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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2015-000361

Joseph D. McMaster, ... Petitioner,

v.

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

RETURN OF RESPONDENT JOHN H. DEWITT, M.D., TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUE ON APPEAL

THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT'S SUMMARY JUDGMENT RULING BECAUSE MR. MCMASTER SUED DR. DEWITT MORE THAN THREE YEARS AFTER NOTIFICATION OF MALPRACTICE.

STATEMENT OF THE CASE

On May 13, 2008, attorney Joe McMaster had an Adderall induced psychosis for which he was admitted to Palmetto Health Baptist Hospital. (R. p. 56, ll. 3-6). He remained hospitalized until May 28, 2008. (R. p. 56, ll. 7-9). Mr. McMaster had been a patient of Psychiatrist John DeWitt since 1993. According to Mr. McMaster, during the May hospitalization, Dr. DeWitt told Mr. McMaster that his psychosis was Adderall induced. After the hospitalization, Dr. DeWitt stopped prescribing Adderall to Mr. McMaster. (R. pp. 80-83).

On June 16, 2011, more than three years later, Mr. McMaster filed a notice of intent to sue Dr. DeWitt, alleging that his psychosis was caused by Dr. DeWitt over-prescribing Adderall. (R. p. 10). Mr. McMaster knew that he had a medication induced psychosis when he was hospitalized in May of 2008. (R. pp, 80-83). Since Mr. McMaster sued more than three years after his hospitalization and after the statute of limitations expired, Dr. DeWitt moved for summary judgment on November 20, 2012. (R. p. 22). Dr. DeWitt's employer, Carolina Psychiatric Services, moved for summary judgment on the same grounds on November 28, 2012. (R. p. 24). Two days before the motion hearing, Mr. McMaster submitted an affidavit contradicting his sworn deposition testimony. Judge Alison Lee heard arguments on the motions on December 13, 2012, and entered an order granting summary judgment for both Defendants on February 21,

2013. (R. p. 4). Mr. McMaster filed a motion for reconsideration on March 5, 2013, which was denied by Judge Lee on March 11, 2013. (R. p. 9). Mr. McMaster served his notice of appeal on March 28, 2013.

Mr. McMaster's appeal was heard by the South Carolina Court of Appeals on October 8, 2014. On December 3, 2014, the Court issued its opinion affirming Judge Lee's Order granting summary judgment. (Appendix 2). Mr. McMaster petitioned the Court for a rehearing. This petition was denied by the Court. (Appendix 14). This Petition for Certiorari followed.

FACTS

Dr. John DeWitt is a psychiatrist who treated Attorney Joe McMaster. Dr. DeWitt prescribed Mr. McMaster Adderall for the treatment of Adult Attention Deficit Disorder. On May 13, 2008, Mr. McMaster was involuntarily committed to Palmetto Health Baptist Hospital. He remained in the hospital until May 28, 2008, when he was discharged in good health. (R. p. 112). According to Mr. McMaster, Dr. DeWitt informed him that the hospitalization was a result of Adderall induced psychosis and ceased prescribing the medication. Mr. McMaster was admitted to the hospital about one month later on June 25, 2008, for paranoia. (R. p. 4).

Mr. McMaster's Notice of Intent and Complaint does not mention the May 2008 hospitalization. (R. p. 6; p. 13, ¶ 10). However, he testified in his deposition that he knew his May 2008 psychosis was Adderall induced. (R. p. 5, 80-83).

Judge Lee found "no genuine issue of material fact about the date [Mr. McMaster] was on notice of his claim." (R. p. 7). She relied upon:

- The pleadings (R. pp. 12-21);

- Deposition excerpts from Mr. McMaster, pp. 34-35, 46-47, 53-54 (R. pp. 27-28);
- Deposition excerpts from Dr. Dave Davis, pp. 35-36 (R. pp. 29-30);
- An affidavit by Mr. McMaster which includes a discharge summary from Palmetto Health Baptist dated 7/2/2008 – 7/27/2008 and a discharge summary from Palmetto Health Baptist dated 9/25/2008 – 12/2/2008 (R. pp. 40-42);
- A discharge summary from Palmetto Health Baptist dated 5/13/2008 – 5/28/2008 (R. p. 112);
- Hospital records dated 6/25/2008 – 7/10/2008 (R. pp. 117-392);
- A detention order request from Columbia Mental Health dated 5/11/2008 (R. p. 102);
- Progress notes from Palmetto Health Richland dated 5/13/2008 and 5/17/2008 (R. p. 104-105); and
- An exam for emergency admission at Palmetto Health Richland dated 5/13/2008 (R. p. 109).

Judge Lee disregarded Mr. McMaster's affidavit which contradicted his deposition testimony as a sham affidavit. In addition, Judge Lee determined that tolling due to insanity under South Carolina Code Section 15-3-545(D) was not available to Mr. McMaster. (R. p. 7). She entered summary judgment for the Defendants finding that the Complaint was barred by the statute of limitations. (R. p. 7).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED JUDGE LEE'S SUMMARY JUDGMENT ORDER BECAUSE MR. MCMASTER SUED DR. DEWITT MORE THAN THREE YEARS AFTER NOTIFICATION OF MALPRACTICE.

The statute of limitations in medical malpractice actions is three years. S.C. Code Ann. § 15-3-545. The statute begins to run when the circumstances of the injury would put a person of common knowledge on notice that some claim might exist. *Dunbar v. Carlson,* 341 S.C. 261, 266, 533 S.E.2d 913, 916 (Ct. App. 2000). In May 2008, Mr. McMaster suffered an Adderall induced psychosis for which he was admitted to the hospital. His Adderall induced psychosis is the basis for his lawsuit against Dr. DeWitt. According to Mr. McMaster, in May 2008, Dr. DeWitt told him he suffered an Adderall induced psychosis, more than three years before Mr. McMaster filed his notice of intent to sue.

As Mr. McMaster testified in his deposition:

Q: In your opinion, you were disabled beginning--
A: Yeah.
Q: --in May of 2008?
A: Yeah. Yeah.
Q: All right. And that was because of the Adderall?
A: Yeah. Yeah. This whole incident.
Q: All right. And you knew that then, when you went in that, that was the problem or when you got out?
A: No. I didn't know it when I went in. I didn't know that was the problem when I went in.
Q: But you knew it when you got out? When you talked to your boss?
A: When I talked to—talked to the doctors on the floor.
Q: Okay.
A: I mean, John [Dr. John DeWitt] called it Adderall induced psychosis when I talked to John.
Q: And that was in May of 2008?
A: Correct.

(R. p. 82, l.10 – p. 83, l.6).

Mr. McMaster also testified as follows:

Q: Okay. What did Dr. DeWitt do wrong?
A: As far as I can tell, he just gave me too much medicine.
Q: All right.
A: I mean, it was just way too much and I didn't know it until it was too late.
Q: And that would've been when you went into the hospital in May --
A: Yeah.
Q: -- of 2008?
A: Right

(R. p. 80, ll. 8-18).

Q: And you were discharged at the end of May 2008 from the hospital?
A: May 2008. The first time, yeah.
Q: 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.

(R. p. 81, ll. 4-11).

Thus, Mr. McMaster testified three times in his deposition that during his May 2008 hospitalization, he knew that he was being hospitalized for an Adderall induced psychosis. He even testified that Dr. DeWitt told him he was hospitalized for an Adderall induced psychosis.

After Mr. McMaster's hospitalization in May of 2008, Dr. DeWitt never prescribed Adderall to Mr. McMaster. According to Mr. McMaster's testimony:

Q: And certainly after your Adderall induced psychosis, where you went in the hospital in May, you weren't prescribed any more Adderall by Dr. DeWitt after that?
A: No.

(R. p. 86, ll. 21-25).

Mr. McMaster filed his notice of intent to sue Dr. DeWitt on June 16, 2011, more than three years after his May hospitalization. The statute begins to run when the circumstances of the injury would put a person of common knowledge on notice that some claim might exist. *Dunbar,* 341 S.C. at 266, 533 S.E.2d at 916. It is not the date on which a diagnosis is made. *See id.* ("The 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 right of hers has been invaded or that some claim against a party might exist"); *Strong v. Univ. of S. Carolina Sch. of Med.,* 316 S.C. 189, 190-91, 447 S.E.2d 850, 851-52 (1994) ("Under the discovery rule, an action accrues when the injury is discovered or reasonably ought to have been discovered").

The date on which discovery should have been made is an objective, not subjective, question. When a claimant is told of the reason for an injury, this is sufficient information to put the claimant on notice of a claim. *Arant v. Kressler,* 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (finding that information on the reason for a D&C, told orally to the claimant, was sufficient to put a person of common knowledge on notice that some claim against the doctor might exist); *see also Snell v. Columbia Gun Exch., Inc.,* 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) ("The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist."); *Knox v. Greenville Hosp. Sys.,* 362 S.C. 566, 608 S.E.2d 459 (S.C. App. 2005) (citing *Joubert,* 534 S.E.2d 1, 9 (Ct. App. 2000)); *Kreutner v. David,* 320 S.C. 283, 465 S.E.2d 88 (1995). "Moreover, the fact that a plaintiff does not comprehend the full

extent of his injuries is immaterial." *Dean v, Ruscon Corp.,* 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996); see also, *Knox,* at 2. "[T]he statute of limitations begins to run when the plaintiff should know that he might have a potential claim against another, not when he develops a full-blown theory of recovery." *Joubert v. S. Carolina Dep't of Soc. Servs.,* 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000).

A medical diagnosis is not a necessary element of notice. In *Knox,* the patient's only notice was pain. The patient knew that pain was abnormal, and the court held that his knowledge of that pain was enough to start the statute of limitations for malpractice. A later medical diagnosis did not re-start the statute of limitations. Mr. McMaster knew that he was hospitalized for an Adderall induced psychosis in May 2008. Even without knowing more, he knew he had a claim against Dr. DeWitt.

Mr. McMaster filed an affidavit with the court two days before the motion hearing. In the affidavit, he states that he was not aware of the Adderall induced psychosis until approximately June 25, 2008. This affidavit directly contradicts his sworn deposition testimony. Judge Lee relied upon *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004), to distinguish Mr. McMaster's affidavit as a sham affidavit. Therefore, there was no genuine issue of material fact as to when Mr. McMaster became aware of the reason for his injury.[1]

As the Court of Appeals correctly ruled, Mr. McMaster knew he suffered an Adderall induced psychosis when he was admitted to the hospital in May 2008. He testified to that knowledge three separate times in his deposition. He admits that after

[1] Even if the court accepts Mr. McMaster's affidavit, he filed after the statute of limitations expired. The statute of limitations is not dependent on a written diagnosis but when Mr. McMaster had notice of injury, which would still have occurred in May 2008.

May 2008, he was not prescribed Adderall by Dr. DeWitt. Mr. McMaster's subsequent hospitalization in June 2008 does not restart the statute of limitations.

Mr. McMaster waited more than three years to file a notice of intent to sue Dr. DeWitt. As a result, he sued after the statute of limitations expired. The Court of Appeals correctly granted Dr. DeWitt Summary Judgment on the grounds that Mr. McMaster's claim was barred by the applicable Statute of Limitations.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL JUDGE'S DETERMINATION THAT MR. MCMASTER'S AFFIDAVIT CONTRADICTING HIS DEPOSITION TESTIMONY WAS A SHAM.

Mr. McMaster's December 12, 2012 affidavit is a sham affidavit directly contradicting his deposition testimony. On December 12, 2012, two days before the motion hearing for summary judgment, Mr. McMaster submitted an affidavit in which he testified that he did not know that he was hospitalized for an Adderall induced psychosis until after June 25, 2008. This testimony directly contradicts his deposition testimony. Mr. McMaster testified three times in his deposition that he knew he was hospitalized in May 2008 for Adderall induced psychosis.

Courts disregard a subsequent affidavit as a sham, or as not creating an issue of fact for purposes of summary judgment, when a party submits the subsequent affidavit to contradict that party's own prior sworn statement. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (citing *Margo v. Weiss,* 213 F.3d 55, 63 (2nd Cir. 2000); *Rohrbough v. Wyeth Labs. Inc.,* 916 F.2d 970, 976 (4th Cir. 1990); *Martin v. Merrell Dow Pharmaceuticals, Inc.,* 851 F.2d 703, 705 (3rd Cir. 1988)), *see also*, *McCleary v Smith*, 2012 WL 3598765 (D.S.C. 2012). In distinguishing a sham affidavit, the South Carolina Supreme Court set forth the following considerations:

> (1) whether an explanation is offered for the statements that contradict prior sworn statements;
> (2) the importance to the litigation of the fact about which there is a contradiction;
> (3) whether the nonmovant had access to this fact prior to the previous sworn testimony;
> (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
> (5) whether the previous sworn testimony indicates the witness was confused at the time;
> (6) when, in relation to summary judgment, the second affidavit is submitted.

Cothran, 357 S.C. at 218, 592 S.E.2d at 633 (citing *Pittman v. Atlantic Realty Co.,* 359 Md. 513, 754 A.2d 1030, 1042 (2000)). In *Cothran*, the South Carolina Supreme Court found federal case law on sham affidavits persuasive, and provided the six considerations cited above for guidance. *Id.* at 217-218, 592 S.E.2d at 633. It held that courts "disregard a subsequent affidavit as a sham, that is, as not creating an issue of fact for purposes of summary judgment . . . [when a party submits] the subsequent affidavit to contradict that party's own prior sworn statement." *Id.* at 218, 592 S.E.2d at 633.

Judge Lee found that Mr. McMaster:

> [H]as not offered an explanation for his contradictory statements, and the date on which [he] had notice of his claim is a central issue in this case. In addition, [Mr. McMaster's] testimony in his prior deposition varies greatly from the statements in his affidavit . . . . There has not been an indication that [Mr. McMaster] was confused during his deposition. Furthermore, in relation to summary judgment, the affidavit was submitted two days before this matter was scheduled to be heard.

(R. p. 6).

Mr. McMaster offered his affidavit to contradict his deposition to create an issue of fact. The affidavit does not state that he was correcting prior testimony. It does not state it was created to correct third parties' prior statements. The only information

offered in this affidavit is a change in the date when Mr. McMaster learned of the reason for his hospitalization. It is solely Mr. McMaster's attempt to create an issue of fact by contradicting himself. There is no explanation offered for his self-contradiction. There is no explanation for Mr. McMaster's failure to correct the deposition earlier, though he had the opportunity to do so. (R. p. 53, ll. 3-7). Mr. McMaster does not explain why he testified three times in his deposition that he knew in May 2008 that he was hospitalized for Adderall induced psychosis. Mr. McMaster's affidavit does not mention his previous deposition, explain why he is now contradicting it, or indicate that he was confused.

Mr. McMaster claims that Judge Lee incorrectly found that he was not confused. He cites his own testimony that was not given to Judge Lee to argue his memory was faulty during his deposition. Mr. McMaster did not claim to be confused in his deposition or in his affidavit. He did not complain of being disoriented with regard to time, place, or identity. To the contrary, Mr. McMaster gave detailed and coherent answers. (R. pp. 80-81). He answered questions about his disability application, and he explained when he had filed the application. (R. p. 82). He recalled the name of a recent job interviewer, his number of shares in a company, and when he was paid for his shares. (R. p. 83). He even found that one of his medications was missing from a health record during the deposition, and testified to the side effects of that medication. (R. pp. 86-87).[2] [3]

[2] Mr. McMaster also recalled the names of doctors he had seen, their current practice location, and their specialty. (R. pp. 71-75). He was able to recall his arrest record and the reasons for his detainment. (R. pp. 69-70). He was able to recall his past employment and his rate of pay. (R. pp. 76-79). He was able to recall the names of company CEO's and companies with which he was trying to create a business relationship in 2005. (R. pp. 84-85). He recalled specific details from his hospitalization in a Lancaster treatment facility in 2001 and exhibited detailed knowledge about his medications at that time. (R. pp. 88-100).

Mr. McMaster is a lawyer and understands the importance of sworn testimony. He did not express any confusion at his deposition regarding sworn testimony. There is no contention that he was unable to truthfully and accurately answer questions at his deposition. In fact, he was asked at his deposition if he could answer questions and responded that he could as follows:

> Q: My name is Ward Bradley and I'm going to take your deposition today.
> A: Okay.
> Q: Do you understand that Mr. McMaster?
> A: Yes, sir.
> Q: You are a lawyer?
> A: Yes, sir.
> Q: So you understand what a deposition is?
> A: Yes, sir.
> Q: And you understand what an oath is that you just took?
> A: Correct.

(R. p. 67, l.18 – p. 68 l.4).[4] In addition, in his December 12, 2012 affidavit, Mr. McMaster does not testify that he was confused during his deposition. Under these factors, the court correctly found that Mr. McMaster's affidavit is a sham affidavit submitted to contradict his earlier sworn testimony, and the court properly rejected it. The Court of Appeals correctly affirmed Judge Lee's rejection of Mr. McMaster's sham affidavit.

[3] Dr. DeWitt is including additional excerpts from Mr. McMaster's deposition which were not presented to Judge Lee to counter the excerpts Mr. McMaster now submits to this court which were not submitted to Judge Lee.

[4] Dr. DeWitt is including additional excerpts from Mr. McMaster's deposition which were not presented to Judge Lee to counter the excerpts Mr. McMaster now submits to this court which were not submitted to Judge Lee.

CONCLUSION

The Court of Appeals correctly affirmed Judge Lee's Order granting summary judgment to Dr. DeWitt. This matter contains no novel question of law. The Court of Appeals decision is consistent with prior decisions of this Court. There are no constitutional or federal questions involved. The unanimous decision of the Court of Appeals is proper and this Court should deny Mr. McMaster's petition.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Return of Respondent John H. DeWitt, M.D., to Petition for Writ of Certiorari on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2015, addressed to attorneys of record as follows:

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