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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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MAR 24 2015

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

ALISON RENEE LEE, Circuit Court Judge

Case No. 2011-CP-40-08373

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS

JOSEPH D. McMASTER,

Petitioner,

v.

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

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF SOUTH CAROLINA:

Joseph D. McMaster respectfully petitions the Court to issue a writ of certiorari by which
to review the decision of the South Carolina Court of Appeals in *Joseph D. McMaster v. John H.
Dewitt, M.D. and Carolina Psychiatric Services, P.A.*, Op. No. 5282.

CERTIFICATION

The undersigned counsel for Petitioner certifies a petition for rehearing was made and finally ruled on by the Court of Appeals. (Appendix pp. 15 & 14).

QUESTION PRESENTED

Did the Court of Appeals err in ruling that plaintiff failed to present sufficient evidence to create an issue of material fact about whether plaintiff's medical malpractice claim was brought within the statute of limitations?

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. (ROA 10). He then filed a Summons and Complaint against the defendants on December 8, 2011. (ROA 12) Defendant DeWitt answered on February 16, 2012, (ROA 15) and Defendant Carolina Psychiatric Services answered on January 3, 2012. (ROA 19). 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 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 trial court found that plaintiff suspected physician misconduct only upon learning from the defendant a diagnosis of “Adderall induced psychosis” (ROA 81). 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.

The Court of Appeals affirmed the order of Judge Lee, establishing *de novo* that the abuse of discretion standard should be the standard for reviewing the circuit court’s decision to exclude a sham affidavit. *See Appendix p. 2, Appeals Court’s Decision*.

After the Court denied the Association’s petition for rehearing, this petition for a writ of certiorari followed.

STATEMENT OF FACTS

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.

Discovery revealed that prior to his commitment in June 2008, McMaster also had been committed for paranoia and delusions on May 11, 2008. (ROA 101, Detention Order Request). The detention order was based on increasing emotional lability, delusions that he was being followed by Homeland Security, and inappropriate behavior, including showing up at his country club “shoeless” and pushing an employee. (ROA 104). DeWitt suggested in his records that McMaster was “overusing” the Adderall that DeWitt had prescribed, but in no way suggested that

McMaster had paranoia and delusions from following his treatment plan. (ROA 106, Discharge Summary). Ultimately, at discharge from that commitment on May 28, 2008, DeWitt concluded that McMaster's paranoid psychosis was of "unclear etiology." (ROA 106).

In addition to his discovery deposition that was taken by defense counsel, McMaster submitted an affidavit dated December 12, 2012, explaining that during the May commitment DeWitt questioned whether "I was being compliant in taking Adderall," but did not suggest "that Adderall or other medications had caused me to have paranoid psychosis." (ROA 40-41). He said, "At that time, I did not know and no one suggested that the amounts of Adderall or other medications prescribed to me by Dr. DeWitt had caused me any harm." (ROA 41). He said he understood that Adderall was being prescribed for "attention deficit disorder." (ROA 41). He also said, "Since December 2007 I had taken Adderall and other medications as prescribed by Dr. DeWitt in the amounts he directed, and I had no reason to know or believe that the amounts were excessive or prescribed in a manner that was outside generally recognized and accepted standards of medical care." None of this was inconsistent with his deposition testimony. (ROA 67-100).

What was inconsistent with his deposition testimony was that McMaster averred in his affidavit that "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." (ROA 41). In his deposition, McMaster testified he learned of Adderall toxicity when DeWitt told him in the May 2008 hospitalization. McMaster held consistently in both deposition and affidavit, however, that he only had reason to suspect negligence when DeWitt himself told him that he had a medication induced psychosis.

McMaster's arguments to the courts below, and the obvious reason for the submission of the inconsistent affidavit, have been that DeWitt's knowledge of Adderall induced psychosis was

a condition precedent to his own knowledge. If DeWitt did not know the reason for McMaster's psychosis until the June 25, 2008, hospitalization, it must be a question of fact whether the statute of limitations bars his complaint.

Argument

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), SCRPC. *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 must apply 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 must 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 on 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.

In determining there was no question of material fact, the courts below wrongly disregarded two key medical records submitted by plaintiff without objection. The first was a discharge summary from the May hospitalization which showed that the hospitalization continued until May 28, 2008 in which defendant DeWitt stated that McMasters paranoid psychosis was produced by "unclear etiology." In other words, he did not know why McMaster had become psychotic. He made no mention of possible medication induced psychosis. (ROA 111).

The courts below further disregarded DeWitt's discharge summary written after McMaster was readmitted into the hospital on June 25, 2008. It was during this commitment that DeWitt diagnosed "medication or drug induced paranoia," and only then would he have been able to tell McMaster that the medication was Adderall. *See* Discharge Summary 7/10/2008 (ROA 113). DeWitt could not have told McMaster something in May 2008 that he did not yet know himself. Consequently, McMaster averred in his affidavit, "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." (ROA 40).

These medical records raised material questions of fact about what defendant knew and when he knew it.

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).

Correcting affidavits are permissible and generally allowed in South Carolina. A ruling that excludes an affidavit is the exception. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)(citing *Hancock v. Bureau of Nat'l Affairs*, 645 A.2d 588, 590 (D.C. App. 1994)

(“When, on a motion for summary judgment, a judge is confronted with a party’s deposition and affidavit, which contradict each other, the deposition is usually considered more reliable. However, ‘the court may not exclude the affidavit from consideration in the determination of the question whether there is any genuine issue as to any material issue of fact’” unless the affidavit constitutes an attempt to create a sham issue of material fact.).

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.”

This Court has attempted to provide guidance when the Court of Appeals previously misapplied the “competing affidavit” or “sham affidavit” rule to exclude an affidavit and grant summary judgment. *Id.* The Court of Appeals’ exclusion of the affidavit was rebuffed when the affiant neither (1) intended to create a sham issue, or (2) submitted the affidavit for “the *sole* purpose of creating a ‘sham’ issue of fact.” *Id.* (emphasis added).

Here, the plaintiff had said in deposition that he knew learned that his commitment was caused by Adderall induced psychosis when he was told that by the defendant during the May 2008 hospitalization. At argument to the trial court, he explained that the date of May 28 pronounced in his deposition could not have been correct, since the defendant himself did not know why plaintiff was psychotic on that date. (ROA 55-58). He further explained that since defendant did not know he had Adderall induced psychosis until his admission beginning on June 25, 2008, that was when he first could know that the Adderall prescribed by defendant was the basis of his paranoia. According to the Supreme Court’s guidance in *Cothran* a court should consider whether an explanation was offered for the inconsistencies between sworn statements. There was no sole 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. 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, not a matter of law.

The courts below stressed that a reason for finding "sham" was that the affidavit was submitted just two days before the summary judgment motions were scheduled to be heard. Yet, plaintiff could not have known that an affidavit should be submitted until a motion for summary judgment was served and filed, only 22 days before. Unusual was the first motion being called for argument only 23 days after it was filed, and second motion being called for argument only 14 days after it had been filed, a period which included the Thanksgiving holiday beginning November 22. The time frame in which the affidavit was filed was reasonable and should not have been a basis for concluding that the affidavit was a sham. Under the expedited circumstances, to strike an affidavit because it was submitted two days before the hearing should be considered an abuse of discretion.

The Court wrongly concluded as a matter of law that because plaintiff was taking Adderall when committed in May 2008 and because he was questioned about his Adderall use that he was on notice of a cause of action. 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 part of his medical history. This turned out to be a side-effect of the drug, but McMaster could not have known that as a matter of law until he was told so by DeWitt. Although in this instance the patient could not know more than his doctor, the Court of Appeals concluded as a matter of law that the defendant's knowledge is "immaterial to our determination of when the statute of limitations began to run."

The trial court, however, recognized that the defendant's knowledge was material to the application of the statute of limitations, and found, significantly, that plaintiff suspected physician misconduct only upon learning from the defendant a diagnosis of "Adderall induced psychosis" (ROA 81). 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." The defendant questioned whether the plaintiff was at fault for abusing or overtaking Adderall, but in no way suggested it was physician fault in the amount prescribed.

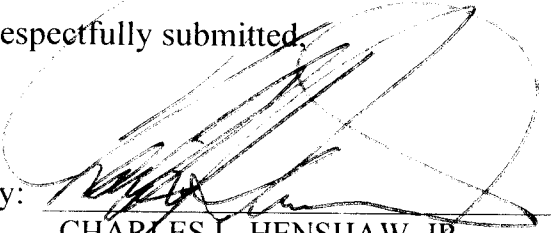
There was nothing in the record showing that other health care providers told plaintiff that his psychosis was caused by taking the Adderall as prescribed by the defendant. In fact, if providers suggested that plaintiff's psychosis was caused by overutilization of Adderall, any reasonable person of common knowledge and understanding that taking Adderall as prescribed would not cause harm. It would not as a matter of law place someone on notice that defendant committed malpractice. Under these circumstances, only if and when the defendant told plaintiff that his psychosis was caused by Adderall could a reasonable person have suspected that the Adderall was negligently prescribed.

Conclusion

The Supreme Court should grant the petition for certiorari and reverse the judgment of the Circuit Court as affirmed by the Court of Appeals.

Respectfully submitted,

By:



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

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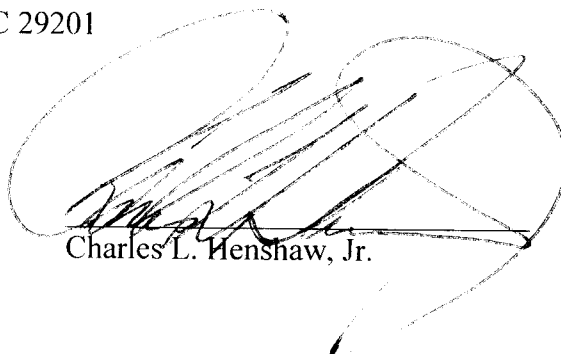
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CERTIFICATE OF SERVICE

I, the undersigned, attorney for Appellant do hereby certify that I have this date served the foregoing Petition for A Writ of Certiorari and Appendix Index, via U.S. mail, upon the individuals whose names and addresses appear below.

Mr. James Edward Bradley
Moore, Taylor & Thomas
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29177

Mr. R. Gerald Chambers
Turner, Padgett, Graham & Laney
1901 Main Street
Columbia, SC 29201



Charles L. Henshaw, Jr.

Dated: March 23, 2015