

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-08373
Appellate Case No. 2013-000717

RECEIVED

JUL 19 2013

SC Court of Appeals

Joseph D. McMaster, Appellant,

v.

John H. Dewitt, M.D., and Carolina Psychiatric Services, P.A. Respondents.

INITIAL BRIEF OF RESPONDENT JOHN H. DEWITT, M.D.

James Edward Bradley, SC Bar No. 66130
John C. Bradley, Jr. , SC Bar No. 7869
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Respondent
John H. Dewitt, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

FACTS 2

ARGUMENT 4

I. DR. DEWITT PROPERLY RECEIVED SUMMARY JUDGMENT BECAUSE THE PLAINTIFF SUED HIM MORE THAN THREE YEARS AFTER NOTIFICATION OF ANY MALPRACTICE 4

II. Mr. MCMASTER ASKS THIS COURT TO DISREGARD HIS DEPOSITION TESTIMONY BECAUSE HE WAS CONFUSED. TO PROVE HIS CONFUSION, HE IMPROPERLY RELIES UPON DEPOSITION EXCERPTS THAT HE DID NOT SUBMIT TO JUDGE LEE 10

III. THE JUDGE CORRECTLY HELD THAT MR. MCMASTER’S AFFIDAVIT CONTRADICTING HIS DEPOSITION TESTIMONY WAS A SHAM 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

<i>Arant v. Kressler</i> , 327 S.C. 225, 489 S.E.2d 206 (1997)	6, 7, 8
<i>Cothran v. Brown</i> , 357 S.C. 210, 592 S.E.2d 629 (2004).....	9, 12, 13
<i>Dean v. Ruscon Corp.</i> , 321 S.C. 360, 468 S.E.2d 645 (1996).....	6
<i>Dunbar v. Carlson</i> , 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000)	4, 6
<i>Joubert v. S. Carolina Dep't of Soc. Servs.</i> , 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000)	7
<i>Knox v. Greenville Hosp. Sys.</i> , 362 S.C. 566, 608 S.E.2d 459 (S.C. App. 2005)	6, 8, 9
<i>Kreutner v. David</i> , 320 S.C. 283, 465 S.E.2d 88 (1995).....	6
<i>Martin v. Merrell Dow Pharmaceuticals, Inc.</i> , 851 F.2d 703 (3rd Cir. 1988)	12
<i>McCleary v Smith</i> , 2012 WL 3598765 (D.S.C. 2012)	12
<i>Rohrbough v. Wyeth Labs. Inc.</i> , 916 F.2d 970 (4th Cir. 1990)	12
<i>Snell v. Columbia Gun Exch., Inc.</i> , 276 S.C. 301, 278 S.E.2d 333 (1981)	6
<i>Strong v. Univ. of S. Carolina Sch. of Med.</i> , 316 S.C. 189, 447 S.E.2d 850 (1994)	6

STATUTES

S.C. Code Ann. § 15-3-545	3, 4, 7
S.C. Code Ann. § 15-78-110	8

RULES

Rule 210, SCACR.....	11
----------------------	----

STATEMENT OF ISSUES ON APPEAL

- I. DR. DEWITT PROPERLY RECEIVED SUMMARY JUDGMENT BECAUSE THE PLAINTIFF SUED HIM MORE THAN THREE YEARS AFTER NOTIFICATION OF ANY MALPRACTICE.

STATEMENT OF THE CASE

On May 13, 2008, attorney Joe McMaster had an Adderall induced psychosis for which he was admitted to Palmetto Health Baptist Hospital. (Hearing Transcript, p.14, ll. 3-6, R. ____). He remained hospitalized until May 28, 2008. (Hearing Transcript, p.14, ll. 7-9, R. ____). Mr. McMaster had been a patient of Dr. John DeWitt, psychiatrist, since 1993. According to Mr. McMaster, during the May hospitalization, Dr. DeWitt told Mr. McMaster that his psychosis was Adderall induced. After the hospitalization, Dr. DeWitt stopped prescribing Adderall to Mr. McMaster. (Deposition of Joseph McMaster, pp, 34-35, 46-47, R. ____).

On June 16, 2011, more than three years later, Mr. McMaster filed a notice of intent to sue Dr. DeWitt, alleging that his psychosis was caused by Dr. DeWitt over-prescribing Adderall. (Notice of Intent to File Suit, R. ____). Mr. McMaster knew that he had a medication induced psychosis when he was hospitalized in May of 2008. (McMaster Deposition, pp, 34-35, 46-47, R. ____). Since Mr. McMaster sued more than three years after his hospitalization and after the statute of limitations expired, Dr. DeWitt moved for summary judgment on November 20, 2012. (DeWitt's Motion for Summary Judgment, R. ____). Dr. DeWitt's employer, Carolina Psychiatric Services, moved for summary judgment on the same grounds on November 28, 2012. (Carolina Psychiatric Services' Motion for Summary Judgment, R. ____). Two days before the motion hearing was scheduled, Mr. McMaster submitted an affidavit contradicting his sworn deposition

testimony. Judge Alison Renee Lee heard arguments on the motions on December 13, 2012, and entered an order granting summary judgment for both Defendants on February 21, 2013. (Order of Judge Lee, R. ____). Mr. McMaster filed a motion for reconsideration on March 5, 2013, which was denied by Judge Lee on March 11, 2013. (Order, R. ____). Mr. McMaster served his notice of appeal on March 28, 2013.

FACTS

Dr. John DeWitt is a psychiatrist who treated Attorney Joe McMaster. Dr. DeWitt prescribed Mr. McMaster Adderall for the treatment of Adult Attention Deficit Disorder. On May 13, 2008, Mr. McMaster was involuntarily committed to Palmetto Health Baptist Hospital. He remained in the hospital until May 28, 2008, when he was discharged in good health. (Discharge Summary, R. ____). According to Mr. McMaster, Dr. DeWitt informed him that the hospitalization was a result of Adderall induced psychosis and ceased prescribing the medication. Mr. McMaster was admitted to the hospital about one month later on June 25, 2008, for paranoia. (Order, p.1, R. ____).

Mr. McMaster's Notice of Intent and Complaint does not mention the May 2008 hospitalization. (Order, p.3, R. ____; Complaint, ¶ 10, R. ____). However, he testified in his deposition that he knew his May 2008 psychosis was Adderall induced. (Order, p.2, R. ____; McMaster Deposition, pp. 34-35, 46-47, R. ____).

Judge Lee found "no genuine issue of material fact about the date [Mr. McMaster] was on notice of his claim." (Order, p.4, R. ____). She relied upon:

- The pleadings (Complaint and Answers, R. ____);

- Deposition excerpts from Mr. McMaster, pp. 34-35, 46-47, 53-54 (Memorandum in Support of Dr. DeWitt's Motion for Summary Judgment, R. ____);
- Deposition excerpts from Dr. Dave Davis, pp. 35-36 (Memorandum in Support of Dr. DeWitt's Motion for Summary Judgment, R. ____);
- An affidavit by Mr. McMaster which includes a discharge summary from Palmetto Health Baptist dated 7/2/2008 – 7/27/2008 and a discharge summary from Palmetto Health Baptist dated 9/25/2008 – 12/2/2008 (R. ____);
- A discharge summary from Palmetto Health Baptist dated 5/13/2008 – 5/28/2008 (R. ____);
- Hospital records dated 6/25/2008 – 7/10/2008 (R. ____);
- A detention order request from Columbia Mental Health dated 5/11/2008 (R. ____);
- Progress notes from Palmetto Health Richland dated 5/13/2008 and 5/17/2008 (R. ____); and
- An exam for emergency admission at Palmetto Health Richland dated 5/13/2008 (R. ____).

Judge Lee disregarded Mr. McMaster's affidavit which contradicted his deposition testimony as a sham affidavit. In addition, Judge Lee determined that tolling due to insanity under South Carolina Code Section 15-3-545(D) was not available to Mr. McMaster. (Order, p.3, R. ____). She entered summary judgment for the Defendants finding that the Complaint was barred by the statute of limitations. (Order, p.5, R. ____).

ARGUMENT

I. DR. DEWITT PROPERLY RECEIVED SUMMARY JUDGMENT BECAUSE THE PLAINTIFF SUED HIM MORE THAN THREE YEARS AFTER NOTIFICATION OF ANY MALPRACTICE.

The statute of limitations in medical malpractice actions is three years. S.C. Code Ann. § 15-3-545. The statute begins to run when the circumstances of the injury would put a person of common knowledge on notice that some claim might exist. *Dunbar v. Carlson*, 341 S.C. 261, 266, 533 S.E.2d 913, 916 (Ct. App. 2000). In May 2008, Mr. McMaster suffered an Adderall induced psychosis for which he was admitted to the hospital. His Adderall induced psychosis is the basis for his lawsuit against Dr. DeWitt. According to Mr. McMaster, in May 2008, Dr. DeWitt told him he suffered an Adderall induced psychosis, more than three years before Mr. McMaster filed his notice of intent to sue.

As Mr. McMaster testified in his deposition:

- Q: In your opinion, you were disabled beginning--
A: Yeah.
Q: --in May of 2008?
A: Yeah. Yeah.
Q: All right. And that was because of the Adderall?
A: Yeah. Yeah. This whole incident.
Q: All right. And you knew that then, when you went in that, that was the problem or when you got out?
A: No. I didn't know it when I went in. I didn't know that was the problem when I went in.
Q: But you knew it when you got out? When you talked to your boss?
A: When I talked to—talked to the doctors on the floor.
Q: Okay.
A: I mean, John [Dr. John DeWitt] called it Adderall induced psychosis when I talked to John.
Q: And that was in May of 2008?
A: Correct.

(Deposition of Joseph McMaster, p.46, l.10 – p.47, l.6, R. ____).

Mr. McMaster also testified as follows:

- Q: Okay. What did Dr. DeWitt do wrong?
A: As far as I can tell, he just gave me too much medicine.
Q: All right.
A: I mean, it was just way too much and I didn't know it until it was too late.
Q: And that would've been when you went into the hospital in May --
A: Yeah.
Q: -- of 2008?
A: Right

(Deposition of Joseph McMaster, p.34, ll. 8-18, R. ____).

- Q: And you were discharged at the end of May 2008 from the hospital?
A: May 2008. The first time, yeah.
Q: All right. And when you were discharged, did you know what was wrong with you?
A: From what I was told, it was Adderall induced psychosis.

(Deposition of Joseph McMaster, p.35, ll. 4-11, R. ____).

Thus, Mr. McMaster testified three times in his deposition that during his May 2008 hospitalization, he knew that he was being hospitalized for an Adderall induced psychosis. He even testified that Dr. DeWitt told him he was hospitalized for an Adderall induced psychosis.

After Mr. McMaster's hospitalization in May of 2008, Dr. DeWitt never prescribed Adderall to Mr. McMaster. According to Mr. McMaster's testimony:

- Q: And certainly after your Adderall induced psychosis, where you went in the hospital in May, you weren't prescribed any more Adderall by Dr. DeWitt after that?
A: No.

(Deposition of Joseph McMaster, p.53, ll. 21-25, R. ____).

Mr. McMaster filed his notice of intent to sue Dr. DeWitt on June 16, 2011, more than three years after his May hospitalization. The statute begins to run when the

circumstances of the injury would put a person of common knowledge on notice that some claim might exist. *Dunbar*, 341 S.C. at 266, 533 S.E.2d at 916. It is not the date on which a diagnosis is made. *See id.* (“The three-year statute of limitations begins to run when the facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of hers has been invaded or that some claim against a party might exist”); *Strong v. Univ. of S. Carolina Sch. of Med.*, 316 S.C. 189, 190-91, 447 S.E.2d 850, 851-52 (1994) (“Under the discovery rule, an action accrues when the injury is discovered or reasonably ought to have been discovered”).

The date on which discovery should have been made is an objective, not subjective, question. When a claimant is told of the reason for an injury, this is sufficient information to put the claimant on notice of a claim. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (finding that information on the reason for a D&C, told orally to the claimant, was sufficient to put a person of common knowledge on notice that some claim against the doctor might exist); *see also Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) (“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.”); *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 608 S.E.2d 459 (S.C. App. 2005) (citing *Joubert*, 534 S.E.2d 1, 9 (Ct. App. 2000)); *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995). “Moreover, the fact that a plaintiff does not comprehend the full extent of his injuries is immaterial.” *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996); *see also, Knox*, at 2. “[T]he statute of limitations begins to run

when the plaintiff should know that he might have a potential claim against another, not when he develops a full-blown theory of recovery.” *Joubert v. S. Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000).

In *Arant*, the plaintiff became sterile after a post-partum procedure. *Arant*, at 227, 489 S.E.2d at 207. Arant gave birth on December 30, 1989, with Dr. Parr attending. *Id.* She was still experiencing heavy, abnormal vaginal bleeding 3 weeks after the delivery. *Id.* She saw Dr. Kressler on January 24, 1990. During that visit, he told her that the bleeding was caused by Dr. Parr's failure to remove the entire placenta after delivery. *Id.* The next day, Dr. Kressler performed a dilation and curettage (“D&C”) procedure in an effort to correct the problem. *Id.*

On March 27, 1990, Arant was diagnosed with Asherman's syndrome, a complication arising from the D&C procedure. *Id.* at 227-28, 489 S.E.2d at 207. She sued Dr. Kressler on February 2, 1993, claiming he negligently performed the D&C procedure. *Id.* During that suit, Dr. Parr testified to the standard of care at delivery regarding placenta removal. *Id.* at 228, 489 S.E.2d at 208. Arant moved to amend her pleadings to add Dr. Parr as a defendant. *Id.* The trial court denied her motion, and the South Carolina Supreme Court affirmed, holding that the claim against Dr. Parr was time barred under S.C. Code § 15-3-545. *Id.* at 228-29, 489 S.E.2d at 208. The court explained that the plaintiff became aware of her injury more than three years before filing her complaint. “By plaintiff's own admission, Dr. Kressler told her on January 24, 1990, that the reason she was bleeding ... was because Dr. Parr had not removed all of the placenta.” *Id.* at 229, 489 S.E.2d at 208.

In *Knox v. Greenville Hospital System*, an emergency room nurse attempted to insert a needle into Mr. Knox's wrist on May 2, 2000. Mr. Knox screamed in pain as the nurse tried to insert the needle. The pain continued while he was in the emergency room. Mr. Knox told others in the emergency room that he was in pain and that he thought the nurse had hit a nerve. Upon discharge, the hospital told Mr. Knox to apply ice packs to his wrist and return if the pain did not subside. *Id.* at 568, 608 S.E.2d at 460-61. Mr. Knox's pain continued, and he sought the opinion of an orthopedic surgeon. On July 26, 2000, the surgeon told Mr. Know that his radial nerve was permanently injured. The condition required surgery and pain management treatment. *Id.* at 568-69, 608 S.E.2d at 461. Mr. Knox sued the hospital on May 8, 2002.

As a governmental entity, the hospital was entitled to a two year statute of limitations. *See* S.C. Code Ann. § 15-78-110 (Supp. 2003). *Id.* at 570, 608 S.E.2d at 461-62.

Mr. Knox argued that he did not discover he had a claim until he was diagnosed by the surgeon on July 26, 2000, and thus had until July 26, 2002, to file his claim. The court held that Mr. Knox was on notice of his injury on May 2, 2000, when he felt pain at the insertion of the needle. The distinctive feature of the case was that Mr. Knox knew that his pain was not a normal reaction. Thus, a person of common knowledge and experience would be on notice of the claim on May 2, 2000. Mr. Knox's claim was barred because it was not brought by May 2, 2002. *Id.* at 571, 608 S.E.2d at 462.

Just as in *Arant* and *Knox*, Mr. McMaster knew he was hospitalized for an Adderall induced psychosis in May 2008. Mr. McMaster stated this fact three times in

his deposition. This is enough, according to South Carolina courts, to put him on notice of his claim.

A medical diagnosis is not a necessary element of notice. In *Knox*, the patient's only notice was pain. The patient knew that pain was abnormal, and the court held that his knowledge of that pain was enough to start the statute of limitations for malpractice. A later medical diagnosis did not re-start the statute of limitations. Mr. McMaster knew that he was hospitalized for an Adderall induced psychosis in May 2008. Even without knowing more, he knew he had a claim against Dr. DeWitt.

Mr. McMaster filed an affidavit with the court two days before the motion hearing. In the affidavit, he states that he was not aware of the Adderall induced psychosis until approximately June 25, 2008. This affidavit directly contradicts his sworn deposition testimony. Judge Lee relied upon *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004), to distinguish Mr. McMaster's affidavit as a sham affidavit. Therefore, there was no genuine issue of material fact as to when Mr. McMaster became aware of the reason for his injury.¹

Mr. McMaster knew he suffered an Adderall induced psychosis when he was admitted to the hospital in May 2008. He testified to that knowledge three separate times in his deposition. He admits that after May 2008, he was not prescribed Adderall by Dr. DeWitt. Mr. McMaster's subsequent hospitalization in June 2008 does not restart the statute of limitations.

Mr. McMaster waited more than three years to file a notice of intent to sue Dr. DeWitt. As a result, he sued after the statute of limitations expired.

¹ Even if the court accepts Mr. McMaster's affidavit, he filed after the statute of limitations expired. The statute of limitations is not dependent on a written diagnosis but when Mr. McMaster had notice of injury, which would still have occurred in May 2008.

II. MR. MCMASTER ASKS THIS COURT TO DISREGARD HIS DEPOSITION TESTIMONY BECAUSE HE WAS CONFUSED. TO PROVE HIS CONFUSION, HE IMPROPERLY RELIES UPON DEPOSITION EXCERPTS THAT HE DID NOT SUBMIT TO JUDGE LEE.

Mr. McMaster argues that Judge Lee overlooked medical records and considered only Mr. McMaster's deposition excerpts in finding Mr. McMaster's affidavit a sham. Judge Lee's order states that she considered the law, "the briefs filed by both parties, the arguments of counsel, and all matters submitted" before granting Defendants' Motions for Summary Judgment. The matters submitted included:

- The pleadings (Complaint and Answers, R. ____);
- Deposition excerpts from Mr. McMaster, pp. 34-35, 46-47, 53-54 (Memorandum in Support of Dr. DeWitt's Motion for Summary Judgment, R. ____);
- Deposition excerpts from Dr. Dave Davis, pp. 35-36 (Memorandum in Support of Dr. DeWitt's Motion for Summary Judgment, R. ____); and
- An affidavit by Mr. McMaster which includes a discharge summary from Palmetto Health Baptist dated 7/2/2008 – 7/27/2008 and a discharge summary from Palmetto Health Baptist dated 9/25/2008 – 12/2/2008 (R. ____).

In addition, Mr. McMaster's lawyer submitted to the court at the motion hearing on December 13, 2012, a discharge summary from Palmetto Health Baptist dated 5/13/2008 – 5/28/2008 (R. ____) and hospital records dated 6/25/2008 – 7/10/2008 (R. ____). Carolina Psychiatric Services' lawyer entered the following items into the record at the motion hearing on December 13, 2012:

- A detention order request from Columbia Mental Health dated 5/11/2008 (R. ____),
- Progress notes from Palmetto Health Richland dated 5/13/2008 and 5/17/2008 (R. ____): and
- An exam for emergency admission at Palmetto Health Richland dated 5/13/2008 (R. ____).

Mr. McMaster now relies upon portions of his deposition which he did not present to Judge Lee. These portions were not referenced in the oral arguments to Judge Lee (Hearing Transcript, R. ____) nor were they submitted to Judge Lee or filed with the clerk of court. They are not part of the record because they were not presented to the trial court.

South Carolina Appellate Rule 210 states that “[t]he Record [on Appeal] shall not . . . include matter which was not presented to the lower court or tribunal.” S.C. App. Ct. R. 210. Thus, Mr. McMaster cannot reference pages 13, 20, 22, 37, and 38 of his deposition. He also cannot designate to be included in the record on appeal pages 1-7, 12-15, 21-22, 24-27, 36-38, 45, and 55-56 of the McMaster deposition and the Davis affidavit.

III. THE JUDGE CORRECTLY HELD THAT MR. MCMASTER’S AFFIDAVIT CONTRADICTING HIS DEPOSITION TESTIMONY WAS A SHAM.

Mr. McMaster’s December 12, 2012 affidavit is a sham affidavit directly contradicting his deposition testimony. On December 12, 2012, two days before the motion hearing for summary judgment was scheduled, Mr. McMaster submitted an affidavit in which he testified that he did not know that he was hospitalized for an

Adderall induced psychosis until after June 25, 2008. This testimony directly contradicts his deposition testimony. Mr. McMaster testified three times in his deposition that he knew he was hospitalized in May 2008 for Adderall induced psychosis.

Courts disregard a subsequent affidavit as a sham, or as not creating an issue of fact for purposes of summary judgment, when a party submits the subsequent affidavit to contradict that party's own prior sworn statement. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (citing *Margo v. Weiss*, 213 F.3d 55, 63 (2nd Cir. 2000); *Rohrbough v. Wyeth Labs. Inc.*, 916 F.2d 970, 976 (4th Cir. 1990); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3rd Cir. 1988)), *see also*, *McCleary v Smith*, 2012 WL 3598765 (D.S.C. 2012). In distinguishing a sham affidavit, the South Carolina Supreme Court set forth the following considerations:

- (1) whether an explanation is offered for the statements that contradict prior sworn statements;
- (2) the importance to the litigation of the fact about which there is a contradiction;
- (3) whether the nonmovant had access to this fact prior to the previous sworn testimony;
- (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
- (5) whether the previous sworn testimony indicates the witness was confused at the time;
- (6) when, in relation to summary judgment, the second affidavit is submitted.

Cothran, 357 S.C. at 218, 592 S.E.2d at 633 (citing *Pittman v. Atlantic Realty Co.*, 359 Md. 513, 754 A.2d 1030, 1042 (2000)). In *Cothran*, the South Carolina Supreme Court found federal case law on sham affidavits persuasive, and provided the six considerations cited above for guidance. *Id.* at 217-218, 592 S.E.2d at 633. It held that courts “disregard a subsequent affidavit as a sham, that is, as not creating an issue of fact for

purposes of summary judgment . . . [when a party submits] the subsequent affidavit to contradict that party's own prior sworn statement." *Id.* at 218, 592 S.E.2d at 633.

Judge Lee found that Mr. McMaster:

has not offered an explanation for his contradictory statements, and the date on which [he] had notice of his claim is a central issue in this case. In addition, [Mr. McMaster's] testimony in his prior deposition varies greatly from the statements in his affidavit There has not been an indication that [Mr. McMaster] was confused during his deposition. Furthermore, in relation to summary judgment, the affidavit was submitted two days before this matter was scheduled to be heard.

(Order, R. ____).

Mr. McMaster offered his affidavit to contradict his deposition to create an issue of fact. The affidavit does not state that he was correcting prior testimony. It does not state it was created to correct third parties' prior statements. The only information offered in this affidavit is a change in the date when Mr. McMaster learned of the reason for his hospitalization. It is solely Mr. McMaster's attempt to create an issue of fact by contradicting himself. There is no explanation offered for his self-contradiction. There is no explanation for Mr. McMaster's failure to correct the deposition earlier, though he had the opportunity to do so. (Hearing Transcript, p.11, ll. 3-7, R. ____). Mr. McMaster does not explain why he testified three times in his deposition that he knew in May 2008 that he was hospitalized for Adderall induced psychosis. Mr. McMaster's affidavit does not mention his previous deposition, explain why he is now contradicting it, or indicate that he was confused.

Mr. McMaster claims that Judge Lee incorrectly found that he was not confused. He cites his own testimony that was not given to Judge Lee to argue his memory was faulty during his deposition. Mr. McMaster did not claim to be confused in his

deposition or in his affidavit. He did not complain of being disoriented with regard to time, place, or identity. To the contrary, Mr. McMaster gave detailed and coherent answers. (Deposition of Joseph McMaster, pp. 34-35, R. ____). He answered questions about his disability application, and he explained when he had filed the application. (Deposition of Joseph McMaster, p.46, R. ____). He recalled the name of a recent job interviewer, his number of shares in a company, and when he was paid for his shares. (Deposition of Joseph McMaster, p.47, R. ____). He even found that one of his medications was missing from a health record during the deposition, and testified to the side effects of that medication. (Deposition of Joseph McMaster, pp. 53-54, R. ____).^{2 3}

Mr. McMaster is a lawyer and understands the importance of sworn testimony. He did not express any confusion at his deposition regarding sworn testimony. There is no contention that he was unable to truthfully and accurately answer questions at his deposition. In fact, he was asked at his deposition if he could answer questions and responded that he could as follows:

- Q: My name is Ward Bradley and I'm going to take your deposition today.
A: Okay.
Q: Do you understand that Mr. McMaster?
A: Yes, sir.
Q: You are a lawyer?
A: Yes, sir.
Q: So you understand what a deposition is?
A: Yes, sir.

² Mr. McMaster also recalled the names of doctors he had seen, their current practice location, and their specialty. Deposition of Joseph McMaster, pp. 16-20. He was able to recall his arrest record and the reasons for his detainment. *Id.*, pp. 10-11. He was able to recall his past employment and his rate of pay. *Id.*, pp. 29-32. He was able to recall the names of company CEO's and companies with which he was trying to create a business relationship in 2005. *Id.*, pp. 48-49. He recalled specific details from his hospitalization in a Lancaster treatment facility in 2001 and exhibited detailed knowledge about his medications at that time. *Id.*, pp. 117-129.

³ Dr. DeWitt is including additional excerpts from Mr. McMaster's deposition which were not presented to Judge Lee to counter the excerpts Mr. McMaster now submits to this court which were not submitted to Judge Lee.

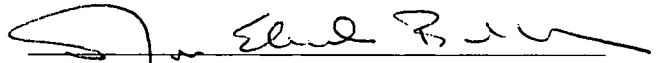
Q: And you understand what an oath is that you just took?
A: Correct.

(Deposition of Joseph McMaster, p.6, l.18 – p.7, l.4).⁴ In addition, in his December 12, 2012 affidavit, Mr. McMaster does not testify that he was confused during his deposition. Under these factors, the court correctly found that Mr. McMaster's affidavit is a sham affidavit submitted to contradict his earlier sworn testimony, and the court rejected it.

CONCLUSION

The affidavit offered by Mr. McMaster was correctly categorized as a sham affidavit and was correctly excluded. Mr. McMaster knew that he had a claim in May of 2008 and did not file the notice of intent to sue until June 16, 2011, after the statute of limitations expired. Thus, this Court should affirm Judge Lee's order for summary judgment.

Respectfully submitted,



James Edward Bradley, SC Bar No. 66130
John C. Bradley, Jr., SC Bar No. 7869
Margaret A. Hazel, SC Bar No. 100634
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Respondent

West Columbia, South Carolina

July 19, 2013

⁴ Dr. DeWitt is including additional excerpts from Mr. McMaster's deposition which were not presented to Judge Lee to counter the excerpts Mr. McMaster now submits to this court which were not submitted to Judge Lee.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-08373
Appellate Case No. 2013-000717

Joseph D. McMaster, Appellant,

v.

John H. Dewitt, M.D., and Carolina Psychiatric Services, P.A. Respondents.

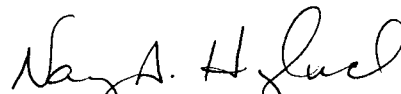
PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent John H. Dewitt, M.D., on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2013, addressed to attorneys of record as follows:

Charles L. Henshaw, Jr., Esquire
1534 Blanding Street
Columbia, SC 29201

R. Gerald Chambers, Jr., Esquire
P.O. Box 1473
Columbia, SC 29202

July 19, 2013



Nancy A. Hazelwood
Assistant to James Edward Bradley

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-08373
Appellate Case No. 2013-000717

Joseph D. McMaster, Appellant,

v.

John H. Dewitt, M.D., and Carolina Psychiatric Services, P.A. Respondents.

**RESPONDENT JOHN H. DEWITT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

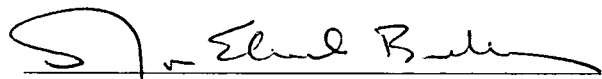
Respondent John H. Dewitt, M.D., proposes the following be included in the
Record on Appeal:

1. Notice of Intent to File Suit;
2. Complaint;
3. Answer of John H. Dewitt, M.D.;
4. Answer of Carolina Psychiatric Services, P.A.;
5. Order dated February 21, 2013;
6. Order dated March 8, 2013;

RECEIVED
JUL 19 2013
SC Court of Appeals

7. Dewitt's Motion for Summary Judgment;
8. Carolina Psychiatric Services' Motion for Summary Judgment;
9. Memorandum in Support of Dr. Dewitt's Motion for Summary Judgment;
10. Affidavit of Joseph McMaster including discharge summaries;
11. Hearing Transcript;
12. Deposition of Joseph McMaster, pages 6-7, 10-11, 16-20, 29-32, 34-35, 46-49, 53-54, and 117-129;
13. Detention Order Request from Columbia Mental Health dated May 11, 2008;
14. Exam for Emergency Admission at Palmetto Health Richland dated May 13, 2008;
15. Progress Notes from Palmetto Health Richland dated May 13 and 17, 2008;
16. Discharge Summary from Palmetto Health Baptist dated May 13, 2008 through May 28, 2008; and
17. Hospital Records dated June 25, 2008 through July 10, 2008.

I certify that this designation contains no matter which is irrelevant to this appeal.



James Edward Bradley, SC Bar No. 66130
John C. Bradley, Jr., SC Bar No. 7869
Margaret A. Hazel, SC Bar No. 100634
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Respondent
John H. Dewitt, MD

West Columbia, South Carolina

July 19, 2013

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-08373
Appellate Case No. 2013-000717

Joseph D. McMaster, Appellant,

v.

John H. Dewitt, M.D., and Carolina Psychiatric Services, P.A..... Respondents.

PROOF OF SERVICE

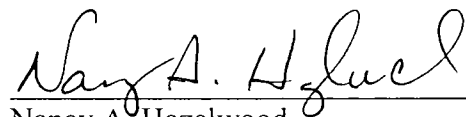
I certify that I have served Respondent John H. Dewitt's Designation Of Matter To Be Included In The Record On Appeal on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2013, addressed to attorneys of record as follows:

Charles L. Henshaw, Jr., Esquire
1534 Blanding Street
Columbia, SC 29201

R. Gerald Chambers, Jr., Esquire
P.O. Box 1473
Columbia, SC 29202

RECEIVED
JUL 19 2013
SC Court of Appeals

July 19, 2013



Nancy A. Hazelwood
Assistant to James Edward Bradley