THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Trial Judge: Clifton Newman, Circuit Court Judge Court of Common Pleas

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..Petitioner.

PETITIONER'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err by failing to hold that the record on appeal contains undisputed facts which objectively should have led a reasonable person to discover the damages complained of herein and trigger the statute of limitations to run?

2. Did the Court of Appeals err in holding that McAlhany may create his own issue of fact by presenting inconsistent and contradictory testimony without also providing the requisite explanation, elaboration, and/or connection to new evidence through an affidavit as necessitated by prior South Carolina precedent?

3. Did the Court of Appeals err by holding that one who produces a CL-100 Wood Infestation Report has a legal duty to discover and disclose mold and/or conditions conducive to mold, which is contrary to statutory and regulatory provisions?

4. Did the Court of Appeals err by failing to hold McAlhany's injuries for personal injury and property damage are indivisible, and as such, the statute of limitations for both began in October or November of 2007?

STATEMENT OF THE CASE

The instant appellate action arises from the grant of summary judgment by the Circuit Court premised upon the affirmative defense of South Carolina's Status of Limitations, S. C. Code Ann. §§ 15-3-530 (3) & (5) as asserted by the Petitioner herein. The Court of Appeals reversed the trial court and, following the necessary request for rehearing, a petition for certiorari ensued. Petitioner, Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. (collectively hereinafter "Carter") conducted an inspection for termites, and other wood destroying organisms, on October 19, 2007, for a residence at 3633 Faust Street, Bamberg, South Carolina and thereafter issued a CL-100 Wood Infestation Report ("CL-100"). (APP. p. 243, ll. 8-15, pp. 227-228). This inspection was performed as a prerequisite for the sale of the Faust Street property from Co-defendant, Erick Cogburn ("Cogburn"), to Plaintiff/Respondent, Claude McAlhany ("McAlhany"). (APP. p. 21, ll. 9). The use of, and certain contents in, this CL-100 are governed by South Carolina regulations as promulgated by the Director of the Department of Pesticide Regulation, as named in the enabling act and relevant regulations.[1]

The CL-100 issued by Carter states, in relevant part, that this "report is for the purpose *only* of an opinion of the presence or absence of wood-destroying organisms." (APP. pp. 227-228) (emphasis added). Moreover, pursuant to South Carolina Regulations, CL-100 inspections are never intended as a "report of the presence or absence of health-related fungi" (such as the mold complained of by McAlhany) "or *conditions conducive to their presence or development in*

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[1] See Pesticide Control Act, S.C. Code § 46-13-10 *et seq.* (defining "Director" to mean the Director of the Division of Regulatory and Public Service Programs, College of Agricultural Sciences, Clemson University.) Also see S.C. Code Regs. 27-1070B (naming the relevant Department as the Department of Pesticide Regulation, a department within the Division of Regulatory and Public Service Programs, Clemson University, and the successor to the Department of Fertilizer and Pesticide Control and the Plant Pest Regulatory Service.)

the structure,"[2] and there is no evidence in the record that McAlhany, or anyone else, retained Carter to perform any inspection other than a CL-100. Additionally, the CL-100 at issue also contains a mandatory, and preformatted, exclusion stating that "[t]his report specifically excludes [inspection of] hidden areas, areas not readily accessible." (APP. pp. 227-228).

While most CL-100 reports include a limited inspection intended to assess wood-moisture content around a property's crawlspace, as a precursor to termite intrusions, the particular CL-100 report at issue here expressly states, in multiple places, that no moisture tests were performed on the Faust Street property.[3] (APP. pp. 227-228). In particular, the mandatory preformatted section (5), of the instant CL-100 states, "[t]here is evidence of the presence of excessive moisture conditions below the first main floor." Section (5) corresponds with two boxes allowing for a "check," or other mark, so as to respond "Yes" (or otherwise) to the preceding statement. The CL-100 in question has a typed "NA" response to section (5), thereby signifying that no moisture tests were performed on the residence. (APP. pp. 227-228). Similarly, section (4) also makes reference to moisture readings and whether wood moisture content exceeded twenty eight percent. Again, the response to such an inquiry includes a typed "NA" to signifying that no moisture readings were taken. (APP. pp. 227-228).

In another section of the CL-100 designated "Remarks," intended for a more detailed explanation of findings, Carter notes that "[t]he building was built on a cement slab and is therefore inaccessible for underneath inspection." (APP. pp. 227-228). Carter further explains in this section that "[w]ood and ground moisture [sic] is not available due to the building being on [sic] cement slab." (APP. pp. 227-228). The CL-100 prominently notes that this report is "VALID FOR 45 DAYS ONLY," and that this "report is submitted without warranty, guarantee,

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[2] S.C. Code Regs. 27-1085K(4) (emphasis added).
[3] *Id.* (3)(c).

or representation as to concealed evidence of infestation or damage or as to future damage."[4] (APP. pp. 227-228). Moreover, the report states, as required by regulatory code, that the findings of this CL-100 have "been made on the basis of visible evidence."[5] McAlhany signed and dated the CL-100 on November 5, 2007, thereby acknowledging that he reviewed and received such report. (APP. pp. 227-228). And, McAlhany further confirmed his acknowledgement by testifying that he "did look it all over," regarding this particular CL-100 report. (APP. p. 96, ll. 13-25).

McAlhany also testified that he took residence in, and possession of, the Faust Street property approximately two weeks before the November 5, 2007 real estate closing. (APP. p. 99, ll. 17-25). McAlhany chose not to have a certified home inspection performed on the home. (APP. p. 102, ll. 8-16). Instead, McAlhany personally inspected the property. (APP. p. 136, ll. 5-10).

Immediately after taking possession of the Faust Street Property, in October of 2007, McAlhany testified that he personally began repair and remodeling work on the home. (APP. p. 100, ll. 10-13). McAlhany pulled-up the existing hardwood floors, which already were warped from water seepage into the home, and installed – what McAlhany believes to be – the correct moisture barrier. (APP. p. 100, ll. 11-25). McAlhany testified that he also discovered "black mold" when he "very first moved in there" and "tore out the first floor," while engaged with the replacement of the existing hardwood floors. (APP. p. 152, ll. 1-7). This time-line of work done to the floors of the Faust Street property, in 2007, is referenced several times by McAlhany in his deposition. (APP. pp. 100-102, p. 152, ll. 1-7). McAlhany testified that he did his best to

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[4] *Id.*(6), "The Wood Infestation Report is not a warranty against future infestation, nor does it place any obligation for the correction of reported damage or infestation upon the applicator or business issuing the report."

[5] *Id.*(3)(b), requiring "Careful sounding and probing of all areas where damage is visible."

clean the mold discovered in 2007 with bleach and other "mold products" supplied by a friend, Mr. Herman Harvey. (APP. p. 152, l. 22; p. 153, l. 3).

According to McAlhany, he then installed the replacement floor, along with a new moisture barrier, on top of the cleaned areas. (APP. p. 152, ll. 16-19). McAlhany's testimony then again confirms that the mold cleaning products for first replacement floor's installation were supplied in 2007. (APP. p. 153, ll. 2-3). The excerpt, which follows, is taken from the deposition of McAlhany:

> 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.
>
> (APP. p. 151, ll. 25, p. 152, ll. 1-7; Deposition of McAlhany).

Later, McAlhany notes that the floor he personally installed, after taking residence at the Faust Street Property, also began to warp from water intrusion about eight to nine months later. (APP. p. 101, ll. 5-9). McAlhany noted, that "come to find out, it was bowing up from the corners like it *was before,* even with the new moisture barrier." (emphasis added) (APP. p 101, ll. 8-10). A careful reading of McAlhany's testimony makes plain that once this floor – the one he installed – also showed signs of water damage that McAlhany contacted his insurance provider and received a payout of $5,000.00, which he used to install ceramic tiles. (APP. p. 101, l. 17).

McAlhany's timeline at this point in his testimony clearly indicates that after the tiles were in place that he then began working on painting portions of the house. McAlhany asserts that he discovered additional mold in a bedroom – somewhat confusingly – in "'07/'08, or late '08 sometime" while he was painting the bedroom walls and the roller penetrated the sheetrock. (APP. p. 102, ll. 2-6, p. 107, ll. 5-13). At another point in his deposition, McAlhany changes his timeframe and asserts that the bedroom mold discovery occurred "[i]n probably '09." (APP. p. 109, l. 25). Upon discovering the bedroom mold, McAlhany claims he used a "sheetrock knife" to remove a 12-foot span of sheetrock. (APP. p. 107, ll. 13-16). The removed sheetrock section, covered in mold, accidentally fell to the ground and created the main mold spore exposure complained of by McAlhany. (APP. p. 107, ll. 13-16).

Sometime after this latest mold discovery in the bedroom, McAlhany hired a mold specialist, Executive Restoration (a/k/a Haynes Microbial Consulting) to investigate. (APP. p. 105, ll. 18-21 & p. 108 ll. 15-25). Executive Restoration determined that the cement blocks, forming the outer wall for the first-floor, are partially buried on the exterior in dirt and sand. These cement blocks apparently were not sealed properly, and as such, when rain water seeps through the sand and dirt next to the walls of the residence, it penetrates the cement block wall, then into the sheetrock, and house. (APP. pp. 105, ll. 18-25, 106, ll. 1-6). According to McAlhany's testimony, "this was a bad design;" Carter would agree. (APP. pp. 105, ll. 23). McAlhany further testified that Carter did not design the home nor install the cement blocks. (APP. p. 118, ll. 12-15).

Due to the mold damages described above, McAlhany initiated the instant action, on April 11, 2011, against Carter alleging negligence in the issuance of the CL-100 inspection by failing to perform a moisture test. (APP. pp. 17-24). McAlhany then asserts that this negligence

caused the mold, property damage, and personal injury (from inhalation of mold/fungi spores) as complained of by McAlhany. (APP. pp. 17-24). McAlhany also brought a claim against Cogburn, the property seller, alleging negligent misrepresentation regarding the condition of the Faust Street property. (APP. pp. 17-24).

Both Carter and Cogburn answered by denying all allegations and causes of action against each and asserting the statute of limitations as an affirmative defense. (APP. pp. 25-38). Following the deposition of McAlhany, Carter and Cogburn each filed motions for summary judgment pursuant to Rule 56, SCRCP, and Carter proffered a supporting memorandum. (APP. pp. 40-71). The trial court heard Carter's and Cogburn's motions for summary judgment on July 26, 2012, and after receiving oral argument and consideration of written memorandums, the trial court took the matter under advisement. (APP. pp. 72-92). Thereafter, the trial court issued an order granting the motion on September 13, 2012. (APP. pp. 5-15). McAlhany then moved the trial Court to reconsider by filing a Rule 59 (e), SCRCP, motion dated, September 24, 2012. (APP. pp. 42-43). McAlhany's Motion to Reconsider was denied on February 15, 2013. (APP. p. 16). In response, McAlhany filed a Notice of Appeal on March 18, 2013. (APP. pp. 316-317). On November 12, 2015, the S.C. Court of Appeals reversed the decision of the trial court regarding damages solely resulting from mold, but not for termites, and remanded the case back to the Circuit for further consideration.[6] (APP. pp. 377-391) A timely Petition for Rehearing was filed by both Carter and Cogburn. (APP. pp. 392-402). The Petition for Rehearing was denied by the Court of Appeals on January 28, 2016. (APP. pp. 411-414). Following the denial, Carter

[6] *McAlhany v. Carter, 415 S.C. 54, 66, 781 S.E.2d 105, 112 (Ct. App. 2015)* "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*." (emphasis in original).

a filed a timely Petition for Certiorari, on February 26, 2016, which was granted on November 9, 2016.

ARGUMENT

A. THE COURT OF APPEALS SHOULD HAVE HELD THAT THIS ACTION IS TIME BARRED BY THE STATUTE OF LIMITATIONS

S. C. Code Ann. §§ 15-3-530 (3) & (5) provide that "(3) an action for trespass upon or damage to real property;" and "(5) an action for... any injury to the person" must be filed within three (3) years such cause arose. In South Carolina, this 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."[7] Moreover, 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."[8] This discovery rule standard, articulated above, is an objective test to be applied to McAlhany and the facts and circumstances of the injury at issue.[9]

McAlhany complains that Carter negligently failed to detect moisture on the CL-100 at issue, thus giving rise to McAlhany's injuries. Carter counters this cause of action by asserting a statute of limitations defense. Carter argues that according to McAlhany's own testimony, he had at least two separate opportunities where through the "exercise of reasonable diligence" McAlhany would have discovered "that some right of his has been invaded or that some claim

[7] *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413 (Ct. App. 1999) (citing and summarizing the holding of *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (S.C. 1994)).
[8] *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (S.C. 1996).
[9] *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371 (S.C. Ct. App. 2004).

against another party might exist."[10] The first of these instances include McAlhany's repeated testimony that he discovered mold and water damage upon immediately taking possession of the Faust Street Property and beginning repairs of the original floor in 2007. (APP. p. 152, ll. 1-7).

Although some of McAlhany's testimony appears contradictory, McAlhany frequently and repeatedly testified he discovered the first floor to be warped by water intrusion and covered in "black mold" in November of 2007. (APP. p. 100, ll. 10-25; p. 152, ll. 1-7). Such testimony reveals that he was fully aware of the existence of water damage, the presence of moisture, and mold/fungi from first taking possession of the property. Since McAlhany had specific knowledge of the very conditions complained of by this lawsuit upon immediately taking possession of the Faust Street property, then the statute of limitations must begin to run from this date.[11] As such, the summary judgment granted by the trial court should be sustained by this Court.

The second instance where – through the exercise of reasonable diligence – McAlhany would have discovered the alleged injuries, about which he complains, is on the face of the CL-100 at issue. (APP. pp. 227-228). With regard to this notice and opportunity for discovery, there is <u>no inconsistency</u> of testimony. (APP. p. 96, ll. 13-25; pp. 227-228). As noted *supra*, this CL-100 makes plain in several places that no moisture tests were performed and that this "report is for the purpose *only* of an opinion of the presence or absence of wood-destroying organisms." (APP. pp. 227-228) (emphasis added). All CL-100 reports in South Carolina include the following preformatted language, "[t]his report specifically excludes hidden areas, areas not readily accessible, and the undersigned pest control operator disclaims that he has made any

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[10] *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 78 S.E.2d 333, 334 (S.C. 1981) (per curium opinion).
[11] *Dean* at 363. (Citing *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)).

inspections of such hidden areas or of such areas not readily accessible." (APP. pp. 227-228). Also previously discussed, Sections (4) and (5) of the CL-100 are marked so as to expressly indicate moisture tests were not performed on the Faust Street property and then goes on to explain that the lack of such a test is due to the building being on cement slab. (APP. pp. 227-228). Specifically, the report states that "[t]he building was built on a cement slab and is therefore inaccessible for underneath inspection" and that "[w]ood and ground moisture [sic] is not available due to the building being on [sic] cement slab." (APP. pp. 227-228).

McAlhany's signature and testimony confirm that he received, read, and familiarized himself with the CL-100 at issue. (APP. p. 96, ll. 13-25; pp. 227-228). Yet, McAlhany's Consolidated Return – filed in response to Carter's Petition for Certiorari – argues that, "Carter was negligent in numerous ways, including failing to conduct a moisture reading test during the CL-100 inspection." If McAlhany believes the failure of Carter to perform such tests give rise to his cause of action, then again, by McAlhany's own argument and testimony, he had specific knowledge that no moisture tests were performed by November of 2007; thus, he was aware from this point in time of the purported malfeasance, which forms the premise of his lawsuit.

McAlhany also chose not to have a certified home inspection performed, on a home built in the 1960's, which would have better determined the condition of the home he was purchasing. (APP. p. 102, ll. 10-15). 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 associated with the presence of moisture, and the possibility of mold ensuing, as well as the likelihood of health problems that might arise with a mold infestation. McAlhany need not be aware of the full extent of his damages or have specific knowledge that a cause of action exists. He merely needs

to understand "that *some* right of his has been invaded or that some claim against another party *might* exist."[12]

The uncontroverted evidence in the record reveals that McAlhany had access to the CL-100 and reviewed the CL-100 with clear and express language notifying him of the lack of a moisture reading. Moreover, McAlhany acquiesced to the proposition that he "knew," in October of 2007, that Carter "hadn't done his job properly." (APP. p. 156, ll. 18-20). As such, McAlhany was certainly on notice that some right of his has been invaded or that some claim against Carter might exist. As such, the summary judgment granted by the trial court should be sustained.

B. THE COURT OF APPEALS SHOULD NOT HAVE ALLOWED MCALHANY TO MANUFACTURE HIS OWN ISSUE OF FACT.

To the extent this Court finds McAlhany's testimony inconsistent, the Court of Appeals erred by too 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."[13] The Court of Appeals' opinion in the instant action focused incorrectly on the "sham affidavit" at issue in *McMaster* and not on the more important principals outlined by the supporting case-law cited in *McMaster*.

Carter maintains that a close examination of McAlhany's deposition testimony demonstrates that McAlhany found mold and moisture at various places and at various times beginning with his initial possession of the house. However, the Court of Appeals disagreed and

[12] *Snell* at 303 (emphasis added.)
[13] *McMaster* at 149 (citing *Torres v. E.I. Dupont de Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. P.R. 2000)).

found his testimony contradictory and unclear.[14] Yet, McAlhany has never offered any explanation, elaboration, or new evidence for the contradictions of his deposition as required by the case-law.

Should McAlhany wish to change his testimony, then – according to well established precedent – he must "give a satisfactory explanation of why the testimony is changed."[15] 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."[16] Courts have long recognized that "[w]here the witness was confused at the earlier deposition or for some other reason misspoke, the subsequent correcting or clarifying affidavit may be sufficient to create a material dispute of fact."[17] In each of the cases cited by *McMaster*, a subsequent affidavit was submitted by the non-moving party to dispositive motion; yet, no clarifying affidavit has ever been submitted by McAlhany.

Without some explanation, McAlhany would appear to lack the personal knowledge necessary to establish a foundation for any ensuing testimony as required by South Carolina Rule of Evidence 602 on a material issue of this action. Alternatively, if McAlhany cannot provide clarification, then he might be considered "incapable of expressing himself concerning [this] matter as to be understood." In either situation, if McAlhany cannot present clear and cogent testimony, or an appropriate explanation for the repeated inconsistency of his testimony, then

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[14] *McAlhany* 415 S.C. 54, 61

[15] *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)) (internal citations omitted).

[16] *McMaster* at 149 (internal citation omitted).

[17] *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 705 (3d Cir. 1988) (citing to *Lane v. Celotex Corp.*, 782 F.2d 1526 (11th Cir. 1986).

Carter should not be required to defend a case where the complainant cannot put forth competent testimony on a material issue of fact.[18]

C. THE COURT OF APPEALS ERRED BY FAILING TO RECOGNIZE THAT A CL-100 INSPECTION INCLUDES NO DUTY TO DISCLOSE CONDITIONS CONDUCIVE TO MOLD

The Court of Appeals' opinion improperly creates a duty on CL-100 inspectors to find mold and/or "conditions conducive to [the] presence or development in the structure" of health related fungi (i.e. mold).[19] Such a holding goes well beyond the statutory duties set forth in the enabling Pesticide Control Act, S.C. Code § 46-13-10 *et seq*. and directly contravenes the regulatory limitations on the scope of Wood Infestation Reports imposed by S.C. Code Regs. 27-1085K.

Specifically, the Court of Appeals notes that "[a]ccording 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."[20] The Court then goes on to recite the elements of negligence, beginning with "a duty of care owed by [Carter] to [McAlhany],"[21] and thereafter asserts that "there was evidence [in the record] Carter had a duty to check moisture levels in the home... as part of a CL-100 inspection."[22] However, Carter's testimony, supported by the relevant regulations, indicates

[18] See *State v. Tennant*, 394 S.C. 5, 12 (S.C. 2011) (indicating that if a foundation is not provided, then such testimony should be excluded.)
[19] *Colantuoni* at 5.
[20] *McAlhany v. Carter,* 415 S.C. 54, 70, (emphasis added).
[21] *Id.*
[22] *Id.* at 71.

that he is required only to perform a moisture reading when there are other visible signs of water and only in readily accessible areas of the property.[23] (APP. pp. 236-239).

It is important for background purposes to note that Cogburn (Carter's Co-defendant and Petitioner herein) originally purchased the Faust Street property in March of 20007 and retained Carter perform a CL-100 prior to that closing. (APP. p. 271, ll. 22-24; p. 274, ll. 2-7). Cogburn testified that he undertook to make $35,000.00 in repairs and remodeling efforts to the Faust Street property, which included, among several other things, repairs to the shingled roof, new flooring, new cabinets, new windows, and expanded bathrooms and bedrooms. (APP. pp. 276-277). All these remodeling efforts occurred between the time Cogburn purchased the Faust Street residence and then sold same to McAlhany. The Court of Appeals found that Carter inspected the home for moisture content in both March and October of 2007 despite the CL-100's assertion otherwise.[24] Yet, Carter repeatedly testified that he only inspects for moisture when there is visible signs of moisture intrusion or damaged wood. (APP. pp. 236-239). Carter testified that the purpose of a CL-100 is "[t]o determine if the home has infestation of termites, and any rotten wood caused by termites, or any *visible damage* caused by termites." (APP. p. 233, ll. 20-22) (emphasis added). And, with all the repair work done by Cogburn, it is entirely reasonable that no visible signs of damage appeared in the home during the subsequent October 2007 CL-100; thus no second moisture inspections were performed at that time. Moreover, if visible moisture damage was present in the home in October 2007, then certainly McAlhany would have been on notice that the home had a moisture issue, which also would trigger the statue of limitations to run.

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[23] S.C. Code Regs. 27-1085k(3)(c).
[24] *McAlhany* at 71.

As previously mentioned, Carter's moisture inspection duty arises solely in connection with an inspection for termites, since moisture makes termites more likely.[25] The Court of Appeals' opinion is silent as to what evidence in the record demonstrates – or on what legal authority it relies – to support the proposition the Carter had a duty to discover moisture related to mold.[26] What can be found in the record is Carter's position that moisture levels need only be measured in readily accessible places (such as a crawl space), when moisture is visibly present, and that the cement slab foundation prevents access to such areas. (APP. pp. 236-239). Further Carter could not have been clearer that he never undertook an inspection for mold, when he testified that:

> A. ... 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.
>
> (APP. p. 251, ll. 14-17).

Carter's duty to inspect the moisture levels is limited in scope to the "moisture-content readings around the interior perimeter of the crawlspace and in the accessible portions of the center of the crawlspace"[27] and only as such moisture-content is useful in "describing the apparent absence of wood-destroying organisms."[28] S.C. Code Regs. 27-1085K(4) makes plain

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[25] S.C. Code Regs. 27-1085K(5)(d) & (e).

[26] *McAlhany* at 60 and 71 (The Court of Appeal finds that the record contains contradictory testimony as to whether any moisture tests were performed during the October 2007 inspection but references no evidence in the record to indicate that, if such a moisture inspection occurred, that those moisture reading were related to an attempt to discover mold or conditions conducive for mold and not solely related to termites. Importantly, the Court of Appeals does agree that the Clemson report, relied on by McAlhany to support his personal injury claims, "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." (APP. pp. 201-204, Clemson Report).

[27] S.C. Code Regs. 27-1085K(3)(c).

[28] S.C. Code Regs. 27-1085K(1).

that one performing a CL-100 inspection has absolutely no duty to discover or disclose moisture – as that moisture might cause or be a condition conducive to – the development of mold/fungi. "The Wood Infestation Report [CL-100] is in no way a report of the presence or absence of health-related fungi or conditions conducive to their presence or development in the structure."[29]

Carter further argues that his position is supported by the Clemson Report, issued by Kristin Lennox. (APP. pp. 201-204). Ms. Lennox's report is also limited to a "visible inspection of readily accessible areas only… and as [t]his structure is built on a slab foundation, only accessible portions … were inspected." (APP. pp. 201-204). Although Ms. Lennox found that the CL-100 at issue failed to fully comply with South Carolina Regulations, Ms. Lennox noted that this failure related solely to the non-disclosure of locations of previous terminate damage. (APP. pp. 201-204). Ms. Lennox refused to comment on the presence or absence of health related mold/fungi in connection to the issuance of the CL-100. Her reports states:

> 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.
>
> (APP. pp. 201-204).

Carter argues Ms. Lennox's refusal to opine occurs because the presence of health related mold and fungi, or condition conducive to such, are not within the scope of a CL-100 inspection, and as such, Ms. Lennox could offer no relevant expert opinion.

By finding Carter had a duty to disclose mold conducive conditions, the Court of Appeals contravenes clear legislative and regulatory intent, which vested in the Director, as defined by

[29] S.C. Code Regs. 27-1085K(4).

the Act, the authority to promulgate regulations related to structural pest control activity.[30] 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 the statutory and regulatory apparatuses already in place.

As the Opinion now reads, an inspector may now be held civilly responsible for any failure to disclose mold conducive conditions. 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 very areas where such mold and mold-causing-conditions might be found and only through a partially destructive inspection to access such hidden areas.

D. APPELLANT'S PERSONAL INJURY CLAIM IS ALSO TIME BARRED BY THE STATUTE OF LIMITATIONS

McAlhany'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/fungi exposure began with the initial discovery of mold and/or the disclosure that no moisture tests were performed in 2007. As this Court held in *Dean v. Ruscon Corp.* that where the subsequent harm was not separate and distinguishable from the original injury the statute of limitations runs from the original harm.[31] In *Dean*, the Court considered whether a building owner exercised reasonable diligence in determining when the damage to her building occurred. Dean, the building owner, observed a fine crack about three feet in length along the building's outer wall, which resulted from pile-driving activity of the Defendant, Ruscon, in November

[30] See S.C. Code § 41-13-55.
[31] *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1995).

1984.[32] Later, in August of 1985, the crack had grown, and there was now a noticeable bulging and buckling of the brick building's façade at the location of the original crack.[33]

The Court held that the potential damage to Dean's building was not latent, but was apparent in 1984.[34] The Court noted that there was no question that the damage was discovered in 1984, and such damage was associated with Defendant's pile driving activities.[35] 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."[36]

The facts of *Dean* are analogous to the case at bar. McAlhany testified that he discovered termites and mold/water intrusion when he first moved in the house in October and November of 2007. (APP. pp. 134, ll. 23-25, 135, ll. 1-5, 152, ll. 1-7). McAlhany also testified that he received notice that no moisture tests were performed as part of the CL-100 in November of 2007. Given the plain language the CL-100 and McAlhany's testimony regarding mold discovered in 2007, McAlhany should have known – by the exercise of reasonable diligence – that a cause of action against Carter existed.[37]

Assuming *arguendo* that Carter had a duty to inspect for moisture related to mold, then at the time McAlhany knew that no moisture tests were performed the statute of limitations would begin to run on all those claims, which are attributable to Carter's failure to perform such moisture tests. This would include McAlhany's personal injury claims resulting from mold

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[32] *Id.* at 362.
[33] *Id.*
[34] *Id.* at 365
[35] *Id.* at 364-365.
[36] *Id.* at 366.
[37] Although, Carter still maintains that the scope of work reflected in the CL-100 in no way addresses, or was the proximate cause of, the mold at McAlhany's residence. Carter was not required to perform moisture readings on the subject property unless water is visible, and a CL-100 is never intended as a report on the presence of mold on the conditions likely to cause mold. See S.C Regs. 27-1085K.

exposure because moisture is commonly known as a precursor to the presence of mold. "[T]hese facts 'would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against [Carter] might exist.'"[38] The fact that McAlhany's alleged personal injuries had yet to manifest is irrelevant; South Carolina case-law holds that "the fact that the injured party [McAlhany] does not comprehend the full extent of his injuries is immaterial."[39]

The Court in *Dean* distinguishes itself from *Benton vs. Roger C. Pease Hosp.*, wherein a Down syndrome patient fell out of his wheel chair and suffered facial lacerations.[40] Subsequently, a more serious injury of neurological damage developed, which may have been caused by the fall or may <u>not</u> have been caused by the fall. Because the causation was unclear, 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.[41] Similarly, Carter argues that *Benton* is distinguishable from the instant action. McAlhany's own claims for relief directly tie his alleged damages to lack of moisture reading appearing on the CL-100 at issue and non-compliance with the South Carolina Pesticide Act. No other possible causation is even alleged, with respect to Carter.

McAlhany testified that he found termites the first day that he moved into the Faust Street property, at end of October of 2007, and "knew" the CL-100 was defective. (APP. pp. 134-135). Alternatively, McAlhany reviewed, and attested to a review of, the CL-100 at issue on November 5, 2007, which stated no moisture tests were performed. Either date would be an

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[38] *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 571 (S.C. Ct. App. 2005) (citing *Snell v. Columbia Gun Exchange*, Inc., 276 S.C. 301 (S.C. 1981)).
[39] *Knox* at 570-571 (citing *Dean*).
[40] *Benton vs. Roger C. Pease Hosp.* 313 S.C. 520, 443 S.E2d 537 (1994).
[41] *Benton* at 524.

applicable date from which to start the running of the statute of limitations. Since McAlhany 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.

CONCLUSION

As argued above, Carter contends that the applicable statute of limitations bars McAlhany's claims related to moisture damage and the resulting mold. McAlhany testified that he found mold and water damage, along with terminates, upon first taking possession of the Faust Street property in late 2007. (APP. p. 151, ll. 25, p. 152, ll. 1-7). McAlhany also testified that he received and reviewed the CL-100 at issue, which repeatedly indicates that no moisture inspection of the property was conducted. (APP. p. 96, ll. 13-25, pp. 227-228). Since either set of facts and circumstances described above would provide notice and opportunity to discover a potential cause of action, McAlhany's statute of limitations should run from this date, November of 2007.[42]

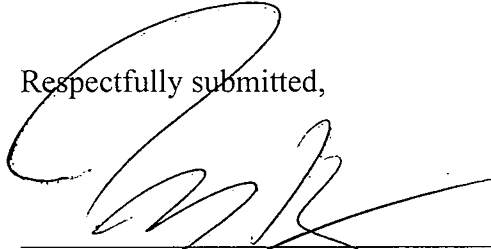
Further, the South Carolina Code of Regulations governing the Wood Infestation Report (CL-100) do not require moisture tests to be performed in areas not readily accessible and then only when visible signs of water or prior damage are apparent, which is advised by the standard preformatted language of the CL-100.[43] Moreover, these same regulations provide that the CL-100 report is in no way a report on health related mold or fungi; as such, Carter had no duty to discover or disclose mold/fungi or the conditions conducive to health related mold/fungi. Finally, McAlhany's claim for personal injury and property damage are indivisible because both arise from the same alleged original harm, the purported failure to disclosure the moisture levels

[42] *Knox* at 571
[43] S.C. Code Regs. 27-1085K.

at the Faust Street property on the CL-100. The statute of limitations runs from the original harm; as such, both claims are barred.

For these reasons, Carter prays this Court sustain the Circuit Court's order grant summary judgment in favor of Carter.

Respectfully submitted,



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December 9, 2016.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE COURT OF APPEALS

Trial Judge: Clifton Newman, Circuit Court Judge Court of Common Pleas

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Appellate Case No.: 2016-000405

Claude McAlhany, ...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, ...Petitioners.

PROOF OF SERVICE

I certify that I have served the Petition's Brief upon the addressees listed below by depositing a true copy in the United States Mail, First Class postage prepaid, on **December 9th, 2016**.

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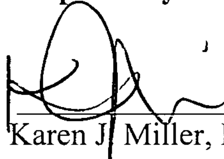

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