

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

SC Court of Appeals

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.

**RESPONDENTS' REPLY IN SUPPORT OF
PETITION FOR REHEARING**

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Pursuant to Rule 221(f), SCACR, Respondents William Mark Casey, Ray E. (“Chuck”) Thompson, and Charles M. Fogarty (collectively, “Respondents”) respectfully submit this Reply in Support of their Petition for Rehearing of the Court’s Unpublished Opinion No. 2014-UP-273 (the “Opinion”).

Respondents’ Petition for Rehearing (“Respondents’ Petition”) explains why this Court should reconsider its decision on the first question on appeal, and hold that the allegations of Appellants’ Second Amended Complaint render Appellants’ abuse of process claim time-barred. Specifically, Appellants’ pleading proves that Appellants knew or reasonably ought to have discovered no later than February 2007 that they possibly had an abuse of process claim against Respondents as to the 2006 Medical Malpractice Action.¹ The three-year statute of limitations period on Appellants’ abuse of process claim thus expired before Appellants filed this suit in October 2010.

To maintain an abuse of process claim, a plaintiff must prove (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding *D R Horton, Inc v Wescott Land Co , LLC*, 398 S.C. 528, 550, 730 S.E 2d 340, 351-52 (Ct. App 2012). While Appellants’ Response to Respondents’ Petition for Rehearing (“Appellants’ Return”) states that “[t]he mere filing of a lawsuit does not give rise to a cause of action for an abuse of process” (Return 7), South Carolina courts recognize that the filing and prosecution of a legal proceeding can constitute abuse of process, if the defendant has engaged in willful and improper coercive acts before the

¹ Respondents continue to deny that Appellants’ Second Amended Complaint asserts an actionable claim for abuse of process. Respondents expressly reserve their right to move again to dismiss this cause of action, if this Court declines to grant Respondents’ Petition for Rehearing and the case is remanded to the Circuit Court.

issuance of process, which “taint” the entire proceeding. *See Huggins v Winn–Dixie Greenville, Inc* , 249 S.C. 206, 209, 153 S.E 2d 693, 694 (1967); *see also Food Lion, Inc v United Food & Commercial Workers Intern Union*, 351 S.C. 65, 71 n.3, 567 S.E.2d 251, 254 n.3 (Ct. App. 2002) (explaining that “the willful act requirement is not limited to those abusive acts occurring after process has issued, but includes coercive or extortionate acts that cause process to issue in the first instance”). Appellants’ Second Amended Complaint alleges – and Appellants’ Return does not refute – that the Medical Malpractice Action itself was an abuse of process.² This is because the lawsuit was the culminating act in Respondents’ alleged “baseless brain injury scheme” that Respondents developed and acted to implement between 2004 and 2006, and because the action was interposed not for any legitimate purpose, but instead to damage Appellants and achieve unwarranted drugs and disability benefits for Casey. (R. at 23, ¶¶ 4-5; R. at 24, ¶ 18; R. at 25, ¶¶ 23-25, 27, 28; R. at 26, ¶ 36, R. at 27, ¶¶ 37 and 38; R. at 28, ¶ 48; R. at 29, ¶¶ 51, 58; R. at 31, ¶ 76; R. at 32, ¶¶ 79-81; R. at 35, ¶¶ 105, 108).

As to the timing of Appellants’ notice of these alleged acts and motives, Appellants specifically pled that they were suffering such tremendous pressure as a result of the publicizing of Respondents’ “destructive scheme” that in February 2007, they dismissed business litigation they had instituted against Fogarty in 2005 to combat Fogarty’s alleged attempts to interfere with their business. (R. at 25, ¶¶ 23-25, 29;

² Respondents identify Appellants’ alleged “wrongful acts in the use of process” and “ulterior purpose” claim elements, as same are pled by Appellants, for the exclusive purpose of aiding the Court’s analysis of the application of the statute of limitations to Appellants’ abuse of process claim. Respondents deny that Appellants have properly or sufficiently alleged the required elements of an abuse of process claim as to Respondents

Stipulation of Dismissal with Prejudice filed in *S Carolina Pharmaceutical Research v Charles M Fogarty, MD*, Spartanburg County Court of Common Pleas, Case No. 2005-CP-42-1085 (the “Stipulation”), attached to Respondents’ Petition for Rehearing as Exhibit “A”).³ Appellants thus directly allege – and Appellants’ Return again does not refute – that they dismissed a civil action in February 2007 based on the negative impact of the very same publicized, destructive, brain injury scheme that formed the alleged exclusive basis and purpose of the Medical Malpractice Action. (R. at 23, ¶¶ 4-5; R. at 25, ¶ 29; Stipulation.)

Appellants therefore admit that by February 2007, they believed Respondents had acted in certain ways and with certain motives, which they now contend support their abuse of process claim. These sophisticated Appellants admit that by February 2007, they had discovered Respondents’ alleged abusive acts; so as people possessing, at the very least, common knowledge and experience, they would have known at least by February 2007 that a cause of action for abuse of process possibly existed against Respondents, such that the matter should be timely investigated. *See Burgess v American Cancer Soc , South Carolina Div , Inc*, 300 S.C. 182, 186-87, 386 S.E.2d 798, 800 (Ct App 1989) (holding statute of limitations starts to run on discovery of facts

³ Appellants object to this Court’s taking appellate judicial notice of the *S Carolina* stipulation of dismissal on grounds that the plaintiff in that action is not a party to this case. (Return 8-9.) This fact has no bearing on this Court’s ability to take judicial notice of the *S Carolina* dismissal. Instead, *Masters v Rodgers Dev Group*, 283 S.C. 251, 256, 321 S.E. 2d 194, 197 (Ct. App. 1984), clearly instructs that “an appellate court can take judicial notice of something that was not before the trial court if it is indisputable.” Because the *S Carolina* dismissal is a properly executed record that was filed in a circuit court of this state, it an indisputable fact of which this Court can and should take judicial notice.

sufficient to put party on inquiry which, if developed, would disclosed alleged wrongdoing). Because Appellants did not file suit against Respondents until over three years later, in October 2010, their claim is time-barred.

Significantly, and as stated above, Appellants' Return does not dispute these operative allegations compelling the dismissal of Appellants' untimely abuse of process claim. Instead, Appellants' Return recounts a series of alleged discovery abuses Appellants claim Respondents committed during the course of the Medical Malpractice Action, supposedly with the intent of concealing Respondents' "ulterior purposes, [sic] willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts." (Return 6-7.) Appellants argue that Respondents' discovery abuses "concealed" these matters "until sometime within 2008," so that the statute of limitations period on Appellants' abuse of process claim did not begin running until 2008. (Return 7.)

Respondents' alleged discovery abuses are immaterial to the question of when the statute of limitations period began running on Appellants' abuse of process claim. This is because, as summarized above and detailed in Respondents' Petition, the Second Amended Complaint directly alleges – and Appellants' Return does not deny – that the Medical Malpractice Action itself was an abuse of process, based on Respondents' ulterior motives and bad acts preceding and culminating in the filing of that lawsuit. Appellants' assertion that Respondents "concealed" their process-abusing bad acts and improper motives through discovery misconduct until 2008 is belied by Appellants' own pleadings. First, Appellants directly allege that were so negatively affected by the "publicizing" of Fogarty's permanent brain injury theory within Respondents'

“destructive scheme” that they dismissed their pending lawsuit against Fogarty, *S Carolina Pharmaceutical Research v Charles M Fogarty, MD*, Spartanburg County Court of Common Pleas, Case No. 2005-CP-42-1085 (“*S Carolina*”). (R. at 25, ¶ 29.) The appellate judicial notice which this Court may and should take of the date of that dismissal reveals that date as being February 15, 2007 – more than three years before Appellants filed this action in October 2010. Per Appellants’ own pleading, Respondents’ alleged cover-up efforts failed to achieve their intended end, because Appellants had notice of the operative facts forming their abuse of process claim by February 2007.

Second, Appellants have neither alleged nor argued that Respondents successfully or even intentionally secreted Fogarty’s alleged baseless brain scheme until 2008. To the contrary, Appellants allege that Fogarty’s brain injury theory was “prominently” published in 2005 and 2006, and used to support Casey’s disability application (R. at 25, ¶ 28; R. at 26, ¶ 36; R. at 32, ¶¶ 79-81); that Casey and Thompson advanced the unfounded theory in the Medical Malpractice Action filed in 2006 (R. at 23, ¶¶ 4-5), and that Appellants were aware of and negatively affected by Fogarty’s publicized theory and Respondents’ associated “destructive scheme” at least by February 2007 (R. at 25, ¶ 29, Stipulation). Likewise, Appellants have not alleged that they were *unaware* of Fogarty’s involvement in the Medical Malpractice Action until they deposed Fogarty in 2008. Instead, Appellants allege that Fogarty – who they claim actively sought to interfere with their business to the extent that Appellants sued him in 2005 – tried to conceal his “level of involvement” in the Medical Malpractice Action by trying to “evade his deposition.” (R. at 25, ¶¶ 23-25, R. at 27, ¶¶ 41-42, R. at 28, ¶ 44.) Fogarty’s alleged discovery

conduct does not change the date on which the statute of limitations period began running on Appellants' abuse of process claim, because the Second Amended Complaint alleges that by February 2007, Appellants possessed some degree of understanding of Fogarty's alleged publicized, destructive scheme and its negative impact upon them, and because the pending Medical Malpractice Action was based on that very same scheme. The statute of limitations period thus began to run at least by February 2007, regardless of whether Appellants then knew the complete details of Fogarty's alleged involvement with the Medical Malpractice Action. *See Gibson v Bank of America, NA*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009) (holding that the statute of limitations period begins running on the date a plaintiff knew or should have known that he had a claim, and not when the plaintiff "obtains actual knowledge of either the potential claim or the facts giving rise thereto"); *Burgess*, 300 S.C. at 186-87, 386 S.E.2d at 800 ("A party cannot escape the application of th[e discovery] rule by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence, the same result follows.").

Also lacking merit is Appellants' argument that this Court should refuse to consider Respondents' Petition because Respondents did not raise their argument concerning the time-barring effect of Appellants' February 2007 dismissal of the *S Carolina* lawsuit "prior to this point in time" and did not include a copy of the *S Carolina* dismissal in the Appendix to Record on Appeal (Return 9.) Contrary to Appellants' suggestion, Respondents' Petition does not raise an issue that Respondents have not previously argued to this Court, or to the circuit court. Instead, Respondents

have argued consistently that Appellants' own pleadings render Appellants' abuse of process claim time-barred. Respondents' Petition properly seeks to aid the Court in deciding this statute of limitations matter correctly, based on Appellants' Second Amended Complaint. *See Arnold v Carolina Power & Light Co*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933) (explaining purpose of proper petition for rehearing).

The Second Amended Complaint specifically alleges that Appellants were forced to dismiss their *S Carolina* lawsuit against Fogarty because of "tremendous pressure" borne of "the publicizing of the baseless allegations of a 'permanent brain injury' within the destructive scheme." (R. at 25, ¶ 29) This allegation directly supports Respondents' position that the statute of limitations period on Appellants' abuse of process claim expired at least by February 2010 – three years from *S Carolina*'s February 2007 dismissal date, and approximately six months before Appellants filed suit. This is not a new argument, but rather is additional evidence that the allegations of the Second Amended Complaint support the Circuit Court's decision to dismiss Appellants' abuse of process claim based on the statute of limitations.

Finally, Respondent Fogarty's request that the Court revise the Order's "Facts/Procedural History" to summarize accurately the allegations of the Second Amended Complaint also should be granted, because Appellants have cited no paragraph of their pleading that supports the Court's finding that Fogarty's treatment of Casey "allegedly included arranging for Casey to obtain an MRI under a fictitious name and date of birth." (Return 10; Opinion 2.) While the Court's recitation of facts has no precedential value, *see Penny Creek Assocs, LLC v Fenwick Tarragon Apts, LLC*, 375 S.C. 267, 275 651 S.E.2d 617, 621 (Ct. App. 2007), even a factual recitation made in a

light most favorable to Appellants must be based on the facts actually alleged by Appellants. *See Sullivan & Co v Sullivan*, 20 S C. 509, 511 (1884) (“Whatever may be the facts of the case, [the appellate] court is confined to the record.”). Although Appellants now “assert that the Court correctly concluded the most logical inference that can be drawn from the facts” is that Fogarty was involved with Casey’s obtaining an MRI, Appellants have not alleged this in their pleading. Fogarty therefore respectfully requests that the Court’s opinion accurately reflect that Appellants have not alleged that Fogarty was involved with the MRI Casey obtained.

Conclusion

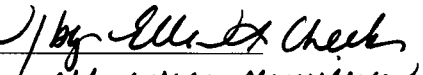

For the reasons set forth above and in Respondents’ Petition for Rehearing, Respondents respectfully request that the Court rehear this appeal on the issue of whether Appellants’ abuse of process claim is time-barred, and uphold the Circuit Court’s finding on that issue. Respondent Fogarty also respectfully asks the Court to revise its factual findings to reflect accurately that Appellants have not alleged that Fogarty was involved with ordering or arranging for Casey to receive an MRI

July 31, 2014

Respectfully Submitted,


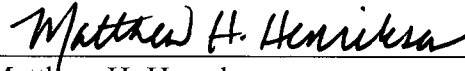


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v.

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

PROOF OF SERVICE

I certify that I have served the *Respondents' Reply in Support of Petition for Rehearing* upon Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, and Devendra Shantha, MD, via UPS overnight, on July 31, 2014, addressed to their attorney of record, F Milton Mann, Jr., Esquire, at his office at 151 Harold Fleming Court, Spartanburg, South Carolina, 29303.

Additionally, I hereby certify that I have served the *Respondents' Reply in Support of Petition for Rehearing* upon co-respondents, William Mark Casey and Ray E. ("Chuck") Thompson, by depositing a copy of it in the United States Mail, postage prepaid, on July 31, 2014, addressed to their attorneys, Joe Mooneyham, Esquire, PO

Box 8359, Greenville, South Carolina, 29604, and Matthew H. Henrikson, Esquire, 1164
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July 31, 2014



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SC Court of Appeals

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July 31, 2014

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Gregory J. Feldman, MD, Joseph A. Boscia III, MD, Upstate Lung and
Critical Care Specialists PC, and Devendra T. Shantha, MD v.
William Mark Casey, Ray E. "Chuck" Thompson and Charles M. Fogarty, MD*
In the Court of Common Pleas for Spartanburg County
C. A. No. 2010-CP-42-5743
Appellate Case No. 2012-212867

Dear Ms Kitchings:

Per Appellate Court Rule 221(a), enclosed for filing is an original and six copies of *Respondents' Reply in Support of Petition for Rehearing and Proof of Service*. Please file the originals in accordance with your usual procedure and return filed-stamped copies to me in the enclosed, postage-prepaid envelope.


Sincerely,



Ellen S. Cheek
echeek@wilkeslaw.com

ESC/jjs
Enclosures
cc (Via U.S. Mail): All counsel of record

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