

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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SC SUPREME COURT

Opinion No. 5360 (S.C. Ct. App. Filed November 12, 2015)
Supreme Court Tracking No. 2016-000405

Claude McAlhany.....Respondent.

v.

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

PETITION FOR WRIT OF CERTIORARI

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

of whom Erick Cogburn is Petitioners,

v.

Claude McAlhany Respondent.

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Petitioner, Erick Cogburn, respectfully requests the South Carolina Supreme Court grant a Writ of Certiorari, pursuant to Rule 242, South Carolina Appellate Court Rules, in order to review and reverse the decision of the South Carolina Court of Appeals on the application of the discovery rule to a single nexus of activity giving rise to a property damage claim, and then years later, a personal injury claim. Petitioner relies upon the Appendix which has been filed of record with this Court by counsel for Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control Inc. (Carter), including the Petitions for Rehearing filed with the lower court by this Petitioner.

CERTIFICATE OF COUNSEL

Counsel for Petitioner herein certifies the Petition for Rehearing was made and finally ruled upon by the South Carolina Court of Appeals on January 28, 2016.

QUESTIONS PRESENTED

Did the Court of Appeals err in finding each layer of potential damages in McAlhaney's claim against Cogburn and Carter constitutes a separate cause of action, and warrants a separate application of the appropriate statute of limitation? Essentially, did the Court of Appeals fail to properly apply the Discovery Rule?

STATEMENT OF THE CASE

A. Procedural History

This appeal involves a personal injury claim against Carter and a negligent misrepresentation claim against Petitioner (Cogburn), both claims stemming from a

November 5, 2007 real estate conveyance of a residence in Bamberg, South Carolina. Petitioner sold the home to Respondent herein (McAlhaney), who later discovered mold inside one of the interior walls. (R. p. 223) Central to this case is a October 19, 2007 CL-100 termite bond, issued by Carter, certifying the home had been properly treated for termites, and the home had no obvious moisture seepage. (R. p. 227).

On November 5, 2007, McAlhaney discovered termites in the home, and according to the Court of Appeals, had sufficient cause to bring suit against Carter for negligently treating the premises for termites. McAlhaney discovered mold in the home at some point in time after the November 5, 2007 closing. At a separate point in time, August 16, 2009, McAlhaney suffered an alleged personal injury when his paint roller penetrated the wall of the home, alleged releasing mold spores into the air. (R. p. 128, line 18—R. p. 129, line 10).

The trial court determined McAlhaney “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,” was barred from recovery for any damages. The Court of Appeals reversed, concluding the grant of summary judgment was premature, and further finding McAlhaney is entitled to a separate statute of limitation inquiry for each set of damages, regardless of the fact that each set of damages relate to a single nexus of activity which culminated in the November 5, 2007 real estate closing. *See Court of Appeals, Opinion Number 5360, November 12, 2015.*

ARGUMENT

- I. The Court of Appeals erred in finding each layer of potential damages in McAlhaney's claim against Cogburn and Carter constitutes a separate cause of action and misapplied the Discovery Rule.

Petitioner is sued for negligent misrepresentation, a cause of action which carries a three-year statute of limitations. *See S.C. Code §15-3-530(5)*. Petitioner asserts McAlhaney was on inquiry notice by November, 2007.

Inquiry notice, the moment of "discovery," triggers a count down of sorts, and compels an injured party toward action. Under current South Carolina law, an injured party is not given opportunity to sit idly by, aware of some claim, against some party, and wait for additional causes of action to accrue or damages to worsen. *See Epstein v. Brown*, 363 S.C. 371, 610 S.E.2d 816 (2005). Rather, the injured party must use the "exercise of reasonable diligence" to uncover facts and circumstances which may substantiate a potential claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996).

The Court of Appeals found that in October 2007, a reasonable person would have been on notice of a potential negligence claim for property damage against at least one of the named defendants, Cogburn or Carter, owing to the uncontroverted discovery of termites on the premises. The Court of Appeals then, improperly, held that McAlhaney's personal injury cause of action accrued, at the earliest, on August 16, 2009, the day he suffered a physical injury. The Court of Appeals declined to charge McAlhaney, as a reasonable person, with the duty to recognize the moisture in the home as the common source of both the termite infestation and the mold, despite the fact that the alleged negligence on the part of Cogburn and Carter is

inextricably linked with the defects in the CL-100, or termite bond, issued by Carter, and paid for by Cogburn. Defects which McAlhaney admittedly discovered outside the statute of limitations: Q: “So you knew in October of 2007 that Mr. Carter hadn’t done his job properly?” A: “Yeah.” (R. p. 156, line 18—20.)

Rather, the Court of Appeals improperly distinguished the Supreme Court’s opinion in *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, in a limited fashion, as described on the face of the CL-100. (*See R. 227.*)

Central to McAlhaney’s case against Cogburn is the date of inquiry notice or discovery of the mold. The Court of Appeals found McAlhaney’s own testimony was inconsistent as to the date of discovery. However, the Court of Appeals seemingly overlooked the date of initial inquiry notice, the first date McAlhaney knew of *some* claim against Carter or Cogurn for a defective CL-100 or termite bond. This date is November 5, 2007.

The Court of Appeals 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. To put it another way, the Court of Appeals failed entirely to apply the discovery rule.

In this instance, McAlhaney 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. (R. 106-107; 109-110.) Appellant chose not to exercise reasonable diligence.

The Supreme Court has 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. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981). In this case, McAlhaney failed to investigate the initial discovery of termites. If McAlhaney’s claims are in fact true, this investigation would have led in the discovery of moisture and mold in 2007. The causes of action would have developed and each party would have full information regarding the events around the 2007 closing. Had McAlhaney investigated and failed to find moisture and mold, he would have had no claim at all, save the claim against Carter for defective treatment of termites. However, the Court of Appeals permits McAlhaney to wait, to allow any moisture issues to multiply and worsen, then permits McAlhaney 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 and accompanying

termite bond, all fixed 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 Court of Appeals decision 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 of Appeals failed to properly apply this principle herein, and for this reason, a writ of certiorari should be granted.

On some date no later than November 2007, Appellant had notice of *some* claim against the named defendants for failure to properly treat the home for termites. This inquiry notice starts the metaphorical clock and shifts the burden to McAlhaney herein to exercise reasonable diligence and investigate his potential claims. The Court of Appeals rewards McAlhaney 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.

The Court of Appeals improperly distinguishes termite damages from mold damages, finding one time-barred and the other viable. The Court of Appeals fails to consider the practical implications of failing to apply the Discovery Rule, and thus permitting a single nexus of activity in 2007 to spiral into the future indefinitely developing new causes of action as layers of damages continue to accrue. This outcome is antithetical to our discovery rule, and is not permitted under a current reading of South Carolina case law and statutes.

CONCLUSION

For the reasons set forth above, petitioner prays this Court consider these matters and grant a Write of Certiorari, that is may review the decision of the Court of Appeals and finally determine the law of this state on the discovery rule question presented herein.

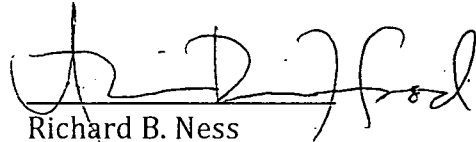
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February 29^m 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

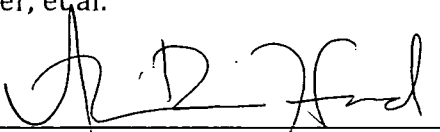
This is to certify that I, Alison Dennis Hood, Attorney for Petitioner Erick Cogburn, along with Richard B. Ness of Ness & Jett, LLC, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **PETITION FOR WRIT OF CERTIORARI**, in the matter 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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February 29th, 2016



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