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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,.....Petitioners.

BRIEF OF RESPONDENT

William F. Barnes, III
R. Alexander Murdaugh
PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK, P.A.
101 Mulberry Street, East
Post Office Box 457
Hampton, SC 29924
Phone: (803) 943-2111
ATTORNEYS FOR RESPONDENT

Other Counsel of Record:

James C. (Trey) Cox, III, Esquire
Trevor M. Hughey, Esquire
GRIER, COX, & CRANSHAW, LLC
Post Office Box 2823
Columbia, SC 29202
Attorneys for Petitioner, Kenneth Carter

Richard Ness, Esquire
Alison D. Hood, Esquire
NESS & JETT, LLC
Post Office Box 909
Bamberg, SC 29003
Attorneys for Petitioner, Erick Cogburn

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CONSOLIDATED COUNTER STATEMENT OF THE CASE

This action arises from the Court of Appeals reversal of the trial court's decision to grant summary judgment on the basis that the statute of limitations expired prior to the filing of the summons and complaint on April 11, 2011. (App. pp. 5-15). The events giving rise to this action relate to Respondent, Claude McAlhany's ("McAlhany") purchase of a house from Petitioner, 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. (App. p. 21). Prior to the real estate closing, Petitioners, Kenneth A. Carter, Sr., Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, and Carter & Son Pest Control, Inc. (collectively

[1] As most of the arguments put forth by Carter and Cogburn overlap, McAlhany submits this consolidated Brief and addresses particular arguments raised by each.

"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. (App. p. 21).

On August 16, 2009, while McAlhany was painting one of the Home's interior walls, the paint roller he was using penetrated the sheetrock, releasing mold spores in the air, which he inhaled. (App. p. 21). McAlhany's inhalation of the mold spores required medical treatment for the injuries he sustained. (App. pp. 22-23). As a result of discovering 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. (App. p. 21).

McAlhany filed this action against Cogburn and Carter on April 11, 2011, in the Bamberg County Court of Common Pleas. (App. pp. 17-24). The Complaint alleges a negligence action against Carter for damage to the Home and for personal injuries McAlhany sustained. (App. pp. 21-22). Specifically, Carter was negligent in numerous ways, including failing to conduct a moisture reading test during the CL-100 inspection. (App. p. 22).

McAlhany also alleged a negligent misrepresentation cause of action against Cogburn. (App. 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]". (App. 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." (App. p. 23).

Carter and Cogburn moved for summary judgment, contending that the applicable statutes of limitation barred McAlhany's claims for damage to the Home and personal injury.

(App. pp. 38-41). The trial court held a hearing on these motions on July 26, 2012, at the Bamberg County Courthouse, and granted summary judgment based on the statutes of limitation on September 13, 2012. (App. pp. 5-15; p. 74).

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 mold and moisture problems with the Home. (App. 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. (App. 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. (App. pp. 42-43). McAlhany contended the trial court's holding that both the property damage claim and the personal injury claim accrued on the same date, even though McAlhany did not sustain personal injuries until August 2009, was reversible error. (App. pp. 42-43). In an order filed February 15, 2013, the trial court denied McAlhany's motion to reconsider. (App. p. 16).

McAlhany filed a Notice of Appeal with the Court of Appeals on March 18, 2013. (App. pp. 316-317). In an Opinion issued November 12, 2015, a unanimous three-judge panel reversed the trial court's grant of summary judgment. The Court of Appeals held that "[b]ecause 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." (App. p. 386). The Court of Appeals also held that summary judgment was inappropriate as to McAlhany's personal injury claim and that McAlhany presented evidence supporting a personal injury claim against Carter as

Carter was aware of water issues but failed to check and disclose moisture levels in the October 2007 CL-100 report. (App. pp. 386-391). Carter and Cogburn filed Petitions for Rehearing with the Court of Appeals, dated December 3, 2015, and December 4, 2015, respectively. (App. pp. 392-410). The Petitions for Rehearing were denied on January 28, 2016. (App. pp. 413-414). Petitioners served the Petition for Writ of Certiorari on March 3, 2016, which this Court granted on November 10, 2016.

CONSOLIDATED FACTS

I. COGBURN'S PURCHASE OF THE HOME

In March 2007, Cogburn purchased the Home in Bamberg, South Carolina, from William Ginn. (App. p. 271, lines 22-25). Cogburn is a customer service representative at a Bamberg insurance agency, and he has bought and re-sold several homes around the Bamberg community.. (App. p. 244, lines 10-11). The insurance agency that employs Cogburn maintained the insurance on the Home dating back to 1998. (App. 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. (App. p. 270, line 19 – p. 271, line 1).

Cogburn paid Ginn $78,000.00 for the Home. (App. p. 273, lines 5-7). Prior to purchasing the Home, Cogburn had a termite inspection and South Carolina Wood Infestation Report done by Carter. (App. 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. (App. p. 231, lines 17-18). A portion of Carter's business relates to conducting home termite inspections and issuing Wood Infestation Reports. (App. 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. (App. p. 233, lines 20-22). Typically, if the purchaser is borrowing money to purchase the home, the bank requires a CL-100. (App. p. 236, lines 5-13). Carter charges $100.00 for a CL-100 inspection. (App. p. 247, lines 1-2).

As part of conducting a CL-100 inspection, Carter looks for moisture and termites. (App. p. 237, lines 17-19). Moisture levels should not be above twenty-eight percent. (App. p. 238, lines 4-5). Carter uses a moisture reading probe to conduct the moisture readings. (App. 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. (App. p. 239, lines 4-16). Upon touching the surface of the wood, the probe gives an immediate reading. (App. p. 229). Carter conducts moisture readings during an inspection if there is visible evidence of water damage. (App. p. 256).

In March 2007, Cogburn asked Carter to conduct an inspection on the Home because it was Cogburn's intent to resell it. (App. 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. (App. p. 241, line 12). Carter was aware of water issues with the Home when he first inspected it in March 2007. (App. 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." (App. p. 224). The report further noted that "[t]here is visible water damage to the front & rear window sills." (App. p. 224). Cogburn testified that Carter did not tell him about any water damage found during the inspection. (App. 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. (App. p. 254, lines 7-13). While conducting the inspection, Carter observed wood that was wet and rotten

and asked Cogburn to replace it. (App. 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." (App. p. 224).

After Cogburn's purchase of the Home was completed, he began making repairs. (App. 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. (App. p. 276, line 20 – p. 277, line 12). Cogburn spent approximately $35,000.00 on the repairs. (App. p. 277, lines 15-18).

III. MCALHANY'S PURCHASE OF THE HOME FROM COGBURN

Sometime following the Fourth of July in 2007, McAlhany contacted Cogburn regarding his interest in purchasing the Home. (App. p. 282, lines 14-17). Cogburn's initial asking price was $149,000.00. (App. p. 285, lines 1-2). After several offers and counter-offers, Cogburn and McAlhany agreed on a $120,000.00 purchase price. (App. 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. (App. 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 mold and moisture problems with the Home. (App. pp. 93-181).[2]

Subsequent to moving into the Home, he painted the living room, painted some upstairs rooms, and replaced a floor. (App. p. 100, lines 16-25). McAlhany painted in "'07/'08, in late '08 sometime. I can't tell you what month because I have no idea." (App. p. 102, lines 4-6). The

[2] 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.

home first flooded about "seven months after we moved. That's when it ruined the first floor." (App. p. 103). McAlhany testified three other times about replacing the floor about seven months after moving into the Home, in June 2008. (App. p. 158, lines 14-16; p. 171, lines 3-4; p. 176, line 16 – p. 177, line 14). McAlhany testified he first observed mold in the house after tearing out the first floor. (App. p. 152, lines 6-7). He cleaned it up with bleach and then installed the proper moisture barrier down underneath the floor. (App. 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. (App. 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. (App. p. 289, line 4 – p. 290, line 10). The first time McAlhany discovered mold was in late 2008. (App. p. 106, line 24 – p. 107, line 3). However, he also testified that it could have been "probably in '09." (App. p. 109, line 23 – p. 110, line 4). McAlhany took pictures of the mold "back in '09 when it very first happened. When I found the mold." (App. p. 141, ll. 24-25). Another exchange took place regarding when McAlhany first discovered 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. 152, ll. 5-7). This does not state when the first floor was replaced or how long after McAlhany tore the floor out before the mold was discovered.

McAlhany saw live termites the day he purchased the home.[3] (App. pp. 134-35). McAlhany believed that the termites had not long ago been sprayed. (App. p. 169, ll. 7-13).

On August 16, 2009, as McAlhany was painting a wall, the paint roller went through the sheet rock, releasing mold spores which he inhaled. As a result of inhaling the mold spores,

[3] Carter testified, and the Court of Appeals correctly noted, that termites have nothing to do with mold despite the arguments from Carter and Cogburn to the contrary that termites should put McAlhany on notice of mold issues. (App. p. 251, ll. 16-17).

McAlhany sustained damage to his sinuses, his eyes itched and burned, and he experienced nosebleeds. (App. 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. (App. pp. 183-198). Shortly after sustaining the injuries from the mold inhalation, in August 2009, McAlhany retained an attorney. (App. 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. (App. 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. (App. 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)." (App. 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. (App. 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

The issue before the Court is not to determine which of the dates is correct as that is for the fact finder. The issue before the Court is what the effect is at the summary judgment stage of inconsistent deposition testimony. In simple terms, Carter and Cogburn ask the Court to view the evidence in a light most favorable to them, despite the well-established summary judgment standard of viewing the evidence in a light most favorable to McAlhany as the non-moving party. Rule 56, SCRCP. Carter and Cogburn want the Court to use the earliest possible date, despite conflicting testimony of when McAlhany learned of mold and moisture issues with the Home. See Hodges v. Federal-Mogul Corp., 621 Fed. Appx. 735, 742 (4th Cir. 2015 ("inconsistencies and possible errors in Hodges's testimony should be considered and resolved by a jury"). This position, if adopted, can have far-reaching consequences if the trial court can make credibility and factual determinations at the summary judgment stage with conflicting testimony.

The only plausible argument put forth is that the Court of Appeals applied the discovery rule incorrectly and improperly distinguished the Supreme Court's opinion in *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). In arguing that the earliest possible date should be used as a basis to grant summary judgment, Cogburn and Carter overlook that, for them to prevail, the Court must construe the evidence against McAlhany, which is contrary to the

summary judgment standard. This Court should affirm the Court of Appeals' reversal of the circuit court's grant of summary judgment to Petitioners on this basis alone.

I. THE COURT OF APPEALS PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD IN VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO MCALHANY

In reversing the trial court's grant of summary judgment, the Court of Appeals properly applied the well-established summary judgment standard by viewing the evidence, including McAlhany's deposition testimony, in a light most favorable to McAlhany as the non-moving party. Koester, 313 S.C. at 493, 443 S.E.2d at 394. This Court said in Koester that "the evidence and all inferences" must be viewed in a light most favorable to the non-moving party. Id. at 493, 443 S.E.2d at 394. The Court did not carve out an exception to view the Plaintiff's own deposition testimony differently than the remaining as argued by Cogburn and Carter. 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.***

(App. 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.

(App. 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.

(App. p. 109, line 23 – p. 110, line 4) (emphasis added).

When not limited to mold or moisture issues, there is also testimony as to when McAlhany discovered problems existed with the Home related to termites. See (App. p. 156, lines 18-20; p. 152, lines 5-7). However, as Carter testified, mold and termites have nothing to do with each other. (App. p. 251, ll. 16-17).

In its Opinion, the Court of Appeals correctly notes McAlhany's testimony about discovery of the mold:

> 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[4], 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.

(App. p. 384) (emphasis added).

Petitioners argue that the Court of Appeals incorrectly applied the discovery rule and improperly distinguished Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). However, Dean is indeed distinguishable from the facts here. 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

[4] The Court of Appeals interpreted "first" as almost the day McAlhany moved in the Home. There is no testimony or evidence as to what he meant by "first" – in everyday vernacular that may mean anything from the first day to the first year when McAlhany is recalling events on January 25, 2012, over four years after he moved into the Home.

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 warranted reversal. McAlhany testified he was in the Home for two years before discovering mold (App. p. 94, lines 10-15); he first discovered mold in late 2008 (App. p. 106, line 24 – p. 107, line 3); or probably 2009 (App. p. 109, line 23 – p. 110, line 4). To apply the discovery rule and Dean to bar McAlhany's claims, the Court would have to view the evidence in a light most favorable to Petitioners. That is not the summary judgment standard and should not be applied here to bar McAlhany's claims. For these reasons, the Court should affirm the Court of Appeals unanimous decision.

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) of the South Carolina Code provides the applicable statute of limitations for personal injury damages. Specifically, § 15-3-530(5) provides a three-year statute of 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) (emphasis added). Section 15-3-530(5) cannot begin to run until an "injury to the person" is sustained. 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 Court of Appeals correctly held that the statute of limitations does not begin to run on a personal injury action until an actual injury is sustained. McAlhany inhaled mold spores while painting one of the Home's walls on August 16, 2009. (App. p. 21). 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. (App.

pp. 22-23). By granting summary judgment on the basis of the statute of limitations, the trial court held 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 focusing not on the date of the injury, but instead focusing on McAlhany's knowledge prior to any injury. If McAlhany filed a personal injury action against Cogburn and Carter prior to any personal injury being sustained, they would argue the necessary elements for a personal injury action are not present. The start date for a personal injury action should not be treated differently and should begin to run when the "injury to the person" is sustained.

III. CARTER'S ARGUMENT THAT MCALHANY "MANUFACTURED" AN ISSUE OF FACT IS NOT PRESERVED FOR APPELLATE REVIEW

In his Brief, Carter argues that McAlhany cannot "manufacture" his own issue of fact through conflicting testimony without a satisfactory explanation. (Carter Pet. pp. 11-12). As an initial matter, Carter did not make the argument that McAlhany is "manufacturing" an issue of fact to the lower court or Court of Appeals prior to its decision and, therefore, the argument is not preserved.[5] Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) ("The negligence issue was raised for the first time in Kleckley's Petition for Rehearing and was not addressed by either the trial court or the Court of Appeals.").

IV. MCALHANY DOES NOT "MANUFACTURE" AN ISSUE OF FACT AND CARTER'S POSITION WOULD HAVE MAJOR IMPLICATIONS FOR DEPOSITION TESTIMONY WHEN PEOPLE ARE MISTAKEN

Even if the Court finds Carter's argument is preserved, the Court of Appeals correctly relied on McMaster v. Dewitt, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014), to hold that McAlhany did not submit a "sham" affidavit shortly before the summary judgment hearing to

[5] Carter made this argument for the first time in his Petition for Rehearing to the Court of Appeals.

create an issue of fact. (App. p. 385). McMaster involved a completely different scenario. In McMaster, a medical malpractice action, Joseph McMaster testified that a doctor told him in May 2008[6] the cause of his psychosis. Id. at 142, 767 S.E.2d at 453. The defendants moved for summary judgment claiming McMaster's claims were barred by the statute of limitations. Id. Two days before the hearing, McMaster filed an affidavit in which he claimed he was not aware of the negligence until June 2008. Id. The trial court refused to consider the affidavit "finding it 'should be disregarded' as a 'sham affidavit' under Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)." Id. at 143, 767 S.E.2d at 453. On appeal, the Court of Appeals affirmed the trial court's decision to not consider the affidavit. Id. at 151, 767 S.E.2d at 457-58.

Here, McAlhany provided all of the testimony at issue in a single deposition taken by Cogburn and Carter. Their counsel had the opportunity to question McAlhany about what they now allege is inconsistent but chose not to do so. Under this scenario, McAlhany is not required to explain anything. The Court of Appeals correctly noted the differences with this case and McMaster.

Carter's argument regarding the issue of conflicting testimony would have far-reaching implications and ignores the fact that people may genuinely not remember the date of an event or are sometimes mistaken in their testimony when asked about something that occurred several years earlier. Under Carter's position, even if an individual misspoke or was mistaken, the misstatement or mistake could still be used against them as a basis for summary judgment. Given the summary judgment standard of viewing the evidence in a light most favorable to the non-moving party, the Court should not allow the lower court to resolve factual discrepancies in

[6] McMaster filed his Complaint on June 16, 2011. Id.

testimony at the summary judgment stage when, as here, McAlhany did not submit an affidavit before the hearing that is inconsistent with his deposition testimony.

V. CARTER HAD A DUTY TO CHECK FOR MOISTURE LEVELS IN THE HOME AS PART OF A CL-100 INSPECTION AND HIS PRIOR KNOWLEDGE OF WATER DAMAGE TO THE HOME

Despite his testimony to the contrary, Carter argues that a CL-100 does not include a duty to check for or disclose moisture levels. (Carter Br. pp. 13-14). Carter could not have been clearer in his deposition about looking for moisture in CL-100 inspections:

Q. So, do you look for moisture and termites in every CL-100 inspection?

A. Yes

(App. p. 237, lines 17-19).

The Court of Appeals correctly held that Carter had previous knowledge about water issues with the Home from his first inspection in March 2007. (App. p. 390). 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." (App. p. 224). The report further noted that "[t]here is visible water damage to the front & rear window sills." (App. p. 224). Despite this knowledge, however, Carter did not check for or disclose moisture levels in the October 2007 CL-100. (App. p. 390).

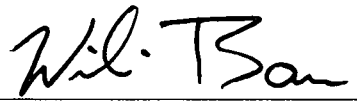
Even if the CL-100 regulations do not include a duty to inspect for moisture, which McAlhany does not concede, Carter inspected for moisture in every CL-100 inspection and had knowledge of previous moisture issues with the Home. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (holding that if an act is voluntarily undertaken "the actor assumes the duty to use due care"). The testimony in this case is that Carter's policy was to inspect for termites and moisture as part of every CL-100 inspection. Roddey v. Wal-Mart Stores

E., LP, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016) ("Evidence of a company's deviation from its own internal policies is relevant to show the company deviated from the standard of care, and is properly admitted to show the element of breach.") There is evidence in this case that Carter had knowledge of moisture problems in March 2007 and checked moisture levels in every CL-100 inspection but failed to do so in his October 2007 inspection.

CONCLUSION

Respondent requests this Court affirm the Court of Appeals' reversal of the circuit court's grant of summary judgment to Petitioners and remand for further proceedings.

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

BY: 

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

ATTORNEYS FOR RESPONDENT

January 6, 2017
Hampton, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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, ... Petitioners.

CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., 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 Brief*** to:

James C. (Trey) Cox, III, Esquire
Trevor M. Hughey, Esquire
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202

Attorneys for Petitioner, Kenneth A. Carter, Sr.

Richard B. Ness, Esquire
Alison D. Hood, Esquire
Ness & Jett, LLC
Post Office Box 909
Bamberg, SC 29003

Attorneys for Petitioner, Erick Cogburn

Megan C Davis
Megan C. Davis

January 10th, 2017
Hampton, South Carolina