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S.C. SUPREME COURT

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.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Issue.....	1
Responsive Argument.....	2
Conclusions.....	6

TABLE OF AUTHORITIES

Case Law:

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).....5
Knox v. Greenville Hosp. Sys., 362 S.C. 566, 608 S.E.2d 459 (Ct.App.2005).....4
Lord v. D & J Enterprises, Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014).....4

Rules:

Rule 56, SCRCP.....6
56(c), SCRCP.....4, 5
56(e), SCRCP.....4, 5

Secondary Sources:

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).....5

STATEMENT OF ISSUE

- I. Is McAlhany's deposition testimony alone sufficient to overcome summary judgment, or does Rule 56(e), SCRCP, require more?

RESPONSIVE ARGUMENT

In the circuit court, appellants Cogburn and Carter filed summary judgment motions, relying entirely on the sworn statements of McAlhany, as evidence of inquiry notice sufficient to trigger the applicable statute of limitations. In his Responsive Brief, McAlhany states: “Under this scenario, McAlhany is not required to explain anything.” See Page 15, Brief of Respondent. This is an incorrect statement of law.

McAlhany lived in the Faust Street home from November 2007 until on or around the date of his alleged personal injuries, August 16, 2009, or a total of 20 months. App. 378—379. During that time, he testified he replaced the flooring in the lower level of the house at least three different times, as a result of various moisture events. App. p. 172, lines 4—11. With no receipts, checks, insurance papers, or any other meaningful documentation to assist in forming a timeline, the testimony of McAlhany was all that the trial court considered in initially granting summary judgment.

McAlhany testified, in October 2007 he began making repairs to the home: “I painted the living room. I painted some upstairs rooms. I put down – the floor warped down in the bottom, down there that had the plank flooring or whatever, the lock in tongue—and—groove flooring, hardwood flooring. Replaced that because it warped all up. Water was coming through the insides of the house. That warped up. They used the wrong moisture barrier. So I put a three – they had a 2 and 1, I put a 3 and 1 moisture barrier. That was the correct moisture barrier, and I put it down.” App. p. 100, line 16—24. McAlhany goes on to describe further water damage, a second event, and second floor warping approximately eight months later from the initial recognition of moisture. He states that he thinks that was late 2008. App. p. 102, lines 2-4. He later states that the

home didn't "flood" until seven months after he moved in. App. p. 103, line 8-9. Then later in the deposition, when prompted, "So the first time you discovered mold was in late '08?" McAlhany responds, "Yeah." App. p. 106, lines 24—p. 107, line 1.

This testimony, given full weight and presumed to be truthful, is evidence of moisture in October 2007, sufficient to require repairs, warping of the floor, and then finally flooding and mold in 2008. Each of these assertions can be true, and even seem logical on their face. Moisture, gives way to warping, which gives way to flooding and mold. This is a description of an escalating problem, with water as its source.

(McAlhany also testified he replaced yet another floor because of a leaky icemaker line. App. 171, line 23—line 25)

This timeline of escalation begins with the end point of inquiry notice, upon which the trial court relied in granting summary judgment, fall of 2007, around the date of the conveyance: 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 into the house? A: When I very first moved in there after I tore out the first floor." App. p. 152, lines 1—7. McAlhany confirms this: A: "I actually got a friend, he does mold...he gave me a chemical that would actually kill the mold." Q: And he gave you this in 2007? A: Yeah. Yeah. App. pp. 152, line 20—p. 153, line 3.

In a different portion of the deposition, during a discussion of a dated report prepared in 2009, McAlhany throws out the latest date, cited by McAlhany in his brief as strong evidence countering the above-testimony, that seems to be confirming only the date of the report, which is attached to the deposition as August 24, 2009. See Page 10,

Brief of Respondent; See App. p. 109, line 23—p. 110, line 4). It is, at best, unclear to what event McAlhany is referring.

McAlhany's assertion that he is "not required to explain anything" and still overcome summary judgment is improper. His own statements indicate knowledge sufficient to constitute inquiry notice, notice of some claim against some person. See *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 608 S.E.2d 459 (Ct.App.2005). While there may be a narrative that could, generously, be strung together from McAlhany's testimony that may counter the statements above, the burden of untangling the contradictory testimony is in fact on McAlhany.

Rule 56(c), SCRCP places an initial burden on the movant to demonstrate there is no material question of fact, and the movant is entitled to judgment as a matter of law. "This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). In this case, Cogburn and Carter relied on the deposition testimony above as credible evidence, read in the light most favorable to McAlhany, of inquiry notice well outside the statute of limitations. This is sufficient to meet this burden.

Once the moving party meets their burden, Rule 56(e), SCRCP in fact compels McAlhany to act: "An adverse party may not rest upon the mere allegations or denials of his pleadings, 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.” Specifically, “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986), cited affirmatively in *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

At the initial summary judgment hearing on this matter, McAlhany relied on his deposition testimony, and did seem to argue then, as he did in his responsive brief, that he “wasn’t required to explain anything.” However, in this instance, McAlhany failed to produce any admissible evidence or testimony to counter the properly submitted Rule 56(c), SCRCP motions filed against him. McAlhany’s own words warranted summary judgment in this action, and the trial court properly found so. McAlhany is, in fact, required to explain.

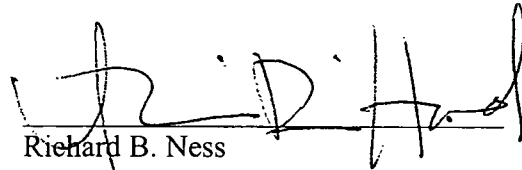
The Court of Appeals erred in finding the only relevant date for inquiry notice is the date of the discovery of black mold. App. 384. McAlhany himself testified he discovered moisture, warping, mold, flooding, and various other forms of water damage throughout the home over the twenty months of his occupation. The testimony quoted above, which contains clear dates and events, is sufficient to shift the burden to McAlhany, under Rule 56(e), SCRCP.

The Court of Appeals seems to advance McAlhany’s theory that a plaintiff “isn’t required to explain anything,” in the case of unclear testimony that can be easily clarified through additional evidence, affidavit, or documentation at the summary judgment stage. This is improper, and for this reason, the order of the Court of Appeals should be

reversed.

CONCLUSION

Cogburn prays this Court sustain the circuit court's order granting summary judgment in favor of Cogburn, based on the testimony of McAlhany, and Rule 56, SCRPC.



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Jan. 18, 2017

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CERTIFICATE OF SERVICE

I, Alison Dennis Hood, attorney for the Petitioner in the case *Claude McAlhany v. Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc. and Erick Cogburn, Appellate Case Number: 2016-000405*, do hereby certify the foregoing Reply Brief of Petitioner Cogburn was served on all attorneys of record in this action, by U.S. Mail, at the following addresses:

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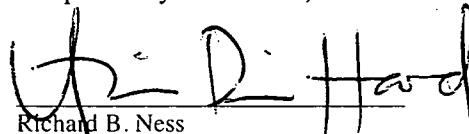
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Respectfully submitted,



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