THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2016-000405

Claude McAlhany, ...Respondent

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.....Petitioner.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Statutes:

Rules:

Secondary Sources:

STATEMENT OF ISSUES

1. The Court of Appeals erred in failing to properly apply the Discovery Rule.

2. As to Cogburn, the Court of Appeals erred in determining later accruing damages from a singular injury amount to distinct causes of action with distinct statutes of limitation.

3. The Court of Appeals erred in holding that a Plaintiff may overcome summary judgment by relying on conflicting deposition testimony and failing to provide any additional evidence to resolve the conflict.

STATEMENT OF THE CASE

Petitioner Cogburn (Cogburn) purchased an investment property on Faust Street in Bamberg, SC, in May 2007. App. 182; 223. The property consists of a split-level home, with the third and lowest floor located below ground-level. App. 161, lines 11-15. Cogburn hired Petitioner Kenneth A. Carter (Carter) to perform the CL-100 Termite Inspection, which was completed in March 2007. App. 223—226. As a result of the inspection and professional recommendations of Carter, Cogburn hired Carter to perform a treatment for termites. Cogburn purchased a transferrable Termite Bond guaranteeing the termite treatment for one-year. App. 54, lines 10—25, App. 57, line 1. Cogburn further hired a professional contractor to make repairs to the home, in anticipation of re-selling the split-level property. App. 164, lines 10—15.

On or around October 15, 2007, Claude McAlhany (hereafter McAlhany) moved into the Faust Street home, in anticipation of purchasing the home from Cogburn. The real estate conveyance proceeded without incident, and was closed November 5, 2007, at which time McAlhany took title and complete possession of the Faust Street home. App. 99, line 17—App. 101, line 3. Carter completed the CL-100 examination for this sale as well, dated October 19, 2007. App. 227—228.

On August 16, 2009, McAlhany alleges he was painting an interior wall in the home, when his paint roller went through the sheetrock, releasing mold spores into the air. App. 128, line 18—App. 129, line 10.

On April 11, 2011, McAlhany filed his action for property damage stemming from moisture and mold within the Faust Street home. App. 17—24. Therein,

McAlhaney claims Cogburn, prior to the sale, 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, and failed to disclose to McAlhany the latent defect. *Id.*

Below, McAlhany argued that there is conflicting evidence regarding the initial date of discovery, a material factual in dispute, which would preclude summary judgment. However, the only evidence offered of the discovery of the moisture, termite, and mold is the deposition testimony of McAlhany, which, taken as truthful and legitimate, outlines a trajectory of awareness of the mold and moisture problems within the home, beginning with the initial discovery of termites and moisture in October and November 2007. App. 151, line 8—App. 153, line 3; App. 169, lines 5—18. From there, McAlhany's awareness of the scope of the problem grew, and his potential damages, including his later alleged personal injuries, mounted. However, there is no evidence offered by an opposing party in this case to dispute or even question McAlhany's own testimony. McAlhany 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, in 2007. App. 62-64. McAlhany further testified in each instance he took remedial measures to treat the termites and the mold to prevent any further damage to the home. App. 151, line 8—App. 153, line 3; App. 169, lines 5—18.

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, McAlhany failed to bring a claim for property damages within the three-year statute of limitations. App. 17—24. His later exposure to mold in August 16, 2009 sparked a secondary claim for personal injury. The personal injury claim is also filed within the April 11, 2011 Complaint. App. 128, line 18—App. 129, line 10.

Cogburn's motion for summary judgment was filed on March 30, 2012 and heard by the trial court on July 26, 2012. App. 40-41. After considering the motion, arguments of counsel, and the memoranda of law presented by the Defendants below, along with the Deposition testimony of McAlhany, the trial court issued its Order granting the motions for Summary Judgment of both Cogburn and Carter, 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 McAlhany. App. 5—16.

In granting Cogburn's motion for summary judgment, the trial court found McAlhaney 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, McAlhaney's causes of action, including the sole cause of action against Cogburn of negligent misrepresentation, are totally barred from recovery. App. 5—16.

The trial court, considering the negligent misrepresentation claim leveled against Cogburn and the negligence claim leveled against Carter as one, determined 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, and, by failing to file his summons and complaint within the applicable statute of limitations," was barred from recovery. The Court of Appeals reversed, concluding the grant of summary judgment was premature, and further finding McAlhany is entitled to a separate statute of limitation inquiry for each set of damages, regardless of the fact that all damages claimed against Cogburn for property damage and personal injury must relate back to the November 5, 2007 real estate closing, in which Cogburn took part as the grantor. App. 377—391.

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, 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.*

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE DISCOVERY RULE.

Cogburn 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).* Cogburn asserts McAlhany was on inquiry notice of some cause of action against some party by November, 2007, more than three years before the circuit court action was filed.

A. Inquiry Notice "Starts the Clock."

Inquiry notice, the moment of "discovery," triggers a countdown 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). "South Carolina's statute of limitation requires 'very

little to start the clock.' " *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998), *citing Roe v. Doe*, 28 F. 3d 404, 407 (4th Cir. 1994) (applying South Carolina law).

This is a burden intentionally placed on a plaintiff to preserve evidence, expedite resolution of claims, and mitigate losses, as the plaintiff possesses all discretion regarding the claim: the ability to hire an attorney, the ability to gather information regarding damages (either medical or historical), the ability to hire experts to investigate claims. All are the province of the injured.

In this case, McAlhany admittedly had notice of a defect in the termite bond, and some time after, had notice of the alleged mold or mildew problem. He failed to investigate, failed to seek counsel, and failed to exercise his rights. "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) (emphasis in original). "The fact that the injured party may not comprehend the full extent of the damage is immaterial." *Id.* at 382, 610 S.E.2d at 821 (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996)).

The Court of Appeals found that in late 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 day of the real estate closing. App. 61. The Court of Appeals then, improperly, held that McAlhany'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 McAlhany, 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. These are defects which McAlhany admittedly discovered outside the statute of limitations: Q: "So you knew in October of 2007 that Mr. Carter hadn't done his job property?" A: "Yeah." App. 156, line 18—20. McAlhany did not change his recollection of this testimony.

In South Carolina, the CL-100 contains two distinct inspection criteria: termite activity and conditions that lend themselves to termites, i.e. moisture in exposed wood. Moisture is a symptom that indicates both termites and mold may be likely in the home, but 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. App. 227.

The Court of Appeals found McAlhany's own testimony was inconsistent as to the date of formal, final discovery of the depth of the moisture and mold problems in the home. However, the Court of Appeals overlooked the date of inquiry notice, the first date McAlhany knew of *some* claim against Carter or Cogurn for a defective CL-100 or termite bond. This date is November 5, 2007. South Carolina law requires acknowledgement of the date of inquiry notice as it relates to the property damage claim against Cogburn. This is the date the clock starts ticking.

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. In so doing, the Court of Appeals discards the well-established rule of inquiry notice.

In this instance, McAlhany 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 early 2008, both dates being offered as the proper date for the replacement of the basement floor in the underground portion of the home. (It is significant to note that McAlhany did not produce any receipts or any other documentation to clarify his allegations, and instead advanced a series of inconsistent recollections from his own memory.) McAlhany elected not to. Had McAlhany investigated the initial discovery of termites, if McAlhany's 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 McAlhany 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. This is the proper operation of inquiry notice, to develop legitimate claims and exclude meritless claims, through timely investigation.

B. Dean v. Ruscon Corp. applies.

The Court of Appeals determined that *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996) is distinguishable from this case, as McAlhany's personal injuries are separate and distinguishable, as they were not "discoverable" until they accrued in 2009, the date the paint roller alleged penetrated the sheetrock of the home.

While the personal injury prong of the complaint should not be given its own statute of limitations and treated as a separate injury, the discovery rule operates to place McAlhany on notice of the termites and moisture within the home, as both were necessarily *discoverable,* if in fact they existed, in November 2007, the date of inquiry notice. Just like the cracks in *Dean v. Ruscon Corp.* were the bellwether of impending structural damage, the termites and moisture here should have alerted McAlhany, a reasonable person, to investigate the concerns raised by these known factors.

The construction of the discovery rule articulated by the Court of Appeals permits McAlhany, and similarly-situated plaintiffs to wait, to allow any moisture issues to multiply and worsen, then provides additional time still 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. This is improper, given the discovery rule, outlined within *Dean v. Ruscon Corp.,* which, in fact, specifically anticipates subsequent harm, in this case personal injury, which was discoverable at the moment of inquiry notice, in this case November 2007. *See Id.,* at 364-65, 468 S.E.2d at 648. Statutes of limitations must protect Defendants from protracted fear of litigation. *See Stokes-Craven Holding Corp., v. Robinson,* 416 S.C. 517, 787 S.E.2d 485 (2016). Statutes of limitation are "triggered not merely by

knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another." *True v. Monteith*, 327 S.C. 116, 118, 489 S.E.2d 615, 617 (1997).

In failing to give weight to the operation of the discovery rule, the Court of Appeals fails to give proper weight to the applicable statute of limitation: "Statutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct.App.2009), overruled on other grounds by *Stokes Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* "Statutes of limitations are, indeed, fundamental to our judicial system." *Id.*

Additionally, the Court of Appeals fails to charge McAlhany, a reasonable person, with the exercise of reasonable diligence. Reasonable diligence means 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. 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, 303, 278 S.E.2d 333, 334 (1981). This is an objective determination. *Wilson v. Shannon*, 299 S.C. 512, 386 S.E.2d 257 (Ct.App.1989). 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).

In this case, McAlhany's chief complaint stems from his, yet unproven, allegations that the home he purchased from Cogburn, protected by Carter's termite bond, had termites, moisture, and water damage, of which Cogburn had knowledge, in 2007. Living within that home, McAlhany accepted the risks associated with the termites from 2007 onward and further accepted the risk associated with the moisture from 2007 or early 2008 onward. It was not until he punctured the wall and was overwhelmed with mold, allegedly, that McAlhany considered this claim. Thus, the personal injury was simply the final straw in a long line of damages, all stemming from the initial complaint, a failure to disclose moisture issues and a failure to properly treat for termites, all fixed in time in 2007. It is significant that the only identified defects, moisture and termites, and the circumstances contributing to their existence, if any (namely a third-floor underground) existed, according to McAlhaney, in 2007. *See Barr v. City of Rock Hill,* 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998), cited in *3 Chisolm Street Homeowners Ass'n, Inc. v Chisolm Street Partners, LLC, 2014 WL 2581458* (Ct. App. 2014)(Unpublished Opinion). This means all alleged defects were, in fact, discoverable in 2007.

"One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.' " *Moates v. Bobb,* 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996) (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct.App.1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." *Moates,* 322 S.C. at 176, 470 S.E.2d at 404.

On some date no later than November 2007, Appellant had notice of *some* claim against the named defendants, Cogburn and Carter, for failure to properly treat the home for termites. This inquiry notice starts the metaphorical clock and shifts the burden to McAlhany to investigate his potential claims. The Court must not reward idleness on the part of McAlhany. Rather, the Court should acknowledge inquiry notice began the clock ticking against McAlhany in November 2007.

II. AS TO COGBURN, THE COURT OF APPEALS ERRED IN DETERMINING LATER ACCRUING DAMAGES FROM A SINGULAR INJRUY AMOUNT TO DISTINCT CAUSES OF ACTION WITH DISTINCT STATUES OF LIMITATION.

The Court of Appeals improperly distinguished *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.

To establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002).

The elements of a personal injury cause of action are: (1) duty, (2) breach of that duty, (3) proximate causation, and (4) injury. *Shipes v. Piggly Wiggly*, 269 S.C. 479, 238 S.E.2d 167 (1977).

The Court of Appeals takes the position that the personal injury claim survives the applicable statute of limitation, as the claim had not yet accrued until the August 2009 painting exposure, when the final prong of "injury" finally occurred.

However, had Plaintiff timely investigated the termite and mold problems, of which he had inquiry notice, he would have uncovered the depth and breadth of the alleged mold issues, and would have been in a position to protect himself from the additional harm of a personal injury. He clearly found mold under the floor tiles in 2007, thereby putting him on notice of mold and moisture, at the latest in early 2008. App. 62-64. Plaintiff failed to take corrective measures. The Court of Appeals permits Plaintiff to essentially take up residence and linger with a known danger, indefinitely, until the point that the danger results in additional injury. Plaintiff's failure to investigate his circumstances, and failure to take remedial measures to prevent further harm, lead to an escalation of damages, and in this case, led to a property damage claim morphing into a personal injury claim. In this case, living in a moldy home is essentially guaranteed to manifest as a personal injury at some point in the future. Our law places the burden to mitigate damage and act reasonably on McAlhaney. *See Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998).[1]

The Court of Appeals concludes that the discovery of termites does not put a reasonable person on notice of a claim for property damage related to mold. Inquiry notice is the red flag that compels a plaintiff to take notice, ask questions, and investigate the circumstances that might lead to some cause of action against some party. The stage was set for a property damage claim at the November real estate closing in 2007. The later accruing personal injury claim is the result of the failure

[1] Our law even denies plaintiffs recovery when they assume a risk intentionally or with knowledge of a known and appreciated hazard. *See Lowrimore v. Fast Fare Stores, Inc.*, 299 S.C. 418, 424, 385 S.E.2d 218, 221 (Ct.App.1989).

of the plaintiff to investigate his property claim, his failure to act when placed on inquiry notice of some claim against some party (Carter or Cogburn) for property damage.

South Carolina law does not permit a second statute of limitations for a second wave of harm caused by the same nexus of activity. For this reason the opinion of the Court of Appeals should be reversed.

III. THE COURT OF APPEALS ERRED IN HOLDING PLAINTIFF MAY OVERCOME SUMMARY JUDGMENT BY GIVING CONFLICTING AND UNRESOLVED DEPOSITION TESTIMONY AND FAILING TO PROVIDE ANY ADDITIONAL EVIDENCE TO RESOLVE THE CONFLICT.

The Court of Appeals would lower the standard needed to overcome summary judgment to the point where a "scintilla" equates with essentially no meaningful evidence. Under the proposed construction, a plaintiff is not compelled even to resolve his own self-serving, conflicting testimony. Rule 56(c), SCRCP, requires more.

At the summary judgment stage, McAlhany offered no evidence to clarify or support his deposition testimony, instead relying on his own conflicting recollections. At best, McAlhany lacks personal knowledge regarding the appropriate time line, and therefore his conflicting recollections should not be permitted to create a question of fact sufficient to overcome summary judgment. *See Simmons v. Berkeley Electric Cooperative, Inc., 2016 WL 6520167* (2016)(Holding an affiant's failure to justify his proposed personal knowledge renders his testimony insufficient to create a question of material fact.) This is the essence of Rule 602, SCRE: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. In this case, Rule 602, SCRE, in conjunction with Rule 56(c), should operate to either exclude or discredit the testimony of McAlhany, which the

Court of Appeals instead enshrines, despite its obvious inaccuracy.

At his deposition, McAlhany testified he replaced the ground-level floor twice. R. App. 100, lines 10-12; 13-25; R. App. 152, line 1-7; R. App. 1010, line 5-9. A purchase of that size would be commemorated within the checking account of McAlhany, and evidence of the purchase date should be been easily produced, by statement or receipt. McAlhany could have clarified his own conflicting testimony through any means, including documentation, supplemental affidavit, etc. He elected not to do so. Rule 56(c), SCRCP does not require more than a scintilla of evidence to overcome summary judgment, but it does require some meaningful evidence. McAlhany's own vague and conflicting testimony is insufficient.

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. In this case, Cogburn and Carter both provided evidence to the court of the dates provided by McAlhany for discovery of the termites and the moisture in the home, both well outside the three-year statute of limitations. "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *See D. R. Horton, Inc. v Wescott Land Co., LLC*, 398 S.C. 528 (2012), citing Rule 56(c), SCRCP. The Court of Appeals permits McAlhany to rest upon his

allegations, without offering even slight evidence to support his conflicting assertions, at least some of which must be incorrect.

McAlhany argues the trial court weighed conflicting testimony in favor of the moving parties, in contravention to the requirements of Rule 56(c), SCRCP. Essentially, McAlhany claims that, in failing to credit deposition testimony offered as "evidence" to contradict other conflicting deposition testimony, the court improperly "weigh[ed] the evidence" and failed to "resolved disputed issues in favor of the moving party." *Anderson v. Liberty Lobby,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986). However, in this case, there is no contradictory evidence to weigh, as all the conflicting allegations came from McAlhany, who gave conflicting dates and descriptions of events at his deposition. McAlhany was served with notice of the motions for summary judgment premised on the statute of limitations, and failed to counter them with any clarification by affidavit or otherwise. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.".Rule 56(e), SCRCP.

Taking the testimony in the light most favorable to Plaintiff does not mean construing all testimony to be meaningful and truthful. In this case, McAlhany simply cannot be right about all his conflicting assertions, as they create an impossible timeline. Rather, McAlhany is wrong about at least some of his assertions. The services of a jury are not necessary to determine which of McAlhany's own assertions are truthful and

correct. *See Huffman v. Sunshine Recycling, LLC*, 417 S.C. 514, 790 S.E.2d 401 (2016). At this stage, the court need not pretend they are all correct. A plaintiff has an obligation to put forth evidence upon which to base his claims, when the credibility of the claims is necessarily in doubt. "The light most favorable to the non-moving party" does not require the court to suspend logic, and grant that directly contradictory testimony might all be true. In this case, McAlhany's own testimony regarding the discovery of termites in October 2007 and black mold in November 2007 must be accepted by the court, as there is no other testimony or evidence to consider. It is not an improper weighting of facts, but rather the application of common sense that led the trial court to conclude that McAlhany's own testimony was evidence that McAlhany knew of first termites, then moisture, then mold at some point in time outside of the three-years statute of limitations.

The trial court is permitted to act on the assumption that there is only one truth about a given set of circumstances in order to prevent a party from gaining an unfair advantage. This is the fundamental principal underlying the concept of judicial estoppel, which is not at issue in this case. *See King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192, 196 (4th Cir.1998). Yet, in this matter, the same principal applies. McAlhany's attempts to overcome summary judgment without the aid of any clarification through affidavit, further deposition testimony, documentary evidence, credit card receipt, or discovery response is contradictory to reason. No one challenges McAlhany's recollection. No one disputes his own words. Viewing them in the light most favorable to him, we all, including the trial court, assume each word is true. This testimony is the evidence that entitles Cogburn to summary judgment, as McAlhany testified he knew of some claim against some party in November 2007.

"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). In this case McAlhany failed to clarify his own testimony at the summary judgment hearing, and instead relies on the Court to accept his own conflicting deposition testimony as a scintilla sufficient to overcome summary judgment. The facts in dispute, both testified to and contested by McAlhany, are contested in a deficient manner. Even a scintilla requires more.

CONCLUSIONS

The Court should issue its Order affirming the law of South Carolina with regard to the Discovery Rule and our laws of evidence, and should vacate the order of the lower court and reinstate the order of the trial court granting summary judgment.

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December 8, 2016

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CERTIFICATE OF SERVICE

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