

2014-002104

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2014-UP-273 (S.C. Ct. App. filed June 30, 2014)

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

v.

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

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

Appellate Case No. 2012-212867

Appeal From Spartanburg County
Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2014-UP-273
Heard June 4, 2014 – Filed June 30, 2014

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Franklin Milton Mann, Jr., of Spartanburg, for
Appellants.

Matthew Holmes Henrikson, of Henrikson Law Firm,
LLC, of Greenville, for Respondent Ray E. Thompson;
Joseph A. Mooneyham, of Mooneyham Berry, LLC, of
Greenville, for Respondent William Mark Casey; and

Michael B.T. Wilkes and Ellen S. Cheek, both of Wilkes Law Firm, PA, of Spartanburg, for Respondent Charles M. Fogarty.

PER CURIAM: Appellants Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, (Upstate Lung) and Devendra Shantha, MD, brought this action against Respondents William Mark Casey, Ray E. ("Chuck") Thompson, and Charles M. Fogarty for abuse of process and civil conspiracy. Upon Respondents' motions to dismiss, the circuit court dismissed these claims with prejudice. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY¹

Feldman and Boscia are physicians and partners in Upstate Lung, and Shantha is an anesthesiologist. In 2006, Thompson, an attorney, filed an action on Casey's behalf against Appellants, alleging that Feldman, Boscia, and Shantha breached the applicable standard of care regarding medical treatment they provided to Casey and that Casey suffered permanent brain damage and became permanently disabled as a result of the alleged breach. While the case was pending, Shantha was granted summary judgment and dismissed as a defendant. The case was tried in May 2010, and on May 28, 2010, the jury returned a verdict for Feldman, Boscia, and Upstate Lung.

On October 27, 2010, Appellants filed this action against Respondents for abuse of process and civil conspiracy arising from the prior lawsuit. According to the complaint, Fogarty was another pulmonologist who had ended a business relationship with Feldman on hostile terms and surreptitiously treated Casey while the malpractice action was pending. The treatment allegedly included arranging for Casey to obtain an MRI under a fictitious name and date of birth.

¹ Because this case was decided on a motion to dismiss, the facts as stated here are restricted to the allegations of the complaint and are assumed to be true for the purpose of our review of the grant of the motion to dismiss. See *Overcash v. S.C. Electric & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) ("A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCF, must be based solely on the allegations set forth on the face of the complaint.").

Instead of filing responsive pleadings, Respondents each moved to dismiss the complaint pursuant to Rule 12(b)(6), SCRCF. Appellants subsequently amended their pleadings twice. After Appellants filed their second amended complaint, Respondents filed separate motions to dismiss. The circuit court held a hearing on the motions. When the hearing commenced, the parties agreed to a dismissal without prejudice of Appellants' civil conspiracy claim, and oral argument proceeded on only the abuse of process claim. The circuit court later issued an order granting Respondents' motions to dismiss Appellants' second amended complaint, holding the three-year statute of limitations had expired before Appellants filed their lawsuit. In addition to dismissing with prejudice Appellants' claim for abuse of process, the circuit court also barred Appellants from re-asserting their claim for civil conspiracy at any time in the future. Appellants moved to alter or amend the circuit court's order and for leave to amend their complaint once again. The circuit court denied these motions, and Appellants filed this appeal.

1. Appellants first argue the circuit court misapplied the discovery rule in dismissing their complaint for abuse of process. We agree.

"In deciding a motion to dismiss pursuant to [Rule] 12(b)(6), SCRCF, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). In reviewing a decision on whether to dismiss an action pursuant to Rule 12(b)(6), SCRCF, "the appellate tribunal applies the same standard of review that was implemented by the trial court." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

"The essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014). Abuse of process claims are subject to a three-year statute of limitations. *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 222 n.18, 525 S.E.2d 888, 896 n.18 (Ct. App. 1999). This period begins to run when the plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005).

In dismissing Appellants' claim for abuse of process, the circuit court found Appellants' abuse of process claim arose in 2006, when the medical malpractice action against them was filed. According to the appealed order, Appellants not

only knew Casey and Thompson had filed the lawsuit against them, they believed the lawsuit was for a purpose other than to redress legitimate medical injuries, namely, to obtain prescription pain medication and disability benefits. The paragraphs of the complaint cited by the circuit court to support this finding, however, do not give any indication as to when Appellants knew or should have known either that Casey was obtaining narcotic drugs and disability benefits as a result of the pending medical malpractice action or that Casey filed the lawsuit with this objective. Furthermore, even if the complaint indicates Appellants had reason to believe the medical malpractice action was filed with Respondents' knowledge that it was based on spurious allegations, Appellants' complaint does not allege any specific point in time at which Respondents committed a willful and improper act in their use of the legal process. Without any information in Appellants' complaint as to when any such acts allegedly occurred, we hold the allegations in the complaint do not support a finding that Appellants could be charged with knowledge that they had a potential abuse of process claim at the time the malpractice action against them was filed. *See Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) ("There is no liability [in an abuse of process action] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions."); *id.* at 136-37, 492 S.E.2d at 107 ("Abuse of process requires both an ulterior purpose and a willful act not proper in the regular course of the proceeding."). We therefore hold the allegations of Appellants' complaint do not support a finding that their action for abuse of process was barred by the statute of limitations and remand for further proceedings on this cause of action.²

2. Appellants argued in their brief that because Respondents had agreed to a dismissal of the conspiracy claim without prejudice, the circuit court erred in dismissing this cause of action with prejudice. Appellants, however, failed to raise this issue in their motion to alter or amend; therefore, the issue is not preserved for appeal. *See In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."). Furthermore, at oral argument, Appellants'

² Our reversal of the dismissal of Appellants' abuse of process claim is without prejudice to Respondents to move again for dismissal of this cause of action once the case is remanded to the circuit court.

counsel indicated that he no longer intended to pursue a claim for conspiracy against Respondents.

3. Appellants also challenge the circuit court's finding that equitable tolling did not apply to their claims and the circuit court's refusal to grant them leave to amend their complaint to advance additional factual allegations that would clarify the relevant timeline as it related to the discovery rule and the statute of limitations. In view of our decision to reverse the dismissal of Appellants' abuse of process claim and remand this matter to the circuit court for further proceedings, we decline to address these arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, THOMAS, and PIEPER, JJ., concur.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

RESPONDENTS' PETITION FOR REHEARING

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Respondents William Mark Casey, Ray E. (“Chuck”) Thompson, and Charles M. Fogarty (collectively, “Respondents”) respectfully petition this Court pursuant to Rule 221(a), SCACR, for rehearing of the Court’s Unpublished Opinion No. 2014-UP-273 (the “Opinion”) concerning the first issue on appeal in this matter, specifically, whether the Circuit Court erred in holding Appellants’ abuse of process claim is time-barred. Respondents seek this rehearing on grounds that the Opinion appears to have overlooked or misapprehended specific allegations in Appellants’ Second Amended Complaint which show that the statute of limitations on Appellants’ cause of action for abuse of process expired more than three years before Appellants filed such claim.

Respondent Fogarty also respectfully requests that the Court alter one sentence contained in the Opinion’s “Facts/Procedural History” to summarize accurately Appellants’ alleged facts as to the MRI obtained by Respondent Casey during the underlying medical malpractice action. Fogarty so requests on the basis that the Court’s factual summary misapprehends and misstates the Second Amended Complaint’s allegations as to Fogarty’s involvement with Casey’s obtaining that procedure.

Rule 211 Standard

Rule 221(a), SCACR, allows parties to petition for rehearing within fifteen days after the Court of Appeals files an opinion. “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001), *quoting* Jean H. Toal, Shahin Vafai & Robert Muckenfriss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*,

168 S.C. 163, 167 S.E. 234 (1933)). Instead, the purpose of a petition for rehearing “is to aid the Court in deciding correctly a case heard by it.” *Arnold*, 168 S.C. at 172, 167 S.E. at 238. A proper petition does not simply contain “a ‘rehash’ of what the losing party has said before, matters which the Court has already considered well and disposed of.” *Id.* Instead, a proper petition specifies points the Court supposedly has overlooked or misapprehended. *Id.*; *see also Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

Respondents’ Petition for Rehearing (the “Petition”) is interposed for a proper purpose, *i.e.*, to aid the Court in deciding this case correctly, based on Appellants’ Second Amended Complaint. The Petition also is proper substantively, because it concerns the statute of limitations issue properly preserved for this Court’s decision, and points out allegations in the Second Amended Complaint that are determinative of that issue, but that the Opinion appears to have overlooked or misapprehended. As shown below, the Petition identifies per Appellants’ pleading the latest date by which Appellants knew the facts comprising their abuse of process claim, which date precedes Appellants’ filing suit on that claim by more than three years. Significantly, in doing so, the Petition does not simply restate or “rehash” the discovery rule arguments Respondents have previously asserted on this statute of limitations issue.

Accordingly, and for the reasons explained fully herein, Respondents respectfully request that this Court rehear the question of whether the circuit court properly held that the statute of limitations bars Appellants’ abuse of process claim.

**Opinion’s Findings and Holding
as to Statute of Limitations Issue**

The Opinion finds that the Circuit Court erred in dismissing Appellants’ abuse of

process claim, because “the allegations of Appellants’ complaint do not support a finding that their action for abuse of process was barred by the statute of limitations[.]” (Opinion 4.) The Opinion recites that “[t]he essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding.” (Opinion 3, *quoting Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014).) Further, the Opinion recognizes that abuse of process claims are subject to a three-year statute of limitations, which period begins running when the plaintiff “knew or by the exercise of reasonable diligence should have known that he had a cause of action.” (Opinion 3, *citing Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 222 n.18, 525 S.E.2d 888, 896 n.18 (Ct. App. 1999) and S.C. Code Ann. § 15-3-535 (2005).)

In reversing the Circuit Court’s dismissal of Appellants’ abuse of process claim, the Opinion first states that the paragraphs of the Second Amended Complaint the Circuit Court cites to support its finding – specifically, that Appellants knew or should have known the Medical Malpractice Action was filed for an improper purpose – “do not give any indication” as to when Appellants knew or should have known the lawsuit was for a purpose other than to redress legitimate medical injuries claimed by Casey. (Opinion 4.) The Opinion then states that even if the Second Amended Complaint does indicate that Appellants had reason to believe the Medical Malpractice Action was based on spurious allegations, the pleading “does not allege any specific point in time at which Respondents committed a willful and improper act in their use of legal process.” (Opinion 4.) On these bases, the Opinion concludes that the Second Amended Complaint’s allegations do not support a finding that Appellants filed their abuse of process claim more than three

years after they knew or should have known they had such a claim. (Opinion 4.)

Argument and Citation of Authority

Respondents respectfully submit that, contrary to the Opinion's findings, the Second Amended Complaint does identify the dates Appellants claim Respondents' alleged improper acts constituting an abuse of process occurred, and establishes the latest date by which Appellants knew of those acts and the wrongful motives behind them.¹ Because these alleged events occurred more than three years before Appellants filed their abuse of process claim, that claim is barred by the statute of limitations.

In considering whether Appellants' abuse of process claim is time-barred, it is important to identify what alleged "wrongful acts in the use of process" and what "ulterior purposes" Appellants claim constitute an abuse of process by Respondents.² It is also useful to reference the holdings in *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"), and *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967) (holding that the filing and prosecution of a legal

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 this Petition and remands the case to the Circuit Court.

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.

proceeding can constitute abuse of process if the defendant has engaged in willful and improper coercive acts before the issuance of process, which “taint” the entire proceeding). This is because, as detailed below, the Second Amended Complaint alleges that beginning in 2004 and continuing through 2006, Respondents engaged in willful and improper acts that culminated in the filing of and tainted with impropriety the entire Medical Malpractice Action – in other words, Appellants contend that the Medical Malpractice Action itself was an abuse of process, such that the filing that suit in 2006 was an improper act triggering Appellants’ abuse of process claim. *See Food Lion*, 351 S.C. at 71 n.3, 567 S.E.2d at 254 n.3; *see also Huggins*, 249 S.C. at 209, 153 S.E.2d at 694. The Second Amended Complaint also contains allegations that definitely prove that Appellants knew or should have known that they had a cause of action against Respondents for this alleged abuse of process when the Medical Malpractice Action was filed in 2006, or, at the latest, by February 15, 2007.

Appellants have pled throughout the Second Amended Complaint that Respondents’ act of filing the Medical Malpractice Action was an improper act forming the basis of their abuse of process claim, because that lawsuit was tainted from its inception by and based on Fogarty’s allegedly “bogus” medical opinions as to Casey’s injuries. Appellants also allege that the suit was motivated and tainted by Casey’s seeking and improperly requesting unnecessary prescription narcotics, and by Thompson’s desire to obtain unwarranted disability benefits for his client. Thus, according to the Second Amended Complaint, Respondents brought the Medical Malpractice Action not to seek redress for injuries Casey sustained as a result of Appellants’ substandard care, but rather for other purposes, *i.e.*, seeking drugs (Casey), harming a competitor (Fogarty), and

seeking disability benefits for an uninjured client (Thompson). Appellants' allegations thus track those asserted in *Huggins*, in which the South Carolina Supreme Court held that the entire "process" of a shoplifting arrest and prosecution based on the theft of two hams was an alleged abuse of process, because it resulted from the store manager's pre-arrest effort to coerce the plaintiff into paying money for other merchandise the manager felt the plaintiff had previously taken. *See Huggins*, 249 S.C. at 209, 153 S.E.2d at 694. Specifically in this case, Appellants allege as follows:

In 2004, Casey sought from Appellants pain medications and support for his disability claims. (R. at 29, ¶ 56.) Appellants determined that Casey's requests "were not medically supported," and therefore denied those requests. (R. at 29, ¶ 56.)

In 2004 and 2005, Fogarty developed a medically unfounded theory that Casey had suffered a "permanent brain injury" as a result of Appellants' treatment of Casey. (R. at 24, ¶ 18; R. at 28, ¶ 48; R. at 29, ¶ 58; R. at 31, ¶ 76.) Fogarty's intent in creating this "scheme" was to help Casey obtain disability benefits, and, most significantly, to injure Appellants by damaging their reputation and embroiling them in protracted litigation defending against the medically unfounded brain injury theory. (R. at 25, ¶ 27; R. at 27, ¶¶ 37 and 38; R. at 35, ¶ 108.) Injuring Appellants in litigation with his "baseless permanent injury fabrications" remained Fogarty's intent "leading up to and during" the malpractice action. (R. at 27, ¶ 38.)

Like Fogarty, Casey knew he had not suffered a brain injury as a result of Appellants' medical treatment; but Casey wanted to obtain narcotics and disability benefits, and therefore willingly advanced Fogarty's brain injury theory in a lawsuit against Appellants. (R. at 31, ¶¶ 72, 75; R. at 35, ¶¶ 105-106.) Thompson also wished to

litigate Fogarty's brain injury theory against Appellants to develop support for Casey's otherwise groundless claim for disability benefits, which had been denied. (R. at 32, ¶¶ 77-79; R. at 35, ¶¶ 110-112.)

Fogarty, Casey, and Thompson therefore worked together to implement this baseless brain injury scheme, which was developed and intended solely for purposes of a medical malpractice action against Appellants. (R. at 29, ¶ 51; R. at 31, ¶ 76; R. at 35, ¶ 105.) To advance this scheme, Fogarty prominently published his brain injury theory and other allegations of malpractice against Appellants in Casey's medical records on July 21, 2005. (R. at 25, ¶ 28; R. at 26, ¶ 36.) These records were then published to Casey's disability carrier, Aetna, in relation to Casey's disability application, which application Aetna denied in 2006. (R. at 32, ¶¶ 79-81.) Fogarty's theory also formed the basis of the Medical Malpractice Action, which Fogarty caused to be filed in 2006, and in which Casey alleged that he had suffered a disabling brain injury because of Appellants' treatment. (R. at 23, ¶¶ 4-5; R. at 35, ¶¶ 104-108.)

Respondents' "misuse of the legal process" by filing and maintaining the baseless Medical Malpractice Action damaged Appellants by harming their reputations and causing them pecuniary and emotional damage. (R. at 37, ¶ 115.) Further, the "publicizing" of Fogarty's permanent brain injury theory within Respondents' "destructive scheme" created such "tremendous pressure" in Appellants' lives that they dismissed their pending lawsuit against Fogarty, *S. Carolina Pharmaceutical Research v. Charles M. Fogarty, M.D.*, Spartanburg County Court of Common Pleas, Case No. 2005-

CP-42-1085 (“*S. Carolina*”).³ (R. at 25, ¶ 29.) Appellants dismissed *S. Carolina* on February 15, 2007. (See Stipulation of Dismissal with Prejudice, attached as Exhibit “A”.)⁴

For the Court’s convenience, the following chart reflects the alleged facts discussed above:

Date	Alleged Event	Record Citation
2004	Appellants deny Casey’s requests for pain medication and support for disability claim on grounds that same are “not medically supported.”	R. at 29, ¶ 56
2004	Fogarty begins working with Casey to “help” him after Appellants refused to prescribe Casey narcotics or support his disability claim.	R. at 24, ¶ 18 R. at 28, ¶ 48 R. at 29, ¶ 58 R. at 31, ¶ 76
	Fogarty “helps” Casey by using his “permanent brain injury” in Casey’s attempt to obtain disability “and the medical malpractice case.”	R. at 31, ¶ 76

³ In *S. Carolina*, Appellants and Fogarty were represented by the same counsel of record as in the present suit.

⁴ Respondents ask the Court to take appellate judicial notice of the date Appellants dismissed *S. Carolina Pharmaceutical Research v. Charles M. Fogarty, M.D.*, Spartanburg County Court of Common Pleas, Case No. 2005-CP-42-1085. A true and accurate copy of the Stipulation of Dismissal with Prejudice filed in that case on February 15, 2007, is attached. A fact is subject to judicial notice if “its accuracy is capable of verification by reference to readily available sources of indisputable reliability.” *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 255, 321 S.E. 2d 194, 196 (Ct. App. 1984); *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996). Appellate courts may take original judicial notice of adjudicative facts that are outside the record as to “matters which are indisputable.” *Masters*, 283 S.C. at 256, 321 S.E.2d at 197; *Wise v. Wise*, 394 S.C. 591, 600, 716 S.E.2d. 117, 122 (“an appellate court can take judicial notice of something that was not before the trial court if it is indisputable”). The fact that the Stipulation of Dismissal with Prejudice of the *S. Carolina* case was signed by the parties to that action and filed on February 15, 2007, is indisputable, and therefore is a fact of which this Court can take appellate judicial notice.

During <i>S. Carolina</i> (2005 – 2-15-07)	Fogarty’s intent in “masterminding” his permanent brain injury theory is to injure Appellants by damaging their reputation and “bogging them down for years in the protracted litigation defending against his scheme.”	R. at 25, ¶ 27 R. at 27, ¶¶ 37-38
	Casey’s intent in basing a lawsuit on Fogarty’s brain injury theory is to obtain prescription medication and support for his disability application.	R. at 31, ¶¶ 75-76 R. at 35, ¶¶ 104-107
	Thompson’s intent in suing Appellants based on Fogarty’s brain is to obtain disability benefits for Casey.	R. at 31-32, ¶¶ 75-78 R. at 36, ¶¶ 111-112
	Fogarty, Thompson, and Casey work to implement Fogarty’s brain injury scheme, which “was simply developed for the purpose of the [Medical Malpractice Action] and not for any treatment or medical purpose.”	R. at 29, ¶ 51 R. at 31, ¶ 76 R. at 35, ¶ 105
07-21-05	Fogarty “publishe[s]” his permanent brain injury theory in Casey’s medical records.	R. at 25, ¶ 28 R. at 26, ¶ 36
	Fogarty’s intent in “publishing and disseminating fraudulent theories of injury” of Casey is to “materially prolong[]” litigation by Appellants to defend those theories, and damage them economically.	R. at 35, ¶ 108 R. at 36, ¶ 109
2006	Casey’s medical records containing Fogarty’s theory are published to Aetna, in relation to Casey’s disability application; Aetna rejects claim and declares permanent brain injury theory is unsupported by objective evidence.	R. at 32, ¶¶ 80, 81
2006	Fogarty initiate[s] Medical Malpractice Action, which alleges that Casey suffered a permanent brain injury because of Appellants’ treatment.	R. at 23, ¶¶ 4, 5 R. at 35, ¶ 108
<i>S. Carolina</i> dismissal (02-15-07)	Because of “the tremendous pressure created in [Appellants’] lives by the publicizing of the baseless allegations of a ‘permanent brain injury’ within the destructive scheme,” Appellants dismiss <i>S. Carolina</i> .	R. at 25, ¶ 29
10-27-10	Appellants file claim for abuse of process.	R. App. at 2

The Second Amended Complaint thus shows that when the Medical Malpractice Action was filed in 2006, Appellants had knowledge of, or by the exercise of reasonable

diligence could have discovered, both of the elements forming their abuse of process claim against Respondents. Appellants allege that the “willful act” constituting an abuse of process in the Medical Malpractice Action was the filing of that suit, based on Fogarty’s having already developed, prominently published, and implemented his “destructive scheme” along with Thompson and Casey, while serving as Casey’s treating physician. Since Appellants already had determined in 2004 that Casey had not suffered a medical injury that would warrant prescription drugs or support for a disability claim, Appellants knew they had been damaged as soon as the Medical Malpractice Action was filed against them in 2006. Even if Appellants lacked this actual knowledge when the suit was filed against them, the institution of that action certainly put Appellants on notice that their rights had been violated, and that they should timely investigate a potential claim. Further, since Respondents’ alleged improper conduct in formulating and implementing the bogus brain injury theory already had occurred when the Medical Malpractice Action was filed, all necessary facts supporting Appellants’ abuse of process claim were easily discoverable through usual avenues of discovery, including subpoenas for medical records and document requests. Appellants’ allegations thus show that when the Medical Malpractice Action was filed in 2006, the discovery rule started the three year statute of limitations running on Appellants’ claim for abuse of process.

Significantly, even if the actual filing of the Medical Malpractice Action did not put Appellants on notice of their claim that the suit constituted an abuse of process, the allegations of the Second Amended Complaint show that Appellants had actual knowledge of their having been damaged by Respondents’ scheme to injure Appellants by litigating Fogarty’s baseless brain injury theory no later than February 2007 – more

than three years before Appellants filed suit for abuse of process in October 2010. This is because paragraph 29 of the pleading states that Appellants dismissed their *S. Carolina* case “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.” (R. at 25, ¶ 29.) Even if Appellants were not aware that Respondents had filed suit against them for a wrongful purpose unrelated to medical injuries suffered by Casey when the Medical Malpractice Action was filed in 2006, Appellants were aware of this no later than February 15, 2007. (See R. at 25, ¶ 29.) This is because Appellants directly allege that the “publicizing of the baseless allegations . . . within the destructive scheme” was the reason they dismissed the *S. Carolina* suit. (R. at 25, ¶ 29.)

These allegations concerning *S. Carolina* fully support a finding that the three-year statute of limitations on Appellants’ abuse of process claim began running, at the latest, in February 2007, and that Appellants’ claim is time barred. At the very least, Appellants’ pleadings demonstrate that as of February 2007, the circumstances alleged by Appellants concerning Respondents’ “destructive scheme” and its impact on Appellants “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,” see *Young v. South Carolina Dep’t of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999), such that the discovery rule applies to bar Appellants’ abuse of process claim.

For these reasons, Respondents respectfully request that this Court grant its Petition and rehear this appeal as to the propriety of the dismissal of Appellants’ abuse of process claim based on the statute of limitations.

**Fogarty's Request for
Alteration of Factual Recitation**

The Opinion's "Facts/Procedural History" recitation includes the following statements:

According to the complaint, Fogarty was another pulmonologist who had ended a business relationship with Feldman on hostile terms and surreptitiously treated Casey while the malpractice action was pending. *The treatment allegedly included arranging for Casey to obtain an MRI under a fictitious name and date of birth.*

(Opinion 2.)

Respondent Fogarty respectfully submits that the italicized sentence is not supported by the allegations of the Second Amended Complaint, which do not allege that Fogarty's treatment of Casey involved his arranging for Casey to obtain an MRI, and do not allege that Fogarty was involved in arranging for Casey to obtain the subject MRI. (See R. at 32-23, ¶¶ 84-87.) Fogarty respectfully requests that the Court revise or alter this italicized sentence to summarize accurately Appellants' alleged facts concerning the subject MRI. Specifically, Fogarty asks that the Court's factual recitation accurately reflect that Appellants have not alleged that Fogarty's treatment of Casey involved Fogarty's arranging for Casey to obtain an MRI, and have not alleged that Fogarty otherwise had knowledge or of involvement with Casey's obtaining an MRI.

Conclusion

Because the allegations of Second Amended Complaint show that the statute of limitations on Appellants' abuse of process claim expired more than three years before Appellants filed such claim, and because the Opinion indicates that the Court may have overlooked or misapprehended those allegations, Respondents respectfully request that

this Court rehear this appeal on that issue. Further, Respondent Fogarty respectfully asks the Court to revise its factual findings to accurately reflect his lack of involvement in ordering or arranging for Casey to receive an MRI.

July 14, 2014

Respectfully Submitted,



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EXHIBIT A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 S. Carolina Pharmaceutical Research, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 Charles M. Fogarty, M.D,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

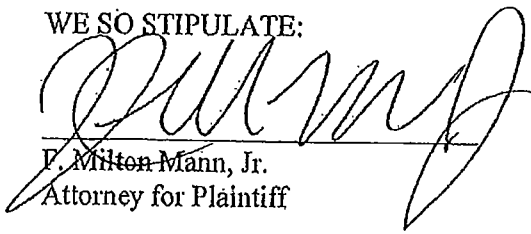
C.A. No.: 2005-CP-42-1085

**STIPULATION OF DISMISSAL
 WITH PREJUDICE**

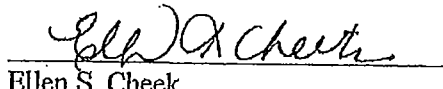
The parties hereby stipulate to the dismissal with prejudice of all of Plaintiff's and Defendant's claims which were ever asserted in this action and any other claims which could have been asserted in this action, including but not limited to those claims asserted in Defendant's proposed counterclaim for attorney's fees and costs.

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 FEB 15 PM 2:58
 MARC KITCHENS

WE SO STIPULATE:


 F. Milton Mann, Jr.
 Attorney for Plaintiff

2/15/07
 (Date Signed)


 Ellen S. Check
 Attorney for Defendant

2/15/07
 (Date Signed)

COPY

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.

APPELLANTS' RESPONSE TO RESPONDENTS' PETITION FOR REHEARING

July 24, 2014

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Attorney for Appellants

Appellants Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, and Devendra T. Shantha, MD (collectively "Appellants") respectfully respond to Respondents' Petition for Rehearing of the Court's Unpublished Opinion No. 2014-UP-273 (the "Opinion") concerning the first issue on appeal in this matter, specifically, whether the Circuit Court erred in holding Appellants' abuse of process claim is time-barred. Additionally, Respondent Fogarty seeks to have this Court alter one sentence contained in the Opinion's "Facts/Procedural History" to address the issue of his involvement pertaining to the MRI obtained by Respondent Casey during the underlying medical malpractice action.

Rule 221 Standard

Rule 221 (a), SCACR, allows parties to petition for rehearing within fifteen (15) days after the Court of Appeals files an opinion. "The purpose of a petition for rehearing is not to present points for which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, S.E.2d 322 (2001), quoting Jean H. Toal, Shahin Vifai & Robert Muckenfriss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167, S.E. 234 (1933)). (R. Pet. Rehearing at 2 to 3.)

Respondents' Petition for Rehearing does exactly what the court said not to do. Respondents presented points in their Petition that were not already before this Court and "rehashed" points previously presented to this Court. Appellants agree with this Court's Opinion and respectfully request that the Opinion stand and Respondents' Petition for Rehearing be denied.

Opinion's Findings and Holding as to the Statute of Limitations Issue

“The Opinion finds that the Circuit Court erred in dismissing Appellants’ abuse of process claim, because “the allegations of Appellants’ complaint do not support a finding that their action for abuse of process was barred by the statute of limitations[.]” (Opinion 4.) The Opinion recites that “[t]he essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding.” (Opinion 3, *quoting Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E. 128, 133 (2014).) Further, the Opinion recognizes that the abuse of process claims are subject to a three-year statute of limitations, which period begins running when the plaintiff “knew or by the exercise of reasonable diligence should have known that he had a cause of action.” (Opinion 3, *citing Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 222 n. 18 (Ct. App. 1999) and S.C. Code Ann. § 15-3-535 (2005).)

“In reversing the Circuit Court’s dismissal of Appellants’ abuse of process claim, the Opinion first states that the paragraphs of the Second Amended Complaint the Circuit Court cites to support its finding – specifically, that Appellants knew or should have known the Medical Malpractice Action was filed for an improper purpose – “do not give any indication” as to when Appellants knew or should have known the lawsuit was for a purpose other than to redress legitimate medical injuries claimed by Casey. (Opinion 4.) The Opinion then states that even if the Second Amended Complaint does indicate that Appellants had reason to believe the Medical Malpractice Action was based on spurious allegations, the pleading “does not allege any specific point in time at which Respondents committed a willful and improper act in their use of legal process.” (Opinion 4.) On

these bases, the Opinion concludes that the Second Amended Complaint's allegations do not support a finding that Appellants filed their abuse of process claim more than three years after they knew or should have known they had such a claim. (Opinion 4.)" (R. Pet. Rehearing. at 3 to 5.)

This Court also decline to address Appellants' argument as to the circuit court's finding that equitable tolling did not apply to their claims and their refusal to grant leave to amend the complaint. "In view of our decision to reverse the dismissal of Appellants' abuse of process claim and remand this matter to the circuit court for further proceedings, we decline to address these arguments." (Opinion 5.)

Argument and Citation of Authority

Appellants agree with the Opinion's findings that the circuit court misapplied the discovery rule in dismissing their complaint for abuse of process and that "the allegations of Appellants' complaint do[es] not support a finding that their action for abuse of process was barred by the statute of limitations...". (Opinion 3.) Appellants rely on those portions of their oral argument and Final Brief (restated below) which address this issue. Further, Respondents' arguments in their Petition was a "rehash" of their oral arguments and their arguments found in pages 9 through 25 of their Final Brief. (Respondents' Br. at 9 to 25.) And, yet again, Respondents attempt to ignore any application of the discovery rule and hinge their argument on the date the suit was filed. This argument was correctly and unanimously rejected by this Court.

"The lower court 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 So., 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 was previously six years) applies to conspiracy claims). "The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

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). In Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) the Court "recognized that, under the discovery rule, the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist." However, "the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, **sufficient to put an injured person on notice of the existence of a cause of action against another.**" True v. Monteith, 327 S.C. 116, 118, 489 S.E.2d 615, 617 (S.C. 1997)(emphasis added).

Appellants' Second Amended Complaint is comprised of two causes of action, abuse of process and civil conspiracy. The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967). "A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillian v. Oconee Memorial Hosp., Inc.,

367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (S.C.App. 2010).

As stated within the Second Amended Complaint, Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (R. p. 27, ¶¶ 39-41) Unjustly, Respondent Fogarty and Respondent Thompson concealed their relationship to the extent of Respondent Fogarty lying under oath during his deposition in a continuing effort to hide his role and level of involvement in the medical malpractice action, with Respondent Thompson suborning his perjury. (R. p. 27, ¶ 42 and R. p. 28, 44 and R. p. 39, ¶ 134)

On February 4, 2007, Respondent Thompson and Respondent Casey engaged in secret medical testing, an MRI, which they knew if negative would be disastrous to their medical malpractice claim by having it performed under a fictitious name, date of birth and in another state. (R. p. 33 ¶¶ 85-87 and R. p. 38, ¶126) Approximately seven months after the secret MRI test, Respondent Thompson advised Respondent Casey to lie under oath during his deposition, thereby abandoning Respondent Thompson's ethical obligations to the Court pursuant to Rule 3.3 in an effort to continue their abuse of discovery efforts by the Appellants. (R. p. 33, ¶¶ 90-91)

Between February 4, 2007 and 2009, Respondent Casey, in furtherance of Respondent Fogarty and Respondent Thompson's permanent brain damage scheme, willingly took part with Respondent Thompson, and other unnamed third party(ies) in their efforts to circumvent the Rules of Civil Procedure. (R. p. 38, ¶ 125) Respondent Thompson received the negative results, yet continued to litigate the matter for eighteen

months, August of 2008, without revealing the MRI test or report to the Appellants, with the Appellants only learning of the MRI by virtue of an anonymous letter. (R. p. 33, ¶¶ 88, 89, 92 and R. p. 38, ¶ 126)

The MRI was a materially important piece of evidence to the Appellants, which was withheld, concealed, and secreted from them by Respondent Casey and Respondent Thompson. (R. p. 34, ¶ 94) By the time the Appellants were aware of the MRI, in excess of thirty depositions had been taken, including the Appellants, eight treating physicians and five medical experts. (R. p. 34, ¶¶ 95-96)

The mere filing of a lawsuit does not give rise to a cause of action for an abuse of process claim. ("Hence, to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e. for collateral reasons, but that willful acts were taken through which the process was misapplied or abused." Food Lion, Inc. v. United Food & Commercial Workers Inter. Union, 567 S.E.2d 251, 351 S.A. 65 (S.C.App. 2002). An aggrieved party must be aware of facts sufficient to allege not only the inception of a lawsuit but an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. (Food Lion, Inc. v. United Food & Commercial Workers Inter. Union, 567 S.E.2d 251, 351 S.A. 65 (S.C.App. 2002). Appellants' Second Amended Complaint alleges, in great detail, the depths the Respondents conducted themselves to avoid discovery of their ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts which were concealed until sometime within 2008.

The Court of Common Pleas' Order dismissing the Appellants' Second Amended Complaint applies the discovery rule as being triggered in 2006, when the underlying Medical Malpractice Action was filed. (R. p. 11-14) Appellants respectfully disagree and submit, as shown above, that their Second Amended Complaint clearly pleads in detail that the essential facts required in establishing the necessary elements of their causes of action were actively concealed from them by the Respondents until 2008. Upon receipt of the medical malpractice suit it would have been in bad faith for the Appellants to simply file an abuse of process claim and/or civil conspiracy claim, subjecting them to judicial sanction. (The South Carolina Frivolous Civil Proceedings Sanction Act, South Carolina Code Ann. § 15-36-10 (2005)).

In summation, Appellants contend that it would be against public policy and the interests of justice to affirm the Court of Common Pleas' Order which serves to reward the Respondents' intentional bad conduct, including Respondent Thompson's suborning perjury as an Officer of the Court, while condemning Appellants' caution in assuring that the ethical requirements of South Carolina's Frivolous Civil Proceedings Sanctions Act were met before they filed suit. Appellants request that the Court of Common Pleas' Order Dismissing their Second Amended Complaint be reversed and this matter remanded for a hearing on the merits of their claims for damages." (Appellants' Br. at 17 to 21.)

Further, Respondents' request for this Court to take appellate judicial notice of the date Appellants dismissed *S. Carolina Pharmaceutical Research v. Charles M. Fogarty, M.D.*, Spartanburg County Court of Common Pleas, Case No. 2005-CP-42-1085 is irrelevant in that *S. Carolina Pharmaceutical Research, Inc.* ("S. Carolina") is not a party

to this lawsuit, not has it ever been a party to this lawsuit. Appellants Gregory J. Feldman, M.D. and Joseph A. Boscia, III, M.D. are partial owners in S. Carolina. However, this litigation was resolved in 2007, more than a year and one-half prior to the necessary facts were discovered in mid to late 2008 to justify Appellants' allegations within the underlying lawsuit. S. Carolina was, also, never a party to the underlying medical malpractice action.

Respondents' argument regarding the significance of the date in which the S. Carolina lawsuit was dismissed is before this Court for the first time in Respondents' Petition for Rehearing. Respondents had an opportunity to make this argument prior to this point in time and to include a "true and accurate copy of the Stipulation of Dismissal with Prejudice" in the Appendix to Record on Appeal dated on May 6, 2013, filed with this Court. However, they did not.

Finally, in *Masters v. Rodgers Development Group*, 321 S.E.2d 194, 283 S.C. 251 (S.C.App. 1984), it was held that "Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. See *United States v. Jones*, 580 F.2d 219 (6th Cir.1978) (applying Fed.R.Evid. 201); *Turner*, *Judicial Notice and Federal Rule of Evidence 201--A Rule Ready For Change*, 45 U.Pitt.L.Rev. 181, 196 (1983)." Based upon Appellants' arguments above, in their Final Brief, and oral argument, Respondents' Petition for Rehearing should be denied.

In the alternative, if this Court grants Respondents' Petition for Rehearing, Appellants request this Court to address the matter that this Court decline to address "as to the circuit court's finding that equitable tolling did not apply to their claims and the circuit court's refusal to grant them leave to amend their complaint to advance additional

factual allegations that would clarify the relevant timeline as it related to the discovery rule and statute of limitations.” (Opinion 5.) This Court decline to address the issue given their decision to reverse the dismissal of Appellants’ abuse of process claim and to remand the case back to the circuit court.

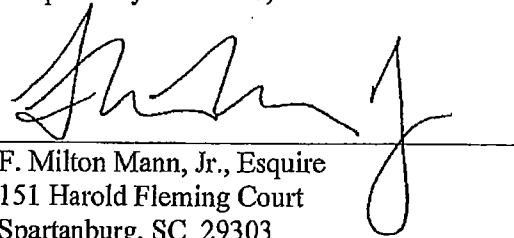
Fogarty’s Request for Alteration of Factual Recitation

Respondent Fogarty’s request that this Court revise or alter the Opinion as it relates to his involvement surrounding Casey’s secreted MRI should be denied. Appellants assert that the Court correctly concluded the most logical inference that can be drawn from the facts, that Fogarty was involved.

Conclusion

Appellants support this Court’s Opinion stating “[W]e therefore hold the allegations of Appellants’ complaint do not support a finding that their action for abuse of process was barred by the statute of limitations...” (Opinion 4.) Appellants also stand on their arguments made before this Court and in their briefs. As such, Appellants respectfully request Respondents’ Petition for Rehearing be denied.

Respectfully submitted,



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July 24, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC 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.

**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, M.D.*, 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, M.D.*, 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, N.A.*, 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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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

RECEIVED

AUG 04 2014

SC Court of Appeals

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 *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
Woodruff Road, Greenville, South Carolina, 29607, respectively.

July 31, 2014



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The South Carolina Court of Appeals

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

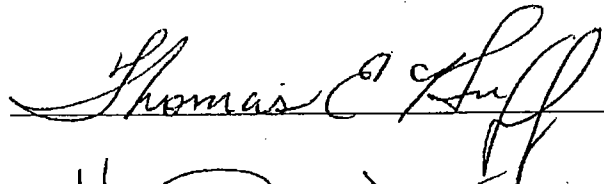
v.

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

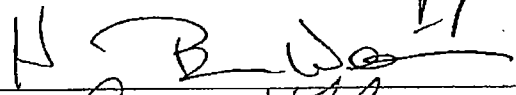
Appellate Case No. 2012-212867

ORDER

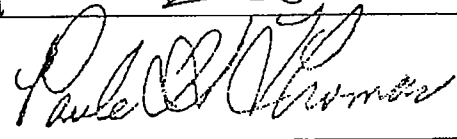
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:
Franklin Milton Mann, Jr., Esquire
Joseph A. Mooneyham, Esquire

Matthew Holmes Henrikson, Esquire
Ellen S. Cheek, Esquire
Michael B.T. Wilkes, Esquire

FILED

September 4, 2014

Certificate of Counsel

The undersigned hereby certifies that the Appendix to Petition for a Writ of Certiorari contains all materials required to be included in the Appendix per Rule 242 of the South Carolina Appellate Court Rules, and not any other material.

October 3, 2014



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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2014-UP-273 (S.C. Ct. App. filed June 30, 2014)

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

v.

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

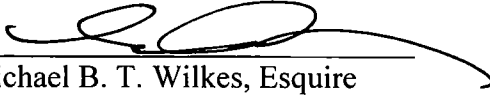
PROOF OF SERVICE

I certify that I have served the *Appendix for Petition for a Writ of Certiorari* on Respondents Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, and Devendra Shantha, MD, via UPS overnight, on October 3, 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 *Appendix for Petition for a Writ of Certiorari* on co-Petitioners, William Mark Casey and Ray E. ("Chuck") Thompson, by depositing a copy of it in the United States Mail, postage prepaid, on October 3, 2014, addressed to their attorneys, Joe Mooneyham, Esquire, PO Box 8359,

Greenville, South Carolina, 29604, and Matthew H. Henrikson, Esquire, 1164 Woodruff Road, Greenville, South Carolina, 29607, respectively.

October 3, 2014



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