

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**

AUG 28 2013

**SC Court of Appeals**

Joseph D. McMaster, ..... Appellant,

v.

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

**RETURN TO APPELLANT'S MOTION TO ENLARGE TIME FOR RETURN;  
MOTION TO VACATE ORDER GRANTING RESPONDENTS RELIEF;  
RETURN TO RESPONDENTS' MOTIONS TO STRIKE; AND APPELLANT'S  
MOTION TO STRIKE IN THE ALTERNATIVE**

**INTRODUCTION**

On July 18, 2013, Respondent John H. Dewitt moved to strike designations of Joseph D. McMaster's deposition and Dr. Davis' affidavit on the basis that these matters were not presented to Judge Lee for consideration on the motion for summary judgment and were not considered by her in granting the motion for summary judgment. Mr.

McMaster's lawyer did not respond to this motion. As a result, on August 14, 2013, the Court granted Dr. Dewitt's motion.

On August 19, 2013, Mr. McMaster filed his Motion to Enlarge Time For Return; Motion to Vacate Order Granting Respondents Relief; Return to Respondents' Motions to Strike; And Appellant's Motion to Strike in the Alternative. Dr. Dewitt submits this return in response.

### DISCUSSION

**a. Respondent Carolina Psychiatric Services' silence does not extend Mr. McMaster's time to file a return.**

Counsel for Mr. McMaster indicates that he should have additional time to respond to Dr. Dewitt's motion because Co-Defendant Carolina Psychiatric Services joined the motion on August 8, 2013. Thus, Mr. McMaster argues he should have 10 days from when Carolina Psychiatric Services joined the motion rather than 10 days from when the motion was filed as required by Rule 240(e) of the South Carolina Appellate Court Rules.

Rule 240(e) requires a return to a motion within 10 days from the date of service. It also indicates that "[f]ailure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition." Mr. McMaster did not file a return to the motion until August 19, 2013 – a full month after the motion was filed. Mr. McMaster argues this Court should extend his time for a return because Carolina Psychiatric Services did not initially respond to the motion. Rule 240(e) states that failure to respond may be taken as consent to the granting of the motion. Thus, Carolina Psychiatric Services' letter of August 8, 2013, joining in the motion does not extend Mr. McMaster's time to reply. Carolina Psychiatric Services' silence in response to the

motion is consent to the motion. As a result, Mr. McMaster has not set forth a legitimate reason to enlarge the time for his return or to vacate the Court's order granting Dr. Dewitt's motion.

**b. Mr. McMaster cannot supplement the record with materials that were not presented to the trial judge.**

Even if this Court vacates its earlier order, Mr. McMaster is not entitled to supplement the record with materials not provided to the trial court. Rule 210(c) indicates that “[t]he record shall not, however, include matter which was not presented to the lower court or tribunal.” In his designation of record, Mr. McMaster attempts to add excerpts from his own deposition which were not presented to Judge Lee for consideration at the motion for summary judgment. The designations now submitted by Mr. McMaster were not presented to Judge Lee.

Mr. McMaster argues that Judge Lee “failed to consider material parts of McMaster’s deposition.” (Motion to Vacate, p.3). He also argues that he merely “seeks to produce those material[s] and relevant parts in the Record on Appeal.” *Id.* Judge Lee did not consider these parts of Mr. McMaster’s deposition because Mr. McMaster did not submit them to her at the hearing. He now seeks to add these designations to the record on appeal when the designations were not presented for Judge Lee’s consideration at the summary judgment hearing. Because Mr. McMaster did not submit these designations to Judge Lee, he cannot include them in the record pursuant to Rule 210(c). Furthermore, his argument that “the trial judge failed to consider material parts of McMaster’s deposition” is improper because he did not submit these excerpts to Judge Lee.

- c. Dr. Dewitt properly submitted deposition designations to the trial judge and has properly included these designations in the record.**

On page 3 of his motion to vacate, Mr. McMaster moves to strike all excerpts from his deposition from the record on the basis “that the deposition in its entirety was not made part of the hearing record.” Dr. Dewitt submitted excerpts from Mr. McMaster’s deposition for Judge Lee’s consideration which are referenced in her order, Dr. Dewitt’s brief, and Dr. Dewitt’s designation of matter to be included on appeal. The excerpts upon which Judge Lee relied for her ruling were presented to her and are properly part of the record on appeal. Mr. McMaster could have submitted the entire deposition for Judge Lee’s consideration, but he did not. There is no requirement that an entire deposition be submitted to support a motion for summary judgment. In fact, the parties may submit excerpts from depositions for the Court’s consideration and convenience.

- d. Dr. Davis’ affidavit was not presented to Judge Lee or relied upon by her. As a result it should not be part of the record.**

Mr. McMaster argues that the affidavit of Dr. Davis should be included in the record on appeal because it was filed with the Notice of Intent to File Suit. However, this affidavit was not presented to Judge Lee for consideration at the motion for summary judgment hearing, and no argument was made to Judge Lee regarding this affidavit. Furthermore, Judge Lee did not reference Dr. Davis’ affidavit as considered in her order or as a basis for her order. Mr. McMaster did not move to reconsider on the basis of the omission of this affidavit. Dr. Davis’ affidavit was not argued to Judge Lee, it was not submitted to Judge Lee, and she did not rely upon it in ruling. Mr. McMaster did not move to reconsider on the basis that Judge Lee admitted in court part of the record. With

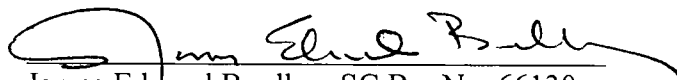
this in mind, Mr. McMaster may not add Dr. Davis' affidavit to the record on appeal as it was not considered by the trial court.

### CONCLUSION

Dr. Dewitt requests that this Court:

- a. Deny Mr. McMaster's motion to vacate its earlier order and enlarge time for return; and
- b. Deny Mr. McMaster's motion to strike.

Respectfully submitted,



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August 28, 2013

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**PROOF OF SERVICE**

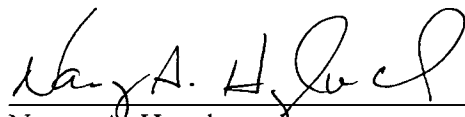
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I certify that I have served the Return to Appellant's Motion to Enlarge time For Return; Motion to Vacate Order Granting Respondents Relief; Return to Respondents' Motions to Strike; and Appellant's Motion to Strike in the Alternative on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on August 28, 2013, addressed to attorneys of record as follows:

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1534 Blanding Street  
Columbia, SC 29201

R. Gerald Chambers, Jr., Esquire  
P.O. Box 1473  
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August 28, 2013



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