ANSWER TO QUESTION NO. 7

Defendant sought to invoke the district court's subject matter jurisdiction on the basis of diversity, 28 USC §1332. To do so, defendant must show that there is complete diversity between the plaintiff and all defendants. *SHR Ltd Partnership v Braun*, 888 F2d 455, 456 (CA 6, 1989). Whether diversity jurisdiction exists is usually determined at the time the lawsuit is filed. *Curry v US Bulk Transport,* 462 F3d 536, 540 (CA 6, 2006). In this case, when plaintiff filed the complaint there was complete diversity because Smith was a resident of Tennessee, UHC was a resident of either Delaware or Illinois, and defendant Johns was a resident of Michigan.

However, the district court nevertheless properly remanded the case back to state court because defendant Johns was a resident of Michigan. Pursuant to 28 USC §1441(b), a case cannot be removed on diversity grounds if a properly served defendant is a resident of the state in which the state court action was brought. Thus, because Johns is a Michigan resident and was sued in a Michigan state court by a non-resident plaintiff, UHC could not remove it to the U.S. District Court in Michigan. *Hutchins v Cardiac Science Inc,* 456 F Supp 2d 173, 192 (D Mass, 2006).

With respect to issue two, a motion for summary disposition arguing no genuine issue of material fact is brought pursuant to MCR 2.116(C)(10). A motion under this subrule is only proper if it is supported by affidavits, admissions, depositions, or other documentary evidence. MCR 2.116(G)(3); *Barnard Manufacturing v Gates Performance,* 285 Mich App 362, 369-370 (2000). If the moving party does not support the motion as required by the court rules, the nonmoving party has no duty to respond and the motion must be denied. MCR 2.116(G)(4); *Barnard Manufacturing,* 285 Mich App at 370. However, if the motion is properly supported, the nonmoving party must come forward with substantively admissible evidence that establishes a genuine issue of material fact for trial. *Id.*

Here, defendants supported their motion with Johns' affidavit, a permissible piece of evidence under the court rule. An argument could be made that the affidavit was not proper because the contents contradicted Johns' prior sworn deposition testimony. See *Casey v Auto-Owners Ins Co,* 273 Mich App 388, 396 (2006). However, this argument cannot prevail because the trial court does not have a copy of Johns' deposition to compare with the affidavit, and therefore the affidavit cannot be disregarded. In light of this,

defendants' motion was properly supported and Smith's burden to oppose the motion arose.

Smith argued that Johns' deposition established at least a question of material fact about the reasons for termination, since he admitted that he thought Smith was "slowing down" because of his age. Normally, this sworn deposition testimony that goes to the heart of the case would create a jury issue. However, Smith's failure to submit the deposition into the record, or even attach the pertinent pages to his response brief, violated his duty under the court rule to oppose a properly supported motion with substantively admissible evidence. And, Smith's promise to provide the deposition the next day did not excuse his failures, as promises to produce evidence are not sufficient to meet his burden under the court rule. *Maiden v Rozwood,* 461 Mich 109, 121 (1999). The motion was properly granted.

Finally, the motion for reconsideration was properly denied. Although the motion was not based upon the deposition transcript filed with the trial court, generally a motion for reconsideration is not proper when it is based upon evidence that could have been submitted with the original motion. MCR2.119(F)(3); *Cason v Auto-Owners,* 181 Mich App 600, 605 (1989). Additionally, a motion for summary disposition can only be decided based upon evidence submitted at the time the trial court decides the motion, *Pena v Ingham County Road Comm,* 255 Mich App 299, 310 (2003), and so the trial court properly denied the summary disposition motion based on the evidence presented at that time. Although an argument could be made that a trial court can give the first motion a "second look" through a motion for reconsideration, *Hill v City of Warren,* 276 Mich App 299, 306-07 (2007), that is not usually done and here it is difficult to make the argument when the facts do not disclose why Smith never ordered or filed the transcript until after the motion for summary disposition was decided.