

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

COUNTY OF SALUDA )

CASE NUMBER: 2013-CP-41-078

Walter Smith, )

Plaintiff, )

v. )

Norman K. Tiffany, Individually, )

Brown Trucking Company; and )

Brown Integrated Logistics )

Defendant. )

AND )

Brown Trucking Company and )

Brown Integrated Logistics, )

Third-Party Defendants )

v. )

Corbett James Mizzell, III )

Third-Party Defendant.)

**FILED**  
2015 APR 30 PM 12:18  
CLERK OF COURT  
SALUDA CO. S.C.

**ORDER**

This matter is before the Court on Plaintiff's Motion for a Protective Order to Quash the Notice of Deposition of Plaintiff Walter Smith ("Mr. Smith") and Defendants Tiffany and Brown's Motion to Compel Plaintiff's Deposition. Having considered the briefings and arguments set forth by counsel in addition to the evidence and testimony presented, the Court hereby makes the following findings of fact and grants Plaintiff's Motion thereby ordering Mr. Smith protected from having to testify in this case.

ATTEST: TRUE COPY

Clerk of Court  
Saluda, S. C.

## FINDINGS OF FACT

### I. Mr. Smith is Mentally Unfit to Testify and His Tendency to Confabulate Would Thwart the Purpose of Discovery and Harm Plaintiff

By order of the Saluda County Probate Court Mr. Smith was found to be impaired by reason of mental deficiency....or disability to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his lawsuit and is an incapacitated adult as defined by S.C. Code Ann. §62-5-101(1).<sup>1</sup> Dr. Marshall A. White, MD, a board certified neurologist, has diagnosed Mr. White with a traumatically induced brain disorder and opines that he is suffering from significant micro-trauma to the brain as a result of the motor vehicle collision that is the subject of this lawsuit.<sup>2</sup> By evaluation of Dr. White, Mr. Smith has dementia and is incapable of participation in the deposition process and providing accurate information based on his limited memory and other cognitive defects.<sup>3</sup>

As a result of his brain injury, deposing Mr. Smith would thwart the very purpose of the discovery process – the search for the truth. Dr. White testified that Mr. Smith has demonstrated a tendency to confabulate – in a deposition setting Mr. Smith would be inclined to agree with his questioner in an attempt to convince those in attendance that he remembers and to hide the fact that he has no memory of a given event.<sup>4</sup> Mr. Smith would also likely become easily frustrated and “shut down” in a deposition setting,<sup>5</sup> further defeating the purpose of his giving sworn testimony.

Mr. Smith’s participation in a deposition would also prove detrimental to his underlying brain disorder.<sup>6</sup> Dr. White testified that Mr. Smith is “neuropsychologically fragile” due to the traumatic brain injury he suffered.<sup>7</sup> As a result, “a confrontational deposition would tend to in my

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<sup>1</sup> November 6, 2014 Saluda County Probate Court Order Appointing Conservator IN RE: Smith; Exhibit A.  
<sup>2</sup> December 9, 2013 Dr. Marshall A. White, MD Independent Medical Evaluation of Walter Smith, Exhibit B.  
<sup>3</sup> March 31, 2014 Dr. Marshall A. White, MD Letter, Exhibit C.  
<sup>4</sup> May 29, 2014 Deposition of Marshall A. White, MD, Exhibit D. 128:23-129:7.  
<sup>5</sup> *Id.*  
<sup>6</sup> March 31, 2014 Dr. Marshall A. White, MD Letter, Exhibit C.  
<sup>7</sup> May 29, 2014 Deposition of Marshall A. White, MD, Exhibit D. 38:23-39:6.

opinion agitate [Mr. Smith] and could have short term adverse consequences.”<sup>8</sup> Mr. Smith would likely suffer continued agitation after the deposition as well as an alteration of his sleep patterns.<sup>9</sup> Defendants Tiffany and Brown have proffered no medical or expert evidence or testimony showing Mr. Smith is of sound mind and that Mr. Smith could give his deposition without confabulating, experiencing agitation, aggravation and exacerbation of his underlying brain injury. Defense expert Paul Pritchard, while not conceding the cause of the mental impairment, agrees that Mr. Smith has mental and cognitive issues and that Mr. Smith needs assistance at home or in a nursing home.<sup>10</sup>

## II. Mr. Smith Not Testifying Will Not Prejudice Defendants

Defendants Tiffany and Brown will suffer no prejudice as a result of Mr. Smith not testifying in this matter. As to liability the Defendant truck driver Tiffany and the defense expert accident reconstruction engineer have conceded that Walter Smith did nothing wrong and was not a contributing cause of the accident.<sup>11</sup> As to questions concerning Mr. Smith’s injuries and subsequent damages, Defendants have taken the deposition of Mr. Smith’s evaluating physician Dr. White, Dr. Gregory McLaughlin who performed three neck surgeries on Mr. Smith, Mr. Smith’s former employer Ken Ruff, and Mr. Smith’s sisters Brenda and Carol Smith who have all testified as to Mr. Smith’s changed physical and mental condition since the collision. The defense was provided with a Life Care Plan by expert Sarah Lustig and an economic damage report prepared by expert Oliver Wood. Plaintiff has turned over all available documents in his possession related to the subject matter involved in the pending action that might pertain to Mr. Smith. Defendants Tiffany and Brown have in their possession the accident report from the wreck, all witness

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<sup>8</sup> *Id.* at 39:6-9

<sup>9</sup> *Id.* at 39:21-40:1.

<sup>10</sup> October 23, 2014 Deposition of Paul Pritchard, Exhibit F. 31:11-24

<sup>11</sup> See Exhibit E; March 12, 2014 Norman K. Tiffany Dep. 133:25-134-8; Exhibit E. “No, I don’t think he did anything wrong.”; September 17, 2013 Lance Corporal Dye Dep. Vol. I 42:4-8 “I didn’t see where he did anything wrong.”; February 4, 2013 Affidavit of Corbett James Mizzell. October 27, 2014 deposition of Michael Sutton P.42 L. 1-14 “So I do not see any...contributing causes for Mr. Smith in this wreck.”

statements, all depositions taken by both parties, and Mr. Smith's medical records and bills. Defendant Brown can fully evaluate liability and Plaintiff's damages utilizing the evidence in its possession.

### CONCLUSIONS OF LAW AND ORDER OF THE COURT

Based on the foregoing, I find good cause is shown demonstrating Mr. Smith will suffer particularized harm if compelled to give his deposition. "When the discovery process threatens to become abusive or create a particularized harm to a litigant or third party, the trial judge may issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense."<sup>12</sup> Here, Mr. Smith has been described by his treating neurologist as "neuropsychologically fragile" and his underlying brain injury would likely cause him to become frustrated, withdrawn, and agitated during and for a period after the deposition, posing a sufficient particularized harm to Mr. Smith such that he should be protected from giving his deposition. The Court finds that one byproduct of his brain injury is that Plaintiff has a documented inability to truthfully communicate information and a tendency to agree with questions in order to hide the fact that he has no memory of an event or topic. Deposing Mr. Smith under these conditions would be abusive, cause him embarrassment and cause him particularized harm. The Court will not compel a deposition of an individual who is mentally incapacitated and incapable of providing accurate information for the benefit of the Defendants who allegedly caused the mental incapacitation.

If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is "relevant and necessary" to the case.<sup>13</sup> In determining whether information is necessary, the party seeking the information must "demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather

<sup>12</sup> *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994).

<sup>13</sup> *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474, 674 S.E.2d 154, 162 (2009).

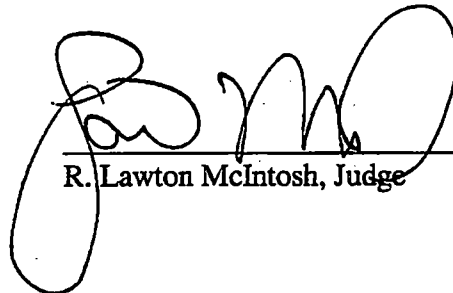
than a merely possible, threat.”<sup>14</sup> Defendants Tiffany and Brown have not offered any medical or expert evidence or testimony tending to show with specificity that Mr. Smith’s deposition is relevant or necessary to its presentation of the case on the merits. Furthermore, counsel for Plaintiff has agreed to stipulate that Mr. Smith will not testify at trial if he is not deposed. Because he cannot be deposed in this matter by Protective Order of this Court, the Court further Orders that Mr. Smith not testify at trial, thereby eliminating any potential prejudice to Defendants.

Based on the foregoing, I find Plaintiff has shown good cause why Mr. Smith will suffer particularized harm if he is compelled to give his deposition or offer testimony in this case. I further find Defendant Brown has failed to demonstrate with specificity how the absence of Mr. Smith’s deposition will impair the presentation of its case on the merits.

Plaintiff’s Motion to Quash the Notice of Deposition of Walter Smith by Protective Order pursuant to Rule 26(c), SCRCP is hereby granted.

**IT IS SO ORDERED!**

4-24, 2015  
Anderson South Carolina

  
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R. Lawton McIntosh, Judge

<sup>14</sup> *Hollman v. Wolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009).