

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-5743

Gregory J. Feldman, MD, Joseph A. Boscia, III, MD,
Upstate Lung & Critical Care Specialists, PC, and
Devendra Shantha, MD,

Appellants,

v.

William Mark Casey, Ray E. "Chuck" Thompson,
And Charles M. Fogarty, **M.D.**,

Respondents.

RECORD ON APPEAL

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INDEX

Orders:

Order of October 7, 2011	2
Order of March 23, 2012	4

Judgments:

Judgment in a Civil Case Form 4 Order of February 1, 2012	17
Judgment in a Civil Case Form 4 Order of May 14, 2012	20

Pleadings:

Second Amended Complaint	22
Notice of Motion and Motion for Reconsideration and to Amend of April 9, 2012	41

Transcripts:

Transcript of Record of September 8, 2011 Hearing	44
Transcript of Record of January 18, 2012 Hearing	63

Other Materials and/or Documents:

Email from The Honorable Roger L. Couch of September 30, 2011	103
Appellants' letter to the Honorable Letitia A. Verdin of March 6, 2012 (with attachments)	104
Appellants' letter to the Honorable Letitia A. Verdin of August 24, 2012	109
Email from The Honorable Letitia A. Verdin of August 24, 2012	110

Certificate of Counsel	111
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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

Gregory J. Feldman, MD, Joseph A.
Boscia, III, MD, Upstate Lung and Critical
Care Specialists PC, and Devendra
Shantha, MD,

Plaintiffs,

vs.

William Mark Casey, Ray E. "Chuck"
Thompson, and Charles M. Fogarty, MD,

Defendants.

ORDER

C.A. NO.: 2010-CP-42-5743

This matter came before this Court upon Defendants' Motions to Dismiss Plaintiffs' Amended Complaint.

Upon considering Plaintiffs' Amended Complaint, Defendants' Motions to Dismiss Plaintiffs' Amended Complaint, Defendants' Memorandum of Law in Support of their Motions to Dismiss, the authority cited therein, and arguments of counsel, I hereby find:

1. This Court reserves ruling on Defendants' Motions to Dismiss Plaintiffs' Amended Complaint under Rule 12 of the South Carolina Rules of Civil Procedure, and does not retain jurisdiction of these Motions.

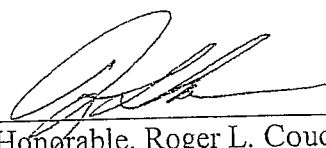
2. Plaintiffs are hereby granted the right to amend their Amended Complaint pursuant to Rule 15. Defendants will not be prejudiced if Plaintiffs amend their Complaint and justice can be served by such amendment. Plaintiffs shall have thirty (30) days from October 6, 2011 to serve a Second Amended Complaint upon Defendants.

3. Defendants' shall have fifteen (15) days from the date of service of Plaintiffs' Second Amended Complaint to respond.

IT IS HEREBY ORDERED that:

Plaintiffs' are hereby granted the right to amend their Amended Complaint pursuant to Rule 15. Plaintiffs' shall have thirty (30) days from October 6, 2011 to serve a Second Amended Complaint upon Defendants. Defendants' shall have fifteen (15) days from the date of service of to Answer Plaintiffs' Second Amended Complaint.

Defendants' 12(b)(6) Motions to dismiss are continued and may be reasserted after the pleadings are settled and the issues are joined.


The Honorable, Roger L. Couch
Judge, Seventh Judicial Circuit

October 6, 2011

Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Gregory J. Feldman, MD, Joseph A.)
Boscia, III, MD, Upstate Lung & Critical)
Care Specialists, PC, and Devendra)
Shantha, MD,)
Plaintiffs,)
vs.)
William Mark Casey, Ray E. "Chuck")
Thompson, and Charles M. Fogarty, MD,)
Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-5743

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS
SECOND AMENDED COMPLAINT**

This action came for hearing before me on January 18, 2012, on the Motions to Dismiss Plaintiffs' Second Amended Complaint filed by Defendants William Mark Casey ("Casey"), Ray E. "Chuck" Thompson ("Thompson"), and Charles M. Fogarty, MD ("Fogarty") (collectively referred to herein as "Defendants"). Plaintiffs were represented by Milton Mann. Casey was represented by Joe Mooneyham; Thompson was represented by Matt Henrikson; and Fogarty was represented by Ellen Cheek. Defendants submitted or rested on previously submitted briefs, which the Court has considered in addition to the parties' oral argument. For the reasons stated below, Defendants' respective Motions to Dismiss Plaintiffs' Second Amended Complaint are granted, Plaintiffs' abuse of process claim is dismissed with prejudice, and Plaintiffs are barred from reasserting at any time in the future their civil conspiracy claim.

Motion to Dismiss Standard

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a plaintiff's pleading based on a failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. The circuit court properly dismisses a claim when the defendant demonstrates that the facts stated in plaintiff's pleading fail to establish an actionable claim. *Hambrick v. GMAC Mortg.*

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Corp., 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). In considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

Plaintiffs' Claims

Plaintiffs' Second Amended Complaint asserts causes of action against all Defendants for abuse of process and civil conspiracy arising from an underlying medical malpractice suit, *William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC*, filed in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, Case No. 2006-CP-42-1728 (the "Medical Malpractice Action"). See Second Amended Complaint at ¶ 4. According to the Second Amended Complaint:

Plaintiffs provided medical services and treatment to Casey between May 28, 2004, and June 3, 2004, with respect to chest pain Casey experienced at work on May 28, 2004. See Second Amended Complaint at ¶¶ 6-13. After Casey was admitted to the hospital, a chest x-ray was taken that showed a small metallic foreign body in the x-ray field. See Second Amended Complaint at ¶ 8. To "clinical[ly] correlate" (or investigate) the foreign body shown on the x-ray, Plaintiffs performed on Casey a flexible bronchoscopy followed by a rigid bronchoscopy. See Second Amended Complaint at ¶¶ 8-12. During the rigid bronchoscopy, Casey suffered a pneumothorax. See Second Amended Complaint at ¶¶ 9-13.

After Casey was discharged from the hospital, he complained to Plaintiffs that he suffered from forgetfulness, short-term memory loss, personality changes and permanent disability caused by the rigid bronchoscopy and resulting pneumothorax. See Second Amended Complaint at ¶¶ 14-17. Plaintiffs rejected Casey's complaints and refused to support his resulting attempt to obtain disability benefits, and declined to continue treating Casey. See

Second Amended Complaint at ¶ 18, 56.

In 2004, after Plaintiffs refused to continue treating Casey, Casey began treating with a psychologist and therapist in Spartanburg. See Second Amended Complaint at ¶¶ 58-59. Also in 2004, Casey became a patient of Fogarty, who previously had been medical partners with Plaintiff Gregory Feldman. See Second Amended Complaint at ¶¶ 18, 20, 28, 48, 58. In the course of assuming Casey's treatment, Fogarty reviewed Casey's medical records, including those relating to Casey's bronchoscopies and pneumothorax, and saw Casey at Fogarty's medical office and Fogarty's medical research facility. See Second Amended Complaint at ¶ 18, 34, 40, 48. Based thereon, Fogarty developed the medical opinion that Casey had suffered a cerebral air embolism and resulting permanent brain injury during the rigid bronchoscopy Plaintiffs performed on Casey, and that Plaintiffs had deviated from the applicable standard of medical care in treating Casey. See Second Amended Complaint at ¶¶ 28, 31, 33-36, 39-40. Fogarty did not order a MRI of Casey's brain. See Second Amended Complaint at ¶ 34. On July 21, 2005, in Fogarty's medical chart for Casey, Fogarty noted his opinion that Casey had suffered a "permanent brain injury." See Second Amended Complaint at ¶¶ 28, 36. As Casey's treating's physician, Fogarty's opinion regarding Casey's medical condition and his office notes regarding same also were provided in relation to Casey's application for private disability insurance benefits, as well as Social Security disability benefits. See Second Amended Complaint at ¶¶ 37, 74-76.

In 2005 and 2006, Thompson, a Spartanburg lawyer who went to high school with Casey, provided Casey legal assistance in relation to Casey's applications for disability benefits. See Second Amended Complaint at ¶¶ 49, 75, 77. Thompson also consulted with Fogarty regarding Fogarty's opinion that Casey had suffered a permanent brain injury as a result of Plaintiffs' having violated their standard of care with respect to Casey's medical treatment. See Amended

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Complaint at ¶¶ 28, 44, 51.

Also in 2006, Thompson filed the Medical Malpractice Action on behalf of Casey.¹ See Second Amended Complaint at ¶ 5. In that suit, Casey alleged that Plaintiffs in the present case breached the standard of care with respect to Casey's medical treatment between May 28, 2004, and June 3, 2004, causing him damages, including neurological injury and permanent disability. See Second Amended Complaint at ¶ 6. Fogarty was identified and deposed in the Medical Malpractice Action as an expert witness, and was consulted by Thompson on occasions with respect to medical matters relating to the Medical Malpractice Action, and with respect to Casey's independent applications for disability coverage. See Second Amended Complaint at ¶¶ 41-42, 48, 76.

During the course of discovery in the Medical Malpractice Action, Thompson arranged for Casey to obtain an MRI under a fictitious name and date of birth from Thompson's brother-in-law. See Second Amended Complaint at ¶¶ 86-90. Thompson and Casey did not reveal the MRI, which was negative, to Plaintiffs during discovery in the Medical Malpractice Action. See Second Amended Complaint at ¶¶ 90-91. Fogarty was not involved in Casey's having the MRI, or Thompson's and Casey's discovery-related efforts with respect to the MRI. See Second Amended Complaint. Plaintiffs learned of the MRI after one of Plaintiffs' lawyers in the Medical Malpractice Action received an anonymous letter regarding it. See Second Amended Complaint at ¶ 92.

The Medical Malpractice Action was tried before a Spartanburg County jury beginning on May 11, 2010. See Second Amended Complaint at ¶ 99. On May 28, 2010, after a 14-day trial, the jury returned a defense verdict in favor of Plaintiffs in this case. See Second Amended

¹ Plaintiffs' Second Amended Complaint does not specify the date that the Medical Malpractice Case was filed; but the case number Plaintiffs cite (2006-CP-42-1728) indicates that the suit was filed in 2006. See Second Amended Complaint at ¶ 4.

Complaint at ¶ 100.

Plaintiffs filed their original Complaint in this case on October 27, 2010, claiming that Defendants engaged in abuse of process and civil conspiracy in relation to the Medical Malpractice Action. *See* Complaint; *see also* Second Amended Complaint. After Defendants moved to dismiss Plaintiffs' original Complaint in lieu of answering same, Plaintiffs filed an Amended Complaint as of right, reasserting against Defendants their claims for abuse of process and civil conspiracy. *See* Amended Complaint. When Defendants moved to dismiss the Amended Complaint, Plaintiffs moved for and received leave of court to file their Second Amended Complaint, again asserting against Defendants claims for abuse of process and civil conspiracy. *See* Second Amended Complaint.

On January 18, 2012, at the hearing on Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint, Plaintiffs withdrew their civil conspiracy claim, expressly reserving the right to re-file such claim if additional facts were discovered during discovery in this case that Plaintiffs believed supported that claim.

Because this Court finds that Plaintiffs' claims for abuse of process and civil conspiracy are time-barred, which fact necessitates the dismissal of the Second Amended Complaint and prevents Plaintiffs from re-filing their civil conspiracy claim at any time in the future, this Order addresses both of these causes of action.

Analysis

The facts alleged in Plaintiffs' Second Amended Complaint show that Plaintiffs had notice of a potential claim for abuse of process more than three years before this action was filed on October 27, 2010. Therefore, Plaintiffs' abuse of process claim is time-barred by the statute of limitations, and Plaintiffs' Second Amended Complaint is dismissed with prejudice pursuant to Rule 12(b)(6), SCRCP. Further, because Plaintiffs' pleading also demonstrates that Plaintiffs

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9

had notice of a potential claim for civil conspiracy more than three years before this action was filed, Plaintiffs are time-barred from re-asserting such claim at any time in the future.

I. Plaintiffs' Claims Are Time-Barred.

This action is governed by a three-year statute of limitations period. S.C.Code Ann. § 15-3-530 (2005); see *Whitfield Const. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999) (applying three-year statute of limitations in abuse of process action); *Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989) (recognizing that Section 15-3-530's limitations period (which previously was six years) applies to conspiracy claims).

"A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Significantly, South Carolina courts recognize that "[s]tatutes of limitations are not simply technicalities." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* Statutes of limitations relieve courts of the burden of trying stale claims of those who have slept on their rights, and are intended to "ensure litigation is brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." *Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2001) (citations and internal punctuation omitted).

In determining when a cause of action arose under an applicable statute of limitations, South Carolina courts apply the "discovery rule." *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). Under the discovery rule, the statute of

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limitations begins to run from the date the party either knew, or by the exercise of reasonable diligence should have known, that some legal right had been invaded. *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010). 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. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

The discovery rule thus focuses upon whether the complaining party acquired knowledge of any existing facts sufficient to put the party on inquiry which, if developed, would disclose alleged wrongdoing. *Burgess*, 300 S.C. at 186-87, 386 S.E.2d at 800. "Moreover, although a party claims ignorance of existing facts and circumstances, the same result [i.e., the statute of limitation's running] follows if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence." *Id.* Thus, the statute of limitations begins to run from the date a plaintiff knew or should have known that he had a claim, and not when the plaintiff sought advice of counsel, or developed a full-blown theory of recovery, or discovered a witness to support or prove his case, or "obtain[ed] actual knowledge of either the potential claim or the facts giving rise thereto." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009) (citations omitted). "Moreover, the focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer:

The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that he had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (quoting *Tollison v. &*

5
Machinery Co., Inc., 812 F.Supp. 618, 620 (D.S.C.1993).

The date on which discovery of the cause of action should have been made is an objective question. *Joubert v. S.C. Dep't of Soc. Servs.*, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000).

In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case 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.

Young v. South Carolina Department of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

In this case, Plaintiffs' abuse of process and conspiracy claims are time-barred because the facts alleged in Plaintiffs' Second Amended Complaint, when taken in the light most favorable to Plaintiffs, clearly demonstrate that Plaintiffs knew or should have known that their claims for abuse of process and civil conspiracy existed in 2006, when the Medical Malpractice Action was filed against them. See Second Amended Complaint at ¶ 4. These facts mandate the dismissal of Plaintiffs' abuse of process claim in the current action, which Plaintiffs filed more than three years after 2006, on October 27, 2010, and prevent Plaintiffs from re-asserting their voluntarily-dismissed civil conspiracy claim at any time in the future.

A. The Statute Of Limitations Expired On Plaintiffs' Abuse of Process Claim.

1. Plaintiffs' Abuse of Process Claim Arose at Least When the Medical Malpractice Action was filed in 2006.

Plaintiffs' abuse of process claim is time barred, because that claim arose at least when the Medical Malpractice Action was filed in 2006 – more than three years before Plaintiffs filed their current suit. According to the Second Amended Complaint, and construing those allegations in the light most favorable to Plaintiffs:

- In 2004, before the Medical Malpractice Action was filed, Plaintiffs knew that

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Casey claimed that he had suffered brain injury and permanent disability as a result of the pneumothorax Casey experienced during the rigid bronchoscopy. Plaintiffs did not believe Casey's injury or permanent disability claims were true or legitimate, and they did not support Casey's theory or Casey's attempt to obtain resulting disability benefits. See Second Amended Complaint at ¶¶ 13-18.

- In 2006, when the Medical Malpractice Action was filed, Plaintiffs knew that Casey and Thompson had filed a medical malpractice lawsuit against them, which suit Plaintiffs believed was for a purpose other than to redress legitimate medical injuries sustained by Casey. Plaintiffs knew Casey and Thompson were claiming that Plaintiffs had committed medical malpractice in the course of Casey's treatment. See Second Amended Complaint at ¶¶ 4-5.

- Plaintiffs contend that Casey's motivation for filing the Medical Malpractice Action was to obtain prescription pain medication and disability benefits. See Second Amended Complaint at ¶¶ 106-107.

Thus, when Casey sued Plaintiffs for malpractice in 2006, Plaintiffs believed that the suit was an abuse of process, because Plaintiffs already had determined that Casey had sustained no permanent injury, and because Plaintiffs believed that Casey was simply seeking to obtain prescription narcotics and disability benefits. The statute of limitations on Plaintiffs' abuse of process claim thus began to run at least from the date the Medical Malpractice Action was filed in 2006, and prevents Plaintiffs from maintaining such claims in the present case, which Plaintiffs filed in 2010. See *Gibson*, 383 S.C. at 406, 680 S.E.2d at 782.

Significantly, the discovery rule bars Plaintiffs' claims regardless of the fact that Plaintiffs' Second Amended Complaint appears to allege that Plaintiffs were not aware of Fogarty's involvement in the Medical Malpractice Action until sometime during the pendency of

7
that case.² As explained above, the discovery rule focuses on the date a plaintiff discovers an injury – in this case, the fact that the Medical Malpractice Action was filed against them – “not the date of the discovery of the wrongdoer.” *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170.

Although Plaintiffs’ pleading alleges that Fogarty’s “involvement” in the Medical Malpractice Action was concealed from Plaintiffs until the “11th hour” of that case, *see* Second Amended Complaint at ¶ 42, the claimed fact that Plaintiffs did not know the identity of all alleged wrongdoers in that suit did not prevent the statute of limitations from running. *See id.* This is because the filing of the Medical Malpractice Action reasonably put Plaintiffs – who believed the suit to be meritless and only interposed to harm them, *see* Second Amended Complaint at ¶¶ 18,

30, 56 – on notice that some right of theirs may have been invaded, regardless of whether Plaintiffs knew the identity of the alleged wrongdoer(s) other than Casey and Thompson, whose names appeared on the pleading. *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. “[T]he requirement of presenting expert testimony to meet the burden of proof on subjects beyond the knowledge and understanding of lay jurors is by no means new,” especially in medical malpractice cases. *5 Star, Inc. v. Ford Motor Co.*, 395 S.C. 392, 399, 718 S.E.2d 220, 224 n.3 (Ct. App. 2011). A reasonable person in Plaintiffs’ position would have known that Casey and Thompson had consulted with and/or were working with a medical expert in relation to the Medical Malpractice Action prior to and upon its filing; and because Plaintiffs believed the suit to be baseless, Plaintiffs knew or should have known that some alleged claim against that medical expert might exist. Because Fogarty’s identity and alleged “role” in the Medical Malpractice Action were facts and circumstances that could have been known to Plaintiffs

² The Second Amended Complaint does not specify when Plaintiffs became aware that Fogarty was Casey’s treating physician, or when Fogarty was identified as an expert witness. *See* Second Amended Complaint. Plaintiffs allege simply that Fogarty’s “role as an expert witness was concealed until the 11th hour” from Plaintiffs and their counsel. *See* Second Amended Complaint at ¶ 42.

5

through the exercise of ordinary care and reasonable diligence when the Medical Malpractice Action was filed in 2006 – more than three years before Plaintiffs instituted this suit – Plaintiffs' Second Amended Complaint is time-barred.

2. When The Medical Malpractice Action Terminated Is Irrelevant To The Application Of The Discovery Rule And The Time-Barring Of Plaintiffs' Abuse of Process Claim.

Perhaps notably, facts pled in Plaintiffs' Second Amended Complaint indicate that Plaintiffs intentionally waited to file their abuse of process claim until after the disposition of the Medical Malpractice Action. See Second Amended Complaint at ¶ 98 (alleging that Thompson sought to protract the Medical Malpractice Action in order to "forestall a counter lawsuit" from Plaintiffs). Significantly, when the Medical Malpractice Action ultimately was resolved is of no relevance to the application of the discovery rule bar to Plaintiffs' abuse of process claim. Unlike a claim for malicious prosecution, an abuse of process claim does not require the termination of the underlying proceedings in the plaintiffs' favor, see *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010),³ and instead begins to run when the plaintiffs knew or should have known that the alleged abuse had occurred, see *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170.

B. Plaintiffs' Civil Conspiracy Claim Is Time-Barred.

The three-year statute of limitations also time-bars Plaintiffs civil conspiracy claim, which Plaintiffs voluntarily dismissed at the hearing on Defendants' Motions to Dismiss with the expressly reserved right to reassert such claim should discovery in this case produce facts which Plaintiffs believe support such claim.

A civil conspiracy becomes actionable only "once overt acts occur which proximately

³ The elements of malicious prosecution are (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *McBride*, 389 S.C. at 565, 698 S.E.2d at 855.

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cause damage to the plaintiff.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). As discussed above, in South Carolina, the statute of limitations for conspiracy claims is governed by the “discovery rule,” and therefore begins to run upon discovery of the conspiracy itself or of “such facts as would have led to the knowledge thereof, if pursued with reasonable diligence.” See *Burgess*, 300 S.C. at 187, 386 S.E.2d at 800-01. A party cannot escape the application of this rule by claiming ignorance of existing facts and circumstances, or ignorance of the identity of an alleged tortfeasor. *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170.

Any claim by Plaintiffs for civil conspiracy is time-barred because more than three years have elapsed since the filing of the Medical Malpractice Action – which is the date when Plaintiffs knew that an alleged conspiracy existed, or when Plaintiffs knew or could have known pertinent facts sufficient to apprise themselves of their claim’s alleged existence. Specifically, according to the Second Amended Complaint, Fogarty was the author of the “permanent brain injury scheme” and indispensable for Thompson in “their common scheme to manufacture a pretext for the lawsuit and disability claim.” See Second Amended Complaint at ¶¶ 199-211. Thus, the alleged conspiracy was to manufacture a pretext to sue Plaintiffs for malpractice; and the overt “act” in furtherance of the conspiracy was the filing of that suit. Accordingly, once Plaintiffs were sued for malpractice – i.e., once the Medical Malpractice Action was filed in 2006 – they were damaged by the alleged conspiracy, and the statute of limitations on that claim began to run, regardless of whether Plaintiffs claim that they only later learned of Fogarty’s “involvement” in the alleged scheme. See *Hackworth*, 385 S.C. at 115, 682 S.E.2d at 874. When the Medical Malpractice Action was filed against Plaintiffs in 2006, Plaintiffs knew the identity of two of the alleged conspirators, Casey and Thompson; and because medical malpractice claims require expert medical testimony, the filing of the suit put Plaintiffs on notice

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that some other physician was involved in the alleged case-filing conspiracy, thus tolling the statute of limitations. Because the three-year statute of limitations on Plaintiffs' civil conspiracy claim expired in 2009, such claim is and will remain time-barred.

II. The Court Does Not Reach Defendants' Arguments That Plaintiffs' Second Amended Complaint Fails To State A Claim Upon Which Relief Can Be Granted.

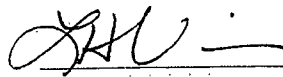
Because this Court finds that Plaintiffs' claims against Defendants for abuse of process and civil conspiracy are time-barred by the statute of limitations, the Court has not reached or ruled upon Defendants' additional arguments that Plaintiffs have failed to plead actionable claims for abuse of process or civil conspiracy.

Conclusion

Because Plaintiffs had notice of a potential claim abuse of process and civil conspiracy when the underlying Medical Malpractice Action was filed in 2006, and because more than three years have expired since that date, Plaintiffs' claims for abuse of process and civil conspiracy are time-barred by the statute of limitations. Therefore, this Court grants in full Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint, and dismisses with prejudice the abuse of process claim asserted therein; and Plaintiffs are barred from re-asserting at any time in the future their claim for civil conspiracy.

IT IS SO ORDERED.

3/21, 2012


Letitia H. Verdin
Presiding Judge

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4205743

Gregory J. Feldman, MD Joseph A. Boscia, III
Upstate Lung and Critical Devendra T Shantha, MD
Care Specialists PC

William Mark Casey Ray E "Chuck"
Charles M Fogarty MD Thompson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:
This matter comes before the Court on Motions to Dismiss of all Defendants. This Court finds that the Plaintiffs had notice of a potential claim for abuse of process and for civil conspiracy before October 27, 2007. This action was filed on October 27, 2010. Therefore, the claim is time-barred by the statute of limitations. Defendants' Motions to Dismiss are granted in full. Defendants are requested to submit a single proposed order consistent with these findings.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

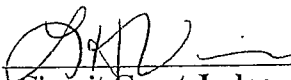
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

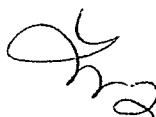
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2162
Judge Code

1/30/2012
Date

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2/1/12 This judgment was entered on, and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Franklin Milton Mann, Jr., F. Milton Mann, Jr Atty at Law,
1089 Boiling Springs Road, Spartanburg, SC 29303

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter

2/1/12
Joe Mooneyham, Mooneyham Flowers Berry & Karow, P.O.
Box 8359, Greenville, SC 29604

Matthew Holmes Henrikson, Henrikson Law Firm, LLC,
P.O. Box 26554, Greenville, SC 29616

Michael B.T. Wilkes, Michael Wilkes Law Firm, PA, 127
Dunbar Street #200 Spartanburg, SC 29306

Ellen S. Cheek, Michael Wilkes Law Firm, PA, 127 Dunbar
Street, Suite 200, Spartanburg, SC 29306

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley

Hope Blackley - Spartanburg County Clerk Of Court

Pat [Signature]

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4205743

Gregory J. Feldman, MD Upstate Lung and Critical Care Specialists PC	Joseph A. Boscia, III Devendra T Shantha, MD	William Mark Casey Charles M Fogarty MD	Ray E "Chuck" Thompson
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)

☐ Statement of Judgment by the Court:

This matter comes before the Court on Plaintiff's Motion to Reconsider pursuant to Rule 59(e) SCRPC. Plaintiff's Motion to Reconsider and for Rehearing is denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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Circuit Court Judge

2162

Judge Code

4/30/2012

Date

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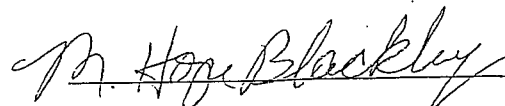
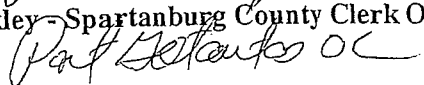
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Hope Blackley - Spartanburg County Clerk Of Court


Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Gregory J. Feldman, MD, Joseph
A. Boscia III, MD, Upstate Lung and
Critical Care Specialists PC, and
Devendra Shantha, MD,

Plaintiffs,

vs.

William Mark Casey,
Ray E. "Chuck" Thompson, and
Charles M. Fogarty, MD.

Defendants.

Second Amended Complaint
(Jury Trial Demanded)

C. A. No. 2010-CP-42-5743

Now comes the Plaintiffs complaining of the Defendants and allege:

Venue and Jurisdictional Allegations

1. That Plaintiffs are citizens of the County of Spartanburg, State of South Carolina.
2. Defendants are, upon information and belief, citizens of the County of Spartanburg, State of South Carolina.
3. Venue and jurisdiction are vested in the Circuit Court of the Seventh Judicial Circuit in and for Spartanburg County, South Carolina.

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Factual Allegations

4. The medical malpractice action out of which this complaint arose was captioned *William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC*, filed in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, case number 2006-CP-42-1728.

5. In the medical malpractice action, Mr. William Mark Casey through his attorney, Mr. Ray E. "Chuck" Thompson, alleged Drs. Feldman, Boscia and Shantha breached the standard of care respecting his medical treatment and as a result of which Mr. Casey suffered permanent brain damage that rendered him totally disabled.

6. Mr. Casey sought actual and punitive damages arising out of certain treatment and care, which took place at the hands of the doctors from the period May 28, 2004 through June 3, 2004, that allegedly caused a profound neurological injury and permanent disability.

7. Essentially, Mr. Casey was admitted to Spartanburg Regional Medical Center with chest pain from his workplace at Michelin on May 28, 2004.

8. As part of the work-up, a chest x-ray was done on that date which revealed a small metallic density foreign body and clinical correlation was suggested.

9. Accordingly, Dr. Boscia performed a flexible bronchoscopy, which did not result in retrieval of a foreign object, but did reveal abnormal tissue.

10. Thereafter, Dr. Boscia referred Mr. Casey to his partner, Dr. Feldman, for a rigid bronchoscopy.

11. Mr. Casey was sent home until several days later on June 3, 2004 when he was admitted for the rigid bronchoscopy.

12. Dr. Feldman performed that procedure with Dr. Shantha, who was the attending anesthesiologist.

13. At the close of the rigid bronchoscopy, Mr. Casey suffered a pneumothorax, a known risk, and was required to stay in the hospital through June 6, 2004.

14. Mr. Casey contended that as a result of the rigid bronchoscopy, he suffered irreversible and "permanent brain injury" as a result of the pneumothorax.

15. He claims, *inter alia*, that bubbles or air emboli migrated to his brain and caused his injury.

16. Following his release from the hospital, Mr. Casey began to complain of pacing the floor, forgetfulness, short-term memory loss and personality changes.

17. Based upon the assertions within Paragraph 16, Mr. Casey sought permanent disability from the Social Security Administration and Aetna Disability Insurance.

18. Mr. Casey came under the care of Charles Fogarty, M.D., another Spartanburg Pulmonologist, after Drs. Feldman and Boscia would not support Mr. Casey's disability claims.

19. To their misfortunes, Dr. Fogarty was well known by Drs. Feldman and Boscia, prior to the medical malpractice action in a very negative way.

20. Before Drs. Feldman and Boscia became partners within Upstate Lung and Critical Care Specialists, PC, Drs. Feldman and Fogarty had been partners for a number of years.

21. The Feldman/Fogarty separation from joint medical practice was so acrimonious, in 2000, the event was very well known within the medical community of Spartanburg.

22. In September of 2004, Drs. Feldman and Boscia formed a pharmaceutical research company, which Dr. Fogarty viewed as a threat to his own medical practice and research company.

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23. Prior to the medical malpractice action, Dr. Fogarty actively sought to interfere with Drs. Feldman's and Boscia's research company and their patient care.

24. As a result of Dr. Fogarty's efforts to hamper the business efforts of Drs. Feldman and Boscia, in 2005 they were forced to sue Dr. Fogarty to clear their names and in an effort to prevent further damage to their reputations and business.

25. The Complaint was captioned *S. Carolina Pharmaceutical Research v. Charles M. Fogarty, M.D.*, filed in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, case number 2005-CP-42-1085.

26. During the *S. Carolina* lawsuit, Dr. Fogarty, in a couple of ways, saw his involvement with Mr. Casey as a golden opportunity to retaliate against Drs. Feldman and Boscia for his perceived wrongs of them starting a research company and filing suit against him.

27. First, Dr. Fogarty continued masterminding the generation of the unfounded "permanent brain injury" claims to injure his business competitors by damage to their reputation and through bogging them down for years in the protracted litigation defending against his scheme.

28. The "permanent brain injury" theory, along with a number of associated allegations of causation due to alleged deviations from the standard of care by Drs. Feldman, Boscia and Shantha ("the scheme"), was developed by Dr. Fogarty from sometime in 2004 until he finally published it in the medical records on July 21, 2005.

29. Second, Dr. Fogarty directly benefited himself by derailing his business competitors' efforts in the *S. Carolina* litigation due to the tremendous pressure created in their lives by the publicizing of the baseless allegations of a "permanent brain injury" within the destructive scheme.

30. Dr. Shantha and ULCCS were merely collateral damage and included in the medical malpractice case as parties in an effort to damage Drs. Feldman and Boscia.

31. Despite a total lack of objective medical investigation into Mr. Casey's alleged neurological condition and having no qualifications within any neurological specialty, Dr. Fogarty hatched a theory that Mr. Casey had suffered a cerebral air embolism ("permanent brain injury"), thereby causing the personality changes and cognitive deficits of which Mr. Casey complained.

32. It is important to note that an admitted fact of the medical malpractice action was that Dr. Fogarty's theories of Mr. Casey's "permanent brain injury" were unsupported by any medical literature. In addition, it was uncontroverted that Mr. Casey suffered no permanent lung damage as a result of the procedures.

33. Dr. Fogarty performed no basic neurological examination of Mr. Casey.

34. Under Dr. Fogarty's "care," Mr. Casey was not referred to any neurological expert nor did Dr. Fogarty order an MRI study of the brain.

35. Although taking the lead in Mr. Casey's medical treatment and being the architect of the "permanent brain injury" scheme, Dr. Fogarty did not review any objective neurological test results for Mr. Casey.

36. Despite the complete absence of any objective support of the "permanent brain injury" scheme, Dr. Fogarty ensured that Mr. Casey's medical records prominently and categorically reflected his baseless injury assertions by inserting this in his office notes dated July 21, 2005.

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37. At all times material, Dr. Fogarty intended for his baseless injury assertions within Mr. Casey's medical records to be the basis for Mr. Casey to claim and receive disability benefits.

38. Furthermore, leading up to and during the litigation, Dr. Fogarty intended for his baseless permanent injury fabrications within Mr. Casey's medical records to be the cornerstone of orchestrated "expert" testimony that was designed to be used in ensuring the survivability of the medical malpractice case for as long as possible.

39. Dr. Fogarty actively sought to mislead the doctors and their attorneys of his level and the purpose of involvement in the litigation by seeing Mr. Casey within his research facility as opposed to his medical practice, which would have created medical records that could have been discovered.

40. In addition, Dr. Fogarty conducted complex medical testing on Mr. Casey at his research facility, yet he did not maintain the medical records in an effort to conceal the purpose of his involvement and in order to harm the doctors' discovery efforts thereby prolonging the medical malpractice case.

41. Until his deposition on December 22, 2008, Dr. Fogarty was very successful in shielding his role in the "permanent brain injury" scheme by his active efforts to obstruct and evade his deposition.

42. Dr. Fogarty and Mr. Thompson went to great lengths to ensure that Dr. Fogarty's role as an "expert" witness was concealed until the 11th hour from the doctors and their attorneys to further frustrate discovery efforts and to hide his level of involvement in the execution of the "permanent brain injury" scheme.

43. Despite the best efforts of Dr. Fogarty and Mr. Thompson in implementing the scheme, Mr. Casey testified during his deposition that no one told him he had a brain injury.

44. Even throughout his deposition, Dr. Fogarty continued his attempts to hide his role as a mastermind of the lawsuit and his level of involvement in the medical malpractice action by making material misrepresentations.

45. A more perfect cast of individuals could not have been available for Dr. Fogarty's use in his efforts of destruction aimed primarily at Drs. Feldman and Boscia.

46. Mr. Thompson's fiancée and agent worked within Dr. Fogarty's clinical practice, assisting in giving Dr. Fogarty and Mr. Thompson unfettered access to each other, off the record and behind the scene, which they used to full advantage in their formation and pursuit of the scheme.

47. Mr. Casey's sister worked at the hospital for more than a decade and knew very well the animosity between Drs. Fogarty and Feldman.

48. It was a simple matter in 2004, when Dr. Fogarty got wind of Mr. Casey's procedure, for him to convince Mr. Casey's sister to allow him to review some of the medical records and offer his practice group's help, ensuring Dr. Fogarty the leadership role in the "permanent brain injury" scheme.

49. Yet, that is not all of the connections between the Defendants. Mr. Thompson and Mr. Casey's sister dated in high school. Further, Mr. Thompson and Mr. Casey played team sports together in high school.

50. In summary, the Defendants were well acquainted with each other for years prior to their schemes against Drs. Feldman and Boscia.

51. Dr. Fogarty and Mr. Thompson willingly implemented Dr. Fogarty's "permanent brain injury" baseless claim with ruthless disregard for the rights of the Plaintiffs.

52. Prior to being brought to SRHS on May 28, 2004, Mr. Casey worked a very physically demanding job on the tire production line of Michelin.

53. At middle age, Mr. Casey was facing burn out from the punishing work and the natural aging process of his body.

54. In addition, Mr. Casey was struggling in several other areas of his life: financially due to excessive debt; going through a divorce; and having trouble with his children. Each of which were significant stressors in his life.

55. Before May 28, 2004, Mr. Casey suffered from depression; was taking pain medications; and had abused prescription drugs. Each fact is clearly documented within Mr. Casey's medical records.

56. Immediately following his hospitalization in June of 2004, Mr. Casey actively sought increases in his pain medications and support for his disability claims from Drs. Feldman and Boscia. These requests of Mr. Casey were not medically supported and therefore were denied.

57. Months after the hospitalization, Mr. Casey started to claim that he could no longer play golf or have relationships with women.

58. In 2004 and in addition to requesting "help" from Dr. Fogarty, arrangements were made for Mr. Casey to start seeking treatment from Joseph Grace, Ph.D., a psychologist and therapist in Spartanburg.

59. Dr. Grace saw Mr. Casey, on a semi-weekly basis following his alleged "permanent brain injury," and his medical records were in evidence in the medical malpractice action by agreement of the parties.

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60. Contrary to the claims of Mr. Casey, the notes of Dr. Grace show that he was interacting with females and carrying on an active social life within the first year or year and a half after his supposed injury.

61. Additionally, Dr. Grace's notes show that Mr. Casey complained bitterly about the diminishment of his skills with his short game in playing golf and that he simply did not enjoy golf as much as he did before.

62. However, Mr. Casey's golf handicap printout from the South Carolina Golf Association showed that his golf handicap was lower after the supposed injury than it was prior thereto.

63. Clearly, Mr. Casey continued to play golf with a reasonable degree of frequency after the treatment and care by Drs. Feldman, Boscia and Shantha.

64. The notes of Dr. Grace also indicated that Mr. Casey had additional stressors at work in his life which pre-existed any treatment and care by Drs. Feldman, Boscia and Shantha and which experts acknowledged to be the type of forces that induce depression.

65. For example and from the notes of Dr. Grace, Mr. Casey had undergone a separation from his wife of many years, his teenage children were engaging in troublesome behavior, he had financial stresses which had caused the sale of his home on the golf course and he for many years had continued to work on an extremely demanding job which required large amounts of narcotic and non-narcotic pain medication to get through the day.

66. Jeffrey Smith, M.D., a psychiatrist who treated Mr. Casey subsequent to the alleged negligence, testified he saw no permanent psychiatric or behavioral injury, but only anxiety and depression and that Mr. Casey had not been honest with him about his pre-existing depression.

67. After a period of depression, Dr. Smith indicated Mr. Casey was able to return to the workforce in early 2006.

68. It is a well-accepted fact by the medical and scientific communities that a known side effect of narcotic pain medication misuse is depression or the worsening of preexisting depression.

69. For an unexplained reason within Mr. Casey's medical records, Dr. Fogarty abruptly doubled Mr. Casey's Hydrocodone prescription in February of 2006.

70. Hydrocodone is a narcotic pain medication and is one of the most widely abused prescription drugs in the United States.

71. Despite mandated state and federal regulations, Dr. Fogarty prescribed narcotics to Mr. Casey without the required medical documentation within Mr. Casey's medical records.

72. Mr. Casey was willing to do whatever it took to ensure his narcotic source and obtain disability benefits to keep him from returning to the backbreaking work at Michelin.

73. With a sure supply of narcotic, Mr. Casey was free to seek help obtaining disability monies.

74. Prior to the medical malpractice litigation, Mr. Casey's disability benefits were denied from the Social Security Administration on July 14, 2005 and Aetna Insurance Company for long-term benefits on May 28, 2006.

75. Following the denials, Mr. Casey turned to Dr. Fogarty and Mr. Thompson for help with his money issues and disability claim problems.

76. To "help" Mr. Casey and Mr. Thompson, as previously stated in the complaint, Dr. Fogarty ensured the development of the "permanent brain injury" scheme, which he infused into Mr. Casey's medical records for their use in the disability appeal and medical malpractice case.

77. In an effort to meet Mr. Casey's needs, thereby ensuring his continuation in the scheme, Mr. Thompson became active in seeking a reversal of his Aetna disability denials, despite not being his attorney in such matters because the denials did not suit his personal needs or agenda.

78. Mr. Thompson's initial efforts centered around the purposeful redaction of Mr. Casey's medical records that were provided to both treating physicians and retained expert witness with willful intent to make it appear that Mr. Casey suffered from a "permanent brain injury."

79. Despite the team's best efforts, Aetna fully rejected Mr. Casey's disability claim on October 13, 2006 in a letter addressed to Mr. Thompson.

80. In the rejection package, Aetna gave the team an analysis of the viability of the "permanent brain injury" claim, which included detailed reports from a Consulting Neuropsychologist and a Board Certified Neurologist.

81. In summary of the rejection, Aetna said that the speculations of Dr. Fogarty were not supported by objective neurological evidence or abnormal neurological examination findings.

82. Instead of heeding Aetna's review and addressing the stated concerns about the lack of any support for the existence of a legitimate "permanent brain injury" claim, the team continues to move forward with the medical malpractice scheme and fails to produce the Aetna report during discovery.

83. The Doctors' attorneys had to seek assistance from the Court to obtain a release from Mr. Casey to request the records directly from Aetna as opposed to Mr. Thompson merely turning over the report.

84. Mr. Thompson did place importance on one piece of information within the Aetna report, the need for an MRI study of the brain.

85. However, Mr. Thompson knew full well, based on the Aetna report, that a negative MRI study would be a death nail for the scheme.

86. Therefore in the cover of secrecy, Mr. Thompson, set the stage for an MRI to be performed on Mr. Casey's brain under a fictitious name and date of birth.

87. Mr. Thompson arranged for the test through his brother-in-law, a North Carolina general surgeon having no connection to Mr. Casey or the case, to be performed at an out of state hospital.

88. The Radiologist's report of the MRI test results stated that the MRI was negative.

89. Mr. Thompson received this report, and then continued to litigate the matter for eighteen months thereafter without revealing the MRI test or the radiology report.

90. To maintain the secrecy of the MRI test and findings, Mr. Thompson instructed his client to deny having any diagnostic medical tests, including specifically, the MRI, in his sworn deposition testimony less than seven months after the MRI was performed.

91. At all times material, Mr. Thompson despite being well aware of his duties to the Court pursuant to Rule 3.3, Candor Toward The Tribunal, willfully sought to injure the Plaintiffs by instructing Mr. Casey to lie under oath and by Mr. Thompson's failure to protect the candor of the proceedings within the medical malpractice case.

92. Ultimately, the Doctors' counsel only learned of the test fortuitously by virtue of an anonymous letter sent to attorney Spencer King.

93. The MRI test results were very important, inasmuch as it exposed the truth and totally confirmed the fact that Mr. Casey's "permanent brain injury" claim was nothing more than a scheme.

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(94.) It was a materially important piece of evidence to the Doctors, which was withheld, concealed, and secreted from them by Mr. Casey and Mr. Thompson, with a very high degree of impropriety.

(95.) By the time the Doctors' counsel received the Casey affidavit confirming the MRI and the results of the MRI, in excess of thirty depositions had been taken.

(96.) This included all of the Doctors, eight treating physicians and five medical experts.

(97.) Once the MRI test and findings were brought into the light of day, Mr. Thompson continued the litigation in an effort to forestall an ethics complaint by Drs. Feldman and Boscia.

98. In addition, once the MRI test and findings were brought into the light of day, Mr. Thompson and Mr. Casey continued the litigation in an effort to forestall a counter lawsuit from Drs. Feldman and Boscia, thereby serving the agenda of Dr. Fogarty as well.

99. The medical malpractice action was tried before the Court and a jury in the Spartanburg County Court of Common Pleas, commencing May 11, 2010.

100. After 14 trial days, the jury returned a verdict in favor of the Doctors on May 28, 2010 after deliberating between two and two and one-half hours.

101. Mr. Thompson knew the lack of validity of Dr. Fogarty's theories respecting any deviation of the standard of care by Dr. Shantha, yet still sought to gain by the publishing and disseminating of the fraudulent theories of injuries by willfully prolonging the medical malpractice litigation.

102. Prior to the trial, Dr. Shantha had been dismissed from proceedings by a motion for summary judgment.

FIRST CAUSE OF ACTION
(Abuse of Process)

103. Plaintiffs reallege all above paragraphs, to the extent not inconsistent herewith, as if each is set forth *in toto* hereunder.

104. Defendants have misused the legal process of the medical malpractice action in an attempt to accomplish purposes for which said proceedings were not allowed by law, specifically, as set out below:

105. Mr. Casey, at all times material, knew he did not have a "permanent brain injury" and that the scheme was simply developed for the purposes of the lawsuit and not for any treatment or medical purpose.

106. Mr. Casey willfully used the legal proceeding of the medical malpractice claim in an effort to continue to obtain narcotic drugs by the submission of false information about his physical condition and lying under oath.

107. Mr. Casey willfully used the legal proceeding of the medical malpractice claim in an effort to continue receiving disability benefits by the submission of false information about his physical condition within his lawsuit/scheme.

108. Dr. Fogarty willfully used the legal proceedings of the medical malpractice claim, which he initiated, in an effort to damage the reputations of Drs. Feldman and Bosca by publishing and disseminating fraudulent theories of injuries of Mr. Casey and thereby materially prolonging the litigation for his direct benefit.

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109. Dr. Fogarty willfully used the legal proceedings of the medical malpractice claim in an effort to economically damage the business interests of Drs. Feldman and Boscia in S. Carolina Pharmaceutical Research by publishing and disseminating fraudulent theories of injuries of Mr. Casey and by materially misrepresenting his involvement on behalf of the litigation team.

110. Mr. Thompson willfully used the legal proceedings to develop bogus "expert" witness testimony by the misleading redaction of medical records, which Mr. Thompson then used to seek Mr. Casey's disability benefits and to unnecessarily prolong the litigation.

111. Mr. Thompson willfully abused the legal process by using his court appointed powers to subvert the disability claims process for the purposes of manufacturing damages for use in the medical malpractice litigation scheme.

112. In addition, Mr. Thompson knew the lack of validity of Dr. Fogarty's theories respecting the "permanent brain injury" scheme, yet still sought to gain by the publishing and disseminating of the fraudulent theories of injuries by willfully prolonging the medical malpractice litigation.

113. Defendant Thompson willfully used the legal proceedings of the medical malpractice case in an effort to escape or forestall a report of his ethical breach to the South Carolina Bar respecting the suborning of perjury by his client.

114. Defendant Thompson willfully used the legal proceedings of the medical malpractice case in an effort to escape or forestall a counter lawsuit being filed against himself, Mr. Casey and Dr. Fogarty by continuing the litigation with full knowledge as to the lack of truthfulness in the "permanent brain injury" scheme and assertions of disability.

115. Plaintiffs have suffered damages, loss and harm, including but not limited to their reputations, money, emotional tranquility, and privacy.

116. Such damages, loss and harm were the proximate and legal result of the misuse of such legal process aforementioned.

SECOND CAUSE OF ACTION
(Civil Conspiracy)

117. Plaintiffs reallege all above paragraphs, to the extent not inconsistent herewith, as if each is set forth *in toto* hereunder.

118. Dr. Fogarty's role on behalf of Mr. Casey far exceeded the reasonable role of a treating physician or expert witness and at all times material, Mr. Thompson was well aware of this fact, even seeking to help him with his efforts.

119. Dr. Fogarty was the author of the "permanent brain injury" scheme, thereby seeking to ensure success for the venture in damaging Drs. Feldman and Boscia by unfairly trapping them in senseless litigation for years and at all times material, Mr. Thompson was well aware of this fact, even seeking to help him with his efforts.

120. Defendant Fogarty sought to professionally damage Drs. Feldman and Boscia, thereby increasing his own business value and productivity at the expense of the Plaintiffs' businesses and their loss of productivity and at all times material, Mr. Thompson was well aware of this fact, even seeking to help him with his efforts.

121. Dr. Fogarty was well aware that he was indispensable for Mr. Thompson in their common scheme to manufacture a pretext for the lawsuit and disability claim.

122. Further, Dr. Fogarty knew that Mr. Thompson would willingly turn a blind eye to any scheme to forward their abusing agenda regardless of how improbable the allegation of permanent injury may be.

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123. Mr. Thompson was well aware that he was indispensable for Dr. Fogarty's destructive agenda in their common scheme to manufacture a pretext for claiming "damages" in the lawsuit and disability claim.

124. Mr. Thompson was very well aware that Dr. Fogarty would go to any length to advance his improbable and malicious scheme in an effort to hurt and to retaliate against Drs. Feldman and Boscia.

125. Between February 4, 2007 and 2009, Mr. Casey, in furtherance of Dr. Fogarty and Mr. Thompson's permanent brain damage conspiracy, willingly took part with Mr. Thompson, and other unnamed third party(ies) in the scheme to circumvent the Rules of Civil Procedure.

126. Mr. Casey, in furtherance of Dr. Fogarty and Mr. Thompson's scheme to establish civil liability against Drs. Feldman and Boscia for causing Mr. Casey fictitious permanent brain damage, agreed to conceal the fact that on February 4, 2007 he had an MRI study of his brain.

127. Mr. Casey, in furtherance of Dr. Fogarty and Mr. Thompson's permanent brain damage conspiracy, agreed and proceeded to lie under oath in his deposition of August 30, 2007, in a willful and knowing effort to conceal the existence of the MRI report and image disc dated February 4, 2007.

128. Mr. Casey willingly participated in the concealment of the MRI report and image disc dated February 4, 2007, of the MRI study of his brain, which he received at the conclusion of the MRI study performed in the out-of-state hospital on February 4, 2007.

129. Mr. Casey was fully aware that the February 4, 2007, MRI study had been arranged by Mr. Thompson.

130. Mr. Casey utilized an assumed name and fictitious date of birth, given to him by Mr. Thompson, when submitting to the February 4, 2007, MRI study.

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131. Mr. Thompson solicited unnamed third-party(ies) to conceal Mr. Casey's MRI report and image disc that were dated February 4, 2007.

132. Mr. Casey solicited unnamed third-party(ies) to conceal his MRI report and image disc that were dated February 4, 2007.

133. Mr. Casey accepted funds from Mr. Thompson and/or unnamed third-party(ies) to pay for his February 4, 2007, MRI study, knowing that such payment was never to be reported or claimed within his lawsuit.

134. In 2008, Mr. Thompson and Dr. Fogarty, in furtherance of their permanent brain damage scheme, agreed for Dr. Fogarty to make material misrepresentations, under oath, during his deposition pursuant to Discovery in the original lawsuit.

135. As a direct and proximal result of the conspiracy between Dr. Fogarty, Mr. Thompson, and Mr. Casey, to concoct and disseminate permanent brain damage allegations, the Spartanburg Herald Journal unwittingly published fabricated allegations of the permanent brain damage and disability.

136. As a direct and proximal result of the conspiracy between Dr. Fogarty, Mr. Thompson, and Mr. Casey, to concoct and disseminate permanent brain damage allegations, the lives of Drs. Feldman and Boscia were instantly turned upside down, causing them additional and undue emotional distress, damage to their professional reputations, standing in the community, and loss of business, in combination resulting in an inability enjoy life, to create new businesses, and the continued harassment through litigation for an additional and unnecessary length of time.

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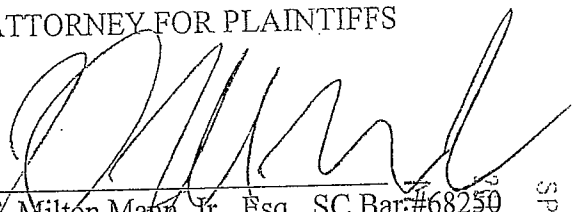
137. Special Damages incurred as a direct result of the allegations within the Second Cause of Action, include, but are not limited to, additional and unnecessary attorneys' fees pursuant to the recovery of the MRI disk from the out-of-state hospital; additional and undue emotional distress of being the victims of Defendants' fraudulent and senseless conspiracy scheme; additional and undue damage to Plaintiffs' professional reputations because of the newspaper article; and additional and undue accounting expenses and further damages to be ascertained through this lawsuit.

WHEREFORE, plaintiff prays that this court enter judgment:

- a. For a jury trial to be conducted in this matter;
- b. For actual and compensatory damages in an amount to be determined by the jury;
- c. For punitive damages in an amount to be determined by the jury; and
- d. For the cost of this action, including reasonable attorney's fees and for other such relief as appears just and equitable in the premises.

F. MILTON MANN, JR.
ATTORNEY FOR PLAINTIFFS

BY:


F. Milton Mann, Jr., Esq., SC Bar #68250
1089 Boiling Springs Road
Spartanburg, South Carolina 29303
(864) 208-0359

October 11, 2011
Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Gregory J. Feldman, MD, Joseph A.
Boscia, III, MD, Upstate Lung and Critical
Care Specialists PC, and Devendra
Shantha, MD,

Plaintiffs,

vs.

William Mark Casey, Ray E. "Chuck"
Thompson, and Charles M. Fogarty, MD,

Defendants.

NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
AND TO AMEND

C.A. NO.: 2010-CP-42-5743

**TO: THE HONORABLE LETITIA VERDIN, JOE MOONEYHAM, ATTORNEY FOR
DEFENDANT, WILLIAM MARK CASEY, MATTHEW H. HENRICKSON,
ATTORNEY FOR DEFENDANT RAY E. "CHUCK" THOMPSON AND ELLEN
CHEEK, ATTORNEY FOR DEFENDANT CHARLES M. FOGARTY, M.D.:**

YOU WILL PLEASE TAKE NOTICE that on the _____ day of

_____, 2012, at _____ .m. or as soon thereafter as the matter
can be heard, the Plaintiffs will move before the Honorable Letitia Verdin, for an Order granting
a rehearing or in the alternative for an Order allowing the amendment of the Court's Order
Granting Defendants' Motions to Dismiss Second Amended Complaint as it relates to Plaintiffs'
claims being time-barred and issued by the Honorable Letitia Verdin, signed on March 21, 2012,
clocked by the Spartanburg County Clerk of Court on March 23, 2012, and received by the
Plaintiffs' attorney by U.S. Mail on March 28, 2012. That such motion shall be based upon
federal case law, statutory case law in the State of South Carolina including, but not limited to,

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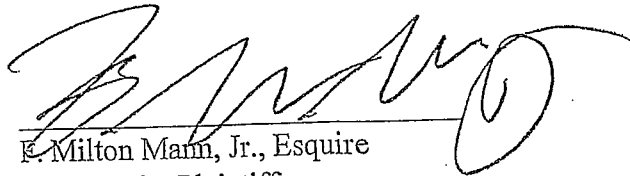
South Carolina Rules of Civil Procedure 52(b) and 59(e) and shall be made upon such grounds as it may appear at the hearing on such motion and any supporting memorandum.

In addition, the Plaintiffs will move for an order allowing Plaintiffs to amend their Complaint pursuant to Rule 15(b) of the South Carolina Rules of Civil Procedure. More specifically, this motion is based on the grounds that justice requires necessary dates be included for clarification, efficiency, and in the interest of justice. That such motion shall be based upon federal case law, the statutory case law in the State of South Carolina, including but not limited to South Carolina Rules of Civil Procedure 15(b) and shall be made upon such grounds as it may appear at the hearing on such motion and any supporting memorandum. Defendants will not be prejudiced by Plaintiffs being allowed to amend their Complaint due to the fact that Defendants are fully aware of all pertinent dates and justice will be served by such amendments.

In addition, the Plaintiffs will move for an order allowing Plaintiffs to amend their Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, more specifically, this motion is based on the grounds that justice requires Equitable Tolling where the Plaintiffs, by exercising reasonable diligence, could not have discovered essential information bearing on their claims. That such motion shall be based upon federal case law, the statutory case law in the State of South Carolina, including but not limited to South Carolina Rules of Civil Procedure 15 and shall be made upon such grounds as it may appear at the hearing on such motion and any supporting memorandum. Defendants will not be prejudiced by Plaintiffs being allowed to amend their Complaint because Defendants' alleged illegal actions of suborning perjury making

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material misrepresentations to the Court, and concealing evidence, caused Plaintiffs to be actively misled and prevented the Plaintiffs in extraordinary ways from discovering the facts essential to the filing of their Complaint and justice will be served by such amendment.



E. Milton Mann, Jr., Esquire
Attorney for Plaintiffs
1089 Boling Springs Road
Spartanburg, SC 29303
864-680-5079

Spartanburg, SC
April 9, 2012

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF COMMON PLEAS NONJURY

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GREGORY J. FELDMAN, MD, JOSEPH A.
BOSCIA, III, MD, UPSTATE LUNG &
CRITICAL CARE SPECIALISTS, PC,
AND DEVENDRA SHANTHA, MD,

PLAINTIFFS,

VS.

WILLIAM MARK CASEY, RAY E. "CHUCK"
THOMPSON, AND CHARLES M. FOGARTY,

DEFENDANTS.

TRANSCRIPT
OF
RECORD

2010-CP-42-05743

September 8th, 2011
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

1 A P P E A R A N C E S :

2 FRANKLIN MILTON MANN, JR.
3 ESQ.
4 Attorney for the Plaintiffs

5
6 JOE MOONEYHAM
7 ESQ.
8 Attorney for the Defendant William Mark Casey

9 MATTHEW HOLMES HENRIKSON
10 ESQ.
11 Attorney for the Defendant Ray E. "Chuck" Thompson

12 DOCTOR CHARLES M. FOGARTY
13 Pro se

14
15
16 PAMELA E. GREEN
17 Circuit Court Reporter
18 Seventh Judicial Circuit
19
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I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

1 P R O C E E D I N G S

2
3 THE COURT: All right. We're on the record in the case
4 of Doctor Feldman versus William Mark Casey and others.

5 I'd heard this case earlier on a motion to dismiss.
6 Later on I believe amended pleadings were filed. And, so,
7 it's become rather convoluted as to exactly where we stand,
8 in my opinion. And, so, the purpose of the hearing, I
9 guess, is to consider where we are and where we go.

10 Mr. Mann, are you ready to proceed?

11 MR. MANN: Your Honor, we are, and, and I believe that,
12 in response to the amended complaints, the defendants have
13 renewed their motions to dismiss. So, technically I believe
14 they have the floor.

15 THE COURT: Okay. So, we, we are now to a motion to
16 dismiss on the amended complaint?

17 MR. MOONEYHAM: That's, that's correct, Your Honor.

18 May it please the Court?

19 THE COURT: Yes, sir.

20 MR. MOONEYHAM: Joe Mooneyham for Mr. Casey.

21 THE COURT: Yes, sir.

22 MR. MOONEYHAM: And, of course, Mr. Henrikson is here
23 as is Doctor Fogarty, and we've all three moved to dismiss
24 the amended complaint.

25 THE COURT: All right. Well then it's your motion.

1 I'll hear from you.

2 MR. MOONEYHAM: All right. Thank you, Your Honor.

3 As I just alluded to, I, I represent Mark Casey in this
4 matter. We have filed a motion to dismiss the complaint
5 pursuant to Rule 12(b)(6). The complaint includes two
6 causes of action. There are extensive factual allegations
7 as you're aware, and then there's a cause of action for
8 abuse of process, and then a cause of action for civil
9 conspiracy.

10 I will not belabor the facts. You're quite familiar, I
11 believe, with the facts in this matter.

12 THE COURT: I am.

13 MR. MOONEYHAM: So, I will not go into those details.

14 In effect though, the complaint alleges that, as it
15 relates to Mr. Casey, that he abused process in this matter
16 in an attempt to damage the defendants -- as to that issue
17 specifically, if you look at the complaint itself, and, of
18 course, we're today limited to the four corners of the
19 complaint. We're not, not allowed to go outside the
20 complaint.

21 THE COURT: That's correct.

22 MR. MOONEYHAM: If you look at the complaint itself,
23 looking at specifically at Page 14 of the actual complaint,
24 which is where the abuse of process complaint or, or cause
25 of action begins, there is no allegation in this cause of

1 action that Mr. Casey did anything to cause damages to the
2 defendant. In fact, they're only two references to
3 Mr. Casey at all.

4 One reference, which is Paragraph 106, says that
5 Mr. Casey willfully abused the legal proceeding in an effort
6 to continue receiving narcotic drugs, and, of course, we
7 know that the defendants were not prescribing narcotic drugs
8 for Mr. Casey. And, so, that is not an allegation that is
9 germane to this relationship with them in anyway. So, that
10 allegation doesn't support the cause of action.

11 Then, in Paragraph 107, it says that Mr. Casey
12 willfully used illegal proceedings in an effort to continue
13 to receive disability benefits, and we know, of course,
14 that, likewise, his -- Mr. Casey's attempts to obtain
15 disability benefits had nothing to do with the defendants,
16 and certainly would not constitute abuse of process as it
17 relates to them. But we know that the litigation between
18 Mr. Casey and the defendants had nothing to do with the
19 abuse issues.

20 And, so, specifically, as to the first cause of action,
21 there is no allegation on the face of the complaint that
22 connects Mr. Casey's filing the lawsuit to any abuse of
23 process that would impact the defendants in anyway.

24 We cited for you the case of Painter. Let me get the
25 complete cite. I skipped over it. Painter against American

1 Medical Internists Incorporated, which sets forth the
2 essential elements of the cause of action of abuse of
3 process, and there just isn't any connection between the
4 conduct that's pled in the first cause of action in abuse
5 and damages to the defendant. And, so, our contention is
6 that, pursuant to Rule 12(b)(6), the first cause of action
7 fails as to Mr. Casey.

8 In addition, Your Honor, as to the second cause of
9 action, which is the civil conspiracy cause of action, which
10 begins on Page 16 of the complaint, there is no allegation
11 in Paragraphs 117 and following that Mr. Casey caused any
12 special damages to the defendants. And as you're quite
13 aware, in our jurisprudence, a cause of action for civil
14 conspiracy requires the plaintiff to prove special damages
15 that arose from some conduct outside the factual allegations
16 in the complaint, and in this case -- and they're, they're
17 ample---

18 THE COURT: Civil damages have to be caused by the
19 conspiracy itself?

20 MR. MOONEYHAM: Yes, sir.

21 THE COURT: Okay.

22 MR. MOONEYHAM: Special damages caused by the
23 conspiracy.

24 THE COURT: Right.

25 MR. MOONEYHAM: Outside the conduct that led us to the

1 underlying litigation.

2 In this case, Your Honor, there is no pleading in---

3 MR. MANN: Judge, I'd just offer a stipulation. Mr.
4 Casey was not named in the second cause of action.

5 THE COURT: Okay. Solves that problem.

6 MR. MOONEYHAM: And that was what I was about to say.
7 I was about to say, Your Honor, no allegation in the second
8 cause of action that addresses Mr. Casey's conduct at all.

9 THE COURT: I understand.

10 MR. MOONEYHAM: Okay. So, so then we're left with the
11 first cause of action. As we've already alluded to, there's
12 no factual allegation or allegation set forth in the first
13 cause of action that connects any abuse of process to any
14 damages suffered by the defendant.

15 THE COURT: All right. Does that complete Mr. Casey's
16 argument?

17 MR. MOONEYHAM: Yes, sir, it does, Your Honor. Thank
18 you.

19 THE COURT: Yes, sir.

20 MR. HENRIKSON: Your Honor, Matt Henrikson for Mr.
21 Thompson.

22 THE COURT: Yes, sir.

23 MR. HENRIKSON: A lot of the same principles apply to
24 Mr. Thompson's case with respect to the abuse of process.
25 Abuse of process requires that there, there be some,

1 creating some service of process or creating a case to be
2 filed for some purpose other than that for which it is
3 ordinarily brought.

4 In this case, a medical malpractice case, as you know,
5 was bought, and, in fact, all of the issues, including the
6 issues of punitive damages, were allowed to go to the jury,
7 which is -- and that's pled in the complaint. And, so, that
8 is, that is dispositive of the abuse of process in a case
9 because the case survived to go to the jury on those issues,
10 and to the extent that it did, we believe that that would,
11 that would obviate or that would defeat the abuse of process
12 cause of action.

13 Now, as to the conspiracy cause of action, I think it
14 would -- we've argued all that and what's interesting about
15 this argument today, as opposed to the one we had several
16 months ago, is that the amended complaint does not really
17 change any of the operative allegations in either, either
18 cause of action. So, we're, we're really repeating our same
19 arguments that we made the last time because there have been
20 no changes.

21 There were, there was some beefing up of the factual
22 allegations in the amended complaint, but there haven't been
23 any -- the, the defects that we argued about here before in
24 the original complaint were not corrected. And, so, there,
25 there still remains the allegation in the abuse of process

1 cause of action that the issues went to the jury, and there
2 still is a failure in the, in a conspiracy cause of action
3 to allege any special damages which resulted, which were
4 unique to the combination, unique to the conspiracy which is
5 required.

6 The Court of Appeals, in the last few weeks, has sort
7 of reiterated the State's position on, on this in the case
8 of Charles Gordon versus Jacklyn Busby citing a civil,
9 holding that civil conspiracy is a combination of two or
10 more persons joining for the purpose of injuring and causing
11 special damage. In that case the Court found that if a --
12 in citing the Hackworth versus Graywood Hammett, LLC case,
13 if a plaintiff merely repeats the damages from another claim
14 instead of specifically listing special damages as part of
15 the civil conspiracy claim, the conspiracy claim should be
16 dismissed, and in that case the Court of Appeals, in a
17 unanimous panel, affirmed the Trial Courts grant of a
18 directed verdict based on essentially the same issue we have
19 here.

20 There have been no special damages as, as required.
21 And, so, that cause of action, likewise, should be
22 dismissed. Moreover, Your Honor---

23 THE COURT: Now, does the complaint allege any special
24 damages at all?

25 MR. HENRIKSON: No, sir, just---

1 THE COURT: Just by, by language does it say they were
2 specially damaged in some fashion?

3 MR. HENRIKSON: Not that I've seen.

4 THE COURT: I'm gonna give you a chance to speak in
5 just a minute, Mr. Mann.

6 MR. MANN: Yes, sir.

7 THE COURT: Go ahead.

8 MR. HENRIKSON: Additionally, Your Honor, all of the
9 facts which, which give rise to both causes of action were
10 all known to the plaintiffs in 2005 and 2006, and my
11 thinking is that the plaintiffs feel like it was the jury
12 verdict that somehow, I guess, perfected their civil
13 conspiracy and their abuse of process claim, but that's --
14 we don't believe that that's true.

15 We think that the, the facts, the causes of action
16 arose. The facts were within the possession of, of the
17 plaintiffs back in 2005 and 2006, and all of those dates are
18 alleged in the complaint. So, we're still within the four
19 corners of the complaint. So that they had that knowledge,
20 they had, they had the allegations of the facts that where
21 they could have, if they wanted to, brought a civil
22 conspiracy cause of action. They could of brought an abuse
23 of process cause of action, but they didn't. They waited
24 beyond the three year statute for both of those.

25 And, so, for that reason, under the, under the Statute

1 of Limitations defense that we've all brought in our
2 motions, those, those two causes of action should be
3 dismissed pursuant to, to the, to the failure to bring it
4 within the Statute of Limitations.

5 But primarily, Your Honor, the complete failure to
6 allege special damages which are unique only to the
7 conspiracy, separate and apart from the general damages,
8 from the underlying alleged tort, and the inclusion in the
9 complaint of the facts that the issues brought in the
10 malpractice case did go to the jury we believe would warrant
11 a dismissal of the amended complaint against Mr. Thompson
12 and, and the other defendants as well.

13 THE COURT: All right. Now, Mr. Mann, I'll be happy to
14 hear from you.

15 MR. MANN: Judge, I didn't know if Doctor Fogarty
16 wanted to respond so that we can direct all the defendant's
17 arguments.

18 DOCTOR FOGARTY: I believe you have my initial brief,
19 Your Honor. I would comment that, as the third party expert
20 witness only at the deposition, I, to my knowledge, did not
21 engage in using any process, and I'm puzzled as to how I'm
22 being sued for abuse of process.

23 The amended lawsuit asserts that my diagnosis in the
24 chart in 2005, which I'm seeing the patient, I'm doing the
25 exam, I'm giving an opinion, that somehow that constitutes

1 an abuse of process when the lawsuit wasn't even filed till
2 a year later, and at the position -- and this, to me, sends
3 a chilling message to the medical community that they can
4 not examine a patient and put something in writing without
5 risk of being sued if, further on down the road, that what
6 they put in the chart serves in some, is perceived by the
7 other party to somehow damage them, and that -- so -- and
8 the other point I would make is that this all happened, as
9 we said, it was published by their own initiative in their
10 brief. In 2005, they're fully aware of this, and from my
11 standpoint, we're being sued five years later.

12 So, I think, in terms of the Statute of Limitations,
13 it's clear cut.

14 THE COURT: Thank you, sir.

15 Yes, sir, Mr. Mann.

16 MR. MANN: Your Honor, briefly.

17 Touching on the points first raised by Mr. Mooneyham, I
18 agree with him that in Paragraphs 106 and 107 -- and, judge,
19 by reference, I would like to include in my argument the
20 amended complaint because I do think that 17 pages of 125
21 enumerated paragraphs speaks for itself. It indicates why
22 my clients have come to Court seeking justice.

23 At the last hearing I thought counsel had made a couple
24 of good points that, in the interest of fairness, it would
25 be better for us to detail, in more specific reference as to

1 the conduct that my clients are taking exception to.

2 Mr. Mooneyham is correct. Paragraphs 106 and 107
3 allege against his client conduct that had absolutely
4 nothing to do with the underlying medical malpractice case
5 and that is abuse of process. His clients sought, within
6 the four corners of the complaint, to use the malpractice
7 case for some other purpose. Some other purpose than what
8 we were gathered for last May.

9 There seems to be a blending of legal theories between
10 malicious prosecution and abuse of process. They're two
11 entirely different causes of action. Abuse of process -- in
12 an abuse of process case, a defendant may sue a plaintiff
13 for abuse of process in a case that the defendant lost. It
14 is the fact that the plaintiff or individuals, such as third
15 party expert witnesses, were intending to use the process
16 for some illegitimate purpose, and that is the complaint
17 that we have brought before the Court.

18 We also allege, within the complaint, that the conduct
19 was ongoing. It went all the way through the trial. We
20 also allege, within the complaint, the intent to
21 fraudulently conceal the level of cooperation and the level
22 of abuse that was going on within the litigation, and I
23 would submit to the Court, their Statute of Limitation
24 argument is a three part test outside of the four corners of
25 the complaint, and that it would be an issue best served to

1 be addressed by a motion for summary judgment.

2 As a final note, we have filed a motion to amend. If
3 there's a scribner's error or if there's a deficiency that
4 can be corrected, I would request that we have that
5 opportunity to do so. In the initial motions to dismiss
6 that were first served in the cause of action, Mr. Thompson
7 and Mr. Casey's attorneys indicated that there was a
8 necessary and appropriate third party, and that we should be
9 dismissed for our failure to include a necessary party. In
10 an abundance of caution we have also indicated that, as a
11 ground, of possibly wanting to amend our complaint.

12 In addition, Mr. Mooneyham has filed an answer on
13 behalf of Mr. Casey. His answer has raised additional
14 points that have allowed us to, number one, review our facts
15 and understanding of the case, and we may indeed find it
16 necessary to file an amended, second amended complaint to
17 name an additional party.

18 So, judge, that's all I've got. I appreciate---

19 THE COURT: Well, back to my question, Mr. Mann.

20 MR. MANN: Sure.

21 THE COURT: Does the complaint allege some type of
22 special damages---

23 MR. MANN: Judge, I would---

24 THE COURT: ---as a result of the civil conspiracy?

25 MR. MANN: ---I would submit that it does. I would

1 submit, in Paragraph 17 of the complaint, Paragraph 125
2 specifically lists damages that occurred as a result of the
3 conspiracy, of the civil conspiracy. Defendants concerted
4 efforts, reading directly from the complaint --

5 THE COURT: Yes, sir.

6 MR. MANN: -- directly and proximately resulted in
7 damages including, but not limited to, loss of productivity.
8 We had two lead physicians that sat here for three weeks of
9 trial as well as all of the other depositions and other
10 things that they had to sit through. Attorneys fees, costs,
11 emotional distress, damage to their professional
12 reputations, accounting expenses, and further damages to be
13 ascertained through this lawsuit.

14 THE COURT: But you're saying those damages were only
15 caused by the civil conspiracy?

16 MR. MANN: I'm saying that parts of these damages, if
17 not the total of these damages, were caused by the civil
18 conspiracy. If the abuse of process, for whatever reason,
19 was either dismissed at summary judgment, we would be
20 seeking these damages within civil conspiracy.

21 THE COURT: What paragraphs did you indicate again?

22 MR. MANN: Paragraph 125.

23 THE COURT: Uh-huh. (Affirmative).

24 MR. MANN: Are you talking about the previous ones
25 that---

1 THE COURT: No, the ones that you just listed that
2 alleged special damages.

3 MR. MANN: 125, Your Honor.

4 THE COURT: All right.

5 MR. MANN: And if we need to break it out in some other
6 form or fashion with the Court guidance, I'll be happy to do
7 so.

8 THE COURT: Well, I, I can't give advisory opinions.

9 MR. MANN: Well, judge---

10 THE COURT: I take them where they are and rule on the
11 motions that I have.

12 MR. MANN: That's right. But, judge, if you tell me it
13 fails, then that's gonna be a real good indication that I
14 need to beef it up a little bit.

15 THE COURT: Okay. Anything further, Mr. Mann?

16 MR. MANN: No, sir.

17 THE COURT: Anything further from the defense?

18 MR. HENRIKSON: Your Honor, just that Paragraph 125
19 doesn't it, if you read it, it doesn't do anything except
20 allege general damages as to both causes of action, and
21 that's exactly what the Court of Appeals, in the Gordon
22 case, said you can't do because they merely repeated the
23 damages from the previous cause of action.

24 There's, there's no allegation, in the four corners of
25 this complaint, as I think Your Honor has caught, caught

1 onto, there's no allegation of special damages unique only
2 to the conspiracy. There's just general damages for both
3 causes of action and no attempt is been made to do that.
4 And, so, that, that case should be dismissed.

5 I, you know, in a, in a sense of fairness and in a
6 sense of sport, I don't think that we should, for the second
7 time, educate the plaintiff and let him come back and amend
8 again and then try to correct it a---

9 THE COURT: As I indicated, I'm not issuing advisory
10 opinions on this matter. I will take a look at it and
11 review the complaint in light of the motions and make a
12 ruling.

13 Thank you very much.

14 MR. HENRIKSON: Thank you, judge.

15 MR. MANN: Thank you, judge.

16 MR. MOONEYHAM: Thank you, Your Honor.

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19 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 8th day of September, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 24th, 2012

A handwritten signature in cursive script that reads "Pamela E. Green". The signature is written in dark ink and is positioned above a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Case No(s): 2010CP4205743
	)	
Gregory J. Feldman, M.D.,	)	
et. al.,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
William Mark Casey, et. al.	)	
	)	
Defendant.	)	

February 18, 2012
Spartanburg, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

A P P E A R A N C E S:

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Attorney for Plaintiff Dr. Gregory J. Feldman

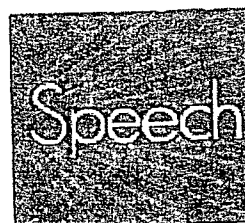
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Motions	4
Certificate of Reporter	40

EXHIBITS PAGE

NO.

DESCRIPTION

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PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 18th day of February, 2011 at approximately 2:42 p.m.)

THE COURT: All right. Let's see here.

(Pause.)

All right. What motions do we have pending today?

MR. MANN: Your Honor, Milton Mann here on behalf of the Plaintiffs. I think I speak with counsel. We have worked very hard for our discussions today to kind of streamline the issues that are currently before the Court.

THE COURT: All right.

MR. MANN: Uh, there had previously been filed an Affidavit of Default in this case. There had been filed a motion to set aside that default as well as affidavit. The parties have agreed that both of those items are simply going to be withdrawn from the record.

THE COURT: Okay.

MR. MANN: And I believe Mr. Henrikson would agree that his answer is to be accepted at the time that it was filed as being the file time date.

THE COURT: All right.

MR. HENRIKSON: I think just a Form 4 order

1 probably would be good enough for that.

2 **THE COURT:** All right.

3 **MR. HENRIKSON:** Unless you would like me to
4 submit something more formal.

5 **THE COURT:** Yeah, we can -- we can -- uh,
6 we'll just do a Form 4 if that's acceptable to you
7 all.

8 **MR. HENRIKSON:** Certainly.

9 **MR. MANN:** So that would hopefully clean
10 that up.

11 **THE COURT:** Okay.

12 **MR. MANN:** Which leaves various motions to
13 dismiss. Plaintiff's Complaint has basically two
14 causes of action in it. The first cause of action
15 is an abuse of process claim. The second cause of
16 action is a civil conspiracy claim. Uh, through
17 discussions with counsel, uh, the Plaintiffs are
18 hereby dismissing, with agreement of counsel, Count
19 2. So the civil conspiracy claim will be
20 dismissed. We would also like to put on the record
21 that it will be dismissed without prejudice. It
22 will not be Rule 5'd unless there are subsequently
23 discovered facts in any ongoing litigation.

24 **THE COURT:** All right.

25 **MR. MANN:** So hopefully, that will just

1 limit our discussions today as to a motion to
2 dismiss the first count of Plaintiff's Complaint.

3 THE COURT: All right.

4 MR. MANN: And with that, I will sit down
5 and be quiet.

6 THE COURT: No, I -- and I appreciate you
7 laying that out. That's great. All right.

8 MR. MANN: Thank you, Judge.

9 THE COURT: Uh, and who all has -- I've got
10 a brief here from Dr. Fogarty. Uh, is there anyone
11 else who has a motion to dismiss today?

12 MR. MOONEYHAM: Good afternoon, Your Honor.
13 Ellen Cheek for Dr. Fogarty, Joe Mooneyham for Mark
14 Casey and Matt Henrikson for Chuck Turner --
15 Thompson, who is standing beside me. I need to get
16 all the Chucks in my head. Uh, our motions have
17 essentially been carried forward and been, I hope,
18 provided to you today.

19 THE COURT: Okay.

20 MR. MOONEYHAM: Dr. Fogarty had appeared pro
21 se previously. Ms. Cheek is here on his behalf
22 today. She's done a very done memorandum. I saw
23 the memorandum back in July which is the same
24 memorandum that I would suggest would be
25 appropriate today.

1 THE COURT: Okay.

2 MR. MOONEYHAM: I remember if you -- did you
3 file?

4 MR. HENRIKSON: I think -- this is actually
5 the third time that we will have argued these. I
6 think I may have filed something earlier on, but I
7 would join in those other two memoranda. It said
8 exactly the same thing as they apply to Mr. Thomas,
9 especially -- particularly regarding the first
10 cause of action which is all that we're here for at
11 this point.

12 THE COURT: All right. All right. All
13 right. Yes, sir.

14 MR. MANN: And Your Honor, again, just from
15 the Plaintiff's side of the table, in the interest
16 of trying to get this case moved forward, it's been
17 on the docket for over a year. Uh, we've been
18 wrangling a little bit with the motions to dismiss
19 and things of that nature. I have no objection to
20 any and all -- and, hopefully, if there's any other
21 hidden within the record that all motions to
22 dismiss are decided today.

23 THE COURT: Okay. Okay.

24 MR. MANN: We're in agreement that that's
25 what we're here for.

1 THE COURT: And I'm happy to hear those.
2 I'll be very candid, Mr. Mooneyham and Mr.
3 Henrikson, with you and tell you I have not yet
4 read any of the briefs other than Dr. Fogarty's
5 brief that I got to my office. I will, however,
6 hear argument from everybody and I will look at
7 those.

8 MR. HENRIKSON: Yes, ma'am. If you don't
9 have any objection -- it's somewhere in the file.
10 The file is probably voluminous.

11 THE COURT: Right.

12 MR. HENRIKSON: I'll hand up a copy of mine
13 if you'd like.

14 THE COURT: All right.

15 MR. HENRIKSON: As I said, and I was not
16 kidding, it's sort of --

17 THE COURT: Okay. All right.

18 MR. HENRIKSON: I'll hand one up. We've all
19 seen this.

20 MR. MANN: Uh, no, I'm sorry. No objection
21 whatsoever. Thank you, Judge.

22 THE COURT: And let me just put on the
23 record because I know there is -- after reviewing
24 the brief, I learned that there is an attorney, a
25 member of the bar, involved in this case. Let me

1 just say I suspect that probably that's why I was
2 assigned the case. There's not been too many
3 traveling judges come through. And I'm from
4 Greenville. Although I am familiar with Mr.
5 Thompson, to my knowledge, I've never had any case
6 with him or, to my knowledge, have had no dealings
7 with him as far as I know.

8 MR. MANN: Your Honor, for the record as
9 well, we have -- the Plaintiff has no objection to
10 your involvement. We welcome you and thank you.

11 THE COURT: All right. All right. Very
12 well.

13 MR. WILKES: Same, Your Honor, with this
14 defendant.

15 THE COURT: All right. All right. All
16 right. Well, thank you very much. I did want to
17 make it clear in case there was ever any question,
18 uh, about something like that. All right. With
19 that being said, even though there may not be an
20 order filed, let's go ahead and start with Dr.
21 Fogarty.

22 MS. CHEEK: Thank you, Your Honor.

23 THE COURT: Uh-huh.

24 MS. CHEEK: May it please the Court.

25 THE COURT: Yes, ma'am.

1 **MS. CHEEK:** My name is Ellen Cheek. My
2 partner Michael Wilkes and I represent Dr. Charles
3 Fogarty in this case. As you know, we're here
4 today on Dr. Fogarty's motion to dismiss
5 Plaintiff's second Complaint. And we ask the Court
6 to dismiss this pleading because it's barred by the
7 three-year statute of limitations and because the
8 pleading does not allege an actionable claim for
9 abuse of process.

10 Uh, Your Honor, I appreciate your reviewing
11 the brief beforehand. As you know from reviewing
12 it, the case -- this case arises out of an
13 underlying medical malpractice case which was filed
14 against the Plaintiffs in this case by one of Dr.
15 Fogarty's patients, Mark Casey, who is also a
16 defendant in this case. The third defendant in
17 this case, Attorney Thompson, was Mr. Casey's
18 lawyer in that underlying suit.

19 Now, it's not a tort for a doctor to treat
20 patients or for a doctor to perform a medical
21 opinion about a patient or to tell that opinion to
22 a patient's lawyer or to give that opinion as an
23 expert in a medical malpractice case. However,
24 that's essentially what the Plaintiffs are claiming
25 in the present suit.

1 They claim that Dr. Fogarty committed a tort
2 when he saw Mr. Casey as a Plaintiff -- as a
3 patient after Mr. Casey had received medical
4 treatment from the Plaintiffs. When Dr. Fogarty
5 formed the medical opinion that Mr. Casey had
6 sustained a brain injury from that treatment,
7 Plaintiffs claimed that Dr. Fogarty engaged in
8 wrongful conduct when he told that medical opinion
9 to Mr. Casey's lawyer and also, uh, gave his
10 opinion in the underlying medical malpractice
11 lawsuit.

12 They claim, Plaintiffs claim that Mr. -- Dr.
13 Fogarty's conduct was wrongful because essentially
14 Dr. Fogarty and Dr. Feldman, one of the Plaintiffs,
15 used to practice medicine together. They had an
16 acrimonious breakup. Uh, they operate competing
17 medical research facilities. And Plaintiffs claim
18 that, as a result, Dr. Fogarty doesn't like the
19 Plaintiffs, he harbors ill-will toward them. And
20 as a result, there's no way that Dr. Fogarty could
21 have treated Mr. Casey or formed a medical opinion
22 or testified in the underlying medical malpractice
23 case in a manner that wasn't tortuous.

24 Uh, but as Your Honor well knows, courts are
25 concerned with whether litigants can plead and

1 prove actionable claims. This is an objective
2 legal determination. Courts don't undertake to
3 delve underneath causes of actions to analyze
4 whether parties in underlying lawsuits or their
5 experts or lawyers have bad feelings toward each
6 other. Whether someone likes the people on the
7 other side or even had a bad motive in bringing the
8 lawsuit aren't elements of the claim and it's not
9 something the courts determine. Even spiteful
10 motives or ill-will toward another party does not
11 warrant an abuse of process claim.

12 Uh, and this makes sense. It's probably rare,
13 if not existent, case in which litigating parties
14 are actually friends and like each other. Our
15 court system would certainly ground to a halt if
16 litigants -- if the court attempted to determine
17 whether the feelings of the litigating parties or
18 motivations of the litigants and lawyers were
19 something actionable in themselves. Yet, these
20 feelings and underlying competition is exactly what
21 Plaintiffs have sued Dr. Fogarty for in this case.

22 And if you will allow me, Your Honor, this
23 case is therefore one that threatens the conduct,
24 not only of patient care by doctors, but also
25 litigation and malpractice litigation in general.

1 It threatens to chill doctor's care of patients by
2 exposing them to civil suit every time they see
3 another doctor's patient and make the medical
4 determination that there had been, uh, either not
5 proper treatment or that the person, the patient
6 had sustained an injury. Uh, it threatens to chill
7 all experts participating in lawsuits by exposing
8 them to civil liability each time they advance an
9 opinion that another side, uh, believes is against
10 his interest or is just wrong.

11 Fortunately for us and, uh, I might say for
12 the case in general, Plaintiffs' case can not go
13 forward. This is because the abuse of process
14 claim is governed by a three-year statute of
15 limitations that expired before Plaintiffs brought
16 this suit in 2010. And, uh, even if this were not
17 the case, even if it were not time-barred, the
18 allegations of the Second Amended Complaint itself
19 failed to state an actionable claim for abuse of
20 process.

21 THE COURT: I've got a question for you on
22 the statute of limitations. I don't want to throw
23 you off your argument, but I do have one. As I was
24 reviewing your brief, one question I had is, uh, --
25 I believe on the abuse of process statute of

1 limitations, your argument was that the statute did
2 run, uh, when the first lawsuit was filed. Uh,
3 what about this allegation of the MRI and, uh, that
4 there was an MRI done secretly and then an
5 anonymous letter was then sent to the defendants in
6 the original lawsuit? Uh, I didn't see a date when
7 that happened. But wouldn't that be -- and I'm
8 really asking for some argument on this. I just --
9 it struck me. Wouldn't that be when the Plaintiffs
10 of this case might have become aware that there was
11 some sort -- that there could be some sort of
12 conspiracy going on?

13 MS. CHEEK: Uh, well, respectfully, Your
14 Honor, with respect to the abuse of process claim
15 by, I believe, by its definition, the abuse of
16 process alleged by Plaintiffs in this case is the
17 filing and maintenance of the underlying medical
18 malpractice action. They knew when that lawsuit
19 was filed, on the date of its filing in 2006 that
20 the process had been issued. They believed at that
21 point that it had been abused.

22 They had treated Mr. Casey. They knew at that
23 point, according to the Second Amended Complaint,
24 Casey had already been to them complaining "I'm not
25 right. I'm having trouble." Therefore, -- well,

1 and the Plaintiffs alleged that they didn't believe
2 him and they weren't going to support those type of
3 allegations either factually or with respect to his
4 disability claims. Instead, they ceased treating
5 him. So that was back in 2004.

6 Uh, we believe that when the actual claim was
7 filed in 2006, they knew two things. They knew
8 that a claim had been filed. They knew that they
9 believed the claim was baseless and was an abuse of
10 the legal process. That's when they discovered the
11 abuse. I do realize that there are allegations in
12 the Complaint about an MRI.

13 If you will allow me, I was not involved in
14 the underlying lawsuit. But what I understand
15 generally was that during the course of discovery,
16 uh, that a consulting opinion -- MRI was obtained.
17 I -- well -- I'm foundering here a little bit
18 because I don't know the facts too well. But in any
19 event, that an MRI was obtained out of state in
20 North Carolina, uh, for Mr. Casey. And, uh, all
21 right. So I've got a date.

22 Is that when the MRI was obtained?

23 MR. MANN: That's my understanding.

24 MS. CHEEK: Okay. Attorney Mann believes it
25 was obtained on 2007.

1 THE COURT: Okay.

2 MS. CHEEK: In 2000 -- February 4, 2007.

3 THE COURT: Okay.

4 MS. CHEEK: At that point, Your Honor, the
5 action that Plaintiffs claim was an abuse of
6 process was ongoing. I understand that the, uh,
7 Plaintiffs allege that this was somehow
8 circumstances in support of their, uh, conspiracy
9 claim that was dropped earlier today.

10 THE COURT: Okay.

11 MS. CHEEK: But in any event, we believe
12 that discovery -- discovery rule applies to the
13 date that it was first, uh, instituted and not by
14 other perhaps continuing or ongoing abuse through
15 the lawsuit itself.

16 And, Your Honor, uh, if you will allow me, the
17 brief that Dr. Fogarty filed in support of his
18 claim also covers the Court's concern with respect
19 to some sort of continuing abuse rule. There was
20 no -- the statute begins to run when the abuse is
21 discovered or should have been discovered and not
22 when the underlying action ends.

23 Likewise, uh, with respect to medical
24 malpractice cases, Supreme Court has explained that
25 it's not a period of time that -- for example, in

1 medical malpractice cases, where a patient says,
2 well, it wasn't just the first time the tort
3 happened, it happened multiple times during his
4 care of me. The Court has declined to adopt that
5 type of continuing tort, uh, rule with respect to
6 the tolling of the statute of limitations and
7 always hands it back to the first main event. In
8 this case, we believe that's clearly the filing of
9 the underlying action.

10 Your Honor, have I answered your question?

11 THE COURT: You have. You very much have.

12 MS. CHEEK: Hauntingly probably. But, uh,
13 also as the Court knows, uh, I have an outline.
14 Bear with me for a minute.

15 THE COURT: That's alright. Take your time.

16 MS. CHEEK: Perhaps at this point, I'll
17 cover what my understanding or the basic facts in
18 the underlying action. I think they do blend into
19 the statute of limitations issue as well as the
20 abuse of process elements claim argument. Uh, from
21 what I understand, Mr. Casey, in 2004, experienced
22 chest pains at work. He went to a hospital and a
23 chest x-ray was conducted. Uh, the chest x-ray
24 that was read by one of the Plaintiffs -- or when
25 seen by one of the Plaintiffs --

1 Forgive me, Gentlemen, for not having these
2 all down.

3 But the chest x-ray that was taken of Mr.
4 Casey showed a screw in the chest x-ray. Uh, this
5 screw, I believe it turns out, was out of the form
6 that surrounds the x-ray. It was not in Mr.
7 Casey's chest.

8 Uh, Plaintiffs did two bronchoscopies to
9 determine whether there was something, in fact, in
10 Mr. Casey's chest. The first was a flexible
11 bronchoscopy. The next was a rigid bronchoscopy
12 that's, I believe, a metal tube that you insert
13 down. During this rigid bronchoscopy, uh, Mr.
14 Casey suffered what is known medically as a
15 pneumothorax where air gets outside the lung cavity
16 and was then hospitalized for a few days
17 afterwards.

18 After he was released from the hospital, uh,
19 Mr. Casey went back to Plaintiffs and said, "I'm
20 not right. I'm having trouble with my balance.
21 I'm having difficulty. I think something's wrong."
22 Uh, Plaintiffs declined to, uh, support his
23 contentions and also cease treating, uh, Mr. Casey.

24 Subsequently, Mr. Casey started seeing a
25 psychologist, uh, in Spartanburg and also went to

1 see another doctor, Dr. Fogarty, who is also a
2 pulmonologist just like the Plaintiffs in this
3 case. Uh, when Dr. Fogarty started seeing Mr.
4 Casey, uh, he determined, in his medical opinion,
5 Mr. Casey had suffered some sort of neurological
6 issue. Dr. Fogarty also reviewed some of the
7 medical, open medical records in relation to the
8 bronchoscopies that had been performed and
9 determined in his medical opinion that the standard
10 of care had not been met with respect to Mr.
11 Casey's treatment and that Mr. Casey had suffered,
12 uh, some sort of brain injury as a result.

13 Turns out that the actual visits, I believe,
14 of the possible brain injury were an embolism that
15 had gotten into his blood stream during this
16 pneumothorax. Traveled his brain. Blocked an
17 artery and resulted in -- resulted in brain injury.

18 Your Honor, uh, the -- although I was not
19 involved in that lawsuit, the, uh, -- I understand
20 that the medical malpractice suit, uh, went
21 forward. It was tried before a jury. The jury
22 actually found that the defendants did not engage
23 in malpractice. But I will point out that, as you
24 well know, that does not -- a jury determination of
25 malpractice doesn't mean that Mr. Casey was not

1 injured.

2 But back to the, uh, arising of the claim
3 again, we believe that it arose upon the Second
4 Amended Complaint filing. At that time, Plaintiffs
5 knew that Casey was complaining of an injury.
6 Plaintiffs knew that they didn't believe that he
7 have one. Therefore, when the suit was filed, uh,
8 we believe that's when the statute was tolled.
9 Likewise, even though Plaintiffs claim they didn't
10 know Dr. Fogarty's involvement, the case law is
11 clear, Your Honor, that the fact that somebody
12 doesn't have a theory of recovery or even know the
13 identity of all tortfeasors does not prevent the
14 statute from running.

15 Uh, regarding the failure to state a claim,
16 uh, an abuse of process, as the Court knows, is the
17 employment of legal process for some purpose other
18 than that for which it was intended by the law to
19 affect and the improper use of a regular issued
20 process. Uh, I know the Court is aware of these
21 cases, but I thought it might be helpful at this
22 point to give a couple of examples of what courts
23 have held to be an abuse of process.

24 One was in the Huggins versus Winn-Dixie case,
25 249 S.C. 206 from 1967 in which a store manager,

1 uh, stopped the fellow for, uh, having a package of
2 ham in his pocket. And when he said did you forget
3 about the ham, the man said, oh, yes, I did, and he
4 offered to pay for it. At that point, the store
5 manager took the man into the back and said I
6 actually believe I want you to pay \$10. The man
7 said why. Well, it's because I think you took some
8 food from this store on another occasion. The man
9 said I didn't take the food on the other occasion.
10 I'm not going to pay you your \$10.

11 So it wasn't for the ham. It was for this
12 other -- trying to get the guy to pay \$10. The guy
13 refused. The manager had the police called. The
14 court found that that was not the proper issuance
15 of process because the manager wasn't trying to get
16 the guy arrested for shoplifting. He was trying to
17 coerce him to pay the \$10 for food he claimed he
18 didn't take.

19 The second one is more contemporary. A 2009
20 case, (inaudible) where a police chief had a deputy
21 arrested for some moonlighting payment-related
22 violations in order to force that deputy to testify
23 against another officer who was under
24 investigation. Those are some cases that abuse of
25 process did lie and I'll try to briefly address why

1 it doesn't lie in this case.

2 **THE COURT:** All right.

3 **MS. CHEEK:** To sustain abuse of process, the
4 Plaintiff pleading has to allege two elements. One
5 that the process was issued, or in this case,
6 lawsuit was brought for an improper purpose. And
7 two, that the willful acts were not authorized by
8 -- that willful acts not authorized by the process
9 were taken through which the process was abused.

10 Uh, courts of this state have been very clear
11 that a bad motive or collateral reasons, even
12 spite, uh, do not sustain abuse of process claim.
13 Uh, also, importantly, uh, the improper purpose
14 element, the first element is met only when the
15 defendant has attempted to coerce the Plaintiff in
16 some manner, uh, to give the defendant a collateral
17 advantage such as paying the money such in the ham
18 case.

19 And our court has explained that in order for
20 coercion to occur, there has to be some event
21 outside the process itself. There has to be some
22 communication between the defendant and the
23 Plaintiff where the defendant is trying to coerce
24 the Plaintiff saying, you know, if you don't do
25 this, I'm going to have process issued against you.

1 Plaintiff's Second Amended Complaint fails to
2 plead this improper purpose element because they
3 haven't alleged that Dr. Fogarty had any contact
4 with the Plaintiffs before or regarding the medical
5 malpractice action. For example, uh, Dr. Fogarty
6 didn't say to Dr. Feldman, if you don't quit, uh,
7 engaging in medical research like I am than I'm
8 going to have this lawsuit or try to get somebody
9 to file this lawsuit and I'm going to have to
10 testify as a witness in it and make your life
11 difficult. In fact, the Complaint doesn't allege
12 any contact between Dr. Fogarty and Plaintiffs at
13 all so, by definition, improper purpose can be
14 established.

15 Plaintiffs also haven't alleged the required
16 willful act element because it's only satisfied
17 that the defendant engaged in some definite act
18 that is related to the judicial process and that's
19 not authorized by it. And South Carolina case law
20 makes clear that in order for this claim's element
21 to be satisfied, the Plaintiff must allege that the
22 process, in this case, the medical malpractice
23 action, was undertaken for the sole or primary
24 purpose other than a legitimate name. It's not
25 enough again that the process is pursued with some

1 sort of collateral purpose in mind, even a spiteful
2 or vengeful mind.

3 In the Second Amended Complaint, Plaintiffs
4 haven't alleged that the malpractice action was
5 brought solely or primarily for an ulterior
6 purpose. And the facts of the Complaint actually
7 reveal that, uh, that action was brought by Casey
8 to entrust his claims that the defendant -- that
9 the Plaintiffs in this case engaged in malpractice.
10 Plaintiffs do claim that the defendants had various
11 ulterior motives for, uh, supporting the lawsuit or
12 being engaged in it. But again, these ulterior
13 reasons, even spiteful ones don't make a lawsuit
14 wrongful. Uh, I'm getting close to closing, Your
15 Honor.

16 THE COURT: Okay.

17 MS. CHEEK: Uh, further, the Second Amended
18 Complaint doesn't allege that Dr. Fogarty
19 committed, uh, acts that in themselves were
20 improper. He wrote notes in a patient's file.
21 Obviously, that's not improper. Obviously, it
22 wasn't related to the action. He, uh, developed a
23 theory of doctor -- Mr. Casey's injury, that while
24 Plaintiffs believe it was wrong, there was not
25 improper about a doctor's forming a patient

1 assessment and writing it in the notes. And also,
2 Plaintiffs claim that Dr. Fogarty was a member of
3 this litigation team. Uh, but there was nothing
4 wrongful about a physician serving or consulting in
5 an expert capacity in respect to a malpractice
6 suit.

7 Uh, Your Honor, in closing, and I again do
8 appreciate your having reviewed our brief. But
9 everyday, this clerk sees litigants and parties at
10 odds with each other. Uh, some cases go, uh, for
11 Plaintiffs awards. Some are defense verdicts.
12 There's a lot of hurt and disagreement that walks
13 the halls of the courtroom. Uh, and, uh, this
14 doesn't mean, however, that those hurt feelings or
15 even bad or improper motives can create causes of
16 action. Plaintiffs' abuse of process claim is not
17 only barred for that reason, because it doesn't
18 state a cause of action, but also for the primary
19 reason that it is time-barred.

20 We appreciate the Court's attention. If you
21 have any other questions, maybe not about the
22 underlying action specifically, I'll be happy
23 to ---

24 THE COURT: No, that's fine.

25 MS. CHEEK: --- try to answer them.

1 THE COURT: Appreciate it.

2 Mr. Mann, if it's alright, I'm going to allow

3 you to respond to all three again.

4 MR. MANN: That's what we agreed to ---

5 THE COURT: All right.

6 MR. MANN: --- beforehand, Judge.

7 THE COURT: All right.

8 MR. MANN: Thank you.

9 THE COURT: Very well. All right. Who's up

10 next?

11 MR. MOONEYHAM: I'll go next, Your Honor.

12 THE COURT: All right.

13 MR. MOONEYHAM: May it please the Court.

14 Joe Mooneyham --

15 THE COURT: Yes, sir.

16 MR. MOONEYHAM: Joe Mooneyham for Mark

17 Casey. I certainly won't repeat anything that Ms.

18 Cheek said with regarding to the time-bar issue.

19 We concur and join in her argument on that issue.

20 The actual filing of the lawsuit would be the time

21 at which the abuse of process cause of action is

22 when the statute of limitations would start to run.

23 That filing occurred more than three years before

24 this second lawsuit was filed.

25 Our contention is because the cause of action

1 is abuse of process, then the process triggers the
2 time -- uh, events that were unrelated to the
3 process. I would contend that even things like
4 discovery abuse -- I'm not suggesting discovery
5 abuse occurred -- but even things like that would
6 not be part of the process itself. The process is
7 the actually abuse of the legal proceeding. So
8 months later, the proceeding was initiated. The
9 time to respond to that had begun to run. In this
10 case, the three years would have run out before the
11 second lawsuit was filed.

12 Secondly, uh, as it relates to Mr. Casey
13 specifically, the Plaintiffs' first cause of action
14 alleges some conduct by Mr. Casey at paragraphs
15 106, 107, uh, and then alleges damages at 115 and
16 116. But if you look at those specific paragraphs,
17 and I actually quoted these for you in my
18 memorandum, uh, the Plaintiffs allege that Mr.
19 Casey willfully used legal proceedings in an effort
20 to continue to receive narcotic drugs and in an
21 effort to continue to receive disability benefits.
22 At the time this event occurred, he was employed at
23 Michelin and had an opportunity to receive short
24 and long-term disability benefits. The allegation,
25 I think, is that because the Plaintiffs in this

1 case refused to cooperate in his efforts to
2 continue these benefits, he filed this lawsuit.

3 The problem with that argument is that neither
4 of those two activities or efforts by him, if true,
5 would have caused him any damages. The defendants
6 aren't damaged in any way -- pardon me. The
7 Plaintiffs aren't damaged in any way, uh, by Mr.
8 Casey's conduct if he filed a lawsuit in an attempt
9 to get those, uh, -- to continue those benefits.

10 They allege that his efforts to continue
11 receiving narcotic drugs or to receive disability
12 benefits, uh, damage their reputation, there's no
13 proximate causation between those. Of course, as
14 has already been eluded to and I'm not going to
15 belabor this -- this matter was, apparently, quite
16 hotly contested. I was not involved in the
17 underlying malpractice case either. But motions
18 for summary judgement were filed. The trial lasted
19 several weeks. Experts were called and flown in
20 from all over the country.

21 So clearly, the underlying lawsuit itself was
22 meritorious to the extent that it would be
23 required. Even if there were ulterior motives, the
24 focus of the litigation from this case's
25 perspective was an intent to establish the

1 malpractice claim rather than the various -- uh,
2 I'll sit down.

3 THE COURT: Okay. Thank you, sir.

4 MR. MOONEYHAM: Thank you, ma'am.

5 THE COURT: Mr. Henrikson?

6 MR. HENRIKSON: Thank you. May it please
7 the Court?

8 THE COURT: Yes, sir.

9 MR. HENRIKSON: Your Honor, I had the luxury
10 of having two lawyers smarter than me go first. I
11 join in their arguments and in their briefs. I
12 would just point out a couple of things. Your
13 Honor asked the question about the MRI which is --
14 and I'll be happy to answer any questions specific
15 about that. My understanding is that even if the
16 MRI was somehow to be the issue which started the
17 clock, which I don't believe it is, I believe it's
18 actually the filing of the lawsuit.

19 THE COURT: Okay.

20 MR. HENRIKSON: But even so, my
21 understanding is that the MRI and the discovery of
22 the MRI occurred prior to the three-year period.

23 THE COURT: Okay.

24 MR. HENRIKSON: I could be wrong about that.
25 That's actually not in the pleadings. I'm trying

1 to limit all of our argument to what's in the
2 pleading ---

3 THE COURT: Sure.

4 MR. HENRIKSON: --- because we're here for a
5 motion to dismiss.

6 THE COURT: All right.

7 MR. HENRIKSON: The one thing that I would
8 point out that I think Mr. Mooneyham did a good job
9 of talking about is that, to me -- and the reason
10 that this is a motion to dismiss and not a motion
11 for summary judgement is that, with respect to the
12 abuse of the process cause of action, in the
13 Complaint itself, uh, it is alleged and thereby
14 admitted that all of these issues, including the
15 issues of punitive damages, all went to the jury.

16 So in addition to failing to plead that there
17 was, that the primary ulterior purpose was
18 something wrongful, uh, the issues as they run to
19 the malpractice action, uh, all went to the jury.
20 The jury decided some times -- the jury -- I been
21 on both ends of a jury verdict. It doesn't
22 necessarily mean that your side was right or wrong.
23 It means the jury was persuaded to come to one
24 result or the other.

25 In this case, it's alleged in the Complaint,

1 so it makes this proper argument for motion to
2 dismiss. I believe there can not be an abuse of
3 process in a case where all the issues actually go
4 to the jury and are decided, even the issues of
5 punitive damages.

6 The other important thing, uh, in this case,
7 Your Honor, is that lawyers obviously have an
8 obligation under the professional rules of
9 responsibility that, uh, that if a lawyer has a
10 legitimate legal and factual position, that lawyer
11 has a duty, uh, to pursue it in a case such as
12 this. In this case, it is without controversy that
13 there were numerous experts on both sides,
14 including experts, uh, that testified that Mr.
15 Casey had brain damage, that he had injuries caused
16 which were related to, uh, the Plaintiffs who were
17 the defendants in the underlying suit.

18 And with that information with Dr. Fogarty,
19 noting that there was a brain injury, which is
20 alleged in the Complaint, uh, with Mr. Casey
21 alleging that he had what he felt were, uh,
22 cognitive difficulties, Mr. Thompson was obligated
23 to pursue those arguments, those legal positions
24 and those factual positions in his case. To do
25 otherwise would have been, uh, to violate his duty

1 under the rules of professional responsibility. So
2 when you're talking about now going back against a
3 lawyer for an abuse of process, it is equality as
4 chilling as you would if the court were to allow
5 such cause of action to stand against the doctor
6 who treats a patient and is essentially being sued
7 because he put a notation in a record.

8 Here, you have a lawyer who has a client who
9 makes a complaint, uh, makes a, uh, -- reports
10 facts which support the cause of action which
11 ultimately go to the jury. Uh, that lawyer has a
12 heightened duty and a responsibility under the
13 rules, uh, to prosecute that case, uh, to the best
14 of his ability, uh, vigorously. But the rules
15 require that, uh, -- and diligently. And that's
16 what happened in this case.

17 **THE COURT:** And so you're -- you're arguing
18 about it going to the jury -- just so I'm clear.
19 Your argument about it going to the jury, is that
20 something akin to probable cause and, uh, -- a
21 finding of probable cause in a malicious
22 prosecution case. Is that kind of where we --

23 **MR. HENRIKSON:** I believe so. It's not one
24 of the -- uh, it's not one of the requirements of
25 abuse of process, but I think what it does is it

1 demonstrates a lack of some other purpose. And
2 again, here, there's a failure to allege
3 specifically that the primary ulterior purpose was
4 to do something other than, uh, prosecute a medical
5 malpractice cause of action.

6 In this case, there may have been a situation
7 where, uh, Dr. Fogarty didn't like the plaintiff or
8 the defendant doctors in the underlying case.
9 There's no evidence that Mister, uh, -- there's
10 nothing alleged that Mr. Thompson or Mr. Casey knew
11 of these doctors or had any hard feelings against
12 them or anything like that. Mr. Thompson was, uh,
13 simply prosecuting, uh, a client's rightful claim,
14 uh, -- he had a right to claim. He didn't, uh, --
15 the jury ultimately decided whether he had a right
16 to, uh, recover. But he certainly had a right to,
17 uh, file the lawsuit. Based on the information
18 which is included in the Complaint, uh, the only
19 reasonable inference to draw is that there was
20 information, uh, given to, uh, Mr. Thompson from
21 Dr. Fogarty and from Mr. Casey which would have
22 required any lawyer, uh, to pursue, uh, -- if he
23 wanted to take the case, of course, uh, to pursue
24 those.

25 And so -- but I do believe that the fact that

1 the case did go to the jury on all issues and the
2 fact that that's alleged in the Complaint is just
3 further support for the fact and what it does is it
4 illustrates, uh, that there is a -- this lack of
5 any pleading and proof that there was primarily an
6 ulterior purpose for this. But certainly, there's
7 no pleading of proof that Chuck Thompson had any
8 ulterior purpose other than to try to get, uh,
9 recovery for his, uh, for his client.

10 So those are the things that I would add, Your
11 Honor. I would join in the other arguments as
12 well, specifically as, uh, to the statute of
13 limitations. Uh, but I think that in this case,
14 it's just a failure to properly plead facts
15 sufficient to support, uh, an abuse of process
16 cause of action. For those reasons, I think the
17 court should dismiss the, uh, -- dismiss the first,
18 uh, first cause of action.

19 **THE COURT:** All right. Thank you, sir.

20 All right. Yes, sir.

21 **MR. MANN:** Thank you, Judge. I don't know
22 how much of this paper I'm going to need, but I'm
23 going to bring some of it up here.

24 **THE COURT:** Okay.

25 **MR. MANN:** And Judge, I'm going to do my

1 very, very best to be brief. Uh, your questions
2 indicate that you've had an opportunity to review
3 the Complaint. And Judge, given that this is a
4 motion to dismiss our Complaint is our memorandum.
5 Okay. It's laid out in 20 pages. We take great
6 exception to the conduct that's occurred, uh, both
7 in the underlying case and, uh, -- and quite
8 frankly, some of the actions that occurred even
9 before -- before either litigation.

10 Uh, Ms. Cheek and I met each other, as
11 paragraph 25 indicates. Uh, paragraph 25 indicates
12 that there was previous litigation between Dr.
13 Feldman and Dr. Fogarty. We met because she
14 represented Dr. Fogarty in that action. So there
15 has been, without a shadow of a doubt, a downplay
16 of the animosity, motivations and things of that
17 nature that are within the four corners of the
18 Complaint. I'm going to do everything I can to
19 stay within these four corners of the Complaint
20 because what I've listened to so far has been one
21 after another motion for summary judgement. And I
22 look forward to discussing those motions for
23 summary judgement at the appropriate time after
24 discovery has occurred.

25 For example, the 25 pages -- again, 20-page

1 Complaint, 25-page memorandum of Dr. Fogarty, uh,
2 is replete with arguments, inferences and things of
3 that nature that are not in the light best suited
4 for the nonmoving party. They go well without and
5 beyond the four corners of the document.

6 Uh, but many things are spot-on. Procedural
7 history are spot-on. Uh, Dr. Fogarty's counsel are
8 well-learned. They state many, many absolute
9 positive points with respect to the law. But it
10 goes too far. It is a memorandum in support of a
11 motion for summary judgement, not a memorandum in
12 support of a motion to dismiss.

13 Again, relationship between parties has been
14 touched upon. But the relationship between the
15 parties is not just between Dr. Fogarty and Dr.
16 Feldman. It goes much deeper than that. Uh, at
17 the time, uh, the Plaintiff's counsel, uh, Mr.
18 Thompson, uh, his current wife was working for Dr.
19 Fogarty. Uh, Mark Casey, the Plaintiff, his sister
20 worked at the hospital. Knew Dr. Fogarty very,
21 very well. All these facts are alleged within the
22 Complaint.

23 These individuals knew each other. That's why
24 it came together. That's why this cause of action
25 happened. That's why the medical malpractice case

1 hung around for as long as it did because these
2 individuals were working for ulterior motives. The
3 ulterior motives don't have to be in synch. All of
4 them don't have to take a vote and say that our
5 ulterior motives are one in the same.

6 And again, for the purposes of our discussion
7 today, within the four corners of the Complaint,
8 the willful acts as to what these individuals were
9 trying to do and trying to accomplish as best as we
10 know today prior to discovery are alleged in 106,
11 107 and 108, 109, 110, 111, 113, 114. And the term
12 "willful" and "willingly" is used repeatedly. Why?
13 Because that's the requirement of the pleading at
14 this juncture.

15 Respecting the statute of limitations
16 argument, Dr. Fogarty's allegation says that
17 there's just a vague toss of the 11th hour that
18 there's nothing really respecting as to when
19 Plaintiff's counsel or when Plaintiff knew that
20 their rights had been infringed upon. And I take
21 exception to that because paragraphs 39, 40 and 41
22 and 42 succinctly allege that there were active
23 actions by Dr. Fogarty and by inference -- and
24 again, the inferences are drawn in the best light
25 to my client --- that their involvement was being

1 hidden. It was being shielded. Paragraph 41 says,
2 December 22nd, 2008 is when that all came to light
3 during his deposition. That's well within the
4 statute of limitations. But irrespective, good,
5 bad, poor or in-between, the statute of limitations
6 argument is primarily angled at motion for summary
7 judgement.

8 So, Judge, I simply and humbly ask -- I'm
9 trying to streamline this process. I'm trying to
10 get up to the plate so we can get some discovery
11 started and get this party started, for lack of a
12 better term. And I do want to get this case moved.
13 I do want to get this case resolved. Okay.

14 My clients feel like they have been taken out
15 behind the woodshed. And if you read the
16 Complaint, they have been. And so I humbly ask
17 that we get this case moving forward, that the
18 motions to dismiss are denied. In the alternative,
19 please tell me where I'm deficient. If I can't
20 plead it out of my action as shown today, I'll be a
21 big boy. I'll pick up my briefcase and go home.

22 THE COURT: All right.

23 MR. MANN: Thank you, Judge.

24 THE COURT: Thank you.

25 All right. Uh, well, I do -- as I told you in

1 the outset, I had not reviewed, uh, the memorandum,
2 uh, submitted on behalf of Mr. Casey or Mr.
3 Thompson. I do want to do that as well. I did
4 want to review the Complaint again in light of all
5 the parties' arguments. I'll be issuing a decision
6 very shortly.

7 I will tell you that I am just a -- just to --
8 just to let you know. I will be on vacation next
9 week, but I would anticipate the following week
10 that I'll issue a decision. All right. Thank you.

11 MR. HENRIKSON: Thank you, Judge.

12 MR. MANN: Thank you, Your Honor.

13 THE COURT: Thank you. Good to see y'all.

14 (WHEREUPON, the proceedings conclude at
15 approximately 3:36 p.m.)
16
17
18
19

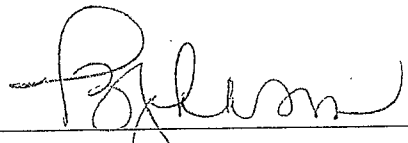
CERTIFICATE

40

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg, South Carolina, on this 28th day of February, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

A handwritten signature in cursive script, appearing to read 'T. B. Johnson', is written over a horizontal line.

Teresa B. Johnson

Circuit Court Reporter



Milton Mann <miltymann@gmail.com>

Feldman v. Casey (2010-CP-42-5743)

Couch, Roger L. Law Clerk (Mark A. Nowell) <rcouchlc@sccourts.org>

Fri, Sep 30, 2011 at 9:24 AM

To: "milton.mann@gmail.com" <milton.mann@gmail.com>, "Joe Mooneyham (Joe@upstatetriallawyers.com)" <Joe@upstatetriallawyers.com>, "mhenrikson@clarksonwalsh.com" <mhenrikson@clarksonwalsh.com>, "charles fogarty (cfogarty@medresearch.com)" <cfogarty@medresearch.com>

All:

Upon hearing the arguments of counsel and thoroughly reviewing Plaintiffs' Amended Complaint, Judge Couch has decided to allow Plaintiffs to amend the Complaint for a second time. Judge Couch would like Mr. Mann to submit a proposed order. Judge Couch is giving the Plaintiffs 30 days from issuance of the order to file the Second Amended Complaint. Plaintiffs should specifically plead the existence of special damages in the civil conspiracy cause action as well as allege facts tying Defendant Casey to the alleged civil conspiracy. Please let me know if you have any questions.

Thanks,

Mark A. Nowell

Law Clerk to the Honorable Roger L. Couch

Seventh Judicial Circuit

180 Magnolia Street

Spartanburg, SC 29304

Tel: (864) 562-4235

Fax: (864) 562-4234

F. MILTON MANN, JR.

ATTORNEY AT LAW
LICENSED IN SC, GA & FL

FILE COPY

March 6, 2012

Honorable Letitia Verdin
Greenville County
305 E. North Street, Suite 318
Greenville, SC 29601

BY EMAIL & U.S. MAIL

Re: Gregory Feldman, MD, et al v. William Mark Casey, et al
Case No. 2010-CP-42-5743

Dear Judge Verdin:

I hope this letter finds you well. Respecting Defendants' proposed Order Granting Defendants' Motions to Dismiss Second Amended Complaint, I have the following comments. Further, I seek the Court's guidance in this matter.

While the proposed Order accurately reflects the legal discussion of the Discovery Rule as it relates to the Statute of Limitations issue, its application appears faulty. The proposed Order asserts that Plaintiffs were on notice respecting their potential claims from the inception of the underlying medical malpractice claim. During the January 18, 2012 hearing, this Court inquired as to the date of the secreted MRI. As discussed at the hearing, the secreted MRI occurred on February 4, 2007, three (3) years prior to the inception of this lawsuit. Thus, the date of the secreted MRI appears to be the actual basis of this Court's finding as opposed to the date of the inception of the medical malpractice lawsuit. Therefore, I would request this Court's clarification as to this issue.

With this said, paragraph 92 of the Second Amended Complaint alleges:

92. Ultimately, the Doctors' counsel only learned of the test fortuitously by virtue of an anonymous letter sent to attorney Spencer King.

In the interest of justice, Plaintiff's should be allowed a final amendment to the Abuse of Process claim to clarify the timeframe by inserting the date they received the anonymous letter (copy of letter and enveloped attached) revealing the secreted MRI. The revelation occurred on or about August 18, 2008, thus, this lawsuit was filed well within the three (3) year window of the discovery of the invasion of their rights. Please recall, at the January 18, 2012, hearing, an oral Motion to Amend was made so that any technical shortcomings in the Complaint could be remedied.

1089 BOILING SPRINGS ROAD • SPARTANBURG, SOUTH CAROLINA 29303
864-208-0359 • FAX 864-208-0233 • CELL 864-680-5079
EMAIL: MILTON.MANN@GMAIL.COM

RECORD 104

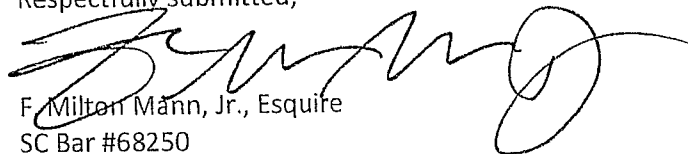
Honorable Letitia Verdin
Greenville County
March 6, 2012
Page Two

Please also recall that, at the onset on said hearing, there was an oral motion and stipulation by all parties, for the Civil Conspiracy claim to be dismissed without prejudice. This motion was granted. Therefore, the proposed Order should reflect the Civil Conspiracy count was dismissed without prejudice, by agreement of the parties, and the Court's Order.

In summary, I am requesting that the basis for this Court's Order granting Defendants' Motions to Dismiss be clarified with the actual findings of this Court. I further request that, in the interest of justice, this Court's Order be issued without prejudice, so that any technical errors in the Complaint may be remedied. Finally, I request that the Court's Order reflect that the Civil Conspiracy claim was dismissed without prejudice, by agreement of the parties. A copy of the hearing transcript is enclosed.

Thank you in advance for your consideration.

Respectfully submitted,



F. Milton Mann, Jr., Esquire
SC Bar #68250
Attorney for the Plaintiffs

Enclosures

CC: Ellen Cheek, Esquire (with enclosures)
Matt Henrickson, Esquire (with enclosures)
Joe Mooneyham, Esquire (with enclosures)
Mr. Overby - **by email only** (with enclosures)

FILE COPY

Extremely Confidential

H. Spencer King
Attorney At Law
The Ward Law Firm
P.O. Box 5663
Spartanburg, SC 29304

GREENVILLE SC 296
13 AUG 2003 PM 3 1



RECORD 106

FILE COPY

THIS PHOTOCOPY IS OF A DISK AND IS BEING SENT TO YOU SO THAT THE PLAYING FIELD IS LEVEL. CHUCK THOMPSON ARRANGED FOR HIS CLIENT TO HAVE AN MRI/HEAD AT PRESBYTERIAN HOSPITAL IN CHARLOTTE, NC, AND FAILED TO PROVIDE IT IN DISCOVERY. HE ARRANGED FOR THE MRI TO BE CARRIED OUT USING THE ALIAS "MARK JOHNSON" THROUGH DR. GODWIN, HIS BROTHER IN LAW, AT PRESBYTERIAN HOSPITAL. AND, IT APPEARS THE TEST WAS PAID FOR IN CASH BY CHUCK. OBVIOUSLY, CHUCK'S CLIENT'S SIGNING AN AUTHORIZATION WOULD NOT HELP YOU IN GETTING A COPY OF SAME. PLEASE USE WHATEVER MEANS NECESSARY TO OBTAIN THE TEST RESULTS AND THE MANNER IN WHICH THE TEST WAS SCHEDULED, PERFORMED AND WHY CHUCK WENT TO SUCH LENGTHS TO HIDE IT FROM YOU.



in
CE

Click on Patient List.

Double click on Study to display.

Use Vertical scroll bar or arrow keys to scroll through images.

Click & drag to adjust contrast & density.

There are several tools that you can use to optimize viewing located under TOOLS 1, 2 & LAYOUT tabs.

Record #
53305541

Mark Johnson
DOB: 10-18-58

date & exam
2-4-07

FILE COPY

F. MILTON MANN, JR.

ATTORNEY AT LAW
LICENSED IN SC, GA & FL

August 24, 2012

Honorable Letitia Verdin
Greenville County
305 E. North Street, Suite 318
Greenville, SC 29601

BY EMAIL & U.S. MAIL

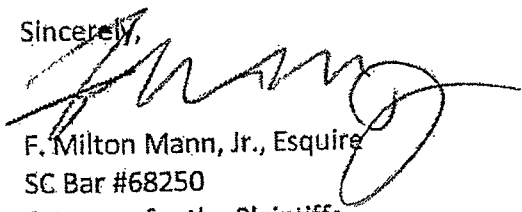
Re: Gregory Feldman, MD, et al v. William Mark Casey, et al
Case No. 2010-CP-42-5743

Dear Judge Verdin:

I hope this letter finds you well. We are in receipt of your Form 4 Order clocked May 14, 2012, which indicates that a formal Order will follow. To-date, we have not received said Order. May we have a time-frame in which we might expect the formal Order?

Thank you for your assistance in this matter.

Sincerely,



F. Milton Mann, Jr., Esquire
SC Bar #68250
Attorney for the Plaintiffs

CC: Ellen Cheek, Esquire
Matt Henrickson, Esquire
Joe Mooneyham, Esquire
Mr. Overby - **by email only**

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holly mann< holly.jo.mann@gmail.com>

Gregory Feldman, MD, et al v. William Mark Casey, et al - Case No. 2010-CP-42-5743

Verdin, Letitia H. Law Clerk () <lverdinc@sccourts.org>

Fri, Aug 24, 2012 at 11:15 AM

To: holly mann <holly.jo.mann@gmail.com>, Milton Mann <milton.mann@gmail.com>, "ECheek@wilkeslaw.com" <ECheek@wilkeslaw.com>, "matt@henriksonlaw.com" <matt@henriksonlaw.com>, "Joe Mooneyham(Joe@upstatetriallawyers.com)" <Joe@upstatetriallawyers.com>

No formal order will follow on Judge Verdin's ruling on Plaintiff's Motion to Reconsider. That is a clerical error.

Thank you.

Stan Overby
Law Clerk to the Honorable Letitia H. Verdin

From: holly mann [holly.jo.mann@gmail.com]
Sent: Friday, August 24, 2012 10:03 AM
To: Milton Mann; ECheek@wilkeslaw.com; matt@henriksonlaw.com; Joe Mooneyham (Joe@upstatetriallawyers.com); Verdin, Letitia H. Law Clerk ()
Subject: Gregory Feldman, MD, et al v. William Mark Casey, et al - Case No. 2010-CP-42-5743

Good Morning!

Please see attached.

Thank you.

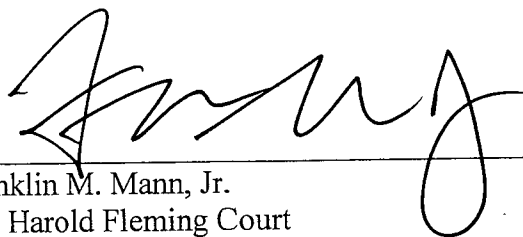
--

holly mann, j.d.
1089 boiling springs road
spartanburg, sc 29303
cell: 864/384-0421<tel:864%2F384-0421>
fax: 866/452-2276<tel:866%2F452-2276>

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

April 29, 2013

A handwritten signature in black ink, appearing to read 'F. Mann, Jr.', written over a horizontal line.

Franklin M. Mann, Jr.
151 Harold Fleming Court
Spartanburg, SC 29303
864/680-5079
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-5743

Gregory J. Feldman, MD, Joseph A. Boscia, III, MD,
Upstate Lung & Critical Care Specialists, PC, and
Devendra Shantha, MD,

Appellants,

v.

William Mark Casey, Ray E. "Chuck" Thompson,
and Charles M. Fogarty,

Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal upon Respondents William Mark Casey, Ray E. "Chuck" Thompson, and Charles M. Fogarty by depositing copies in the United States Mail, postage pre-paid, on April 29, 2013, addressed to their respective attorneys' of record at the addresses listed below:

Joe Mooneyham, Esquire
Mooneyham, Barry & Karow, LLC
PO Box 8359
Greenville, South Carolina 29604
Attorney for Respondent Casey

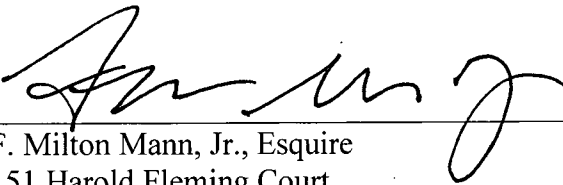
Matthew H. Henrikson, Esquire
Henrickson Law Firm
1164 Woodruff Road
Greenville, South Carolina 29607
Attorney for Respondent Thompson

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MAY 01 2013
SC Court of Appeals

ORIGINAL

Ellen Cheek, Esquire
Michael B.T. Wilkes, Esquire
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Attorney for Respondent Fogarty

April 29, 2013



F. Milton Mann, Jr., Esquire
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(864) 680-5079
Attorney for the Appellants