ORIGINAL

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

JOSEPH D. McMASTER,

Appellant,

v.

JOHN H. DEWITT, M.D. and CAROLINA PSYCHIATRIC SERVICES, P.A.,

Respondents.

BRIEF OF APPELLANT

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Statement of the Case

This is a medical malpractice case arising from treatment of Joseph D. McMaster by John H. DeWitt, M.D., and Carolina Psychiatric Services, P.A.

Joseph D. McMaster commenced the action by filing a Notice of Intent to File Suit on June 16, 2011, in the Richland County Court of Common Pleas. He then filed a Summons and Complaint against the defendants on December 8, 2011. Defendant DeWitt answered on February 16, 2012, and Defendant Carolina Psychiatric Services answered on January 3, 2012. Each of the defendants generally denied the material allegations of the complaint. Defendant DeWitt raised the statute of limitations as an affirmative defense, but defendant Carolina Psychiatric Services did not raise the statute of limitations as an affirmative defense.

McMaster alleged that DeWitt and Carolina Psychiatric Services, P.A., deviated from generally recognized and accepted standards of care and failed to render medical care expected of a reasonably competent medical practitioner under the same or similar circumstance by prescribing to McMaster an amount of Adderall in excess of the maximum amounts directed by reasonably competent physicians exercising standard medical care under the same or similar circumstances. McMaster claimed the deviation from standard care most probably caused McMaster to suffer an unnecessary injury of medication induced psychosis. *See* Notice of Intent to File Suit (ROA 10); Complaint (ROA 12).

In giving notice pursuant to S.C. Code § 15-79-125(A) and then in his Complaint, McMaster outlined a long history with DeWitt and Carolina Psychiatric Services, P.A. that began in 1993. He said DeWitt first prescribed Adderall to him in January 1999 for

the purpose of improving his attention span. Initially the dosing for Adderall was 20 mg. twice per day. Over the course of treatment, Dr. DeWitt increased the dosing of Adderall, which was being prescribed to McMaster in addition to other drugs. By December 2007, DeWitt was directing McMaster to take Adderall XR 2 (extended release) in the amount of 30 mg twice a day and once every noon and to take Adderall Regular Release in the amount of 30 mg twice a day and once every noon. *See* Notice of Intent to File Suit (ROA 10); Complaint (ROA 12).

In support of his allegations, McMaster submitted the affidavit of Dave McAlister Davis, M.D., a board certified psychiatrist practicing in Atlanta. Dr. Davis stated that Dr. DeWitt deviated from standard medical care in prescribing an excessive amount of Adderall that caused McMaster to have a medication induced psychosis on or about June 25, 2008. McMaster was examined by defense counsel at deposition on October 4, 2012. *See* McMaster Deposition (ROA 67). The court reporter completed the transcript on October 18, 2012. *See* McMaster Deposition (ROA 67).

DeWitt moved for summary judgment on November 20, 2012, on grounds that the statute of limitations barred the plaintiff's action. *See* DeWitt's Motion for Summary Judgment (ROA 22). Carolina Psychiatric Services moved for summary judgment on November 28, 2012, also on grounds that the plaintiff's action was barred by the statute of limitations. *See* Carolina Psychiatric Services Motion for Summary Judgment (ROA 24). On December 12, 2012, two days before a scheduled hearing, McMaster filed and served an affidavit in response to the motions for summary judgment. The hearing then was rescheduled for oral argument on December 13 with the understanding that the affidavit would not be time-barred.

The Hon. Alison Renee Lee heard argument on the defendants' motions for summary judgment on December 13, 2012. On February 21, 2013, Judge Lee entered an order granting summary judgment to both DeWitt and Carolina Psychiatric Services, P.A., on the basis that "(p)laintiff's Complaint is barred by the statute of limitations and does not establish any potential liability on the part of Carolina Psychiatric Services, P.A. or Dr. Dewitt." *See* Order, filed February 21, 2013 (ROA 4). The court found as a matter of law that the statute of limitations in medical malpractice actions is three years, *see* S.C. Code Ann. § 15-3-545, and that "(t)he 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 claim against a party might exist." *See* Order (ROA 4)(*citing Dunbar v. Carlson,* 341 S.C. 261, 266, 533 S.E.2d 913, 916 (Ct. App. 2000).

The court found that McMaster had been told in May 2008 the reason for his injury, which was "sufficient information to put the claimant on notice of a claim." *See* Order (citing *Arant v. Kressler,* 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997)). Basing its findings entirely on McMaster's deposition testimony, the court said McMaster knew he was hospitalized for Adderall induced psychosis in May 2008 and that the statute of limitations began to run at that time. *See* Order (ROA 4).

The court acknowledged that McMaster had submitted an affidavit contradicting his deposition testimony, but the court found that the affidavit was a sham. *See* Order (ROA 4).

McMaster filed a motion for reconsideration on March 5, 2013. Judge Lee denied the motion for reconsideration by order filed on March 11, 2013, without oral argument.

McMaster served notice of appeal as to the orders of summary judgment and denial of reconsideration on March 28, 2013.

Argument

I. Did plaintiff present sufficient evidence to create an issue of material fact about whether plaintiff's medical malpractice claim was brought within the statute of limitations?

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999). A trial court should grant a motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law. *Wells v. City of Lynchburg,* 331 S.C. 296, 501 S.E.2d 746 (S.C. Ct. App. 1998). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n,* 332 S.C. 54, 504 S.E.2d 117 (1998). If triable issues exist, those issues must go to the jury for consideration. *Rothrock v. Copeland,* 305 S.C. 402, 409 S.E.2d 366 (1991). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). The appellate court is to review all ambiguities, conclusions,

and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009); *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976).

The trial court based its summary judgment on two excerpts from McMaster's deposition:

Q: And you were discharged at the end of May 2008 from the hospital?

A: May 2008. The first time, yeah.

Q: Okay. 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.

McMaster Deposition at 35 (ROA 81), ll. 4-11.

A: I mean, John called it Adderall induced psychosis when I talked to John.

Q: And that was in May of 2008?

A: Correct.

McMaster Deposition at 47 (ROA 83), ll. 3-6.

The court concluded that if McMaster knew his diagnosis in May 2008, then he was too late to commence an action when he filed his Notice of Intent to File Suit in June 16, 2011. Yet McMaster could not have known in May 2008 that his involuntary

commitment for paranoia and hallucinations was caused by medication induced psychosis, because the diagnosis was not made until on or after June 25, 2008.

The court wrongly overlooked key medical records submitted by plaintiff's without objection. The first was a discharge summary from the May hospitalization which showed that the hospitalization continued until May 28, 2008. At the conclusion of the hospitalization DeWitt dictated the discharge summary and stated expressly that McMaster's diagnosis was paranoid psychosis of unclear etiology. He made no mention of possible medication induced psychosis. In other words, as of May 28, he did not know what was causing McMaster's psychosis.

The second document was DeWitt's discharge summary written after McMaster was readmitted into the hospital on June 25, 2008, for psychotic behavior manifested by paranoia, believing that he was being followed by the FBI. It was on this diagnosis that DeWitt stated the diagnosis of "medication or drug induced paranoia." *See* Discharge Summary 7/10/2008 (ROA 113).

Together, these discharge summaries raised a question of fact as to whether McMaster could have been told a diagnosis of medication induced psychosis before June 25, 2008, but they were overlooked by the court. DeWitt could not have told McMaster something in May 2008 that he did not yet know himself.

McMaster submitted an affidavit to correct the responses he made to the leading deposition questions of defense counsel that suggested he learned of the diagnosis in May 2008. In the affidavit, he stated, "Only after I was admitted to the hospital on June 25, 2008, did I know or have reason to know that the medications prescribed by Dr. DeWitt, including Adderall, were the cause of my paranoia and psychotic state."

If the affidavit had been accepted, the court would have found a material question of fact. Instead, the court wrongly rejected the affidavit as sham, and accepted only the deposition testimony. See Order (ROA 4).

When considering whether to reject an affidavit submitted in response to a motion for summary judgment, the court must consider whether the previous sworn testimony indicates the witness was confused at the time. *See Cothran v. Brown,* 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). In rejecting McMaster's affidavit, the court asserted "there has not been an indication that Plaintiff was confused during his deposition." *See* Order (ROA 4). Yet, McMaster said several times during deposition that his memory was faulty.

Q: All right. Was your disability at all affected or created by the allegations against Dr. DeWitt in this lawsuit?

A: I think so, yes.

Q: Why is that?

A: Just since that time, I haven't -- I'm just -- it's been very hard for me to -- to do anything really. My memory is terrible and forgive me, if I've gotten anything wrong so far, it's not intentional. I just really can't remember things. My memory is very bad.

McMaster Deposition at 13 ll. 5-15.

My memory is gone. I can't remember

anything. I do the best I can. I used to be in politics. I could remember names. I was pretty good at names. I can't remember names, places, and it's -- it's terrible. I told Charley about this. It's just terrible. I got -- I just got to live with it.

McMaster Deposition at 37-38.

Moreover, at the time of his deposition, McMaster was not on his regularly scheduled medications, including the Adderall which treated his attention deficit disorder.

Q: When was the last time you took medicines on a regular basis?

A: Last month.

Q: What medicines were you taking then?

A: It was Adderall 20 mg twice a day.

Q: Who was prescribing that for you?

A: That last visit I had at Eastover, he did prescribe a prescription of Adderall before I left.

Q: That's the Dr. Franklin Watson?

A: Or something like that. Yeah. I'm sorry. I can't remember his name.

Q: That's okay. And that's at Eastover Psychiatric?

A: Yeah.

Q: In Charlotte?

A: Right.

Q: And you haven't been back to see him?

A: No. I've got an appointment to go back, but I had to get all the releases done. They haven't been done and those need to be sent to Keith Noland.

Q: Releases from your prior records?

A: Right.

Q: Okay.

A: And anybody else, I just signed it carte blanche and he was going to see me after he reviewed those.

Q: All right. And so why are you not taking the medicines now that you were taking last month?

A: Well, my appointment is next -- next week and just -- I don't have them right -- I'm -- I'm not taking them for this deposition and I'm not --

Q: Did you just run out or did you --

A: Yeah. I ran out.

Q: -- not take them because you had a deposition?

Why -- why are you not taking them now?

A: I ran out --

Q: Okay.

A: -- and I didn't want to take them for the deposition either.

Q: All right. So when was the last time you've taken Adderall?

A: Last week.

McMaster Deposition at 20-22.

When taken with documented evidence showing that the diagnosis of medication induced psychosis was unknown to McMaster's doctors in May, the failure of memory is an adequate explanation for the statements of the affidavit that contraindicated the sworn statements given by McMaster in response to leading questions about the timing of DeWitt's diagnosis. *See id.*

The court stressed that the affidavit was submitted just two days before the summary judgment motions were scheduled to be heard. The court's concern over the timing of the affidavit was undue, however, given that the one of the motions was filed just 22 days before the filing of the affidavit and the second motion was filed only 13 days before the affidavit.

The court further should have recognized that it was important for McMaster to correct his deposition testimony by affidavit, since the statute of limitations turned on when DeWitt told him the diagnosis. In doing so, McMaster was correcting deposition answers that had been suggested to him by defense counsel, not long standing or repeated sworn testimony. *See Cothran* at 218.

The general rule in South Carolina is that a correcting affidavit should not be excluded. The "sham" afidavit rule is an exception to the general rule of allowing the affidavit. *See Cothran,* 357 S.C. at 218 (Supreme Court found that Court of Appeals "misapplied" the sham affidavit rule to exclude a second affidavit rendered to correct an earlier affidavit). Under the circumstances, McMaster's affidavit in response to the motions for summary judgment was submitted *not* for the sole purpose of creating a "sham" issue of fact. *See id.*

II. Did the lower court commit error when it entered summary judgment for a party that had not pleaded the statute of limitations as an affirmative defense?

Carolina Psychiatric Services, P.A. did not plead the statute of limitations. *See* Carolina Psychiatric Services Answer (ROA 19). Consequently, the court erroneously entered summary judgment on a defense not raised by the defendant's pleading. In South Carolina a statute of limitations defense is an affirmative defense that must be raised by the defendant's answer, before the defendant may avail himself of it. *See* R. 8(c), SCRCP; *Davis v. Atkinson*, 281 S.C. 102, 313 S.E.2d 648 (Ct. App. 1984).

Conclusion

The summary judgments for respondents should be reversed and the case remanded.

Respectfully submitted,

By: _____

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October 31, 2013

CERTIFICATE OF COUNSEL

Appellant's counsel certifies that the Brief of Appellant complies with Rule 211(b), SCRAP. Appellant's counsel further acknowledges that certain designated matters have been extinguished from the Record on Appeal by order of the Court. Where those matters continue to be reflected in the Brief of Appellant (so as to be identical to the Initial Brief) no citation to the Record on Appeal has been made.

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I, the undersigned, a secretary of Furr & Henshaw, attorney for Appellant do hereby certify that I have this date served the foregoing Brief of Appellant, via U.S. mail, upon the individuals whose names and addresses appear below.

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Dated: November 1, 2013