69140

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.

MOTION TO STRIKE FROM RECORD
MATERIALS NOT SUBMITTED TO TRIAL JUDGE

The Defendant and Appellee Dr. John Dewitt hereby moves for an order of this Court striking from the record certain materials which were not presented to the trial judge. South Carolina Appellate Court Rule 210(c) indicates that "the record shall not, however, include matter which was not presented to the lower court or tribunal." The Appellant Mr. Joseph McMaster has designated the following materials which were not submitted to the trial judge at the motion from which the Appellant appeals:

- Deposition of Joseph McMaster, pages 1-7, 12-15, 20-22, 24-27, 36-38, 45, and 55-56; and
- Affidavit of Dave McAlister Davis.

Because these materials were not submitted to the trial court, the Defendant and Appellee Dr. John Dewitt hereby moves that they be stricken from the appellate record. In support of this motion, the Defendant and Appellee attaches the transcript from the motion hearing before the Honorable Allison Renee Lee indicating which materials were submitted and not including the materials referenced above which the Appellant attempts to now include in the record.

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
John H. Dewitt, MD

West Columbia, South Carolina

July 18, 2013

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
JOSEPH D. McMASTER, PLAINTIFF, -vs- JOHN H. DeWITT, M.D., AND CAROLINA PSYCHIATRIC SERVICES, P.A. DEFENDANTS.	DOCKET NUMBER: 2011-CP-40-08373 TRANSCRIPT DECEMBER 13, 2012 COLUMBIA, S. C.

BEFORE:

HONORABLE ALISON LEE, JUDGE

APPEARANCES:

CHARLES L. HENSHAW, JR.
Attorney for Plaintiff.

JAMES EDWARD BRADLEY
Attorney for Defendant,
John H. DeWitt, M.D.

VIRGINIA WILLIAMS
Attorney for Defendant,
Carolina Psychiatric Services, P.A.

PATRICIA A. NYE
COURT REPORTER.

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
FOR PLAINTIFF:				
1.				
2.				
FOR DEFENDANT:				
1.				
2.				

EXHIBITS	FOR ID	IN EVID
NONE OFFERED		

THE COURT: Counsel, thank you for being accommodating in rescheduling this hearing. This is Joseph D. McMaster versus John DeWitt, Carolina Psychiatric Services, PA. The Plaintiff is represented by -- my mind just went blank -- Charles Henshaw. Dr. DeWitt is represented by Ward Bradley.

MR. Bradley: Ward Bradley. Yes, Your Honor.

THE COURT: I just wanted to make sure I have the right person. And representing Carolina Psychiatric Services is --

MS. WILLIAMS: I'm Virginia Williams, here for Gerald Chambers.

THE COURT: Virginia --

MS. WILLIAMS: Williams.

THE COURT: Williams. Thank you. And, again, I appreciate you all accommodating the schedule to reschedule this. We're here on motions for summary judgment that have been filed by the Defendant. I have read the motions. I haven't read all of the memoranda to the extent that you submitted them. As I understand it, the issue relates to the statute of limitations. I understand from Mr. Henshaw that there was an affidavit filed and I'm not sure that that has made it to the file, yet.

MR. BRADLEY: Yes, Your Honor. It was filed yesterday.

THE COURT: If you can just loan me one, temporarily. I'll be glad to --

MR. BRADLEY: Yes, ma'am. I hope I can.

MR. HENSHAW: You can have my copy, Judge.

MR. BRADLEY: Here's a copy on copy, Your Honor, or at least a copy that shows the stamp --

THE COURT: If you'll give this one back to Mr. Bradley and he'll make a copy and -- I'm going to give it back to you. She's going to make a copy. This is Docket number 2011-CP-40-08373. And, Mr. Bradley, I think you filed your motion first, so I'll hear you first. Then I'll hear from Ms. Williams.

MR. BRADLEY: Thank you, Judge. Both motions I think will have identical facts. I represent Dr. DeWitt. This is a medical malpractice case, which would have a three year statute of limitation, which is the basis for our motion for summary judgment. Dr. DeWitt is a psychiatrist who treated Joe McMaster as planned. In his treatment, he prescribed a medicine called Adderall, which is a treatment for Adult Attention Deficit Disorder. And he had prescribed it to Mr. McMaster for many years.

In May, 2008, Mr. McMaster -- actually, May 13, 2008, Mr. McMaster was checked into Palmetto Baptist Hospital in Adderall induced psychosis. He was treated there for two weeks by Dr. DeWitt and the other people at the hospital -- Dr. DeWitt has privileges there -- and he was released. He went back to the hospital a month later, on June 25, in another psychosis. He was treated then and released as well.

In June -- actually June 16, 2011, he filed a notice of intent to sue Dr. DeWitt. That was more than a year after he was released from his initial hospitalization for psychosis, more than three

years after his initial hospitalization for psychosis, and that's the basis for our motion for summary judgment based on the statute of limitations. That is that if what he says is true and that is that Dr. DeWitt prescribed him too much medicine which caused him to have psychosis in May of 2008, that he filed the lawsuit too late because he waited until June of 2011, more than three years later.

In his deposition, I asked Mr. McMaster when he first learned what had caused him to go into the hospital in 2008. And I've actually excerpted that testimony beginning on page 2 of our memoranda and it is attached as exhibit A right after the deposition. He actually testified to it three times at different points in his deposition and in the first excerpt there on page 2, he says that in 2008 is when he began to be disabled because of Adderall. And then I asked him when he found out that was a problem, when he found out the Adderall caused the problem and he says, I mean John -- it's there at the bottom of page 2 -- and that's Dr. DeWitt's first name, John, called it Adderall induced psychosis when I talked to John. And I said and that was in May of 2008? He says correct. So that's the first time he acknowledged in his deposition that when he was in the hospital in May, 2008 it was because of his Adderall induced psychosis.

The second time it starts at the bottom of that page and it goes on the next page. I asked what did Dr. DeWitt do wrong? He says he gave me too much medicine. And I say -- he says, I mean it

was just way too much and I didn't know about it until it was too late. And I say that would've been when you went to the hospital in May? Yes. Of 2008? Answer, right. And I asked again at a different point and you were discharged at the end of May 2008 from the hospital, May 2008, the first time? Yeah. And when you were discharged, did you know what was wrong with you? From what I was told, it was Adderall induced psychosis. So three times in his deposition he testified that he knew in May, 2008 that he was in the hospital and he was in the hospital for Adderall induced psychosis.

He actually testified the first time that the reason he knew about it was because the Defendant, Dr. DeWitt, told him that in May of 2008. So it's clear from his deposition testimony that he knew in May, 2008 that he was hospitalized for an Adderall induced psychosis and Dr. DeWitt is who had prescribed him Adderall.

The whole basis of his lawsuit as set forth in his notice of intent and also in his expert's deposition, which is also excerpted in our memo, is that Dr. DeWitt prescribed him too much Adderall, which caused him to go into a psychosis. So it's clear that the base of his lawsuit is the Adderall prescription, Dr. DeWitt is who was prescribing Adderall, and that he testified three times in his deposition that he knew in May 2008 that he was in the hospital for Adderall induced psychosis.

The statute of limitations begins to run when a plaintiff knew or should have known that they had a claim and a comment from a

doctor that this was why you were in the hospital is enough to begin the statute running. And there's a case that's excerpted in there where I've actually cited, *Arant versus Kressler*, which is 489 Southeastern 2d 206, and in that case where a woman had had a DNC, she was told by the doctor why it was and that was the problem with her pregnancy. And that was sufficient to put her on notice that she might have a claim against the doctor. And that was the case where a Plaintiff had alleged hey, I didn't know that I had this injury until later, but the court said no, when the doctors told you and you acknowledged that you were told that, that's when the statute begins to run. And the reason why we cited that case is because it's similar to Mr. McMaster's own testimony where he says that in May of 2008, Dr. DeWitt told him why he was in the hospital for Adderall induced psychosis.

We've also cited *Young versus South Carolina Department of Corrections*, which is 511 Southeastern 2d 413. And that's the case where Mr. Young had a detached retina. He went to see the doctors at the Department of Corrections. They did not refer him to an ophthalmologist until several months later. When he went to see the ophthalmologist, the ophthalmologist told him hey, you have a detached retina and you should've been referred sooner. Mr. Young acknowledged that in his own testimony and later he developed a cataract and he brought the lawsuit more than two years, because it was a governmental entity, after he had been told by the ophthalmologist that there was a problem with his notice. And the

court said no, you can't bring it on a later date if the doctor told you you had a problem and told you the reason for it when you were there originally. And that's enough to put you on notice.

Those cases, *Young versus South Carolina Department* of corrections and *Arant versus Kressler*, say when the doctor tells you what the problem is, that's when the statue starts to run. That combined with Mr. McMaster's testimony himself that in May of 2008, Dr. DeWitt told him -- and his other testimony three times during his deposition that he knew during his initial hospitalization why he was in there, is what starts the statute running.

Now, yesterday we received an affidavit from Mr. McMaster and that affidavit essentially says this. I didn't know why I was in the hospital for two weeks in May of 2008. I didn't know that this was a problem. I didn't know that until a month later, which would be within three years.

The problem with that affidavit is it directly contradicts the sworn testimony in his deposition that he made three times. The South Carolina Supreme Court has said in *Cochran versus Brown* that you cannot submit a later affidavit to contradict previous sworn testimony as a basis to resist summary judgment. So, essentially, if you testify one way in your deposition, you can't later submit an affidavit the exact opposite of what you said before to create a factual issue that can go for a summary judgment. You're stuck with what you said in your deposition.

The only factual issue that they can create is this. They submitted an affidavit in which they contradict what Mr. McMaster said in his deposition. In his affidavit, he says I didn't know until June. In his deposition he says I knew in May and the court says that that's a sham affidavit. And there are six factors the court looks at in determining whether it's a sham affidavit. They're laid out in our memo. One of them is whether there's an explanation for why you're saying one thing in a sworn statement now and why you said something different in your deposition. There's been no explanation of that.

The second factor is the importance to the litigation, which this question is what the litigation turns on because if he knew in May, 2008 he missed the statute of limitations and that's what he said in his deposition and we've alleged that as an affirmative defense to our answer.

The third factor is whether the non-moving, that would be us, knew this fact before his deposition and we didn't know what he was going to say until we took his deposition. In his deposition he said he knew in May because Dr. DeWitt told him.

Number four is the frequency and degree of variation between the statements and the previous sworn statement and the statements on the later affidavit. He testified three times in the deposition that he knew in May of 2008 and now he's submitting an affidavit saying that he didn't know until June so they're completely opposite and he's testified three times that way.

Five, whether the previous sworn testimony indicates that he was confused at the time. There is no indication that Mr. McMaster was confused during his deposition. There's been no testimony or affidavit submitted to say that. In fact, he reserved the right to read and sign the deposition. I don't know if he's ever done that because I haven't seen it but he reserved the right to do so and he hasn't made any corrections to the deposition.

And six, when in relation to summary judgment, the second affidavit was submitted -- well, it was submitted at the absolute last minute because the motion was originally scheduled for tomorrow. He submitted it yesterday.

So to sum up, the statute of limitations is three years. Mr. McMaster went in the hospital in May 2008. He brought the lawsuit in June 2011. He testified in his deposition three times that he knew why he was in the hospital in May, 2008. He even testified that my client, Dr. DeWitt, told him why he was in the hospital in May of 2008. The law is when the doctor tells you what you're in for, that's enough to start the statute of limitations running. That puts you on notice that you have a claim or potential claim. And his last minute affidavit to the contrary should be disregarded by the court under *Cochran versus Brown* because it directly contradicts previous sworn testimony. Thank you.

THE COURT: Ms. Williams, is there anything that you wish to add before I have Mr. Henshaw respond?

MS. WILLIAMS: Yes, Your Honor. My name is Jenny Williams.

I'm here on behalf of Carolina Psychiatric Services. For a large portion of the time that Dr. DeWitt was treating Mr. McMaster, he was working at Carolina Psychiatric Services so that's how we are involved in this lawsuit.

I agree with everything that has been set forth on behalf of Dr. DeWitt. I just wanted to submit to the Court some excerpts from the medicals while he was at the hospital in May of 2008, which support that he was there for the Adderall induced psychosis and that information was available to Mr. McMaster at that time.

On the last page is the detention order request from May 11, 2008 which is leading up to his admission into the hospital. Under the summary of conversation it says paranoia, delusional, likely substance induced from prescription pills. So even as early as May 11th, there was indication that his problems could be from prescription pills.

On the following page is a note presented by the physician 5/13/08. It says he's been under the care of Dr. DeWitt and prescribed for depression ADHD as well as prescribed Adderall. And then continuing on down to the bottom diagnosis; psychosis, depression, and ADHD by history, possible delusion secondary to overutilization of Adderall. And it continues on -- Your Honor, again, it's referenced on the following page. You can read for your information but it's very clear that Mr. McMaster was aware that he was in the hospital for the Adderall induced psychosis in May of 2008.

And then the second set of documents -- the reason they're separate, the first set came from the documents we received from Plaintiff's counsel so I wanted to maintain that order. And the second, smaller set came from documents that we actually subpoenaed from the hospital so that's why I separated them out. But in the second set, again it says on the first page that he was being treated for depression, ADHD by psychiatrists, and taking high levels of Adderall which may be playing a role in his symptoms and that document is dated 5/13/08. And then again the last page of that second set it notes that he is taking Adderall. And also underneath the health of the patient where there is items to be checked off, it is checked that it is possible that he's overusing Adderall so that's all I would like to add on behalf of Carolina Psychiatric Services.

THE COURT: But you would acknowledge, though, that while these are the medical records, the statute begins to run from the time when he should've known?

MS. WILLIAMS: Yes, Your Honor. Yes, Your Honor.

THE COURT: Yes, sir, Mr. Henshaw.

MR. HENSHAW: Thank you, Your Honor. Your Honor, we would make two points in response to the motion for summary judgment. One turns entirely on whether or not this is a question of fact that remains to be decided by a jury in this case as opposed to being decided by you today as a matter of law. And the second generally is a matter of law having to do with the total provision

for the statute of limitations. I will submit Plaintiff's exhibit one and two to the Court.

I provided these to Mr. Bradley and to you, Your Honor. The chronology here is that, as Mr. Bradley has already stated, Mr. McMaster was admitted to Baptist Medical Center, the mental health unit there on May 13, 2008. What you have there, I believe in Exhibit 1 is the discharge summary, from that hospitalization which indicates that hospitalization continued until May 28, 2008 and this is the discharge summary of Dr. DeWitt himself. It indicates that during his hospitalization he made a diagnosis of Mr. McMaster in which the diagnosis was paranoid psychosis of unclear etiology, rule out bipolar psychosis, rule out bipolar type versus history of mixed substance abuse, history of adult attention deficit disorder.

Your Honor, during his hospitalization, as the affidavit reflects, there were discussions about Adderall but there were also discussions about other aspects of Mr. McMaster's drug use, including whether or not he had abused cocaine. Dr. DeWitt suspected that and suggested that in his records.

Number two, there were questions about whether or not Mr. McMaster himself had been inappropriately abusing Adderall, requesting Adderall from other doctors, over taking Adderall, in addition to anything prescribed by Dr. DeWitt. Those features of the fact pattern were included in both of those discharge summaries and the affidavit merely stands as an amplification of these questions that Mr. McMaster was asked at the deposition in regard

to whether or not there were other facts that were being considered at the time that would explain why he was behaving in a psychotic fashion.

Now, what is important, Your Honor, is -- what this affidavit does very clearly is answer the question and creates a question, in fact by doing so, as to when did you, Joe McMaster, begin to reasonably suspect or know that Dr. DeWitt had committed malpractice on you. The questions that were asked in the deposition were not framed as that question but instead were framed more on the lines and suggestion well, didn't you know that Adderall could be involved and he said yes, it was suggested to me that it could be. That's not the same thing as saying I knew, I suspected that in fact, Dr. DeWitt had committed malpractice on me at that time. And he couldn't have because the facts within the record, Dr. DeWitt's own statements in those records, indicate at the end of that hospitalization it was an etiology that was uncertain and he says it as his principal diagnosis, psychosis etiology uncertain.

Now, Exhibit 2 is different than that, clearly different than that, because Exhibit 2 indicates that Mr. McMaster goes back into the hospital on June 25, 2008 and comes out of the hospital on July 10, 2008, again, back in the same unit, again, back in for psychotic behavior manifested by paranoia, believing that he's being followed around by the FBI but the difference -- and the significant difference in these statements by Dr. DeWitt is that

here Dr. DeWitt clearly says that it's a diagnosis of medication or drug-induced paranoia.

And so it only could have been after July -- June 25, 2008 that Mr. McMaster could've known that there was a reason to question the treatment that had been given to him by Dr. DeWitt. To me, Your Honor, it's as simple as this. A cancer patient who has been misdiagnosed as having cancer cannot know that there has been -- that they have a legal right until they first know that they have cancer. The diagnosis first has to be made in order for the patient to be able to even recognize or suspect. And it may be that that's not a question of law but certainly it's a question of fact and if it's a question of fact, summary judgment is not appropriate. And Mr. McMaster could not have known this diagnosis until Dr. DeWitt himself knew because he's the one who had to state it. And it's on that basis that Mr. McMaster came to the conclusion that he had a legal right.

The second point, Your Honor, we would make in regard to our defense against the statute of limitation is that there is a provision, 15-340, that states that if a person is entitled to bring an action mentioned in article five of this chapter and an action under chapter 78 of this title except for a penalty of forfeiture against the sheriff or other officer for escape is that at the time of the cause of action approved either, one, within the age of 18 years or, two, in same, the time of the disability is not part of the time limited for the commencement of the action except

for that period within which the action must be brought could not be extended more than five years by such disability or in case longer than one year after the disability ceases.

Those records that are in front of you, Your Honor, indicate that Joe McMaster suffered from a mental condition of paranoia at least from May 13 until July 10, 2008. This statute should apply as a tolling provision for that period of time under which circumstances were clearly within the period of time allowed by the statute of limitations. Those are the points that we would make, Your Honor. I'd be glad to answer any questions you may have.

THE COURT: Any response, Mr. Bradley?

MR. BRADLEY: Thank you, Judge. The relevant question really is when Mr. McMaster knew or should have known that he had a claim. He was asked in his deposition when he knew that he had an Adderall induced psychosis and the answer was in May, as clear as a bell. And, in fact, Dr. DeWitt told him that in May. So he knew he was having psychosis as a result of the medicine that he was taking, according to his own testimony. He cannot create an issue of fact by impeaching himself. What he's trying to do is say well, when I said that -- I couldn't have said that, that couldn't be true, what I swore to you under oath before, because nobody knew it. He swore under oath that Dr. DeWitt told him that. The question -- I'm sorry.

THE COURT: Go ahead.

MR. BRADLEY: The question is: What did he know at the time or

what should he have known at the time. And he testified that he knew it. In his own deposition that he knew that's why he was in the hospital because Dr. DeWitt told him May, 2008. And the whole Sham Affidavit rule is you're stuck with what you say at your deposition. You can't go back later and impeach yourself to create an issue of fact, which is what they're trying to do by putting up the medical records saying he couldn't have known this at the time because the medical records don't say it. But, in fact, he swore under oath that he did know it at the time. That's the question.

You have to take what he said under oath as true and what he said under oath is that I knew it. Now, the second part of that is -- sort of the implication -- well, he didn't know enough. He knew he had the Adderall induced psychosis but he didn't know this was medical malpractice and that's not the legal standard. The standard is if you knew you had a bad result from some treatment you received, then that's what puts you on inquiry notice and the case on that is the *Arant versus Kressler* case I cited before. And I'd like for your convenience just to give you a copy, Judge, if that would be okay.

THE COURT: That's fine.

MR. BRADLEY: The law is that when you're on notice -- not when you know for sure that there's negligence, but when you're on notice that something your physician did had a bad result, that's what puts you on notice. You can look on page three where the court is addressing this same argument that Mr. Henshaw is making

-- the Supreme Court is addressing the same argument in a different factual context. They're saying the appellate asserts the time of discovery is the time when the treating physician's actual notice becomes known. And the court says to the contrary. "We object to this contention and held the plaintiff's injury was readily discovered when she was told that her injury was caused by the treating physician's follow-up care." She was told what the problem was so the fact that he was told what the problem is and what caused it, an Adderall induced psychosis, is enough to put him on notice. That's what the case says and that's what the law is. So it's not a question of fact because it's what he said and he can't create a question of fact by impeaching himself.

THE COURT: Does the statute -- if he was hospitalized from May 13th until May 28th would the statute end up tolling during that time or for that matter, the time period from June 28th through July 2nd or July 10th, would that --

MR. BRADLEY: That's an excellent question. It's my understanding the way that -- let me back that up. He got out of the hospital on May 28th. The notice of intent was filed June 16, 2011. So his hospitalization from May 13th to May 28th shouldn't make any difference, assuming he knew, by his own testimony -- he didn't say I was crazy, I didn't know, I was disabled. He said I knew.

The end of May is when he got out. Just assuming it was May 28th -- just assume that's the date the statute starts to run, he

still didn't file until June 16, 2011, so that would have no consequence, whatsoever.

THE COURT: So the June hospitalization wouldn't, in effect, toll during the three-year period?

MR. BRADLEY: Well, my understanding is a month later he was hospitalized on June 25th for about a week. And I assume the argument that they're making is that they get an extra week on the statute of limitations because he was hospitalized for a week in June because there's no argument that after July, 2008 he was impaired in any way. It's my understanding the tolling provision works -- and I haven't looked through it all -- in order to toll it you have to be in the minority at the time it starts it doesn't just add extra time.

So I think the argument Mr. Henshaw's making is, look on June 25th until July so-and-so, I was in the hospital for two weeks and I was psychotic and therefore I should get an extra two weeks on the statute of limitations, I guess is what his argument is, you tack it on the end. And even if we did it that way, it's still two weeks and he's still 16 days late so he doesn't make it. If you say during the two weeks you were in the hospital from June 25th through July whatever you were told, he still wouldn't have filed until June 16, 2011, even if you give them the very last day of May, May 28th, that's 18 days after he knew that he was hospitalized for Adderall induced psychosis.

So even if the law is that what happens is you take your time when you're hospitalized for a psychotic condition and add it on the statute of limitations, he still doesn't make it. I don't think that's what the law is. I think it's that the statute can't expire while you're in a psychotic condition but I haven't done the research on that.

Finally, they haven't submitted any proof whatsoever that he was insane such that he couldn't manage his legal affairs. On June 25th, he voluntarily checked himself into the hospital for feelings of paranoia. Not that he was disabled or insane by it, but just that he had feelings of paranoia. And I don't know why paranoia would impair you from attending to your legal business. They haven't submitted proof of that that would toll the statute. So even if they toll it, they don't toll it enough to get in under three years and we don't think their interpretation of law is the way it works, Judge.

THE COURT: Anything further, Ms. Williams?

MS. WILLIAMS: No, Your Honor.

MR. HENSHAW: Your Honor, if I may, the hospitalization date times is not what's critical to the tolling statute. What's critical to the tolling statute is whether or not my client, under that statute, would have been considered insane for a period of time and for the period of time that he would have been insane, using the language of the statute, is the time that it was tolled.

If you read those two documents together that Dr. DeWitt wrote, it's no question that this is an entire psychotic event that is occurring at least from when he is voluntarily committed from May 13th all the way up until he is discharged from the second hospitalization on July 10. The fact that he was dismissed and then had to come back shortly thereafter does not mean that they are not connected and that he was not continuing to be under that disability during that entire period of time. Under that situation, the calculation clearly is that our notice is timely even under Mr. Bradley's argument.

But, I do think this, Your Honor, in all fairness, it's probably a question of fact. I think that when you suggest that somebody qualifies under the tolling provision for disability of insanity, then that is a question of fact and I don't think that that's something that this Court will answer. I think that a jury very well may answer it differently -- I mean, will answer it one way or the other, but I'm not sure that the Court, as a matter of law under what is presented to you today, can say there's not a question of fact there.

So, again, the motion for summary judgment should be denied. Again, back to what Mr. McMaster knew, he did not know that there was a diagnosis that this was a medically induced psychosis, not just paranoia. Paranoia was the manifestation of the psychosis so please don't accept Mr. Bradley's definition of Dr. DeWitt's own diagnosis where he says this man has a psychosis.

I think that as the facts play out psychosis will be deemed to be a form of insanity. Paranoia can be a form of insanity but not necessarily always, but certainly a psychosis is. But under any circumstances Mr. McMaster could only know what Dr. DeWitt told him and that's what he says in his deposition, that's what he told me. But Dr. DeWitt couldn't have told him that if Dr. DeWitt himself is not willing to say in his own medical records.

And I think that the affidavit in that context reflects that there is some question as to what the days really were where Dr. DeWitt was actually telling his patient look, you have a medically induced psychosis. We know that he doesn't use that terminology in the first hospitalization that ended on May 28th, but we do know that he used it in the second hospitalization that began on June 25, 2008 sometime within that hospitalization.

So, again, as a factual question as to what Mr. McMaster knew, I agree with Mr. Bradley's interpretation of the case law, that it's a question of what the plaintiff knew and when they knew it or what they could have reasonably have known or suspected but in this case it's a factual question as to what Mr. McMaster knew, when he knew it, what he could've reasonably suspected and then, of course, then there's the question of whether his disability applies to have kept him from acting on it.

It's interesting that the disability statute references minors. It very well may be that a child who is 17 years old can, in fact, know that he has legal rights against an individual, but

the disability statute doesn't say that the disability discontinues once he understands and appreciates that. It continues on for the period of the disability all the way up until the very end of it, even if the person is capable of understanding and appreciating that he's got these legal rights. I don't think it's any different for a situation for a person under the disability of insanity.

Consequently, I think that we are entitled to go forward and I would hope that at some point the Court will rule that, as a question of law, the tolling provision absolutely applies and the statute of limitations is not even a question in this case but at the very least, I think it's a question that the jury will have to decide.

THE COURT: Thank you all very much. I'll reread everything and look at the statute and all of the information that you've provided to me. I'll either ask somebody to prepare an order, depending on what it is.

MR. BRADLEY: Thank you, Your Honor.

THE COURT: Thank you and I appreciate you again for coming early.

MR. BRADLEY: Your Honor, have a good holiday if I don't see you before the holiday.

THE COURT: You all do the same. Thank you. Have a good holiday to all of you.

MR. HENSHAW: Happy holiday.

(WHEREUPON, THE HEARING WAS CONCLUDED.)

C E R T I F I C A T E

I, the undersigned PATRICIA A. NYE, Official Court Reporter for the Third Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Richland County, South Carolina, on the 13th day of December, 2012.

I do further certify that I am neither of kin, counsel or interest to any party.

February 5, 2013

PATRICIA A. NYE

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 Motion to Strike From Record Materials Not Submitted to Trial Judge on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on July 18, 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 18, 2013

Nancy A. Hazelwood
Assistant to James Edward Bradley