneumonia, endocarditis and desseminated infection, primarily in immunocompromised individuals.
Myxomycetes	Habitat:	Found on decaying plant material and as a plant pathogen.
	Health Effects:	Some allergenic properties reported, but generally pose no health concerns to humans.
Pithomyces	Habitat:	Common fungus isolated from soil, decaying plant material. Rarely found indoors.
	Health Effects:	Allergenic properties are poorly studied. No cases of infection in humans.

Hayes Microbial Consulting
Indoor Air Quality Microbiology Consulting
Email: IAQ@hayesmicrobial.com www.hayesmicrobial.com

2800 Savage View Dr.
Midlothian, VA 23112
Ph. 804.562.3435 Fax. 804-562-3435

Stachybotrys	Habitat:	Commonly found in soil and on decaying plant material. It is cellulolytic, and can be found indoors on wet materials containing cellulose, such as wallboard, ceiling tile, and other paper-based materials. It is found outdoors on decaying plant material although it is rarely detected on outdoor air samples.
	Health Effects:	Allergenic properties are poorly studied and no cases of infection have been reported in humans. They do however produce potent tricothecene mycotoxins. The toxins produced by this fungus can suppress the immune system affecting the lymphoid tissue and the bone marrow. The mycotoxin is also reported to be a liver and kidney carcinogen.

Mold Solutions, Inc.
4436 Augusta Road
Lexington, SC 29073

Invoice

Date	Invoice #
8/18/2009	1857

Bill To
Claude McAlhany 3633 Faust Street Bamberg, SC 29003

Jobsite
3633 Faust Street Bamberg, SC 29003

P.O. No.	Terms	Due Date
Verbal	Due on receipt	8/19/2009

Date of Service	Description	Qty	Rate	Amount
8/19/2009	Mold Inspection Service to include 6 swabs sent to independent 3rd party laboratory for testing.		420.00	420.00

Please remit to Mold Solutions, Inc. at above address.
Please remit via Check, Cash, VISA, Mastercard or Discover Card.
Thank you for your business - we appreciate it very much.

Phone #	Fax #	E-mail
803-996-0116	803-996-0264	pdavis@moldsolutionsinc.net

Subtotal	$420.00
Sales Tax (0.0%)	$0.00
Total	$420.00
Payments/Credits	$0.00
Balance Due	$420.00

Mold Solutions, Inc.
4436 Augusta Road
Lexington, SC 29073

Invoice

Date	Invoice #
8/18/2009	1857

Bill To
Claude McAlhany 3633 Faust Street Bamberg, SC 29003

Jobsite
3633 Faust Street Bamberg, SC 29003

P.O. No.	Terms	Due Date
Verbal	Due on receipt	8/19/2009

Date of Service	Description	Qty	Rate	Amount
8/19/2009	Mold Inspection Visit		250.00	250.00

Please remit to Mold Solutions, Inc. at above address.
Please remit via Check, Cash, VISA, Mastercard or Discover Card.
Thank you for your business - we appreciate it very much.

Phone #	Fax #	E-mail
803-996-0116	803-996-0264	pdavis@moldsolutionsinc.net

Subtotal	$250.00
Sales Tax (0.0%)	$0.00
Total	$250.00
Payments/Credits	$0.00
Balance Due	$250.00

Nationwide®
On Your Side™

August 28, 2009

803 914 9014
ATT
(Bonnie)

AMI AND CLAUDE MCALHANEY
3633 FAUST STREET
BAMBERG, SC 29003-1368

RE: Policy Number: 61391IP442734

Property Location : 3633 FAUST STREET BAMBERG, SC 29003-1368

Policy Form: Homeowner

Thank you for the opportunity to provide this important insurance protection.

We sincerely regret we are unable to continue your Homeowner insurance protection at this time.

This is notice that this policy is cancelled effective December 1, 2009, 12:01 a.m. local time.

The reason(s) for this action is due to:

1. Other - The home is uninhabitable due to mold.

You may become eligible for coverage if the following criteria are met:
- Mold is removed from home, all mold damage and water damage is repaired, and home is habitable and occupied by the owners.

IMPORTANT NOTICE: Within thirty days of receiving this notice, you or your attorney may request in writing that the Director review this action to determine whether the insurer has complied with South Carolina laws in canceling or non-renewing your policy. If this insurer has failed to comply with the cancellation or non-renewal laws, the Director may require that your policy be reinstated. However, the Director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or non-renewal laws, the Director does not have the authority to overturn this action.

Should you have any questions, please contact your Nationwide representative RICHARD P PINSON at 803-245-5367.

cc: 0001091-39

DEFENDANT'S EXHIBIT NO. 7

WPCN_010SCMT(d)

Nationwide Property & Casualty Insurance Company
One Nationwide Plaza Columbus, OH 43215-2220
Hearing or Voice Impaired: 1-800-822-2421 (TTY only)
nationwide.com

WPCN_010SCMT/2089357

Nationwide, the Nationwide framemark and Nationwide Is On Your Side are federally registered service marks of Nationwide Mutual Insurance Company

Policy Number: 6936HP441734

IMPORTANT NOTICE

If the full premium payment indicated in this billing statement is not received by the due date of this installment, your policy will be cancelled for non-payment effective 12:01 a.m. on the installment's due date.

While we hope that your payment will be received prior to the due date, your Nationwide representative may also be able to provide other coverage options and insurance to you. You should feel free to contact your representative at 803-245-5367 with any questions. In addition, your agent can provide you with information on a consumer buyer's guide for property insurance that has been developed by the South Carolina Department of Insurance. You may also want to obtain this information directly from the Department of Insurance by contacting them at Capitol Center, 1201 Main St., Suite 1000, Columbia, SC 29201 or phone (803) 737-6180 or the toll-free number 1-800-768-3467.

If we receive a written request from you within 90 business days of this notice, we will furnish to you the specific reason(s) for cancellation or nonrenewal if that information was not furnished to you in this notice. In addition, we will supply the items of personal information used in making this decision, if any.

If this letter indicates that a consumer reporting agency was used to obtain information, you may contact the referenced agency within 60 business days of this notice to request details regarding the information received. If there are any errors on your report, the consumer reporting agency will be happy to help you correct the information.

We value your business and want you to stay protected. Please send in your payment with this notice today.

Please Note: Any changes made to your policy, which may result in Nationwide issuing a revised Declarations page, will not affect the policy cancellation effective date indicated on the reverse side of this notice.

You may immediately receive a new bill for your next installment after sending in your past-due payment. The new bill is payable on the indicated date.

If your policy cancels for non-payment of premium and is later reinstated, you may have to pay a higher rate.

Case File Number: 090093691

CLEMSON UNIVERSITY

Report of Structural Pest Inspection

Department of Pesticide Regulation
511 Westinghouse Road
Pendleton, SC 29670
864.646.2150
http://dpr.clemson.edu

Date Issued: October 9, 2009

Inspector: Kristin Lenox

Homeowner: Claude McAlhany

The property in reference to Claude McAlhany, located at 3633 Faust Street, Bamberg, SC 29003 was inspected by the above Regulatory Specialist of the Department of Pesticide Regulation on September 9, 2009, and the following conditions were found. This report details those findings as they relate to wood destroying organisms, their damage, and standard procedure required to control and report the presence of those organisms. This inspection is based upon visible evidence in readily accessible areas only, and does not attempt to reveal or address all damages, which may be present. All references to direction in this report are given from and facing the front of the structure. This structure is built on a slab foundation, and thus only the accessible portions of the interior and exterior walls were inspected (see attached graph).

No live subterranean termites or termite shelter tubes were observed. This inspection revealed subterranean termite damage to the bottom edge of exterior siding on the front and rear of the laundry room. In addition, subterranean termite damage was observed in the sheathing of the right front wall of the main structure. (see attached graph).

This structure was originally treated on April 3, 2007 for the previous owner by Carter and Son Pest Control. The structure is not presently under contract with them.

The following section(s) of the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act (the Standards for the Prevention or Control of Wood Destroying Organisms) were neither met nor waived during the April 3, 2007 treatment:

1) Section 27-1085 (G) (2)(d): "For conventional liquid soil treatments, treat all soil adjacent to foundation walls, pillars, and other supports by forming a narrow trench at the base of each side and flooding it with termiticide in accordance with label directions.
*The exterior of the block foundation wall under the entrance slab was not treated.

DEFENDANT'S EXHIBIT NO. 8

2) Section 27-1085 (G) (2) (e): "All cavities and voids within hollow masonry units...or between construction elements that are in contact with the soil must be drilled at intervals of no more than 16 (sixteen) inches..."

*The blocks in the laundry room, and porch step voids were not drilled and treated.
*the void between the monoslab and block wall at the front, and right and left sides were not treated.
*the block wall under the front entrance slab was drilled at greater than twenty-two (22) inch intervals.
*The void between the monoslab and left brick wall was not treated.

3) Section 27-1085 (G) (2) (f): "Soil areas beneath attached concrete slabs (porches, patios, garages, walkways, etc.) which are less than 18 inches below the sill or plate line of the structure should be treated at no more than 12 inch spacing."

* The front entrance slab, the carport, and the 3 attached slab entries on the rear of the structure were drilled at greater than nineteen (19) inch intervals.
* The expansion joint of the laundry room slab was not drilled.

During the Department's inspection on September 9, 2009, the foundation was measured and the necessary treatment volume was calculated. The records of Carter and Son Pest Control showed that they treated the structure on April 3, 2007 with approximately 200 gallons of a 0.06% solution of Talstar One Multi-Insecticide (EPA Reg. #279-3206, FMC). This is consistent with the volume calculated during DPR's inspection, therefore, this structure was treated with the necessary volume.

Damage and small round emergence holes typical of anobiid powder post beetles were observed in a right front stud, which appeared inactive, and in the right trim board adjacent to the left rear sliding glass door. Activity of these insects is determined by the presence of emergence holes and frass (a sawdust-like material produced by beetle larvae) the color of fresh-cut wood streaming from or piled beneath emergence holes. Frass was observed to be packed in the galleries, and there was a pile of frass beneath an area where framing had been removed. However, streaming frass was not observed; therefore, this infestation can not be conclusively determined to be active at this time. It would be prudent to monitor this condition by reinspecting these areas during the primary emergence season for these insects (late Spring-early summer) so that a more conclusive determination of activity can be made.

At the time of this inspection, wood moisture-content readings in the substructure ranged from 8% to 18%. Decay fungi become active when wood moisture levels reach 28%. Moisture readings below 20% are considered normal. Wood decay fungi damage was observed in the front and right side wall and a rear window frame of the main structure and the bottom front and right rear exterior sheathing and trim of the laundry room. The presence of decay damage indicates that active decay fungi have been present for significant periods of time in the past.

The decay damage noted in the main structure appeared to be associated with the soil against the blocks adjacent the monoslab. The homeowner said that he intends to lower the front elevation to match the rear elevation of the structure.

Questions have arisen regarding the accuracy of two Official South Carolina Wood Infestation Reports in reference to this structure issued by Carter and Son Pest Control, Inc. on March 20, 2007 and October 19, 2007. The wood infestation report issued on October 19, 2007, did not comply with Section 27-1085 K of the Rules and Regulations for the Enforcement of the

South Carolina Pesticide Control Act. Although evidence of a previous infestation of subterranean termites was disclosed, the location of that infestation and the accompanying damage was not disclosed. The wood infestation report issued on March 20, 2007 was found to be in compliance.

Note: This inspection was not made to address the presence or absence of any health-related molds or fungi. No opinions are given or intended concerning mold-related air quality or other health issues. Questions in this regard should be addressed to an industrial hygienist, physician or public health official.

NOTE: Because this Structural Pest Inspection may provide the basis for enforcement action against the Commercial Applicator(s) involved (including, if applicable, the Designated Certified Applicator), and/or the Business License, if there is additional information not contained herein or not previously provided, in writing, which the regulated person wishes this Department to consider in determining its enforcement response, it should be sent to the Departmental representative named below. To be considered, it must be postmarked within ten (10) days of the issuance of this report.

SUBMITTED BY Kristin Lenox
Kristin Lenox
Pesticide Regulatory Specialist

attachment

cc: Kenny Carter Sr.; Carter and son Pest Control
Lee Galloway, District Supervisor, DPR

File

CASE FILE NUMBER: 090909-36-01

DEPARTMENT OF PESTICIDE REGULATION 090093601

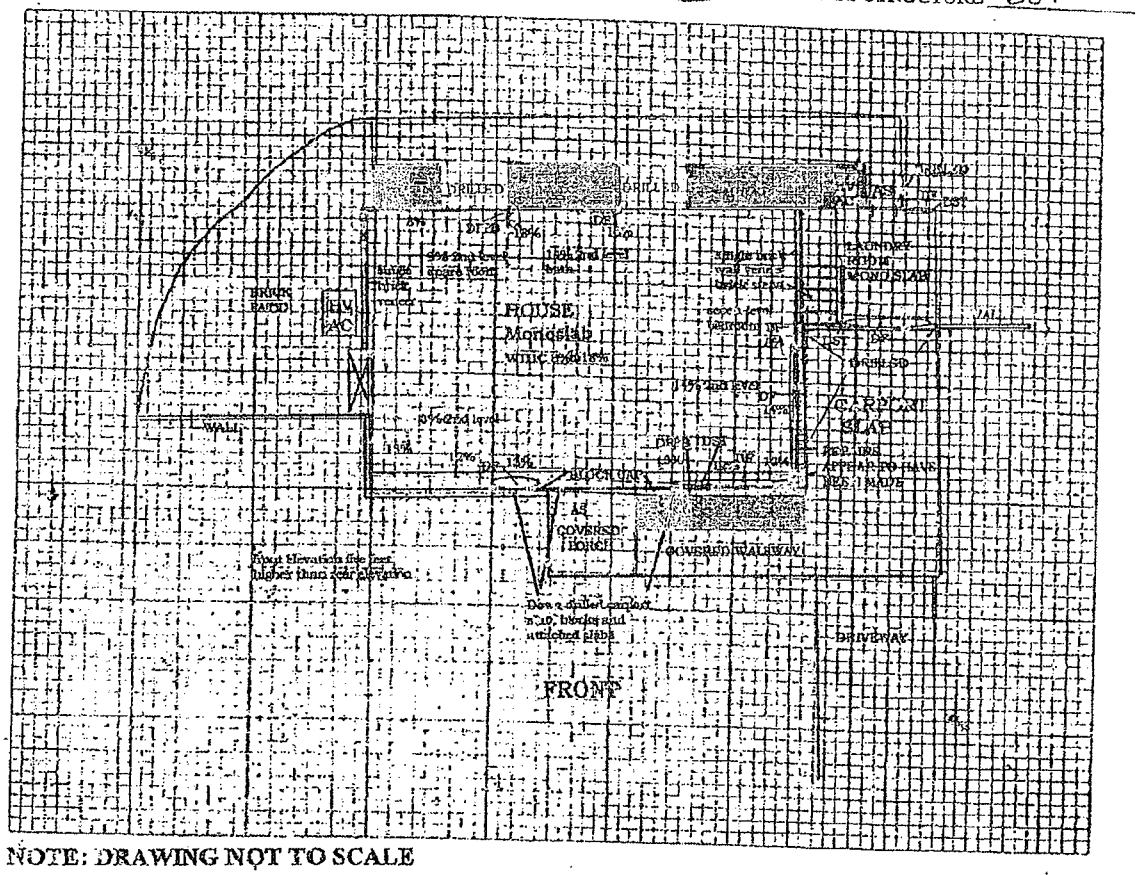
Wood Destroying Organisms Activity And/Or Damage Graph

OWNER'S NAME Claude + Ami McAlhany DATE September 9, 2009

ADDRESS OF STRUCTURE 3633 Faust Street Bamberg SC 29003
city state zip

HOME PHONE _____ BUSINESS PHONE (803) 837-4115 INSPECTED BY Lenox

VAPOR BARRIER PRESENT? YES (NO) SUBSTRUCTURE INSULATED? (YES) NO AGE OF STRUCTURE 30+



NOTE: DRAWING NOT TO SCALE

DAMAGE AND OTHER SYMBOLS KEY

WOOD DESTROYING INSECTS	FUNGI/MOISTURE RELATED	STRUCTURAL	OTHER SYMBOLS
CA = carpenter ant	(F) = damage area delineated	☒ = chimney	HVAC = Heat Ventilation & Air Conditioning
CB = carpenter bee	F = fungi	☒ = crawlspace access	___ = _____
DW = drywood termite	% = percentage wood moisture content	Ⓡ = earth filled	___ = _____
OHB = old house borer	SMM = surface molds & mildews	⊗ = foundation vent	___ = _____
OWB = other wood borers	SW = standing water	IA = inaccessible area	___ = _____
PPB = powder post beetle		• = plumbing leak	___ = _____
ST = subterranean termite		RPRS = repairs	___ = _____
		⊗ = well vents	
		WTG = wood to ground contact	

"D" placed before an activity symbol indicates damage from that pest exists.

This inspection graph is based on visible evidence of readily accessible areas and does not make any attempt to reveal all damage which may be present. No attempt to remove insulation, carpeting, paneling, etc., to search for hidden damage was made. Where visible damage is found, hidden damage is likely to exist.

DPR-39-0006R(1/96)

0204

DEFENDANT'S
EXHIBIT
NO.
07/16/2009 10:53 AM
0205
DEFENDANT'S
EXHIBIT
NO.

0206

07/16/2009 10:53 AM
DEFENDANT'S
EXHIBIT
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07/16/2009 10:53 AM
DEFENDANT'S EXHIBIT
NO.

07/15/2009 10:54 AM
DEFENDANT'S
EXHIBIT
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0210

DEFENDANT'S
EXHIBIT
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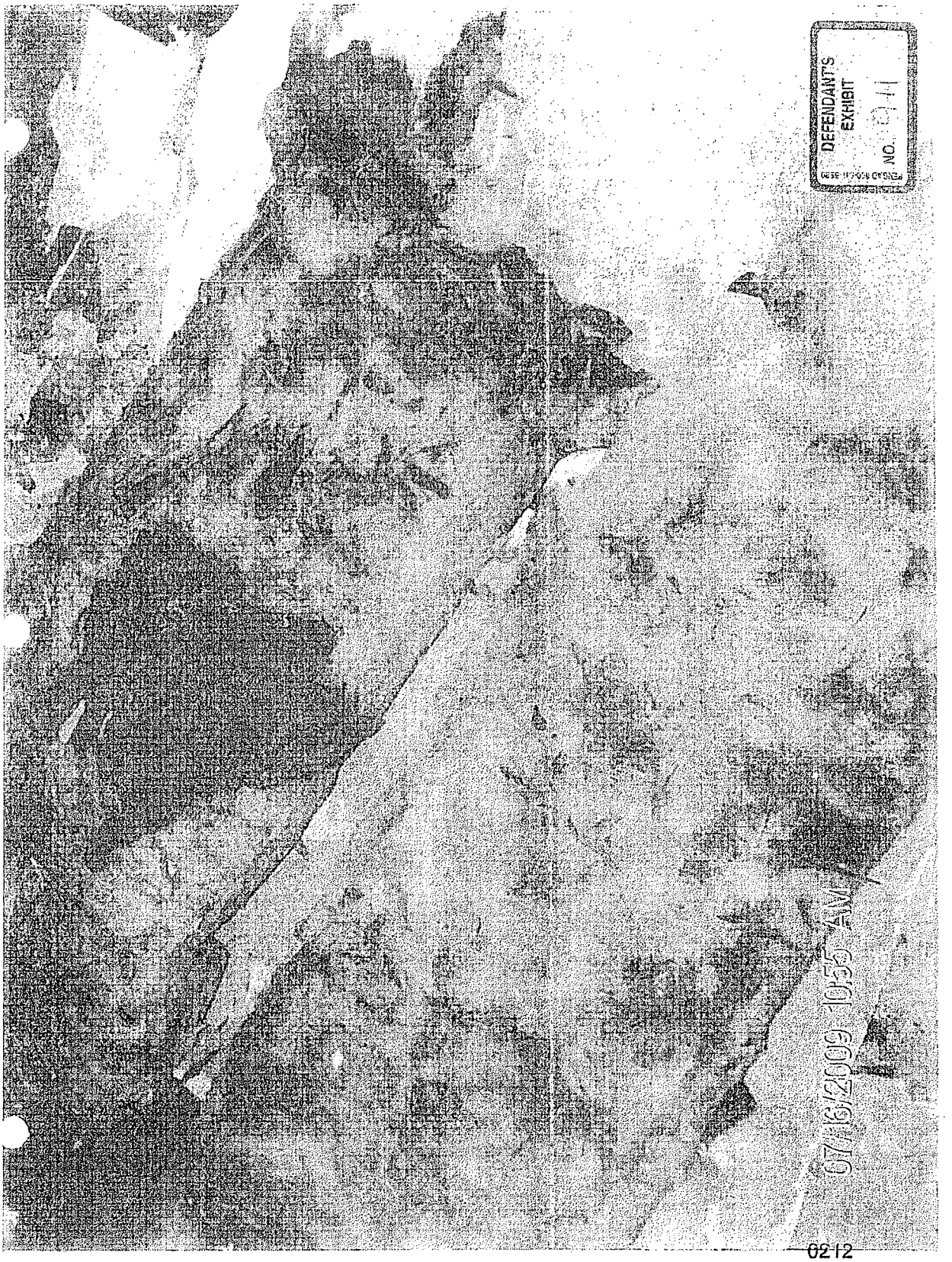
07/16/2009 10:54 AM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DEFENDANT'S
EXHIBIT
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2005 1113 A1V

DEFENDANT'S
EXHIBIT
NO.
07/17/2009 09:57 AM
0219

0220

DEFENDANT'S
EXHIBIT
NO. 16

DEFENDANT'S
EXHIBIT
NO.

OFFICIAL SOUTH CAROLINA WOOD INFESTATION REPORT

THIS REPORT VALID FOR 45 DAYS ONLY. THIS REPORT MAY NOT BE USED IN A REAL ESTATE CLOSING AFTER 45 DAYS. THIS REPORT IS NOT TO BE CONSTRUED AS A GUARANTEE OR WARRANTY AGAINST FUTURE INFESTATION OR DAMAGE. IT IS RECOMMENDED BY THE DEPARTMENT OF PESTICIDE REGULATION, REGULATORY AND PUBLIC SERVICE PROGRAMS, AND THE SOUTH CAROLINA PEST CONTROL ASSOCIATION THAT THE PURCHASER OF THE STRUCTURE, RATHER THAN THE SELLER, OBTAIN THIS WOOD INFESTATION REPORT.

Date March 20, 2007 File No. Graham / 07

This is to report that a qualified inspector employed by the below named firm has carefully inspected readily accessible areas, including attics and crawl spaces which permit entry, of the property located at the below address for termites, other wood-destroying insects, and fungi. The inspection for fungi and fungi damage commonly called wood decaying fungi, or decay is limited to the areas below the first main floor of the structure as defined by DHEC-105. This report specifically excludes hidden areas and areas not readily accessible, and the undersigned pest control operator disclaims that he has made any inspection of such hidden areas or of such areas not readily accessible.

The inspection described has been made on the basis of visible evidence, and special attention was given to those accessible areas which experience has shown to be particularly susceptible to attack by wood-destroying insects. Probing and/or sounding of those areas and other visible accessible wood members allowing evidence of infestation was performed. This report is submitted without warranty, guarantee, or representation as to concealed evidence of infestation or damage as to future infestation.

If there is evidence of active infestation or past infestation of termites and/or other wood destroying insects or fungi, it must be assumed that there is some damage to the building caused by this infestation, however any visible damage to a wood member in accessible areas has been reported. The undersigned firm's inspectors are not engineers or builders, and you may wish to call a qualified engineer or expert in the building trade to provide their opinion as to whether there is structural damage to this property.

LOCATION AND DESCRIPTION OF PROPERTY INSPECTED: 6033 Faust Street, Gemperi, SC
Wood frame crawl slab with multiple grade

TYPE OF TRANSACTION: FHA ____ VA ____ CONVENTIONAL X LOAN ASSUMPTION ____ CASH SALE ____

IF ANY OF THE FOLLOWING ITEMS ARE MARKED YES, DESCRIBE ON REVERSE:

	Check Only Applicable Items YES
WERE ANY AREAS OF THE PROPERTY OBSTRUCTED OR INACCESSIBLE?	[ ]
INFESTATION	
1. There is visible evidence of active: (A) subterranean termites	[ ]
(B) other wood-destroying insects	[ ]
2. There is visible evidence of a previous infestation of:	
(A) subterranean termites	[ ]
(B) other wood-destroying insects	[ ]
3. There is visible evidence of prior subterranean termite treatment	[ ]
4. There is evidence below the first main floor of the presence of:	
(A) active wood-destroying fungi (wood moisture content 20% or above)	[ ]
(B) wood-destroying fungi is present but not active (less than 20% wood moisture content)	[ ]
5. There is evidence of the presence of excessive moisture conditions below the first main floor (20% or above wood moisture content, standing water, etc.)	[ ]
DAMAGE: Termites, other wood-destroying insects and fungi (Note: reporting of fungi damage to wood, commonly called water damage decay or rot, is limited to the area below the first main floor of the structure as defined by DHEC-105.) At the time of our inspection, there were visibly damaged wooden members (e.g. insect damage to columns, sills, joists, girders, subfloors, headers, exterior stairs, porches, or fungi damage below the first main floor)	[X]
If the answer is "YES," specify exhibit and location(s) on back.	

DAMAGE OBSERVED (IF ANY)	Check Appropriate Box(s) Below
A. Will be or has been corrected by this company	[ ]
B. Will be or has been corrected by another company, see attached contract	[ ]
C. Will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by a qualified building expert licensed or registered with the S.C. Department of Labor, Licensing, and Regulations, Residential Builder's Commission and that needed repairs be made	[X]
D. In our opinion there is insufficient visible damage to recommend repair. (Explanation on the reverse side why repair was not recommended)	[ ]
TREATMENT	[ ]
1. The property described was treated by us for the prevention or control of _____ (date of treatment)	[NA]
A waiver has been issued and is attached to this form	[NA]
This present treatment warranty will expire on _____ and may be renewed initially at $ NA by the owner.	[NA]
2. The property described has not been treated by us and is not now under contract with our firm	[X]

SEE OTHER SIDE OF THIS REPORT FOR ADDITIONAL CONDITIONS GOVERNING THIS REPORT.

PCI-100 Approved by the South Carolina Pest Control Association, Inc., and the Division of Regulatory and Public Service Programs, Clemson University
Revised 3/98 Supercedes earlier versions.

(OVER)

DEFENDANT'S EXHIBIT NO. 10

CONDITIONS GOVERNING THIS REPORT

Please read carefully.

This report is based on the observations and opinions of our inspector. It should be noted that all buildings have some wood members which are not visible or accessible for inspection. It is not always possible to determine the presence of infestation without removing paneling and in some cases actual dismantling of parts of the structure being inspected.

All inspections and reports will be made on the basis of what is visible, and we will not render opinions covering areas that are enclosed or not readily accessible, areas of finished rooms, areas concealed by wall coverings, floor coverings, insulation, furniture, equipment, stored articles, or any portion of the structure in which inspection would necessitate tearing out or moving finished work. We do not move furniture, appliances, equipment, etc. Furnishings may not be present at the time of inspection. If evidence of such items is disclosed, liability for the correction of such items is specifically denied. No opinion can be rendered as to infestation or damage on that portion of the flooring, siding or other susceptible material which continues below soil grade.

The areas of the substructure and attic that are accessible and open for inspection have been inspected. The substructure is defined as that portion of the building below the first floor living space.

Detached garages, sheds, follow-ups, fences, or other buildings on the property are not included in this inspection report unless specifically noted.

The company, upon specific request and agreement as to additional charge, will open any inaccessible, concealed, or enclosed area and inspect same, make a report thereon.

REMARKS

THIS SPACE IS TO BE USED TO DETAIL ANY "YES" ANSWERS FROM THE FRONT OF THIS FORM. INCLUDE ITEM NUMBER WITH EACH EXPLANATION. CLARIFICATION AND EXPLANATION OF OTHER ITEMS MAY ALSO BE INCLUDED.

_____The building was built on a crawl slab and is therefore inaccessible for underneath inspection._____

_____1. At the time of the inspection, there was no visible evidence of active and previous termites._____

_____Due to the presence of water damage to the window sills, this firm has recommended termite treatment. This firm has been contracted and paid by the Purchaser to treat this home for termites and this will be done by March 30, 2000. At that time, this house will be under contract with this firm._____

_____A. Wood and ground moisture is not available due to this building being on crawl slab._____

_____Damage: There is visible water damage to the front & rear window sills. This damage is being repaired by a licensed contractor.

_____

_____Carter & Son Pest Control is a professional pest control company only and cannot structural engineers. We do not make an evaluation of damage or the structural integrity of the building. Carter & Son Pest Control report is for the purpose only of an opinion of the presence or absence of wood destroying organisms based on the visible evidence at the time of the inspection._____

Neither I nor the company for which I am acting have had, presently have, or contemplate having any interest in this property. I do further state that neither I nor the company for which I am acting is a party to this transaction.

LICENSE NUMBER OF PERSON SIGNING THIS REPORT:

CA 0010909 Firm: Carter & Son Pest Control
(MUST BE CERTIFIED IN CITY/COUNTY)

By: K A Carter Sr.

Business License Number: B2021 ADDRESS: P.O. Box 1132

OF FIRM: Bluffton, South Carolina

ACKNOWLEDGEMENT:

PURCHASER ACKNOWLEDGES THAT A COPY OF THIS REPORT HAS BEEN REVIEWED AND RECEIVED.

DATE ACKNOWLEDGED _____ PURCHASER'S SIGNATURE

CARTER & SON PEST CONTROL

P.O. BOX 1132
Bamberg, S.C. 29003
803-245-4747

INVOICE

DATE:	March 20, 2007	
LOCATION:	3633 Faust Street, Bamberg, SC	
SERVICE:	Termite Inspection	$125.00
	Termite treatment	$775.00

TOTAL DUE $900.00

Thank you.

CARTER & SON
PEST CONTROL

P.O. BOX 1132
BAMBERG, S.C. 29003

803-245-4747

S.C. Commercial Applicator
Lic. No: CA00010389

Date: 3-21-07

Duties Performed

____ Pest Control	_X_ Termite Treatment
____ Retreatment	____ New Delivery
____ CL100	____ Other ____

DUE UPON RECEIPT

Amt Charged 900.00 Amt Paid 900.00

Pesticide Applied Termidor Bait

Concentrate Used NA

By: Kenny Carter SR

Name Eric K. Cogburn

Address 3633 Fairfield Rd Barnwell

0226

OFFICIAL SOUTH CAROLINA WOOD INFESTATION REPORT

THIS REPORT VALID FOR 45 DAYS ONLY. THIS REPORT MAY NOT BE USED IN A REAL ESTATE CLOSING AFTER 45 DAYS. THIS REPORT IS NOT TO BE CONSTRUED AS A GUARANTEE OR WARRANTY AGAINST FUTURE INFESTATION OR DAMAGE. IT IS RECOMMENDED BY THE DEPARTMENT OF PESTICIDE REGULATION, REGULATORY AND PUBLIC SERVICE PROGRAMS, AND THE SOUTH CAROLINA PEST CONTROL ASSOCIATION THAT THE PURCHASER OF THE STRUCTURE, RATHER THAN THE SELLER, OBTAIN THIS WOOD INFESTATION REPORT.

Date October 19, 2007 File No. Cogburn/McAthaney -07

This is to report that a qualified inspector employed by the below named firm has carefully inspected readily accessible areas, including attics and crawl spaces which permit entry, of the property located at the below address for termites, other wood-destroying insects, and fungi. The inspection for fungi and fungi damage commonly called water damaged wood, rot or decay is limited to the area below the first main floor of the structure as defined by DPTPN-198. This report specifically excludes hidden areas and areas not readily accessible, and the undersigned pest control operator disclaims that he has made any inspection of such hidden areas or of such areas not readily accessible.

The inspection described has been made on the basis of visible evidence, and special attention was given to those accessible areas which experience has shown to be particularly susceptible to attack by wood-destroying insects. Probing and/or sounding of those areas and other visible accessible wood members showing evidence of infestation was performed. This report is submitted with not warranty, guarantee, or representation as to concealed evidence of infestation or damage or as to future infestation.

If there is evidence of active infestation or past infestation of termites and/or other wood destroying insects or fungi, it must be assumed that there is some damage to the building caused by this infestation; however any visible damage to a wood member in accessible areas has been reported. The below-named firm's inspectors are not engineers or builders, and you may wish to call a qualified engineer or expert in the building trade to provide their opinion as to whether there is structural damage to this property.

LOCATION AND DESCRIPTION OF PROPERTY INSPECTED: 3933 Faust St, Bamberg, SC
wood frame on slab

TYPE OF TRANSACTION: FHA ____ VA ____ CONVENTIONAL X LOAN ASSUMPTION ____ CASH SALE ____

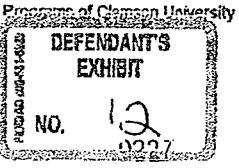
IF ANY OF THE FOLLOWING ITEMS ARE MARKED YES, DESCRIBE ON REVERSE.

	Check Only Appropriate Items YES	
WERE ANY AREAS OF THE PROPERTY OBSTRUCTED OR INACCESSIBLE?	[X]	[ ]
INFESTATION:		
1. There is visible evidence of active: (A) subterranean termites	[ ]	[X]
(B) other wood-destroying insects	[ ]	[X]
2. There is visible evidence of a previous infestation of:		
(A) subterranean termites	[X]	[ ]
(B) other wood-destroying insects	[ ]	[X]
3. There is visible evidence of prior subterranean termite treatment	[X]	[ ]
4. There is evidence below the first main floor of the presence of:		
(A) active wood-destroying fungi (wood moisture content 28% or above)	[ ]	[NA]
(B) wood-destroying fungi is present but not active (less than 28% wood moisture content)	[ ]	[NA]
5. There is evidence of the presence of excessive moisture conditions below the first main floor (20% or above wood moisture content, standing water, etc.)	[ ]	[NA]
DAMAGE: Termite, other wood-destroying insects and fungi (Note: reporting of fungi damage to wood, commonly called water damage, decay or rot, is limited to the area below the first main floor of the structure as defined by DPRPN-198.) At the time of our inspection, there were visibly damaged wooden members (e.g. insect damage to columns, sills, joists, plates, doorjambs, headers, exterior stairs, porches, or fungi damage below the first main floor) ... If the answer is "YES," specify causes and location(s) on back.	[ ]	[X]

DAMAGE OBSERVED (IF ANY)	Check Appropriate Block Below
A. Will be or has been corrected by this company	[ ]
B. Will be or has been corrected by another company, see attached contract	[ ]
C. Will not be corrected by this company, recommend that structure be thoroughly and completely evaluated by a qualified building expert licensed or registered with the S.C. Department of Labor, Licensing, and Regulations, Residential Builder's Commission and that needed repairs be made	[ ]
D. In our opinion there is insufficient visible damage to recommend repair. (Explanation on the reverse side why repair was not recommended)	[ ]
TREATMENT	
1. The property described was treated by us for the prevention or control of Subterranean Termites 3-21-07 (date of treatment)	[X]
A waiver has been issued and is attached to this form	[NA]
The present treatment warranty will expire on ____ and may be renewed initially at $150.00 by the owner.	[X]
2. The property described has not been treated by us and is not now under contract with our firm.	[ ]

SEE OTHER SIDE OF THIS REPORT FOR ADDITIONAL CONDITIONS GOVERNING THIS REPORT.

CL-100 Approved by the South Carolina Pest Control Association, Inc., and the Division of Regulatory and Public Service Programs of Clemson University
Revised 3/99 Supercedes earlier versions. (OVER)



CONDITIONS GOVERNING THIS REPORT

Please read carefully.

This report is based on the observations and opinions of our inspector. It must be noted that all buildings have some wood members which are not visible or accessible for inspection. It is not always possible to determine the presence of infestation without extensive probing and in some cases actual dismantling of parts of the structure being inspected.

All inspections and reports will be made on the basis of what is visible, and we will not render opinions covering areas that are enclosed or not readily accessible, areas of finished rooms, areas concealed by wall coverings, floor coverings, insulation, furniture, equipment, stored articles, or any portion of the structure in which inspection would necessitate tearing out or marring finished work. We do not move furniture, appliances, equipment, etc. Plumbing leaks may not be apparent at the time of inspection. If evidence of such leaks is disclosed, liability for the correction of such leaks is specifically denied. No opinion can be rendered as to infestation or damage on that portion of sheathing, siding or other susceptible material which continues below soil grade.

The areas of the substructure and attic that are accessible and open for inspection have been inspected. The substructure is defined as that portion of the building below the first floor living space.

Detached garages, sheds, lean-tos, fences, or other buildings on the property are not included in this inspection report unless specifically noted.

The company, upon specific request and agreement as to additional charge, will open any inaccessible, concealed, or enclosed area and inspect same and make a report thereon.

REMARKS

THIS SPACE IS TO BE USED TO DETAIL ANY "YES" ANSWERS FROM THE FRONT OF THIS FORM. INCLUDE ITEM NUMBER WITH EACH EXPLANATION. CLARIFICATION AND EXPLANATION OF OTHER ITEMS MAY ALSO BE INCLUDED.

_____

_____The building was built on a cement slab and is therefore inaccessible for underneath inspection._____

_____2a. There is visible evidence of previous infestation of termites._____

_____3. This house was treated by this firm on 3-21-07 and is under contract._____

_____4. Wood and ground moisture is not available due to the building being on cement slab._____

_____

___Carter & Son Pest Control is a professional pest control company only and are not structural engineers. We do not make an evaluation of damage or the structural integrity of a building. Carter & Son Pest Control's report is for the purpose only of an opinion of the presence or absence of wood destroying organisms based on the visible evidence at the time of the inspection._____

_____

Neither I nor the company for which I am acting have had, presently have, or contemplate having any interest in this property. I do further state that neither I nor the company for which I am acting is associated in any way with any party to this transaction.

LICENSE NUMBER OF PERSON SIGNING THIS REPORT

CA 0010389 (MUST BE CERTIFIED IN CATEGORY 7A)

Firm: Carter and Son Pest Control

By: KA Carter SR.

Business License Number B 2021

ADDRESS: P.O. Box 1132

OF FIRM: Bamberg, South Carolina

ACKNOWLEDGEMENT:

PURCHASER ACKNOWLEDGES THAT A COPY OF THIS REPORT HAS BEEN REVIEWED AND RECEIVED.

11-5-07
DATE ACKNOWLEDGED

PURCHASER'S SIGNATURE

STIPULATIONS

The deposition of KENNETH A. CARTER, SR. is taken in accordance with provisions of the circuit court rules for the purpose of discovery or for use as evidence, or for both purposes, and all questions as notice are waived.

It is stipulated that all objections will be reserved until the time of trial, with the exception of objections as to the form of the question.

It is stipulated that the witness waives the reading and the signing of the deposition.

- - - -

KENNETH A. CARTER, SR., having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BARNES:

Q Please state your full name.

A Kenneth A. Carter, Sr.

Q And, Mr. Carter, what's your address?

A Home address is 186 Evergreen Drive, Branchville, South Carolina 29432.

Q Okay. And we met just a minute ago; and my name is William Barnes. I'm a lawyer down in Hampton, and I, along with Alec Murdaugh represent Claude McAlhany in this action. We're here today to take your deposition

in this matter. Have you ever had your deposition taken?

A No.

Q All right. Well, this is just an opportunity for me to ask you questions about this case. And, if you don't understand my question at any time, just ask me to rephrase, I'll be happy, because I want you to understand my questions. If you do answer my question, is it fair that you understood my question?

A Yes.

Q All right. And, we're not going to be here too long, but if for any reason you need to take a break, just let me know. Are you married?

A Yes.

Q And, what's your wife's name?

A Susan Graham Carter.

Q And, do you have any children?

A I have two; a 33-year-old son and a 28-year-old daughter.

Q And, what are your kids' names?

A Kenneth, Jr. and Jackie Haddock.

Q And where do they live?

A Kenneth, Jr. lives 78580 Stone River Road, Branchville, South Carolina. My daughter lives 101 First Street, Cameron, South Carolina.

Q Are they Carters?
A Yes, sir. All of them are Carters except one niece and she is a Beaks.
Q How do you spell that?
A B-E-A-K-S.
Q And, you said earlier, what's your wife's maiden name?
A Graham.
Q Graham? Is she from Bamberg County?
A She was born in Greenville, South Carolina.
Q Okay. Does she have any family in either of those?
A Her father lives in Bamberg. He lives in Branchville, but it's Bamberg County.
Q Do you attend a church here in Bamberg County?
A No, sir.
Q Do you attend a church in Orangeburg County?
A No, sir.
Q Are you the owner of Carter & Son Pest Control?
A That's correct.
Q And how long have you had that business?
A Since 1994. Maybe 1993.
Q And, what license do you have to have to be a -- to own a pest control business?
A Certified Applicators.
Q And who is that done with?
A State. Clemson University. State Pesticide and

Fertilizer Regulation.
Q Do you have any continuing education requirements?
A Yes, sir. I have to acquire 10 units per five years.
Q Has your license ever been suspended or revoked --
A No.
Q -- for any reason?
A No, sir.
MS. PAYNE: If you'd let him finish the question before you answer.
MR. BARNES: Yeah, I was just about to say that. She's taking down everything we say and sometimes when people talk over each other it's difficult for her to take down everything.
Q What is your territory of the customers you serve with your pest control company?
A I've got customers in Aiken, and I've got customers in Charleston; I've got customers in Allendale and I've got customers in Santee. I mean, it's just no territory as long as I don't go out of state.
Q And, I assume since you have to be licensed by the state you can't do anything in Georgia or --
A Or North Carolina.
Q Okay.
A Just South Carolina only.
Q About how many customers would you estimate you have?

A It's hard to say, sir. 1,500 maybe.
Q How many employees do you have?
A One full-time employee, my son.
Q Do you have any part-time employees?
A I do at certain times of the year. In the busy part of the year I'll hire one or two part-timers, and when it gets slack I'll lay them off.
Q What are your busy times of the year?
A From March to August.
Q Who had been your most recent part-time employees?
A Charles Peak, P-E-A-K.
Q Where is he from?
A Bamberg.
Q As part of your services with your pest control company, do you also provide CL100s?
A Yes, sir.
Q And, if you would, explain to me what a CL100 is?
A It's a Wood Infestation Report.
Q And what's the purpose of a CL100?
A To determine if the home has infestation of termites, and any rotten wood caused by termites, or any visible damage caused by termites.
Q Are there particular regulations or statutes that you have to follow for completing a wood infestation report?

A You pretty much have to just follow what's in the training book through Clemson, the pesticide regulations.
Q What's the book you're referring to?
A Official Code of the South Carolina Pesticide and Fertilizer Regulations.
Q It's just regulations?
A It's a code book.
Q So this is not like a training manual from Clemson that --
A No, sir.
Q -- shows you how to do this?
A It's the code for the South Carolina Pest Control.
Q I meant to ask you this earlier. Have you ever been a party to a lawsuit?
A Never.
Q Either bringing a lawsuit or --
A Never.
Q -- having a lawsuit against you, other than this one?
A This was only.
Q Have you ever made any claims against an insurance company?
A Of course I've had car wrecks, but as far as my insurance with this pest control, never.
Q What type of insurance do you have with your pest

control company?
A The only thing I know, it's the SIA Group.
Q Is that just a general company or is it one specifically tailored to pest control companies?
A It has to tailor to pest control companies, because just any insurance company does not offer coverage, bonding and -- I mean, I just couldn't go down here and get insurance at Pinson's Insurance Agency with the type of work I do. They have to tailor to pest control, is my understanding.
Q Have you ever been arrested?
A Yes, I have.
Q And I don't mean any disrespect when I ask that. Just typically, it's what's asked from most witnesses.
A When I was a teenager I was arrested.
Q And, what was the circumstances leading to that?
A Intoxication.
Q What was the result of that charge?
A Reckless driving, but not DUI.
Q Have you had any other arrests since then?
A Not since then.
Q You ever receive treatment for drug or alcohol abuse?
A Never.
Q We were talking a minute ago about CL100 inspections. How often do you do a CL100 inspection?

A In good economy, could be 100/150 a year. In this poor economy, maybe five.
Q What are typically the circumstances leading to a CL100 report being done?
A Circumstances have been, if you borrow money to buy a home, the bank requires a infestation report.
Q Are you typically contacted by the bank or by the seller or the buyer?
A The bank suggests to use so and so, normally, is my understanding. The typical buyer don't know how to do this and that and the other. Between the lender and the lawyers, they will recommend, well, this has got to be done so use this man.
Q How long does it take to do a CL100 report?
A It depends on the size of the home. If it's like a double-wide trailer it takes an hour. If it's a larger home it could take up to two hours.
Q If you would, kind of walk me through what you do when you do a CL100 report.
A Well, you only --
Q After you arrive at the home.
A You go and crawl under the homes with flashlights and a probe, and if it's a crawl home you take a moisture reader with you, moisture meter. You look for termite shelter tubes coming up block, brick walls, heading

into the wood joists, beams and seals. And if you see that then you go to it and you scrape it down. If there's live termites in it, then you already know you got a home there that's got a X that needs a treatment. Then you -- after you cover your crawl space, you would go in and, especially in the baths and kitchen areas where there's water present, you check for soft floors, leaks under the sinks and so forth. And, if you have to, you have to get in the attic, crawl up through the attic, same method as the crawl space; you would look for damaged wood.

Q What are you looking for when you mentioned in kitchen areas leaks and soft floors?

A Damage.

Q From termites?

A From moisture and termites.

Q So, do you look for moisture and termites in every CL100 inspection?

A Yes.

Q You mentioned --

A Visible. Visible. I cannot dismantle that wall to look behind that wall. It's only what I can see by eye.

Q You mentioned the -- you said you crawl under the homes where you can and you take a moisture probe. What do

you do with that probe?
A I don't understand.
Q What purpose is it used for?
A Moisture cannot be above 20 percent -- 28 percent max. And if, at that time, then wood starts decaying.
Q Where -- if you would, explain this probe to me, what it looks like? Because I've never seen one and I'm just trying to...
A It's a -- do you know what an amp meter is, where you take a meter with two probes and you stick it in a receptacle and it tells you it's 110 volts?
Q Right.
A Same principle, but with one lead.
Q So, where do you stick the probe?
A In the wood.
Q Is it the wood in the walls, on the bottom of the floors or --
A Just the floor joists and maybe around windows, maybe around door casings.
Q Do you -- so you -- do it inside the home?
A Not if it's not visible. I mean, if there's not water leaking out of that wall there, no. No, you don't.
Q Okay. So you don't do a moisture reading unless there's visible damage?
A Everything's done by eye, by vision.

Q You mentioned you could do a probe around the edge of a door. What type of --
A The bottom of the door, if there's damage there.
Q Okay. What type of -- would they leave a mark or what type of damage would be seen if you did a moisture reading on this door right here in the room?
A Wouldn't be no damage. It don't go in the wood. It just -- it hits the wood.
Q Okay.
A I mean, it's not much bigger than this paperclip.
Q It's just making contact?
A It's making contact. It doesn't go in four or five inches. It just goes up and makes contact.
Q It's not -- so there's really not that much extra work for doing that even if there is no visible damage, is there?
A It's not required by code.
Q Do you do that now in every home?
A Only in places that I see visible evidence of moisture.
Q What are you looking for -- for visible evidence of moisture?
A If it's sheetrock, there would be a hole in it or it would be discolored paint. Or if it's around a toilet, you could tell if the floor's wet. If you come in here and look and see, but there's no moisture in this room.

Q How long does it take to -- if I was to walk up with your probe and put that probe on the wall, how long would it take to get a reading?
A Immediately. It's analog.
Q So basically, I could walk around this room right now in a very quick period of time and get moisture readings on each of the four walls?
A Yeah.
Q We are here about this house at 3633 Faust Street in Bamberg. When did you first learn of --
MR. BARNES: Strike that.
Q What was your first involvement with this home?
A Erick Cogburn had purchased it from Mr. Ginn somewhere along March '07.
Q So, when Mr. Ginn was the owner of the home, had you done any work --
A No, sir.
Q -- from a pest control standpoint with that home?
A Never been to the home before in my life until Mr. Cogburn bought it.
Q How do you know Mr. Cogburn?
A Bamberg's a small town. I'm sure Hampton is too. I went to school in Bamberg.
Q So, did Mr. Cogburn call you?
A Yes, sir.

Q And what did he tell you?
A He wanted me to inspect the house so he could get it ready to do a resale on it.
Q So in March of 2007, he called you and said that he wanted you to come and inspect it. And, was it his intent then to resell it?
A To flip it. And it could have been February. I don't know the exact date.
Q But sometime in early '07?
A Prior to that first letter.
Q What did you do after you and Erick talked?
A Basically told him he needed to treat it for termites.
Q Was that before an inspection was done or did you inspect it and then say it needed to be treated for termites?
A Now let me back up. This is when he was buying it from Ginn, and I did the inspection for Cogburn, and told him that it needed to be treated. I said, "If you're going to flip it, you're going to have to treat it."
Q Okay. So when Cogburn was purchasing it from Ginn, you did a CL100 inspection?
A To the best of my knowledge. I mean, that's five -- close to five years ago.
Q Okay. And then told him that it needed to be treated?
A Yes.

Q Would you have told him it needed to be treated without doing an inspection?
A I don't understand where you're going with that --
Q I'm just --
A -- type of question.
Q I mean, I was -- I'm asking --
A I'm not in the business to say, "You need to treat your house." You know, I looked and I seen a few things that alarmed me that it needed to be treated.
Q I guess what I'm asking is, was this a formal inspection on a CL100 or was this just you coming around looking visually and saying I advise --
A Let's just say it was a preliminary inspection.
Q Okay. Walk me through what you did in treating the home from the time Erick first contacted you in early 2007?
A I didn't personally treat the home. My technicians did.
Q What is your knowledge of what your technicians did in treating the home?
A Drilling, trenching, flooding, floating.
Q All right. Walk me through the drilling.
A You just have to drill concrete. At the time when this was done we were drilling on a 24-inch basis, but since then they've cut it back to 16; the codes. You just

MR. BARNES: [To the Court Reporter:] I need that. It's the October 19th.

Q I'm going to mark this as Exhibit 1 and ask you, I believe this is what you were referring to?

(Whereupon, Plaintiff's Exhibit No. 1 was marked for identification.)

A [Witness reviews document.] Yes.

Q And I just want to walk through this. Is this a form that you did the inspection for?

A Yes.

Q And on Exhibit 1, it's dated October 19, 2007, and it's got "File No. Cogburn/McAlbany"?

A Yes.

Q 3633 Faust Street?

A Yes.

Q And it's got "type of transaction" and it's got "conventional" marked. What does that designate?

A It's conventional bank loan. It's not an FHA loan. It wasn't a VA loan. It's a conventional bank loan through Home Federal Savings & Loan.

Q Who contacted you about this inspection?

A Cogburn.

Q Did he know that it was going to be necessary for one, for the -- for McAlbany to obtain the money from the bank?

A Yes, because he dabbles in buying and flipping, and he knows the ins and outs of closing home mortgages.
Q How many homes does -- are you aware Mr. Cogburn owns?
A I don't know if he owns a home at the moment.
Q How many homes are you aware of he's bought and flipped?
A A few. To give you an exact number, I could not come up with an exact number.
Q Would it be 5 or 10?
A In the last 10 years, yes. Five, ten, maybe. It could be one.
Q Have you performed the -- how many CL100s have you --
A This one.
Q This is the only one?
A [No verbal response.]
Q Did you know from the community that Erick bought and resold homes?
A Yes, sir.
Q Are y'all friends?
A I don't eat supper with him every Sunday, but I know the guy.
Q What's his reputation in the community?
A He's an insurance broker, fine fellow.
Q Getting back to the Exhibit 1, I just want to walk through what you -- ask you some questions about this.

Below where the conventional, it says, "Were any areas of the property obstructed or inaccessible?"
A Yes. It's built on a cement slab.
Q And then under one you check "no" for both evidence of active subterranean termites or other wood-destroying insects?
A That's correct, no.
Q And you noted there was a previous infestation of subterranean termites?
A There was a previous.
Q Do you remember where you saw that?
A Not right off. No, sir.
Q And, you said there were no other -- no evidence of any previous evidence of an infestation? 2B.
A Other the wood-destroying insects? 2B?
Q Yeah. I said you did not --
A 2B's a no.
Q Right.
A Yeah.
Q There is visible evidence of prior subterranean termite treatment. You said, "Yes." You actually did that prior treatment?
A Yes.
Q No. 4 is there is evidence below the first main floor of the presence of active wood-destroying fungi. You

put not applicable?
A Couldn't get on the first floor. It's a slab.
Q And then you say there's not applicable on wood-destroying fungi under 4B?
A It goes back to 4A. It's a slab. You cannot get up under a slab.
Q And 5 is also not applicable. Under damage you said there was no visibly damaged wood members?
A From the previous CH100 there was damage around windowsills and a couple of doorsills and a few other places that Mr. Cogburn corrected.
Q And we'll get to what you know about those repairs in a minute. And then you don't -- you didn't observe any damage?
A I mean, he completely remodeled the house. He painted the walls, and you walk through it. Like I said earlier, without dismounting that wall, I cannot tell what's behind it. If the wall looks good, it's good.
Q Under "Treatment" you've got the date that it was previously treated on, March 21, 2007. It's got there was no waiver issued; is that correct?
A That's correct.
Q It's got not applicable. And then you said present treatment warranty will expire on and there's no date there?

Q What's the cost for a Wood Infestation Report?
A At this was $100.
MR. BARNES: Do y'all need a copy of that?
MS. HOOD: No.
(Whereupon, Plaintiff's Exhibit No. 2 was marked for identification.)
Q I'm going to hand you this, Plaintiff's Exhibit 2, and ask you, can you identify that document?
A [Witness reviews document.] This is a warranty.
Q And, explain to me what this document is?
A It's a one-year termite warranty. If you have a re-infestation of termites, I will come back and get rid of that infestation free of charge.
Q And this was issued to Erick Cogburn on March 21st?
A Yes.
Q Are you aware of any communications Mr. Cogburn may have had with Mr. McAlhany regarding --
A I have --
Q -- this warranty?
A I instructed Cogburn to give McAlhany the warranty paper that I give him, and then the following year, I will send the postcard out to McAlhany instead of Cogburn.
Q When did you -- let's fast forward a little bit. When did you first learn of problems with the Faust Street

home that the McAlhany's owned?
A Probably about 2010, in that neighborhood.
Q And, what did you learn?
A I don't remember.
(Whereupon, Plaintiff's Exhibit No. 3 was marked for identification.)
Q I think that's the letter you're looking at there. That's Plaintiff's Exhibit 3?
A Yeah.
Q And, this is a letter you got from Bo Griffin?
A Yes. This is after the termite contract had been void --
Q And --
A -- from lack of payment.
Q This says L.E. but L.E. is Bo?
A I don't know what Bo's name is to be honest.
Q And it reads, "Dear" -- it's dated August 14, 2009?
A Yes.
Q And he -- the second sentence says, "It is our understanding that there were active termites present and also damage involved with this and/or previous infestation." And, he's basically asking about any retreatment or repair of damages?
A That's basically what he's asking.
Q Did you have any verbal communications with Bo after

receiving this letter?
A I responded to Bo.
Q And, I have your letter dated here. Did you have any communications with him after, other than the letter? I mean, did you call him on the phone?
A I don't remember.
(Whereupon, Plaintiff's Exhibit No. 4 marked for identification.)
Q I'm going to next hand you Exhibit 4 --
A All right.
Q -- and this is your response?
A This is our response back to Bo in August of '09.
Q And, Exhibit 4 is dated August 26, 2009?
A Yes.
Q And, the fourth sentence there says, "This property was treated for termites for Mr. Cogburn in March 2007 after termites were found." And then you go on and note that at that time there was also visible damage that Mr. Cogburn had repaired scabbed on repairs. What type of repairs are you aware of that Mr. Cogburn made to the home?
A He did a good bit of painting and he repaired some door facings, window facings. And, other than that, it's been so long I cannot remember.
Q What do you mean when you say scabbed on repairs?

A Well, you just don't demolish the whole house and build it over; you just take out the rotten wood and put new wood in. You don't tear the whole wall down and build a wall back. You just tear what you need out and you scab back on to it, and put the sheetrock back up.
Q So was there rotten wood in the house?
A I don't know. I wasn't there. It was behind -- when he did -- like I said earlier, I cannot dismantle.
Q And I understand that, but I'm just asking what your knowledge is?
A When he brought me over to do the re-inspection, we went to the areas that I found, and it was nice, clean, painted and beautiful.
Q So is painting a scabbed on repairs, I mean, to you?
A Well, this is evident that he took door facings out and put new door facings in and painted them.
Q Are you aware of him putting in new sheetrock?
A He -- in certain places he would have had to --
Q Why --
A -- because you got to cut the sheetrock out to get behind the doorframe to put new wood in.
Q Are you aware of any additions or revisions to the studs in the walls?
A I'm not aware of them.
Q Have you --

A -- is take the paperwork down to the lawyer's office and they just distribute the paperwork. I don't get involved in that.
Q What all do you know about Claude McAlhany?
A Zero.
Q I mean, do you know him when you see him or --
A No.
Q Do you know anything about him?
A That he's got my ass sued. That's all I know about him.
Q What do you think about this lawsuit?
A In my honest opinion I think it's bullshit.
Q And why is that?
A Because he's suing me for mold, I don't deal with mold. I don't have a license to deal with mold; I don't have the education to deal with mold. Mold has nothing to do with infestation of termites.
Q A lady by the name of Kristin Lenox --
A Yes, she's an inspector.
Q -- came to inspect the home from Clemson University. Did you visit the Faust Street home with --
A My son did.
Q Okay. So you weren't there that day?
A I haven't been there since 2007.
Q Okay. What all had your -- is your son a full-time

employee of --

A Yes.

Q -- of Carter & Son? What all did he tell you about that day?

A It's all right here in that letter from Clemson, his affidavit and all. And, he said he missed a few spots of drilling, that he had a few spots drilled too far apart. And, by memory, I can't come up with anything else he said.

Q Did he tell you about any conversation he had with --

A Kristin?

Q -- with Mr. McAlhany?

A No. No.

Q Do you mind if I see the paper there?

MS. PAYNE: [Reviews paper.]

A [Complies.]

MR. BARNES: Let's mark that as a deposition exhibit.

MS. PAYNE: Well, can we get a copy made?

MS. HOOD: Yeah --

MR. BARNES: Yeah.

MS. HOOD: -- I was going to say. Let's just take one minute.

[Briefly off the record of 2:34 p.m. to 2:35 p.m.]

(Whereupon, Plaintiff's Exhibit No. 5 was marked

don't have --
Q So --
A -- no, I don't have.
Q -- so no local companies, just the national --
A Yeah.
Q -- guys that... Did you know Mr. Ginn that owned the home previously?
A I've known Mr. Ginn since first grade. He's in the school system as a teacher and a principal.
Q Did -- were you aware of any issues with water seepage at the home on Faust Street?
A The home is built on a pretty good incline, and any time you build a home on an incline of five feet or more like that one, you're going to have water issues.
Q Did you know that at the time you did your first CL100 inspection?
A Yes.
Q How do you develop water issues? What do you mean by that?
A Rainwater is going to follow the path of least resistance. So it's going to start over there on that doorframe right there and then start rotting in the bottom of that doorframe. And that was corrected by the -- I'm not real sure if he did any excavation to correct that problem or not, because like I said, I

haven't been back over there.
Q Were you aware at the time, or was Erick aware, to you knowledge, that there were water issues with this home?
A I'm not real sure about that, about Erick knowing, because there's no way I can think what he's thinking. I can't say what he's thinking.
Q And, that's fair enough. Did he ever say anything to you or you say anything to him that says, hey, this thing's on a hill and there might be water issues?
A I'm sure it was brought up during our conversation when I was telling him to fix the molding around this and that door, which at -- right now, I don't even remember which door it was.
Q Do you know if he said anything to Mr. McAlhany about any water issues?
A I have no idea.
Q Are you aware of anybody else that has lived in that home?
A Just Mr. Ginn.
Q No one else?
A Yeah. Mr. Taylor lived there for a good while.
Q What's his name?
A Not Taylor. I don't remember. Timmy Wilson, that's it.
Q How long did he live there?

A It could have been 5, 10 years. I just remember him living there.
Q And I assumed if Mr. Ginn owned the home, was Mr. Wilson renting?
A I don't know. I don't know if he bought or -- he couldn't have bought, because Cogburn bought it from Ginn, so he had to be leasing.
Q Does -- do you know if Mr. Ginn, I mean, Mr. Wilson knows Mr. Cogburn?
A They went to school together, they're the same age, I'm sure they do know one another.
Q Did you -- other than this letter you got from Kristin Lenox, did you have any other communication with her?
A Just my back feed that I -- that I'm sure you got.
Q You wrote a letter to her?
A No.
Q So you're just talking about this letter right here?
A Yes.
Q From her?
A Yeah.
Q Did you talk with her on the phone?
A Yes.
Q And what did you two talk about?
A She was telling me a few things that my son skipped as far as drilling, and a few holes he had too far apart

and, this, that and the other. That's hard to remember from five years back. But it should be all right there in that letter. Because everything she spoke to me about is in that letter right there.

Q Were there any repercussions from the letter?

A Zero.

Q At the time you did the CL100 in October, which was the 2nd, and you testified earlier you had to -- you realized that this was on a decline or incline, however you want to look at it, did you think it may be best to confirm any moisture issues?

MS. PAYNE: Object to the form of the question. You can still answer it.

A The moisture issues? Let me put it like this: If I go over there and it's been dry for six months, and you could kick dust up and grass, there's no moisture issues. If you go over there in the pouring down rain, you'll get a better idea of what needs to be done. I've never been there in the pouring down rain.

Q And I understand that. What I'm asking though is, you testified earlier that you had, by the home being on the slope, that water issues are possible; is that correct?

A Water issues are possible in any home.

Q And, did you do anything to see if there were any

MS. HOOD: I'm not sure that I have --
MS. PAYNE: Okay.
MS. HOOD: -- your production. [Inaudible response.]

CROSS-EXAMINATION

BY MS. HOOD:

Q Mr. Carter, my name is Alison Hood. I'm here, I'm representing Mr. Cogburn. In the interest of time, I'm going to ask you a couple of questions while Mr. Barnes goes through that folder. I want to show you real quick, I believe it's been marked in the previous depositions as Defendants' 5 and --

MS. HOOD: And Suesan, you might need to help me.

Q -- the March 20, 2007 CL100.

MR. BARNES: That's No. 11.

MS. HOOD: That's No. 11?

THE COURT REPORTER: That's 11.

Q I just want to show you this. It's the March 2007 CL100 and the October 2007. And I just have one question about these. Right here, the question, total damage that speaks to, let's see, at the time of the inspection, damaged wooden members, then it gives a list. In March you marked "yes" and then in October you marked "no". And that's both on the Faust Street residence. Can you explain what happened between March and October that you said "yes" in March and "no" in

October?
A March was the initial inspection and treatment.
Q Yes, sir.
A There was damage at that time. And I guess between March and October, Mr. Cogburn repaired all the damage before this letter -- before this issued to -- sold it to --
Q Mr. McAlhany.
A -- Mr. McAlhany. Going back to what I said, by viewing, by vision only. That damage that I seen here [witness points to document] was repaired, painted and pretty, so I've marked no damage here.
Q Okay. And then the same thing. In the March you don't mark that there was any evidence of a previous infestation of subterranean termites. You mark "no" on termites, wood-destroying insects and visible evidence --
A Yes.
Q -- of prior treatment. And then --
A Right.
Q -- in October you mark "yes" there is evidence of a prior infestation. Is that new evidence?
A Yes.
Q So you -- it's your -- you observed an infestation in October that you did not observe in March?

A Yes.
Q Okay. I just wanted to be clear about that. Okay, and then I have just five more questions.
MS. PAYNE: Don't rush.
MS. HOOD: Well, it's okay.
Q Do you normally check for mold when you do a CL100 inspection?
A I have nothing to do with mold. I'm not licensed to deal with mold. I don't have the training or the education --
Q Okay.
A -- to pursue a career and determine what type of mold is what.
Q What is your knowledge of fungus?
A Fungus is different from mold. Fungus is created when wood is reaches 28 percent moisture content, which are fungi, not fungus, fungi is -- starts developing. And once it starts, it will destroy that wood.
Q Uh-huh (affirmative).
A And how long, I couldn't tell you.
Q So you assume the existence of fungi if the moisture level is at a certain level, the 28 percent?
A Yes. Anything under that, fungi is inactive.
Q Okay.
A And it's not fungus, it's fungi.

Q Fungi is singular and plural. When you make a representation, is it based on your observation of fungi or is it based on your observation of --
A Vision.
Q -- the moisture --
A Vision.
Q -- level? It's based on your vision?
A Yes.
Q Okay.
A Fungi leaves a white powder.
Q And then that prompts you to do the moisture test?
A Yes.
Q Okay. And, did you do the moisture test in March and October --
A Not on the --
Q -- in 2007?
A There's a slab flooring. There's no way to do moistures on the downstairs.
Q So you didn't do moisture test in either instance, March or October of 2007?
A All the way around the, couple of places I seen that was wet and rotten that I asked Mr. Cogburn to replace.
Q So if you observed wet rotten wood, that prompts you to do the moisture test?
A Yes.

TERMITE WARRANTY

YEAR 1st

PLAINTIFF'S EXHIBIT NO. 2

CARTER & SON PEST CONTROL
P.O. BOX 1132
BAMBERG, SC 29003-1132
803-245-4747
SC LIC. #CA00010389
BUS LIC. #B0002021

ISSUE TO: Erik Cogburn PO Box 296, Bamberg SC 29003 DATE: 3-21-07
PROPERTY OWNER ADDRESS

In consideration of Sums received and to be received by us for treating and re-inspecting the structure located at 512 Faust St Bamberg SC for the control of Subterranean Termites. We Guarantee, subject to the provisions of the Warranty, to re-inspect annually the structure treated, and apply any necessary additional treatment to such structure at NO EXTRA COST, if re-infestation is found herein during the period that this Warranty remains in force.

TERMS AND CONDITIONS

The initial payment under this Warranty for termite treatment (excluding repairs) performed by us is $ 900.00, plus an additional payment of $ _____ for repairs, receipt of all which is hereby acknowledged. The initial period of the Warranty shall be one year, commencing on 3-21-07. The date of the initial treatment, and terminating on 3-21-08. In addition to this initial one year period, you may at your sole option, renew this Warranty annually for a period of (4) additional years, by making annual payments of $ 150.00, payable on or before 3-21 of each subsequent year, which is the anniversary date, with the company reserving the right to adjust this annual renewal. If such payments are made without lapse during said additional (4) year period, the period of this Warranty shall be for (5) years from the date of the initial treatment. If annual payment is NOT made on or before said date of any subsequent year, during said additional (4) year period, this Warranty shall terminate and become null and void as of the anniversary date on which such payment is due. This Warranty covers the premise as of the date of initial treatment, and in the event the structure is modified, altered, or otherwise changed after the date of the initial treatment, this Warranty shall terminate unless a prior written agreement shall have been entered into by the owner for the Company to treat and to re-inspect the structure, provide additional treatment if necessary at additional cost to the owner and/or adjust the annual renewal fee.

Wood frame on Slab
Description of Property

H A Carter Sr.
Carter and Son Pest Control Authorized Signature

pd

0261

APP 0261

CONDITIONS OF WARRANTY

a) For new single family residential construction not otherwise covered by a federal warranty requirement, the Pest Control Operator (PCO) will provide to the Builder (or owner, if known at the time of treatment) a one year transferable warranty, which shall cover repair of damage and retreatment. The warranty period begins the day pretreatment is billed. This warranty must be transferred to any owner within the original one year warranty period, by notification from the new or the old owner to the Pest Control Operator by certified mail, return receipt. The PCO must offer the homeowner the opportunity to renew the warranty on the same terms and conditions the PCO offers renewals of the regular termite treatment contracts for 4 consecutive years. Failure of the homeowner to renew any one year relieves the PCO of any future responsibility for renewals, based upon this section. The renewal warranty must, as a minimum, extend to retreatment, but may by mutual agreement, be extended and/or enlarged.

b) The PCO's original warranty shall not extend to:

1. Violations of the Standard Builder's Code by the owner/builder which occur after the completion of the pretreatment (stucco or Styrofoam sheeting, or similar material which extends below grade, inadequate ground clearance, etc.)
2. Additions not treated by PCO.
3. Remodeling/landscaping which occurs after pretreatment is complete and which entails considerable disturbance of the treated soil area.
4. Conditions for which a waiver has been approved prior to the commencement of the pretreatment.

c) A copy of the warranty and a copy of waivers, if any, shall be delivered to the purchaser of the treatment prior to closing. The warranty shall clearly state its transferability, renewability and the requirements therefore.

SAVANNAH & LOANS

PLAINTIFF'S EXHIBIT NO. 3

August 14, 2009

Carter Pest Control
3049 Main Hwy
Bamberg SC 29003

Re: Claude McAlhany/3633 Faust Street; Bamberg, SC

Dear Kenny:

Your company provided a CL100 and subsequent treatment regarding the above dwelling. It is our understanding that there are active termites present and also damage involved with this and/or previous infestation. We further understand that a bond was given on this dwelling.

Please advise as to coverage under your company for re-treatment and repair of damages. Thank you for your assistance in this matter.

Sincerely,

J. E. Griffin
CEO

tlc

xc: Claude McAlhany

Chairman

Vice Chairman

Secretary
Director

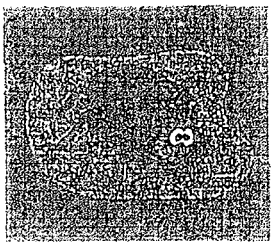
Chief Executive Officer
Director

Director

James V. Hicks, Jr.
Director

Kathryn C. Rhoad
Director

P.O. Box 249
2490 Main Highway
Bamberg, SC 29003
phone: 803-245-5139
fax: 803-245-4622



PLAINTIFF'S EXHIBIT NO. 4

CARTER & SON PEST CONTROL
PO BOX 1132
BAMBERG, SC 29003
803-245-4747

August 26, 2009

L.E. Griffin
Home Federal Savings & Loan
PO Box 239
Bamberg, SC 29003

Re: Claude McAlhany/3633 Faust Street, Bamberg, SC

Dear Bo:

This letter is in response to your letter dated August 14, 2009(rec'd 8-25-09). A CL100 was issued on the residence noted above in October 2007. At that time there was no evidence of active termites or visible damage. This property was treated for termites for Mr. Cogburn in March of 2007 after active termites were found. At that time, there was also visible damage that Mr. Cogburn had repaired (scabbed on repairs). As previously discussed with Mr. McAlhany, there was a bond on this property from March 21, 2007 until March 21, 2008. At this time, the bond was not renewed by the owner. This disqualifies this residence for any protection from our company.

Mr. McAlhany told Kenny Jr. that he had not received copies of the CL100 or warranty at the time he purchased the house. This is not the fault of this company. We have no contact with the buyers unless they seek us out. It is the responsibility of the seller/and/or/financial institute to make sure that the paperwork is forwarded to the new owner.

However, we do send out postcard marked "Homeowner" with the address on file for the property where a property we have on bond comes renewable and we know it has been sold. After no response to the postcards, this contract was cancelled in our records. Termite chemical is distributed with a one year warrantee and this is why it is so important to renew on an annual basis.

Carter & Son Pest Control has no responsibility at this time for the termites or the damage as the contract had lapsed for 1-1/2 years. However, Kenny Jr. did mentioned to Mr. McAlhany, that we would be happy to treat the house for the same price as an annual renewal (with no bond) as we are a hometown business and would like to support our customers.

If Mr. McAlhany would like to contact us for treatment options, we will be happy to help him the best we can.

If you have any questions, please feel free to contact me.

Sincerely,

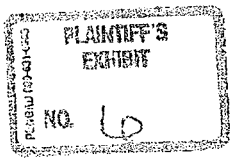
Kenny Carter Sr.,
Owner/Operator
Carter & Son Pest Control

CC: Claude McAlhany

KA Carter SR.

CLEMSON
UNIVERSITY

Kenny Carter
Carter & Son Pest Control
PO Box 1132
Bamberg, SC 29003



RE: APPLICATOR WARNING LETTER

Dear Mr. Carter:

November 5, 2009

Reference your company's 2007 subterranean termite treatment, your October 19, 2007 Official South Carolina Wood Infestation Report and our October 9, 2009 Structural Pest Inspection Report on the structure in reference to Claude McAlhany, located at 3633 Faust St., Bamberg, S.C. 29003. During the 2007 treatment, the following Standards for Prevention or Control of Wood Destroying Organisms were not properly completed as required by the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act:

1) Section 27-1085 G(2)(d): "For conventional liquid treatments, treat all soil adjacent to foundation walls..."

* Soil along exterior foundation under front entrance was not treated.

2) Section 27-1085 G(2)(e): "All cavities and voids within hollow masonry... must be drilled at intervals of no more than 16 inches..."

* Voids in block foundation around laundry room were not drilled & treated.
* Voids in porch steps were not drilled & treated.
* Void between the monolithic slab and the block foundation wall on the left, front and right sides was not drilled & treated.
* Void between the monolithic slab and the brick veneer on the left side was not drilled & treated.
* Block wall under the front entrance was not properly drilled & treated.

3) Section 27-1085 G(2)(f): "Soil areas beneath attached concrete slabs... which are less than 18 inches below the sill or plate line of the structure must be treated..."

* The carport and the 3 rear slab entries were not properly drilled and treated.
* The laundry room slab was not drilled & treated.

It is a violation of the South Carolina Pesticide Control Act to fail to properly perform the Standards for Prevention or Control of Wood Destroying Organisms.

Case File # 0909093601

DEPARTMENT OF PESTICIDE REGULATION
511 Westinghouse Road Pendleton, SC 29670 864.646.2150 FAX 864.646.2179
Regulatory & Public Service Programs Public Service Activities

In the October 2007 Wood Infestation Report, evidence of subterranean termites was not properly disclosed. Although evidence of a previous infestation of subterranean termites was disclosed on the front of the report, the nature and location of that evidence was not described on the rear of the report. Also, the accompanying termite damage was not disclosed.

It is a violation of Section 27-1085 K of the Rules and Regulations for the Enforcement of the SC Pesticide Control Act not to properly disclose all readily visible or accessible wood destroying organisms or their damage when issuing the Official South Carolina Wood Infestation Report.

The specifics of this case indicate that this warning letter is the appropriate enforcement response. Future violations of the Act may result in civil penalties, or suspension of your South Carolina Certified Applicator's License. It is hoped that this warning letter will insure future compliance with all of the state pesticide laws. If you have any questions regarding this or other matters feel free to contact the department anytime.

Sincerely,

Lee Galloway
District Supervisor

cc: Kristin Lenox - DPR
Jim Wright, Regulatory Supervisor - DPR
Regulatory Coordinator - DPR

Case File # 0909093601
License # CA010389

(PLF. EXH. 1, Handwritten note to Mr. Bo Griffin, was marked for identification.)

(PLF. EXH. 2, Summary Appraisal Report, was marked for identification.)

(PLF. EXH. 3, Official South Carolina Wood Infestation Report, was marked for identification.)

(PLF. EXH. 4, Termite Warranty, was marked for identification.)

(PLF. EXH. 5, Official South Carolina Wood Infestation Report, was marked for identification.)

(PLF. EXH. 6, Color photographs labeled 6.0 through 6.22, was marked for identification.)

FREDERICK PATTERSON COGBURN, JR.

being first duly sworn, testified as follows:

EXAMINATION

BY MR. BARNES:

Q. Please state your full name for the record.

A. Erick Cogburn.

Q. And do you have a middle name?

A. On my birth certificate it says Frederick Patterson Cogburn, Jr., but I sign my name as Erick Cogburn. Everybody knows me as Erick

explained it. If you would, just allow us to -- allow me to finish my questions before you start your response because she's taking everything down, and sometimes that may be difficult if we're talking over each other.

A. Yes, sir.

Q. Do you have any relatives in Bamberg County other than the last name of Cogburn?

A. Yes, sir. I do.

Q. And what are those names?

A. Hutto, H-U-T-T-O, and England, E-N-G-L-A-N-D.

Q. Any others?

A. No, sir. I might have some cousins that married into other families, you know, but primarily that's my family.

Q. Have you ever been married?

A. No, sir.

Q. Do you have any children?

A. No, sir.

Q. I don't mean any disrespect when I ask this. This is what we ask of every witness. Have you ever been arrested?

A. Yes, sir.

Q. And what was that for?

A. I was arrested when I was 22 years old before I was -- before I graduated from college. I was arrested. They charged me for disorderly conduct, but it was thrown out.

Q. Where was that?

A. Columbia, South Carolina.

Q. Any other arrests?

A. No, sir.

Q. Have you ever received treatment for drug or alcohol abuse?

A. No, sir. That's when I was 22 years old and that's -- it's over with.

Q. We're here about the home that you purchased and subsequently sold to Claude McAlhany on Faust Street.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. When did you -- strike that.

When did you learn that this home was for sale?

A. Well, I had the house insured, and the owner -- the owner said he wasn't going to rent it anymore. He moved to Moncks Corner, and he was not coming back to Bamberg, and that's when I learned

it was for sale.

Q. And who was the owner?

A. Mr. William Ginn, G-I-N-N.

Q. You said that you had the home insured?

A. Yes, sir.

Q. I assume that was property insurance, homeowners?

A. Yeah. Well, I had the fire insurance on it. He was renting it out.

Q. Did the agency also have homeowners or --

A. We only put one policy on that house because he was renting the -- he was renting the house out. So he moved to Moncks Corner. When he left that house, he rented it out for several years, and so I insured his house in Moncks Corner, and I put a different fire insurance policy on the house in Bamberg that he was renting and -- yes, sir.

Q. When did he move to Moncks Corner?

A. I don't know.

Q. I believe you -- you purchased the home in March of 2007. Does that --

A. Yes, sir.

Q. -- sound right?

A. Yes, sir.

Q. How long before that had you had the house insured?

A. When I work -- went to work with Pinson Insurance Agency, my boss had already had that same house insured.

Q. So dating back to 1998?

A. Yes, sir.

Q. At that time was Mr. Ginn still living in the home, or was it being rented?

A. In 1998 he was still living in the home.

Q. So how long after --

A. I don't know when he left to go to Moncks Corner. I can try to find out.

Q. When do you first recall someone renting the home?

A. I'd say probably -- the best answer I could give is probably around the year 2000.

Q. Do you recall who the tenant was that was living in the home?

A. No, sir.

Q. Do you know of any of the tenants that lived in that home?

A. Yes, sir.

Q. Did you ask about any of those types of problems?

A. No, sir. I just -- I asked him if the house was a good house. He said it was.

Q. How much did you pay for the home?

A. Right around 78,000, if I remember correctly.

Q. And after you purchased it you made some repairs to it?

A. Yes, sir.

Q. Did Mr. Ginn suggest any repairs that needed to be made?

A. No, sir. When I went to buy the house from him, the second time I walked in the house, he was painting the kitchen cabinets, and he said you gonna buy this house? I said, yes, sir. He said, well -- he said I want you to shake my hand and tell me that, he said, because I'm going to quit painting these cabinets. And I told him I'd buy it.

Q. Did he give the brush to you?

A. No, sir.

Q. Prior to purchasing the home, what -- what all did you do as -- did you have an inspection done?

A. No, sir.

Q. Did you have an inspection done, a CL-100?

A. Yes, sir. I did.

Q. And who did that?

A. Kenny Carter. He owns a company called Carter's Pest Control.

Q. And how did you decide to -- to do that?

A. Well, he -- at the office building I work at, at the insurance agency, he has the contract on that building.

Q. And you told him you just purchased a home?

A. Told him I was getting ready to purchase it and told him the bank told me that I needed to have a CL-100 done.

Q. What did he do from there?

A. He told me on the phone, he said, when's the last time the house has been treated for termites? I told him that I had asked Mr. Ginn. Mr. Ginn didn't know.

He said the best thing to do is let me treat the house for termites. He said then -- he said I can give you a bond on the house and you can

transfer the bond to the new owner. He said that'll be one thing you don't have to worry about. And I was in -- and that made sense to me.

Q. And so you paid Mr. Carter to conduct the inspection?

A. Yes, sir.

Q. What was your understanding of what that CL-100 inspection included?

A. The banker told me -- I asked the banker. I said what is a CL-100? And she said, well, if there's active termites in that house, we will not loan you the money to buy it.

Q. Who was the banker you're referring to?

A. Sandra Harley at Enterprise Bank here in Bamberg.

Q. And Mr. Carter did his inspection?

A. Yes, sir.

Q. Did he find active termites?

A. I don't know. I went around there the day they were treating the house, and his son was out in the front yard, and he said he was almost through, and I went ahead and paid him. And he said that he would be bringing -- he would deliver the CL-100 to the bank for the closing.

Q. So you were ultimately able to obtain

bank?

A. Yes, sir.

Q. Did Mr. Carter explain to you in any way after this about any of the findings?

A. No, sir. He did not.

Q. Did Mr. Carter's son?

A. No, sir.

Q. They just told you that everything was fine and delivered it to the bank?

A. Yes, sir.

Q. And it looks like on page 3 of this document that it was $900?

A. Yes, sir.

Q. Does that sound about right?

A. Yes, sir. It does.

Q. So you obtained the CL-100, and the bank approved the financing, and after that you started making repairs to the home?

A. Yes, sir.

Q. And what all types of things did you repair inside the home?

A. We started outside. We put a new architectural shingle roof on the home. We moved inside and we put new crown molding up, put new baseboard molding up, put new flooring in the

house, put some new cabinet facings on the cabinets, tiled the backsplash in the kitchen and ceramic tiled the countertops in the kitchen.

Went upstairs and made the bathroom larger, going into the second bedroom, taking up the closet space and making a nice, large bathroom, and we put all new bathroom fixtures in it with new ceramic tile flooring.

We put some new windows in the home, hung some new light fixtures, and put a new -- a new door in the front with -- with lights on each side.

Q. On the front?

A. Yes, sir.

Q. How much did you spend on the repairs, approximately?

A. Let's see here. I'd say at least $35,000.

Q. I was writing down as you were going through some of those. Was the new crown molding throughout the house?

A. I don't think we hung new crown molding upstairs. It was on the downstairs only. We hung it to match the hardwood flooring.

Q. So that was only downstairs; is that

correct?

A. Yes, sir.

Q. What about the baseboards?

A. We put new baseboard down, and we painted them white.

Q. Throughout the house?

A. On the downstairs.

Q. You said you put in new flooring?

A. Well, what we did, we put in the floating floor, we call it. It's laminate hardwood floors, and it was honey oak. That was downstairs.

Q. So did you have to take up the floor that was previously there before putting the new one down, or was --

A. My contractor did.

Q. Who was your contractor?

A. Steedley Construction.

Q. I assume it's Mr. Steedley?

A. Yes, sir.

Q. What's Mr. Steedley's first name?

A. Manual.

Q. Had you used Mr. Steedley before?

A. Yes, sir.

Q. And so Mr. Steedley did all the repairs or just some of them?

A. He did 99 percent of them -- of it, yes, sir.

Q. Did someone else do any of the work?

A. Well, I had to do a little bit of electrical work hanging the new light fixtures and the ceiling fans, so I got a licensed electrician to do that.

And Mr. Steedley did some of the painting. Some of the other painting he subbed out to another gentleman, yes, sir.

Q. Where were the new windows put in?

A. It's one of the last things we did.

Q. Throughout the house or only --

A. No.

Q. -- particular portions?

A. No, sir. It was just -- I think it was like -- there was one downstairs, one upstairs in the large bedroom, and one new window in the renovated bathroom upstairs.

Q. Do you recall where the window was downstairs?

A. Yes, sir. It was -- it was downstairs in the big room looking at Faust Street outside. If you looked to your right, you'd see the fireplace.

Q. Was any Sheetrock put in?

A. The only Sheetrock was put in was when we renovated the bathroom, we knocked that wall out from the existing bathroom into the -- into the closet, so we had to put new Sheetrock, waterproof Sheetrock, you know, because it was a bathroom, but to my knowledge that was the only new Sheetrock that was installed.

Q. Did you do any painting inside the house?

A. Yes, sir.

Q. Where all did you paint?

A. Painted the entire house except the room -- when you walk in the back door, there's a room to your left. It's a small room, and it's got a half bath. We did not paint that room.

Q. Did you replace any of the door frames?

A. I don't think I did. Talking about interior door frames?

Q. Correct.

A. I don't think I did.

Q. Did Mr. Steedley do all this work himself, or did he have employees?

A. Mr. Steedley, he's got a niece named Audie Raye Mixon. She helped him, and he had one

laborer helping him.

Q. Do you recall that person's name?

A. His name is Mike Peay.

Q. How do you spell the last name?

A. I think it's P-E-A-Y.

Q. Were you in the home when any of the repairs were being done?

A. No, sir.

Q. Did you go to the home to check on the progress?

A. Yes, sir. I did. I did. Several times they were working on my lunch break. I'd go around there, you know, and look at this, look at that, and then mostly in the afternoons when I was by myself I'd go around and look at it.

Q. How long did these repairs take?

A. They started in March, and I want to say around July the 4th they were through.

Q. At any time when the repairs were being done did you see any water seepage issues inside the home?

A. No, sir. Never did.

Q. When the repairs were being done, did you see any mold inside the home?

A. No, sir.

Q. Did Mr. Steedley advise you of anything he had found related to water seepage or mold when he was doing the repairs?

A. No, sir. He did not.

Q. Did any of his employees?

A. No, sir.

Q. Who was -- the name of the electrician?

A. Joe Evans, E-V-A-N-S.

Q. And where is he from?

A. He lives in Cope, South Carolina.

Q. And I think you said he just did the electrical work on the new light fixtures and --

A. Yes, sir.

Q. When did you first learn of Claude McAlhany's interest in the home?

A. It was on a Sunday morning, and it was after July the 4th.

Q. And how did you come to learn of his interest?

A. He asked me if he could look at the house, and I told him I would be glad to show it to him but I was going to church. And he told me who he was, and he had insurance with me at Nationwide, automobile insurance.

And I said then I knew who he was and I

had a key hidden at the house, and I said, well, the key is, you know, with so and so and so and so; go ahead and, you know, look at the house all you want; make yourself at home.

Q. Did you see Claude somewhere or...

A. No, sir. He called me that morning and told me he was interested in looking at the house.

Q. And do you know if he went around there that Sunday?

A. Yes, sir.

Q. And did he call you after he looked at it, or did you talk to him or call him, or what took place?

A. Pretty sure he called me back and said he liked the house and would get back with us, and he put the key back where it was hidden.

Q. How long after that did you talk to Claude again?

A. Well, he started calling me every couple weeks.

Q. And what was the nature of those conversations?

A. Wanting to look at the house again.

Q. Now, you said it was sometime after July 4. Was it the middle of July, the first of

August?

A. I'd say it was probably about the middle of July.

Q. And did you accompany him at --

A. I never showed him the house. He'd call me every couple of weeks wanting to look at the house again, and I just told him -- he said do I have permission to get the key, and I told him he did.

Q. When did Claude first express an interest in making an offer on the home?

A. I'd say August.

Q. First part of August, mid-August, or when?

A. Say around the first part of August.

Q. And what was the nature of those conversations?

A. He started calling me wanting me to get the price -- wanting me to accept a lower offer.

Q. Had you told him that you would sell it prior to that point?

A. Yes, sir. I told him what the asking price was, and then in August he told me would I consider any less, and I told him I would, yes, sir.

Q. What was your initial asking price?
A. 149.
Q. How did you arrive at that number?
A. Well, I had the house appraised. I had to have the house appraised when I bought the house to satisfy Enterprise Bank, and -- and the appraisal was around 169, and I put it on 149. That was my asking price.
Q. So Enterprise -- or the appraisal was done prior to you purchasing it?
A. I'm sorry. Okay. I bought the house. Okay. And then after I bought the house I had my own appraisal done.
Q. How long after that?
A. My best answer is in June when we were almost through.
Q. So sometime around the first of August Claude calls you and --
A. Yes, sir.
Q. -- asks if you'll accept lower than 149?
A. Yes, sir.
Q. And what was your response?
A. I told him I would.
Q. And what was -- what was that price?

up?

A. She just called me out of the blue.

Q. Did she say I had talked to Claude or Claude asked me to call you, or what --

A. She said she was calling I think on behalf of Claude.

Q. How did she know Claude?

A. She was living about four or five down -- four or five doors down the road from that house.

Q. On Faust Street?

A. Yes, sir.

Q. You said she's a convicted felon. Do you know what she's been --

A. She stole a little -- she stole money from the Bamberg School District and spent, I think, almost two years in a Texas penitentiary.

Q. So y'all ultimately agreed you'd be willing to accept and he'd be able to pay 120,000. When, approximately, was that?

A. That was getting on into the end of August.

Q. And we'll hand you what I've marked as Exhibit 1 to your deposition and ask you --

A. Okay.

A. I had never read a CL-100 report until -- until Claude McAlhany, you know, filed suit.

Q. Do you recall when Claude and Amy moved into the home, when that was?

A. It was shortly after Labor Day.

Q. And when were y'all able to get all the paperwork done?

A. Well, we closed on the house on November the 5th of '07.

Q. I've seen somewhere -- did you have a mortgage on the home?

A. Okay. When I bought the house, I did have to borrow some money from Enterprise Bank.

Q. I'm asking about from Claude and Amy.

A. Oh, when I sold him the home?

Q. Right.

A. Okay. He was -- okay. He was approved at 115,000 from Home Federal. Mr. Griffin told me, on the home, he said that's all we can do. And told him, I said if it's okay with Claude and Amy, can I be a second lienholder at 5,000? He said that would be fine. And that suited Claude and Amy fine.

Q. Have they paid that 5,000?

A. Yes, sir.

Q. How long did it take them to pay that?
A. Rhoad Law Firm drew us up I think what is called an amortization, sheet of payments; and his first payments, he paid them right on time. Then he -- then he went several months with no payments, and he came and told me and told me he was going to refinance his house and he was going to pay me in full, and he did.
Q. When did you first learn about moisture problems in the home from Claude?
A. Probably about the middle of August of '09 when he called me around there.
Q. And what did he call and tell you?
A. He told me that he had a problem at his house; could I come around there. I told him I would, and when --
Q. When you got there, what was the problem?
A. In the downstairs, in that one room off to the side that's got an attached half bath, he had torn out Sheetrock and -- and I saw molded Sheetrock, molded Sheetrock and insulation.
Q. Did you see any mold?
A. Yes, sir.
Q. Where was the mold?

A. It was -- the mold was present on the 2-by-4 studs, and it was present on the Sheetrock and insulation.

Q. But what did he tell you? How did he -- came to discover the mold?

A. He told me he was going to paint that room and when he put -- he started painting, the paintbrush went through the Sheetrock.

Q. And that was in March of '09?

A. No, sir. That was in August of '09.

Q. August. Okay.

A. Yes, sir.

Q. Had Claude said anything prior to August of '09 about any water issues inside the home?

A. The only thing he told me, that -- I'm trying to remember exactly what he told me. Prior to that he said that -- downstairs had a laminate floating floor -- had a laminate floating hardwood floor, and he wanted to change that floor out, and there was water up underneath that floor. That's the only thing he'd ever -- he had ever mentioned about water to me.

And then like a few weeks later he asked me to come around to his house and he showed

me the mold.

Q. So this was within a couple weeks of each other?

A. Yes, sir.

Q. The problem with the floor -- water under the floor and then the mold?

A. Yes, sir.

Q. So all this would have been '09; is that correct?

A. Yes, sir.

Q. Did Claude ever come to the insurance agency to talk with you about this?

A. No, sir. He always called.

Q. Did Claude ever -- did he bring you a copy of the letter Kenny Carter had written?

A. Yes, sir. He did.

Q. And where did he show you that letter?

A. At my office.

Q. So he did come by --

A. Yes, sir.

Q. -- your agency?

A. Yes, sir.

Q. What did he tell you when he showed you the letter?

A. He told me that the moisture and the

Q. Did you know Claude from the community or --

A. No, sir. I did not.

Q. Have you since come to know Claude in the community?

A. Yeah. I mean -- well, I -- yeah. I see him, you know, in passing, yes, sir.

Q. Have you talked with him about this case?

A. The last time I talked to Claude about it he told me, he said, Erick, I'm not mad with you. You didn't know there was mold in that wall. I'm not going to sue you.

Q. When did he tell you that?

A. That was probably in around -- excuse me. I'd say probably in October of '08.

Q. You mean October of '09?

A. Well, the mold was found -- the mold was found on August of '08; is that right?

Q. I thought we said earlier it was August of '09, but --

A. No. I'm sorry. You're right. You're right. You're right. The mold was found in August of '09, so, yes, sir, you are correct. It had to be sometime -- it might have been in 2010. I'm

sorry. I'm trying to go back five years. Just hard to remember everything.

Q. Have you had any other conversations with Claude about the home that we haven't already talked about?

A. After that he called me several times at the insurance office and used very, very vulgar language, talking about me, talking about my boss, and I don't know why. And then he said he was going to sue me.

Q. What was he saying?

A. You knew there was mold in that house. You sold me a shitty house. Where is your boss. I want to talk to your boss.

Q. And when you say your boss, you're referring to Rick Pinson?

A. Yes, sir.

Q. Did he ever talk with Mr. Pinson?

A. He did. He told my boss that I was on cocaine and I should be fired from Nationwide, which was a lie.

I told my boss that I would take a drug test, but I wasn't paying for it; either Claude could pay for it or Nationwide could pay for it, and I wasn't going to go to Rite Aid here in

has treated our office. He just sprayed it a few weeks ago for bugs, his son did, but -- but I was not there, but that's why I called him.

Q. And did you have any communications with Mr. Carter when he's treating your -- the property you work at, or you just saw him and that was the first --

A. No. No, ma'am. Usually he comes in and he'll get a key from my boss, and he'll -- he'll do his work when we're gone, after hours.

Q. Okay. If you'll look at Exhibit 3, please, it's the first CL-100.

A. Okay.

Q. I believe you testified earlier, and correct me if I'm wrong, that you did not receive a copy of that?

A. That is correct.

Q. Okay. If you will look at page 2, and it's in the remark section, if you will read through that -- at least 1 and 4.

A. Okay. You're talking about on this page right here, ma'am?

Q. Yes, sir.

A. Okay.

Q. The second page of Exhibit 3.

A. It says: At the time of the inspection, there was no visible evidence of active and previous termites.

All right. The next line: Due to the presence of water damage to the windowsills, this firm has recommended termite treatment.

Q. I'm going to stop you right there.

A. Okay.

Q. Do you recall having a conversation with Kenney, Sr. or Kenny, Jr. about the presence of water damage to the windowsills?

A. No, ma'am.

Q. Okay. Okay. And if you'll read the next line.

A. Okay. Wood and ground moisture is not available due to the building being on cement slab.

Q. I'm sorry. The sentence after --

A. Okay. I'm sorry.

Q. Okay.

A. Okay. All right. This firm has been contracted and paid by the purchaser to treat this home for termites, and this will be done on March 30, 2007.

Q. And let me stop you there. Was it treated by March 30 of 2007?

A. Yes, ma'am.

Q. Okay. And if you'll read the last line.

A. At that time this house will be under contract with this firm.

Q. Okay. And then if you'll look under number 4 where it says damage, and if you'll read that.

A. There is visible water damage to the front and rear windowsills. This damage is being repaired by a licensed contractor.

Q. Okay. Do you recall having any conversations with anyone at Carter & Sons regarding that?

A. No, ma'am.

Q. Okay. How would Carter & Sons have known that you were planning on hiring a contractor, period?

A. I told him.

Q. You did?

A. I told him.

Q. Okay. And so it's your position or your testimony today that Mr. Carter didn't tell you that there was any water damage that he found during his inspection?

A. No, ma'am.

Q. Okay. How many people called you when you listed the home for sale?

A. I had several phone calls.

Q. Did you have any people make an offer like Mr. McAlhany did?

A. The only offers I had was rent to own.

Q. Okay.

A. Yes, ma'am.

Q. So you didn't have any contracts or anyone have a home inspection done?

A. No, ma'am.

Q. After the treatment on March 30 of 2007 and before your calling Mr. Carter and Sons to come back out to perform the second CL-100, did you have any communications with Mr. Carter?

A. No, ma'am.

Q. Okay. You mentioned that you painted the whole house except for that bottom room with the half bathroom. Why did you not paint in there?

A. All right. The day I walked in that house and Bill Ginn, time I walked in, he said you going to buy the house? And he was painting the kitchen cabinets green. And I said, yes, ma'am.

And he said, well, I just got through

painting that room. And it was yellow. And I said, yes, sir, I'm going to buy it. He said I'm going to shake your hand. I shook his hand. He said I'm going to quit painting.

And then when I hired Audie Raye Mixon and Manual Steedley, I told Audie Raye, I said I want you to pick out the colors that we're going to use to paint. And she said why? And I said, well, ladies can always do a better job in picking out colors than the men.

And she said, well, that's fine. She said how about the room that's already been painted. I said I want that painted too. She said why? I said because I don't like yellow. She said, well, I do. And I said -- she said why don't you just save some money, and she said it's -- she said he did a good job -- and just paint the rest of the house. And I said all right. No problem.

Q. Okay. What's a contact number for Audie Raye Mixon?

A. I can get it to you, but I think she -- it should be in the Orangeburg directory.

Q. Okay. How many times had you worked with Mr. Steedley and Ms. Mixon before this house?

A. Several times. They were both on the

Nationwide Blue Ribbon contractors -- contractors team where if you had a claim and if the adjuster couldn't get there, they could go out and do an estimate and Nationwide would guarantee their estimate.

Q. Did Mr. Steedley give you an estimate for the renovations on this home?

A. Oh, yeah. Yes, ma'am.

Q. Do you still have a copy that?

A. I met with them on a Friday night after both of them had looked at the house, had priced the materials, had done this and done that, and they -- and their estimate was that they would do everything and furnish the materials for X amount of dollars.

Q. How much -- what was the X amount of dollars?

A. The initial -- the initial invoice was around -- it was right at 23,000, but then after that we made some changes and I agreed to pay them more.

Q. And what were the changes?

A. Well, it was upstairs, remodeling that bathroom.

Q. Do you have copies of those invoices?

A. No, ma'am. I don't.
Q. Do you know if they retained copies of their invoices?
A. I never signed anything with them.
Q. They didn't provide anything written?
A. Huh-uh. No, ma'am. I just -- I knew them from being -- from working at Nationwide, and they knew me, and I mean -- and they knew I wasn't going to have -- they knew they would have no problems with me, and I knew I wouldn't have any problems with them.
Q. Do you have a copy of the check stub that you paid them with?
A. No, ma'am. I don't.
Q. Do you know the final amount that you paid?
A. Ma'am, I think -- I think I ended up paying them around -- either close to 28,000 and then I sunk a lot of money in the yard.
Q. When Mr. Steedley or Ms. Mixon would come across an issue while they were doing the renovations, how would they -- how would they address it with you?
A. Could you repeat that, please?
Q. Yes. When Mr. Steedley or Ms. Mixon

came across a problem or a question that they had during the renovations, how would they address it with you? Would they call you? Would they --

A. Really, they never would call me about a problem. I trusted them. I just told them to handle it, you know.

Q. So if they had seen water damage, they wouldn't have brought it to you; they just would have fixed it?

A. Oh, yeah. They'd have told me. They would have told me because I -- because they were in the business to make money, and the little extras that they did, nothing was free. It was always, well, this is -- we didn't -- we didn't -- we didn't figure this in. This is extra 300. We didn't figure the front door in. That's extra 1900, you know.

Yes, ma'am. Believe me, they would have -- they would have charge -- they would have fixed it and they would have charged me.

Q. Okay. When they replaced the floor on the bottom level --

A. Yes, ma'am.

Q. -- did they say that they saw evidence of any water damage at the time?

A. No, ma'am. They called me around there, and I went around there and they showed me the slab. They said, now, what kind of flooring do you want? I said I want to go with the real hard wood.

Mr. Steedley looked at me, and he said, Erick, he said, we're going to have to glue that to the slab. And I said, well, what do you think we ought to do?

He said let's go with laminate hardwood floating floor. He said you can buy it from Lowe's. He said they'll give you a 16-year warranty and, you know, guarantee not to scar and all that. He said -- and he said if you'll go over there and look at the samples, he said you'll see what I'm talking about.

And I went over there and bought the most expensive grade they had.

Q. And did you let Mr. McAlhany know that that hardwood floor had a warranty on it?

A. Oh, yeah. Yes, ma'am. Absolutely.

Q. Did he ever call you about the flooring on the bottom at any point?

A. He called me one time, but I told him, I said if -- I said if there is -- I said if there

A. No, ma'am.

Q. Are you aware of if a CL-100 covers mold discovery or anything like that?

A. I'm not aware of it. I mean, my definition of a CL-100, I thought it was termites only. I didn't know -- not know it would deal with moisture, you know, or mold.

Q. Has anyone ever told you different?

A. No, ma'am.

MS. PAYNE: No further questions.

MS. HOOD: I don't have any questions, Mr. Barnes.

EXAMINATION

BY MR. BARNES:

Q. I've got a couple of follow-up questions, Mr. Cogburn. We talked a lot today about Mr. Carter. He also has a son that works for him as well.

A. Yes, sir.

Q. Have you had any conversations with Mr. Carter's son, Kenny, Jr., about the home at Faust Street?

A. Now, I always speak to him when I see him, but -- he's never mentioned Faust Street to me, and I've never mentioned it to him.

Q. Did you advise Mr. McAlhany to get a home inspection?

A. No, sir. I mean, a home inspection wasn't on my mind. You know, I didn't have to get one at Enterprise Bank, you know.

Q. Wait. You said earlier that there was no problems with the home and so --

A. Right. Exactly.

Q. -- I assume there would be no need for a home inspection.

A. Well, no. I didn't tell him there was no need for a home inspection. He moved into that house in early September and stayed there free of rent till -- until the bank called me and told me that the loan had been approved; they were ready to close. You know, he could have done whatever he wanted to. I just left the ball in his court so to speak.

Q. The water problems we've talked about, they just don't happen, do they?

MS. HOOD: Object to the form of the question.

THE WITNESS: I don't -- I don't know how the water problems, you know, happened. When I had the home, I never noticed any water problems,

never noticed any mold, and my contractors never -- you know, never mentioned anything to me about it while they were working.

BY MR. BARNES:

Q. And you were asked some questions earlier by Ms. Payne about Exhibit No. 3, which was the March CL-100?

A. Yes, sir.

Q. And on that second page it -- Mr. Carter is noting water damage; is that correct?

A. That's -- if he -- if he typed this in, that is correct.

Q. So in your eyes is it -- obviously in addition to inspecting for termites he's also looking at water damage?

A. You're correct, but I did -- I have -- I did not see the CL-100 until I got suit papers, and -- and I hired Mr. Ness, and when I left that day, I said, you know, I'm going to go find the CL -- you know, the two -- both of the CL-100s that I paid for. And I had to go to Enterprise Bank, wait a couple days till they produced them, but that's the first time I'd ever seen this.

Q. What were your thoughts when you read this?

A. That I didn't know we had -- that the house had water damage -- that the presence of water damage to the window -- windowsills was there. You know, I never did see any -- I never saw any -- any rot around any of the windows. I was shocked when they told me that, you know, we needed to -- I needed to call Sanders and have them come measure, you know, for new windows.

Q. And I believe you were asked earlier -- I mean, did Mr. Carter tell you about any -- did y'all have any conversation about the water damage?

A. No, sir.

Q. How did he know the water damage -- under number 4 there, how did he know the water damage to the windowsills was going to be repaired if he didn't talk to you about that?

MS. HOOD: Object to the form of the question.

THE WITNESS: Okay. Repeat that one more time now.

BY MR. BARNES:

Q. How did Mr. Carter know that the water damage to the windowsills was going to be repaired by a licensed contractor if he did not talk about that with you?

A. I don't know. I didn't tell him -- I didn't disclose any of the work that was going to be done to Mr. Carter. And -- I mean, to my knowledge he did not talk to my contractor.

Q. But on March 20, 2007, he's noting that the water damage to the front and rear windowsills is going to be repaired.

A. Well, I can't help what he put in the CL-100 because he did not disclose any of this to me.

Q. And y'all didn't have any conversation about that?

A. No, sir. It was very cut and dry.

MR. BARNES: I don't have anything else.

(The witness, after having been advised of his right to read and sign this transcript, waives that right.)

(The deposition was concluded at 4:53 p.m.)

TERMITE WARRANTY

YEAR 1st

CARTER & SON PEST CONTROL
P.O. BOX 1132
BAMBERG, SC 29003-1132
803-245-4747
SC LIC. #CA00010389
BUS LIC. #B0002021

ISSUE TO: Erik Cogburn PO Box 296, Bamberg SC 29003 DATE: 3-21-07
PROPERTY OWNER ADDRESS

In consideration of Sums received and to be received by us for treating and re-inspecting the structure located at 512 Faust St Bamberg SC for the control of Subterranean Termites. We Guarantee, subject to the provisions of the Warranty, to re-inspect annually the structure treated, and apply any necessary additional treatment to such structure at NO EXTRA COST, if re-infestation is found herein during the period that this Warranty remains in force.

TERMS AND CONDITIONS

The initial payment under this Warranty for termite treatment (excluding repairs) performed by us is $ 900.00, plus an additional payment of $ _____ for repairs, receipt of all which is hereby acknowledged. The initial period of the Warranty shall be one year, commencing on 3-21-07, the date of the initial treatment, and terminating on 3-21-08. In addition to this initial one year period, you may at your sole option, renew this Warranty annually for a period of (4) additional years, by making annual payments of $ 150.00, payable on or before 3-21 of each subsequent year, which is the anniversary date, with the company reserving the right to adjust this annual renewal. If such payments are made without lapse during said additional (4) year period, the period of this Warranty shall be for (5) years from the date of the initial treatment. If annual payment is NOT made on or before said date of any subsequent year, during said additional (4) year period, this Warranty shall terminate and become null and void as of the anniversary date on which such payment is due. This Warranty covers the premises as of the date of initial treatment, and in the event the structure is modified, altered, or otherwise changed after the date of the initial treatment, this Warranty shall terminate unless a prior written agreement shall have been entered into by the owner for the Company to treat and to re-inspect the structure, provide additional treatment if necessary at additional cost to the owner and/or adjust the annual renewal fee:

Wood frame on Slab — H A Carter Sr.
Description of Property — Carter and Son Pest Control Authorized Signature

PLAINTIFF'S EXHIBIT 4

fd

CONDITIONS OF WARRANTY

a) For new single family residential construction not otherwise covered by a federal warranty requirement, the Pest Control Operator (PCO) will provide to the Builder (or owner, if known at the time of treatment) a one year transferable warranty, which shall cover repair of damage and retreatment. The warranty period begins the day pretreatment is billed. This warranty must be transferred to any owner within the original one year warranty period, by notification from the new or the old owner to the Pest Control Operator by certified mail, return receipt. The PCO must offer the homeowner the opportunity to renew the warranty on the same terms and conditions the PCO offers renewals of the regular termite treatment contracts for 4 consecutive years. Failure of the homeowner to renew any one year relieves the PCO of any future responsibility for renewals based upon this section. The renewal warranty must, as a minimum, extend to retreatment, but may by mutual agreement, be extended and/or enlarged.

b) The PCO's original warranty shall not extend to:

1. Violations of the Standard Builder's Code by the owner/builder which occur after the completion of the pretreatment (stucco or Styrofoam sheeting, or similar material which extends below grade, inadequate ground clearance, etc.)
2. Additions not treated by PCO.
3. Remodeling/landscaping which occurs after pretreatment is complete and which entails considerable disturbance of the treated soil area.
4. Conditions for which a waiver has been approved prior to the commencement of the pretreatment.

c) A copy of the warranty and a copy of waivers, if any, shall be delivered to the purchaser of the treatment prior to closing. The warranty shall clearly state its transferability, renewability and the requirements therefore.

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July 9, 2013

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Ms. Lisa H. Davenport
Post Office Box 5485
Aiken, SC 29804

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

Dear Ms. Davenport:

Defendant's Motion for Summary Judgment was heard on July 26, 2012 before the Honorable Clifton Newman in Bamberg County. As the court reporter for this hearing, we would appreciate you furnishing us with a copy of the complete transcript as soon as conveniently possible. If you need any additional information, please let us know.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/dmb
cc: Honorable Jenny Abbott Kitchings,
SC Court of Appeals
SC Court Administration
Danielle F. Payne, Esquire
Richard B. Ness, Esquire

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March 15, 2013

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The Honorable James B. Hiers
Bamberg County Clerk of Court
Post Office Box 150
Bamberg, SC 29003

Re: Claude McAlhaney v Kenneth A. Carter, Sr., Kenneth A. Carter, Sr, d/b/a Cater & Son Pest Control, Carter& Son Pest Control, Inc., and Erick Cogburn
Case#: 2011-CP-05-65

Dear Mr. Hiers:

Enclosed for filing in your office are two copies of the Notice of Appeal in the above entitled matter. Please return a copy of the same marked filed in the envelope provided. The original Notice of Appeal has been filed with the SC Court of Appeals.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/lbb
Enclosures as stated

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

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March 15, 2013

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The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211-1629

Re: Claude McAlhaney v Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Cater & Son Pest Control, Carter& Son Pest Control, Inc., and Erick Cogburn
Case#: 2011-CP-05-65

Dear Ms. Kitchings:

Enclosed for filing in your office, please find the original and two copies of the Notice of Appeal in the above entitled matter along with the following:

1. Proof of Service of the Notice of Appeal on the Respondents and the Clerk of Court for Bamberg County;
2. The Court's Order Filed September 13, 2012 granting Summary Judgment to Defendant's Cogburg and Carter, and The Court's Order Denying Plaintiff's Motion to Reconsider Pursuant to Rule 59(e), SCRCP, both of which are being challenged on appeal.
3. Our check I the amount of $100.00 for the filing fee.

Please return a copy of the filed documents in the envelope provided.

By copy of this letter a copy of the Notice of Appeal and Proof of Service is being served on the Clerk of Court for Bamberg County and a copy served on counsel for the respondents, Danielle F. Payne, Grier, Cox, & Cranshaw, LLC, P.O. Box 2823, Columbia, SC 29202, and Richard B. Ness, Ness & Jett, LLC, P.O. Box 909, Bamberg, SC 29003

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/lbb
Enclosures as stated

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

The Honorable James B. Hiers
Bamberg County Clerk of Court
Post Office Box 150
Bamberg, SC 29003

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.: 11-CP-05-65

Claude McAlhaney,..... Appellant,

-v-

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

PROOF OF SERVICE

I, William F. Barnes, certify that I have served the Notice of Appeal on Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc. and Erick Cogburn, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on March 15, 2013, addressed to its attorneys of record as follows:

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
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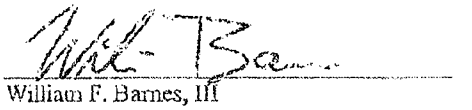
ATTORNEYS FOR RESPONDENTS

Respectfully submitted,



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September 18, 2013

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

Re: Claude McAlhany v. Kenneth A. Carter.
Appellate Case No.: 2013-000578

Dear Ms. Kitchings:

The transcript of the hearing ordered from Lisa H. Davenport, the court reporter who covered the motion for summary judgment hearing in the matter, was received from her on September 9, 2013.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/med

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

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.: 11-CP-05-65

Claude McAlhaney,..... Appellant,

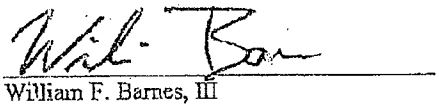
-v-

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

NOTICE OF APPEAL

Appellant, Claude McAlhany appeals the Court's Order Filed September 13, 2012 granting Summary Judgment to Defendant's Cogburg and Carter, and The Court's Order filed February 15, 2013 denying Plaintiff's Motion to Reconsider Pursuant to Rule 59(e), SCRCP. Appellant received written notice of the Order on February 19, 2013.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENTs

Certificate of Counsel

The Undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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ATTORNEYS FOR APPELLANT
CLAUDE MCALHANY

February 7, 2014

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,

-v-

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

APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTIONS ON THE BASIS THAT MCALHANY'S PROPERTY DAMAGE CLAIM WAS NOT FILED WITHIN THE APPLICABLE THREE-YEAR STATUTE OF LIMITATION?

II. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTIONS ON THE BASIS THAT MCALHANY'S PERSONAL INJURY CLAIM WAS NOT FILED WITHIN THE APPLICABLE THREE-YEAR STATUTE OF LIMITATION?

III. DID THE TRIAL COURT ERR IN HOLDING THAT THERE WAS NO EVIDENCE TO SUPPORT A PERSONAL INJURY CLAIM AGAINST CARTER AND SON PEST CONTROL?

STATEMENT OF THE CASE

This appeal arises from the trial court granting summary judgment in favor of all Respondents on the basis that the statute of limitations expired prior to the filing of the summons and complaint on April 11, 2011. (R. pp. 5-15). The events giving rise to this action relate to Appellant, Claude McAlhany's ("McAlhany") purchase of a house from Respondent, Erick Cogburn ("Cogburn"). In March 2007 Cogburn purchased the home located at 3633 Faust Street ("Home") in Bamberg and subsequently renovated and sold it to McAlhany in November 2007. (R. p. 21). Prior to the real estate closing, Respondents, Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. (collectively "Carter") issued a South Carolina Wood Infestation Report, also known as a CL-100, on October 19, 2007 based on its inspection of the Home. (R. p. 21).

On or about August 16, 2009, McAlhany was painting one of the Home's interior walls, when the paint roller he was using penetrated the sheetrock, releasing mold spores in the air which he inhaled. (R. p. 21). McAlhany's inhalation of the mold spores required medical treatment for the injuries he sustained. (R. pp. 22-23). As a result of discovering the mold throughout the Home, McAlhany also learned that the Wood Infestation Report issued by Carter on October 19, 2007 was not performed in accordance with the South Carolina Pesticide Control Act. (R. p. 21).

McAlhany filed this action on April 11, 2011, in the Bamberg County Court of Common Pleas against Cogburn and Carter. (R. pp. 20-24). The Complaint alleges a negligence action against Carter for damage to the Home and for personal injuries McAlhany sustained. (R. pp. 21-22). Specifically, Carter was negligent in numerous

ways, including failing to conduct a moisture reading test during the CL-100 inspection. (R. p. 22).

McAlhany also alleged a negligent misrepresentation cause of action against Cogburn. (R. pp. 22-23). McAlhany alleged that Cogburn "falsely represented the condition of the Home, including its propensity for water seepage, when discussing the Home's condition with [McAlhany]". (R. p. 23). As a result of Cogburn failing to disclose the Home's condition, McAlhany "incurred expenses for alternate housing, lost use of the Home, incurred medical expenses, and other actual and pecuniary damages for which Defendant Cogburn is liable." (R. p. 23).

Carter and Cogburn moved for summary judgment contending the applicable statutes of limitation barred McAlhany's claims for damage to the Home and personal injury. (R. pp. 38-41). The trial court held a hearing on these motions for summary judgment on July 26, 2012, at the Bamberg County Courthouse. (R. p. 74). After hearing oral argument from counsel and reviewing the parties' submissions, the trial court granted Respondents' motions in an order filed September 13, 2012. (R. pp. 5-15). The trial court held that Carter and Cogburn were entitled to summary judgment based on the statutes of limitation. (R. pp. 5-15).

Upon receipt of the trial court's order, McAlhany filed a Rule 59(e), SCRCP, motion on September 24, 2012, contending there was conflicting evidence as to the date when McAlhany first learned of the problems with the Home. (R. pp. 42-43). By granting summary judgment on the earliest possible date in light of conflicting testimony, the trial court made a factual determination that contravenes the well-established summary judgment standard of viewing the evidence in a light most favorable to the non-moving

party. (R. pp. 42-43). McAlhany also argued that the statute of limitation in a personal injury action cannot accrue and begin to run until an injury is sustained. (R. pp. 42-43). The trial court's holding that both the property damage claim and personal injury claim accrued on the same date, when McAlhany did not sustain personal injuries until August 2009, is reversible error. (R. pp. 42-43). In a summary order filed, February 15, 2013, the trial court denied McAlhany's motion to reconsider. (R. p. 16). Upon receiving the trial court's order, McAlhany filed the Notice of Appeal on March 18, 2013. (R. pp. 316-317). As an action for personal injury cannot begin to accrue until personal injuries are sustained, the order granting summary judgment on the statute of limitations should be reversed.

FACTS

I. COGBURN'S PURCHASE OF THE HOME LOCATED AT 3633 FAUST STREET

In March 2007, Erick Cogburn purchased the Home located at 3633 Faust Street in Bamberg, SC, from William Ginn. (R. p. 271, lines 22-25). Cogburn is a customer service representative at a Bamberg insurance agency that has bought and re-sold several homes around the Bamberg community. (R. p. 244, lines 10-11). The insurance agency that employs Cogburn had maintained the insurance on the Home dating back to 1998. (R. p. 272, lines 2-8). In early 2007, Cogburn learned the Home would likely be for sale as the owner did not wish to continue renting it. (R. p. 270, line 19 – p. 271, line 1).

Cogburn paid Ginn $78,000.00 for the Home. (R. p. 273, lines 5-7). Prior to purchasing the Home, Cogburn had a termite inspection and South Carolina Wood Infestation Report done by Carter and Son Pest Control in Bamberg. (R. p. 274, lines 2-7; pp. 223-226).

II. CARTER'S WOOD INFESTATION REPORTS ON THE HOME IN MARCH 2007 AND OCTOBER 2007

Kenny Carter owns and operates Carter and Son Pest Control which does business in and around Bamberg. (R. p. 231, lines 17-18). A portion of Carter's business relates to conducting home termite inspections and issuing Wood Infestation Reports. (R. p. 236, lines 1-6). A Wood Infestation Report, more commonly known as a CL-100, is used to determine if the home has an infestation of termites, any rotten wood caused by termites, or any visible damage caused by termites. (R. p. 233, lines 20-22). Typically, if the purchaser is borrowing money to purchase the home, the bank requires a CL-100. (R. p. 236, lines 5-13). Carter charges $100.00 for a CL-100 inspection. (R. p. 247, lines 1-2).

As part of conducting a CL-100 inspection, Carter looks for moisture and termites. (R. p. 237, lines 17-19). Moisture levels should not be above twenty-eight percent. (R. p. 238, lines 4-5). Carter uses a moisture reading probe to conduct the moisture readings. (R. p. 237, line 24 – p. 238, line 9). To get a moisture reading, the probe does not have to penetrate the wood, instead it merely touches the surface of the wood. (R. p. 239, lines 4-16). Upon touching the surface of the wood, the probe gives an immediate reading. (R. p. 229). Carter conducts moisture readings during an inspection if there is visible evidence of water damage. (R. p. 256).

In March 2007 Cogburn asked Carter to conduct an inspection on the Home because it was Cogburn's intent to resell it. (R. p. 241, lines 4-8). As a result of the inspection in March 2007, Carter advised Cogburn that the home needed to be treated for termites. (R. p. 241, line 12). Carter was aware of water issues with the Home when he first inspected it in March 2007. (R. p. 253, lines 15-17). On the March 2007 CL-100 report, Carter noted that "[d]ue to the presence of water damage to the window sills, this

firm has recommended termite treatment." (R. p. 224). The report further noted that "[t]here is visible water damage to the front & rear window sills." (R. p. 224). Cogburn testified that Carter did not tell him about any water damage found during the inspection. (R. p. 295, line 22 – p. 296, line 1; pp. 305-306). Carter, on the other hand, is sure the water issues with the Home were discussed with Cogburn. (R. p. 254, lines 7-13). While conducting the inspection, Carter observed wood that was wet and rotten and asked Cogburn to replace it. (R. p. 260, lines 21-22). On the March 2007 CL-100 report, Carter noted that the visible water damage to the front and rear window sills was "being repaired by a licensed contractor." (R. p. 224).

After Cogburn's purchase of the Home was completed, he began making repairs. (R. p. 276, lines 16-19). The repairs included, among other things, a new roof, new crown molding, new baseboard molding, new cabinet facings, tile on the kitchen backsplash, ceramic tile on the kitchen countertops, and new flooring. (R. p. 276, line 20 – p. 277, line 12). Cogburn spent approximately $35,000.00 on the repairs. (R. p. 277, lines 15-18).

III. MCALHANY'S PURCHASE OF THE HOME FROM COGBURN

Sometime following the Fourth of July in 2007, Claude McAlhany contacted Cogburn regarding his interest in purchasing the Home. (R. p. 282, lines 14-17). McAlhany looked at the house and continued calling Cogburn every couple of weeks. (R. p. 283, lines 17-20). Cogburn's initial asking price was $149,000.00. (R. p. 285, lines 1-2). After several offers and counter-offers, Cogburn and McAlhany agreed on a $120,000.00 purchase price. (R. p. 286, lines 18-22; p. 95, lines 19-21; p. 182).

McAlhany moved into the Home approximately two weeks prior to the November 5, 2007 closing. (R. p. 287, lines 6-9; p. 99, lines 19-21).

McAlhany was questioned extensively during his deposition regarding the circumstances surrounding the purchase of the Home, the events in August 2009 where he inhaled mold spores, and when he first learned of problems with the Home. (R. pp. 93-181).[1] Subsequent to moving into the Home, McAlhany painted the living room, painted some upstairs rooms, and replaced a floor. (R. p. 100, lines 16-25). The room was painted "in late '08 sometime." (R. p. 102, lines 4-5). McAlhany replaced the floor about seven months after moving into the Home, in June 2008. (R. p. 155, line 14 – p. 158, line 6; p. 171, lines 3-4; p. 176, line 16 – p. 177, line 14). While replacing the floor, McAlhany did not observe any water damage or water seepage. (R. p. 159, lines 18-21). McAlhany first observed mold in the house after tearing out the first floor. (R. p. 152, lines 6-7). He cleaned it up with bleach and then installed the proper moisture barrier down underneath the floor. (R. p. 152, lines 16-17). Cogburn informed McAlhany about seven months after the June 2008 floor replacement that the property had a tendency to flood. (R. p. 158, lines 7-13). Cogburn testified that the only time McAlhany mentioned replacing a floor due to water damage was several weeks prior to August 2009. (R. p. 289, line 4 – p. 290, line 10). The first time McAlhany discovered mold was in late 2008. (R. p. 106, line 24 – p. 107, line 3). However, it could have been sometime in 2009. (R. p. 109, line 23 – p. 110, line 4).

[1] Admittedly, portions of McAlhany's testimony are conflicting, which for the purposes of summary judgment must be viewed in a light most favorable to McAlhany as the non-moving party. Rule 56, SCRCP.

On August 16, 2009, as he was painting a wall, the paint roller went through the sheet rock, releasing mold spores which McAlhany inhaled. As a result of inhaling the mold spores, McAlhany had damage to his sinuses, his eyes itched and burned, and had nosebleeds. (R. p. 128, line 18 – p. 129, line 10). These injuries required medical treatment. A mold analysis report was conducted on August 24, 2009, and revealed that several organisms in the inside sitting room were classified as "ratio abnormality" – the report's highest level. (R. pp. 183-198). Shortly after sustaining the injuries from the mold inhalation, in August 2009, McAlhany retained an attorney. (R. p. 117, line 1 – p. 118, line 2).

Carter learned of the problems with the Home in August 2009 after receiving a letter dated August 14, 2009 from Bo Griffin with the Home Federal Savings and Loan in Bamberg regarding a bond that was given on the Home. (R. p. 248, lines 1-12; p. 263). Carter wrote Griffin a letter dated August 26, 2009 regarding the damage to McAlhany's home and whether a bond was issued. (R. pp. 264-265). In the letter, Carter stated that the Home "was treated for Mr. Cogburn in March of 2007 after active termites were found. At that time, there was also visible damage that Mr. Cogburn had repaired (scabbed on repairs)." (R. pp. 264-265). When conducting "scabbed on repairs", the whole house is not demolished but instead all rotten wood is taken out and new wood is installed. (R. p. 249, line 25 – p. 250, line 5).

STANDARD OF REVIEW

The standard governing summary judgment is well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled

to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether 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 nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

ARGUMENT

McAlhany's action alleges two different injuries that are governed by two different statutes of limitation – one for damage to the Home governed by S.C. Code Ann. § 15-3-530(3) and the other for personal injuries which is governed by S.C. Code Ann. § 15-3-530(5). In the September 13, 2012, order the trial court held the Respondents are entitled to summary judgment because the complaint, filed on April 11, 2011, was not commenced within three years from date McAlhany should have discovered a cause of action existed. (R. pp. 5-15). In reaching this conclusion, the trial court impermissibly weighs conflicting testimony, contravening the summary judgment standard, as to the time McAlhany first learned of problems with the Home. Additionally, the trial court essentially holds that the statute of limitation on an action for personal injury can begin to run prior to any injury actually occurring. For these reasons, the trial court's order granting summary judgment should be reversed.

I. THE TRIAL COURT DOES NOT VIEW MCALHANY'S TESTIMONY IN A LIGHT MOST FAVORABLE TO HIM AS THE NON-MOVING PARTY

The trial court order holds that the Respondents are entitled to summary judgment because the summons and complaint were not filed within three years: "[T]he Court finds that Plaintiff knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November of 2007, and, by failing to file his summons and complaint within the applicable statute of limitations, Plaintiff is now barred from recovery." (R. p. 11). This case illustrates the importance of the summary judgment standard of review because, to reach this conclusion, the trial court impermissibly weighs McAlhany's conflicting testimony to decide the action was not filed within three years from October or November 2007. It is well established, but worth repeating, that at the summary judgment stage the evidence and all inferences must be viewed in a light most favorable to the non-moving party – in this case McAlhany. Koester, 313 S.C. at 493, 443 S.E.2d at 394. More importantly, all that is needed to defeat a motion for summary judgment is a mere scintilla of evidence. Hancock, 381 S.C. at 330, 673 S.E.2d at 803. For the purposes of this appeal from an order granting summary judgment, the testimony quoted below about when McAlhany first learned of any problems with the home must be viewed in a light most favorable to him.

> And anyways, he signed the papers and we, you know, let us went ahead and move in the house, and I got with Bo Griffin. I got the loan. I paid Erick. And, ***I stayed there probably about - - about almost two years, I rec[k]on, and that's when I discovered the mold and stuff.***

(R. p. 94, lines 10-15) (emphasis added).

> Q. So the first time you discovered mold was in late '08?
> A. ***Yeah.***
> Q. Is that correct?
> A. That's correct.

(R. p. 106, line 24 – p. 107, line 3) (emphasis added).

Q. Okay. So when you were saying earlier that you thought it was late '08, it actually could have been - -
A. ***In probably '09.***
Q. - - in '09. And I'm just trying to get a timeline down.
A. Yeah.
Q. I'm not trying to trick you at all, okay?
A. Yeah.

(R. p. 109, line 23 – p. 110, line 4) (emphasis added).

There is conflicting testimony as to when McAlhany discovered problems existed with the Home.

Q. So you knew in October of 2007 that Mr. Carter hadn't done his job properly?
A. Yeah.

(R. p. 156, lines 18-20).

Q. So you found mold when you first moved in the house?
A. When I very first moved in there after I tore out the first floor.

(R. p. 152, lines 5-7).

As the testimony in this matter is conflicting, the evidence most favorable to McAlhany at the summary judgment level controls. However, the trial court relied on the earliest of these conflicting dates to grant summary judgment in favor of Respondents. It is axiomatic that the evidence and all inferences be viewed in a light most favorable to the non-moving party, but the evidence most unfavorable to McAlhany is what the trial court relied on to grant summary judgment.

Section 15-3-530(3) provides that actions for damage to real property must be brought within three years. S.C. Code Ann. § 15-3-530(3). The trial court relied on Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996) to support the conclusion that

McAlhany's action was not filed within the three-year statute of limitations. (R. pp. 5-15). In that case, Susan Dean purchased a building in Charleston in September 1984. Id. at 362, 468 S.E.2d at 646. During October and November 1984, Ruscon Corporation performed pile driving activities at a nearby construction site. Id. In early November 1984, Dean observed a fine crack approximately three feet in length in the front right corner of the building. Id. As a result of seeing the crack, Dean hired a contractor and structural engineer to inspect the building. Id. In the summer of 1985, Ruscon resumed pile driving activities and in August 1985 Dean noticed that the original crack had expanded. Id. In April 1991, Dean filed an action against Ruscon Corporation. Id. at 362, 468 S.E.2d at 647. Both Dean and her expert testified that the damage to the building resulted from the 1984 pile driving activities. Id. at 363. The circuit court directed a verdict in favor of Ruscon, concluding that as a matter of law, Dean's lawsuit accrued in November 1984, and by not filing until April 1991 was barred by the six-year statute of limitation. Id.

In affirming the trial court's directed verdict, the Supreme Court noted that the evidence "establishes that Dean acted promptly by retaining consultants in November 1984 to inspect the damage." Id. at 365, 468 S.E.2d at 648. More importantly, "Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984." Id. In this case, unlike in Dean, there are two claims – one for property damage and one for personal injury – and conflicting testimony that warrants reversal. McAlhany testified he was in the Home for two years before discovering mold (R. p. 94, lines 10-15); he first discovered mold in late 2008 (R. p. 106, line 24 – p. 107, line 3); or probably 2009 (R. p. 109, line 23 – p. 110, line 4). For the purposes of

summary judgment, the evidence must be construed in McAlhany's favor. The later of the dates to which he testified should be the triggering date for summary judgment purposes. For these reasons, the trial court's order granting summary judgment on McAlhany's claim for property damage should be reversed.

II. MCALHANY'S ACTION FOR PERSONAL INJURY DAMAGES DID NOT ACCRUE UNTIL AN INJURY AND DAMAGES WERE SUSTAINED ON AUGUST 16, 2009

McAlhany's personal injury claim was brought within the three-year statute of limitation regardless of whether the claim for property damage was brought within the three-year statute of limitation. Section 15-3-530(5) provides the applicable statute of limitations for personal injury damages. Specifically, § 15-3-530(5) provides a three-year statute o limitation for "action[s] 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." S.C. Code Ann. § 15-3-530(5). Section 15-3-535 provides 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." S.C. Code Ann. § 15-3-535. The important "focus is upon the ***date of discovery of the injury***, not the date of discovery of the wrongdoer. . . ." Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (emphasis added). The Supreme Court in Wiggins noted that:

> The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. 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.

Id. The inquiry of when an injury is sustained is an objective determination. Id.

Viewing the evidence in a light most favorable to McAlhany as the non-moving party, the trial court's order granting summary judgment on McAlhany's claim for personal injury damages should be reversed. McAlhany inhaled mold spores while painting one of the Home's walls on August 16, 2009. There is no testimony that McAlhany inhaled mold spores resulting in physical injuries at any time before August 2009. As a result of inhaling mold spores, McAlhany received medical treatment for his injuries. By granting summary judgment on the basis of the statute of limitations, the trial court holds that the applicable three-year statute of limitation begins to run prior to the date the actual injury was sustained. This rationale contravenes Wiggins by not focusing on the date of the injury, but instead focusing on McAlhany's knowledge prior to any injury.

The trial court's finding implies that McAlhany should have prevented his own injury. Such a ruling is improper because prior to August 2009 he had no personal injury on which to bring an action. An action for personal injury does not accrue until an injury is sustained, which then starts the three-year limitation imposed by § 15-3-530(5). Wiggins, 314 S.C. at 128, 442 S.E.2d at 170. McAlhany's knowledge prior to sustaining an injury may be considered in a comparative negligence analysis but cannot be a basis to grant summary judgment on the statute of limitations. By filing this action on April 11, 2011 – within three-years of August 2009 – McAlhany timely sought relief and the trial court's order granting summary judgment on the personal injury claim should be reversed.

III. MCALHANY PRESENTS A MERE SCINTILLA OF EVIDENCE TO SUPPORT A PERSONAL INJURY CLAIM AGAINST CARTER

In the order granting summary judgment, the trial court wrote "[t]here is no evidence to support a personal injury claim against" Carter. (R. p. 14). In this case, only a mere scintilla of evidence is needed to defeat summary judgment. Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The evidence before the Court warrants reversal of this finding.

McAlhany contends that Carter's negligence is in failing to conduct a moisture reading on the home in October 2007 when he knew in March 2007 that the home had water damage and the propensity to flood. (R. p. 169, lines 5-8). Carter was aware of water issues with the Home when he first inspected it in March 2007. (R. p. 253, lines 15-17). On the March 2007 CL-100 report, Carter noted that "[d]ue to the presence of water damage to the window sills, this firm has recommended termite treatment." (R. p. 224). The report further noted that "[t]here is visible water damage to the front & rear window sills." (R. p. 224). Carter merely had to use his moisture probe to get a reading while inspecting the Home in October 2007. (R. p. 237, line 24 – p. 238, line 9). Getting a reading is immediate and does not require any wood to be penetrated. (R. p. 239, lines 4-16). The wood just has to be touched at various locations to get a reading.

Despite being aware of the water issues with the Home in March 2007, Carter contends that a moisture reading is not required. However, Carter conducts moisture readings during an inspection if there is visible evidence of water damage. (R. p. 257, lines 2-4). In October 2007, during his second CL-100 inspection of the Home in seven months, Carter was aware of the water issues related to the Home but failed to conduct a moisture test using the probe. As a result, the Home developed mold, which resulted in

McAlhany being injured in August 2009. This presents a mere scintilla of evidence to support a personal injury action against Carter.

CONCLUSION

This action presents conflicting testimony as to when McAlhany knew a problem existed with the Home. At the summary judgment stage, the court must view the evidence and all inferences in a light most favorable to McAlhany as the non-moving party. The trial court improperly held the earliest of the dates triggered the statute of limitations despite the summary judgment standard. Additionally, McAlhany's action for personal injury cannot accrue until he sustains an injury. As a result, the claim for personal injuries was properly filed within the three-year statute of limitation. There is also evidence to support a claim for personal injury against Carter when he knew in March 2007 the Home had water issues, but failed to take any moisture readings in October 2007. For these reasons, the trial court's decision granting summary judgment should be reversed.

Respectfully submitted,

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February 12, 2014
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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,

-v-

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

CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCARC.

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Claude McAlhaney, Appellant

Vs.

Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control a Carter & Son Pest Control, Inc. and Buck 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 ISSUE ON APPEAL

I. DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

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

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

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.

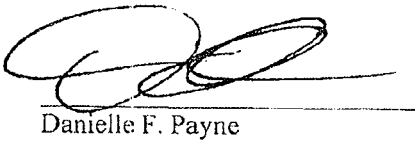
More importantly though, Appellant's negligence claim rests upon allegations that Respondents failed to comply with the South Carolina Pesticide Act when it issued its CL-100 on October 19, 2007. Appellant is trying to confuse the issues and allege that his claims against Respondents include a personal 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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West Columbia, South Carolina
May 19, 2014.

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.

CERTIFICATE OF COUNSEL

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

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West Columbia, South Carolina
May 15, 2014.

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. 2013-000273

Claude McAlhaney, Appellant,

v.

Kenneth A. Carter, Sheriff/Acting per Diem Assistant
Carter & Son Restaurant, Inc. d/b/a Hilltop Coburn, Of whom
Enid Coburn is, Respondents.

RESPONDENTS' FINAL BRIEF

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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. R. p. 223. The property consisted of a split-level home, with the third and lowest floor located below ground-level. R. p. 161, lines 11-15. Respondent hired co-defendant-below Kenneth A. Carter to perform the CL-100 Termite Inspection, which was completed in March 2007. R. pp. 223—226. 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. R. p. 56 lines 10—25, R. p. 57, line 1. Respondent further hired a professional contractor to make repairs to the home, in anticipation of re-selling the split-level property. R. p. 164, lines 10—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. R. p. 99, line 17—R. p. 101, line 3. Defendant Carter completed the CL-100 examination for this sale as well, dated October 19, 2007. R. pp. 227—228.

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. R. p. 128, line 18—R.p. 129, line 10.

On April 11, 2011, Appellant filed his action for damages stemming from moisture and mold within the Faust Street home. R. pp. 17—24. 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. R. p. 151, line 8—R. p. 153, line 3; R. p. 169, lines 5—18. 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. R. pp. 17—24.

Respondent's motion for summary judgment was filed on March 30, 2012 and heard by the trial court on July 26, 2012. R. pp. 40-41. 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. R. pp. 5—16.

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. R. pp. 5—16. 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." R. p. 169, lines 5—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. R. p. 100, lines 13—25; R. p. 152, lines 1—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." R. p. 152, line 13—R. p. 153, 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. " R. p. 156, lines 18—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 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. R. p. 17—24. 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 could not 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 refute 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, 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."

[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. R. pp. 223—226.

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.

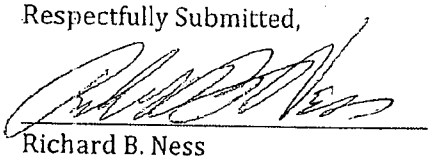
The statutes of limitation on all causes of action began to run by November 2007, and Appellant is not entitled to an extension of time for additional personal injury which was simply an extension and manifestation of the original harm he first observed immediately after purchasing the home, beginning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



Bamberg, S.C.
May 13, 2014

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

I, Alison Dennis Hood, attorney for the Respondent in the appeal of *Claude McAlhaney v. Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn, Case Number 2011-CP-05-065, Appellate Case Number: 2013-000578,* do hereby certify the foregoing Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

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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 FINAL BRIEF** 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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THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2013-000578

Appeal From Bamberg County
Clifton Newman, Circuit Court Judge

Opinion No. 5360
Heard March 3, 2015 – Filed November 12, 2015

REVERSED AND REMANDED

Richard Alexander Murdaugh and William Franklin Barnes, III, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, for Appellant.

Richard B. Ness and Alison Dennis Hood, both of Ness & Jett, LLC, of Bamberg, for Respondent Erick Cogburn; and Danielle F. Payne, of Grier, Cox, & Cranshaw, LLC, of Columbia, for Respondents Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control and Carter & Son Pest Control, Inc.

LOCKEMY, J.: In this negligence action, Claude McAlhany appeals the trial court's grant of summary judgment to Respondents Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn. McAlhany argues the trial court erred in finding the statute of limitations barred his property damage and personal injury claims. He further asserts the trial court erred in finding there was no evidence to support his personal injury claim. We reverse the trial court's grant of summary judgment and remand for further proceedings.

FACTS

In March 2007, Erick Cogburn purchased a house located at 3633 Faust Street (the home) in Bamberg. As part of the purchase, Cogburn asked Respondents Kenneth A. Carter, Sr. (Kenneth) d/b/a Carter & Son Pest Control and Carter & Son Pest Control, Inc. (collectively, Carter) to conduct a termite inspection on the home because Cogburn intended to "flip it." On March 20, 2007, Carter inspected the home and issued a South Carolina Wood Infestation Report, also known as a CL-100 (the March 2007 CL-100). According to the March 2007 CL-100, "[d]ue to the presence of water damage to the window sills, [Carter] has recommended termite treatment." The report noted "[t]here is visible water damage to the front [and] rear window sills." It further stated, "Wood and ground moisture is not available due to the building being on a cement slab." Finally, the report stated the visible water damage to the front and rear window sills was "being repaired by a licensed contractor." After the March 2007 inspection, Cogburn purchased a termite warranty from Carter that covered the cost of additional termite treatment for one year.

After purchasing the home, Cogburn began making repairs, including a new roof, new crown molding, new baseboard molding, new cabinet facings, tile on the kitchen backsplash, ceramic tile on the kitchen countertops, and new flooring. Cogburn stated that during the time he made the repairs, he never saw any "water seepage issues" or mold inside the home.

On November 5, 2007, Cogburn sold the home to McAlhany. Prior to the closing, Carter again inspected the home for termites and issued a second CL-100 on October 19, 2007 (the October 2007 CL-100). The October 2007 CL-100 found no "visible evidence of active . . . subterranean termites" or "other wood destroying insects," but it did find evidence of a prior infestation of subterranean termites. Like the March 2007 CL-100, the October 2007 CL-100 stated, "Wood and ground moisture is not available due to the building being on a cement slab."

On April 7, 2011, McAlhany sued Carter and Cogburn, alleging Carter was negligent in its October 2007 inspection of the home and the October 2007 CL-100 was not performed in accordance with the South Carolina Pesticide Control Act (the Act).[1] According to his complaint, McAlhany was injured on August 16, 2009, while painting one of the home's interior walls, when a paint roller penetrated sheetrock, releasing mold spores into the air, which he inhaled. Upon further investigation, McAlhany discovered mold behind the home's interior walls. McAlhany claimed Carter was negligent in failing to conduct a reasonable inspection of the home's premises, failing to act as a reasonably prudent company would act under the same or similar circumstances, and failing to satisfy the applicable provisions of the Act. As a result of Carter's negligence, McAlhany claimed property damages to his home and personal injury damages. McAlhany explained in his deposition that the mold spores had caused him sinus problems, his eyes "burn and itch like crazy," he developed sores on his body, suffered nosebleeds, and suffered lost wages. In addition to the negligence claim against Carter, McAlhany sued Cogburn for negligent misrepresentation for failing to accurately disclose the home's condition prior to selling it to him.

Carter and Cogburn both filed answers, asserting the statute of limitations as a defense, among others. They later moved for summary judgment on the grounds that the statute of limitations barred all of McAlhany's claims. McAlhany argued the statute of limitations did not bar his claims because he did not discover mold in the home until August 2009 when he was injured by the mold spores, and he filed his claim within three years of that date. At the summary judgment hearing, the trial court considered the following evidence.

Kenneth explained in a deposition that a CL-100 inspection determines if a home has an infestation of termites, rotten wood caused by termites, or visible damage caused by termites. A bank typically requires a CL-100 inspection if the purchaser is borrowing money to buy the home. As part of conducting a CL-100 inspection, the inspector crawls under the home with a flashlight and "moisture reader," looking for visible damage from moisture and termites. Upon touching the surface of the wood with the moisture reader, the probe gives an immediate reading. Kenneth stated he looks for moisture and termites in every CL-100 inspection; however, he does not use a moisture reader to check moisture levels unless he sees visible evidence of moisture or termite damage. He explained that moisture levels

[1] *See* S.C. Code Ann. § 46-13-10 (1987 & Supp. 2014).

in wood "cannot be above 20[%] . . . 28[%] max" because fungus can develop. According to Kenneth, fungus "leaves a white powder" on wood, which prompts him to do a moisture test. He stated, however, that the Official Code of the South Carolina Pesticide and Fertilizer Regulations do not require that he check moisture levels in areas of the home where there is no visible damage. He further stated a CL-100 inspection does not check a home for mold, he was not licensed to deal with mold, and "[m]old has nothing to do with infestation of termites." Kenneth explained that he was prevented from checking the moisture levels on the first floor of the home during both the March and October 2007 inspections because the home had "slab flooring."

The following colloquy occurred during Kenneth's deposition:

> Q: So you didn't do [a] moisture test in either instance, March or October of 2007?
>
> A: All the way around the, couple of places I seen that was wet and rotten that I asked Mr. Cogburn to replace.
>
> Q: So if you observed wet rotten wood, that prompts you to do the moisture test?
>
> A: Yes.

Kenneth explained that at the time of the March 2007 CL-100, he knew the home had "water issues," which is a common problem for homes built on an incline of more than five feet. Kenneth stated he was "sure" he informed Cogburn of the water issues within the home before Cogburn sold the home to McAlhany. Specifically, Kenneth testified that before his company re-inspected the home in October 2007, Cogburn had repaired the water damage to the home that was discovered in the March 2007 CL-100. Cogburn, however, stated Kenneth never told him of any of the water damage found during the March 2007 CL-100 inspection. According to Cogburn, he first learned of moisture problems or mold damage in the home in August 2009 when McAlhany showed him molded sheetrock in one of the downstairs bedrooms.

In his deposition, McAlhany explained that he was suing Carter for negligence because his company failed to conduct moisture tests on the home during the October 2007 CL-100 that would have revealed high moisture levels in the walls.

McAlhany asserted that had he known there were high moisture levels in the home, he would have cut the sheetrock out of the walls to determine the source of the moisture. He explained that he reviewed the October 2007 CL-100 when it was issued and saw nothing that concerned him. McAlhany testified Kristi Lenox of Clemson University later told him a CL-100 required the inspector to check moisture levels in the home. He introduced into evidence a "Report of Structural Pest Inspection" issued on October 9, 2009, by Clemson University (the Clemson report). The Clemson report found the October 2007 CL-100 "did not comply with [s]ection 27-1085 K of the Rules and Regulations for the Enforcement of the [Act]. Although evidence of a previous infestation of subterranean termites was disclosed, the location of that infestation and the accompanying damage was not disclosed."

McAlhany testified he moved into the home approximately two weeks before the closing, which would have been mid to late October 2007. He stated that prior to purchasing the home, Cogburn informed him that the home had been treated for termites by Carter. McAlhany did not request nor was a property disclosure form filled out by Cogburn and given to McAlhany prior to the purchase of the home. Although McAlhany inspected the home prior to purchasing it, he was unsure if a building inspector inspected the home.

After McAlhany moved in, he painted the living room, painted some upstairs rooms, and replaced the floor on the first floor. He stated the floor had to be replaced because the home flooded about seven months after he moved in. He further stated Cogburn first told him the home had flooding problems around June 2008, and he would not have purchased the home had he known it had flooding problems.

McAlhany's testimony was unclear as to when he discovered mold within the home. Initially, he claimed he first discovered mold in "late '08"; however, he later stated it was "probably '09" or August 2009 when he was painting the downstairs, and the mold spores injured him. McAlhany also testified he discovered "black mold" when he "very first moved in" and replaced the floor on the first floor of the home. He explained that in 2007, he consulted with a mold specialist, who told him to use bleach "and clean it up and put down the new flooring." McAlhany later claimed he replaced that floor seven months after he purchased the home, which would have been approximately June 2008. He admitted, however, that in October 2007, he was aware Carter "had not done its job properly." He further admitted he learned of termite problems in the home "[t]he day and hour [he]

purchased the house." Later, McAlhany was asked, "So . . . there were termites and water damage prior to you purchasing the house?" and he responded, "Not water damage."

The trial court granted summary judgment to Carter and Cogburn, finding McAlhany's claims were barred by the three-year statute of limitations. It concluded McAlhany "knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November of 2007 . . . ." The trial court rejected McAlhany's claim that he did not discover mold in the home until 2009, finding he "testified thoroughly that he discovered in 2007 that the prior owner had not installed a proper moisture barrier and found mold when he pulled back the existing hardwood floor." As to his property damage claim, the court found that "[h]ad [McAlhany] conducted a reasonable investigation . . . [he] would have uncovered additional areas within the first floor of the home that also did not have a proper moisture barrier and contained mold." Next, the court concluded the statute of limitations barred McAlhany's personal injury action because the "personal injury and property damage are indivisible and caused by the same alleged negligent act of [Carter and Cogburn]." Finally, the trial court found McAlhany presented no evidence to support a personal injury action against Carter.[2] McAlhany filed a Rule 59(e), SCRCP, motion for reconsideration, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." *McMaster v. Dewitt*, 411 S.C. 138,

[2] Although the trial court's order indicates it granted summary judgment to Carter and Cogburn, the order does not specifically address McAlhany's negligent misrepresentation claim against Cogburn, which is the only claim McAlhany brought against Cogburn. Instead, it appears that for purposes of the statute of limitations, the court treated the negligent misrepresentation claim against Cogburn and the negligence claim against Carter as one "negligence" claim. Moreover, in his appellate brief, McAlhany does not specifically address the negligent misrepresentation claim. Nevertheless, at oral argument, both parties agreed the court granted summary judgment to Cogburn and that McAlhany had appealed that ruling. Therefore, the negligent misrepresentation claim is properly before us on appeal.

143, 767 S.E.2d 451, 453 (Ct. App. 2014), *cert denied*. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). Summary judgment should be granted when "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 a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Id.* "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Id.*

LAW/ANALYSIS

I. Property Damage Claim

McAlhany argues the trial court erred in finding the statute of limitations barred his property damage claim. Specifically, he asserts his testimony created a question of fact as to when he "first learned of any problems with the home"; however, the trial court failed to view McAlhany's testimony in the light most favorable to him. We agree.

Subsection 15-3-530(3) of the South Carolina Code (2005) provides for a three-year statute of limitations for "an action for trespass upon or damage to real property." According to the discovery rule, "'the three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered.'" *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (quoting *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)). "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." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury 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." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). "[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean*, 321 S.C. at 364, 468 S.E.2d at 647. "The date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995).

Viewing the evidence in the light most favorable to McAlhany, we find the trial court erred in finding the statute of limitations barred his claim for property damages. The trial court's finding that the statute of limitations had expired was based on a factual finding that McAlhany "testified thoroughly that he discovered in 2007 that the prior owner had not installed a proper moisture barrier and found mold when he pulled back the existing hardwood floor." Based on our review of the record, however, we believe McAlhany's testimony was conflicting as to when he first discovered mold within the home. *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."); *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) ("When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide."); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("Whether a claimant knew or should have known that they had a cause of action is question for the jury.").

At one point in his deposition, McAlhany stated he first discovered mold in August 2009. He later claimed he saw "black mold" when he first moved into the home, which would have been late October 2007, while replacing the floor on the first floor of the home. He later testified, however, that he did not replace the floor until seven months after he moved in, which would have been June 2008. Because McAlhany's testimony as to when he discovered mold within the home was conflicting, a question of fact existed as to this issue. Furthermore, the date McAlhany discovered mold in the home was a material fact because, assuming the statute of limitations was not triggered until June 2008, his lawsuit would have been timely filed in April 2011.

Carter and Cogburn rely on the case of *McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014), *cert denied*, for the proposition that a plaintiff "cannot manufacture a genuine issue of material fact . . . by submitting conflicting

statements of fact . . . either by affidavit or within one's own deposition testimony." *McMaster* involved a medical malpractice claim brought against a doctor for overprescribing the appellant the drug Adderall. *Id.* at 141, 767 S.E.2d at 452. The trial court granted summary judgment to the doctor, finding the statute of limitations barred the action. *Id.* On appeal, the appellant argued summary judgment was improper because, although the appellant's deposition testimony indicated he failed to file his action within three years from when he was aware of the cause of his injury, the trial court erred in not considering his affidavit, which contained evidence that contradicted his deposition testimony. *Id.* at 148-49, 767 S.E.2d at 456. We concluded the trial court did not abuse its discretion in excluding the affidavit as a "sham affidavit." *Id.* at 149-51, 767 S.E.2d at 456-58. Specifically, we noted the statements contained in the affidavit differed greatly from the appellant's testimony, the appellant offered no explanation for his contradictory statements, and "[t]he last-minute submission of the affidavit indicate[d] [he] was attempting to create an issue of fact for purposes of summary judgment." *Id.*

McMaster is distinguishable from the present case for several reasons. First, and perhaps most importantly, McAlhany did not submit a last-minute "sham" affidavit in an attempt to create an issue of fact for summary judgment. Rather, his deposition testimony was conflicting as to when he discovered mold within the home. In contrast, the appellant's deposition testimony in *McMaster* was consistent as to when he learned the cause of his injury. Moreover, the inconsistencies in McAlhany's recollection of the date he saw mold in the home occurred several times during the same deposition rather than a few days before the summary judgment hearing as in *McMaster*. Thus, a trier of fact could find McAlhany was confused as to the dates rather than purposefully intending to contradict his earlier testimony. *Cf. id.* at 151, 767 S.E.2d at 458 (finding the trial court did not abuse its discretion in excluding a "sham affidavit" that contradicted the appellant's testimony when the affidavit was submitted two days before the summary judgment hearing). Therefore, we find Carter and Cogburn's reliance on *McMaster* is misplaced.

We note with interest that McAlhany sued Carter, a pest control company, for negligence arising out of its inspection of the home and issuance of a CL-100 on October 17, 2007. While the parties dispute the scope of inspection required by a CL-100, it is undisputed that a CL-100 determines if a home has an active infestation of termites. The October 2007 CL-100, which McAlhany reviewed at the time it was issued, found no "visible evidence of active . . . subterranean

termites" or "other wood destroying insects" within the home. Nonetheless, McAlhany's uncontradicted testimony was that he saw active termites in the home on the day he moved in, which would have been late October 2007, and he knew in October 2007 that Carter had not done its job properly. Because McAlhany was aware of termites in the home in late October 2007, and he knew the October CL-100 erroneously stated there were not active termites in the home, a reasonable person would have been on notice of a potential negligence claim against Carter for *termite damage*. Nevertheless, a reasonable person would not have been on notice of a potential negligence claim for *mold damage*. *See Holly Woods Ass'n of Residence Owners*, 392 S.C. at 183, 708 S.E.2d at 793 (stating "the three-year statute of limitations begins to run when the *underlying cause of action* reasonably ought to have been discovered" (emphasis added)). As Kenneth testified, "Mold has nothing to do with infestation of termites." Rather, the three-year statute of limitations for McAlhany's property damage claim did not accrue until a reasonable person would have discovered mold within the home. Because McAlhany presented evidence that he did not discover mold within the home until June 2008 or August 2009, which would have made his lawsuit timely filed in April 2011, the trial court erred in granting summary judgment as to the property damage claim. *See Logan*, 389 S.C. at 618, 698 S.E.2d at 883 ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.").

II. Personal Injury Claim

McAlhany next argues the trial court erred in finding the statute of limitations barred his personal injury claim because the statute of limitations does not begin to run in a personal injury action until the injured party either knows or should know by the exercise of reasonable diligence that a cause of action has arisen. We agree.

Subsection 15-3-530(5) of the South Carolina Code (2005) provides for a three-year statute of limitations for "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." Section 15-3-545 of the South Carolina Code (2005) provides that, "Except as to [medical malpractice actions], 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 elements of a cause of action in tort for personal injury are (1) duty, (2) breach of that duty, (3) proximate

> causation, and (4) injury. . . . The fundamental test . . . in determining whether a cause of action has accrued[ ] is whether the party asserting the claim can maintain an action to enforce it. Stated differently, [a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.

Grillo v. Speedrite Products, Inc., 340 S.C. 498, 502, 532 S.E.2d 1, 3 (Ct. App. 2000) (citations and internal quotation marks omitted) (second, third, and fourth alterations in original)); *see also Sims v. Amisub of S.C., Inc.*, Op. No. 27561 (S.C. Sup. Ct. filed Aug. 12, 2015) (Shearouse Adv. Sh. No. 31 at 27) ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (internal quotation marks omitted)).

In addition to his property damage claim, McAlhany sued Carter for personal injuries he allegedly sustained on August 16, 2009, when a paint roller he was using penetrated sheetrock, releasing mold spores into the air, which he inhaled. The trial court determined the statute of limitations for the personal injury claim began at the same time as his property damage claim and therefore this claim was untimely filed. We disagree with the learned trial court. Because a personal injury cause of action cannot accrue until there is an injury, McAlhany's cause of action accrued at the earliest on August 16, 2009—the time he suffered an injury and thus "ha[d] a legal right to sue on it." McAlhany filed his lawsuit on April 7, 2011, which was within three years from the date of accrual. Therefore, the trial court erred in granting summary judgment to Carter and Cogburn on the personal injury claim on the basis of the statute of limitations.

In granting summary judgment, the trial court relied on *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean*, the appellant purchased a building in September 1984 located on King Street in Charleston, and a contractor inspected it and determined it was structurally sound. *Id.* at 362, 468 S.E.2d at 646. In October and November 1984, Ruscon performed pile driving activities at a nearby construction site and, shortly thereafter, Dean saw a three-foot crack at the front right corner of the building and concluded Ruscon's pile driving caused the crack. *Id.* Ruscon resumed pile driving activities in the summer of 1985 and, shortly thereafter, Dean noticed the original crack had expanded and a new crack had formed on the other side of the building. *Id.* at 362, 468 S.E.2d at 646-47. Dean was forced to close her business after inspectors found the building was no longer structurally sound. *Id.* at 362, 468 S.E.2d at 647. In April 1991, Dean filed suit against Ruscon for damage to her building, and at trial, the evidence established

that the damage to Dean's building was "most reasonably caused by the pile driving activity" in 1984, not 1985. *Id.* at 362-63, 468 S.E.2d at 647. The trial court granted Ruscon's directed verdict motion, finding Dean's lawsuit accrued in November 1984, when she discovered the damage to her building, and because she did not file her lawsuit until April 1991, the six-year statute of limitations under subsection 15-3-530(3)[3] barred her claim. *Id.* at 363, 468 S.E.2d at 647.

On appeal, our court reversed, finding a question of fact existed as to whether Dean was reasonably diligent in determining whether Ruscon caused the damage to her building thereby triggering the statute of limitations in 1984. *Id.* On appeal to the supreme court, Dean argued the crack in 1984 and the bulging of the bricks in 1985 presented two distinct harms and, therefore, two different dates of accrual existed for purposes of the statute of limitations. *Id.* at 364, 468 S.E.2d at 647. The supreme court disagreed, finding

> the resulting harm to Dean's building in 1985-enlarged crack and bulging bricks-by being in the same location and of the same nature as the original harm, evolved from Ruscon's 1984 pile driving activities. Therefore, because the subsequent harm was not separate and distinguishable, it was discoverable in 1984.

Id. at 364-65, 468 S.E.2d at 648. The court noted the damage to Dean's building was not latent, but was apparent in November 1984, and there was "no question that Dean initially discovered the damage in 1984 and associated it with Ruscon's pile driving activities." *Id.* at 365, 468 S.E.2d at 648. Finally, the court concluded "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.* at 366, 468 S.E.2d at 648.

We find *Dean* distinguishable from the present case. We note that the trial court relied on *Dean* to find the statute of limitations for McAlhany's personal injury claim began at the same time as his property damage claim because the two injuries were indivisible. As previously stated, however, a question of fact existed as to when a reasonable person would have discovered mold within the home and thus triggered the statute of limitations for the property damage claim. Thus, to the

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[3] This subsection was later amended to provide for a three-year statute of limitations.

extent the trial court erred in granting summary judgment on the property claim, it likewise erred in doing so on the personal injury claim. Moreover, in *Dean*, both the original harm in 1984 and the subsequent harm in 1985 were property damage; whereas, here McAlhany allegedly suffered personal injury and property damage. Unlike *Dean*, where the appellant knew Ruscon damaged her building in 1984 yet waited until her building was further damaged by similar conduct before filing suit, McAlhany could not have "comprehend[ed] the full extent of his damages" because he had no personal injury damages prior to August 2009. *See Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 524, 443 S.E.2d 537, 539 (1994) (finding the appellant's negligence claim for neurological injuries resulting from a fall at a hospital was not barred by the statute of limitations because "[t]he nature of the injuries was not readily discoverable" when the fall occurred). Even if McAlhany's personal injuries were indivisible from his property damage, summary judgment was still improper because, as previously discussed, a question of fact existed as to when a reasonable person would have discovered mold in the home. Therefore, the trial court erred in granting summary judgment on McAlhany's personal injury claim.

III. Evidence Supporting Personal Injury Claim

McAlhany next argues the trial court erred in finding he did not present any evidence to support a personal injury claim against Carter. According to McAlhany, Carter was 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.

After finding the statute of limitations barred McAlhany's claims, the trial court determined McAlhany did not present any evidence to support a personal injury claim against Carter. The court found McAlhany's reliance on the Clemson report to support his personal injury claim was misguided because, although the report found the October 2007 CL-100 "did not comply with Section 27-1085 K of the Rules and Regulations for the Enforcement of the [Act,]" it did not indicate Carter's failure to comply with the Act "caused or contributed in any manner to the mold."

We interpret the trial court's ruling that the Clemson report did not indicate that Carter's failure to comply with the Act "caused or contributed in any manner to the mold" to mean that McAlhany failed to establish Carter's alleged negligence was the proximate cause of his personal injuries. *See J.T. Baggerly v. CSX Transp.,*

Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (stating the elements of negligence are "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty"). The Clemson report indicates the October 2007 CL-100 did not comply with the Act because Carter did not disclose the location of a previous termite infestation and accompanying damage. The report does not state an opinion regarding Carter's alleged negligence in failing to discover and disclose mold or moisture damage within the home. In fact, it specifically states "This inspection was not made to address the presence or absence of any health-related molds or fungi. No opinions are given or intended concerning mold-related air quality or other health issues." Thus, we agree the Clemson report does not establish proximate cause because the report does not indicate Carter violated the Act for failing to discover or disclose mold or moisture damage. Nevertheless, McAlhany presented other evidence that created a genuine issue of material fact as to his personal injury claim against Carter. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment.").

First, there was evidence Carter had a duty to check moisture levels in the home because Kenneth explained that as part of a CL-100 inspection, he looks for visible damage from moisture and termites. Furthermore, there was evidence Carter knew the home previously had water damage. The March 2007 CL-100 indicates "visible water damage to the front [and] rear window sills" of the home, and Kenneth admitted he was aware of this damage to the home. The record, however, is unclear as to whether and to what extent Carter checked for moisture levels in the home. The March and October 2007 CL-100 reports indicate "[w]ood and ground moisture is not available due to the [home] being on a cement slab"; however, when Kenneth was asked whether he checked the home for moisture he replied, "All the way around the, couple of places I seen that was wet and rotten that I asked Mr. Cogburn to replace." One inference from Kenneth's testimony is that he checked the moisture levels of certain areas in the home; however, he did not disclose the moisture levels in either of the CL-100 reports.

We believe the evidence that Kenneth was aware of water issues in the home, yet apparently did not check and disclose the moisture levels in the October 2007 CL-100 created a question of fact as to whether Carter's inspection in the October 2007 CL-100 fell below the standard of care. There was also evidence that McAlhany's

personal injuries would not have occurred but for Carter's negligence. *See J.T. Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (stating "[p]roximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence" (citation omitted)). 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. Thus, there is evidence that had Carter disclosed the moisture levels in the home, McAlhany would not have been injured.

Finally, we believe further inquiry into the facts is desirable as to this issue based on the language of the trial court's order. *See Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."). The trial court clearly granted summary judgment on the personal injury claim due to the running of the statute of limitations; however, its order is unclear as to whether it granted summary judgment to Carter on the ground that McAlhany did not present any evidence to support this claim. The trial court's analysis on this issue was limited to one sentence: "The [Clemson] report does not indicate that [Carter's] failure to comply with [the] Act caused or contributed in any manner to mold." As previously stated, however, McAlhany presented other evidence that, when viewed in the light most favorable to the non-moving party, created a question of fact as to whether any negligence by Carter caused McAlhany's injuries. Therefore, the trial court erred in finding McAlhany did not present any evidence to support his personal injury claim against Carter.

CONCLUSION

Based on the foregoing, we reverse the trial court's grant of summary judgment to Respondents and remand for further proceedings.

REVERSED AND REMANDED.

SHORT and MCDONALD, JJ., concur.

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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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.

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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.

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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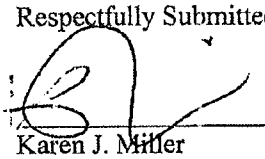

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2013-000578
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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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.

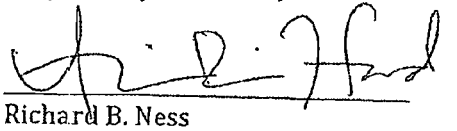
On some date no later than November 2007, Appellant had notice of *some* claim against Carter for failure to properly treat the home for termites. This inquiry notice starts the metaphorical clock and shifts the burden to Appellant herein to investigate his potential claims. The court herein rewards 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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Alison Dennis Hood

Bamberg, S.C.
12/4, 2015

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Erick Cogburn

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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The South Carolina Court of Appeals

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January 28, 2016

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Re: Claude McAlhany v. Kenneth A. Carter
Appellate Case No. 2013-000578

Dear Counsel:

Please see the enclosed order regarding the petitions for rehearing filed by the respondents in the above matter on appeal.

The Court will be taking no further action on the motion to serve and file out of time filed by Alison Dennis Hood, Esquire.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: William Franklin Barnes, III, Esquire
Richard Alexander Murdaugh, Esquire
The Honorable Clifton Newman

The South Carolina 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.

Appellate Case No. 2013-000578

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

Paul E. Short, Jr. J.

J.

Stephanie P. McDonald J.

Columbia, South Carolina

cc:
William Franklin Barnes, III, Esquire
Richard B. Ness, Esquire
Alison Dennis Hood, Esquire

FILED
1/28/2016

Richard Alexander Murdaugh, Esquire
James C. (Trey) Cox, III, Esquire
The Honorable Clifton Newman

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED
FEB 29 2016
SC SUPREME COURT

Case No.: 2011-CP-05-65

Claude McAlhaney, ...Respondent.

-vs-

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

PROOF OF SERVICE

I certify that I have served the Respondent's Appendix to the Petition for Writ of Certiorari upon the addressees listed below by depositing a digital copy in the United States Mail, First Class postage prepaid, on **February 26, 2016**.

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