

74518

**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**

DEC 18 2014

**SC Court of Appeals**

JOSEPH D. McMASTER,

Appellant,

v.

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

Respondents.

---

PETITION FOR REHEARING

---

The appellant respectfully petitions for a rehearing on the following grounds:

1. This medical malpractice lawsuit alleged that defendant's deviation from standard care most probably caused plaintiff to suffer an unnecessary injury of medication induced psychosis. Summary judgment was granted on the sole basis that the

action was not commenced within three years of when plaintiff discovered the alleged malpractice.

2. The trial court based its summary judgment on two excerpts from plaintiff's deposition in which he said that defendant told him he had "Adderall induced psychosis." In deposition, he agreed that he was told of the "Adderall induced psychosis" in May 2008.
3. In affirming summary judgment on grounds that the action was barred by the statute of limitations, the Court overlooked material issues of fact as to whether plaintiff discovered within three years of the lawsuit that the cause of his psychosis was the medications prescribed by defendant. There was sufficient evidence to create an issue of material fact about whether plaintiff's medical malpractice claim was brought within the statute of limitations. The summary judgment was based entirely on conversations between plaintiff and defendant about the cause of plaintiff's psychosis in which the defendant told plaintiff that his psychosis was caused by the drug Adderall. The Court overlooked that the patient was dependent on the doctor to diagnose the cause of his psychosis and could know only what the doctor knew.
4. The Court misapprehended the basis of plaintiff's cause of action. The plaintiff alleged that defendant's medical prescriptions for psychotropic medications were outside standard medical care. Whether the statute of limitation applied should have been determined by when a reasonable person should have known or suspected that the prescription was at fault, not simply whether Adderall or other drugs were related to the psychosis. Determining that plaintiff should have known

in May that the drug induced the psychosis is different from saying that he should have known that prescribing the drug in the first place was negligent. We all know that every drug can have side effects. But when the side effect happens, that is no reason to suspect that prescribing the drug was negligent.

5. The Court overlooked that plaintiff could not begin to suspect that defendant had negligently over-prescribed Adderall until he was told that Adderall was the cause of his psychosis.
6. The Court overlooked and misapprehended when defendant knew that Adderall was the cause of plaintiff's psychosis. In May 2008, the defendant concluded plaintiff's hospitalization stating the cause or "etiology" of plaintiff's psychosis was "unknown." If unknown to doctor, then unknown to patient. Whether the defendant knew in May that Adderall was the cause of plaintiff's psychosis was a question of fact.
7. The Court misapprehended that plaintiff's affidavit was not timely and concluded that filing the affidavit only two days before the summary judgment motion hearing demonstrated that it was a "sham" affidavit. The plaintiff gave the deposition on October 4, 2012, and the court reporter completed the deposition transcript on October 18. The defendant moved for summary judgment on November 20, and the motion was heard on December 13, less than 30 days after the motion was filed. Under those circumstances, to file a notarized affidavit only 22 days after the motion, does not give inference as a matter of law that the affidavit was "sham" and demonstrated a misapprehension by the Court as to

what was practical in considering, drafting, and formalizing an affidavit in response to defendants' motions for summary judgment.

8. The Court overlooked and misapprehended key medical records that had been submitted by plaintiff without objection in opposition to the summary judgment motion. 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 defendant dictated the discharge summary and stated expressly that plaintiff's diagnosis was "paranoid psychosis of unclear etiology." He made no mention of possible medication induced psychosis. In other words, as of May 28, defendant did not know what was causing plaintiff's psychosis. These documents raised material questions of fact about what defendant knew and when he knew it.
9. The found as a matter of law that plaintiff's hospitalization in May "coupled with his knowledge that it was induced by Adderall put him on notice of a claim against defendant and commenced the running of the statute of limitations. The Court overlooked and misapprehended the facts and circumstances. The plaintiff had been under the defendant's care for years. He had been on Adderall for many months prior to the May hospitalization. The defendant admitted him to the hospital in May for a "psychosis of unclear etiology." In the hospital, the defendant doctor questioned and suggested to him that his psychosis could be caused by abusing or overtaking Adderall or other drugs, but did not say to him that his psychosis could be caused by taking Adderall as prescribed. The plaintiff stated and the trial court found that plaintiff suspected physician misconduct only

upon learning from the defendant a diagnosis of “Adderall induced psychosis” which was not documented until the June 28 hospitalization. The Court misapprehended what a person of common knowledge and experience could derive from being hospitalized for psychosis. This is a matter in which a reasonable person becomes suspicious of malpractice only after he learns that the doctor’s prescription was the cause of his psychosis. The Court misapprehended that the defendant’s knowledge is “immaterial to our determination of when the statute of limitations began to run.” The Court also misapprehended the plaintiff’s “own personal knowledge.” The patient in this instance could not know more than his doctor.

10. The Court found that other medical providers stated that plaintiff’s illness was “likely substance induced from [prescription] pills and “due to overutilization of Adderall.” The Court overlooked that there was nothing in the record showing this was conveyed to plaintiff by those providers. Moreover, “overutilization” under these facts and circumstances meant that the plaintiff was taking his Adderall in a manner not prescribed by defendant. The Court misapprehended that this should have placed plaintiff on notice that defendant committed malpractice in the way that he prescribed Adderall.

11. The Court found that defendant wrote in May that “It was felt that the patient had been overusing his Adderall . . . [and] that might have precipitated this delusional condition.” Overusing in this circumstance clearly meant taking medication in a way not prescribed and placed blame on the patient for his illness. The Court misapprehended that this should have placed plaintiff on notice that defendant

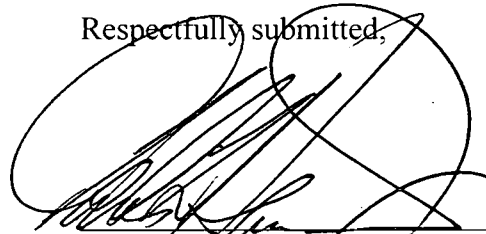
committed malpractice in the way that he prescribed Adderall. The Court overlooked that once plaintiff denied “overusing” his Adderall, the defendant said the etiology of plaintiff’s psychosis was “unknown.”

12. The Court overlooked and misapprehended the general rule in South Carolina permitting a correcting affidavit to remedy a defect in previously sworn testimony. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). Allowing a correcting affidavit to deposition testimony is consistent with Rule 30, SCRCivP, which allows a deponent to make “[a]ny changes in form or substance” that he “desires to make.”
13. The Court overlooked and misapprehended that the so-called “sham” affidavit rule is an exception to the general rule of allowing a correcting 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). If the affidavit is to be ignored in a motion for summary judgment, the affidavit must have been submitted for the sole purpose of creating a “sham” issue of fact. *See id.* There was no purpose of “sham” in the plaintiff correcting a date, when the defendant’s own statements showed that in May 2008 he did not know that plaintiff’s psychosis was induced by Adderall and he could not have told plaintiff that it was.
14. The plaintiff explained that the medical records showed that defendant did not know during the May hospitalization that plaintiff’s psychosis was induced by Adderall. The Court overlooked the Supreme Court’s guidance in *Cothran* that a

court should consider whether an explanation was offered for the inconsistencies between sworn statements.

15. The Court misapprehended that the South Carolina Supreme Court would apply an abuse of discretion standard for reviewing the circuit court's decision to exclude plaintiff's affidavit. The Court was previously reversed by the Supreme Court for misapplying the so-called "sham" affidavit rule. While the Supreme Court said there were circumstances in which a court could apply such a rule, the court would have to find that the sole reason for submitting the affidavit was to create a dispute of material fact where one would not otherwise exist. The Supreme Court has not pronounced that such a finding is at the discretion of the court.

Respectfully submitted,



---

CHARLES L. HENSHAW, JR.  
FURR & HENSHAW  
1534 Blanding Street  
Columbia, South Carolina 29201  
Telephone (803) 252-4050  
charles.henshaw@fholaw.com  
ATTORNEY FOR APPELLANT

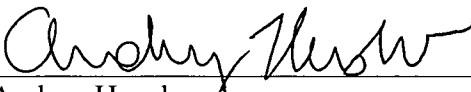
December 18, 2014

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of Furr & Henshaw, attorney for Appellant, do hereby certify that on this date I caused to be served a copy of the foregoing **PETITION FOR REHEARING** upon the individuals whose names and addresses are listed by U.S. mail.

James Edward Bradley  
Moore Taylor & Thomas, P.A.  
P.O. Box 5709  
West Columbia, SC 29171  
Attorney for Respondent John H. DeWitt, M.D.

R. Gerald Chambers  
Turner, Padgett, Graham & Laney, P.A.  
1901 Main Street  
Columbia, SC 29201  
Attorney for Respondent Carolina Psychiatric Services

  
\_\_\_\_\_  
Audrey Henshaw

December 18, 2014